

ARIZONA SUPERIOR COURT

PIMA COUNTY

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4 DEMOCRATIC PARTY OF PIMA COUNTY,
political organization, REPUBLICAN
5 PARTY OF PIMA COUNTY, a political
organization; PIMA COUNTY COMMITTEE
6 OF THE ARIZONA LIBERTARIAN PARTY
INCORPORATED, a political organization;
7 PIMA COUNTY, a political subdivision of
the State of Arizona, by and through its
8 BOARD OF SUPERVISORS and COUNTY ADMIN;
and REGIONAL TRANSPORTATION AUTHORITY,
9 an Arizona special taxing district,
Defendants.

C20085016

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MOTION TO DISMISS

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REGIONAL TRANSPORTATION AUTHORITY, an
Arizona special taxing district,
12 Counterclaimant,

January 13, 2009

13

vs.

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BETH FORD, in her official capacity as
Pima County Treasurer,
15 Counterdefendant.

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PIMA COUNTY COMMITTEE OF THE ARIZONA
LIBERTARIAN PARTY INCORPORATED, a
18 political organization, and the DEMOCRATIC
PARTY OF PIMA COUNTY, a political organization,
19 Cross-Claimants,

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vs.

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PIMA COUNTY, and BETH FORD, in her official
capacity as Pima County Treasurer,
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BEFORE THE HONORABLE CHARLES V. HARRINGTON

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Debora K. Moore, RPR
Certified Court Reporter 50215

COPY

A P P E A R A N C E S

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8 Democratic Party of Pima County

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P R O C E E D I N G S

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THE COURT: This is case number C2008 5016, Beth Ford in her official capacity as Pima County Treasurer is the plaintiff, Democratic Party and others as defendants. And please announce your appearance.

MS. FICKBOHM: Ronna Fickbohm on behalf of Pima County. I'm sitting at the plaintiff's table today primarily because I was Pima County's first moving party in connection with the motions you're about to hear. Present and with me is John Moffatt who's with the County's Office of Strategic Technology Planning.

THE COURT: Thank you.

MR. EUCHNER: And, Your Honor, Ralph Ellinwood is not present yet. David Euchner is the former chairman, now treasurer, of the Pima County Libertarian Party. Mr. Ellinwood had a sentencing at 9:30 in Federal Court. He was hoping to be here by 10 o'clock.

THE COURT: And we did delay starting a little bit. I did get that message from you and Mr. Risner but, unfortunately, we can't put this off any longer.

MR. EUCHNER: Yes, Your Honor. Mr. Risner is authorized to argue on our behalf --

THE COURT: Okay.

MR. EUCHNER: -- while Mr. Ellinwood is not

1 present.

2 THE COURT: All right. Thank you.

3 MR. RISNER: Yes, Judge, Bill Risner for the
4 defendant Democratic Party of Pima County. Here
5 representing the party is our chairman Jeffrey Rogers.

6 THE COURT: Okay.

7 MR. BENAVIDEZ: Judge, Thomas Benavidez on behalf
8 of the Regional Transportation Authority.

9 THE COURT: All right.

10 MR. BEARCLIFFE: Judge, Sear Brearcliffe for the
11 Pima County Republican Party.

12 MR. RICHARDSON: John Richardson on behalf of the
13 plaintiff Beth Ford. Ms. Ford is with me here in court.

14 THE COURT: All right. And this is the time set
15 for the Motion to Dismiss the Second Amended Crossclaim
16 filed by Pima County. I want to make sure that I have all
17 of the pleadings, because some pleadings were delivered this
18 morning, which I have not looked at, and some of those were
19 apparently delivered to Judge Cornelio's chambers because it
20 was his bailiff that brought them over to me just before and
21 I haven't had a chance to look at them.

22 But this is what I have looked at. I have looked
23 at the motion to dismiss itself filed by Pima County. I've
24 looked at plaintiffs/counterdefendants partial joinder in
25 Pima County's Motion to Dismiss the Second Amended

1 Crossclaim which was filed by Mr. Richardson on behalf of
2 Beth Ford as Pima County Treasurer. I've also read the
3 Democratic Party of Pima County's and the Pima County
4 Committee of the Arizona Libertarian Party's, Incorporated,
5 a joint opposition to various motions to dismiss. I have
6 read the plaintiff's counterdefendant's reply in support of
7 joinder, et cetera, filed by -- on behalf of Ms. Ford, and
8 the joinder and the reply submitted by Beth Ford which was
9 submitted by Pima County.

10 Did anybody else file anything that I do not have
11 or -- for whatever reason? Let's see.

12 MR. BEARCLIFFE: Judge, there's also the
13 Republican Party's Motion for Judgment on the Pleadings.

14 THE COURT: Yeah, I saw that. I'm not sure that
15 we have that scheduled today.

16 MR. BEARCLIFFE: I believe we set it all for the
17 same hearing date, but I'm willing to --

18 THE COURT: Is everybody ready to argue that? I
19 have not read those briefs, but if everybody's ready to
20 argue that I will certainly permit that to go forward? Is
21 there anybody who's not -- what was -- it was your Motion
22 for Judgment on the Pleadings?

23 MR. BEARCLIFFE: Yes, sir, which is fully briefed.

24 THE COURT: Are you ready to?

25 MR. RICHARDSON: Fine with me, Your Honor.

1 MR. BENAVIDEZ: Judge, the RTA didn't anticipate
2 arguing that motion today.

3 THE COURT: No.

4 MR. BENAVIDEZ: I'm not sure that we couldn't, but
5 I'm just saying --

6 THE COURT: Did you file --

7 MR. BENAVIDEZ: We did file a response and a
8 motion to strike.

9 THE COURT: I don't have it on the calendar for
10 today, so if there's an objection and if somebody in your
11 position has not -- is not prepared to argue it, I'm going
12 to sustain that objection. But if you're ready to go, if
13 you feel comfortable, we'll go forward.

14 MR. BENAVIDEZ: No, we'd object to moving forward.

15 THE COURT: Okay. All right. Then we'll have to
16 set that for another date. All right.

17 MR. RISNER: Judge, the Democratic Party filed a
18 supplemental citation of authority.

19 THE COURT: Okay. Then I'll look for that.

20 MS. FICKBOHM: When was that?

21 MR. RISNER: Dated January 6th.

22 THE COURT: All right. All right. Ms. Fickbohm,
23 this is your motion, so you may proceed.

24 MS. FICKBOHM: Thank you, Your Honor.

25 First, just a couple procedural matters. I am in

1 receipt of Mr. Risner's supplemental citation of authorities
2 which, for the most part, ~~cites to Arizona constitutional~~
3 ~~provisions.~~ I don't know if the Court is going to consider
4 ~~these.~~ If it is, I would like the chance to respond in
5 ~~writing.~~ No one sought leave to file anything supplemental
6 and my understanding of the limited permissive scope of
7 supplemental submissions is if a person becomes aware of
8 authorities they couldn't have known about at the time that
9 they submitted their original response. And since the
10 Constitution has been around since about 1912, that probably
11 doesn't apply and I don't know that there's anything else in
12 there that's brand new, and so I don't intend to address
13 that today.

14 THE COURT: All right. What I'll do is -- I have
15 not read that. I will take note of the fact that you've
16 objected to that. If I sustain the objection, I'll sustain
17 the objection. If I overrule the objection, I will permit
18 you time to respond to that.

19 Any objection to that, Mr. Risner, that procedure?

20 MR. RISNER: No, Judge, but I do object to her
21 characterization of it.

22 THE COURT: And I will let you respond to that.

23 MS. FICKBOHM: Your Honor, the limited issue that
24 I'm optimistic we'll all be able to stick to today is
25 whether or not the second amended crossclaim submitted by

1 the Democratic Party of Pima County, which I'll refer to
2 just as the Democratic Party and the Libertarian Party of
3 Pima County, should be dismissed.

4 I just want to be clear with everyone, because I
5 think there's been a lot of misconceptions floated,
6 especially in the media, about what we've been doing in this
7 courtroom.

8 Beth Ford filed a simple declaratory judgment
9 complaint with the Court saying I have these election
10 materials which by statute are subject to be destroyed,
11 certain important people, political parties, members of the
12 Board of Supervisors, have asked me to not destroy those,
13 but the law says I should so, Judge, you tell me what should
14 be done with these records. That was an appropriate request
15 for her to make and no one today is going to argue that her
16 complaint should be dismissed and you should not make that
17 determination. That determination is left for another day.

18 Also, what I want to make a record on right now is
19 that no one that I'm aware of and certainly not Pima County
20 is saying that if the Attorney General's Office determines
21 that there was a violation of Arizona's election law as
22 codified in Title 16 or elsewhere, that violation should not
23 be remedied. No one is saying that.

24 And also no one is saying that the various
25 political parties that have taken an interest in this

1 matter, including the Republican Party, the Democratic Party
2 or the Libertarian Party do not serve an important or even
3 essential role in monitoring elections. But that also is
4 not what we're here about today.

5 What we are here about today is whether the
6 Democratic Party and the Libertarian Party, through their
7 second amended crossclaim, can expand what is really a very
8 simple lawsuit into something much larger for which there
9 appears to be no basis in law.

10 Their second amended counterclaim proposes that
11 because they are political parties, they have not just the
12 duty but the right as a matter of law to receive those
13 ballots, to exam them, and then to come to the Court and put
14 on their evidence and have the Court make a determination
15 that criminal conduct occurred, if that's what they believe
16 occurred, and then they also have the right and the duty to
17 work with the Court to fashion a remedy for that criminal
18 conduct if, in fact, the Court determines there was any
19 ballot tampering that occurred in connection with the May,
20 2006, special election. That is beyond this Court's
21 jurisdiction and that fails to state a claim upon relief can
22 be granted.

23 Number one. Even though the Democratic Party says
24 in its response, No, we're not looking to mount an election
25 challenge, this would be an election challenge. If they

1 received ballots and counted them all and compared them to
2 the official published results, that would be a de facto
3 election challenge.

4 Election challenges, contests as we've previously
5 discussed in this very courtroom on a number of occasions,
6 are currently time barred by A.R.S. Section 16-624(D). And
7 a lot of people are unhappy with the short time limitation
8 put by that statute on the ability to mount an election
9 challenge, but that unhappiness is not anything you have the
10 power to do anything about.

11 If the political parties or anyone else, Joe
12 Public, is unhappy with the short period of time allowed by
13 Title 16 for an election challenge, they need to drive up to
14 Phoenix and take it up with the Arizona State legislature
15 and get that law changed. And Pima County isn't saying that
16 should or should not happen, because that really isn't an
17 issue here, but we must be honest to the law and the law
18 prohibits an election challenge at this late date and
19 provides that this Court doesn't have subject matter
20 jurisdiction to entertain such a challenge.

21 Number two. If this isn't an election
22 challenge -- and the complaint, the second amended
23 complaint, is kind of hard to read about what they're
24 actually trying to do. What it is, is their request that
25 this Court facilitate them conducting a criminal

1 investigation. They want to get the ballots to assist them
2 in determining whether or not a criminal offense, as defined
3 by Title 16, occurred. So in order to do that they have to
4 have -- this Court has to have jurisdiction to assist them
5 in that task. And the statutes that they cite, the Arizona
6 constitutional provisions that they cite, don't provide that
7 jurisdiction.

8 The political parties are not given the power to
9 investigate and then prosecute crimes, that's uniquely
10 bestowed upon the State of Arizona and its political
11 subdivisions by the Arizona Constitution at Article VI,
12 Section 25.

13 When I say it's difficult to tell, that is because
14 the amended counterclaim skips that part of a pleading where
15 we would normally see a cause of action defined. The
16 jurisdictional basis, which is really just general
17 jurisdiction -- well, powers given to the Court is cited,
18 fact allegations are made and then they move directly from
19 the fact allegations to the relief that they want from the
20 Court without telling us, you know, I am pursuing this
21 specific type of cause of action.

22 And, Your Honor, you're going to here, I'm
23 competent, some passionate pleas about if they don't do it,
24 nobody will, and this must be done to protect the public's
25 interest and other such matters. But, in fact, as the Court

1 has already been advised, the Attorney General's Office has
2 been involved in looking to whether the contentions of
3 ballot tampering are true or not.

4 And the bottom line here is that the Democratic
5 Party and the Libertarian Party are unhappy with either the
6 pace or the steps or the results coming out of the Attorney
7 General's office. ~~And I'm not saying that they're not~~
8 ~~entitled to be unhappy,~~ but that doesn't mean that they get
9 to come to you and say I think the Attorney General's Office
10 isn't doing it good enough and we can do it better, so,
11 Judge, we want you to help us be the ones to do this
12 criminal investigation and I'll just move down the road to
13 ~~what an extension of that argument means.~~

14 Let's say that I believed somebody on my street is
15 dealing drugs out of their house and I go to the County
16 Attorney's Office and I report that and I ask them to put
17 their special investigators on it, because I haven't had any
18 results from the police office and the County Attorney's
19 Office says, Well, we'll take a look at it. But nothing
20 happens very fast and I'm still unhappy, the house is quiet,
21 it's not a nuisance, but I just know that that's happening
22 down there and I'm unhappy with how the County Attorney's
23 Office is progressing or not progressing.

24 So am I able to disregard Article VI of the
25 Arizona Constitution, Section 25, and file a civil cause of

1 action and come in here and ask you to issue a warrant
2 allowing me to enter this home down the street to find some
3 evidence of illegal conduct and then come back to you with
4 that evidence. We'll just leave the police and the County
5 Attorney's Office out of there, come back to you, get -- you
6 know, put some of evidence on for you and then you'll enter
7 a finding that, yeah, criminal conduct is occurring there
8 and then working together you and I will fashion a remedy
9 for this criminal conduct.

10 I know it's somewhat of a ridiculous example, but
11 that is the logical extension of what they appear to be
12 arguing.

13 Despite the passion with which the democratic
14 Party and the Libertarian Party argue their case in writing
15 and I'm sure we're going to hear, lots more today, things
16 that aren't in writing yet. For the most part, the issue
17 that they want to -- issues that they want to pursue are
18 either moot, and that's an election challenge, it's way past
19 time for an election challenge, so that issue would be moot,
20 or to the extent that they're looking to the future are
21 abstract or advisory, which this Court also is not required
22 to assist them in obtaining.

23 Even if you accept all of the well pled
24 allegations of their second amended crossclaim as true,
25 there is not a competent allegation that they have a good

1 ~~faith basis for believing that any problems that occurred in~~
2 ~~the past are expected to occur in the future.~~

3 As such, what they are really looking for is an
4 abstract or advisory ruling to the extent that they say, No,
5 no, this isn't about the past, this is about what will
6 happen in the future. I don't want to get today into a
7 discussion of the problems that occurred with the special
8 May, 2006, election, because none of that's before the
9 Court, other than to say there were some problems, they were
10 identified, the Pima County Department of Elections believes
11 that they were remedied. And this Court doesn't have
12 anything in front of it on the record to show that any
13 problems that occurred then were not remedied and are
14 expected to continue into the future.

15 This is all about the May, 2006, Special Election
16 and the Democratic Party's and the Libertarian Party's
17 ~~unhappiness with the results of that election~~ and their
18 unhappiness with how the Attorney General's Office is
19 pursuing alleged criminal conduct that they brought to its
20 attention.

21 If, in fact, this case is about uncovering and
22 then remedying criminal conduct, I would also propose that
23 that's not the province of anybody in this room, other than
24 perhaps you, if this Attorney General's Office were one of
25 the parties that was involved. And so if that's what we're

1 talking about, then we've got a Rule 19 problem and the
2 Attorney General's Office needs to be here.

3 In closing, I just want to comment briefly upon
4 the exhibits submitted to the response filed by the
5 Democratic Party and the Libertarian Party. Items 3, 4 and
6 5 are editorial pages from newspapers that I read and enjoy.
7 And No. 6 is a unsigned minute entry ruling out of Maricopa
8 County Superior Court.

9 While interesting, I would propose that those are
10 irrelevant to any considerations you have. Sometimes we
11 agree with the editorials in the paper and sometimes we
12 disagree. Sometimes editorials are intended to stimulate
13 public discussion, which is a valid purpose, but they're not
14 evidence. They're hearsay. They're opinion. I don't think
15 a discussion of them is worthwhile or offers any meaningful
16 comment to what's in front of this Court today. And
17 certainly an unsigned minute entry ruling out of a Maricopa
18 County Superior Court case has no precedential value.

19 It's my intent to allow Mr. -- I'm sorry, it's my
20 intent to allow Beth Ford's position in the reply to be
21 argued and only briefly join in that, to the extent that
22 Pima County has anything additional to submit in reply, so
23 that we assume the division labor that we took in connection
24 with the motion.

25 THE COURT: Thank you.

1 MS. FICKBOHM: Thank you.

2 THE COURT: Mr. Richardson, anything?

3 MR. RICHARDSON: I'm not going to add very much, I
4 just want to echo our agreement with what's been presented
5 by Pima County, again to take the passions and things out of
6 it and simply look at the law.

7 There are two places for the Democratic and
8 Libertarian Party to go in this situation, if they're
9 uncomfortable. One is to continue their efforts to
10 coordinate with the Arizona Attorney General's Office and,
11 number two, the Arizona legislature, since they've indicated
12 their only concern is that this isn't an election contest
13 and they want to look to the future.

14 If not, it becomes, I think, kind of an impossible
15 morass for any sitting judge to decide, you know, how long
16 after the fact -- now we have an election that's over two
17 years old, we ought to be delving into, you know, who sat at
18 what table and who looked at what piece of paper.

19 Last but not least, of course, we do have one
20 slightly separate interest. Independent of Pima County, the
21 treasurer, Beth Ford, really does not need to be a party in
22 the crossclaim/counterclaim filed by the democrats and the
23 libertarians. We fully support the full dismissal of the
24 motion but, in any event, Beth Ford should not have to be a
25 party to it if for some reason it has any vitality which we

1 do not believe it has.

2 Thank you.

3 THE COURT: Thank you.

4 Mr. Risner.

5 MR. RISNER: Yeah. Thank you, Judge.

6 There is some truth that my clients and I are in
7 fact passionate about honest elections and the democratic
8 process. I think that the way we approach it, though, is
9 that that is the role of political parties. Our
10 Constitution, which Your Honor and, I suppose, all of us
11 have a role in defending and carrying out in Arizona, is
12 quite clear and quite strong in this state. It's really an
13 unusual constitution in many respects, where the power of
14 the people is set forth so plainly, where the constitution
15 says that the purity of elections is so important.

16 I don't know how many constitutions you'll find in
17 this country that on election day says that citizens can't
18 be arrested on their way to vote except for felonies and
19 breaches of the peace, that you can't even do military
20 service on the day of the election.

21 These are unquestionably important fundamental
22 matters and I did, and the Libertarian Party also in our
23 joint filing, did go to some length to set out many of the
24 places in our statute that talk about the roles of the
25 political parties concerning an election and its beginning

1 to end, its beginning to end.

2 The parties, months beforehand, they get the
3 layout of the ballot. They appoint, they get a list, and
4 the County must appoint the people that political parties
5 say appoint from this list to be the observers at the -- at
6 the polls.

7 It is the function of our party and every
8 political party, it should be their function, to see that
9 the election process is pure, clean, honest, and to uphold
10 the franchise. That's our duty. That's our obligation to
11 the people of this state.

12 Political parties surely propose policies that
13 they're in favor of in terms of good government and what's
14 in the public interest. But when it comes to elections,
15 we're all tasked, all political parties, with monitoring the
16 purity and monitoring the acts of those elections.

17 You Honor, I went back to and looked at the -- the
18 history of, you know, our election statute. I started in
19 1874, 1877 statutes, you know, on through the years. And
20 what initially was done in this state and, in fact, the
21 statute still on our books, I think it's 16-601 if I
22 remember right. But what happened is when people voted, the
23 polls are closed, the public can be there, anyone that can
24 fit in that room, and they counted the ballots publicly and
25 announced the results publicly.

1 Interestingly enough, although it's a little bit
2 off the mark here, in 1877 there was 40 days to challenge
3 that election. Then 1913 they cut it down to 20; 1928, 20;
4 1939, 20; 1955, 20. And that 40 days to challenge was at a
5 time when they publicly counted them in a room and everybody
6 saw what the numbers are.

7 This is not an election challenge. We're clear.
8 The Democratic Party -- the argument is, that I just heard,
9 was that the Democratic Party was unhappy with the outcome
10 of that election. The Democratic Party endorsed and urged
11 the public to vote in favor of the RTA. They're not
12 unhappy. My client is not unhappy with the outcome of the
13 election. But if the election did not represent the actual
14 votes of the public, Yes, we would not be happy about that,
15 but we're not challenging the outcome of the election.

16 What this motion says is -- they say that this
17 Court has no jurisdiction. And what is of concern to us,
18 because we are tasked with seeing that votes are honestly
19 counted, we are concerned when we have an affidavit that
20 says the election person who ran the computer admitted
21 rigging the election.

22 We are unhappy that there is considerable evidence
23 that corroborates that, but I need not go into that because
24 this is a 12(b)(6) motion. The posture of this motion is
25 not to test whether that may be the case. The posture of

1 this motion assumes that, in fact, the election was rigged.
2 The posture assumes that the same individuals who operated
3 the computer are there. The same -- everything is the same,
4 that, in fact, it was important enough to rig one election
5 and they're running another election and when will it be
6 important enough to rig that election.

7 That is a matter that is of supreme importance to
8 our political party, because that is everything we're about
9 is having honest elections and an honest count. We're
10 asking for prospective relief. We will not be asking this
11 Court to set aside the RTA. It's not in the pleadings and
12 we're not asking that of this Court.

13 The argument that I've heard is that, Well, if it
14 turns out that when the ballots are looked at -- and, again,
15 we're not asking for the ballots to be turned over to the
16 democratic party, we're asking for a procedure where the
17 Court maintains control and we find out if, in fact, that
18 election was rigged. If so, there's prospective relief that
19 we will ask the Court to enter that will protect the
20 franchise in future elections.

21 Now, what I had filed as sort of that thick stuff
22 that you got in court this morning, isn't -- well, it is
23 important. Arizona statutes -- and it's important because
24 it's, I think, a key part of the background. Arizona
25 statutes that will give someone five days to challenge an

1 election, were such a challenge to be made, is impossible as
2 a practical matter when computers count -- count the votes.

3 We've attached statements of a deposition by Joe
4 Kanefield who says everybody in the country knows that the
5 software is insecure. We've had experts, one appointed by
6 the Republican Party, who's on the County Election
7 Commission, Michael Duniho who was retired from the NSA --

8 MS. FICKBOHM: Your Honor, I'm going to have to
9 object. This is way beyond anything in the record.

10 THE COURT: Well, I'll -- it probably is and we're
11 really looking on the legal aspect of this, but I will give
12 you some leeway with respect to that. I think he's
13 explaining to me what those documents were that he provided
14 today. Are you not?

15 MR. RISNER: Sure. And, incidentally, since
16 Ms. Fickbohm supports Pima County, I put in our original
17 filing the determination by Judge Miller that the software
18 is insecure and it was the argument she's prohibited by res
19 judicata and collateral estoppel from suggesting that or
20 arguing that the software that we used in Pima County is
21 somehow secure. It is insecure. Is it -- there's no
22 question and Pima County argued this thing, that there's no
23 question that it's easy to rig an election using a computer,
24 extremely difficult to determine, and virtually impossible
25 with any confidence to know that wherein the five-day period

1 of time. So --

2 THE COURT: But as you've said, all of these facts
3 that are in the complaint are under the rules. I've got to
4 take them as true --

5 MR. RISNER: Right.

6 THE COURT: -- for the purposes of this argument,
7 so it really isn't necessary to rehash the facts. What I
8 think is -- what I'm concerned about and I think what you
9 are all concerned about is do I have a legal basis in which
10 to, in essence, take control or, state it another way,
11 jurisdiction over this matter and the other legal issues
12 that have been raised?

13 MR. RISNER: Sure. But in looking at that
14 jurisdiction it is a point that there is no way that anyone
15 could ever challenge an election where a computer is used.
16 That's a point that --

17 THE COURT: Because of the five-day limit?

18 MR. RISNER: Yeah, right. So --

19 THE COURT: And let me ask you this.

20 MR. RISNER: Yeah.

21 THE COURT: As Ms. Fickbohm points out, why is
22 that not an issue that the legislature should address? She
23 says that everybody's unhappy about this five-day limit, it
24 should be extended. Apparently your research indicated that
25 it was, like you say, 40 days when they did hand counts and

1 there were probably a few thousand votes at most. Why
2 shouldn't the legislature take up that issue and say maybe
3 we need 40 days again?

4 MR. RISNER: Well, Judge, I can give you a long
5 list of what the legislature should look at. The
6 legislature has --

7 THE COURT: But I mean as opposed to the Court?
8 The legislature has said we've got five days here.

9 MR. RISNER: Yeah.

10 THE COURT: And we may all disagree with that --

11 MR. RISNER: Yeah.

12 THE COURT: -- but can we just ignore it?

13 MR. RISNER: No, Judge. This is not an election
14 challenge. They said you have five days for an election
15 challenge. I accept that. So, you know, I think the
16 argument is, is we're saying as political parties we've got
17 a prospective problem in the future that this Court can
18 address. That's what this is about. They're saying, Hey,
19 wait, but if we address the problem prospective in the
20 future, then the public will learn that an election was
21 rigged and they'll be disturbed and somehow that will be
22 against the public interest and that will necessarily create
23 some sort of a problem for this other thing.

24 THE COURT: Let me make sure I understand what
25 you're saying. What you're saying is that we should go into

1 the ballots, we should look at them, we should determine
2 whether or not the election was, I think in words you've
3 used, rigged or not rigged.

4 MR. RISNER: Yeah.

5 THE COURT: If it was rigged, we ignore the fact
6 that it was rigged, except we tell people don't rig it again
7 in the future?

8 MR. RISNER: No.

9 THE COURT: You're client's shaking his head yes
10 and you're shaking your head no.

11 MR. RISNER: Well, I --

12 MR. ROGERS: That's a problem when you have a
13 lawyer as a client.

14 THE COURT: And that's a problem when you have
15 clients period, isn't it?

16 MR. RISNER: Judge, we will offer prospective
17 relief that we can be assured they won't do it again. We're
18 not going to ask you to tell them not to do it again. We
19 will specifically show what you can simply order to make
20 sure that they can't do it again.

21 THE COURT: But you're asking in the first
22 instance for a finding by the Court that the first election
23 was rigged, and we're just going to ignore that. Basically,
24 finding that it's an invalid election, but we're going to
25 ignore that except to have some prospective relief?

1 MR. RISNER: Well, whether you -- I don't think
2 that -- I -- we're not filing a challenge to that election.
3 This Court could certainly determine, Look, the votes
4 weren't accurately reported last time, but there's a statute
5 that says you can't challenge it, and then the legislature
6 can change that statute. I'm not suggesting that you don't
7 have to follow that statute or that you don't have to follow
8 all the cases that say you're required to follow that
9 statute.

10 But are something as important as elections, if we
11 know that the election was rigged, is this Court required to
12 say there's nothing that can be done on behalf of the
13 public, we have to let the same people run the next election
14 with the same computer with no one checking?

15 THE COURT: Well, what if -- what if, in fact, you
16 did bring an election challenge on the seventh day and we
17 all know that it was rigged. We all know that it was
18 rigged.

19 MR. RISNER: Yeah.

20 THE COURT: You have indicated that you don't have
21 any quarrel with that. But if you were to bring an election
22 challenge on the seventh day, our courts have said it's too
23 late, we would have known it was rigged and we have to sit
24 there and ignore it. What's the difference between the two?

25 MR. RISNER: What's the difference?

1 THE COURT: Yes.

2 MS. FICKBOHM: The difference is there's an
3 election every year, or year or two, where the next election
4 can be rigged. ~~It's the next election that we're concerned~~
5 ~~about~~ and we don't believe the Court is powerless to sit in
6 the chair and say they can go on keeping rigging elections
7 even though it's impossible for anyone to ever find out and
8 make a challenge in time and even though the Democratic
9 Party can do everything that they're required to do.

10 They can get hundreds of people, as we do, have
11 hundreds of people that go in -- 400 and some ten precincts
12 in Pima County. We have people that watch every step, they
13 photograph what's going on, but if the election is rigged,
14 there's nothing anybody can do. There is. There's
15 prospective relief that this Court can give.

16 THE COURT: So in the first instance, because it's
17 an election challenge, I can't even hear the case. You
18 would agree with that?

19 MR. RISNER: Yeah, I agree that you can't hear an
20 election challenge. That's right, but we're not here for an
21 election challenge. What we say is that you have equity
22 jurisdiction to give us prospective relief for the next
23 election and the election after that. And the -- the reason
24 that I'm mentioning the remedies that the legislature has is
25 that there are no remedies there. There are none.

1 THE COURT: Let's talk about the public policy of
2 the State of Arizona, which I think both of you have
3 referred to in your briefs.

4 MR. RISNER: Yeah.

5 THE COURT: There's a balance, obviously, that we
6 all have to make and the courts have said at some point we
7 have to have finality in our elections --

8 MR. RISNER: Right.

9 THE COURT: -- and it doesn't take a lawyer or a
10 rocket scientist or a brain surgeon to understand why. At
11 some point we're not going to be able to go back to an
12 election and disrupt that for a variety of reasons which the
13 courts lay some of those out.

14 At what point do courts on an equitable basis stop
15 going back to elections, recounting, trying to determine
16 whether or not they were conducted properly. I mean, for
17 example, should we go back -- maybe it's a little late, but
18 should we go back to the presidential election of 2000 and
19 see whether or not that was done properly?

20 MR. RISNER: Well, a couple things. First of
21 all --

22 THE COURT: I know you would you like, being on
23 the democratic party.

24 MR. RISNER: Well, we are in fact aware of
25 numerous electoral issues nationwide that are of concern to

1 us, but the --

2 THE COURT: And it's good that you are and this is
3 a good thing to look into. I agree with you. But with the
4 policy of finality, when do we stop?

5 MR. RISNER: Well, the legislature has said and
6 they've passed a statute in this state of when you can go
7 back and challenge an election, but the problem we have is
8 that our votes are counted by computers.

9 THE COURT: Uh-huh, right.

10 MR. RISNER: The computer is easy to rig, the same
11 person sitting there who my have rigged the last election,
12 and can rig the next one and the next one and the next one
13 after that.

14 THE COURT: You know, the Court is faced -- and
15 it's a very concerning argument. The Court is faced with
16 this argument in elections, in breathalyzers -- you've seen
17 that in the press lately. I add that only as an editorial
18 comment.

19 MR. RISNER: Okay. But I don't know -- you know,
20 people in breathalyzers -- I don't know what those fact
21 patterns are.

22 THE COURT: Right, right, right.

23 MR. RISNER: Our fact pattern here takes as a
24 matter of fact that the RTA was rigged. That's our fact
25 pattern.

1 THE COURT: Exactly.

2 MR. RISNER: Our fact pattern is that they're --

3 THE COURT: This is in your motion to dismiss.

4 MR. RISNER: -- using a computer.

5 THE COURT: Absolutely.

6 MR. RISNER: Okay. That's an important matter.

7 THE COURT: Absolutely.

8 MR. RISNER: And it couldn't be dealing with
9 anything more important --

10 THE COURT: I don't disagree with you.

11 MR. RISNER: -- than our democracy.

12 THE COURT: I agree with you entirely.

13 MR. RISNER: Okay. So the issue simply is, is it
14 a fact that using a computer with lousy security, a crook's
15 running it and is rigging elections, does the Court have the
16 ability to give prospective relief? We say the answer is
17 yes.

18 THE COURT: And it is under the Court's equitable
19 jurisdiction that you --

20 MR. RISNER: Yes.

21 THE COURT: -- that you -- the legal basis?

22 MR. RISNER: Yes, it is.

23 And to -- I don't think it's a complete answer to
24 say, Well, gee, you know, what if the public knew, you know,
25 and that there was nothing that could be done, we can't let

1 them know. But we must for the next election prevent it
2 from happening. That is in the public interest. People --
3 when there are decisions made on policies or when people are
4 elected, we must know that that was based on a majority vote
5 that was accurately and honestly counted.

6 If you looked at the -- this -- the Arizona
7 Constitution, and that's why I listed all of them, it is
8 rock bottom, it is solid, and I don't think that you say,
9 ~~Yep, it was a rigged election, it was illegal and we have~~
10 ~~to -- just because there's an Attorney General that could do~~
11 ~~something about it, that's his job. Our political party is~~
12 ~~concerned about the next election and it doesn't help to~~
13 ~~look at an individual and say, Well, we've got this Attorney~~
14 ~~General that might do something. What if it was Attorney~~
15 ~~General Blagojevich that was in charge and he had some deal~~
16 ~~working with somebody, you know.~~

17 Whether there's a criminal prosecution or what he
18 does, our attorney, he or she, they have discretion. This
19 Court cannot enter an order telling the Attorney General
20 what to do and we sure can't, but the Court can enter
21 prospective relief to absolutely to prevent this from
22 happening to the future and you've got jurisdiction to do
23 that. You're obligated to do that. It's your oath. It's
24 your job. It's what courts are here for. You just can't
25 wash your hands and say, Yep --

1 THE COURT: No, Mr. --

2 MR. RISNER: No, I'm --

3 THE COURT: Sir, do not, please, say that I'm
4 washing my hands of this matter.

5 MR. RISNER: No, no, no, no.

6 THE COURT: That is an insult to this Court.

7 MR. RISNER: I -- I wasn't.

8 THE COURT: Please do not make that as an issue
9 here. This Court is taking this case extremely seriously.
10 I have read everything that you have submitted to me and I
11 am allowing you an absolutely level playing field,
12 100 percent, and I will follow the law. I have strong
13 shoulder.

14 MR. RISNER: Judge, I didn't do it. What I was
15 saying was -- by "you," I'm saying the court system cannot
16 do that. That's what --

17 THE COURT: The court system will not do that. We
18 will not wash our hands of this matter. We will take this
19 absolutely 100 percent seriously. I agree with this
20 100 percent, the necessary -- the necessity for integrity in
21 this system and, as you have indicated, I had sworn to
22 uphold the Constitution and I take that oath absolutely
23 100 percent to heart. Please do not -- the court system
24 will not wash its hands of this matter.

25 MR. RISNER: Okay. Thank you.

1 THE COURT: Thank you.

2 MR. RISNER: You know, just looking at the notes
3 from Ms. Fickbohm's argument, I think she argued that
4 there's no good faith basis that what happened in the past
5 will occur in the future. We don't know that they will rig
6 an election in the future, but it is our obligation as
7 political parties to do what we can to see that they will
8 not do it in the future and we certainly will be able to
9 offer prospective relief that we'll see that that cannot
10 occur, Judge.

11 Thank you.

12 THE COURT: Assuming we get to the point of Rule
13 19, having not joined the Attorney General, what's your
14 position on that?

15 MR. RISNER: Our position is that there's -- my
16 understanding is that you can't order the Attorney General
17 to investigate, to prosecute or do anything. It's the
18 executive branch, he's got his job, he does what he can do.
19 He has an open investigation. What's occurring? I have no
20 idea. He won't communicate with us. He won't accept
21 information from us. I don't know what's going on, but he
22 could, I'm sure, petition -- the Attorney General can do
23 what the Attorney General wants to do, but it's not
24 something that this Court can order him to do and,
25 therefore, he's not required to be here. He doesn't have

1 possession of the ballots. The ballots are in the
2 possession and control of Beth.

3 THE COURT: So it's your understanding that if the
4 Attorney General were to be brought in, about the only thing
5 he would be brought in for would be for the Court to say,
6 Okay, you've got to look into this?

7 MR. RISNER: Basically.

8 THE COURT: And that there's no sense doing that,
9 because we can't do it.

10 MR. RISNER: Right.

11 THE COURT: Okay. Okay. Thank you.

12 MR. RISNER: Yes.

13 THE COURT: Mr. Richardson.

14 MR. RICHARDSON: Everybody wants elections to have
15 integrity. Everybody in this room wants elections to have
16 integrity. But it goes too far to have a situation where
17 almost two years after an election is held, because that's
18 when the cross-claimant's writ had been filed by the
19 Libertarian Party, you bring an action saying I want to
20 delve into the details of this case, because there's no
21 other way to do what they want to do, and I think they admit
22 this, but then to look at the ballots and to review the
23 minutia of that election in circumstances that are long and
24 complicated and may take, as their expert says, you know, a
25 year of forensic analysis to determine whether that election

1 was or was not properly conducted on the suggestion that,
2 well, we know we've missed the timeline and, therefore, we
3 want to just find that information out so he can come back
4 and ask the Court to do something else for the future.

5 That's going too far, because that has no cutoff.

6 THE COURT: Assuming we have a rigged election
7 here --

8 MR. RICHARDSON: Yes.

9 THE COURT: -- and I have to assume that for
10 purposes of this motion.

11 MR. RICHARDSON: I understand that, Your Honor.

12 THE COURT: Why should we not get to the bottom of
13 it?

14 MR. RICHARDSON: Why we should not get to the
15 bottom of it is that despite everyone's intentions and
16 desire to have judicial -- I mean election integrity to
17 go -- we know that it will have major consequences if you --
18 anytime you do things. First of all, just the consequence
19 of the litigation costs and expense of the litigation.

20 Number two. Let's assume it is rigged and let's
21 assume what everybody has said there's nothing you can do
22 about it. You're going to have a sitting political body
23 that -- that -- that -- a determination that you're going to
24 not let somebody run some machine in the future is going to
25 be very minor compared to the impact that the untold

1 story -- you know, the story that would be out there, but
2 then you'd say but I can't upset the election.

3 That is why there is a finality of the deadline.
4 No one likes the five days and it's fine to suggest that the
5 legislature should change the five days and make a
6 reasonable timeline, but there has to be some timeline.

7 THE COURT: But Mr. Risner is saying this is not
8 an election challenge, that the five days does not apply,
9 and that this is, in fact, an equitable action for
10 prospective relief.

11 MR. RICHARDSON: Mr. Risner also says that neither
12 party is in the same -- in the same pleading where he says
13 it's not an election contest, he says neither party is in
14 favor of the passage of any measure or the seating of any
15 candidate that does not receive the majority of plurality of
16 votes cast. In the same pleading he also says, "that he
17 notes the importance of the public in determining whether
18 the RTA election results are fraudulent."

19 We can't do one without destroying -- without, in
20 effect, impacting the other. If he had -- if this was a
21 case where there was a concern about what someone was doing
22 and you could look at that someone and track down what they
23 were doing and say whether you get to do that or -- you
24 know, that might be a different situation. But when you
25 have to look at an almost two-year-old election in a manner

1 that for him to be able to be -- to be entitled to any
2 relief, in effect pretty much destroys a sitting public
3 body. That's -- that's inappropriate and there's really no
4 place for it in the law.

5 There isn't such thing as -- I mean, what kind of
6 things is he going to ask you to do, if he found it rigged.
7 We've conveniently missed that.

8 One of the things I would ask the Court to do
9 is -- we were all delivered the packet of materials, the
10 Democratic Party Supplemental Memorandum Declaration of
11 Exhibits, experts and exhibits yesterday, which has I think
12 a very telling affidavit. It's the final affidavit in it,
13 an affidavit of a Michael Duniho, and he talks about that
14 the software is able to be manipulated, that they've gone
15 back to the legislature and done some helpful things,
16 because they had this manual recount thing.

17 But that wasn't done. You know, that was after
18 the 2006. And he says really to look at something like you
19 had in 2006, it's going to take a year of forensic analysis.
20 And then he says, and so if we do that and find out, what
21 could we do for the future? Well, we could sort early
22 ballots by precincts, induce different types of hand count
23 audits. We could photograph the ballots and post them on
24 the World Wide Web. We could require frequent backup of the
25 data bases so that they're -- so we can forensically analyze

1 those in a different manner.

2 Is that this case? Are we in a case right now
3 where we're going to be setting -- there's no more
4 jurisdiction for the Court to develop those type of election
5 processes and procedures than there is to determine, you
6 know, whether the RTA ballot was rigged. There's --
7 there's -- even if you think, well, okay, I'm only looking
8 to the future, there's no -- there's nowhere to go.

9 ~~It is just inappropriate under these circumstances~~
10 ~~to do something that will -- that would have such a dramatic~~
11 ~~affect.~~ As we have said, you know, originally, the remedy
12 is in the legislature, the remedy is at the Attorney
13 General's Office. Because, if not, even if the legislature
14 changes the timeline to six months, somebody eight months
15 from now -- because there's always a conversation or
16 something that brings this out, here we have an affidavit of
17 somebody talking in some bar to somebody else and saying
18 something. Well, that could have happened after four days
19 or it could have happened after four months. All right.

20 After four days they could have run down and filed
21 an election contest. Obviously, after four months they
22 can't. But after four months, can they file one of these?
23 If it happens after eight months, can they file one of
24 these? If it happens after 24 months? 48 months? No.

25 The statutory scheme is clear and there simply is

1 no jurisdiction to thoroughly analyze and go into ballots
2 that are supposed to remain sealed by law, you know, until
3 they're destroyed and review those on an idea that maybe
4 I'll start changing some of the processes for future
5 elections in the ways that they've suggested, maybe I'll
6 have them put it on the web, maybe I'll tell the different
7 precincts to sort them in a different manner. Even those
8 suggestions are legislature manners -- matters that are not
9 judicial matters.

10 So for the reasons that I think were argued in the
11 original motion is, is this case cannot go forward, the
12 crossclaim, only the declaratory judgment action.

13 Thank you.

14 THE COURT: Thank you.

15 Mr. Fickbohm, same questions. Do you want me to
16 restate them?

17 MS. FICKBOHM: Remind me what the question is.

18 THE COURT: Well, for example, one of the
19 questions is why should we not permit an inquiry into this
20 election to determine what problems were -- occurred, if
21 any.

22 And, secondly, Mr. Risner's position that this
23 Court should exercise its equitable jurisdiction, given that
24 this is not an election challenge, and should look at this
25 as not an election challenge, but rather exercising its

1 equitable jurisdiction to provide prospective relief.

2 MS. FICKBOHM: Okay. Can I take the second one
3 first?

4 THE COURT: Of course.

5 MS. FICKBOHM: First of all, I'm not going to
6 reargue what Mr. Richardson just argued. I think that, you
7 know, you can look at that waste can and say that's not a
8 waste can, but it still is. ~~And just because Mr. Risner~~
9 ~~says it's not an election challenge, doesn't mean it's not.~~
10 You have to look at what the outcome of what he's asking for
11 would be, just like you've got to look and say, Well,
12 Mr. Risner, you're saying that's not a waste can, but I'm
13 looking at it and it sure looks like a waste can to me.

14 And with regard to the prospective relief part, I
15 would like to correct a couple misstatements of the record
16 that were made to you. The answer and second amended
17 crossclaim is what it is. They amended it twice. So let's
18 assume they got it right and it's where they want it to be.
19 I was just reading it again when Mr. Risner was arguing,
20 because he was saying a lot of things that I didn't remember
21 seeing in the record and I would like to correct those right
22 now.

23 This does incorporate an affidavit in paragraph 11
24 of a former county employee who was fired who alleged that
25 he talked to an elections employee who said I rigged the

1 election. And the -- and the answer in the second amended
2 complaint incorporates that. What Mr. Risner doesn't tell
3 you is the accused employee has stated under oath that he
4 denies doing -- rigging the election and he denies ever
5 talking to the person who said that he said what he said and
6 he denies ever being in the place that he supposedly was
7 when he made these admissions.

8 And even the Democratic Party and the Libertarian
9 Party, in making their answer and second amended
10 counterclaim or crossclaim, don't say that this election was
11 rigged. You do not have to accept that fact as a well pled
12 allegation for purposes of this motion.

13 What they allege is that there is substantial
14 evidence of tampering and then they allege that the Court
15 should get the ballots to -- and make them available to them
16 to examine. So when Mr. Risner said, Well, we don't want
17 the ballots, that's not true. They do want the ballots,
18 because they want to exam them, and that's paragraph 12.

19 And then in paragraph 13 they say, "This Court,
20 after providing the parties with adequate time for discover
21 should conduct a hearing to determine if the ballots were
22 tampered with." So in submitting their pleading, the
23 Libertarian Party and the Democratic Party were
24 intellectually honest and they said, We don't know. We have
25 an allegation. I think implicit they recognized that those

1 allegations have been denied. They want to look at the
2 ballots to find out whether or not it's true. They did not
3 avow to the Court that there is a good faith basis for
4 believing, yes, in fact, the election was rigged. They say
5 we want to look at the ballots and figure it out and then we
6 want to have you help us remedy it.

7 So all this argument about how we must proceed
8 forward, based upon the assumption that the election was
9 rigged, it's just wrong and that's not what they said in
10 their pleading, and Mr. Risner has talked about a lot of
11 things that aren't in the record and aren't part of the
12 complaint that was filed.

13 So your question about the equitable jurisdiction,
14 it isn't -- I believe it isn't an election challenge and,
15 number two, I don't think that when you look at their
16 complaint you will see enough pleading to -- enough pleading
17 of material facts to demonstrate that there is a present and
18 clear risk of a problem with a future election.

19 And I got to tell you, what's been implied to you
20 today here -- which, again, I'm at somewhat of a
21 disadvantage of which is why I have Mr. Moffatt with me,
22 because this stuff isn't in the record -- wasn't in the
23 response and maybe it wasn't something that got delivered to
24 my office yesterday, which I get to see by the way.

25 Pima County has made hundreds of procedural and

1 control changes to the election process since the May 2006
2 elections, most in cooperation with the political parties.
3 So to stand here today and imply to you that everything is
4 the same as it was in May, 2006, is just wrong. And if you
5 want to really get into that and talk about it, Mr. Moffatt
6 was intimately involved in that process and he can talk
7 about it.

8 But, again, when I started arguing today I said
9 can we just stick to the issue that we're here about, and
10 that's the issue about when you look at the second amended
11 crossclaim and accept its well-pleaded allegations as true,
12 is there an actionable claim here.

13 For the Court to exercise this inherent equitable
14 relief, it shouldn't be in a simply advisory or moot
15 capacity. That does not serve anybody's interest for the
16 Court to make a ruling about something bad happened years
17 ago without that having a possibility of fixing something
18 that there's a pretty good evidence that it's going to
19 happen again. Quick, if you don't jump in. Judge, if you
20 don't make this ruling, they're going to bring the bulldozer
21 over and take my tree down, if you don't tell them that that
22 tree is on my property and not theirs. I mean that's the
23 kind of stuff that we do prospective relief for.

24 This is all about the -- the desire of a couple
25 political parties to, again, criticize what happened in

1 connection with the 2006 elections in May. And nobody's
2 going to stand here and tell you that those elections were
3 perfect. What I am going to stand here and tell you is that
4 Pima County has made hundreds of procedural and control
5 changes with its electoral process since then.

6 And I really think that that addresses everything
7 above and beyond what Mr. Richardson already argued, except
8 for the one other thing I would add is this -- if we're
9 concerned about the procedures for retaining election
10 materials, how long they should be retained, who should have
11 access to them, who should be able to use them, it's not
12 just the legislature that we need to be talking to.

13 Certainly, some of those procedures are set
14 forward in Title 16, but the Secretary of the State has
15 published a whole manual about election procedures that has
16 the force and effect of law. And, certainly, if somebody's
17 in front of you asking you to put new procedures into place
18 prospectively, you know, that's also the province of the
19 Secretary of State.

20 THE COURT: Okay. Thank you. I will take the
21 matters under advisement.

22 Mr. Brearcliffe, you've got a motion that you
23 wanted to be heard. Why don't we have all of you come back
24 and we will get a date set for that motion. And so if you
25 all come back, I would appreciate it.

1 Hello, Mr. Ellinwood. I'm glad that you could
2 make it.

3 MR. ELLINWOOD: Your Honor, I apologize for being
4 late, to the Court, Counsel and the parties. Judge Richard
5 Collins kept me longer than I thought he would.

6 THE COURT: And we understood you were in a
7 predicament. We did wait for a little while, but we had to
8 go ahead and start without you. Your client -- I know you
9 had filed a joint motion with Mr. Risner. Mr. Risner and
10 your client agreed to go ahead and have Mr. Risner argue
11 your position, so -- but thank you for stating that.

12 MR. ELLINWOOD: Thank you.

13 THE COURT: And you are forgiven.

14 Okay. Come on back, if you would, please.

15 (The hearing concluded at 11:18 a.m.)

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C E R T I F I C A T E

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I, Debora K. Moore, RPR, do hereby certify that as a Certified Court Reporter, I reported the foregoing proceedings to the best of my skill and ability; and that the same was transcribed under my supervision via computer-aided transcription; and that the foregoing pages of typewritten matter are a true, correct and complete transcript of all the proceedings had as set forth in the title page hereto.

Debora K. Moore
Debora K. Moore, RPR
Certified Court Reporter, No. 50215