

No. 2005-CI-_____

CYNTHIA TEST,
CONTESTANT

vs.

NOEL SUNIGA,
CONTESTEE

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IN THE DISTRICT COURT

____ JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**CONTESTANT’S AMENDED PETITION
FOR ELECTION CONTEST**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **CYNTHIA A. TEST**, Contestant in the above styled and numbered cause, and through her attorney of record files the Original Petition for Election Contest seeking to challenge the result of the City of San Antonio, City Council Election for District 7 held on May 7, 2005. Official election results show that the margin of victory for NOEL SUNIGA was 33 votes or .2% -- SUNIGA came in second and qualified for the run off election. Contestant for cause of action would respectfully show the Court as follows:

DISCOVERY CONTROL PLAN

1. Discovery in this case is intended to be conducted under level 3 of rule 190 of the Texas Rules of Civil Procedure.

PARTIES AND SERVICE

2. Contestant, **CYNTHIA A. TEST** is a Texas citizen and a natural person residing in San Antonio, Bexar County, Texas. Contestant was a candidate for City Council District 7 of the City of San Antonio, in the election held on May 7, 2005.
3. Contestee, NOEL SUNIGA is a Texas citizen and natural person residing in San Antonio, Bexar County, Texas. He is likewise a resident of Bexar County, Texas. Contestee NOEL SUNIGA may be personally served at 6418 Maverick Trail, San Antonio, Texas

78240. Contestee must be commanded to answer this Original Petition by 10:00 a.m. on the 10th day after the date of service of the citation and a citation not served within 20 days of issuance must be returned as unexecuted. TEX. ELEC. CODE § 232.011.

JURISDICTION AND VENUE

4. The District Court of Bexar County, Texas has exclusive jurisdiction and venue of this cause of action pursuant to the Texas Election Code § 221.002 *et seq.*, and § 232.006 (c).

STATEMENT OF FACTS

5. This suit is brought for the purpose of contesting the May 7, 2005 Election for the City of San Antonio City Council Election in District 7. The initial results demonstrated that **CYNTHIA A. TEST** came within .2% of Contestee for second place, which qualifies a candidate for a place on the run off ballot. The run off election is scheduled for June 7, 2005.
6. The Canvass of the election results will be conducted on May 17, 2005. Results currently indicate:

Candidate	Votes Received	Percentage
Jim Valdez	816	5.86
Elena Guajardo	3,163	22.71
Noel Suniga	2,657	19.08
Reinette Alecozay	322	2.31
Ernie MacDonald	1,619	11.62
Ted Kenyon	832	5.97
Cynthia Test	2,624	18.84
Fred Rangel	1,896	13.61

8. Contestee NOEL SUNIGA was declared the winner because he received 33 more vote than Contestant **CYNTHIA A. TEST**.
9. The election was conducted using the iVotronic electronic voting system (“ivotronic” or “EVS”) manufactured by the Election Systems and Software (“ES&S”).
10. Examining vote data produced by the iVotronics, there is a strong possibility that an error in the ballot programming caused the machines to report inaccurate results.
11. In Precinct 3003, the results indicated was “over vote.”
12. At the polling location at Coke R. Stevenson, the EVM malfunctioned, in that it “froze up.” This polling location services Precincts 2037, 2086, 2084, 2093, 2108, and 2153.
13. Historically, iVotronics lose ballots. The high under vote rates (ballots cast without a vote in the primary contest) recorded on electronic voting machines (EVM) have convinced many that EVMs lose votes, and possibly entire ballots.
14. In the San Antonio Election held on May 7, 2005, the contest for mayor yielded 1% of the ballots cast recorded no vote for mayor, thus putting the “under vote” at 1%. According to election experts, an under vote rate of 0.5% is normal. A higher under vote rate suggests the possibility that votes may have been lost. The under vote rate in the District 7 contest was 5.3%. Although down-ballot contests have higher under vote rates, this rate is suspiciously high, again suggesting that votes may have been lost.
15. Contests have been omitted on iVotronics. Some voters who participated in the May 7, 2005 election reported that certain candidates in the District 7 City Council contest did not appear on the screen. Others had trouble reading the screen. While the explanation provided by election officials — that some candidates’ names were difficult to find — is possible, it is not unlikely that they were simply absent from many ballots or displayed in a way that obscured their appearance.

16. iVotronics switch votes to other candidates. In the May 7, 2005 election, some voters reported that the review screen did not reflect the choices they had made on earlier screens. This problem has occurred on iVotronics in other elections as well. For example, in the November 2004 Presidential Election alone, vote-switching on iVotronics was reported in the following counties: Broward County, Florida, Craven County, North Carolina, Mahoning County, Ohio, Bexar County, Texas. *See Exhibit A.*
17. ES&S often makes errors in ballot programming. Ballot programming is done uniquely for each election. The programming maps the touches on the screen or the marks on a ballot to actual votes recorded for candidates. An error in ballot programming causes votes to be recorded incorrectly. Ballot programming errors have given one candidate's votes to an opponent in many elections.
18. Without testing the machines in "election mode" or examining the software (which is protected by trade-secret laws), it is impossible to detect a ballot programming error on an EVM. This is because there are no source documents to compare to the electronic tally. Nevertheless, because so many ballot programming errors have been detected on optical scanners that it is unreasonable to believe such errors do not also occur on EVMs.
19. Contestant will prove, by clear and convincing evidence, that the voting machines malfunctioned and that the election results reported are inaccurate. Contestant would also aver that there were irregularities in the casting and counting of ballots in this election to the extent that the true outcome would result in the Contestant being declared the winner or that the election cannot be ascertained, thereby requiring the voiding of the election and the need for a new election.
20. Contestant expressly reserves her right to amend and/or supplement this Petition to assert additional grounds in support of her claims after being permitted to examine, inspect,

and/or photocopy all election materials, ballots, machines, tapes, ballots, and any and all information related whether hard copy or electronic associated with the May 7, 2005 election.

21. As a result of the allegation in this Original Petition, the outcome of the contested election as shown by the final canvass is not the true outcome of the election because of the malfunction of the electronic machines. *See* Exhibit A; TEX. ELEC. CODE § 221.003. If the number of illegal votes is greater than the number of votes necessary to change the outcome of the election and the Court cannot determine the true outcome of the election, the Court must declare the election void. TEX. ELEC. CODE §§ 221.009, 221.012. This Honorable Court must then order a new election. TEX. ELEC. CODE §232.041. Contestant prays for the use of paper ballots if a new election is ordered.
22. Contestant would respectfully request the Court to order that the electronic machines be examined by experts to determine if a malfunction has occurred.

NOTICE OF DISQUALIFICATION

23. Pursuant to the Texas Election Code §231.004, notice is hereby given that this matter involves territory covered by the District Court of Bexar County. As such, the regularly and duly elected judge of this Court is statutorily disqualified. The District Clerk shall promptly notify the judge of this filing so that a special judge may be assigned to hear this matter. TEX. ELEC. CODE §231.004 (b).

REQUIRED NOTICE

24. Pursuant to the Texas Election Code § 232.009 (a), Contestant specifically requests that the head Canvassing Authority of the City of San Antonio elections be notified by the District Clerk's office of the filing of the Contest. Such notice should be sent to Helen

Vacek, at her office location at City Hall, 2nd Floor, San Antonio, Texas 78205.

CAUSE OF ACTION

25. As a result of such irregularities, the canvass does not reflect the true result. Upon trial of this contest, contest will show that the true winner of the election cannot be determined, Contestant requests that the election results be declared void, and that a new election be held. Should a new election be ordered by this Court, Contestant requests that this Court maintain supervisory jurisdiction over the election, and issue sufficient orders to prevent a recurrence of the irregularities which impugned the election in question.
26. Contestant is entitled to necessary cost and attorney's fees.

PRAYER

27. **WHEREFORE, PREMISES CONSIDERED**, Contestant prays that since each and every voting device, EVM, cartridge, tape, laptop and unit is necessary to the disposition of this election contest, the Bexar County Elections Administrator, Clifford R. Borofsky be ordered to preserve each voting device used in the election in its secured condition. *See* TEX. ELEC. CODE §126.032; §126.033; and §127.181.
28. Contestant prays that a runoff election for San Antonio City Council District 7 not be held until judgment in this election contest becomes final. *See* TEX. ELEC. CODE §232.007.
29. Contestant prays that after trial on the merits on her cause of action, that the results of the election and canvass to be retallied, such that Contestant be declared the true winner of the election, or alternatively, that the election be declared void because the result cannot be determined and a new election be ordered held using paper ballots.
28. Contestant prays that the result of the May 7, 2005 election be declared void, that a new election be ordered held as soon as is practical, that Contestant be granted her

consequential damages, that costs and attorney's fees be assessed against Contestee, and for all other and further relief, either at law in equity, to which Contestant may show herself justly entitled.

Dated: May 18, 2005

Respectfully submitted,

LAW OFFICE OF ROLANDO L. RIOS
115 East Travis, Suite 1645
San Antonio, Texas 78205
Ph (210) 222-2102
Fax (210) 222-2898

CASTRO & KILLEN, P.C.
115 E. Travis, Suite 314
San Antonio, Texas 78205
Ph (210) 220-1008
Fax (210) 220-1801

By: _____
Rolando L. Rios
State Bar No. 16935900

Attorney for Contestant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amended Peition for Election Contest was served with each party or attorney of record in accordance with the Texas Rules of Civil Procedure either by facsimile or first class mail.

By: _____
Rolando L. Rios