

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS  
CIVIL COURT DEPARTMENT

DAWN NORTH, et al. )  
 )  
 Contestants, )  
 )  
 v. ) Case No. 18CV06796  
 ) Division 14  
 ) K.S.A. Chapter 60  
 ADAM T. THOMAS )  
 )  
 Contestee. )

**CONTESTEE ADAM T. THOMAS'**  
**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Contestee, Adam T. Thomas respectfully moves this Court to dismiss the present action.

In support of his motion, he presents this memorandum of law.

**I. Introduction**

Contestee is the duly elected Kansas Representative for the Kansas 26<sup>th</sup> House legislative district. Representative Thomas was the prevailing candidate in the 2018 general election for the Kansas 26<sup>th</sup> House legislative district. Representative Thomas was sworn into office in January 2019 and has served his first year of his two-year term.

**II. The August 2018 Primary**

It is unclear from the Notice of Contest whether the Contestants are challenging the August 2018 primary which resulted in Representative Thomas emerging as the Republican nominee for the 26<sup>th</sup> House District. To the extent Contestants are challenging the primary, their contest must fail as a matter of law because:

1. The three-day time limit permitted to file a challenge (KSA 25-308(a)(1)) had long expired prior to their filing the present challenge in this Court on December 10, 2018;
2. This Court does lacks jurisdiction over primary elections. (KSA 25-308(c)); and

3. There was a primary challenge and the Kansas State Objections Board ruled unanimously in favor of Representative Thomas and that ruling is “final.” (KSA 25-308(c)).

Representative Thomas won the August 2018 primary and was declared the Republican nominee for the November 2018 general election. (Notice of Election Contest, paragraph 7).

To challenge the primary nomination for a state officer, a contestant must comply with KSA 25-308. The objection has to be made in writing within three days. KSA 25-308(a)(1). The present case was filed on December 10, 2018 which was after the general election and well beyond the three days permitted. Moreover, to challenge a primary nomination, the contestant must file the contest with the secretary of state and not this Court. KSA 25-308(c).

In fact, there was a contest to the primary election which resulted in the nomination of Representative Thomas. The challenge to Representative Thomas nomination was filed by the Democrat challenger, Deann Mitchell and her challenge was heard by the Kansas State Objections Board. (See Order of Kansas State Objections Board, certified copy attached as Ex. A.). The objections board is comprised of the lieutenant governor, secretary of state and the attorney general or their designees. According to KSA 25-308(c), “the decision of a majority of these officers shall be final.”

The challenge of Representative Adams nomination by the Democrat challenger Deann Mitchell was heard and on September 19, 2018 the Kansas State Objections Board unanimously overruled Mitchell’s objection. This is a final decision. (See, KSA 25-308(c) and Ex. A.)

### **III. The November 2018 General Election**

To challenge the election of a member of house of representatives, the hearing shall occur within 20 days after notice has been filed. KSA 25-1442. In the present case, the Notice of Contest was

filed on December 10, 2018. The hearing the contestants seek had to occur not later than December 30, 2018.

To contest the November 2018 General Election, contestants were required to file this case pursuant to KSA 25-1442 and trigger the very rigorous and prompt deadlines of KSA 25-1442. Instead, Contestants filed this case as a Chapter 60 case on December 10, 2018 and as a result, the mandatory 20-day deadline for a hearing was missed. The contest hearing deadline was missed for two reasons. First, contestants failed to properly file the contest pursuant to Chapter 25 rather than Chapter 60. More importantly, contestants have wholly failed to prosecute this case. KSA 25-1442 requires, “If the contestant does not proceed within the time provided for herein the action shall be dismissed and the judge shall transmit a copy of the order of dismissal to the chief clerk of the house of representatives or the secretary of the senate as appropriate.” KSA 25-1442.

This case was only recently reassigned to this Court. It was previously assigned Division 14, The Honorable Kevin Moriarty. Division 14 attempted numerous times via the Division 14 Administrative Assistant to push the contestants to prosecute the case but still, the contestants did not make any meaningful effort to prosecute the case. Attached as Exhibit B is a list of the efforts the court’s Administrative Assistant made to push the contestants to prosecute the case.

**Wherefore**, contestee Representative Adam Thomas moves this Court to dismiss the Notice of Election Contest and for such other and orders this court deems just and equitable because:

1. this Court lacks jurisdiction over the primary election (KSA 25-308(c));
2. the decision of the Kansas State Objections Board is a final decision in regard to the primary (KSA 25-308(c));

3. the contestants failed to properly pursue this contest as a Chapter 25 case as opposed to a Chapter 60 case and therefore missed the mandatory hearing within 20 days of filing the Notice of Election Contest (KSA 25-1442); and because
4. the contestants have failed to prosecute the case and “if the contestant does not proceed within the time provided for herein the action **shall** be dismissed ...” (KSA 25-1442)(emphasis added).

Additionally, contestee Representative Thomas prays that this Court enter an Order requiring contestants to pay all costs pursuant to KSA 25-1452 which requires “[i]f the election be confirmed or the contest be dismissed, judgment shall be rendered against the contestant for all costs.”

Respectfully submitted,

/s/ Michael J. Kuckelman

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*Attorneys for Defendant*

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 26, 2019, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all persons listed in the Court’s electronic notification system.

/s/ Michael J. Kuckelman

Attorney

# **EXHIBIT A**

KANSAS STATE OBJECTIONS BOARD

IN THE MATTER OF THE OBJECTION )  
FILED BY DEANN MITCHELL )  
CONCERNING THE CERTIFICATION )  
OF NOMINATION ISSUED TO )  
ADAM THOMAS AS THE REPUBLICAN )  
CANDIDATE FOR THE 26<sup>TH</sup> HOUSE )  
DISTRICT OF KANSAS )

**ORDER OF THE BOARD**

This matter comes before the State Objections Board on the objection to the candidacy of Adam Thomas (“Thomas”) as the Republican candidate for the 26th House District. This objection is brought by Deann Mitchell (“Mitchell”), the Democrat candidate in that House District race. Thomas was represented by Michael Kuckelman (“Kuckelman”) and Mitchell was represented by Victor W. Miller (“Miller”). The State Objections Board consisted of Athena Andaya (“Andaya”) on behalf of the Attorney General, Brant Laue (“Laue”) on behalf of the Lieutenant Governor, and Kathy Sachs (“Sachs”) on behalf of the Secretary of State.

**BACKGROUND**

1. On August 31, 2018, Thomas was confirmed by the State Board of Canvassers as having received the most votes in the Republican primary election, held on August 7, 2018, and was issued a certificate of nomination to have his name placed on the ballot for the general election as the Republican nominee for the 26<sup>th</sup> District of the Kansas House.
2. On August 31, 2018, Mitchell was confirmed by the State Board of Canvassers as having received the most votes in the Democrat primary election, held on August 7, 2018, and was issued a certificate of nomination to have her name placed on the ballot for the general election as the Democrat nominee for the 26<sup>th</sup> District of the Kansas House.

3. On September 4, 2018, Mitchell filed a written objection to the nomination of Thomas as the Republican nominee for the 26<sup>th</sup> District of the Kansas House because Thomas “was not a qualified elector of District 26 . . . at the time of his filing for the office nor at any time prior to July 5, 2018.” Instead, Mitchell alleged, “[a]t all times prior to July 5, 2018, Mr. Thomas, his wife Kristin and their four children resided . . . outside the 26<sup>th</sup> District.”

4. Thomas did not provide a written response to the objection.

5. At the hearing, Miller and Kuckelman presented arguments and Mitchell testified. Twenty exhibits were provided to the Board by the parties, including voter registration applications, affidavits, photographs, and copies of letters and envelopes from various associations.

6. After hearing testimony and considering the presented exhibits, the Board overruled the objection.

#### **ARGUMENTS AND EVIDENCE BY OBJECTOR**

The question presented to this Board is whether Thomas was eligible to be a candidate in the primary election which he was already declared the winner so as to remove him from the ballot for the general election. Mitchell argued that because in her opinion Thomas did not actually reside at the home that Thomas included on his voter registration application, he did not reside in the 26<sup>th</sup> House district for the entirety of his candidacy, and therefore was ineligible to be a candidate. Mitchell provided the voter registration forms for Thomas and his wife, which declared that they had changed their residence to a home on East 152<sup>nd</sup> Street (152<sup>nd</sup> Street Home) from a home on South Apache Lane (Apache Home). The 152<sup>nd</sup> Street Home is in the 26<sup>th</sup> District and the Apache Home is not. Mitchell Exs 1-2.

To support her argument, Mitchell produced two affidavits from Melissa Brook Macdonald, the individual purporting to be the owner of the 152<sup>nd</sup> Street Home. *See* Tr. 10:6-10:21. Both affidavits indicate that Ms. Macdonald does not have a lease with the Thomases nor that she is familiar with the Thomases. The affidavit states that the 152<sup>nd</sup> Street Home is leased to a Jacob Swisher, she has not been informed that anyone besides Mr. Swisher lives there, and that during a “routine” inspection of the premises on June 11, 2018, she “did not notice evidence of additional occupants.” She indicated that during this inspection she glanced into two bedrooms and did not inspect the master bedroom or the lower level bathroom. Mitchell Ex. 3.

Mitchell also produced an affidavit of the individual residing in the other half of the 152<sup>nd</sup> Street Home, a Mr. Sprouse. Mr. Sprouse claims that “throughout all of the year 2018,” he lived at that address and the occupant of the 152<sup>nd</sup> Street Home “has been a sole adult male who parks his vehicle in the single car garage[.]” Mr. Sprouse also states that he observed no other occupants nor any female adult nor children occupying the 152<sup>nd</sup> Street Home. He also stated that no other vehicles parked in the driveway of that home. Mitchell Ex. 4.

Next, Mitchell produced her own affidavit. She states that both the 152<sup>nd</sup> Street Home and the Apache Home were “under constant observation since the beginning of June by [her]self and numerous acquaintances of [hers].” Mitchell Ex. 5. According to Mitchell, “at no time” did “anyone” observe the Thomases or their children at the 152<sup>nd</sup> Street Home. However, “[o]n numerous occasions throughout June 2018 and up to July 5, 2018,” the Thomases were observed at the Apache Home, including vehicles overnight in the driveway or down the street. Ex. 6.

Next, Mitchell produced nine photographs from eight different days of vehicles in front of the Apache home and a moving van on July 5, 2018. Ex. 6, 7. Mitchell also produced a campaign finance form dated May 31, 2018, where Thomas indicated that his home was the



Apache Home and that this home was the home of his treasurer and wife. Ex. 8. Mitchell produced campaign finance statements indicating that Mr. Swisher gave money to Thomas when he was a candidate for Olathe city council. Ex. 9. Mitchell produced a screen print of the August primary for the Johnson County election office indicating that Thomas was a candidate to be a precinct committeeman in Ward 3, Precinct 23. Ex. 10. Miller indicates that the Apache home was the address used for this candidacy and that home is in District 78, not District 26. Tr. 16:1-8. Thomas filed his declaration of intent for precinct committeeman on May 11, 2018. Objectee's Ex. 10.

After providing these exhibits, Miller argued that a Kansas Court of Appeals case from 1897, *Hatch v. Smith*, 6 Kan. App. 645 (1897), controls for purposes of determining residency. Specifically, Miller argues that in proving residency, that court held that conduct was more important than declaration of intent. In other words, he argued that it was not enough to simply declare you live somewhere, but that you actually have to live there. Tr. 17-18. *Hatch* is not an elections case.

#### **ARGUMENTS AND EVIDENCE BY OBJECTEE**

In response, Kuckelman made three arguments. First, Kuckelman argues that Mitchell does not have standing to challenge Thomas's eligibility to be on the ballot because she is a Democrat, and therefore was not eligible to vote in the Republican Party primary. Tr. 36-39. While this standing argument was discussed, it was ultimately not decided by the Objections Board. It was unclear to Board members whether K.S.A. 25-1435 applied to objections before the board, or only to election contests. *See* Tr.84:7-90:14; 126:18-129:23.

Second, Kuckelman argued that the only conceivable ground for objection, K.S.A. 25-1436(a), could not be sustained because that statute permits an objection if someone was not

eligible to hold office at the time of the election. Kuckelman also argued that the Article IV, Sec. II of the Kansas Constitution does not require one to be a resident of a district on the date of filing, but only “during” the time of candidacy. Tr. at 40-42. Under Kuckelman’s reading, the statute only requires a candidate to be a resident of the district at some time during the candidacy, not the entire time of candidacy as argued by Miller. *Id.* Kuckelman argued that Mitchell conceded that that Thomas was a resident on July 6<sup>th</sup>, which was approximately one month before the primary election. Tr. at 39-40. The Board did not address this argument as it was unclear to the Board whether the Kuckelman’s reading of the statute and Kansas Constitution were correct. The interpretation of these provisions did not ultimately matter in the Board’s decision.

Third, Kuckelman argued that Thomas had a clear intent to be a resident of that district and that the intent of the candidate matters. Kuckelman pointed out that many people have multiple homes where they might stay. For instance, Thomas argued that intent was particularly important or else situations involving individuals who are separated from spouses, college students, persons who travel for business, military members, and retirees would always cause problems. Tr. 42-47. As part of this argument, Kuckelman questioned Mitchell about her affidavit. Mitchell conceded that although her affidavit stated the two residences were under “constant observation” by herself and “numerous acquaintances,” Ex. 6, Mitchell really meant that she and two other individuals were observing where the Thomas’s vehicles were approximately 15 minutes per day. Tr. 57:17-57:22; 63:2-63:20; 76:4-77:24 *but see* Tr. 73:24-75:5 (stating that others beyond the three were also observing).

The Board, citing Attorney General Opinion 75-75, noted that residence requires “two factors, one physical, the other intellectual. There must be bodily presence at a location coupled

with intent to remain[.]” Tr. 90:20-90:24. Additionally, the Board noted, the length of stay is not what controls, because no period of time is required to complete a residence change. Tr. 90:25-91:3.

To substantiate these two factors, that Thomas had the intent to reside in the 26<sup>th</sup> District and a physical presence in the District, Kuckelman introduced numerous exhibits. Objectee’s Exhibit 2 was an affidavit of Thomas which included an email showing that Thomas entered into a lease to purchase his current home on May 31, 2018; the home on Sunset is not either of the properties that Mitchell was observing, but is where Thomas is currently living and registered to vote. Tr. 83:17-84:2. Kuckelman argues that this lease to purchase agreement shows Thomas had the intent to reside in the district prior to the date of his candidacy. That lease to purchase agreement was presented in addition to Thomas’s stated intention in changing his voter registration to the 152<sup>nd</sup> Street Home, a home in the 26<sup>th</sup> District. *Id.* at 91:24-92:1. Miller appeared to concede that had Thomas listed the Sunset home on his voter registration application on May 31 instead of the 152<sup>nd</sup> Street Home, there would not be an objection to Thomas’s candidacy. *See* Tr. 116:21-116:25 (“I think they would have been better off if they’d claimed the [Sunset] address as their residence and then came in here and presented the lease purchase agreement but they’re not claiming that.”). Miller later stated he did not make such a concession. *See* Tr. 123:3-123:10.

Kuckelman acknowledged that it probably would have been easier for Thomas to list the Sunset address as his new place of residence. However, Kuckelman explained that Thomas did take the other address at 152<sup>nd</sup> Street as his residence for the time between moving from his former residence on Apache and into the home on Sunset, but was trying to be as cautious as possible as a novice to politics and the law. *See* Tr. 121:17-123:2. But either way, Kuckelman

argued, both addresses are in the 26<sup>th</sup> District, making Thomas eligible to be a candidate. Tr. 123:16-124:2.

To further establish Thomas's change of residence to the 152<sup>nd</sup> Home, Kuckelman presented numerous copies of pieces of mail and envelopes to demonstrate that Thomas had a right to be at that residence. Kuckelman reasoned that since Thomas was receiving mail at the 152<sup>nd</sup> Street Home address and the mail was received by Thomas, as opposed to being marked return to sender, Thomas had a right to be at that address. *See generally*, 107:21-; *See also* Objectee's Exs. 3-9.

### CONCLUSION

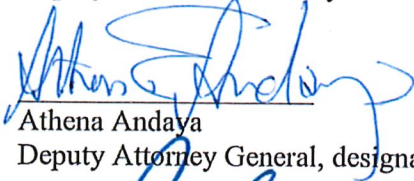
After considering all of the evidence presented and considering the residency requirement as described in the attorney general's opinion, the Board voted unanimously to overrule the Objection. Specifically, the Board cited to Thomas signing a voter registration application under penalty of perjury at the 152<sup>nd</sup> address and the fact that mail was being sent to that address. *See* Tr. 132:16-21. In contrast, Mitchell presented evidence of part-time observations by individuals who were politically opposed to Thomas's candidacy. *See* Tr. 132:21-23. As a result, there was not enough evidence to remove Thomas from the ballot, even under a preponderance of the evidence standard, which may be too low of a standard for an Objections Board hearing. *See e.g.* *Cline v. Meis*, 21 Kan.App.2d 622 (1995); *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (restrictions on ballot access burden "the right of individuals to associate for the advancement of political belief" and "the right of qualified voters . . . to cast their votes effectively"); *see also* Tr. 26:4-26:19.

Dated this 19 day of September, 2018.



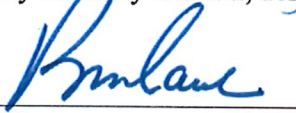
Kathy Sachs

Deputy Assistant Secretary of State, designated to represent the Kansas Secretary of State



Athena Andaya

Deputy Attorney General, designated to represent the Kansas Attorney General



Brant Laue

Chief Counsel for the Lieutenant Governor, designated to represent the Lieutenant Governor



I hereby certify this to be a true and correct copy of the original on file.

Certified on this date: 7/26/2019

SCOTT SCHWAB

Secretary of State



# **EXHIBIT B**

*North et al. v. Thomas*, Johnson County District Court Case No. 18CV06796  
Status Conference, April 25, 2019

KSA 25-1442 states in part: "If the contestant does not proceed within the time provided for herein the action shall be dismissed and the judge shall transmit a copy of the order of dismissal to the chief clerk of the house of representatives or the secretary of the senate, as appropriate." (emphasis added).

- 12/10/18      *North et al v. Thomas*, Case No. 18CV06796 filed.
- 1/4/19          Email from Court's Administrative Assistant, Emily Gray stating in part "In order to prevent it from slipping between the cracks, I need to set if for a hearing."
- 1/14/19        Email from Court's Administrative Assistant, Emily Gray stating "Good Morning, Judge would like to set this for a conference call. Do parties have any time this morning?"
- 1/14/19        Court held conference call at 10:45 am. Parties appear by phone and to notify court when decision (regarding judge) is made.
- 1/14/19        Email from Court's Administrative Assistant, Emily Gray stating "Good Morning, here is a list of all District Court Judges for your convenience."
- 1/17/19        Email from the Court's Administrative Assistant, Emily Gray stating "I am following up regarding the conference call on Monday, January 14<sup>th</sup>. Have the parties reached a decision? If you would like to have another conference call please let me know.
- 2/5/19          Email from the Court's Administrative Assistant, Emily Gray stating "Good Morning, I am following up regarding the conference call that was held on Monday, January 14<sup>th</sup>. Have the parties reached a decision?"
- 2/21/19        Email form the Court's Administrative Assistant, Emily Gray stating "Good Morning, [t]his case has no future court dates set. In order to prevent it from slipping between the cracks I need to set it for a hearing. I can set it for a status conference at 10:30 am on April 25, May 2, May 16 or June 27. Let me know what date the parties agree on, or I will pick a date if I don't hear back by the end of the day on February 1."

This case has been on file for **136** days. (12/10/19)

Representative Thomas was sworn in ~~more than~~ **101** days ago. (1/14/19)

This Court order the parties to proceed with selecting **101** days ago. (1/14/19)