

STEPHEN C. PIEPGRASS
804.697.1320 telephone
804.698.5147 facsimile
stephen.piepgrass@troutmansanders.com

TROUTMAN SANDERS

TROUTMAN SANDERS LLP
Attorneys at Law
Troutman Sanders Building
1001 Haxall Point
P.O. Box 1122 (23218-1122)
Richmond, Virginia 23219
804.697.1200 telephone
troutmansanders.com

December 17, 2012

VIA HAND DELIVERY

Bevill M. Dean, Clerk
Richmond City Circuit Court
John Marshall Courts Building
400 N. 9th Street
Richmond, Virginia 23219

Re: *Bruce W. Tyler v. Jonathan T. Baliles*
Civil Action No. CL12-5266-00

Dear Mr. Dean:

Enclosed for filing in the above-referenced matter is Respondent's Answer, Demurrer and Plea in Bar, and Notice of Hearing. Also enclosed are courtesy copies each document to be hand-delivered to Judge Delk, Judge Baskervill, and Judge Cavedo. An e-mail copy will be sent to Judge Cavedo's law clerk.

Please feel free to contact me with any questions. I appreciate your assistance in this matter.

Sincerely,



Stephen C. Piepgrass

Enclosures

cc: L.B. Cann, III, Esq. (w/encls. via US mail and e-mail)
Lee E. Goodman, Esq. (w/encls. via US mail and e-mail)
David E. Anderson, Esq. (w/encls. via US mail and e-mail)
Anthony F. Troy, Esq. (w/encls. via e-mail)

20229257v1

VIRGINIA :

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

BRUCE W. TYLER,)	
)	
Contestant,)	
)	
v.)	Civil Action No. 12-5266-00
)	
JONATHAN T. BALILES,)	
)	
Contestee.)	

ANSWER

Preserving and not waiving his objection based on personal jurisdiction and subject matter jurisdiction, Contestee Jonathan T. Baliles (“Baliles”), by counsel, states as follows for his Answer to the Complaint filed by Contestant Bruce W. Tyler (“Tyler”), contesting the results of the First Council District election:

1. Baliles admits the allegations in Paragraph 1 of the Complaint.
2. Baliles admits the allegations in Paragraph 2 of the Complaint.
3. Baliles admits the allegations in Paragraph 3 of the Complaint.
4. Baliles admits the allegations in Paragraph 4 of the Complaint, and states affirmatively that the current 22-vote margin may or may not change as a result of the recount.
5. The allegations in Paragraph 5 state a legal conclusion regarding the meaning of Virginia Code § 24.2-806, to which no response is required. Additionally, Code § 24.2-806 is a statute that speaks for itself, and Baliles denies all allegations in Paragraph 5 inconsistent with the language of § 24.2-806.
6. The allegations in Paragraph 6 state a legal conclusion regarding the meaning of Virginia Code § 24.2-807, to which no response is required. Additionally, Code § 24.2-806 is a

statute that speaks for itself, and Baliles denies all allegations in Paragraph 5 inconsistent with the language of § 24.2-807.

COUNT I: Contest of Election

7. As set forth in the following subparts, Baliles lacks sufficient information to determine whether the facts set forth by Tyler actually occurred, denies that all of those facts, if they did occur, constitute “irregularities” in the conduct of the election, and denies that all of the voters in question were disenfranchised.

(a) Baliles lacks sufficient information to determine the truth of the facts set forth in paragraph 7(a), and accordingly denies the same.

(b) Baliles lacks sufficient information to determine the truth of the facts set forth in Paragraph 7(b), and accordingly denies the same.

(c) Baliles lacks sufficient information to determine the truth of the facts set forth in Paragraph 7(c), and accordingly denies the same.

(d) Baliles lacks sufficient information to determine the truth of the facts set forth in Paragraph 7(d), and accordingly denies the same.

(e) Baliles lacks sufficient information to determine the truth of the facts set forth in Paragraph 7(e), and accordingly denies the same.

(f) Baliles lacks sufficient information to determine the truth of the facts set forth in Paragraph 7(f), and accordingly denies the same.

(g) Baliles lacks sufficient information to determine the truth of the facts set forth in Paragraph 7(g), and accordingly denies the same.

8. Baliles denies the allegations in Paragraph 8 of the Complaint.

9. Baliles denies the allegations in Paragraph 9 of the Complaint.

10. Baliles denies the allegations in Paragraph 10 of the Complaint.

11. Baliles denies that Tyler is entitled to any of the relief requested in the Prayer for Relief, including in the WHEREFORE clause and each of its subparts.

12. Baliles denies any allegations not specifically admitted herein.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. Tyler failed to properly serve Baliles in this case and thus the Court lacks personal jurisdiction to hear the contest, as set forth more fully in Baliles' Motion on this subject.

3. Pursuant to the Charter of the City of Richmond, the City Council, not the Court, has jurisdiction to decide any election contest, as set forth more fully in Baliles' Motion on this subject.

4. The Complaint does not contain any objections to the eligibility of Baliles nor is it based on specific allegations and/or objections to the conduct or results of the election accompanied by the required specific allegations which, if proven true, would have a probable outcome of the election.

5. The Complaint fails to specify how any of the alleged "irregularities" in Paragraph 7 of the Complaint and its subparts would have had a "probable impact on the outcome of the election," and therefore fails to state a proper claim for a contest under Virginia Code § 24.2-807.

6. The Complaint fails to allege with any required specificity that the votes which it claims were not counted would have been cast in favor of Tyler.

7. The Complaint fails to assert facts that overcome the strong presumption of validity arising from the certification of the results by the Richmond Electoral Board.

8. The Complaint calls for speculation and fails to set forth by direct and credible evidence any direct proof that certain votes were intended for Tyler.

9. To the extent that Tyler seeks to overturn the results of the election, declaring it invalid, as opposed to declaring him the winner of the election, the Complaint fails to assert any malconduct or illegalities as opposed to irregularities.

10. In the absence of any alleged scienter or malconduct or any knowing noncompliance by election officials or reckless indifference, then the alleged “irregularities” would have impacted the parties randomly and would be counted or discounted in proportion to the valid votes each candidate received. Thus, these alleged “irregularities” would not have changed the results of the election. To hold otherwise would risk shifting control of the elections from the ballot box to a judicial tribunal.


11. As shown by the certification of the Richmond Electoral Board, and as will be shown by the results of the recount, the will of the people can be ascertained and should not be overturned – Baliles has been elected.

12. Apart from the bare allegation in Paragraph 8, without any allegation of facts in support, the Complaint fails to assert the required probability, as opposed to possibility, that the outcome of the election would be changed.

13. To the extent that the issues raised in his Demurrer and Plea in Bar constitute Affirmative Defenses, Baliles incorporates them by reference as if set forth fully herein.

Respectfully submitted,

JONATHAN T. BALILES

By: 
Counsel

Anthony F. Troy (Va. Bar No. 05985)
Stephen C. Piepgrass (Va. Bar No. 71361)
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23219
Phone: (804) 697-1318
Fax: (804) 698-5162
Email: Tony.Troy@TroutmanSanders.com

Counsel for Respondent, Jonathan T. Baliles

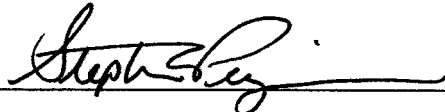
CERTIFICATE OF SERVICE

I certify that on December 17, 2012, I sent the foregoing by electronic mail and U.S. Mail to the following counsel of record for Contestant Bruce W. Tyler:

Lee E. Goodman (Va. Bar No. 31695)
LEClairRyan, A Professional Corporation
1101 Connecticut Ave., NW, Suite 600
Washington, DC 20036
Phone: (202) 659-6730
Fax: (202) 775-6430
Email: Lee.Goodman@LeClairRyan.com

L.B. Cann III (Va. Bar No. 17052)
David E. Anderson (Va. Bar No. 37003)
LeClairRyan, A Professional Corporation
951 East Byrd Street, Suite 800
Richmond, VA 23219
Phone: (804) 343-4066
Fax: (804) 783-7611
Email: Brad.Cann@LeClairRyan.com
Email: David.Anderson@LeClairRyan.com

Counsel for Contestant Bruce W. Tyler



VIRGINIA :

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

BRUCE W. TYLER,)
)
 Contestant,)
)
 v.) Civil Action No. 12-5266-00
)
 JONATHAN T. BALILES,)
)
 Contestee.)

DEMURRER AND PLEA IN BAR

Preserving and not waiving his objection based on personal jurisdiction and subject matter jurisdiction, Contestee Jonathan T. Baliles (“Baliles”), by counsel, states as follows for his Demurrer¹ and Plea in Bar² to the Complaint filed by Contestant Bruce W. Tyler (“Tyler”), contesting the results of the First Council District election:

¹ A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations; it does not, however, admit the correctness of the pleader’s conclusions of law. See Va. Code § 8.01-273; *Ward’s Equip., Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382, 493 S.E.2d 516, 518 (1997); *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397, 410 S.E.2d 652, 653 (1991). Baliles’ response to Paragraphs 7 (d), (e), (f), (g) and, in part, to 7(a) and (b), is framed as a demurrer.

² A plea in bar asserts a single issue, which, if proved, creates a bar to a plaintiff’s recovery. *Schmidt v. Household Fin. Corp., II*, 276 Va. 108, 116, 661 S.E.2d 834, 838 (2008); *Baker v. Poolservice Co.*, 272 Va. 677, 688, 636 S.E.2d 360, 366 (2006); *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 594, 537 S.E.2d 580, 590 (2000). The issue raised by a plea in bar may be submitted based on discrete facts identified by the movant through pleadings, or through evidence supporting the plea. *Kroger Co. v. Appalachian Power Co.*, 244 Va. 560, 562, 422 S.E.2d 757, 758 (1992); see *Schmidt*, 276 Va. at 112, 661 S.E.2d at 836; *Niese v. City of Alexandria*, 264 Va. 230, 233, 564 S.E.2d 127, 129 (2002). Baliles’ response to Paragraph 7(c), of Tyler’s Complaint, *infra*, relying on evidence provided by the General Registrar in the form of log of Rejected Absentee Ballots, and to Paragraphs 7 (a) and (b), relying on the Public Absentee [Ballot] Application List, may be considered as a plea in bar.

Introduction

Tyler's contest is predicated on alleged "irregularities" in the November 6, 2012, election discussed in Paragraph 7 of the Complaint and its subparts. The alleged "irregularities" cited by Tyler are not irregularities at all and none would have had a "probable impact on the outcome of the election" within the meaning of Virginia Code § 24.2-807. Alternatively, even to the extent that it appears irregularities occurred there is no direct proof that any of the ballots identified by Tyler would have been cast for Tyler.³ Indeed, to conclude that a sufficient number of these votes would have been cast for Tyler to call into question the results of the election requires sheer speculation and speculation does not and cannot be the predicate to meet the required "probability" standard.

Lastly to the extent that Tyler seeks to invalidate the election, (Complaint ¶ 10), rather than declare Tyler the winner, the Complaint fails to assert any act of malconduct on the part of any Officers of Election. In the absence of any such assertion the assumption is any irregularities had a random impact on both candidates and thus the required probability that the results of the election would change cannot be met.⁴

For all of these reasons, Tyler's contest must be dismissed.

³ *Gilmer v. Fletcher*, Journal of the House of Delegates, at 189 (Feb. 3, 1950) (**Exhibit A**) (considering only those ballots for which there was "direct proof" that ballot would have been cast for challenger).

⁴ *See Oberndorf v. Babalas*, Report of Contested Election, Senate Committee on Privileges and Elections, at 21-23 (Feb. 17, 1980) (relevant excerpt attached as **Exhibit B**) (following *Hammond v. Hickel*, 588 P.2d 256 (Alaska 1978) (distinguishing malconduct in elections causing bias in the vote, from irregularities that contain no element of bias, and holding that, with respect to the latter, irregular votes are presumed to be counted or discounted in proportion to the share received by each candidate in the election, such that the outcome of the election would not change)).

Paragraph 7(a)

1. Paragraph 7(a) of Tyler’s Complaint claims that at least ten “[v]oters who timely applied for absentee ballots . . . never received their absentee ballots.” This does not constitute an “irregularity,” nor is this an objection to the “conduct or results of the election,” because there is no allegation, (unlike for example in Paragraph 7 (b)) of any failure on the part of the General Registrar or any election official. At most, Paragraph 7(a) asserts a complaint about the mail service. Such a complaint is not grounds for a contest.

2. Furthermore, Virginia Code § 24.2-708(b) specifically provides a procedure for voters who do not receive requested absentee ballots to request replacement of those ballots. A voter need only fill out a form (**Exhibit C**) and send it in to the electoral board, registrar or officer of election to receive a replacement ballot. Tyler does not allege that any of the voters in Paragraph 7(a) complied with this simple procedure.

3. Additionally, Tyler makes no allegation that any absentee ballot, if received and returned, would have been voted for the First District City Council race. Indeed, to make such a claim would be pure speculation, and would also be contrary to the facts already known to the parties, which show that more than twenty-one percent of ballots cast in the First District were for other offices (mainly for president) and did not include votes for candidates in the First District City Council race. Thus, Tyler asks that this Court speculate that the voters described in Paragraph 7 (a) would not have been part of this “drop off.” The Court may not engage in such speculation.

4. Finally, if the ballots in question did include votes for the First District City Council election, Tyler does not allege how many, if any, of the absentee ballots, if cast, would

have been voted in favor of Tyler, and thus asks that the Court add further speculation onto speculation.

Paragraph 7(b)

5. In Paragraph 7(b) of the Complaint, Tyler alleges that at least seven voters applied for an absentee ballot, but did not receive them in sufficient time for the ballot to be received before the close of the polls on Election Day.

6. The voters described in Paragraph 7(b) were not disenfranchised because, as Tyler admits, these voters received their absentee ballots before Election Day and therefore could have cast them any time before the polls closed at 7:00 p.m. on Election Day.

7. Virginia Code § 24.2-709(B) creates an exception to the general rule that late-arriving absentee ballots may not be counted, and allows the counting of certain late-arriving ballots pursuant to the Uniformed and Overseas Citizens Absentee Voting Act. The ballots Tyler describes in Paragraph 7(b), however, do not fit within the exception permitting the counting of late-arriving absentee ballots in § 24.2-709(B), and therefore could not be counted.

8. Additionally, as explained in Paragraphs 2 and 3, *supra*, Tyler asks to Court to again engage in speculation and makes no allegation that the voters in question would have voted for the First District City Council election and/or that they would have voted for Tyler.

9. Even more importantly, the print-out provided to the Richmond Electoral Board, entitled “Public Absentee Applications List – Cumulative with Email Absentee Applications Received Before 11/06/12,” for those precincts in the First District for the City of Richmond

(Exhibit D) (the “First District Absentee Applications List”),⁵ belies Tyler’s assertions in Paragraphs 7(a) and (b) of his Complaint.

10. For each of the nine precincts in the First District, the First District Absentee Applications List sets forth (i) the registered voter who applied for an absentee ballot (first column), (ii) the address where the ballot was to be sent (second column), (iii) the date the absentee ballot was received (fifth column, marked “App Rcvd”), and (iv) the status of the ballot (last column), including the date the ballot was returned.

11. The first critical column is the “App Rcvd” column, which indicates when the ballot was received and approved for mailing. In general, absentee ballots were mailed on the date in the column or (with minor exceptions) within three business days from that date. As reflected on the First District Absentee Applications List, applications received prior to September 21, (forty-five days prior to the date of the election) were sent out on September 20.

12. The second critical column is the “Ballot Status” column, which indicates the date that an absentee ballot was returned. The first page of the First District Absentee Applications List provides examples indicating how to interpret ballot status. Most ballots show a return date prior to the November 6 election, indicating that the ballot was “marked,” meaning that it was voted. Some ballots are returned “unmarked,” meaning that the voter received the ballot but returned it un-voted. There are also some instances where the ballot status is shown as “issued.” In those cases, the ballot was sent but, for whatever reason, was never returned by the voter.

13. A review of the last two columns of the First District Absentee Applications List makes clear that all timely-requested absentee ballots also were timely mailed, giving the voters

⁵ General Registrar Kirk Showalter has submitted a declaration that these materials are true and accurate copies containing data compiled during the election by her office and the officers of election working under her.

sufficient time to return the ballots. In fact, as shown in the “App Rcvd” column, *all absentee ballots were mailed in either September or October.* (The November dates in this column reflect voters who came in person, applied for, and cast their absentee ballots on the available machines.)

14. Lastly, as mentioned, for those ballots returned late, Tyler calls upon the Court to engage in speculation to determine (i) why there was a delay in such return, (ii) whether there would have been a vote cast in the First District Council election, and (iii) whether that vote would have been cast for Tyler.

Paragraph 7(c)

15. Paragraph 7(c) of the Complaint claims that fifteen voters’ who cast absentee ballots had their ballots rejected “in violation of the Due Process Clause of the U.S. Constitution and Virginia law . . . without providing the voters any prior notice . . . or . . . any opportunity to correct any defects in their ballots.”

16. The Due Process Clause of the U.S. Constitution and Virginia law do not require prior notice before an absentee ballot can be rejected. On the contrary, 1 VAC 20-70-20 provides that absentee ballots that contain material omissions “shall be rendered invalid” and voters are made fully aware of such fact and have clear instructions on how to fill in and return an absentee ballot and the consequences if such ballots are not properly filled out. The instructions and envelope included with absentee ballots clearly indicate how the ballots are to be marked and returned. *See Commonwealth of Virginia Instructions Voting an Absentee Ballot and Envelope B (Exhibit E).* Thus, voters were fully on notice of these requirements.

17. Furthermore, Code § 24.2-711.1 provides that local electoral boards are to “send a written explanation of the reason for rejection of an absentee ballot to the voter whose absentee

ballot is rejected *within ninety days of the date on which the ballot is rejected.*” Plainly, the timeframe contained in the Code does not support Tyler’s contention that voters whose absentee ballots are rejected must be notified in sufficient time to correct defects such that their votes can be cast in the current election. Instead, these voters are to be notified of deficiencies and problems so that they do not reoccur in *later* elections.

18. The Complaint further states “upon information and belief” that every absentee ballot rejected by election officials was rejected for improper reasons. This is not true. There were only fifteen absentee ballots rejected in the entire First District and all were properly rejected. Tyler, in essence, and contrary to the strong presumption of validity and regularity in the conduct of the election based on its certification,⁶ asks this Court to believe that not a single Officer of Election acted properly in determining whether an absentee ballot should be rejected and that every absentee ballot was improperly rejected. It is unclear upon what “information and belief” Tyler was operating, when he asserted that all fifteen were rejected for improper reasons.⁷

19. In fact, each and every one of the absentee ballots identified by Tyler was properly rejected. The Statement of Rejected Absentee Ballots (**Exhibit F**, redacted to avoid disclosure of voter names and indentifying information) includes every absentee ballot rejected by election officials (all fifteen of them) and provides the specific reasons for those rejections. Every one of those ballots was rejected for failure to comply with a material requirement element of 1 VAC 20-70-20(B) (**Exhibit G**), the regulation adopted by the State Board of Elections

⁶ See *Oberndorf*, Report of Contested Election, Senate Committee on Privileges and Elections, at 20 (**Exhibit B**) (recognizing the burden on the contestant “to overcome the strong presumption of validity arising from the certification” (quoting *Gilmer*, Journal of the House of Delegates at 188-89)).

⁷ Cf. Va. Code § 8.01-271.1.

governing the counting of absentee ballots and defining what omissions by absentee voters are considered material.

20. As the statement shows, seven absentee voters failed to provide an address as required under 1 VAC 20-70-20(B)(4); three failed to return the ballot in the sealed envelope (“Envelope B”) as required under 1 VAC 20-70-20(B)(9); two failed to provide the witness statement required under 1 VAC 20-70-20(B)(8); one failed to sign the absentee envelope as required under 1 VAC 20-70-20(B)(6); one failed to put his or her name on the absentee envelope as required under 1 VAC 20-70-20(B)(2), (3); and one failed to fill out Envelope B at all, in violation of 1 VAC 20-70-20(B)(1) through (9). Every one of these omissions is declared by the regulation to be “always material.”⁸

21. Additionally, as explained in Paragraphs 2 and 3, *supra*, Tyler again asks that the Court engage in speculation and makes no allegation that the absentee ballots in question had cast a vote in the First District Council election, or that any vote had been cast for Tyler.

Paragraph 7(d)

22. In Paragraph 7(d), Tyler claims that one ballot was rejected when the “voter personally returned his absentee ballot to his precinct on election day.”

23. The City of Richmond operated a central absentee voter precinct pursuant to Virginia Code § 24.2-712 and a voter seeking to return a voted absentee ballot on election day was required to return the absentee ballot to the central absentee precinct, not the voter’s local precinct. Thus, the officers of election responded properly when they informed the voter described in Paragraph 7(d) that he could not cast his absentee ballot at his local precinct.

⁸ For the Court’s ease of reference, counsel for Baliles has written in red the reference to each subsection of that regulation that was relied upon by the officers of election in rejecting the ballots in question.

24. Additionally, as explained in Paragraphs 2 and 3, *supra*, Tyler makes no allegation that the voter in question made any request to vote in person at his precinct (compare for example the allegations in ¶ 7(e)) or that he would have voted in the first district council election, or that he would have voted for Tyler. Again, Tyler proposes that the Court resolve questions about these ballots through speculation rather than the required proof.

Paragraph 7(e)

25. In Paragraph 7(e), Tyler asserts that there was a single instance in which an individual wanted to vote but was turned away. Again, Tyler does not allege that the voter in question would have voted in the First District Council election, nor does he allege that she would have voted for Tyler. Again, Tyler asks the Court to engage in speculation without concrete evidence.

Paragraph 7(f)

26. In Paragraph 7(f), Tyler alleges that “[o]ne voter was allowed to vote only in the presidential election but wanted to vote in the 1st District Council election too.” The Complaint contains no allegation that the voter in question was even qualified to vote in the First District Council election. In fact, based on the allegation that the voter received and voted a Presidential ballot, it appears that the voter had recently moved out of Virginia and was thus entitled to vote only for President and not for any other local or federal office.

27. Virginia Code § 24.2-402 specifies that any voter who has moved outside of the Commonwealth less than 30 days prior to the election may return but will only be permitted to cast a ballot for President and Vice President. Thus, given the presumption of validity attributed to the certified results of an election, *see* footnote 5, *supra*, the voter in question was properly given the presidential candidate only ballot. The fact that she accepted and cast the ballot she

was given does not constitute any allegation of irregularity with respect to the conduct of the election; instead, it merely describes the conduct of the voter, consistent with a properly-run election.

28. Additionally, Tyler again asks that this Court engage in speculation and makes no assertion that the voter in question would have voted for Tyler.

Paragraph 7(g)

29. In Paragraph 7(g), Tyler complains that in Precinct 105, election officials included a vote count of twelve more votes than the number of voters in the poll book, and in Precinct 102, election officials included a vote count of nine more votes than the number of voters in the poll book.⁹ This is not grounds for a contest.

30. Virginia Code § 24.2-802(D)(3) specifically deals with situations where the number of votes cast exceeds the number on the poll book:

If, on all direct electronic voting devices, the number of persons voting in the election, or the number of votes cast for the office or on the question, totals more than the number of names on the poll books of persons voting on the devices, the figures recorded by the devices shall be accepted as correct.

31. Given that the Code specifically addresses the situation about which Tyler complains, the allegations in Paragraph 7(g) cannot, as a matter of law, be grounds for a contest.

32. Paragraph 7(g) also fails to allege irregularity sufficient to support a contest, because the alleged “irregularity” would have affected both parties. *See* footnote 4, *supra*. To find that the supposed irregularity would have had an impact upon the outcome of the election would require speculating that alleged twenty-one voters in Precincts 105 and 102 identified by Tyler (i) were not qualified to vote, and voted anyway (rather than that a poll worker simply

⁹ The Statement of results for Precinct 105 does not support the allegation of twelve additional votes.

neglected to check their names off in the poll book when these voters checked in), (ii) that these voters voted in the First District City Council election,¹⁰ and (iii) that these voters all voted for Baliles, rather than Tyler. There is no ground for all of this speculation, particularly given the presumption of regularity accorded to certified election results. *See* footnote 5, *supra*.

Deficiencies in Additional Allegations of Complaint

33. To the extent that Tyler seeks to overturn the results of the election, declaring it invalid, as opposed to declaring him the winner of the election, the Complaint fails to assert any malconduct or illegalities, as opposed to irregularities, that would require the setting aside of the election results. *See Oberndorf*, Report of Contested Election, Senate Committee on Privileges and Elections, at 24 (**Exhibit B**) (requiring a showing not just that irregularities occurred in an election – because “errors and irregularities, including the kind of conduct proved here, are inevitable and no constitutional guarantee exists to remedy them” – but that those irregularities resulted in a probability of a changed outcome (quoting *Hennings v. Grafton*, 523 F.2d 861, 865 (7th Cir. 1975)). Apart from the bare allegation in Paragraph 8, without any allegation of facts in support, the Complaint fails to assert the required probability, as opposed to possibility, that the outcome of the election would be changed.

34. In the absence of any alleged scienter or malconduct or any knowing noncompliance by election officials or reckless indifference, then the alleged “irregularities” would have impacted the parties randomly and would be counted or discounted in proportion to the valid votes each candidate received. Thus, these alleged “irregularities” would not have

¹⁰ The Statement of Results and voting machine tapes show that while there were a total of 990 votes cast in Precinct 102 and 1349 in Precinct 105, only a total of 938 votes were cast in the First District Council election in Precinct 102 and 1240 votes in Precinct 105. *See* machine tapes for Precinct 102 (**Exhibit G**) and Precinct 105 (**Exhibit H**). Thus, not only by statute can it *not* be assumed that individuals voted who should not have, it also cannot be presumed – other than by speculation – that those purported voters even cast ballots in the First District Council race.

changed the results of the election. To hold otherwise would risk shifting control of the elections from the ballot box to a judicial tribunal. *See id.*

WHEREFORE, Baliles respectfully requests that the Court dismiss the contest filed by Tyler and provide him such further relief as the Court deems just and proper.

Respectfully submitted,

JONATHAN T. BALILES

By:  _____
Counsel

Anthony F. Troy (Va. Bar No. 05985)
Stephen C. Piegrass (Va. Bar No. 71361)
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23219
Phone: (804) 697-1318
Fax: (804) 698-5162
Email: tony.troy@troutmansanders.com
Email: stephen.piegrass@troutmansanders.com

Counsel for Respondent, Jonathan T. Baliles

CERTIFICATE OF SERVICE

I certify that on December 17, 2012, I sent the foregoing by electronic mail and U.S. Mail to the following counsel of record for Contestant Bruce W. Tyler:

Lee E. Goodman (Va. Bar No. 31695)
LeClairRyan, A Professional Corporation
1101 Connecticut Ave., NW, Suite 600
Washington, DC 20036
Phone: (202) 659-6730
Fax: (202) 775-6430
Email: Lee.Goodman@LeClairRyan.com

L.B. Cann III (Va. Bar No. 17052)
David E. Anderson (Va. Bar No. 37003)
LeClairRyan, A Professional Corporation
951 East Byrd Street, Suite 800
Richmond, VA 23219
Phone: (804) 343-4066
Fax: (804) 783-7611
Email: Brad.Cann@LeClairRyan.com
Email: David.Anderson@LeClairRyan.com

Counsel for Contestant Bruce W. Tyler



VIRGINIA :

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

BRUCE W. TYLER,)	
)	
Contestant,)	
)	
v.)	Civil Action No. CL 12-5266-00
)	
JONATHAN T. BALILES,)	
)	
Contestee.)	

NOTICE OF HEARING

PLEASE TAKE NOTICE that, if Contestee Jonathan T. Baliles' Motions to dismiss this action for lack of subject matter jurisdiction and personal jurisdiction are overruled, then on Wednesday, December 19, 2012, at 11:00 a.m. or as soon thereafter as this matter may be heard, Contestee Baliles, by counsel, will bring on for hearing his Demurrer and Plea in Bar.

Respectfully submitted,

JONATHAN T. BALILES

By: 
Counsel

Anthony F. Troy (Va. Bar No. 05985)
Stephen C. Piepgrass (Va. Bar No. 71361)
Troutman Sanders LLP
1001 Haxall Point
Richmond, VA 23219
Phone: (804) 697-1318
Fax: (804) 698-5162
Email: tony.troy@troutmansanders.com
Email: stephen.piepgrass@troutmansanders.com

Counsel for Respondent, Jonathan T. Baliles

CERTIFICATE OF SERVICE

I certify that on December 17, 2012, I sent the foregoing by electronic mail and U.S. Mail to the following counsel of record for Contestant Bruce W. Tyler:

Lee E. Goodman (Va. Bar No. 31695)
LEClairRyan, A Professional Corporation
1101 Connecticut Ave., NW, Suite 600
Washington, DC 20036
Phone: (202) 659-6730
Fax: (202) 775-6430
Email: Lee.Goodman@LeClairRyan.com

L.B. Cann III (Va. Bar No. 17052)
David E. Anderson (Va. Bar No. 37003)
LeClairRyan, A Professional Corporation
951 East Byrd Street, Suite 800
Richmond, VA 23219
Phone: (804) 343-4066
Fax: (804) 783-7611
Email: Brad.Cann@LeClairRyan.com
Email: David.Anderson@LeClairRyan.com

Counsel for Contestant Bruce W. Tyler