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PAUL MERRITT

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PAUL MERRITT,
Plaintiff,
vs.
HON. ALEX PADILLA,
Defendant.

CASE NO.: 8:16-cv-00606-DOC-JCG

**NOTICE OF MOTION AND
MOTION FOR
RECONSIDERATION OF COURT'S
ORDER RE: DEFENDANT'S
MOTION TO DISMISS**

HEARING DATE: Apr. 17, 2017
HEARING TIME: 8:30 am
JUDGE: Hon. David O. Carter
COURTROOM: 9D

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on Apr. 17, 2017, 8:30 am (or as soon thereafter as this matter may be heard before the United States District Court, Central District of California, Hon. David O. Carter presiding), Plaintiff Paul Merritt will move this Court to:

1. Reconsider its Feb. 1, 2017 Order Granting Defendant's Motion to Dismiss his Second Amended Complaint, pursuant to Local Rule 7-18;
2. Deny Defendant's Motion to Dismiss as to his First Amendment and

1 Equal Protection claims; and

2 3. Grant leave for him to file his Third Amended Complaint within twenty-
3 one (21) days, as to his Due Process claim.
4

5 Mr. Merritt brings this Motion on the ground that the Court based the
6 relevant part of its Order on law that materially differed from that presented and
7 reasonably anticipated by Mr. Merritt. Namely, the Court mistakenly ruled that
8 under *Chamness v. Bowen* [722 F.3d 1110 (9th Cir. 2013)], a candidate may be
9 barred from stating, in his or her candidate statement, that he or she is
10 “Independent”.

11 Mr. Merritt’s Motion is based on this Notice of Motion and Motion, the
12 accompanying Memorandum of Points and Authorities, and all other papers,
13 documents, or exhibits on file or to be filed in this action. This Motion is made
14 following the conference of counsel pursuant to Local Rule 7-3 which took place on
15 Feb. 10, 2017.
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1 DATED: Feb. 28, 2017

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3 BUSINESS, ENERGY, AND
ELECTION LAW, PC

4
5 By: /s/ _____
6 GAUTAM DUTTA, ESQ.

7 Attorneys for Plaintiff

8 PAUL MERRITT
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POINTS AND AUTHORITIES

I. Introduction

Plaintiff Paul Merritt respectfully asks the Court to reconsider its Feb. 1, 2017 Order (Dkt. 41) that granted Defendant's Motion to Dismiss, for the Court based the relevant part of its Order on law that materially differed from that presented and reasonably anticipated by Mr. Merritt. Namely, the Court mistakenly ruled that under *Chamness v. Bowen*,¹ a candidate may be barred from stating, in his or her candidate statement, that he or she is "Independent". Accordingly, Mr. Merritt asks that the Court:

1. Reconsider its Feb. 1, 2017 Order Granting Defendant's Motion to Dismiss his Second Amended Complaint, pursuant to Local Rule 7-18;
2. Deny Defendant's Motion to Dismiss as to his First Amendment and Equal Protection claims; and
3. Grant leave for him to file his Third Amended Complaint within twenty-one (21) days, as to his Due Process claim.

II. Relevant Background²

The Secretary of State's Voter Information Guide. The California Voter Information Guide (the "State Voter Guide") is "printed by a governmental body and distributed to all registered voters."³ The Parties agree that the State Voter Guide constitutes a limited public forum as a matter of law.⁴

Under state law, candidates for U.S. Senate have the right to have their candidate statements published in the State Voter Guide, provided that they (1) pay

¹ *Chamness v. Bowen*, 722 F.3d 1110 (9th Cir. 2013).

² Unless indicated otherwise, all facts derive from Mr. Merritt's Dec. 23, 2017 Opposition (Dkt. 36) to the Secretary of State's July 11, 2016 Motion to Dismiss (Dkt. 26).

³ *See Gebert v. Patterson*, 186 Cal.App.3d 868, 874 (Cal.Ct.App. 1986).

⁴ Secretary of State's Motion to Dismiss, at 16:1; Plaintiff's Opposition, at 5-7. *See also Cogswell v. City of Seattle*, 347 F.3d 809, 814 (9th Cir. 2003); *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1080 (9th Cir. 1990).

1 the required fee, (2) limit their statement to 250 words, and (3) do not “make any
2 reference” to any of their opponents.⁵ No part of the State Voter Guide may be
3 amended unless a voter or the Secretary of State has filed a lawsuit for that purpose
4 during the “public examination” period, when the public may review the unofficial
5 Voter Guide.⁶

6 *Content of Ballot Labels.* The Secretary of State has represented to the Court
7 that, unlike the State Voter Guide, “the ballot is *not a forum for speech*.”⁷ In a part
8 of *Chamness* that was not briefed by the Parties, the Ninth Circuit admonished that
9 a candidates has the right to state, in his or her candidate statement, that he or she is
10 “Independent”.⁸ Specifically, the Ninth Circuit held that barring the ballot label of
11 “Independent” would not “severely burden” free-speech rights, in part because a
12 candidate has an “*alternative way to express his views[:]* through a *candidate's*
13 *statement* distributed prior to the election.”⁹

14 *Mr. Merritt’s Candidate Statement.* The first line of Mr. Merritt’s candidate
15 statement contained the following phrase:

16 Paul Merritt Independent Registered voter

17 During the “public examination” period, no one filed any lawsuit challenging any
18 part of Mr. Merritt’s candidate statement.

19 *The Secretary of State’s Censorship of Mr. Merritt’s Candidate Statement.*
20 In the June 7, 2016 State Voter Guide, the Secretary of State censored the first line
21 of Mr. Merritt’s candidate statement. Instead of stating that he was a “Registered
22 Independent voter”, the State Voter Guide was altered to state that Mr. Merritt had
23

24 ⁵ Cal. Elections Code §9084(i).

25 ⁶ Cal. Elections Code §9092 & Cal. Gov’t Code §88006.

26 ⁷ Secretary of State’s Motion to Dismiss, at 14:13-14:14 (italics added) (*citing*
Timmons v. Twin Cities Area New Party, 520 U.S. 351, 362-63 (1997)).

27 ⁸ *Chamness*, 722 F.3d at 1117.

28 ⁹ *Id.* at 1117 (italics added) (*citing Rubin v. City of Santa Monica*, 308 F.3d
1008, 1016 (9th Cir. 2002)).

1 “NO PARTY PREFERENCE”.

2 *The Court’s Ruling on the Secretary of State’s Motion to Dismiss.* Citing
3 *Chamness*, this Court ruled that a candidate may be barred from stating, in his or
4 her candidate statement, that he or she is “Independent”.¹⁰ On that basis, the Court
5 dismissed, with prejudice, Mr. Merritt’s First Amendment and Equal Protection
6 claims.

7 In so doing, the Court overlooked a part of *Chamness* that had not been
8 briefed by the Parties. Namely, as shown earlier, *Chamness* admonished that a
9 candidate has the right to state, in his or her candidate statement, that he or she is
10 “Independent”.¹¹

11 The Court’s Order also dismissed, without prejudice, Mr. Merritt’s Due
12 Process claims. Subsequently, the Parties stipulated that Mr. Merritt’s amended
13 complaint would not be due until the Court has ruled on this Motion for
14 Reconsideration.¹²

15 **III. Legal Standard**

16 Local Rule 7-18(a) authorizes a motion for reconsideration on the ground of
17 a “material difference in fact or *law* from that presented to the Court before such
18 decision that in the exercise of reasonable diligence could not have been known to
19 the party moving for reconsideration at the time of such decision[.]”¹³ A party
20 seeking reconsideration may not “repeat any oral or written argument made in
21 support of or in opposition to the original motion.”¹⁴

22 **IV. Legal Analysis**

23 **A. Mr. Merritt Meets the Requirements for Reconsideration**

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25 ¹⁰ Court’s Feb. 1, 2017 Order, at 5-6 (*citing Chamness*, 722 F.3d 1110).

26 ¹¹ *Chamness*, 722 F.3d at 1117 (italics added) (*citing Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002)).

27 ¹² Court’s Feb. 15, 2017 Order (Dkt. 43).

28 ¹³ Italics added.

¹⁴ Local Rule 7-18.

At the outset, Mr. Merritt meets the requirements of Local Rule 7-18(a), for the Court based its Order on law that materially differed from that briefed and reasonably anticipated by Mr. Merritt. Here, the Secretary of State represented to the Court that, unlike the State Voter Guide, “the ballot is *not a forum for speech*.”¹⁵ In a part of *Chamness* that was not briefed by the Parties, the Ninth Circuit admonished that a candidate has the right to state, in his or her candidate statement, that he or she is “Independent”. Specifically, the Ninth Circuit held that the Secretary of State may bar the ballot label of “Independent”, in part because candidates can freely express their political views elsewhere: on their candidate statements.¹⁶

However, this Court mistakenly ruled that under *Chamness*, a candidate may be barred from stating, in his or her candidate statement, that he or she is “Independent”. Because the Court based the relevant part of its Order on law that materially differed from that presented and anticipated by Mr. Merritt, reconsideration is warranted under Local Rule 7-18(a).

B. Upon Reconsideration, the Court Should Deny the Motion to Dismiss

Upon reconsideration, the Court should deny the Secretary of State’s Motion to Dismiss as to Mr. Merritt’s First Amendment and Equal Protection claims. As shown earlier, the Court based the relevant part of its Order on law that materially differed from that presented and reasonably anticipated by Mr. Merritt. If it applies the relevant part of *Chamness* (i.e., that a candidate has the right to state, in his or her candidate statement, that he or she is “Independent”), the Court must deny the Secretary of State’s Motion to Dismiss as to Mr. Merritt’s First Amendment and Equal Protection claims.

¹⁵ Secretary of State’s Motion to Dismiss, at 14:13-14:14 (italics added) (*citing Timmons*, 520 U.S. at 362-63).

¹⁶ *Chamness*, 722 F.3d at 1117 (italics added) (*citing Rubin v. City of Santa Monica*, 308 F.3d 1008, 1016 (9th Cir. 2002)).

