

1 GARY CLOUTIER SBN: 158033  
2 ATTORNEY AT LAW  
3 101 California Street, Suite 2450  
4 San Francisco, California 94111  
5 Telephone: (415) 946-8988  
6 Facsimile: (707) 747-5209

7 Attorney for Plaintiff  
8 GARY CLOUTIER

**FILED**  
Clerk of the Superior Court

JAN 04 2008

By UCW  
DEPUTY CLERK

9 **SUPERIOR COURT OF CALIFORNIA**  
10 **SOLANO COUNTY**

11 GARY CLOUTIER

12 Plaintiff,

13 vs.

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16  
17 THE REGISTRAR OF SOLANO COUNTY,  
18 THE CLERK AND THE SOLANO COUNTY  
19 BOARD OF SUPERVISORS, THE  
20 VALLEJO CITY COUNCIL and Real Party In  
21 Interest, Osby Davis, and Does 1-10 inclusive

22 Defendants.

CASE NO.: FCS030730

CMR-135189 3200

COMPLAINT FOR TRO AND  
PRELIMINARY INJUNCTION

23 Plaintiff alleges:

24 1. Plaintiff is, and at all times mentioned in this complaint was a properly certified candidate for  
25 Mayor of Vallejo, California in the regular municipal election November 6, 2007.

26 2. Following that election, the Plaintiff was certified by the Registrar of Voters of Solano County as  
27 the winner of said election by a total of five votes.  
28

1 3. Following the certification of the election, another properly certified candidate for Mayor of  
2 Vallejo, Osby Davis, asked for a recount by hand. That recount commenced on December 3, 2007 and  
3 was completed December 5, 2007. According to the Registrar of Solano County, the recount resulted in  
4 Osby Davis winning the election by three votes.

5 4. On December 6, 2007, the Registrar of Solano County notified the campaign manager for the  
6 Cloutier Mayoral campaign, that a ballot marked in favor of Cloutier was discovered in a sealed plastic  
7 bag in a garbage can and that the ballot was not counted.

8 5. On December 10, 2007, the Plaintiff sent a letter to the Solano County Board of Supervisors  
9 setting forth discrepancies in the recount procedure by the County Registrar during the recount  
10 procedures which included but are not limited to failure to properly supervise the recount boards, failure  
11 to tally the recount results publicly, the allowance of ex parte communications from the Davis observers  
12 respecting contested ballots, and the failure to properly explain numerous discrepancies between the  
13 machine count and hand count. A copy of that letter is attached hereto and is incorporated herein by  
14 reference.

15 6. Defendants, the Solano County Board of Supervisors and the Vallejo City Council are, and at all  
16 times mentioned in this complaint were the elected Boards responsible for voting to accept the  
17 certification of recount results from the Registrar of Solano County. Both boards are scheduled to vote  
18 on accepting said results at their regular meetings on December 11, 2007. If said results are accepted,  
19 Gary Cloutier will be decertified as Mayor of Vallejo and Osby Davis will be sworn in as Mayor.

20 Defendant, The Registrar of Solano County, is the public official responsible for certifying the results of  
21 elections in Solano County. Real Party in Interest, Osby Davis, is a candidate for the office of Mayor of  
22 Vallejo.

23 7. Defendants Doe I through Doe 10, inclusive, are sued in this complaint under fictitious names.  
24 Their true names and capacities are unknown to plaintiff. When their true names and capacities are  
25 ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein.  
26 (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is  
27 responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as  
28 alleged in this complaint were proximately caused by those defendants.)]

1 8. Defendants act to vote to accept the results of the recount election unless and until enjoined and  
2 restrained by order of this court, will cause great and irreparable injury to Plaintiff as Plaintiff will be  
3 removed from the office of Mayor based on a recount procedure in which the safeguards of state law  
4 under the elections code were not applied and there is evidence of intentional and fraudulent interference  
5 with arriving at a proper and true vote count.

6 9. Plaintiff has no adequate remedy at law for the injuries in that he will be removed from office after  
7 being certified Mayor in a properly conducted machine count based on a recount in which the Registrar  
8 failed to follow procedures established under the election code and there is evidence of intentional and  
9 fraudulent interference with arriving at a true and proper vote count., including the intentional disposal  
10 or definitely one and possibly more ballots. Defendant intends to file a contest within the time allowed  
11 by law.

12 10. Plaintiff was sworn in as the Mayor of Vallejo on December 4, 2007 based on a properly certified  
13 election and has already voted on public matters as Mayor. Irreparable and significant harm will result  
14 to his and the public interest if he is removed from office before a contest is decided in that the  
15 Supervisors and Vallejo City Council will be installing a new Mayor on results tainted by fraud. The  
16 affairs of the City of Vallejo will become even more chaotic than they already are at present, and the  
17 voters will lose confidence in the integrity of the electoral process. In order to prevent this serious and  
18 significant harm to the public interest, the court must have time to consider the most orderly way of  
19 proceeding.

20 WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

21 1. For an order requiring defendants to show cause, if any they have, why they should not be  
22 enjoined as set forth in this complaint, during the pendency of this action;

23 2. For a temporary restraining order enjoining Defendants, and each of them, and their agents,  
24 servants, and employees, and all persons acting under, in concert with, or for them from voting on or  
25 accepting the certification of the Solano County Registrar's recount election findings until such time as  
26 the State Attorney General and or Secretary of State has time to conduct a proper investigation of the  
27 recount procedures and/or a contest under the election code is held and a court of proper jurisdiction  
28 determines the proper and best remedy.

1 3. To prevent the certification of the Registrar's office of the recount results in the Vallejo Mayor's  
2 race from having any force and effect whatever, and to prevent said certification from being used as  
3 proper authority to allow Osby Davis to be sworn in as Mayor of Vallejo until such time as a court  
4 decides the proper remedy under a Contest.

5 4. For an order upholding the certification of the Registrar of Solano County finding Gary Cloutier  
6 the winner in the Vallejo Mayor's race of November 6, 2007 until such time as a court of proper  
7 jurisdiction determines the proper and best remedy under a contest of the election results to be brought  
8 by Plaintiff in the time allowed by law.

9 4. For such other and further relief as the court deems proper.

10 By: Gary Cloutier Date: 12/11/07

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12  
13  
14 VERIFICATION

15 I, Gary Cloutier, am the plaintiff in the above-entitled action. I have read the foregoing complaint and  
16 know its contents. The same is true of my own knowledge, except as to those matters that are alleged in  
17 the complaint on information and belief, and as to those matters, I believe them to be true.

18  
19 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and  
20 correct.

21 12/11/07

22 Gary Cloutier  
23 GARY CLOUTIER  
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VIA FACSIMILE ONLY TO 707-784-6665

Gary Cloutier for Mayor of Vallejo  
Box 735  
Vallejo, California 94590

December 10, 2007

Patricia Crittenden  
Clerk  
Solano County Board of Supervisors  
600 Union Avenue  
Fairfield, California

Dear Clerk and Members of the Board of Supervisors:

I am writing to set forth my serious concerns about the process surrounding the recount of the ballots in the Vallejo Mayor's race. As you know, that process took place at the Office of Ira Rosenthal, the Solano County Registrar, starting on December 3, 2007. The counting went on over the next three days. We were notified of the results on December 6, 2007 at about 2 o'clock p.m. by Mr. Rosenthal. The following documents our observations and concerns with the recount procedure.

1. When the observers for the Cloutier campaign arrived at Mr. Rosenthal's office at 9:00 a.m. on the morning of December 3, 2007, and although written instructions for observers existed and had been prepared by Mr. Rosenthal's office, they were not provided to our observers. Our observers did not even know of the existence of these instructions and were not aware of their existence until they were handed out the next day, December 4, 2007. The observers for Mr. Davis were given the instructions when they arrived the morning of December 3, 2007.
2. The normal procedure was for an official of the Registrar's office to review the contested ballots at the end of each day when counting for the day had ceased (usually at around 4 p.m). On December 3, 2007 at the end of the day, Mr. Lindsey McWilliams of the Registrar's office heard arguments from Osby Davis and Terrye Davis over the validity of 13 contested ballots. Our observers were not notified that they had the right to be present. We do not know the disposition of those ballots.
3. Many of the counters were from Vallejo. In such a closely contested election, the right and proper procedure would be to make sure that the counters lived in any city in Solano County but Vallejo. I understand that one of our observers saw a counter at lunch with one of the observers from the camp of Mr. Davis. I am seeking a sworn declaration to confirm that fact. The rules of fair play and common sense should have caused the Registrar to ensure the fairness of the process by verifying that the counters came from cities with no stake in the outcome.
4. Elections Code Section 15625 states, "The recount shall be conducted under the supervision of the elections official by special recount boards consisting of four voters of

the county appointed by the elections official.” The procedure from the beginning was to divide the counters in three separate rooms. The only people in the rooms during the time the counters worked from 9 to 4 each day of the recount were the counters and observers. Contrary to the requirements of the code that an election official supervise the recount board, the registrar provided no one in each of the three rooms to supervise and monitor the recount. The Registrar should have made sure that a county official was in the room at all times during the recount procedure to supervise the four boards.

5. Each of the rooms in which the counting was done had a garbage can. There should never be garbage cans in a room when boards are recounting ballots.
6. There were several occasions when there was a discrepancy between the number of ballots recorded for that precinct as counted by the machine and those counted by hand. Although my observers asked for an explanation for a discrepancy from a county official, the official was not able to provide a full or satisfactory explanation for the discrepancy.
7. One of my observers noticed a discrepancy on Wednesday, December 5, 2007. In precinct 27110 on election day, there were 416 votes and on Wednesday during the recount there were 414 votes. My observer did not know at the time why there were two votes different. He asked the IT employee for the county to explain the discrepancy. He explained that the manual count takes precedence over the machine count. When my observer got home, he went to the computer and downloaded the Consolidated Election Precinct Results. These results showed that on Wednesday during the recount in Precinct 27110 I gathered 156 votes out of the total votes cast. During the recount, the counters counted 154 votes for a loss of two votes. My best understanding is that the ballots were run through the machine twice to ensure an accurate count. Your Registrar has never provided a satisfactory explanation on the loss of these two votes.
8. Your county press release says the, “boards concluded their vote tabulations about 2 p.m. on Tuesday December 4, 2007.” Actually, the vote count was not completed until the afternoon of the next day. I know. I was sitting in the room when the counters finished counting the ballots the afternoon of the 5<sup>th</sup>. A copy is attached.
9. On Wednesday December 5, 2007, one of my observers noticed a discrepancy in precinct 27130. County officials said there were 370 votes cast but when the counting was completed, only 368 ballots were counted for a loss of two.
10. On December 4, 2007, a county staff person brought in one of the rooms the ballots from precinct 17160, along with a folder of duplicate ballots. The staff person informed the board and observers that no one except him was to open the folder of duplicate ballots. We understand from our other observers that this instruction was not consistently given or executed by the other boards. The machine count for this precinct was 836. The board only counted 835 ballots by hand. When questioned, Mr. McWilliams explained, “the count on the bags may not be accurate.” The second precinct that was counted was precinct 17180. Although the count on the sealed bags was 405, only 403 ballots were counted by hand. In addition, in two of the rooms the observers were allowed to examine the originals of duplicate ballots. In one, they were not. Again, there were no uniform procedures.

11. At the conclusion of the recount and after Mr. McWilliams had ruled on the final contested ballots, I was standing directly outside Mr. McWilliams office with a witness, Mark Stein. We saw Terrye Davis in Mr. McWilliams office with a contested ballot in her hand while she made further oral arguments on the validity of that ballot for Mr. Davis. Mr. McWilliams had a duty under the letter and spirit of the recount procedures of the Election Code to halt immediately those ex parte communications. Instead and after Ms. Davis was done making further arguments, Mr. McWilliams shut his office door. I was never informed of the content of the conversation or further disposition regarding that ballot.
12. Elections Code Section 15629 states, "The recount shall be conducted publicly." I was present when the counters completed counting all the ballots by hand on the afternoon of Wednesday, December 6<sup>th</sup> at around 3 o'clock in the afternoon. The tally sheets for the hand recount were then taken in a back room and counted. I could actually see two county officials in an adjacent room from one of the conference rooms where the counting had been done with the tally sheets in their hands. The fact that the tally sheets were not counted in the presence of all the parties was a clear violation of the Election Code. The failure to count the results "publicly" as required by the Code places the results under a cloud of suspicion and doubt, especially given that a ballot for me and maybe more were deliberately discarded.
13. One of the contested ballots that was ruled to be an "undervote" by Mr. McWilliams and which was counted by the machine for me was observed to have a blackened oval with an x marked over it next to my name. Mr. McWilliams ruled that this ballot could not be counted for me and it was disqualified.
14. When I was given the result of the afternoon of the 5<sup>th</sup> in the company of Osby and Terrye Davis, your county counsel, Mr. McWilliams, Mr. Rosenthal, the county spokesman and my campaign manager, Pam Keith and my colleague Tony Pearsall, Mr. McWilliams passed out a six page sheet of precinct information. The final tally was nowhere on the handout. Mr. Rosenthal then proceeded to tell us he was "absolutely convinced" they had "looked everywhere" and "counted every ballot" and that the hand count resulted on a net loss of ten ballots as compared to the machine count. He could not provide a satisfactory or coherent answer as to the discrepancy between the machine and hand count except to blame jamming ballots in the machines. This went on for about five minutes when he concluded his remarks by saying that is what had happened and that is how they arrived at the final count.

Incredibly, but in a fashion that seamlessly matches the gross negligence under which the entire recount procedure was managed to the very last minute, Mr. McWilliams had passed out the incorrect handout. That he had passed out the wrong handout came to my attention when I asked Mr. Rosenthal who won the election. He said, "Isn't the tally on your handout?" I said no. Mr. McWilliams then proceeded to pass out a second and different six page handout with the tally on the final page showing Mr. Davis the winner by three votes. My campaign manager, Pam Keith said, "You have Mr. Davis ahead by three votes. Does that mean you are declaring him the winner?" Pam turned to county

counsel, Dennis Bunting and said, "What does all this mean in English? He said, "Mr Davis has won by three votes."

15. Mr. Rosenthal notified my campaign manager after business hours on December 7, 2007 that a ballot marked in my favor was discovered in the garbage. It was determined that the ballot was not counted for me during the recount. Given this finding, it is logical to conclude that the four other ballots not accounted for in the recount were similarly removed and discarded during the recount procedure.

I understand that the Board of Supervisors is considering a resolution to certify the results of the recount election at the regular board meeting at 9 a.m. on December 11, 2007. As you know, I have been certified by your Registrar as the Mayor of Vallejo under the machine count. Standing alone, the fact that there is evidence of intentional fraud, with the discovery of a discarded ballot, renders the entire recount result unreliable. The most credible explanation for the discrepancy in the count between the machine and hand count is that further ballots in my favor were intentionally removed and discarded to change the outcome in Mr. Davis' favor. When this evidence is added to the gross negligence with which the recount was handled from the beginning to end, it would be a grave injustice for you to certify the results of the recount election. No one who voted in this election could possibly have any faith in the results of the recount. Not only would it be unfair to all the Vallejo residents who voted for me, it would be grossly unfair for Mr. Davis to have to become Vallejo's Mayor under such a cloud.

The only logical and compelling option is to allow the Registrar's present certification in my favor as Mayor of Vallejo to stand, for that is the only result which is untainted by human incompetence and malicious meddling.

Please be advised that I am sending a copy of this letter under separate cover to the Attorney General of the State of California and the Secretary of State, asking for a full investigation. I am also seeking a restraining order with Judge Harrison in Solano County Superior Court at 10 a.m. on December 11, 2007.

At this point, it strikes me that the prudent course of conduct is to allow time to decide on the best remedy which may include a properly conducted recount with independent monitors or a new election. Given the evidence of intentional tampering with the attempted destruction of a ballot, I have very serious doubts that even a properly managed recount will restore voter confidence in the ultimate result. Nevertheless, it strikes me that the worst possible course of action would be for you to act precipitously and affirm the results of this recount election. The voters of Solano County would never have any confidence in election results again.

Very truly yours,



Gary Cloutier

cc: The Attorney General of the State of California



# SOLANO COUNTY

County Administrator's Office

## FOR IMMEDIATE RELEASE

December 5, 2007

Contact: Stephen Pierce

(707) 784-6122

slpierce@solanocounty.com

### Registrar of Voters reports results of Vallejo Mayoral race recount

FAIRFIELD – The Solano County Registrar of Voters announced today the results of the manual recount in the Vallejo mayoral race. Osby Davis received the most votes at 5,718, followed by Gary Cloutier at 5,715.

The Elections Office initiated the manual recount on Monday, Dec. 3, at 9 a.m. at the request of Osby Davis. Davis challenged the results of the Nov. 6 election, in which Davis received 5,718 votes and Cloutier received 5,723 votes.

Observers representing all four candidates in the mayoral race participated in the manual recount process. There were three recount boards with four people at each board counting the ballots, and candidate observers were at each board. The boards concluded their vote tabulations about 2 p.m. on Tuesday, Dec. 4.

Ira Rosenthal, Registrar of Voters, explained that manual recounts are always likely to show some difference in voting results because human observers can make judgments about voter intent that electronic counting machines cannot.

"If a voter mistakenly marks a ballot, crosses it off and circles their desired candidate, the observers can figure out the voter's intent. The electronic counter considers that an over voting ballot and does not count it," said Rosenthal.

Candidate	Original Count	Recount	Difference
Osby Davis	5,718	5,718	0
Gary Cloutier	5,723	5,715	-8
Pamela Pitts	4,746	4,746	0
Cris P. Villanueva	3,509	3,511	2
Write In	37	31	-6
Over Votes	24	23	-1
Under Votes	128	131	3
Total Ballots	19,885	19,875	-10

The manual tally of total ballots was 10 less than machine count. This discrepancy is being attributed to ballot misfeeds. "All ballots casts in the election were counted during the manual recount," Rosenthal said.

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