

RICHARD HOUSER and CATHERINE BURNS, :
 :
 Plaintiffs :
 :

IN THE COURT OF COMMON PLEAS :
 OF LYCOMING COUNTY :
 PENNSYLVANIA :

v. :
 :

CIVIL ACTION - LAW

COUNTY OF LYCOMING, LYCOMING :
 COUNTY BOARD OF ELECTIONS, :
 LYCOMING COUNTY COMMISSIONER :
 TONY MUSSARE, LYCOMING :
 COUNTY COMMISSIONER SCOTT :
 METZGER, LYCOMING COUNTY :
 COMMISSIONER RICHARD :
 MIRABITO, and FORREST LEHMAN, :
 DIRECTOR OF ELECTIONS, :
 Defendants :

NO.: CV22-01219

FILED
LYCOMING COUNTY
2022 DEC 27 PM 4:15
THOMAS D. REAP
PROthonARY

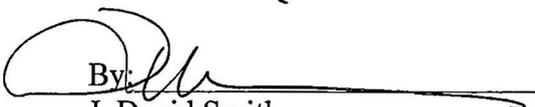
NOTICE TO PLEAD

YOU ARE HEREBY NOTIFIED to file a written response to the enclosed

PRELIMINARY OBJECTIONS OF DEFENDANTS TO PLAINTIFFS' COMPLAINT

within twenty (20) days from service hereof or a judgment may be entered against you.

McCORMICK LAW FIRM

By: 

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FILED
LYCOMING COUNTY
2022 DEC 27 PM 4:16
THOMAS D. HEAR
PROCLERK

PRELIMINARY OBJECTIONS OF DEFENDANTS TO PLAINTIFFS' COMPLAINT

AND NOW, come Defendants County of Lycoming, Lycoming County Board of Elections, Lycoming County Commissioner Tony Mussare, Lycoming County Commissioner Scott Metzger, Lycoming County Commissioner Richard Mirabito, and Forrest Lehman, Director of Elections, by and through their counsel, McCormick Law Firm, and file the following Preliminary Objections to Plaintiffs' Complaint, and in support thereof, state as follows:

I. Demurrer to Plaintiffs' Complaint

1. Plaintiffs commenced this action by filing their "Complaint in Mandamus" on December 6, 2022.
2. While Plaintiffs' Complaint speaks for itself, generally, Plaintiffs' allege that Defendants were made aware of alleged fraud and/or irregularities regarding the November 2020 General Election and that the Defendants failed to adequately investigate these claims of fraud.

3. Plaintiffs' Complaint states that the alleged fraud and/or irregularities were brought to the Defendants' attention at meetings in the Fall of 2021, which Defendants were not party to, and also in May, June, and July of 2022.

4. Plaintiffs demand several forms of equitable relief including, *inter alia*, that the Lycoming County Board of Elections perform a "forensic audit" of the November 2020 election through an independent third-party group, and that should the results of said audit reveal fraud, the Board must "decertify" the election results.

5. Mandamus is an extraordinary remedy that compels the official performance of some ministerial act or mandatory duty. See McGriff v. Commonwealth, 809 A.2d 455 (Pa. Commw. 2002).

6. A ministerial act is an act "which a public officer is required to perform, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." M.B. Investments v. McMahon, 903 A.2d 642, 645 (Pa. Commw. 2006).

7. "Mandamus cannot issue 'to compel performance of a discretionary act or to govern the manner of performing the required act.'" Brown v. Levy, 78 A.3d 514, 516 (Pa. 2013); *quoting* Volunteer Firemen's Relief Ass'n v. Minehart, 203 A.2d 476, 479 (Pa. 1964).

8. Mandamus lies to compel the performance of a ministerial act or mandatory duty only where: (1) there is a clear legal right in the plaintiff; (2) a corresponding duty in the defendant; and (3) a want of any appropriate and adequate remedy. See Shellem v. Springfield Sch. Dist., 297 A.2d 179, 181 (Pa. Commw. 1972).

9. Here, Plaintiffs allege that starting in the Fall of 2021, certain "abnormalities," "irregularities," and "frauds" regarding the November 2020 General Election were raised with the Defendants in an effort to seek a "forensic audit" of the election results.

10. When Defendants did not agree to perform a “forensic audit,” Plaintiffs assert generally that Defendant Board of Elections is in violation of 25 P.S. § 2642. While not specifically cited by Plaintiffs, 25 P.S. § 2642(i) provides as follows:

The county boards of elections, within their respective counties, shall exercise, in the manner provided by this act, all powers granted to them by this act, and shall perform all the duties imposed upon them by this act, which shall include the following:

* * *

(i) To investigate election frauds, irregularities and violations of this act, and to report all suspicious circumstances to the district attorney.

See 25 P.S. § 2642(i).

11. In Plaintiffs’ Complaint, Plaintiffs demand that the Defendant Board of Elections be compelled to perform a “forensic audit” of the November General Election 2020 election through a third-party organization and, based on the audit “upon proof of fraud and irregularities,” decertify the election results “in accordance with the Election Code.”

12. At its core, Plaintiffs’ Complaint is an action challenging the results of the November 2020 General Election.

13. While Plaintiffs have keyed in on a ministerial act of the Board of Elections (i.e., investigating election fraud, irregularities, etc., as set forth in 25 P.S. § 2642(i)), Plaintiffs have failed to cite any authority that entitles Plaintiffs to a forensic audit of election results based upon their own allegations of fraud, or that the Election Code provides an adequate alternative remedy for challenging the results of an election based upon Plaintiffs’ belief in the existence of fraud.

14. Indeed, there is no provision of the Election Code nor any case law which provide for a “forensic audit” of election results based upon a voter’s allegations of election fraud or irregularity, despite Plaintiffs’ demand for the same.

15. Instead, the Election Code specifically provides a procedure for challenging the results of an election where voters believe fraud or error was committed in the tabulation of votes cast -- namely, a petition to open ballot boxes. See 25 P.S. §§ 3261, et seq.

16. Such petitions must have been filed within five days of completion of the Election Board's computation of the vote -- which would have occurred over two years ago. See 25 P.S. § 3263(a)(1).

17. Thus, Plaintiffs have failed to establish a clear right to a "forensic audit" of election results based upon their own allegations of fraud and/or irregularities, and an appropriate and adequate remedy existed to compel the recounting and/or recanvassing of votes cast in the November 2020 General Election based upon their allegations of fraud and/or irregularities.

18. Additionally, due to Plaintiffs' failure to adhere to the procedures laid out by the Election Code for challenging the results of the November 2020 General Election, the Court of Common Pleas is without jurisdiction to hear this matter. See Rinaldi v. Ferrett, 941 A.2d 73, 79 (Pa. Cmwlth. 2008) ("jurisdiction will attach only if [the procedures specified by the Election Code] are followed in all respects."); see also In re Opening of Ballot Boxes, 718 A.2d 774, 777 (Pa. 1998) ("it has been consistently held for more than eighty years that a recount petition not verified in accordance with the statutory requirements does not properly invoke the jurisdiction of the common pleas court and should be dismissed.").

WHEREFORE, Defendants respectfully request that this Honorable Court dismiss Plaintiffs' Complaint in its entirety, with prejudice, for a failure to state a claim upon which relief can be granted and for failing to bring the matter within the jurisdiction of this Court in addition to granting such other relief in favor of Defendants as is deemed necessary and proper under the circumstances.

II. Demurrer to Naming of County of Lycoming, Commissioners Mussare, Metzger, and Mirabito, and Forrest Lehman in Plaintiffs' Complaint (In the Alternative)

19. Paragraphs 1 through 18 are incorporated by reference as though fully set forth herein.

20. In the alternative, Plaintiffs' Complaint is captioned as a case against Defendants Lycoming County, Lycoming County Board of Elections, Lycoming County Commissioner Tony Mussare, Lycoming County Commissioner Scott Metzger, Lycoming County Commissioner Richard Mirabito, and Forrest Lehman, Director of Elections.

21. However, the only arguable assertion of an alleged failure on the part of any so captioned Defendant is an assertion that the Defendant Lycoming County Board of Elections failed to investigate alleged fraud, irregularities, and violations of the law pursuant to 25 P.S. § 2642.

22. At best, this case is a case against the Lycoming County Board of Elections and Plaintiffs have failed to state any legally recognizable claims against the remaining defendants.

23. Accordingly, Defendants Lycoming County, Lycoming County Board of Elections, Lycoming County Commissioner Tony Mussare, Lycoming County Commissioner Scott Metzger, Lycoming County Commissioner Richard Mirabito, and Forrest Lehman, Director of Elections should all be dismissed from this action.

WHEREFORE, Defendants respectfully request that this Honorable Court dismiss Defendants Lycoming County, Lycoming County Board of Elections, Lycoming County Commissioner Tony Mussare, Lycoming County Commissioner Scott Metzger, Lycoming County Commissioner Richard Mirabito, and Forrest Lehman, Director of Elections from this action, with prejudice, for a failure to state claims against these parties for which relief can be granted, in addition to granting such other relief in favor of Defendants as is deemed necessary and proper under the circumstances.

III. Motion to Strike (In the Alternative)

24. Paragraphs 1 through 23 are incorporated by reference as though fully set forth herein.

25. Paragraphs 40 through 53 contain averments regarding reports of voter fraud and convictions in other states, a request for a ballot referendum, and an alleged conflict of interest by the undersigned's firm.

26. Pa.R.C.P. 1028(a)(2) permits the filing of preliminary objections for the "failure of pleading to conform to law or rule of court of inclusion of scandalous or impertinent matter."

27. The generally accepted definition of "impertinent" is "not pertinent to a particular matter or irrelevant."

28. What allegedly occurred in other states or jurisdictions is irrelevant and the averments of Plaintiffs' Complaint alleging fraud and irregularities in other states or jurisdictions should be stricken as impertinent to proceedings involving the 2020 General Election in Lycoming County. Defendants should not have to respond to allegations of conduct in jurisdictions other than Lycoming County.

29. Furthermore, the matters pertaining to the ballot referendum decision referenced in Plaintiffs' Complaint is likely impertinent and should be stricken. Whether there was or was not a ballot referendum on the use of an electronic voting system is not relevant to the relief sought of matters raised by Plaintiffs in Plaintiffs' Complaint.

30. Finally, the averment of an alleged conflict of interest violates Pa.R.C.P. 1028 (a)(2). A pleading is not the proper filing for such allegations. If Plaintiffs believe there is a conflict of interest, they can file a motion to disqualify (which will be contested as having no basis). However, Defendants should not have to respond to such averments in a pleading.

WHEREFORE, Defendants respectfully request that this Honorable Court grant their motion to strike as follows: (1) striking any averments in Plaintiffs' Complaint regarding

alleged fraud and/or irregularities in other states or jurisdictions; (2) striking any averments in Plaintiffs' Complaint regarding the ballot referendum decision; and, (3) striking any averments regarding an alleged conflict of interest; in addition granting such other relief in favor of Defendants as is deemed necessary and proper under the circumstances.

IV. Failure to Properly Verify Complaint (In the Alternative)

31. Paragraphs 1 through 30 are incorporated by reference as though fully set forth herein.

32. The verifications attached to Plaintiffs' Complaint contain the language, "...although the language is that of my counsel and to the extent the content of the foregoing document is that of counsel, I have relied upon counsel in making this Verification."

33. The inclusion of such language in the verifications fails to meet the requirements for a verified pleading as set forth in Pa.R.C.P. 1024(a) in that it suggests that the content of the pleading is not that of Plaintiffs and there is no verification signed by counsel for Plaintiffs attached to Plaintiffs' Complaint.

34. The manner in which this verification is phrased does not meet the requirement that every fact contained in Plaintiffs' Complaint is true upon Plaintiffs' personal knowledge or information and belief.

35. This failure is a violation of Pa.R.C.P. 1028(a)(2) in that it is a failure to adhere to a rule of court, namely Pa.R.C.P. 1024(a)

WHEREFORE, Defendants respectfully request that this Honorable Court grant their preliminary objection to Plaintiffs' verifications and either dismiss the action for failure to be properly verified or require Plaintiffs to attached to Plaintiffs' Complaint verifications which comply with the requirements of Pa.R.C.P. 1024(a) in addition to granting such other relief in favor of the Defendants as is deemed necessary and proper under the circumstances.

Respectfully submitted,

MCCORMICK LAW FIRM

By: 

J. David Smith

Pa. Id. No. 27813

J. Michael Wiley

Pa. Id. No. 69657

Attorneys for Defendants.

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DIRECTOR OF ELECTIONS, :
 :
 Defendants :

NO.: CV22-01219

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the *Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

McCORMICK LAW FIRM

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DIRECTOR OF ELECTIONS, :
Defendants :

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CERTIFICATE OF SERVICE

The undersigned, J. Michael Wiley, Esquire, certifies that he served a copy of the attached Preliminary Objections of Plaintiffs' Complaint upon the following this 27th day of December 2022, as follows:

Via Email and Courthouse Mail

Gregory A. Stapp, Esquire
153 West Fourth Street, Suite 6
Williamsport, PA 17701
gstapp@stapplaw.com

MCCORMICK LAW FIRM

By: 

J. David Smith

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J. Michael Wiley

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COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA
MOTION COVER SHEET

 ORIGINAL

RICHARD HOUSER and CATHERINE
BURNS,
Plaintiffs

: Docket No. 01219 CV-22-10219
: Case Assigned to Judge _____
: none
: Family Court Hearing Officer

v.

COUNTY OF LYCOMING, LYCOMING
COUNTY BOARD OF ELECTIONS,
LYCOMING COUNTY COMMISSIONER
TONY MUSSARE, LYCOMING
COUNTY COMMISSIONER SCOTT
METZGER, LYCOMING COUNTY
COMMISSIONER RICHARD
MIRABITO, and FORREST LEHMAN,
DIRECTOR OF ELECTIONS,
Defendants

1. Name of filing party: Lycoming County
2. Filing party's attorney: J. Michael C. Wiley, Esquire
3. Type of filing: Preliminary Objections of Defendants to Plaintiffs' Complaint

<p>4. The following is/are requested:</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Argument <input type="checkbox"/> Evidentiary Hearing <input type="checkbox"/> Court conference <input type="checkbox"/> Rule to show cause <input type="checkbox"/> Entry of uncontested order (attach supporting documentation) <input type="checkbox"/> Expedited consideration. State the basis: <input type="checkbox"/> Video conferencing requested. Request form has been submitted. See Lyc. Co. R.G.C.B. L8. <input type="checkbox"/> Attach this cover sheet to original motion previously filed on: <p>5. Time required: <u>30 minutes</u></p>	<p>6. Name and addresses of all counsel of record and unrepresented parties:</p> <p>J. Michael C. Wiley, Esquire McCormick Law Firm 835 West Fourth Street Williamsport, PA 17701</p> <p>Gregory A. Stapp, Esquire 153 West Fourth Street, Suite 6 Williamsport, PA 17701</p> <p><input type="checkbox"/> Continued on separate sheet.</p>
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ORDER

1. ___ An ___ argument ___ factual hearing ___ court conference is scheduled for _____ at ___ M. in courtroom no. ___, Lycoming County Courthouse, Williamsport, PA.
2. ___ Briefs are to be filed by the following dates:
Filing party _____
Responding party(ies) _____
3. ___ A rule is issued upon respondent to show cause why the petitioner is not entitled to the relief requested.
4. ___ A response to the motion/petition shall be filed within _____ days.
5. ___ See order attached. ___ See separate order issued this date.
6. ___ Other _____

Judge

Date

cc: ALL PARTIES OR OTHERS TO BE SERVED WITH NOTICE MUST BE DESIGNATED IN "6." ABOVE.

NOTICE: The parties are directed to confer for the purpose of resolving any issue raised in the motion/petition. If a resolution is reached prior to the scheduled date, the moving party shall immediately notify the court scheduling technician, the judge or hearing officer assigned to hear the matter, and all counsel of record or parties if unrepresented. Such notice may be in writing or by email.