IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

JIM ROOT, Petitioner, v. TONY "CHUBBY" BROWN, as a candidate for Sheriff of Macon County; and JOSH TANNER, as Macon County Clerk Constituting the Election Authority for Macon County, for the General Election held on November 6, 2018, Respondents.	)	*For Court Use Only* Case No. 2018-MR-1027

RESPONDENT TONY "CHUBBY" BROWN'S MOTION TO BAR EVIDENCE REGARDING THEORIES PREVIOUSLY STRICKEN BY THE COURT AND ABANDONED BY PETITIONER

NOW COMES the Respondent, TONY "CHUBBY" BROWN, as a candidate for Sheriff of Macon County, by and through his attorneys, Giffin, Winning, Cohen & Bodewes, P.C., and respectfully moves this Court *in limine* to bar Petitioner from presenting any evidence or argument regarding fraud, ballots cast exceeding ballot applications, "stuffing" the ballot box, etc., or that there should be a proportionate deduction of votes in any precinct as a result and, in support thereof, states as follows:

1. On December 19, 2018, Petitioner's *Verified Election Contest Petition* (the "*Petition*") was filed. Among other things, it alleged that "mistakes and fraud have been committed in the casting and counting of ballots for the office of Sheriff of Macon County." *Petition,* at ¶ 4. Additionally, Petitioner made general allegations of fraud in the casting and counting of ballots in Hickory Point 7 and Hickory Point 1.

GIFFIN WINNING COHEN & BODEWES, P.C. ATTORNEYS AT LAW
POST OFFICE BOX 2117
SPRINGFIELD, ILLINOIS 62705
TELEPHONE (217) 525-1571

Petition, at ¶¶ 6-8. Additionally, Petitioner alleged that "numerous duly qualified voters in Macon County were wrongly denied their right to vote in the election, and numerous individuals who were not qualified to vote wrongly voted." *Petition,* at ¶ 5.

2. *Respondent's Combined Motion Pursuant to 735 ILCS 5/2-619.1* was filed on January 25, 2019. In the *Memorandum in Support of Respondent's Motion to Strike Pursuant to 735 ILCS 5/2-615*, which was filed on the same date, Respondent asserted, "**All allegations of electoral fraud** within the Petition should be stricken because they are wholly unsubstantiated and unsupported by specific factual allegations." (Emphasis added.)

3. The Court agreed, and, in its June 28, 2019 *Memorandum Opinion and Order* (the "*June 2019 Order*"), wrote, "the Court finds the Motion well founded. Allegations of fraud unsupported by fact in Paragraphs 4, 6, 7 and 8 of the Petition are hereby stricken." *June 2019 Order,* at pg. 6.

4. In the *June 2019 Order*, the court also struck the allegations contained within Paragraph 5 of the *Petition*: "Similarly, Root's allegations that qualified voters were wrongly denied their right to vote in the election, **and that numerous individuals who were not qualified to vote wrongly voted**, are unsupported by specific fact. These particular allegations contained [in] Paragraph 5 of the Petition are hereby stricken." *June 2019 Order,* at pg. 7 (emphasis added).

5. Since the *June 2019 Order* was entered, Petitioner has never amended his *Petition* or requested leave to do so. Moreover, in Paragraph 9 of his *Petition*, Petitioner indicated that "[t]he investigations continue and the results hereof will be

used to amend the above with additional facts and greater specificity from time to time during the pendency of this proceeding." *Petition*, at ¶ 9. To date, Petitioner has failed to "amend the above with additional facts and greater specificity".

6. Because Petitioner has not amended his *Petition* with any facts or specificity relating to allegations of fraud, or that individuals who were not qualified to vote voted, these have not been issues in this case since the Court entered its *June 2019 Order* some 18 months ago.

7. On December 8, 2020, *Petitioner's Submission as to Remaining Contested Ballots* was filed herein. No reference is made therein to any theory of fraud or individuals not qualified to vote wrongly voting in the November 6, 2018 election, although it vaguely asserts that "the Petitioner reserves the right to present evidence as to any matter observed during the hand recount, and within the parameters set by this Court."

8. On December 10, 2020, during opening remarks on the first day of trial, counsel for Petitioner alluded to some precincts having a greater number of ballots being cast than ballot applications, adding that Petitioner intends to request a proportionate reduction in those precincts. In making a request for such relief, Petitioner is now – 18 months later and on the first day of trial – arguing that illegal votes were cast, *i.e.*, that the ballot boxes were "stuffed" in those precincts. See *In re Durkin*, 299 Ill. App. 3d 192, 200-01 (2d Dist. 1998) (stating that "when the evidence does not disclose the recipient of illegal votes, such votes should be eliminated by allocating them to the candidates in the same proportion that each candidate received votes in the precincts where the illegal votes were cast"); see

also See *Jordan v. Officer*, 170 Ill.App.3d 776, 789, (5th Dist. 1988) (illegal votes must be apportioned in a ratio of each candidate's vote at a given precinct and reduced proportionately from the candidate's vote totals).

9. Because none of these issues have been properly raised in any of the pleadings filed by Petitioner, any evidence related to ballots cast exceeding ballot applications, "stuffing" the ballot box, voter fraud, etc. are not relevant to any of the issues that are pending before the Court, and, therefore, such evidence is not admissible. *Barnett v. Zion Park Dist.*, 171 Ill. 2d 378, 384 (4th Dist. 1996) ("[a]llegations in a former complaint not incorporated in the final amended complaint are deemed waived"); Ill. R. Evid. 402 ("Evidence which is not relevant is not admissible."); see *Aguinaga v. City of Chicago*, 243 Ill. App. 3d 552, 567 (1993) ("In determining whether evidence is relevant, the trial court must consider the evidence in light of the factual issues raised by the pleadings and it is not error to exclude testimony which does not bear on the specific issues under consideration."); Ill. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); see also *Garrison v. Choh*, 308 Ill. App. 3d 48, 54-57 (1st Dist. 1999) (where document attached to a complaint is not an instrument upon which claims are founded, "complaint must be judged by the allegations set forth in the four corners of that pleading and cannot be expanded" by the document attached to the complaint). Petitioner should not be allowed to resurrect his long-abandoned

allegations that were stricken by the Court and never repleaded despite ample opportunity to do so. See *N. Shore Marine, Inc. v. Engel*, 81 Ill. App. 3d 530, 533 (2d Dist. 1980) ("Once a trial has begun an amendment which is prejudicial or would alter the nature and quality of proof required to defend should not ordinarily be allowed as to matters which the pleader had full knowledge at the time of interposing the original pleading if no excuse is presented for not putting its substance in the original pleading.").

10. While "[a] pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just", 735 ILCS 5/2-616(c), a review of the standard for allowing such amendments reveals that it would be inappropriate to allow Petitioner to amend his *Petition* at this point (even if he were to request leave to do so).

11. As the Fourth District Appellate Court recently stated, "[i]n determining whether it is appropriate to allow the plaintiff an opportunity to amend the complaint, the court must consider whether (1) the proposed amendment would cure the defective pleading, (2) the other parties would be prejudiced or surprised by the proposed amended complaint, (3) the plaintiff had previous opportunities to amend the complaint, and (4) the proposed amendment is timely." *Vogt v. Round Robin Enterprises, Inc.*, 2020 IL App (4th) 190294, ¶ 15 (citing *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992)). "The most important of [these] factors is the prejudice to the opposing party, and substantial latitude to amend will be granted when there is no prejudice or surprise to the nonmovant. Prejudice may be shown where delay before seeking an amendment leaves a party

unprepared to respond to a new theory at trial." *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 638 (3d Dist. 2004) (citation and quotation omitted).

12. Here, while any proposed amendment by Petitioner may cure the defective pleading, the other three factors weigh heavily against allowing amendment.

13. First, Respondent would clearly be prejudiced. All allegations of fraud in the election or that people not qualified to vote voted in the election were stricken by the Court in June 2019. Petitioner has never sought leave to amend despite promising in his *Petition* to provide additional facts and greater specificity as those facts became available. "It is well established that a plaintiff may not recover on a theory that is not contained in her complaint. * * * Proof without pleadings is as defective as pleadings without proof." *Schultz v. Schultz*, 297 Ill. App. 3d 102, 106 (2d Dist. 1998). Based on the Court's prior ruling and Petitioner's failure to amend his *Petition*, Respondent has not conducted any discovery relating to Petitioner's abandoned theories or prepared for trial on these issues. By attempting to raise these issues again orally during opening statements, Petitioner has left Respondent unprepared to respond at trial to theories that Petitioner has not properly pled.

14. Second, Petitioner clearly had previous opportunities to amend his *Petition*. When Petitioner originally filed his *Petition*, he promised that "[t]he investigations continue and the results hereof will be used to amend the above [allegations] with additional facts and greater specificity from time to time during the

pendency of this proceeding." *Petition*, at ¶ 9. Additionally, the "above" allegations referenced in Paragraph 9 of the *Petition*, which related to fraud and alleged that people voted in the election who were not qualified to vote, were stricken in June 2019. It has been 18 months since these allegations were stricken, and, therefore, Petitioner has had ample time to seek leave to amend his *Petition*.

15. Third, for the reasons stated above, any proposed amendment would be untimely. Petitioner could have sought leave to amend his *Petition* at any time since the Court struck his allegations in June 2019, yet he has failed to do so, and trial has already started. The issues of alleged fraud – had they been properly raised in a timely manner – could have allowed Respondent to investigate them in the months leading up to trial, but Respondent was never afforded the opportunity to do so because, since June 2019, Petitioner has never sought to amend his *Petition*.

16. Even though claims of voter fraud are presently a national cause célèbre, Petitioner's unpled and last-minute theories of fraud should not be countenanced by this Court. Petitioner should be barred from presenting any evidence or argument that there should be a proportionate deduction of votes in any precinct due to fraud. Such allegations were previously stricken by the Court, no such allegations were set forth in any amendments to the *Petition*, and adding a new theory on the first day of trial constitutes unfair surprise and prejudices Respondent.

WHEREFORE, the Respondent, TONY "CHUBBY" BROWN, prays that this Court enter an Order as follows:

A. Barring Petitioner from introducing any evidence or making any argument regarding his unpled theories of fraud, ballots cast exceeding ballot applications, "stuffing" the ballot box, etc. or that there should be a proportionate deduction of votes in any precinct as a result;

B. Barring Petitioner from advancing any unpled theory that there should be a proportionate deduction of ballots in any precinct due to fraud (*i.e.*, because voters who were not qualified to vote cast votes and/or there were more ballots cast than applications for votes in a particular precinct); and

C. Granting such further and other relief as this Court deems appropriate and just.

Respectfully Submitted,

TONY "CHUBBY" BROWN, as a candidate for Sheriff of Macon County, Respondent

By: /s/ Christopher E. Sherer
One of His Attorneys

David A. Herman, ARDC No. 6211060
dherman@GiffinWinning.com
Christopher E. Sherer, ARDC No. 6275910
csherer@GiffinWinning.com
Matthew R. Trapp, ARDC No. 6284154
mtrapp@GiffinWinning.com
GIFFIN, WINNING, COHEN & BODEWES, P.C.
efile@GiffinWinning.com
Post Office Box 2117
Springfield, IL 62705-2117
(217) 525-1571

CERTIFICATE OF FILING AND PROOF OF SERVICE

I hereby certify that on December 17, 2020, I caused to be submitted the foregoing document for filing with the Circuit Clerk for the Sixth Judicial Circuit, Macon County, Illinois by using the Odyssey eFileIL system.

I further certify that the following were served via email on the above date:

John Fogarty, Jr.
fogartyjr@gmail.com

Keith E. Fruehling
urbecf@heylroyster.com
kfruehling@heylroyster.com
tparker@heylroyster.com

Michael E. Raub
urbecf@heylroyster.com
mraub@heylroyster.com
asnyder@heylroyster.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge.

By: /s/ Christopher E. Sherer
Christopher E. Sherer, ARDC No. 6275910
csherer@GiffinWinning.com
GIFFIN, WINNING, COHEN & BODEWES, P.C.
efile@GiffinWinning.com
Post Office Box 2117
Springfield, IL 62705
(217) 525-1571