

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 WAYNE SNODGRASS, State Bar #148137
TARA M. STEELEY, State Bar #231775
3 Deputy City Attorneys
City Hall, Room 234
4 1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
5 Telephone: (415) 554-4655
Facsimile: (415) 554-4699
6 E-Mail: tara.steeley@sfcityatty.org

7 Attorneys for Defendants
JOHN ARNTZ, in his official capacity as Director of the
8 Department of Elections for the
City and County of San Francisco;
9 DENNIS J. HERRERA, in his official capacity as City Attorney
for the City and County of San Francisco

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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
13 UNLIMITED JURISDICTION

14 MICHAEL DENNY; NICHOLAS SMITH;

15 Plaintiffs,

16 vs.

17 JOHN ARNTZ, Director of Elections;
18 DENNIS HERRERA, City Attorney,

19 Defendants.

Case No. CGC-19-575070

**NOTICE OF ENTRY OF ORDER
SUSTAINING DEMURRER OF DEFENDANTS
JOHN ARNTZ AND DENNIS J. HERRERA TO
COMPLAINT**

Date Action Filed: April 5, 2019
Trial Date: None Set

Attached Documents: Exhibit A

1 On June 19, 2019, the Honorable Ethan P. Schulman executed the Order Sustaining Demurrer
2 of Defendants John Arntz and Dennis J. Herrera to Complaint. Attached hereto as **Exhibit A** is a true
3 and correct copy of that Order.
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6

7 Dated: June 19, 2019

8 DENNIS J. HERRERA
9 City Attorney
10 WAYNE SNODGRASS
11 TARA M. STEELEY
12 Deputy City Attorneys

13 By: /s/Tara M. Steeley
14 TARA M. STEELEY

15 Attorneys for Attorneys for Defendants
16 JOHN ARNTZ, in his official capacity as Director of the
17 Department of Elections for the City and County of San
18 Francisco; DENNIS J. HERRERA, in his official
19 capacity as City Attorney for the City and County of San
20 Francisco
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EXHIBIT A

TO

**NOTICE OF ENTRY OF ORDER SUSTAINING DEMURRER OF DEFENDANTS
JOHN ARNTZ AND DENNIS J. HERRERA TO COMPLAINT**

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 5 Telephone: (415) 554-4655
 Facsimile: (415) 554-4699
 6 E-Mail: tara.steeley@sfcityatty.org

FILED
 San Francisco County Superior Court
 JUN 19 2019
 CLERK OF THE COURT
 BY: [Signature]
 Deputy Clerk

7 Attorneys for Defendants
 JOHN ARNTZ, in his official capacity as Director of the
 8 Department of Elections for the
 City and County of San Francisco;
 9 DENNIS J. HERRERA, in his official capacity as City Attorney
 for the City and County of San Francisco

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 12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 13 COUNTY OF SAN FRANCISCO
 14 UNLIMITED JURISDICTION

15 MICHAEL DENNY; NICHOLAS SMITH;

Case No. CGC-19-575070

16 Plaintiffs,

**[PROPOSED] ORDER SUSTAINING
 DEMURRER OF DEFENDANTS JOHN
 ARNTZ AND DENNIS J. HERRERA TO
 COMPLAINT**

17 vs.

18 JOHN ARNTZ, Director of Elections;
 DENNIS HERRERA, City Attorney,

Reservation No.: 05280619-02

19 Defendants.

Hearing Date: June 19, 2019
 Time: 9:30 a.m.
 Place: Dept. 302

Date Action Filed: April 5, 2019
 Trial Date: Not set

1 The Demurrer of Defendants John Arntz, in his official capacity as Director of the Department
2 of Elections for the City and County of San Francisco and Dennis J. Herrera, in his official capacity as
3 City Attorney for the City and County of San Francisco, to Plaintiffs' Complaint was heard on June
4 19, 2019, in Department 302 of the San Francisco County Superior Court, the Honorable Judge Ethan
5 P. Schulman presiding.

6 Having considered the papers submitted and good cause appearing, the Court hereby rules as
7 follows:

8 Defendants John Arntz and Dennis J. Herrera's demurrer to Contestants Michael Denny and
9 Nicholas Smith's complaint is sustained as to all five causes of action without leave to amend. None
10 of Contestants' causes of action states a claim for a post-election challenge under Elections Code
11 section 16100 to Proposition A, the Embarcadero Seawall Earthquake Safety Bond, a city proposition
12 that was enacted in the November 6, 2018 general election by 82.7 percent of the votes cast. (RJN,
13 Ex. A at 23.)

14 As a threshold matter, Contestants are mistaken in arguing that Defendants' demurrer is
15 procedurally improper. Division 16, Chapter 5, Article 3 of the California Elections Code, on which
16 Contestants rely, applies only to election contests involving a recount brought on the following
17 grounds: (a) the defendant is not eligible for the office in dispute; (b) the defendant has committed an
18 offense against the elective franchise as defined in Division 18; or (c) a sufficient number of votes
19 were illegal, fraudulent, forged, or otherwise improper. (Elec. Code § 16440.) This action was not
20 brought on any of those grounds. A "defendant" for purposes of the Elections Code is defined as a
21 candidate in the election; the term does not include the individuals (the City's Director of Elections
22 and City Attorney) whom Contestants chose to sue in this lawsuit. (Elec. Code § 16002 ["Defendant"
23 means that person whose election or nomination is contested"].) Moreover, the Elections Code
24 expressly incorporates the Code of Civil Procedure and Evidence Code "so far as the same may be
25 applicable." (Elec. Code § 16602; *Anderson v. County of Santa Barbara* (1976) 56 Cal.App.3d 780,
26 786 [Elections Code section 16602 (formerly section 20085) makes Code of Civil Procedure
27 procedures, such as summary judgment under Code Civ. Proc. § 437c, applicable to elections
28 contests].) The statutes in the Code of Civil Procedure governing demurrers are compatible with the

1 Elections Code, which expressly authorizes courts to dismiss an election challenge where “the
2 statement of the cause of contest is insufficient.” (Elec. Code § 16602.)

3 “The purpose of an election contest is to ascertain the will of the people at the polls, fairly,
4 honestly and legally expressed. Strict rules embodied in the Elections Code govern a court’s review of
5 a properly contested election. It is a primary principle of law as applied to election contests that it is
6 the duty of the court to validate the election if possible. That is to say, the election must be held valid
7 unless plainly illegal.” (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192
8 [citations and internal quotations omitted].)

9 A trial court’s authority to invalidate an election is limited to the grounds specified in Elections
10 Code Section 16100: misconduct by elections board members, ineligibility of the person declared
11 elected to an office, bribery, illegal votes, denial of eligible voters’ right to vote, errors in the conduct
12 of the election or canvassing of returns, or errors in the vote-counting programs or summation of ballot
13 counts. (*Id.* at 192–193.) Those grounds are the exclusive statutory grounds for a post-election
14 challenge. (*Id.* at 192–194 [“That the court’s authority to invalidate an election is limited to the bases
15 for contest specified in Elections Code section 16100 and that section is exclusive is strongly
16 suggested by the nature of the grounds for contest therein enumerated.”] [holding that challenge to
17 adoption of voter-approved initiative measure submitted to the voters by a city council was not a
18 permissible election challenge under § 16100]; see also, e.g., *McKinney v. Superior Court* (2004) 124
19 Cal.App.4th 951, 954.) Contestants do not allege that any of these statutory grounds applies, other
20 than Elections Code Section 16100(c): “That the defendant . . . has committed any other offense
21 against the elective franchise defined in Division 18 (commencing with Section 18000).” (Elec. Code
22 § 16100(a),(b),(d),(e),(f),(g).) However, there are at least three fatal defects in Contestants’ theory.

23 First, as discussed above, “defendant” is defined as a candidate in the election, so Section
24 16100(c) is inapplicable to Defendants in this action. (Elec. Code § 16002.)

25 Second, Contestants have failed to allege the commission of “any other offense against the
26 elective franchise” or to specify any such alleged offense. Failing to prepare an impartial summary of
27 a ballot measure, as Contestants allege—even if the voters are misled—is not an “offense against the
28 elective franchise” within the meaning of Elections Code Section 16100(c). In particular, “there [is]

1 no statutory basis in the Elections Code to attack the outcome of an election based on deficiencies in
2 the impartial analysis.” (*People ex rel. Kerr v. County of Orange* (2003) 106 Cal.App.4th 914, 932,
3 citing *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 773–775 [holding that city’s
4 failure to comply fully with statutory requirements governing preparation of impartial analysis of
5 proposed ballot measure did not invalidate subsequently enacted rent control ordinance or its rent
6 rollback provision].) That is because, as one court has explained, “if you want to attack an impartial
7 analysis, the pre-election period is when you need to do it.” (*Id.* at 932.)

8 Third and finally, Contestants admit that they cannot show the alleged violations affected the
9 outcome of the election, as required for a challenge to a ballot measure under subdivision (c). (See
10 Compl. ¶ 85 [“No one can say with any certainty what the will of the voters would have been if they
11 had been . . . presented with a ballot stating the chief purpose of the measure free from language that is
12 untrue, misleading, partial and likely to create prejudice in favor of the measure.”]. “When a
13 contestant seeking to overturn a ballot measure election, as opposed to a candidate election, relies on
14 subdivision (c), he or she must demonstrate that the forbidden act affected the outcome.” (*Horwath*,
15 212 Cal.App.3d at 774.) In any event, the Court takes judicial notice of the Voter Information
16 Pamphlet for the November 6, 2018 general election, which shows that the full text of Proposition A
17 was presented to the voters such that the voters could not have been reasonably deceived by the
18 alleged impartial summaries. (See RJN Ex. C at p. 104–106; *Owens v. County of Los Angeles* (2013)
19 220 Cal.App.4th 107, 126 [“[w]here, as here, the voters are provided the whole text of a proposed law
20 or ordinance, we ordinarily assume the voters voted intelligently on the matter.”].)

21 Thus, none of the grounds giving rise to a post-election challenge under Elections Code section
22 16100 applies. Contestants were required to bring their challenge before the election. (See *McKinney*,
23 124 Cal.App.4th at 957 [“one cannot pass up a preelection remedy in favor of a post-election
24 challenge”]; *Kerr*, 106 Cal.App.4th at 932 [challengers needed to make a “preelection effort to cure
25 any deficiency and thereby prevent any alleged misleading of the voters before it happened.”]; Elec.
26 Code § 9295(b)(1) [“writ of mandate or injunction request shall be filed no later than the end of the
27 10-calendar-day public examination period.”]; S.F. Muni. Elec. Code § 590(b) [dictating that the
28 public examination periods for all ballot measure materials end before elections].) Contestants did not

1 file suit until April 5, 2019, over four months after the election. (RJN Ex. A.) Thus, any amendment to
2 the complaint would be futile.

3 IT IS SO ORDERED. *of*

4
5 Dated: June 19, 2019

Ethan P. Schulman
The Honorable Ethan P. Schulman
JUDGE, SUPERIOR COURT

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1 **PROOF OF SERVICE**

2 I, Pamela Cheeseborough, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the above-
4 entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton
B. Goodlett Place, San Francisco, CA 94102.

5 On June 19, 2019, I served the following document(s):

6 **NOTICE OF ENTRY OF ORDER SUSTAINING DEMURRER OF DEFENDANTS JOHN
7 ARNTZ AND DENNIS J. HERRERA TO COMPLAINT**

8 on the following persons at the locations specified:

9 Michael Denny
3329 Cabrillo Street
San Francisco, CA 94121
10 Telephone: (415) 608-0269
Email: mike@dennz.com
11 Plaintiffs, in pro per

Nicholas Smith
3329 Cabrillo Street
San Francisco, CA 94121
Telephone: (415) 608-0269
Email: mike@dennz.com
Plaintiffs, in pro per

12 in the manner indicated below:

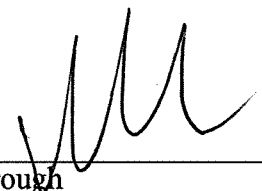
13 **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed
14 envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional
messenger service. A declaration from the messenger who made the delivery is attached or will be
filed separately with the court.

15 **BY ELECTRONIC-SERVICE:** Based on a court order or an agreement of the parties to accept
16 electronic service, I caused the documents to be served electronically through File & ServeXpress or
TrueFiling in portable document format ("PDF") Adobe Acrobat.

17 **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and
18 correct copies of the above document(s) via a facsimile machine at telephone number Fax #' to the persons and the
fax numbers listed above. The fax transmission was reported as complete and without error. The transmission
19 report was properly issued by the transmitting facsimile machine, and a copy of the transmission report is
attached or will be filed separately with the court.

20 I declare under penalty of perjury pursuant to the laws of the State of California that the
21 foregoing is true and correct.

22 Executed June 19, 2019, at San Francisco, California.

23 

24 Pamela Cheeseborough