

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WASHINGTON ELECTION INTEGRITY
COALITION UNITED, a Washington State
Nonprofit Corporation; et al.,

Plaintiffs,

vs.

JULIE ANDERSON, Pierce County Auditor;
PIERCE COUNTY; et al.,

Defendants.

NO. 3:21-cv-05726-RAJ

DEFENDANTS' REPLY TO PLAINTIFF
TOOKER'S OPPOSITION TO MOTION TO
DISMISS

NOTED ON CALENDAR:
NOVEMBER 12, 2021

I. INTRODUCTION

Of the 15 *pro se* “Citizen Plaintiffs” who brought suit against the Pierce County Auditor for damages under 42 U.S.C. §1983 as well as declaratory and injunctive relief under both federal and state law,¹ Dkt. 1-2, only Timothy Tooker filed a response opposing Defendants’ motion to dismiss those state and federal claims. Dkt. 40. The only other *pro se* “Citizen Plaintiff” who has filed any submission in this case – *i.e.* Kevin Schmadeka -- has moved to voluntarily “withdrawal as a Plaintiff in this case” and expressly clarified that “[f]or the submission of the actual Response To Defendant's Motion To Dismiss, Plaintiff Schmadeka *defers to Plaintiff WEICU.*” See Dkt. 28; Dkt. 39 at 4.

¹ The remaining Public Records Act action brought against the Auditor *and* Pierce County solely on behalf of the “Washington Election Integrity Coalition United” (hereinafter “WEICU”) is the subject of Defendants’ separate FRCP 12(b)(6) motion to dismiss and is noted for hearing November 19, 2021. *Compare* Dkt. 1-2 at 11-13 *with* Dkt. 30.

1 Nevertheless, Mr. Tooker represents that his brief speaks for all the *pro se* Plaintiffs regarding the
 2 dismissal motion. *See e.g.* Dkt. 40 at 2 (“*Plaintiffs are providing this opposition without waiving*
 3 *their rights to contest the jurisdiction or venue of this Court*”)(emphasis added). However, Mr.
 4 Tooker has neither appeared as counsel for the other *pro se* Plaintiffs nor shown he is qualified to do
 5 so, and no *pro se* Plaintiff other than himself has signed or otherwise joined his response brief oppos-
 6 ing dismissal.² Because only Mr. Tooker opposes dismissal of the *pro se* Plaintiffs’ federal and state
 7 claims, all claims of the *nonresponding* “Citizen Plaintiffs” should be separately dismissed for failure
 8 to respond and oppose dismissal. *See* WDLCR 7(b)(2)(a failure to respond is “an admission that the
 9 motion has merit”); *see also* *Wodja v. Wash. State Employees Credit Union*, 2016 WL 6086220, at *1
 10 (W.D. Wash. 2016); *Allstate Ins. Co. v. Lighthouse Law P.S. Inc.*, C15-1976RSL, 2016 WL 4041198,
 11 at *7 (W.D. Wash. 2016); *Picu v. Bot*, C14-330RSL, 2015 WL 12930488, at *1 (W.D. Wash. 2015).

12 As to Mr. Tooker’s action, it likewise should be dismissed for the reasons stated in the motion to
 13 dismiss as well as those discussed below. *See* Dkt. 11.

14 II. ANALYSIS

15 A. ALL ALLEGED CLAIMS OF “CITIZEN PLAINTIFFS” SHOULD BE DIMISSED BECAUSE 16 THE COMPLAINT FAILS TO STATE A CLAIM UNDER FRCP 12(B)(6)

17 Mr. Tooker opposes dismissal of his claims without citing *a single decision* that supports him
 18 and without acknowledging – much less refuting or distinguishing -- *any* of the *numerous* authorities
 19 cited by Defendants that support dismissal. *Compare* Dkt. 40 at 1-8 *with* Dkt. 11. Instead, he argues
 20 the Complaint includes pages “containing factual allegations” but offers only verbatim quotes of its
 21 conclusory assertions that restate his “information and belief” without disputing their lack of “factual
 22 content” as detailed in Defendants’ motion. *Compare* Dkt. 40 at 3-7 *with* Dkt. 11 at 3-20. Indeed, Mr.

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 24 ² Mr. Tooker instead includes only a signed joinder by some of the other “Citizen Plaintiffs” regarding *Mr. Schm-*
deka’s motion “to strike notice of removal” and opposition to the potential intervener’s motion – though the hearing
 date on both motions had since past. *See* Dkt. 40-2, 40-3.

1 Tooker does not deny that his quotes from the Complaint lack the required “factual content.” Rather,
2 he denies such facts are necessary because he rejects, without explanation, binding federal precedent
3 that expressly holds a complaint must “plead[] *factual content* that allows the court to draw the rea-
4 sonable inference that the defendant is liable for the misconduct alleged” because “mere conclusory
5 statements,” “labels and conclusions, and a formulaic recitation of the elements of a cause of action
6 will not do” to “raise a right to relief above the speculative level” since such only “allege[s] – but it
7 has *not* ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Compare* Dkt. 40 at 3-4 with *Bell Atlantic*
8 *Corp. v. Twombly*, 550 U.S. 544, 545, 555, 561-63, 578 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 676,
9 679 (2009).

10 Specifically, without authority and contrary to binding precedent, Mr. Tooker simply asserts
11 from whole cloth that it is enough for his Complaint to make its conclusory statements “based on in-
12 formation and belief in a State Court filed complaint.” Dkt. 40 at 12. The Federal Rules of Civil Pro-
13 cedure and precedent are to the contrary. *See e.g.* FRCP 81(c)(Federal Rules of Civil Procedure “ap-
14 ply to a civil action after it is removed from a state court”); *Donald J. Trump for President, Inc. v.*
15 *Sec’y of Pennsylvania*, 830 Fed. Appx. 377, 386-87 (3d Cir. 2020)(holding allegations based on “in-
16 formation and belief” that “a substantial portion of the approximately 1.5 million absentee and mail
17 votes in Defendant Counties should not have been counted” are a “way of saying that the [Plaintiff]
18 does not know that something is a fact but just suspects it or has heard it,” and thus the allegations
19 were “conclusory” and the complaint’s amendment was futile because it “offers no specific facts to
20 back up these claims”); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir.2009)(“It is well-
21 settled that the Federal Rules of Civil Procedure apply in federal court, irrespective of the source of
22 the subject matter jurisdiction, and irrespective of whether the substantive law at issue is state or fed-
23 eral.”)(quoting internal quotations omitted); *Pebles v. Hiam*, C12-0054-RSM, 2012 WL 2455563, at
24 *2 (W.D. Wash. June 27, 2012)(rejecting Plaintiff’s argument “that because she originally filed the

1 action in state court, where only notice pleading is required, she should not be held to the higher fed-
2 eral pleading standard required under *Iqbal* and *Twombly*.”)(citing FRCP 81(c); *Kearns, supra*).

3 In short, Mr. Tooker does not dispute Defendants’ briefing demonstrating that his Complaint
4 fails to provide the required “factual content” to show Defendants committed the “unlawful acts” it
5 claims *or* that such acts somehow caused *him harm* beyond the “textbook” undifferentiated general-
6 ized grievance that is shared in substantially equal measure by all other voters. *See* Dkt. 11 at 5-20.
7 Rather, he asserts he at least has “Causes of Action under RCW 29A.68.013.” Dkt. 40 at 5-7. Again,
8 his assertions in that regard are based on another recitation of numerous verbatim quotes of conclu-
9 sory assertions from his Complaint stating his “information and belief.” *See* Dkt. 40 at 5-7. As noted
10 above, this does not dispute their lack of “factual content” as required by *Iqbal/Twombly*.

11 Further, even as to a supposed state election law action under RCW 29A.68.013, Mr. Tooker
12 does not explain: 1) how this statute that expressly controls “primary, election, *challenge to certifica-*
13 *tion*” applies when his Complaint instead states “Plaintiffs are *not seeking de-certification* of the
14 Election,” *see* Dkt. 1-2 at 3; 2) how that statute provides him a private cause of action, *see e.g. Lover-*
15 *idge v. Schillberg*, 17 Wn. App. 96, 100 (1977) (“Not every breach of a statutory duty gives rise to a
16 private cause of action for damages”), how he has met the requirements of Washington’s Declaratory
17 Judgment Act (hereinafter “UDJA”), *see* RCW 7.24.020 (relief available only to those “whose rights,
18 status or other legal relations are affected”) or how he meets each of the three elements required for a
19 state injunction, Dkt. 11 at 18-20; and 3) why *any* action under that statute is not barred as untimely
20 since no “affidavit of an elector” was “filed with the appropriate court no later than ten days follow-
21 ing the official certification of the primary or election ... or, in the case of a recount, ten days after
22 the official certification of the amended abstract” as it requires. *See* RCW 29A.68.013.

23 Because the Complaint fails to state a claim upon which relief can be granted, all federal and
24 state claims of Mr. Tooker and other “Citizen Plaintiffs” should be dismissed under FRCP 12(b)(6).

1 B. ALL TOOKER'S AND "CITIZEN PLAINTIFFS'" CLAIMS SHOULD BE DIMISSED SINCE
 2 THEY WERE PLEAD ONLY AGAINST THE AUDITOR AND SHE WAS NOT SERVED

3 A plaintiff bears the burden of establishing personal jurisdiction over a defendant. *Behagen v. Am-*
 4 *ateur Basketball Ass'n of the United States*, 744 F.2d 731, 733 (10th Cir. 1984), *cert. denied*, 471
 5 U.S. 1010 (1985)(citing *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij*,
 6 N.V., 710 F.2d 1449, 1454 n. 2 (10th Cir.1983)); *Springer v. Balough*, 96 F. Supp.2d 1250, 1255
 7 (N.D. Okla, 2000). However, "Citizen Plaintiff" Tooker's submissions instead confirm Auditor An-
 8 derson was *not* personally served as required to make her a separate Defendant. Specifically, the rec-
 9 ord shows service of process was made instead only *at the Auditor's office* and only *on the Deputy*
 10 *Auditor*. See Dkt. 40 at 8; Dkt. 40-4. Though Mr. Tooker's submissions appear to dispute some of the
 11 circumstances surrounding that service *on the Deputy Auditor*, they do not dispute that his process
 12 server never requested to *personally* serve Auditor Anderson, that the person whom he did serve was
 13 known by him *not to be* Ms. Anderson, and the person served was *not authorized* to accept personal
 14 service for Ms. Anderson. Compare Dkt. 12, 14 with Dkt. 40-3, 40-4. See also e.g. *Coleman v. Mil-*
 15 *waukee Bd. of Sch. Dirs.*, 290 F.3d 932, 933 (7th Cir. 2002)(suit properly dismissed for lack of ser-
 16 vice where municipal executive not served and plaintiff only left "a copy of the complaint and sum-
 17 mons with an employee"); *Marshall v. Labor & Indus.*, 89 F.Supp.2d 4, 11 (D. D.C. 2000)(service on
 18 receptionist for municipal official did not comply with Rule 4 and therefore "plaintiff has failed to es-
 19 tablish this Court's jurisdiction over the defendants in this action" so "this case must be dismissed.");
 20 *Davidheiser v. Pierce County*, 92 Wn.App. 146, 153 (1998)(holding service on wrong County agent
 21 was not service on County even when County employee mistakenly stated she could accept service).
 22 The record therefore is undisputed that service was made *only on the County* through service on its
 23 Deputy Auditor under RCW 4.28.080(1), but *no service was made on Auditor Anderson* personally in
 24 her private capacity pursuant to FRCP 4(e).

1 This fact requires dismissal because Mr. Tooker admits “Causes of action XV through XVII in
 2 the complaint are brought by the Citizen Plaintiffs *against the Auditor (and not the County),*” and
 3 thus the County is not “being sued for the Constitutional claims” under state or federal law, nor for
 4 “the County’s ‘individual actions’ ... at issue in” those paragraphs which seek “Declaratory Relief:
 5 Violations of Constitutional Rights, Injunctive Relief: Violations of Constitutional Rights, and Dam-
 6 ages for Civil Rights Violations” Dkt. 40 at 2-3; Dkt. 1-2 at 13-16 (emphasis added). It thereby
 7 likewise follows that the remaining claims of the “Citizen Plaintiffs” asserted at paragraphs IV-XIII
 8 (i.e. supposed “Wrongful Acts” alleging “use of uncertified voting system,” “vote flipping, additions,
 9 and/or deletions,” “party preference,” and “security envelopes”) also are not claims against the
 10 County because they too *are not pled against it* but only against Auditor Anderson. *Id.*³ In other
 11 words, Mr. Tooker and the “Citizen Plaintiffs” make all their claims against Auditor Anderson and *no*
 12 *claim against the County*, but have *not* served the Auditor who is the *only Defendant they are suing*.

13 Because all the federal and state claims of Mr. Tooker and the “Citizen Plaintiffs” were alleged
 14 against *Auditor Anderson*, and because she has not been personally served, all claims of Mr. Tooker
 15 and the Citizen Plaintiffs should be dismissed also under FRCP 12(b)(2), (b)(4) and (b)(5) since the
 16 Court lacks personal jurisdiction as to her, there was insufficient process and insufficient service re-
 17 spectively. *See, e.g., Cardenas v. City of Chicago*, 2010 WL 610621, *2 (N.D. Ill. 2010) (“where there
 18 has been insufficient service of process, the Court does not have personal jurisdiction over the de-
 19 fendant” and “motions pursuant to Rule 12(b)(5) and 12(b)(2) (for lack of personal jurisdiction) are
 20 interrelated and the standards for both motions are the same.”); 5B Wright and Miller, Fed. Prac. &
 21 Proc. Civ. §1353 (3d ed. 2004) (“cases indicate that it generally is quite acceptable to question the
 22 court's jurisdiction by a motion objecting to service of process.”).

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 24 ³ Though paragraph XIV – i.e. the “Public Records Action” -- was plead against *both* the “Auditor and County,” it was
 not a claim brought by the “Citizen Plaintiffs” but only by “WEiCU.” *See* Dkt. 1-2 at 11-13.

1 **III. CONCLUSION**

2 For the above stated reasons, Defendants Auditor Julie Anderson and Pierce County respect-
3 fully request the Court dismiss with prejudice all claims against them brought by Mr. Tooker and the
4 remaining nonresponding “Citizen Plaintiffs.”

5 DATED this 12th day of November, 2021.

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CERTIFICATE OF SERVICE

On November 12, 2021, I hereby certify that I electronically filed the foregoing DEFENDANTS' REPLY TO PLAINTIFF TOOKER'S OPPOSITION TO MOTION TO DISMISS with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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And on November, 12, 2021, I prepared for delivery true and correct copies of the same to be mailed via U.S. Mail, postage paid, with appropriate instruction to forward the same to the following:

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