

1 STATE OF NEW MEXICO  
2 COUNTY OF BERNALILLO  
3 SECOND JUDICIAL DISTRICT COURT  
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ENDORSED  
FILED IN MY OFFICE THIS

NOV - 5 2008

7 DANIEL P. SILVA, JAMES TAYLOR, and  
8 SHANNON ROBINSON,  
9

*Guadalupe M. Duran*  
CLERK DISTRICT COURT

10 Contestants,

11 v.  
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CV-2008-08053

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14 ELEANOR CHAVEZ, et al.,  
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16 Contestees and Third-Party  
17 Defendants.  
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MEMORANDUM OPINION AND ORDER

20 {1} THIS MATTER comes before the Court on the motion of the Nonprofit Third-Party  
21 Defendants to dismiss all claims against them; on the Contestees' motion to dismiss/motion for  
22 judgment on the pleadings; and on Defendants Conservation Voters New Mexico Inc.'s, Javier  
23 Benavidez's, and Ned Farquhar's two motions to dismiss for failure to state a claim upon which  
24 relief can be granted. For the reasons that follow, Contestees', Nonprofit Third-Party Defendants',  
25 and Defendants Conservation Voters New Mexico Inc.'s, Javier Benavidez's, and Ned Farquhar's  
26 motions are GRANTED.

**I. Facts and Background**

27  
28 {2} This is an election contest brought by unsuccessful candidates ("Contestants") in three  
29 districts in Bernalillo County. Because it is an election contest, it is important to point out what  
30 Contestants do not allege. They do not allege that their names were left off the ballot, that the votes  
31 were miscounted, or the ballots misplaced. Nor do they allege that any voters were disenfranchised.  
32 Rather, they allege a widespread conspiracy between certain nonprofit entities, their directors, and  
33 the successful candidates ("Contestees") to defeat Contestants "in their primary elections using fraud,  
34 corruption, acts of intentional misconduct, and other unlawful conduct." (Contestants' Response  
35 at 1-2). They also allege that but for Defendants' unlawful conduct, done with the knowledge and/or  
36 participation of the Contestees, they would have prevailed in their primary elections as they have  
37 done numerous times before. Id. at 2.

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**II. Discussion**

{3} Nonprofit Third-Party Defendants contend that a motion to dismiss all claims against them is appropriate because (1) they are not the proper parties to an election contest, and there is no relief that may be granted to Contestants as to the third-party Defendants; (2) even if Third-Party Defendants are proper parties in an election contest, Contestants do not have standing to prosecute them for alleged violations of federal tax law or of state laws governing campaign financing; and (3) “[c]ontestants fail to state a valid claim under the New Mexico statutes governing election contests because they do not and cannot allege that they received the majority of the votes cast in the primary elections or that they are otherwise legally entitled to the offices at issue.” (Nonprofit Third Party Defendants’ Motion to Dismiss at 1-2).

{4} Contestees allege that Contestants’ complaint fails to state a claim upon which relief can be granted. They also speculate that Contestants might attempt to argue that the election code is not the exclusive remedy or means for providing a remedy to an unsuccessful and aggrieved candidate. Because Contestants do not respond to this argument they either never attempted to raise it or have abandoned it. Therefore, this Court will not address this issue.

{5} Defendants Conservation Voters New Mexico, Inc., Javier Benavidez, and Ned Farquhar move for dismissal based on reasons similar to Nonprofit Third-Party Defendants. They assert that they are not proper parties to an election contest, that Contestants lack standing to sue for Defendants’ alleged violations of Federal Tax and State Campaign practices law, and that Contestants have not stated a claim under New Mexico’s election contest statutes. These Defendants also ask the Court to dismiss all claims against them because Contestees improperly named them in the complaint.

**A. Proper Parties**

{6} However denominated, Contestants’ complaint is an election contest. In Hartley v. Bd. of County Comm’rs, 62 N.M. 281, 308 P.2d 994 (1957), the appellants argued that their election challenge was not an election contest because, similar to the instant Contestants, they had alleged fraud. The court disagreed, stating: “Although the action may be denominated an equitable proceeding, its character remains unchanged, an action to contest an election.” Id. at 283, 308 P.2d

1 at 995. Accord Dinwiddie v. Bd. of County Comm'rs, 103 N.M. 442, 445, 708 P.2d 1043, 1046  
2 (1985) (whether the cause of action is directed to the validity or the result of the election, it is an  
3 election contest).

4 {7} "The right to contest an election is entirely statutory[.]" Id. at 445, 708 P.2d at 1046.  
5 Therefore, the statutory proceedings must be strictly followed. Id. "One has the right to contest an  
6 election only in the manner and to the extent prescribed by statute." Id. NMSA 1978, § 1-14-3  
7 (1971) states in part:

8 Any action to contest an election shall be commenced by filing a verified complaint  
9 of contest in the district court of the county where either of the parties resides. Such  
10 complaint shall be filed no later than thirty days from issuance of the certificate of  
11 nomination or issuance of the certificate of election to the successful candidate. *The*  
12 *party instituting the action shall be known as the contestant, and the party against*  
13 *whom the action is instituted shall be known as the contestee.*  
14

15 (Emphasis added). From this, it is clear that a contestant can sue only the contestee in an election  
16 contest. See Bull v. Southwick, 2 N.M. 321, 325 (1882) (an election contest is a proceeding  
17 exclusively between rival candidates for office). Contestants sued their opponents and also sued  
18 numerous organizations and their directors, all allegedly part of a conspiracy to deprive Contestants  
19 of their offices. Because the statutory provisions for an election contest must be strictly followed,  
20 neither Nonprofit Third-Party Defendants nor Defendants Conservation Voters New Mexico, Inc.,  
21 Javier Benavidez, and Ned Farquhar are proper parties in this matter.

#### 22 **B. Standing**

23 {8} Each of the defending parties allege that Contestants do not have standing to bring claims  
24 under federal tax and state campaign practices laws. The New Mexico Campaign Practices and  
25 Reporting Act, NMSA 1978, § 1-19-16 (A) (1973), makes it unlawful in an election for any person,  
26 organization or political committee to publish or print campaign advertising which does not specify  
27 the name of the sponsor or of the responsible officer who authorized the printing or publication of  
28 the material. Section 1-19-16 (B) requires the printer of such material to be identified. Section 1-  
29 19-16 (C) states that any one who has violated Section B or C is guilty of a fourth degree  
30 misdemeanor "and shall be punished as provided in the Criminal Code." Contestants do not have  
31 any authority to enforce the criminal code.

1 {9} Additionally, violations of the Internal Revenue Code are investigated and enforced by the  
2 Secretary of the Treasury of the United States. 26 U.S.C. § 7602(b). Neither the IRC nor New  
3 Mexico's Campaign Practices and Reporting Act provide for a private right of action such as  
4 Contestants seek. Therefore, all claims asserting violations of federal tax law or of the New Mexico  
5 Campaign Practices and Reporting Act must be dismissed.

6 **C. Failure to State a Claim**

7 {10} As stated earlier, Contestants' Complaint is significant for what it does not allege. It does  
8 not allege that Contestants received the majority of votes or that some of the votes cast for their  
9 opponents were illegal, and that but for those votes Contestants would have prevailed. Contestants  
10 do, however, allege that but for Defendants' allegedly illegal activities, Contestants would have  
11 prevailed. However, because the Non-Profit Third-Party Defendants as well as Conservation Voters  
12 New Mexico, Inc., Javier Benavidez, and Ned Farquhar are not proper parties to an election contest,  
13 it has no bearing on them.

14 {11} Contestants' sole Response to this is that courts are willing to entertain election contests  
15 where there are allegations of fraud and other intentional, illegal activity. (Response at 6 (citing  
16 Valdez v. Herrera, 48 N.M. 45, 53, 145 P.2d 864 (1944))). The Valdez court, however, said this in  
17 reference to a voter's right to have his vote counted. In Valdez, the County Canvassing Board  
18 refused to canvas votes cast in certain precincts because the poll books were not delivered to the  
19 County Clerk within twenty-four (24) hours of the close of the polls. The court was concerned that  
20 voters had been disenfranchised and stated: "We will examine most carefully, and rather  
21 unsympathetically, any challenge to the right of so large a number of voters to participate in an  
22 election before denying that right, absent bad faith, fraud or reasonable opportunity for fraud." Id.  
23 There is no allegation in the instant case that voters were deprived of their right to vote. Therefore,  
24 Contestants have not set forth a valid claim against the Non-Profit Third-Party Defendants or  
25 Conservation Voters New Mexico, Inc., Javier Benavidez, and Ned Farquhar.

26 {12} Furthermore, Contestants ask the Court to void the election results in their respective districts  
27 and to have them declared the winners. (Complaint at ¶¶ 50, 54, 58). This request for relief has  
28 nothing to do with the Third-Party Defendants. Or, as the Non-Profit Third-Party Defendants state

1 in their Reply: "Contestant[s] do[] not seek any relief that would specifically address [their] claims  
 2 brought against the . . . Third Party Defendants." (Reply at 3). The elections statutes make clear  
 3 that relief can only be sought from the contestee and not from any Third-Party Defendants (who  
 4 cannot even be a party to such a lawsuit). NMSA 1978, § 1-14-4 (1969) states:

5 Judgment shall be rendered in favor of the party for whom a majority of the legal  
 6 votes shall be proven to have been cast, and shall be to the effect that he is entitled  
 7 to the office in controversy with all the privileges, powers and emoluments belonging  
 8 thereto and for his costs. If the contestant prevails he shall have judgment placing  
 9 him in possession of the contested office and for the emoluments thereof from the  
 10 beginning of the term for which he was elected and for his costs.  
 11

12 {13} Therefore, pursuant to Section 1-14-4, and consistent with this Court's determination that  
 13 the Third-Party Defendants are not proper parties in this lawsuit, there is no relief that can be granted  
 14 to Contestants related to their claims against these Defendants. The claims against them should be  
 15 dismissed.

16 {14} Contestees also assert that Contestants failed to state a claim upon which relief can be  
 17 granted. They point out that Contestants ask the Court to reject all of the votes case in the election  
 18 and declare Contestants the winners. Contestants ask this despite their failure to attain a majority  
 19 of votes. Section 14-4-4 makes clear that the winner of an election contest is the individual who  
 20 received the most votes. Therefore, absent any allegation from Contestants that the votes were  
 21 miscounted or uncounted, that voters cast their votes illegally or that election officials committed  
 22 fraud, Contestants have not asserted a claim against Contestees for which relief can be granted.

23 **D. Improperly Named Parties**

24 {15} Defendants Conservation Voters New Mexico, Inc., Javier Benavidez, and Ned Farquhar also  
 25 seek dismissal of all claims against them because Contestants misidentified each of them in the  
 26 complaint. In the complaint, Contestants name as defendants Conservation Voters New Mexico, Inc.  
 27 Defendant assumes it is a reference to Conservation Voters of New Mexico (CVNM), a 501(C)(4)  
 28 organization. However, in the body of the complaint, Contestant refer to Conservation Voters  
 29 Alliance, Inc., which is apparently a defunct entity that cannot be sued. Defendants point out further  
 30 that although Contestants refer in name to CVNM, the activities with which they take exception,  
 31 were taken by Conservation Voters New Mexican Action Fund ("CVNM Action Fund"). In fact,

1 among Contestants' exhibits is a mailer sent to voters and paid for and distributed by CVNM Action  
2 Fund. The Action Fund is not a 501(C)(4) but rather, a registered New Mexico Political Committee.  
3 Its president is not Ned Farquhar; he is the president of CVNM. Maria Gayle Painter is the President  
4 and Treasurer of CVNM Action Fund, but she has neither been named as a party nor served with a  
5 complaint.

6 {16} Nor is Javier Benavidez a proper party to the complaint, He is named in his purported role  
7 as Executive Director of Conservation Alliance Inc., an organization that does not exist. He is not  
8 the executive director of CVNM or CVNM Action Fund. The executive director to CVNM is Sandy  
9 Buffet, and CVNM Action Fund has no executive director. Because he is not the executive director  
10 or any of the incorrectly named entities or of the entities about which Contestants complain, he must  
11 be dismissed from the complaint.

### 12 III. Conclusion

13 {17} Contestants' claims against all of the Defendants must be dismissed in their entirety. Under  
14 an election contest Contestants can only have a claim against the opposing party (or parties) to the  
15 election race. None of the Third-Party Defendants fit in this category. Furthermore, Third-Party  
16 Defendants Conservation Voters New Mexico, Inc., Javier Benavidez, and Ned Farquhar must be  
17 dismissed because they were all misidentified in the complaint and are not associated with the  
18 alleged violations of elections law that Contestants claim. All of the Defendants also must be  
19 dismissed because none of them can provide Contestants with any of the relief they seek.

20 {18} Even though Contestees are proper parties to an election contest they must nevertheless be  
21 dismissed because Contestants do not properly plead an election contest. Contestees received the  
22 majority of votes, and Contestants do not allege that votes were cast illegally or there was  
23 questionable counting of votes—elements of an election contest claim.

24 {19} Therefore, all claims against each Defendant must be dismissed. The hearing scheduled for  
25 December 16, 2008 on these motions is hereby vacated.

26 {20} **IT IS SO ORDERED.**  
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LINDA M. VANZI

LINDA VANZI  
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of  
the foregoing document was mailed/delivered/or  
otherwise provided to Ray Vargas, II, David Duhigg,  
Brandt Milstein, Shannon Bacon, J. Kate Girard,  
John Boyd, David Urias, Sara Berger, James Taylor  
Jason Bowles, B.J. Crow, and Shannon Robinson  
on the 5<sup>th</sup> day of November, 2008

BRANDY FISHEL