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2003 LEGISLATIVE ELECTION CHALLENGE

Contestant,

VS.

Defendant.

**Response of Assemblyman
Marcus Conklin to Statement of Contest
Filed by Sandra June Vitolo**

I.

Nature of This Response

Mr. Marcus Conklin was elected by the voters of Nevada's Assembly District 37 to represent that district in the 2003 legislature. Election Day, November 5, 2002 was the final day of the voting season which included early voting from October 19, 2002 to November 1, 2002. Clark County Registrar of Voters Harvard Lomax certified the following election results: Mr. Conklin received 4,560 votes. This is 134 votes more than his opponent, Ms. Frances Allen (4,426.) *Statement of Vote, Clark County General Election, Conklin's Exh. A, submitted in a separate volume of exhibits.*

On November 19, 2002, Ms. Sandra June Vitolo, an Assembly 37 voter, filed a contest to the election of Mr. Conklin with the Nevada Secretary of State. Her Statement of Contest asserts that “[t]he 160 names and addresses [in her Exhibit 3] were verified to be fraudulent by David Groover and Associates.” She provided no verification for her Exh. 3, no real explanation of it and no verification by Mr. David Groover. She refused to provide any additional information for the next two months and then, at the last minute, Ms. Vitolo withdrew her contest by fax at 4 pm. on February 1, 2003.

Assemblyman Conklin respectfully requests the Special Committee to consider the circumstances of this contest, dismiss it to the extent that he rightfully retains his legislative seat and consider appropriate measures against those who are behind it.

Dismissal is warranted on substantive grounds because:

1. Ms. Vitolo's purported verification does not meet statutory requirements. She has no personal knowledge of any of the voters, their names, their addresses or the circumstances of their voting.
2. Lacking personal knowledge, Ms. Vitolo fails to provide accurate information available from public records about the names and addresses of the 160 votes she is contesting.

3. Lacking personal knowledge, Ms. Vitolo appears to be relying on information collected by others yet failed to offer any reason why the information ought to be believed. She offers nothing about its source, whether the source had personal knowledge, or if it is current. In short, she offers no reason for anyone to believe her information is accurate. It turns out that most of Ms. Vitolo's allegations are inaccurate.
4. Ms. Vitolo misstates the Nevada law applicable to these voters. She cites only a statute dealing with brand new voter registrations. Nearly all of the 160 votes she is contesting do not fall into this category. She had that information.
5. Most of the votes Ms. Vitolo questions were properly and legitimately cast by voters who had moved within Clark County, who completed the proper documentation for the Election Department at the time they voted. Ms. Vitolo and the others assisting her in this contest could have easily ascertained the following information from the Election Department:
 - (a) Inactive does not mean ineligible;
 - (b) Nevada law requires a voter who has moved but has not notified the Election Department of their address change to vote in their old district; and
 - (c) These voters were asked, and each of them completed, the oral or written affirmation attesting to their new residence.

This information was readily available to Ms. Vitolo and to those assisting her: it is part of Nevada Revised Statutes. Some of the people assisting Ms. Vitolo were in contact on a number of occasions with Mr. Lomax, Clark County Registrar of Voters, who provided them with this information.

6. Ms. Vitolo and others assisting her sought to deprive Mr. Conklin of his due process right to defend the results of the election. Ms. Vitolo and her attorney refused to cooperate in any way in the investigation about the votes they were questioning. Despite claiming she had "personal knowledge," Ms. Vitolo and her attorney refused to allow her to be deposed. They refused to provide documentation beyond that attached to the Statement of Contest. They declined to attend the deposition of the Registrar of Voters who again explained applicable Nevada law directly contrary to the suppositions of Contestant in her Statement and who testified that a sampling of contested votes did not support a proper contest.

The investigation Mr. Conklin has been forced to undertake to defend against this contest is not complete. By the time Ms. Vitolo's attorney faxed her last minute withdrawal, Mr. Conklin's defense investigation uncovered enough information to dispel any notion that there were enough questionable votes to change the outcome of this election and to prove that this contest was totally without merit. Regrettably, however, it has been an expensive and difficult process. More regrettably, the contest cast aspersions on perfectly valid votes and those who cast them, Republican and Democrat alike, and has led to an unwarranted intrusion into these innocent voters' privacy based on shoddy investigative techniques for no apparent good reason.

II. Statement of Applicable Law

A. Ms. Vitolo is Mistaken in Her Representations about Where These Voters Were Supposed to Vote

Nevada Revised Statutes govern where and how a voter votes. Contestant cites only NRS 293.485 which covers who is entitled to register to vote in the first instance (such as moving into the state from a different state) and the cutoff dates are for these initial registrations (living in the county for 30 days, and in the precinct for 10 days prior). The vast majority, 148, of the 160 contested votes are not initial registrations.¹ Contestant ignores the statutes applicable to the change of address for voters who are already registered to vote in Clark County. Nevada complied with the federal legislation known as the National Voter Registration Act of 1993, often referred to as the "Motor Voter Act" and chose one of two options permitted under the federal statute. Nevada's option requires a voter who has moved within the state but not changed their registration to vote in their old district, not the district they have just moved into.

NRS 293.525 Vote after residence changed but registration not transferred; affirmation by elector; use of information regarding current address to correct registrar of voters' register.

1. Any elector who is presently registered and has changed his residence after the last preceding general election and who fails to return or never receives a postcard mailed pursuant to NRS 293.5235, 293.530 or 293.535 who moved:

(a) From one precinct to another or from one congressional district to another within the same county must be allowed to vote in the precinct where he previously resided after he provides an oral or written affirmation before an election board officer attesting to his new address.

(b) Within the same precinct must be allowed to vote after he provides an oral or written affirmation before an election board officer attesting to his new address.

2. If an elector alleges that the records in the registrar of voters' register or the election board register incorrectly indicate that he has changed his residence, he must be permitted to vote after he provides an oral or written affirmation before an election board officer attesting that he continues to reside at the same address.

3. If an elector refuses to provide an oral or written affirmation attesting to his address as required by this section, he may only vote at

¹ Ms. Vitolo links 12 voters and votes to Gary Horrocks, a failed Republican candidate, and his tavern. Due to the pendency of the DA's criminal investigation, these 12 votes were not investigated and so are not addressed in this brief and they are not numerous enough to change the outcome. The persons in question have no connection of any kind to Mr. Conklin.

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the special polling place in the county in the manner set forth in NRS 293.304.

4. The county clerk shall use any information regarding the current address of an elector obtained pursuant to this section to correct information in the registrar of voters' register and the election board register.

Contestant never mentions or takes into account this statute when accusing 160 people of voting fraudulently. Nor did she research whether the 160 voters she publicly castigates were already registered and simply moved within Clark County. This information is readily available from the Election Department. Mr. Lomax testified about how his Election Department enforces this statute. *1/16/03 Depo of Mr. Lomax, pg. 15-16, Exh. B.*

B. Ms. Vitolo Did Not File and Has Not Come Forward with Reliable Evidence That 134 Votes Are So Questionable That If They Were Discarded, the Election Result Would Be Different

NRS 293.425 Contest of general election for office of assemblyman or state senator: Filing of documents and other evidence with secretary of state. If the contest is of the general election for the office of assemblyman or state senator, a statement of contest, prepared as provided in NRS 293.407, and all depositions, ballots and other documents relating to the contest must be filed with the secretary of state within the time provided for the filing of statements of contests with the clerk of the district court.

The above-quoted statute incorporates requirements for election contests filed for other elections (such as those contests which are to be filed in district court) and so those requirements are set forth below:

NRS 293.407 Filing of written statement of contest with clerk of district court; verification.

1. ...
2. Except where... a voter who wishes to contest an election, ..., must, within the time prescribed in NRS 293.413² file ...a written statement of contest, setting forth:
 - (a) The name of the contestant and that he is a registered voter of the political subdivision in which the election to be contested or part of it was held;
 - (b) The name of the defendant;

² NRS 293.413 requires election contests be filed within 5 days of a recount, and not later than 14 days after the election if no recount is demanded. Ms. Allen did not demand a recount for Assembly District 37 so Ms. Vitolo, contestant, filed this contest on the last possible day, November 19, 2002.

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- (c) The office to which the defendant was declared elected;
 - (d) The particular grounds of the contest and the section of Nevada Revised Statutes pursuant to which the state is filed; and
 - (e) The declaration of the result of the election and the body or board which canvassed the returns thereof.
3. The contestant shall verify the statement of contest in the manner provided for the verification of pleadings in civil actions. . . .

Nevada Revised Statutes also incorporates due process by legislating that even judicial courts are not allowed to dismiss election contests "for want of form if the grounds of contest are alleged with sufficient certainty to inform the defendant of the charges he is required to meet." NRS 293.410. Certainly Mr. Conklin is entitled to the same due process (notice, opportunity to be heard, right of confrontation) for the election contests committed to the legislature for adjudication, such as the one filed by this contestant.

III.

Ms. Vitolo's "Verification" Is Not Sound and Does Not Meet Statutory Requirements

A contestant is required to verify the statement of contest in the same manner as verification for pleadings. NRS 293.407 §3. Verification of pleadings is governed by NRS 15.010. It requires that the matters being sworn to are those which an affiant knows are true based on his or her personal knowledge or a belief in that the facts stated are true. Ms. Vitolo's Statement, which she personally verified, shows she has no personal knowledge and no reason to believe any of it is true—since she knows nothing about any of it.

Page three of Contestant's Statement contains three facts which Contestant later claims to be "verifying" although they appear in the section of the Statement entitled "Argument." They are:

1. "Some of the illegal votes were obtained with the assistance of Gary Horrocks."
2. "A number of people registered with a false residence addresses, but mailed their ballots from either a post office box leased by Nevada Association of Concerned Motorcyclists..."
3. "Several of these residence addresses were checked , and many were found vacant..."

Statement of Contest, pg 3.

Ms. Vitolo offers no reason how she has personal knowledge of these "facts" although she "verifies" them at the end of her Statement of Contest. Does she know these voters personally? Did she go to their homes and speak with them? Did she look them up in the phone book, call them up and ask them if they had moved and when did they tell the Election Department? Did someone else conduct some diligent investigation to check out these voters

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and their addresses? How many were checked, by whom, on what day, what follow up was conducted about these people? Who briefed Contestant on the investigation? It is most telling that Contestant's recitation of facts lack specificity of any kind and that she casts loud and non-specific aspersions about a large number of voters by lumping them with the sins of a few. Contestant's Statement seems to be linking all of the 160 votes to the Horrocks problem. This is a deception on a massive scale, grievously unfair to many voters who have nothing to do with that particular issue. A careful examination of Contestant's Exh. 3 shows only 12 are linked to that problem.

Nor can Ms. Vitolo's "verification" be rehabilitated by her reliance on others to arrive at a belief. No one can call her reliance reasonable when it turns out that so many of the Exh. 3 facts are inaccurate and were easily ascertainable. Ms. Vitolo attempts to sidestep the personal knowledge/reasonable belief requirement for verification by claiming, without explanation, that the 160 names and addresses were verified to be fraudulent by David Groover. Yet Contestant offers no verification of any kind from Mr. Groover.

There is little doubt that this type of "verification" is not sufficiently sound to meet the statutory requirements of actual personal knowledge or reasonable belief. And the statutory definition of perjury can assist the Committee in understanding the grave nature of submitting untruthful, legally inadequate "verifications." Perjury includes those who "willfully makes an unqualified statement of that which he does not know to be true" NRS 199.120 §1.

IV.

Very Few of the 160 Votes Ms. Vitolo Alleged to Be "Fraudulent" Are Even Questionable; Most of the Voters in Question Completed the Proper Forms for the Clark County Election Department and Were Required to Vote in Assembly District 37

With limited time, flimsy allegations to work from, no cooperation at all from the Contestant and obstruction of his efforts to obtain information from elected officials, persons who identified themselves conducted a documented investigation for Mr. Conklin. They were able to confirm that for over 110 votes alleged to be questionable, there is no evidence that they are, a number sufficient to defeat this contest. The results of this as yet incomplete investigation are set forth below. They are supported by admissible and reliable evidence set forth in exhibits which are also being submitted. All of the exhibits are of the type showing reliability of the type which would make them admissible in a court of law—they are self-authenticating copies of public records, sworn affidavits, deposition, pleadings served on parties and witnesses by fax and mail, and follow up letters.

- A. Five voters listed in the Contestant's Exh. 3 have no notation next to their name. Therefore, those votes should not be considered "contested"

Contestant's Exh. 3 contains no notations of any kind next to names of the following voters:

Herbert Dunson (Non partisan)³
Harold James Humphries (R)
Brigitte Marie Johnson (D)
Randall Cameron Johnson (R)
Wayne C. Rogers (L)

Therefore, Contestant has failed to meet the statutory requirement of submitting verified evidence by November 19, 2002, calling these votes and these voters into question. Since these votes have not been properly challenged, they cannot be considered part of this contest.

B. Public records show one voter, Ms. Shepard, continues to reside at the residence listed with the Election Department

Contestant questions Ms. Shepard's vote with just a Groover notation that "Apt. manager has never heard of her." This is probably true because Ms. Shepard's home address, 1913 Spangle Drive, Las Vegas, is a single family dwelling where she has resided since 1998 along with a Jason Shepard. *Affidavit of Jim Thomas, ¶15, Conklin's Exh. C.* Ms. Shepard has an unlisted phone number and so we refrained from any further intrusions of her privacy.

C. For seven voters, the Exh. 3 Groover notation indicates only that the voters were not home, did not answer the door or did not answer the phone

Karin N. Henson (D)
Leo J. Henson (D)
Alma Aytona McCarthy (R)
William L. McCarthy (R)
Kevin S. Williams (R)
Kevin Lee Williams, Sr. (D)
Nilda R. Williams (R)

Contestant's inclusion of these seven voters is a striking illustration that Contestant lacks even the most minimal of information about voters and that she is willing to cast serious aspersions without a proper investigation. For these people, according to the Exh. 3 notation, an unknown person claims that there was "no answer" at a particular residence on an unspecified day. This is certainly not the kind of verified evidence weighty enough to call a voter a fraud or justification to discard a vote. By including these names in the list of 160, Contestant is urging the Legislature to do just that. This is unfair to these voters and this makes a mockery of the election contest process and the statutory requirements.

³ For the first few sets of allegedly questionable votes set forth in this response, their publicly disclosed party affiliation is included to demonstrate that Ms. Vitolo's broad brush obscured the truth for many of those she accused and they are from all political parties and non-affiliated voters.

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For example, Contestant included the McCarthy's in her list of 160. There is a very good reason why they may not have answered the door at their Nevada address—they are in the military and have an APO address. They asked that their absentee ballots be sent to their APO address -- PSC 5 Box 682, APO AE 09050.

Still another example of the dearth of real evidence Contestant Vitolo offers is when she questions the validity of the votes by three individuals with the last name of Williams. The Groover notation claims the address for Keith and Nilda (7516 Sea Spray Ave) is "highly suspect" because the residence has a car in the driveway with California plates. Even if the mere presence of a car with out of state plates in one's driveway were statutorily sufficient to question a voter's right to vote, it turns out that this California car was in someone else's driveway! The true facts are that all three Williams had moved out of the Sea Spray Avenue address. They signed verifications of their respective address changes. Copies of their affirmations and the screens from the Election Department database pertinent to each of the three voters are contained within *Exh. D* at pgs CCED 247-249 (Keith S.), CCED 250-252 (Kevin) and CCED 253-255 (Nilda).

All of the affirmations on file with Election Department for those voters who moved are collected and attached as *Exh. D*. At his deposition on January 16, 2003, which Contestant chose not to attend, Mr. Lomax testified extensively about these screens from his department's database—including the fact that the date of the Election Department's update of their database is shown on the bottom right hand corner of the screen. Contestant and those assisting her consistently ignored the true state and import of these easily discoverable public facts.

D. 86 Voters properly completed affirmations or notices for change in residence

Mr. Lomax testified extensively about his Election Department's procedures for the mailing of notices in his deposition on January 16, 2003, procedures he is more than willing to explain to anyone who needs to understand them. Mr. Lomax acknowledged voters rarely notify his Department when they move. Federal law requires the Election Department to keep voters on the active rolls until they fail to vote in two consecutive federal elections. If mail sent to them is returned as undeliverable, they are placed on inactive status but they still remain eligible to vote. *1/16/03 Depo of Mr. Lomax, pgs 18-20, Conklin Exh. B*. In this last general election, numerous voters were redistricted into new precincts and new districts as a result of the last Legislature's redistricting actions, oftentimes causing some confusion.

At least 86 of the 160 contested voters listed in Contestant's Exh. 3 fall into this category of moving without notifying the Election Department but eventually signing affirmations. Every one of these 86 voters completed proper affirmation cards or new voter registration forms. Many were apartment dwellers referred to in the previous section who moved to a different apartment in Clark County or bought and moved into a house. The records demonstrating the validity of the votes cast by these voters were available to Contestant and those assisting her in this contest. Election Department records, the signed affirmation cards

and the Election Department screens showing when the Election Department updated their records for those voters are attached as *Conklin Exh. D*. The names of the people Contestant wrongfully accused are:

- 1 Elizabeth Argel-Valeriano
- 2 Susyn Marchelle Atkin
- 3 Gail Barber
- 4 John Robert Beaupre
- 5 Darrell Lynn Beavers
- 6 Christopher Bradley Berger
- 7 Monica S. Berry
- 8 Carlos Tosti Bettencourt
- 9 Darcy Gail Briggs
- 10 Bruce Arnold Brown
- 11 Anthony Busch
- 12 Aaron James Cantor
- 13 Ezequiel Castellanos
- 14 Kirsten Tami Castellanos
- 15 Mona Delossantos
- 16 Victoria Elaine Eklof
- 17 Waldemar Erik Eklof
- 18 Luke Charles Everist
- 19 Eva M. Culverson
- 20 Raymond Figueroa, Jr.
- 21 Rebecca Grace Glover
- 22 Cassandra Gold
- 23 Isaac A. Green
- 24 Cynthia Rae Grieco
- 25 Steven Douglas Grissom
- 26 Allyse Beth Hague
- 27 Pamela Ann Hank
- 28 Kelery A. Hansen
- 29 Gustavo Hernandez, III
- 30 Kacie Michelle Hoard
- 31 Tyrone Quincy Hoard, Jr.
- 32 Eric A. Hudson
- 33 Lela Ann Hudson
- 34 Harold James Humphries
- 35 Chiyo S. Iocca
- 36 Alejani Jimenez de Chavez
- 37 Bridgette Marie Johnson
- 38 Randall Cameron Johnson
- 39 Terri Michelle Jones
- 40 Cheryl R. Keller

41 Justin James Kobielsky
42 Jill Elizabeth Labandz
43 Kevin Leo Leonard
44 Scott Gregory Leonard
45 David Wayne Lumpkin
46 Gregory Noah Manley
47 Warren F. May
48 Michael Vernon McGhie
49 James Rocco Meranto
50 Brenda Minor
51 William James Molony
52 Vicenta Elizabeth Montoya
53 Diana Sue Myers
54 Mark Royce Nacinovich
55 James Edward O'Donnell
56 Mary Elizabeth Orie
57 Karen Suann Outley
58 Joseph Nazia Perez
59 Christina Pizano
60 Marilyn Michelle Pope
61 Shannon E. Powers
62 Antoinette Regan
63 Jeremiah John Richardson
64 Kenney S. Ross
65 Barbara Ann Satterfield
66 Angela Annette Schwindt
67 Martin Irby Shuman
68 Erik Oren Simpson
69 Alexandria Chris Sprecher
70 Michael Joseph Stephanski
71 Karen Kay Stonebraker
72 Thomas Strother
73 Jodi Lynn Terrien
74 James Richard Tlanda
75 Carol Susan Townsend
76 Gregory Bedford Townsend
77 Jennifer Flavia Trone
78 Teri Lee Walsh
79 Lavonne Vesta Warfield
80 Richard Allan Weinstein
81 Henry S. Wiggins
82 Keith S. Williams
83 Kevin Lee Williams, Sr.
84 Nilda R. Williams

85 Ileen Isela Wood
86 Roland Christopher Zubei

E. At least 18 of the Voters Being Challenged by Contestant simply and properly requested absentee/mail ballots⁴

Contestant, again without reliable documentation and without having conducted any investigation in to the records on file with the Election Department, accuses at least 18 innocent voters who simply asked to be provided with absentee/mail ballot. These wrongfully accused voters are:

1. Retha Hazel Anderson
2. Walter Darrel Anderson
3. Edward Betancourt
4. Patrick Cassidy
5. Beverly Ann Deshazo
6. Roy Curtis Earhart
7. Lewis William Ground
8. Warren May
9. Alma Aytona McCarthy (also listed in the "no answer" category)
10. William L. McCarthy (also listed in the "no answer" category)
11. Henry Richard Molinengo, II: Contestant, through Groover, claims this vote is "invalid?" for no apparent reason. It turns out that Mr. Molinengo did nothing more than request an absentee ballot be sent to an address in Virginia, which is perfectly legal and proper.
12. Daniel Lewis Orr: Groover's notation claims, without any foundation, that this registered Republican is in the final stages of dementia. Mr. Orr's father, respected Las Vegas dentist Dr. Daniel Orr, begs to differ with that characterization. *Affidavit of Dr. Daniel L. Orr, II, Conklin Exh.G.*
13. Brigit Mary Petersen: Groover's accusation is based on the alleged fact that the unidentified resident claimed he or she was not the voter, but refused to sign a declaration to that effect.
14. Steven Frederick Talbott
15. Susan Henrietta Talbott
16. Joe Vargas
17. Noelle Renee Vargas
18. Anna Kathleen Wroble

⁴ Not included in this count are any of the absentee/mail ballots which Vitolo, through submitting newspaper articles and through her investigator, Mr. Groover, have linked with failed Republican candidate Gary Horrocks and his bar, The Clubhouse Tavern.

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F. The Unverified Exh. 3 makes so many unsubstantiated and inaccurate accusations that the validity and credibility of all of Contestant's "evidence" is highly suspect

Hearsay is an out-of-court declaration offered to prove the truth of the matters asserted. Court rules, such as the rules of evidence, exclude hearsay evidence because of its inherent unreliability and because no one is given the chance to cross-examine the person who is making the out of court declaration. Yet rules of evidence allow hearsay evidence to be considered by courts and juries, if there are other, substantial reasons demonstrating the evidence is somehow reliable and worthy of belief. Examples include public records, dying declarations, and admissions by parties themselves.

Contestant's Exh. 3 is the most blatant type of questionable hearsay—no author, no authentication, vague assertions attributed to no one person, etc. While the rules of evidence are not applicable to these proceedings, the same common sense grounds for exclusion of unreliable hearsay should compel the Committee's exclusion of this unreliable evidence. First, Contestant offers no explanation of the source of the Exh. 3 information. Second, she does not say who collected it, when it was collected, or anything else demonstrating that it is the product of a diligent and honest investigation.

The most frequent Groover notation in Exh. 3 is that apartment managers at eight Las Vegas apartment complexes gave someone (Groover?) information about some 80 apartment dwellers. The Groover notations make it seem as if these persons had never resided at the apartment complexes.

In stark contrast, Mr. Conklin hired a professional, diligent investigator whose affidavit, Exh. C, meticulously details the work he undertook and information he collected. In contrast, Mr. Thomas spoke with every apartment manager and names them in his affidavit and when he spoke with them, and exactly what he was told. Not one of these apartment managers had spoken to Mr. Groover or someone from his office. Mr. Thomas' investigation and his discovery that Contestant's "evidence" is highly suspect is further corroborated by Tammy Wanta, apartment manager for the Brittnae Pines Apartments. Her affidavit is attached as *Conklin Exh. E*.

For these apartment dwellers, Mr. Thomas conducted additional research on the voters and many had simply moved to a new residence in Clark County. Mr. Conklin suggests that Contestant and her investigator should have conducted a similar investigation before making accusations. In contrast to the inaccurate accusations of Contestant's Exh. 3, Mr. Thomas' thorough but uncompleted investigation is detailed in *Conklin Exh. C*. It underscores the shoddiness and inaccuracy of whatever investigation or compilation led to the written assertions in Contestant's Exh. 3, assertions Contestant claims Mr. David Groover has "verified" when he has done nothing of the sort.

These examples demonstrate the danger in relying on Contestant's information to disenfranchise registered voters and the votes they cast. Dangerous, too, because a

minimally honest and diligent investigation would have uncovered the true facts and would have suggested this contest not have been filed in the first instance or should have been withdrawn long before the eve of opening day. This is why courts and these contest statutes require "verified" information, that is, information based on personal knowledge of identified persons, swearing under penalties of perjury or a reasonable belief in reputable information, such as public records. Here are a few more examples of the poor investigative work poisoning all of Contestant's Exh. 3:

1. *Joseph Anthony Lopez, IV*: Contestant, through Groover, claims that on an unspecified date, an unidentified individual was somehow verified to be the resident of Mr. Lopez' home at 6513 Fresh Meadows Lane, LV. This unidentified resident claimed Mr. Lopez was unknown to him or her. Yet Mr. Lopez, a Nevada attorney, has resided at the 6513 Fresh Meadows Lane for the last 10 years, he lives by himself and he is entitled to, and does, use his office address for his mailing address. *Affidavit of Joseph Anthony Lopez, Exh. F*. Mr. Lopez's office, used for his mailing address on file with the Election Department, is listed in Contestant's Exh. 3 so was known to Groover, and shows that Mr. Lopez' office is right across the street from Mr. Groover's office—any reasonably diligent search might have included walking across the street and speaking with Mr. Lopez before accusing him of voter fraud.
 2. *James Rocco Meranto*: Contestant, through Groover, claims that he is "long gone, divorced" without providing any support of any kind for the claim or that these facts, alone, warrant discounting Mr. Meranto's vote. The true facts are that Mr. Meranto resides at a new address for which he signed an appropriate Affirmation which is on file at the Election Department. *Conklin Exh. D, pages CCED 147-149.*
 3. *Karen Loraine Smart-Wilson*: Contestant, through Groover, claims that her residence, 6616 Socorro Drive, LV, is "vacant home, realtor: 838-1622." Mr. Thomas researched this properly through public records (Assessor) and determined that the Wilson Family Trust owns the property. Mr. Thomas called the listed number in the phone book and spoke with a Toni Johnson who said her sister, Karen, had resided there until just a few weeks ago. *Thomas Affidavit, ¶24, Conklin Exh. C.*
- G. The 12 voters and votes linked to Mr. Horrocks, a failed Republican candidate, and his bar, The Clubhouse Tavern, were not explored because they have no connection to Mr. Conklin, are so few in number that they would not change the outcome of the election and the District Attorney is investigating for possible criminal violations

Although the bulk of Contestant's argument involves these votes, they constitute so small fraction of allegedly questionable votes they cannot change the results of the election. And no one knows who these people voted for. Rather than reporting this information to the proper authorities (such as the DA's office) and with absolutely no evidence of any link, Contestant includes these votes in her contest. This is nothing more than a thinly veiled attempt by Mr. Conklin's Republican opponents to hide possible wrongdoing by their very

own candidate (Mr. Horrocks' being an unsuccessful Republican candidate in the primary election.)

Contestant levels accusation supported by attaching newspaper articles, hardly the "verified" information sufficient to overturn an election. Contestant's Exh. 3 paints with the same broad brush. Without foundation, and sometimes just by noting that the address might be near the bar, Groover claims to identify the following 12 persons as linked to the alleged misconduct of Mr. Horrocks and possible irregularities in registering to vote and using Mr. Horrock's bar as a residence address. These names are offered with the caveat that there is nothing illegal about using a bar as a mailing address, as apparently some did, but a bar cannot be used as one's residence address (unless, of course, one actually does live there!) Some of these may actually fall into a legal, "OK to have a bar as your mail drop" category, others may have more serious problems:

1. Robert Allen Hagan, Sr
2. Amy Lynn Krzyzopolski
3. David Alan Krzyzopolski
4. Jackie Lee Kunkes
5. Jennifer Kay Lewis
6. James W. Moseley
7. Antoinette Regan
8. Henry Saucedo
9. Russell John Skuse
10. Patrick Riley Vinopal
11. Edwin Duane Brooks
12. Carol Ann Kemp

For the reasons stated above, and because he did not wish to interfere with any criminal investigation, and because he is supportive of legitimate efforts to ensure that elections are fair and proper, Mr. Conklin refrained from investigating these 12 votes of the 160 in the Contest. Mr. Conklin will leave it to the proper authorities.

Given the absence of real, reliable, verified evidence, this contest seems to be an orchestrated political effort to impugn Mr. Conklin and his election as an assemblyman. This perhaps is best illustrated by Contestant's attachment of an affidavit from Frances Deane, a Republican candidate who was elected County Recorder. *Contestant's Exh. 4*. Ms. Deane sets forth a conversation she claims to have had with Mr. Horrocks at the Republican victory party on election night which had absolutely nothing to do with the results of votes being cast in the Assembly 37 race! Despite having just been elected to a responsible government position overseeing the County's Recorder's office, a position which ought to give her concern about the filing of false documents, she never reported her concerns about what Mr. Horrocks told her until someone secured her affidavit for this contest. Then, when contacted, Ms. Deane refused to be deposed and refused to cooperate in any discovery about who

secured or why her affidavit was attached to this election contest. This is still another obstruction of Mr. Conklin's right to defend against this contest.

V.

Contestant Stonewalled and Obstructed Mr. Conklin's Efforts to Learn More about and Challenge Contestant's Evidence, depriving him of due process

As would be customary in any adversarial proceeding, and incorporating well-known and constitutionally mandated standards of due process, in prior contests the Legislature has enacted procedural rules to allow the defendant to explore the "evidence" the contestant is offering. Similar rules, now scheduled to be adopted by the current Committee, contain due process safeguards by allowing parties to a contest to examine, test and refine their respective evidence so that it can be presented to the Legislative Committee in a concise and fair fashion.

Due process is a flexible constitutional entitlement concept—the amount of process that is due depends on the importance of what person might lose. By this contest, Contestant asked the Assembly to strip Mr. Conklin of the elected office to which he has been elected on November 5, 2002. At the very least, due process requires that Mr. Conklin is entitled to adequate notice of the charges against him, the right to confront those who seek to deprive him of his legislative seat, an opportunity to explore those accusations in order for him to present a defense. Due process requires that he is entitled to a full and fair opportunity to be heard.

Nevada's contest statute embodies these notions of due process: the statute requires the contest be verified, that it contain all evidence the contestant has, and that it be filed shortly after the election so there is sufficient time for the defendant (the person whose election is being contested) to receive, review and follow up on the evidence. The procedural rules routinely adopted by the Assembly also ensure that contestants and defendants are afforded due process by allowing depositions and the collection of and exchange of evidence before presentation and providing for the orderly consideration of that evidence.

Contestant and those assisting her, many of whom have remained in the shadows, have attempted to deprive Mr. Conklin of the due process he is entitled to. Contestant and her lawyer, Craig Mueller, have refused to participate in any exchange of information. They refused to produce any actual evidence, such as records, papers, declarations from neighbors, etc. although they vaguely mention them in Exh. 3. They refused to undergo questioning under oath about their filed evidence and where it came from. They refused to allow Ms. Vitolo to be questioned under oath about what she claims is her personal knowledge or why she has a belief in what she calls "facts." This behavior violates the statute, the Assembly's procedural rules, and constitutional standards of due process and needs to be addressed even if this Contestant seeks to avoid such scrutiny by the last minute withdrawal of her contest.

Mr. Lomax testified that he had numerous conversations with Assemblyman Bob Beers, including one just the day before Mr. Lomax was deposed (i.e. on January 15, 2003) at which time Mr. Beers wrongly suggested that Mr. Conklin was not entitled to depose witnesses:

Question (by Ms. England): Now, you indicated that you've had a conversation with Mr. Beers since receiving that notice about the deposition.

Answer (by Mr. Lomax): Yesterday.

Question: And what did Mr. Beers tell you?

Answer: He indicated that—and I don't—again, I don't remember the exact terminology he used. But in essence, what he told me is Marcus Conklin—I don't know if he didn't have legal standing or whatever. But just his position, there was something legally wrong with it. I ought to be advised there's really no reason for me to participate in it. And he had checked this out with the Legislative Council Bureau, and they agreed with him. In his eyes this was just an action on the defendant's part to harass Ms. Vitolo, I guess...

1/16/03 Depo of Lomax, pg 11, ll. 18 to 12, ll. 1-8,

Conklin Exh. B.

Catalogued below are Mr. Conklin's efforts to obtain the evidence from Contestant and the obstructive behavior of all those involved in her side of the contest. Not only did the Contestant and her lawyer refuse to provide any evidence or supporting documentation, but they refused to participate in the deposition of the County election official who clearly explained that their interpretation and application of election laws were wrong. They also seemed to have persuaded everyone associated with the contest's vague, unsupported and unverified allegations not to cooperate as well, since those same persons refused to be deposed or to provide any explanations of their participation in the exhibits and information attributed to them. All of the documents referred to in this section are attached as a collective exhibit, *Conklin Exh. H.*

A. EFFORTS TO SECURE COOPERATION AND INFORMATION FROM COUNTY REGISTRAR HARVARD LOMAX

1. Late December, 2002: England phone request to Mr. Lomax and his office, Clark County Election Department, for generalized information about election procedures, including copies of all applicable laws (state and federal), sample affirmation cards,

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sample address change notices, polling place regulations and policies, and official training materials, etc.

Response: *Binder of materials provided by Clark County Election Department on 12/31/02*

2. 1/10/03 England letter to Mr. Lomax, Clark County Registrar of Voters, requesting affirmations of change of address for 87 voters of the 160 listed by contestant in Exh. 3:

Response: *All documents requested produced on January 15, 2003.*

3. Conklin Deposition Notice of Clark County Registrar of Voters, Mr. Harvard Lomax, served January 13, 2003 setting Mr. Lomax's deposition for January 16, 2003 at 2:00 p.m., a date and time convenient for Mr. Lomax; Contestant and her attorney noticed by fax and mail.

Response: *Mr. Lomax's deposition goes forward for 3 hours on January 16, 2003. Neither Vitolo nor Mueller participate.*

4. 1/27/03 faxed England letter to Mr. Lomax, requesting affirmations or change of address notices for an additional 38 voters.

Response: *Additional documents provided on January 31, 2003.*

B. EFFORTS TO SECURE COOPERATION AND INFORMATION FROM CONTESTANT SANDRA VITOLO

1. 12/30/02 Phone call and confirming England letter to Sandra J. Vitolo, Contestant, requesting cooperation in gathering evidence to facilitate the legislative committee's consideration.
2. 1/6/03 England letter to Ms. Vitolo, requesting list of witnesses, documentation, and availability for deposition.

Contestant Response: *1/9/03 Attorney Mueller Letter to England, stating he and Ms. Vitolo will not cooperate in any way.*

3. Notice of Deposition of Contestant Sandra June Vitolo, served by fax and mail on January 14, 2003; Ms. Vitolo's deposition set for January 21, 2003 at 10:00 a.m.

4. 1/17/03 England letter to Mr. Mueller inquiring whether Ms. Vitolo will attend the noticed deposition and asking who else he represents in this matter.

Contestant Response: *No show*

5. Mr. Conklin's "Request to Contestant for Information and Document," served on Contestant's counsel by fax and mail on January 17, 2003, asking for all documentation in support of Ms. Vitolo's Statement of Contest, and asking that it be provided by January 24.

Contestant Response: *Nothing produced*

Contestant Response: *1/20/03 Mueller letter to Ms. England, stating he thought he had made it abundantly clear that Ms. Vitolo would not cooperate in any way*

6. 1/24/03 England letter to Mr. Mueller, enclosing hard copies of notices previously served by fax and inquiring if he will be providing requested information and documents by requested date.

Response: *Nothing produced.*

C. EFFORTS TO SECURE COOPERATION AND INFORMATION FROM AFFIANT AND COUNTY RECORDER FRANCES DEANE

Ms. Frances Deane, elected Clark County Recorder on November 5, 2002, gave an affidavit attached as Exh. 4 in support Contestant's Statement. The affidavit spoke of conversations Ms. Deane with a Mr. Horrocks. Ms. Deane never cooperated with Mr. Conklin.

1. 1/10/03 England letter to Ms. Frances Deane, Clark County Recorder, requesting time for a deposition and information she has which led to her affidavit attached to Vitolo Statement of Contest.

Response: *Nothing*

2. Conklin's 1/13/03 Deposition Notice of Affiant and Clark County Recorder Frances Deane, setting deposition for January 17, 2003 at 10:30 a.m.
3. 1/15/03 England letter to Ms. Deane, memorializing phone call from Ms. Deane's assistant who said Deane would not attend deposition. England offers to re-set deposition at Deane's convenience.

Response: 1/15/03 Deane memorandum to Ms. England, stating that she will not be attending any deposition

4. 1/16/03 England letter to Ms. Deane, offering to accommodate Ms. Deane's work schedule to take her deposition.

Response: Deane is a no-show at 1/17/03 deposition and refuses to offer any other date

D. EFFORTS TO SECURE COOPERATION AND INFORMATION FROM DAVID GROOVER, ALLEGED TO BE THE AUTHOR OF CONTESTANT'S EXHIBIT 3 AND KNOWLEDGEABLE THAT THE 160 VOTERS LISTED HAVE CAST "FRAUDULENT VOTES"

1. Conklin's 1/14/03 Deposition Notice of David Groover, setting his deposition for January 21, 2003 at 2:30 p.m. and asking him to bring all of his files and supporting documentation and records for allegations in Exh. 3 being attributed to him and his work.
2. 1/21/03 England letter to Mr. Mueller, confirming neither he nor Ms. Vitolo appeared at her deposition and inquiring if Mr. Mueller represents Mr. Groover and whether Mr. Groover would show up for his scheduled deposition.

Response: 1/21/03 Groover letter to Ms. England, asking why notice doesn't specify a court for issuance and stating that he will attend his deposition only if she can attest that deposition notice is a legal document.

3. 1/23/03 England letter to Mr. Groover, responding to his questions about the deposition, explaining the usual process of election contests includes discovery of information and requesting that he give a recorded statement if he does not wish to be deposed.
4. 1/24/03 England letter to Mr. Groover, enclosing Assembly Rule No. 45, "Procedure for Election Contests." These rules were adopted for previous contests and allowed all parties to take depositions and to explore evidence. Groover is asked if he will now agree to be deposed.

Response: Groover calls and says he has to consult with the people who hired him and will notify England by 2 p.m.

Further Response: No Groover call, no documents provided

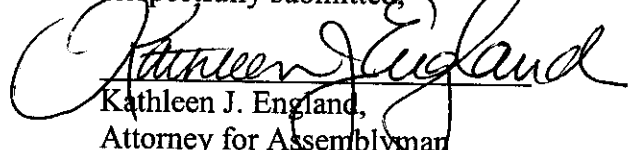
Because almost all of Contestant's evidence turned out to be inaccurate or untruthful, and because persons assisting Contestant encouraged public officials to decline to cooperate, Mr. Conklin ought to be entitled to be awarded the costs and expenses he has incurred in preparing this response. This is particularly compelling, and seems just and fair when, at the last minute, Contestant withdrew. Attached as *Conklin Exh. I* is a list of costs incurred to date for which bills have been received. This does not include the thousands of dollars in attorneys' fees. A number of additional bills have yet to be received and Mr. Conklin requests permission to update this accounting.

VII. **Conclusion**

This contest should be dismissed for the Contestant's failure to come forth with verified reliable evidence and for Contestant's failure to allow her evidence to be discovered and examined. Through extensive but as yet uncompleted, Contestant's "questions" about more than 115 of 160 voters listed in Contestant's Exh. 3 have been answered and there is no reason to continue to impugn these voters or pry into their private lives to prove their innocence. Since no one is permitted to ask these voters to disclose who they voted for, statistically one could reasonably assume that they may have cast ballots in roughly the same proportion as all of the votes cast. As such, there is not a sufficient number of votes remaining in question to change the outcome of the election, a fact which Contestant could have ascertained before filing her Contest on November 19, 2002 or within a short time thereafter.

Last but not least, Contestant and those who assisted her owe the voters whose good names and privacy have been the subject of Contestant's bad faith, unsubstantiated, ill-supported accusations an apology.

Respectfully submitted, 2/4/03


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