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SUPREME COURT
STATE OF ARIZONA

FRANKLIN BRUCE ROSS, a citizen and
qualified elector of Arizona State
Legislative District 18,

Petitioner-Appellant,

vs.

KEN BENNETT, in his official capacity as
Secretary of State for the State of Arizona;
THE BOARD OF SUPERVISORS OF
MARICOPA COUNTY; HELEN
PURCELL, in her official capacity as
Maricopa County Recorder; and KAREN
OSBORNE, in her official capacity as
Maricopa County Elections Director,

Respondents-Appellees,

and

CITIZENS FOR A BETTER ARIZONA
IN SUPPORT OF RC-04-2011, an Arizona
Political Committee,

Real Party in Interest-
Appellee.

NO.

Maricopa County Superior Court
No. CV2011-011864

**APPELLANT'S RULE 8.1
STATEMENT IN EXPEDITED
ELECTION MATTER**

Pursuant to Rule 8.1(c), Arizona Rules of Civil Appellate Procedure,
Appellant hereby provides:

I. Notice of Appeal.

A conformed copy of the notice of appeal in this matter, reflecting the date of filing in the Maricopa County Superior Court, is provided as Appendix 1 to this Statement.

II. Designation.

This case is an “Expedited Election Matter” pursuant to A.R.S. § 19-208.04 (C). This case involves the legal sufficiency of the recall petition against Arizona State Senator Russell Pearce, President of the Arizona State Senate, that resulted in the calling of a recall election for the office of State Senator in Legislative District 18 on November 8, 2011. The last day for ballot printing to begin is September 23, 2011. The issues on appeal are of substantial statewide importance and would become moot before Supreme Court review unless the appeal is filed directly in the Supreme Court.

The names and contact information, including e-mail addresses, of counsel for each party are:

Appellant Franklin Bruce Ross

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Appellee Ken Bennett, Arizona Secretary of State

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Appellees Maricopa County Board of Supervisors, Maricopa County Recorder Helen Purcell, Maricopa County Elections Director Karen Osborne

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Appellee Citizens for a Better Arizona in Support of RC-04-2011


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III. Final Order.

A copy of the superior court's final order from which the appeal is taken is provided as Appendix 2 to this Statement.

RESPECTFULLY SUBMITTED this 15th day of August, 2011.

GAMMAGE & BURNHAM P.L.C.

By 

Lisa T. Hauser
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Phoenix, Arizona 85004
Attorneys for Petitioner-Appellant

ORIGINAL and seven **COPIES** of the foregoing filed (or e-filed) this 15th day of August, 2011, with:

Clerk of the Court
Arizona Supreme Court
1501 West Washington
Phoenix, Arizona 85007

COPIES of the foregoing sent via e-mail and/or mailed this 15th day of August, 2011, to:

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for a Better Arizona in Support of RC-04-2011*

A handwritten signature in cursive script that reads "Leticia Varela". The signature is written in black ink and is positioned above a horizontal line.

APPENDIX 1

1 Lisa T. Hauser #006985
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12
13 **SUPERIOR COURT OF ARIZONA**
14 **MARICOPA COUNTY**

15 FRANKLIN BRUCE ROSS, a citizen and
16 qualified elector of Arizona State
17 Legislative District 18,

18
19 Petitioner,

20 vs.

21 KEN BENNETT, in his official capacity as
22 Secretary of State for the State of Arizona;
23 THE BOARD OF SUPERVISORS OF
24 MARICOPA COUNTY; HELEN
25 PURCELL, in her official capacity as
26 Maricopa County Recorder; and KAREN
OSBORNE, in her official capacity as
Maricopa County Elections Director,

Defendants,

and

CITIZENS FOR A BETTER ARIZONA
IN SUPPORT OF RC-04-2011, an
Arizona Political Committee,

Real Party in Interest.

NO. CV2011-011864

NOTICE OF APPEAL

Priority Election Case

(Hon. Hugh E. Hegyi)

1 Notice is hereby given that Petitioner Franklin Bruce Ross appeals to the Supreme
2 Court of Arizona from the signed minute entry order dated and filed August 12, 2011.

3 RESPECTFULLY SUBMITTED this 14th day of August, 2011.

4 GAMMAGE & BURNHAM P.L.C.

5
6
7 By /s/ Lisa T. Hauser

8 Lisa T. Hauser
9 Two North Central Avenue, 15th Floor
10 Phoenix, Arizona 85004
11 Attorneys for Petitioner

12 **ORIGINAL** of the foregoing e-filed
13 this 14th day of August, 2011 with:

14 Clerk of the Court
15 Maricopa County Superior Court

16 **COPY** of the foregoing e-mailed
17 this 14th day of August, 2011 to:

18 James E. Barton
19 Thomas M. Collins
20 Office of the Attorney General
21 1275 West Washington Street
22 Phoenix, AZ 85007
23 *Attorneys for Secretary of State*

24 Colleen M. Connor
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26 301 West Jefferson Street
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Maricopa County Recorder and Maricopa County Elections Director*

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Attorney for Real Party in Interest

/s/ Lisa T. Hauser

APPENDIX 2

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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08/12/2011

HONORABLE HUGH HEGYI

CLERK OF THE COURT

J. Polanco

Deputy

FRANKLIN BRUCE ROSS

LISA T HAUSER

v.

KEN BENNETT, et al.

JAMES E BARTON II

XAVIER A CARPIO
COLLEEN CONNOR
THOMAS M RYAN
DOCKET-CIVIL-CCC

RULING

The Court heard oral argument August 8, 2011 with regard to the July 26, 2011 Motion to Dismiss (hereafter referred to as the "Committee's Motion") filed by Real Party in Interest Citizens for a Better Arizona in Support of RC-04-2011 (the "Committee"); the July 26, 2011 Motion to Dismiss (the "Secretary's Motion") filed by Defendant Ken Bennett (the "Secretary"); the July 26, 2011 Motion to Dismiss (the "County's Motion") filed by Defendants Board of Supervisors of Maricopa County, Helen Purcell, and Karen Osborne (the "County Defendants"); and Petitioner's August 2, 2011 Motion for Partial Summary Judgment (the "Petitioner's Motion"). Following argument, the Court took the matters presented under advisement.

Having further considered those matters,

IT IS ORDERED granting the Committee's Motion to Dismiss as to all Counts of Petitioner's Complaint.

IT IS FURTHER ORDERED granting the Secretary's Motion to Dismiss as to Counts 1 through 7 but denying his Motion as to Count 8.

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IT IS FURTHER ORDERED granting the County's Motion to Dismiss as to Counts 5 and 7.

IT IS FURTHER ORDERED denying Petitioner's Motion for Partial Summary Judgment as to Counts 1 through 7.

IT IS FURTHER ORDERED denying Petitioner's requests for injunctive relief.

Discussion

This action constitutes a challenge to Recall Petition RC-04-2011 (the "Petition") as to Legislative District 18 State Senator Russell Pearce. Petitioner's Complaint asks the Court to find that the Petition contains insufficient numbers of valid signatures and to enjoin the appropriate officials from conducting a November 8, 2011 recall election (the "Special Election").

The Petition was submitted to the Secretary of State, Defendant Ken Bennett, on May 31, 2011. Following the review required by A.R.S. §§ 19-208.01 and -208.02(A) by the Secretary and Defendants Helen Purcell and Karen Osborne, the Petition was certified to contain 10,296 signatures, 2,540 signatures more than the required 7,756.

On July 8, 2011 the Secretary notified the Governor of the number of signatures and filed the Petition. The Governor called for a special recall election to be held on November 8, 2011. This action was filed July 18, 2011.

The Committee's Motion asks the Court to dismiss all Counts of the Complaint. The Secretary's Motion asks the Court to dismiss Counts 1 – 4, 6 and 8 of the Complaint. The County's Motion asks the Court to dismiss Counts 5 and 7 of the Complaint. Petitioner's Motion asks that the Court grant summary judgment as to Counts 1 – 3 of his Complaint, grant partial summary judgment on Counts 4 – 7 of the Complaint, and enjoin the State and County Defendants from recognizing the validity of the Petition, conducting the Special Election, and printing ballots for the Special Election. Petitioner also requests an award of his costs and fees.

Applicable Standard

The parties agree that existing law provides that this Court construe statutory and constitutional requirements concerning recall petitions in favor of permitting recall elections. Johnson v. Maehling, 123 Ariz. 15, 18, 597 P.2d 1, 4 (1979). They further agree this means the Court should review the Committee's Petition to determine whether it substantially meets these requirements.

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However, Petitioner urges the Court to require that the Petition strictly comply with constitutional and statutory provisions, following the change in Arizona's appellate case law he perceives arising from Western Devcor v. City of Scottsdale, 168 Ariz. 426, 428-29, 814 P.2d 767, 769-70 (1991). In that case, the Arizona Supreme Court departed from precedent requiring the application of a substantial compliance standard in reviewing referendum petitions in favor of strict compliance. The Court distinguished between petitions for an initiative, which permits citizens to submit legislation to the voters, and a referendum, which effectively permits a minority to delay or set aside the effective date of decisions already made by the voters through their elected officials.

However, Petitioner's proposed change is not Arizona's law at present and, except in unusual circumstances not found here, the law relegates consideration of a change of this nature to the Supreme Court, and not to this trial court.

Further, Johnson was decided as it was because, as the Court put it, the provisions permitting recall of officials "[are] for the benefit of the public rather than the officials." Johnson, supra at 18, 597 P.2d at 4. Elected officials who are the subject of recall petitions remain in office unless and until they are defeated by another candidate at a specially called election. While a recall petition and election may be distractions to the official in question, the electorate's determination to be represented by that official is not structurally thwarted or delayed by the processes involved. The official remains free to vote and otherwise participate on behalf of his or her constituents in the representative assembly to which he or she has been elected.

Thus, the Court must construe constitutional, statutory, and regulatory requirements in favor of permitting recall elections. This requires the application of a substantial compliance standard.

Count 1
Constitutional Challenge to Circulators' Affidavit

Count 1 of Petitioner's Complaint alleges that the circulator's oath recited on all of the sheets containing recall signatures attached to the Petition (the "Oath" or "Affidavit") was invalid, and that all of the certified signatures in support of the Petition must, consequently, be discarded. That oath stated:

I, _____, a person who is qualified to register to vote in the county of _____ in the state of Arizona at all times during my circulation of this petition sheet, and under penalty of a class 1 misdemeanor, depose and say

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that each individual signed this sheet of the foregoing petition in my presence on the date indicated, and I believe that each signer's name and residence address or post office address are correctly stated and that each signer is a qualified elector of the state of Arizona (or in the case of a city, town or county measure, of the city, town or county affected by the recall) and that I am qualified to register to vote and all signers of this petition are qualified to vote in the recall election.

Petitioner argues that the oath sworn by each circulator is constitutionally infirm because it does not state that the signatures it contains are "genuine" or the "functional equivalent" of such a statement. Petitioner's Motion at 8-19. He notes that "genuine" means to be authentic, for an object to have the quality it purports to have, and to be free of forgery or counterfeiting. Response at 9. Further, he notes, attestation to genuineness of a signature must require affirmation that the person signing the Petition actually be the purported signer. Response at 11.

In support, Petitioner looks to the language of Article VIII, Part 1, Section 2 ("Section 2") of the Arizona Constitution which provides:

Every Recall Petition must contain a general statement, in not more than two hundred words, of the grounds of such demand, and must be filed in the office in which petitions for nominations to the office held by the incumbent are required to be filed. The signatures to such Recall Petition need not all be on one sheet of paper, but each signer must add to his signature the date of his signing said petition, and his place of residence, giving his street and number, if any, should he reside in a town or city. One of the signers of each sheet of such petition, or the person circulating such sheet, must make and subscribe an oath on said sheet that the signatures thereon are genuine.

Petitioner recites the history of the framing of Arizona's Constitution, which indicates the Framers were concerned that an oath be sworn by circulators of recall petitions to the effect that the signatures contained on a recall petition are genuine.

Petitioner concedes that the circulator's oath contained on the Petition's attachments was prescribed by the Secretary of State, but correctly notes that Arizona law does not give deference to the Secretary's determination. He also agrees that the language comports with the Legislature's implementing legislation, A.R.S. § 19-205 ("Section 19-205"). However, he argues the Legislature's requirements conflict with the Constitution's requirements and are, consequently, invalid.

Section 19-205 provides:

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A. Every qualified elector signing a petition for a recall election shall do so in the presence of the person who is circulating the petition and who is to execute the affidavit of verification on the reverse side of the signature sheet. At the time of signing, the qualified elector shall sign and print his first and last name and the elector so signing shall write, in the appropriate spaces following the signature, his residence address, giving street and number or, if the elector has no street address, a description of his residence location, and the date on which he signed the petition.

B. The person before whom the signatures were written on the signature sheet shall in an affidavit subscribed and sworn to by him before a notary public verify that each of the names on the sheet was signed in his presence on the date indicated, and that in his belief each signer was a qualified elector of the election district on the date indicated in which such recall election will be conducted. All signatures of petitioners on a signature sheet shall be those of qualified electors who are registered to vote in the same county. However, if signatures from more than one county appear on the same signature sheet, only the valid signatures from the same county which are most numerous on the signature sheet shall be counted. In the absence of a legible signature, the name as it is printed shall be the name used to determine the validity of the signature.

C. The affidavit shall be in the form prescribed for initiative and referendum. In addition it shall also require a statement by the circulator that the circulator believes that the circulator is qualified to register to vote and all signers thereof are qualified to vote in the recall election.

Section 2 does not require that the Oath contain the word "genuine." It merely requires "an" oath that the Petition signatures are genuine, but does not prescribe a specific oath that will accomplish that objective.

The Legislature has determined in Section 19-205 that the Petition language is sufficient to meet this constitutional requirement if it meets the "form prescribed for initiative and referendum" and contains a statement that "the circulator believes that the circulator is qualified to register to vote and all signers thereof are qualified to vote in the recall election." These requirements have been met. In this case, each circulator swore that:

1. He or she circulated the petition at all times;
2. He or she made their oath under penalty of a class 1 misdemeanor;

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3. Each individual signed the petition in the circulator's presence on the date indicated; and
4. The circulator believed that each signer's name and address were correctly stated.

The oath that each signer's name is correctly stated is nothing more or less than a statement that the signatures are genuine. It is a statement that the signature is authentic, and that it is the signature of the individual it purports to represent. As a consequence, it attests that the signature is free from forgery or counterfeiting. If a circulator swears under oath that he or she believes that the signer's name and address are correctly stated, the Court is at a loss to determine a component of genuineness that could be missing.

To summarize, Petitioner argues that the Framers specifically intended that an oath peculiar to recalls be prescribed. The Legislature has done that, and the Committee has complied with the Legislature's mandate. The Legislature faithfully captured the intent of the Framers. The Court does not find the Legislature enacted an unconstitutional law.

Petitioner's argument that the circulator's oath must specifically address the signature, rather than the signer, is not well taken. A signature is a paper representation of the signer. Because the Constitution contemplates signed documents, there is no distinction, so long as the signature is that of the person it identifies.

To the extent Petitioner seeks to invalidate the Petition because the circulator's affidavit to the genuineness of the signatures is to the circulator's belief, rather than a simple assertion, the Court finds a statement of belief is all that is required by the Constitution and statutes. As a practical matter, unless a circulator is personally acquainted with an individual or conducts an extensive background investigation before allowing a person to sign, the circulator will not know the person is who they purport to be. Even then, the circulator might falsely, but unknowingly, attest to the identity of a person determined to conceal their true identity.

The Court concludes the circulator Affidavit employed by the Petition comports with the requirement of Article VIII, Part 1, Section 2 of our Constitution as to genuineness of signatures. The Motions by the Committee and the Secretary to dismiss Count 1 of the Complaint are granted. Petitioner's Motion is denied as to this Count.

Count 2
Statutory Challenge to Circulator's Affidavit

Count 2 of the Complaint alleges that the Affidavit fails to comply with the requirement of A.R.S. § 19-205(B) to the effect that it state the circulator's belief that the signers were qualified electors of the election district on the date indicated in which that recall election will be

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conducted. As noted above, the Affidavit states, in part, "I believe ... each signer is a qualified elector of the state of Arizona." Thus, Petitioner correctly notes that the circulator does not expressly attest that the signer resides in Legislative District 18.

The portion of the circulators' Oath stating that "all signers of this petition are qualified to vote in the recall election", however, is an affirmation by the circulator to his or her belief that the signer was qualified to vote in this election. Residence in Legislative District 18 is required in order to meet that qualification. Moreover, the top of each signature sheet begins with the language, "We, the qualified electors of the electoral district from which State Senator Russell Pearce, District 18, was elected ...". The statement of the grounds for recall on each sheet identifies the signers as "residents of District 18".

When viewed in this context, the Oath substantially complies with the statute's requirements.

The Motions by the Committee and the Secretary to dismiss Count 2 of the Complaint are granted. Petitioner's Motion is denied as to this Count.

Count 3
Statement of Grounds for Recall

The text of the sheets that were signed contain the following verbiage:

Recall Petition

We, the qualified electors of the electoral district from which **State Senator Russell Pearce, District 18** was elected, demand his recall. The grounds of this demand for recall are as follows:

We, Citizens for a Better Arizona and residents of District 18, submit this petition to recall State Senator Russell Pearce for his failure to focus on issues and concerns that affect all Arizonans. Mesa and Arizona need a leader who will pass laws to create jobs, protect public education and ensure access to health care for our children and those most in need. We deserve a representative that reflects our values, beliefs and vision for Mesa and all of Arizona. By signing this petition we publicly withdraw our support for Russell Pearce and what he represents.

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Petitioner contends the last sentence of this statement was inappropriately included on the signature sheets and may have misled potential signers as to the possible consequence of their signature. He asks the Court to disqualify the Petition as a result, pursuant to A.R.S. § 19-203 and the Court of Appeal's opinion in Sklar v. Fountain Hills, 220 Ariz. 449, 454-55, 207 P.3d 702, 707-08 (App. 2008).

The sole requirement concerning the statement of grounds found in A.R.S. § 19-203 is that it "contain a general statement of not more than two hundred words stating the grounds of the demand for the recall." A.R.S. § 19-203(B). As Petitioner correctly notes, there are no restrictions on what may constitute proper grounds for recall. Response at 24.

As the Supreme Court has stated, recall petitions are "not a judicial [proceeding] but political in nature". Abbey v. Green, 28 Ariz. 53, 62-63, 235 P. 150, 154 (1925). Consequently, it is not necessary that an officer should have been guilty of misfeasance or malfeasance in his office in order to become subject to a recall petition. The voters may recall an official "for any or no reason whatever", id., just as they may vote for a candidate in a general election for any reason or no reason.

Petitioner correctly notes that the sentence in question does not, by its terms, purport to be a statement of grounds for recall. However, his reliance on Sklar is misplaced. Sklar concerned a petition for a referendum. Because referenda seek to reverse particular legislative actions, Arizona law requires that they specifically inform the public of the precise public action that may be reversed and that signers not be confused or misled by the addition of superfluous statements of opinions. Sklar, supra.

In contrast, the voters may recall a public official for any reason or no reason at all. Neither Arizona's Constitution nor its statutes provide for the disqualification of a recall petition because it contains superfluous language or because it includes a false or misleading statement in its statement of grounds for recall. Petitioner has directed the Court to no holding of Arizona's appellate courts that would permit this Court to undertake such an action on its own initiative.

Further, Petitioner has presented no evidence that voters have been, or would be, misled by the sentence. Viewed in their totality, the circulator sheets conveyed the actual purpose for which the signatures were being gathered. Each sheet was clearly labeled "Recall Petition." The introductory statement on each sheet stated that, "We, the qualified electors of the electoral district from which State Senator Russell Pearce, District 18 was elected, demand his recall." The statement of grounds for recall also contains the statement that, "We ... residents of District 18 submit this petition to recall State Senator Russell Pearce ..." Finally, the questioned sentence itself is not inconsistent with the purpose of the Petition.

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The Motions by the Committee and the Secretary to dismiss Count 3 of the Complaint are granted. Petitioner's Motion is denied as to this Count.

**Count 4-6
Invalidated Signatures**

Petitioner contends that the existence of signatures determined to be invalid on a circulation sheet, and failure of a signer to print his or her first and last name or to insert his or her address and signing date, voids the circulator's Affidavit. Petitioner reasons this to be the case because where these defects appear, he believes, the Affidavit is false and, consequently, requires that the Court void all signatures contained on that sheet. Complaint at ¶¶ 51-53, 56-58, 60-61, Response at 27-32.

However, as Petitioner notes, the statutes provide a remedy when it cannot be determined from a signature comparison that the person signing the Petition is the same as the person registered to vote in the district. The County Recorder is required to discard those signatures. A.R.S. §§ 19-121.02(A)(7) and 19-208.02(A). The same is true if a signer fails to print his or her first and last name, or to include his or her address and signing date. A.R.S. §§ 19-112(A) and 19-205(A).

Petitioner relies on Brousseau v. Fitzgerald, 138 Ariz. 453, 675 P.2d 713 (1984), in which the Court held that entire petition sheets should be disqualified in instances in which they were circulated by minors or other unqualified persons, and where they were certified by persons other than the actual circulators. However, no such showing has been made here. The Court in that case clearly distinguished between what it referred to as "mere omissions or irregularities" and "fraud". Id. at 456, 675 P.2d at 716. The latter required the voiding of entire sheets of signatures, while the former did not. Petitioner's present allegations fail to allege the elements of fraud and are, consequently, insufficient to state a claim entitling Petitioner to the relief he seeks.

If this were an ordinary case with normal time frames, the Court might allow Petitioner an opportunity to amend his allegations to properly state a claim. However, in this case the parties have stated a need for a speedy determination in order to permit expedited review of this Court's decision and time to allow the printing of ballots for early and regular balloting, if necessary.

The Motions of the Committee and the Secretary as to Count 4 and 6, and of the Committee and the County as to Count 5, are granted. The allegations of Petitioner's Complaint being insufficient to establish a basis for relief, Petitioner's Motion is denied as to Counts 4 through 6.

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Count 7
Signers Not Registered in LD 18

The Petitioner argues for a reversal of existing case law that would result in the exclusion of 471 signatures of signers whose registered addresses are outside of Legislative District 18, but notes that this is a decision that must be made by the Supreme Court. Response at 32-35. The Court finds that, under existing law, the 471 signatures were properly counted by the Recorder and the Secretary. Pacuilla v. Cochise County Board of Supervisors, 186 Ariz. 367, 923 P.2d 833 (1996).

The Motions by the Committee and the County to dismiss Count 7 of the Complaint are granted. Petitioner's Motion requesting partial summary judgment is denied as to this Count.

Count 8
Disqualification of Circulators

The Committee's Motion asks the Court to dismiss Count 8 of the Complaint. That count alleges fraud on the part of Petition circulators Darryl Jackson and Michael Stevens in conclusory terms. However, Petitioner's allegations fail to allege the elements of fraud and are, consequently, insufficient under Brousseau, supra, to state a claim entitling Petitioner to the relief he seeks.

The Committee's Motion is granted as to Count 8 of the Complaint.

Timeliness of Challenge

The Secretary's Motion asks the Court to dismiss as untimely Counts 1, 2, 4, 6, and 8 of Petitioner's Amended Complaint. Those counts challenge his determinations that circulator affidavits were valid and should be transmitted to the County Recorder. Secretary's Motion at 12-14.

The Secretary relies on Transportation Infrastructure Moving Arizona's Economy v. Brewer, 219 Ariz. 207, 213 ¶ 30, 196 P.3d 229, 235 (2008) ("TIME"). However, the Court credits the distinctions Petitioner urges between the recall petitions and those required for initiatives and referenda. Response at 35-37.

The Secretary's Motion is denied to the extent it requests dismissal for failure to timely file.

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Injunctive Relief

Petitioner may be subjected to irreparable harm if the injunctive relief he seeks is not granted. However, the Court finds Petitioner is not likely to ultimately prevail on the merits. The Court further finds a balance of the hardships that favors neither side. Petitioner's request for injunctive relief is denied.

Conclusion

For the foregoing reasons, the Committee's Motion to Dismiss is granted as to all counts of the Complaint. The Secretary's Motion to Dismiss is granted as to Counts 1 through 7, but denied as to Count 8. The County's Motion to Dismiss is granted as to Counts 5 and 7. Petitioner's Motion for Partial Summary Judgment is denied as to Counts 1 through 7.

Petitioner's requests for injunctive relief are denied.

SO ORDERED.

/s/ HUGH E. HEGYI

JUDGE OF THE SUPERIOR COURT

DATED: August 12, 2011

ALERT: eFiling through AZTurboCourt.gov is mandatory in civil cases for attorney-filed documents effective May 1, 2011. See Arizona Supreme Court Administrative Orders 2010-117 and 2011-010. The Court may impose sanctions against counsel to ensure compliance with this requirement after May 1, 2011.