

At Art.78 Part ___ of the Supreme Court of the State of New York, held in and for the County of Albany at the Court House located at 16 Eagle Street, Albany, New York, on the 4th day of February, 2008.

PRESENT:

HON. Gerald Connolly AJSC
Justice

-----X
ELECTION SYSTEMS & SOFTWARE, INC.,

Petitioner,

Index No. 954/08

For a Judgment Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules

ORDER TO SHOW CAUSE WITH STAY
PROVISION PURSUANT TO CPLR
SECTION 7805

- against -

NEW YORK STATE BOARD OF ELECTIONS, and
NEIL W. KELLEHER, DOUGLAS A. KELLNER,
HELENA MOSES DONAHUE, EVELYN J. AQUILA,
as Commissioners of the New York State Board of
Elections,

Respondents.

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Upon the annexed affidavit of Stephen A. Malito, Esq., sworn to on the 5th day of February, 2008, the annexed petition of ELECTION SYSTEMS & SOFTWARE, INC., verified by Eric A. Anderson, its Vice President/General Counsel, on the 4th day of February, 2008, and the annexed exhibits,

LET RESPONDENTS SHOW CAUSE before this Court, at Art. 78 Part thereof, at the Albany County Courthouse, located at 16 Eagle Street in the City and County of Albany,

New York, Room _____, on the 10 day of February, 2008, at 9:30 a.m. or as soon thereafter as counsel can be heard,

WHY A JUDGMENT SHOULD NOT BE MADE AND ENTERED PURSUANT TO THE PROVISIONS OF NEW YORK CIVIL PRACTICE LAW AND RULES

ARTICLE 78:

(A) Vacating and annulling the decision of Respondents as stated in the letter dated January 29, 2008 from the Co-Executive Directors of the New York State Board of Elections to New York State's County Boards of Elections, finding that the ES&S AutoMark portion of its voting system to be non-compliant with New York's ballot display provisions, and declaring that the counties' sole choice for purchase of a ballot marking device is Sequoia Image Cast, and ;

(B) directing Respondents to (1) include ES&S as an approved ballot marking device vendor, and (2) notify forthwith the County Boards of Elections that ES&S an approved ballot marking device vendor that may be selected by the county boards for purchase of a ballot marking device for their respective counties, and

(C) granting Petitioner such other, further and different relief as to the Court may appear just, equitable and proper, together with costs and reasonable attorneys fees.

AND SUFFICIENT REASON HAVING BEEN ALLEGED THEREFOR, PURSUANT TO CPLR SECTION 7805, IT IS

~~ORDERED~~, that respondents, their employees, and all persons acting in concert with them or on their behalf, are stayed from enforcing the decision appealed from in this proceeding as set forth in the January 29, 2008 letter, from the New York State Board of Elections Co-Executive Directors to the County Boards of Elections, and it is further

ORDERED, that Respondents shall forthwith notify New York State's County Boards of Elections that Petitioner has commenced this proceeding and, in the event the relief requested in the Verified Petition filed herein is granted, that Election Systems & Software, Inc. will be an approved vendor for the purchase and use of its ballot marking device known as AutoMARK Model A200, and it is further

ORDERED, that the County Boards of Election in New York State, and each of them, including the New York City Board of Elections, their officials, employees, and all persons acting in concert with them or on their behalf, are stayed from choosing a ballot marking device vendor until further order of this Court, and it is further

ORDERED, that Respondents shall take all actions necessary to extend the deadline for the County Boards of Elections to choose a ballot marking device vendor, which presently is set for February 8, 2008, until this Court shall decide the merits of the Verified Petition filed herein and direct the entry of Judgment upon said petition, and it is further

ORDERED, that personal delivery of this Order To Show Cause together with the papers to which it is annexed, to the New York State Board of Elections and Commissioners Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher and Helena Moses Donohue, be made by delivering a copy thereof to the New York State Board of Elections at 40 Steuben Street, Albany, New York 12207, on or before the ___ day of February, 2008, shall be deemed good and sufficient service upon respondents, and it is further

~~ORDERED, that respondents' answering papers, if any, shall be served upon petitioner by delivery to its attorneys, James E. Long & Associates, at their offices located at 668 Central Avenue, Albany, New York, 12206, and Davidoff Malito & Hutcher LLP, at their offices located at 605 Third Avenue, New York, New York 10158, on or before the ___ day of February, 2008.~~

ENTER:



Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
ELECTION SYSTEMS & SOFTWARE, INC.,

Petitioner,

Index No. 954/08

For a Judgment Pursuant to the Provisions of Article 78
of the New York Civil Practice Law and Rules

VERIFIED PETITION

- against -

NEW YORK STATE BOARD OF ELECTIONS, and
NEIL W. KELLEHER, DOUGLAS A. KELLNER,
HELENA MOSES DONAHUE, EVELYN J. AQUILA,
as Commissioners of the New York State Board of
Elections,

Respondents.

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Petitioner ELECTION SYSTEMS & SOFTWARE, INC. ("ES&S"), by its attorneys,
James E. Long & Associates, and Davidoff Malito & Hutcher LLP, as and for its petition
pursuant to the provisions of Article 78 of the New York Civil Practice Law and Rules and
Section 16-100 et seq. of the New York Election Law, respectfully alleges upon information and
belief the following:

PRELIMINARY STATEMENT

1. This proceeding seeks a judgment of the Court annulling, vacating and setting
aside a decision of the NEW YORK STATE BOARD OF ELECTIONS ("NYSBOE") set forth
in a letter to New York's County Boards of Elections, dated January 29, 2008, which precludes
the individual County Boards of Elections in New York State from selecting certain voting

equipment known as a “ballot marking device” manufactured by ES&S and limits their choice to a single vendor.

2. Respondents have eliminated the ballot marking device manufactured by ES&S notwithstanding that since 2005 petitioner’s equipment has been employed in thirteen to fifteen counties in New York State with the assent of respondents and, moreover, the ES&S equipment conforms to the specifications of all applicable laws, rules and regulations.

3. Petitioner urgently seeks the Court’s intervention in this matter because NYSBOE’s January 29, 2008 letter to the county elections boards mandates that they choose the ballot marking device manufactured by the sole approved vendor by February 8, 2008, or NYSBOE will make that choice for them. As is explained more fully below, the February 8 deadline is based upon a schedule furnished by respondents to a federal court in a lawsuit brought by the United States Justice Department against NYSBOE arising from the respondents alleged failure to comply with the Help America Vote Act. Pursuant to the federal court’s order, the ballot marking devices must be employed by New York no later than the September 2008 primary elections.

4. Thus, ES&S seeks this Court’s immediate review of respondents’ actions in precluding petitioner’s ballot marking device from being chosen by New York’s local elections boards, which would be a complete and unconscionable travesty of justice arising from the actions of respondents that are nothing less than arbitrary, capricious, an abuse of discretion and illegal. Otherwise, in a matter of days the County Boards of Elections will be foreclosed from considering ES&S’s ballot marking device, including those boards where petitioner’s equipment has been in use since 2005.

PARTIES

5. ES&S is a corporation duly organized and existing under the laws of the State of Delaware, and authorized to do business within the City and State of New York, with its principal corporate offices located at 11208 John Galt Boulevard, Omaha, Nebraska 68317.

6. Respondent NYSBOE is an agency in the Executive Department of the State of New York, duly created and existing pursuant to the provisions of the New York Election Law, with its principal office in the County of Albany.

7. Respondents NEIL W. KELLEHER, DOUGLAS A. KELLNER, HELENA MOSES DONAHUE and EVELYN J. AQUILA, each are one of the four commissioners constituting the NYS BOE.

VENUE

8. This proceeding is brought in Albany County, where respondents have their principal offices and the events material to this proceeding took place.

INTRODUCTION

A. New York State's Obligation To Employ Ballot Marking Devices By September 2008

9. Petitioner's request for the Court's intervention is most urgent and compelling. Pursuant to an Order of U.S. District Judge Gary L. Sharpe entered on January 16, 2008, in the matter styled *U.S. v. New York State Board of Elections, et al*, Civil Action No. 06-CV-0263 (GLS) (N.D.N.Y.) ("Judge Sharpe's Order"), New York's respective county boards are required to select, by February 8, 2008, a ballot marking device for use by the September, 2008 primary elections, which is intended to facilitate voting by persons with disabilities. A true and correct copy of Judge Sharpe's Order is annexed hereto as Exhibit "A".

10. Judge Sharpe's Order mandates that pursuant to the Federal Help America Vote Act, 42 U.S.C. Section 15301, et seq. ("HAVA"), ballot marking devices must be utilized in the upcoming September primary elections and November general elections in New York. Judge Sharpe's Order incorporates the NYSBOE's own Action Plan, which, inter alia, mandated that all New York State counties complete their vendor selection process by February 8, 2008, and, in the case of those counties that have not chosen a ballot marking device vendor by February 8, 2008, then the NYSBOE will select the vendor for them. A true and correct copy of the NYSBOE's Action Plan, as adopted by Judge Sharpe's Order, is annexed hereto as Exhibit "B".

11. Notwithstanding the compliance of petitioner's ballot marking device with HAVA and the applicable requirements of the New York Election Law for such equipment, respondents have precluded the individual county boards from choosing the ES&S ballot marking device. Respondents' actions, potentially will place the county boards at risk of violating Judge Sharpe's Order and the NYSBOE's own Action Plan, as the local election boards will be constrained to purchase from the single vendor instead of being afforded the opportunity to choose from among multiple vendors, as has been the intent prior to January 29, 2008.

B. On January 24, 2008 The NYSBOE Commissioners Unanimously Voted To Approve Petitioner's Equipment

12. On January 24, 2008, the NYSBOE voted to certify the ballot marking devices that could be selected by the county boards, and respondent's decision actually approved ES&S' ballot marking device, known as the "AutoMARK Voter Assistance Terminal (Model A200)," requiring a minor, albeit unnecessary, modification to the equipment's firmware that would allow the voter to view the full face of the paper ballot when it is initially placed in the AutoMARK terminal. ES&S agreed to make this modification and furnished it to the NYSBOE

on January 28, 2008 in compliance with the Commissioner's January 24, 2008 decision. A true and correct copy of the transcript of the January 24, 2008 NYSBOE public meeting is annexed hereto as Exhibit "C"; the NYSBOE decision that is respectfully brought up for review is found at page 10.¹

13. While it was debated among the Commissioners as to whether modification was necessary, and ultimately the debate was resolved with the Commissioners unanimously approving the AutoMARK with the firmware display modification, there was no doubt or disagreement that petitioner's ballot marking device otherwise fully complied with both HAVA and the requirements of the New York Election Law and the regulations promulgated thereunder.

14. Petitioner complied with NYSBOE's direction by modifying the AutoMARK's firmware to allow the voter to view the full face ballot display upon inserting the full face paper ballot in the device.

15. It bears emphasis, however, that the modification was not necessary. The ES&S system already had met the State's full face ballot display requirement in that the voter was able to view the full face paper ballot prior to it being inserted into the AutoMARK reader to cast his or her vote. At the time of the NYSBOE's public meeting held on January 24, 2008, the NYSBOE had already confirmed that ES&S' product met the applicable Federal and New York State regulations. See, Exhibit "C" at page 10. In fact, the AutoMARK fully satisfied the requirement of New York Election Law Section 7-104 (1) that:

All ballots shall be printed and/or displayed in a format and arrangement, of such uniform size and style as will fit the ballot frame, and shall be in as plain and clear a type or display as the space will reasonably permit. Such type or display on the ballot shall satisfy all requirements and

¹ Reference to the applicable transcript pages shall be to the respective pages of the transcript as the transcripts did not contain page numbers.

standards set forth pursuant to the federal Help America Vote Act.

The AutoMARK also conformed to the further detailed specifications under Section 7-104 pertaining to the format of the ballot voting information that must be fully displayed.

16. Petitioner's ballot marking device, moreover, met the requirements established by the NYSBOE's regulations as set forth in 9 New York Codes, Rules and Regulations ("NYCRR") Section 6902.2(a)(1), which mandates that voting systems "(p)rovide a full ballot display on a single surface". In this respect it bears emphasis that, 9 NYCRR Section 6209.2(f)(1)(b)(iv) and (v) state that a paper and electronic display of voter selections shall be presented and if the paper record cannot be displayed in its entirety, a means of moving the paper to show the paper record shall be provided to the voters. It is beyond argument that ES&S's AutoMARK equipment fully meets this criteria satisfying both the letter and spirit of New York's full ballot display requirements.

17. To the extent that the NYSBOE required that ES&S' AutoMARK firmware be modified to display the full face ballot on screen, even after the voter had seen the full face ballot in paper form, it was arbitrary and capricious. As explained more fully below, the arbitrary and illegal decision by the NYSBOE to unnecessarily require the modification of petitioner's AutoMARK firmware opened the door to its staff five days later instructing the County Boards of Elections that they were prohibited from selecting the ES&S ballot marking device.

C. On January 29, 2008 NYSBOE Staff Effectively Reversed the Commissioner's Decision

18. Although petitioner's AutoMARK already complied with the Election Law's full face ballot display provisions (by providing the voter with a full face ballot paper display), ES&S modified its firmware for the device to enable voters to view the full face ballot after placing it in

the AutoMARK as directed by the NYSBOE, and delivered the modified ballot marking device to the NYSBOE on January 28, 2008. Nevertheless, by letter dated January 29, 2008, the NYSBOE's Co-Executive Directors wrote to the county boards declaring that the only ballot marking device they could select would be a Canadian manufactured device, which clearly was arbitrary, capricious, illegal and beyond the scope of their authority. A true and correct copy of the letter dated January 29, 2008 from the NYSBOE's Co-Executive Directors to New York's County Boards of Election is annexed hereto as Exhibit "D".

19. The January 29, 2008 letter also informed the county boards that another vendor had initiated a lawsuit challenging a determination that its equipment was non-compliant (a determination that was not limited to the full face ballot display requirement at issue herein), and a hearing on that petition was scheduled to be heard on January 31, 2008. On January 30, 2008, the Co-Executive Directors sent an e-mail to the county boards modifying the January 29, 2008 letter, but only to the extent of noting that the pending litigation may affect the pool of ballot marking devices that may be ordered and advising that a decision was anticipated on February 4, 2008. A true and correct copy of the e-mail dated January 30, 2008, is annexed hereto as Exhibit "E."

20. Specifically, by the January 29, 2008 letter to the county boards, the NYSBOE Co-Executive Directors, without any authority whatsoever, unilaterally disqualified ES&S as an authorized vendor for ballot marking devices. This unauthorized and illegal act was made despite the fact that on January 24, 2008, the NYSBOE Commissioners voted to approve ES&S as a qualified vendor. See, Exhibit C at page 10.

21. Further, it is clear on the record that to the extent the Commissioners desired verification of the ES&S modification pertaining to the full face ballot display requirement, it

was the expressed intent of the Commissioners that they, themselves, would view the modification and not staff. See Exhibit C at pages 14 – 16.

22. By acting unilaterally and without authority, the NYSBOE Co-Executive Directors have violated Section 3-100(4) of the New York Elections Law, which mandates a three (3) commissioner vote for each official act of the NYSBOE.

23. Therefore, the disqualification of the ES&S AutoMark ballot marking device and preclusion of ES&S as a vendor that could be considered by the County Boards of Elections, was arbitrary, capricious and illegal.

FACTS

24. ES&S has acquired substantially all of the assets of AutoMARK Technical Services, LLC, and is in the business of, inter alia, owning the intellectual property of, developing the future product of, and manufacturing the AutoMARK Voter Assistance Terminal, otherwise known as a “ballot marking device”. ES&S’s ballot marking device, the ES&S AutoMARK Model A200 is a device that enables disabled voters to vote privately and independently in accordance with HAVA requirements. Specifically, ES&S’ AutoMARK Model A200 is set up so a disabled voter may insert a paper ballot into ES&S’ device, and the device allows the disabled voter to interact through audio or visual commands, so the disabled voter may have access to the entire ballot.

25. In 2005, ES&S was selected as an approved vendor by the NYSBOE for “ballot marking device” systems.

26. Since 2005, ES&S’ ballot marking device has been consistently used in thirteen to fifteen New York State counties during each of those counties’ elections.

27. The United States Justice Department has alleged, and a Federal court has found, that respondents consistently have violated HAVA, specifically HAVA Section 301, in that the State of New York has failed to meet HAVA's January 1, 2006 compliance deadline. Pursuant to a December 20, 2007 Order entered by Hon. Gary L. Sharpe, Judge of the United States District Court for the Northern District of New York, respondents submitted certain "plans of action" to Judge Sharpe. These plans clearly included ES&S as a ballot marking device vendor. See, NYSBOE's Plan, as adopted by Judge Sharpe's Order, Exhibit "B" at page 1.

28. Consistent with the January 16, 2008 Supplemental Order issued by Judge Sharpe, all voting machines in New York State are to be compliant with HAVA. In addition, the second decretal paragraph of Judge Sharpe's Order specifically directed that:

The defendants Plan B for the deployment of ballot marking devices accessible to person with disabilities in every polling place in the State for use in the fall 2008 federal primary and general elections, as set forth in the defendants' January 4, 2008 filing with the Court and according to the specific timetable set forth in Exhibit C to that filing (Docket #179), shall be implemented in full by the Defendants;

See, Judge Sharpe's Order, Exhibit "A".

29. Also, New York Election Law Section 7-104 requires that each ballot "satisfy the requirements and standards set forth [in HAVA]".

30. Toward that end, ES&S' "ballot marking device" system fully complies with both New York State Election Law Section 7-104 and HAVA. As is demonstrated below, the NYSBOE Commissioners acknowledged that ES&S' ballot marking device fully complied with Section 7-104 because it was identical to those of the AutoMARK ballot display device offered by another vendor, Premier, which the NYSBOE had determined complied with the full face

ballot display requirement. See, NYSBOE January 24, 2008 hearing transcript, Exhibit “C”, at pages 7 to 8.

31. Further, the ES&S system also met the requirements of 9 NYCRR Section 6902.2(a)(1). Specifically, 9 NYCRR Section 6902(a)(1) mandates that voting systems “(p)rovide a full ballot display on a single surface”. Further, 9 NYCRR Section 6209.2(f)(1)(b)(iv) and (v) states that a paper and electronic display of voter selections shall be presented and if the paper record cannot be displayed, a means of moving paper to show the paper record shall be provided to the voters. ES&S has met both qualifications, as the Commissioners’ have noticed and as is more fully set forth herein.

32. Finally, Judge Sharpe’s January 16, 2008 Supplemental Order adopts the NYSBOE’s Plan, inter alia, that the various New York State counties complete their selection of vendors by February 8, 2008, and upon the failure of any county boards to make their selection by February 8, 2008, then the NYSBOE will select the vendor for them. See, Exhibits “A” and “B”.

AS AND FOR A FIRST CAUSE OF ACTION

NYSBOE’s January 24, 2008 Proceedings

33. Petitioner repeats, realleges and reaffirms the matters set forth in Paragraphs “1” through “32” above as if set forth fully herein.

34. On January 24, 2008, pursuant to Section 3-100(4) of the New York Elections Law, the NYSBOE Commissioners unanimously voted to approve ES&S’ AutoMARK system, with a modification of its firmware to enable an on-screen full face ballot view, as a compliant ballot marking device in accordance with the requirements of the New York Election Law.

35. Specifically, the Commissioners’ action approving ES&S was as follows:

HELENA MOSES DONOHUE: The last one is ES and S Automark with modification.

>> DOUGLAS KELLNER: All right.

I have the same remarks as with respect to the Premiere Automark, that the

It's my opinion that the system as originally submitted did comply with the help America vote act and New York legal requirements.

I have no objection to the modification and so I will vote aye.

>> ALLISON: With the modifications, vote yes with the modifications.

>> HELENA MOSES DONOHUE: With the modifications.

>> NEIL KELLEHER: And I vote aye with modifications.

See, NYSBOE January 24, 2008 hearing transcript, Exhibit "C", at page 10.

36. However, as outlined above, ES&S' ballot marking device system had already been modified to fit the full face ballot initiative.

37. Further, one of the three NYSBOE Commissioners who voted on January 24, 2008 to approve petitioner's ballot marking device as with the full face ballot display firmware modification acknowledged that ES&S met applicable specifications prior to modification, and all three of the Commissioners acknowledged further that with the firmware modification ES&S' product, like that of Premier, complied not only with HAVA but with New York law as well. As the Commissioners stated:

>> HELENA MOSES DONOHUE: The second one that I would like to put up for a vote is the Premiere Automark.

Supposedly it is in the process of being delivered with the full face quality.

I put that up for a vote.

>> ALLISON: Give them until Monday

>> HELENA MOSES DONOHUE: Oh, they are supposed to be here by Monday, but I think it will be before then.

>> DOUGLAS KELLNER: I am going to vote in favor of this also.

I believe that the, it's my position that the submission that was already made does comply with the law in that it starts with a premarked, a preprinted full face ballot and that it ends with a marked full face ballot.

Therefore, it complies with section 7 104 and that it also complies with the help America vote act disability access requirements. I understand that they want to make a modification that has been requested by the Republican Commissioners. In fact, I saw a version of that modification this morning which unlike the Avante did present a full face ballot that was legible and therefore, I don't have any problem with that modification either. So I will vote aye.
Commissioner Kelleher?
>> NEIL KELLEHER: Aye.
>> HELENA MOSES DONOHUE: I will vote aye with the improvement that we mentioned.

See, NYSBOE January 24, 2008 hearing transcript, Exhibit "C", at pages 7 to 8.

38. By reason of the foregoing, petitioner's AutoMARK Model A200 system already was fully compliant with the letter and the spirit of the New York Election Law's full face ballot provisions, as well as HAVA, in that the voter is furnished with a full face ballot at the outset, which is then inserted into the AutoMARK to allow the voter to mark his or her election choices. The requirement that ES&S modify the Model A200's firmware so as to enable the on-screen full face ballot view imposed upon petitioner a requirement that went beyond the Election Law's full face ballot requirement.

39. Accordingly, insofar as the NYSBOE's vote to approve ES&S' ballot marking device required petitioner to modify the Model A200's firmware to provide an on-screen full ballot view, in addition to the paper full face ballot furnished to the voter, the condition imposed by the NYSBOE was arbitrary, capricious and an abuse of its discretion.

AS AND FOR A SECOND CAUSE OF ACTION

The Co-Executive Director's January 29, 2008 Decision

40. Petitioner repeats, realleges and reaffirms the matters set forth in Paragraphs "1" through "39" above, as if set forth fully herein.

41. In their letter dated January 29, 2008 to the County Boards of Elections, the Co-Executive Directors purport to declare that the Sequoia ballot marking device is the only compliant equipment and the sole system that may be selected by the county boards. See, Exhibit "D". However, this action of the Co-Executive Directors was beyond the scope of their authority as administrative employees of the NYSBOE and contrary to the action taken by the NYSBOE when it approved petitioner's AutoMARK Model A200, as modified to provide an on-screen full face ballot display.

42. Plainly, the record of proceedings before the NYSBOE on January 24, 2008, shows that at no time during those proceedings, when the Commissioners unanimously voted to approve the ES&S AutoMARK Model A200, did they delegate to the Co-Executive directors any authority to decide that petitioner's ballot marking device did not meet the requirements of the New York Election Law. Indeed, such determination remained squarely within the authority and power of the NYSBOE Commissioners, without any delegation of that authority to the NYSBOE's administrative staff.

43. The January 29, 2008 letter from the NYSBOE Co-Executive Directors to New York's County Boards of Elections, states, in pertinent part:

As you are aware, on January 24, 2008, the State Board met and pending the result of testing, voted to authorize the use of voting machines as ballot marking devices. . . . The Co-Executive Directors reviewed to determine if the ES&S . . . portion of their voting systems were modified so that they comply with the ballot display provisions. We have reviewed the modifications to those machines as offered by ES&S . . . We are constrained to find them to be non-compliant by split determination, Stanley Zalen voting that the modification is compliant and Todd Valentine voting that the modification is not compliant.

44. Tellingly, nowhere in the Commissioners' decision approving the ES&S AutoMARK Model A200 do they cede to their administrative staff, including the Co-Executive Directors or any other NYSBOE employee, any such authority. See, NYSBOE January 24, 2008 hearing transcript, Exhibit "C", at pages 14 to 16.

45. Further, New York State Elections Law Section 3-100(4) clearly states that any act within the purview of the Commissioners of the NYSBOE requires the affirmative vote of three (3) commissioners. Accordingly, the purported determination of the Co-Executive Directors disqualifying petitioner's AutoMARK Model A200 from among the ballot marking devices that may be considered by the county election boards, was beyond the jurisdiction of the Co-Executive Directors and illegal. The Co-Executive Directors simply did not have the power to override the unanimous January 24, 2008 decision of the NYSBOE Commissioners, approving the ES&S AutoMARK system. See, NYSBOE January 24, 2008 hearing transcript, Exhibit "C", at page 10.

46. In fact, it is clear on the record, that to the extent the Commissioners chose to review whether the firmware modification made by petitioner was satisfactory with respect to providing an on-screen full face ballot view, the Commissioners emphatically and unequivocally reserved such right of review for themselves, as follows:

Does anybody else want to address that issue?

>> ALLISON: Well, they said 6500.

They didn't say the 8,000 because we already have a couple hundred out there.

>>: Are we going to see the

>>: Modifications, disapproved three machines, based upon modifications you were received. We have to make registration by February 8.

When are we going to see those modifications?

>> HELENA MOSES DONOHUE: They should be in tomorrow, Monday at the latest.

>>: Hopefully tomorrow we can see them here?
>> HELENA MOSES DONOHUE: Will they be here?
I don't know if they are sending them to our office or not.
>> ALLISON: Do you want to see them here?
>>: Of course!
>>: If they are here, we can
We have a choice of three, it will be helpful.
>> ALLISON: We can tell the vendors.
I'm sure that if they have a modification that they can make while
they're here
>> DOUGLAS KELLNER: I believe that the Premiere machine
already has the modification that's out there.
I want to make clear just for the legal record that the reason I went
along with this is because in my view this machine already met the
State legal
requirements and that the modification is a very minor change that
is surplusage.
Essentially the only modification that I understand it that is going
to be made is that the first screen that will appear to the voter
will be a full face ballot rather than simply a listing of candidates
for the first office on the ballot, which is how it appears now.
But I believe if you want to see what it looks like, you can look at
the Premiere machine that's here.
It is an example of what they are doing.
>> ALLISON: Well, again, we haven't seen the modifications yet.
We've got to make sure that we accept the modifications as well.
>> DOUGLAS KELLNER: I have agreed to that.
>> NEIL KELLEHER: Yeah.
>> DOUGLAS KELLNER: I've agreed.
>> TODD VALENTINE: Right.
>> DOUGLAS KELLNER: I'm not trying to block you from doing
that.
I want to make it clear legally that the only reason I'm going along
with this is because I believe it already complied, as distinguished
from other vendors who wanted to still submit modifications but
did not meet the January 10 deadline.
>> ALLISON: We are not accepting it like it was.
We are accepting with modifications.
>> TODD VALENTINE: We've got it.
I see what you're saying.
>> DOUGLAS KELLNER: All right.

See, NYSBOE January 24, 2008 hearing transcript, Exhibit "C", at pages 14 to 16.

47. Further, during the prior day's proceedings at which the Commissioners also considered compliance of various ballot marking devices with the specifications required by the New York Election Law and HAVA, a proposed resolution pertaining to Avante DRE system included an expressed delegation of authority to the Co-Executive Directors to determine compliance of the Avante DRE system in the prior day's hearings, and the Commissioners explicitly delegated certain duties to their staff as such:

Resolution number --

The resolution is that the following voting machines shall be approved as ballot marking devices.

The Dominion, the Liberty, and the following ballot marking devices shall be approved with conditions.

The Avante DRE, pending approval by the co-executive directors of a scanner to be attached for independent verification.

And the Automark pending approval of a firm ware change to allow the system to display a full-face ballot.

>> NEIL KELLEHER: Do I have a second on the motion?

>> HELENA MOSES DONOHUE: Second.

>> NEIL KELLEHER: Seconded.

All those approved say eye?

>> HELENA MOSES DONOHUE: Aye.

>> DOUGLAS KELLNER: You going to discuss it at all?

>> NEIL KELLEHER: If you want to.

Don't be bashful.

Don't be bashful.

>> DOUGLAS KELLNER: Obviously I don't approve of the resolution as written.

A true and correct copy of the transcript of the January 23, 2008 public NYSBOE meeting is annexed hereto as Exhibit "F"; the NYSBOE decision that is respectfully brought up for review is found at page 5.

48. As previously stated, since 2005, between thirteen (13) and fifteen (15) Counties throughout the State of New York have consistently used ES&S' "ballot marking devise" system.

49. The NYSBOE, however, awarded the contract solely to Sequoia Image Cast, a vendor and product with absolutely no track record within New York State.

50. What respondent's have done is effectively made the counties' decision for them, thus eliminating all competition. Further, this improper action was made before the date the Counties had the ability to pick their own vendor, namely February 8, 2008, a clear violation of U.S. District Court Judge Sharpe's Order.

51. By reason of the foregoing, the action of the Co-Executive Directors, which effectively invalidates the decision made by the Commissioners of the NYSBOE was arbitrary, capricious, beyond their jurisdiction and illegal.

AS AND FOR A THIRD CAUSE OF ACTION

The Co-Executive Director's January 29, 2008 Decision

52. Petitioner repeats, realleges and reaffirms the matters set forth in Paragraphs "1" through "51" above, as if set forth fully herein. The County Boards should be allowed to select ES&S as a ballot marking system vendor, and may not be precluded from doing so by the arbitrary and illegal actions of respondents.

53. In their January 29, 2008 letter to the County Boards of Elections, the Co-Executive Directors purport that because they reached an impasse, and could not themselves agree that the ES&S AutoMARK Model A200 complied with the New York Election Law's full face ballot provisions, and solely for that reason, the County Boards could not select petitioner's ballot marking device for use in their respective counties. See Exhibit "D". To the extent that the Co-Executive Directors may have been authorized to review petitioner's compliance with New York's full face ballot requirement, then upon reaching an impasse it was incumbent upon them to refer the issue back to the Commissioners for determination.

54. Indeed, if anything, the impasse created by the Co-Executive Directors should have, in keeping with the Commissioner's directives, sent the Co-Executives back to the Commissioners.

55. Certainly, neither the New York Election Law, the rules of the NYSBOE promulgated thereunder, nor any other applicable law, rule or regulation, permitted the conclusion by the Co-Executive Directors that their failure to agree on the compliance of the ES&S AutoMARK Model A200 would constitute a determination of non-compliance. This is especially true when one of the two Co-Executive Directors explicitly decided that the equipment was in compliance with the Election Law's full face ballot standard.

56. It is respectfully submitted that the Court, in the alternative, should deem the action of the Co-Executive Directors a nullity, and consistent with the vote of the Commissioners on January 24, 2008, hold that the County Boards of Elections may select the ES&S AutoMARK Model A200 as their ballot marking device of choice.

AS AND FOR A FOURTH CAUSE OF ACTION

**Petitioner's Prayer For a Stay of Respondents'
Decision Pending The Hearing of This Petition**

57. Petitioner repeats, realleges and reaffirms the matters set forth in Paragraphs "1" through "56" above, as if set forth fully herein.

58. As outlined above, the aforementioned decision effectively precludes ES&S from being a ballot marking device vendor, which will cause severe irreparable harm to ES&S and its employees. Hence, petitioner urgently requires that the Court enter an order pursuant to CPLR Section 7805, staying the enforcement of respondent's decision pending the hearing and determination of this petition.

59. By reason of the Federal Court's order, which was based in part on the NYSBOE's own schedule for HAVA compliance, New York's county election boards all must choose a ballot marking device vendor by February 8, 2008. Since the January 29, 2008 letter from the NYSBOE to the local boards expressly precludes them from selecting ES&S and limiting their choice to a single vendor, without a stay of the January 29, 2008 NYSBOE decision, pursuant to Judge Sharpe's January 16, 2008 Order, the County Boards of Election will make their choice of ballot marking devices by February 8, 2008, which, as a result of respondents' actions, will not include ES&S, or they may decline to make a choice and then the NYSBOE will make the selection for them.

60. In addition, as a result of the severe and irreparable harm that will be suffered by ES&S and its employees by reason of respondent's refusal to approve ES&S, ES&S seeks a stay, pursuant to CPLR Section 7805, restraining the approval of Sequoia Image Cast pending the Court's hearing and determination of this petition.

WHEREFORE, petitioner respectfully prays for an order and judgment as follows:

(A) vacating and annulling the decision of respondents as stated in the letter dated January 29, 2008 from the Co-Executive Directors of the New York Stated Board of Elections to New York State's County Board of Elections, declaring Sequoia Image Cast as the sole ballot marking device eligible for selection;

(B) directing respondents to (1) include ES&S as an approved ballot marking device vendor, and (2) notify forthwith the County Boards of Elections that ES&S is among the approved ballot marking device vendors that may be selected by the county boards, and

(C) granting petitioner such other, further and different relief as to the Court may appear just, equitable and proper, together with costs and reasonable attorneys fees.

Dated: New York, New York
February 5, 2008

JAMES E. LONG & ASSOCIATES

By: 

James E. Long

Co-Counsel for Petitioner
668 Central Avenue
Albany, New York 11206
(518) 458-2448

DAVIDOFF MALITO & HUTCHER LLP

By: _____

Charles Capetanakis


Co-Counsel for Petitioner
605 Third Avenue
New York, New York 10158
(212) 557-7200

VERIFICATION

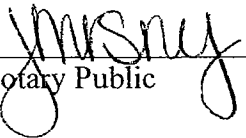
ERIC A. ANDERSON, being duly sworn, depose and say:

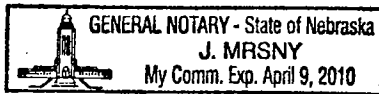
I am a Vice President and General Counsel of ELECTION SYSTEMS & SOFTWARE, INC., a corporation authorized to do business in the State of New York and the petitioner herein.

I have read the foregoing petition and the contents thereof, and the same is true to my own knowledge, except those matters therein which are stated upon information and belief, and as to those matters I believe them to be true based on the books and records of petitioner, conversations with employees and agents of petitioner, and conversations with other persons who have knowledge of the facts and circumstances that is the subject of the petition. The verification is made by me because the above party is a corporation and I am an officer thereof.


ERIC A. ANDERSON

Sworn to before me this
4th day of February 2008


Notary Public



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
ELECTION SYSTEMS & SOFTWARE, INC.,

Petitioner,

Index No.

954/08

For a Judgment Pursuant to the Provisions of Article 78
of the New York Civil Practice Law and Rules

AFFIDAVIT IN SUPPORT
OF ORDER TO SHOW
CAUSE AND VERIFIED
PETITION

- against -

NEW YORK STATE BOARD OF ELECTIONS, and
NEIL W. KELLEHER, DOUGLAS A. KELLNER,
HELENA MOSES DONAHUE, EVELYN J. AQUILA,
as Commissioners of the New York State Board of
Elections,

Respondents.

-----X
STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

STEPHEN A. MALITO, being duly sworn, deposes and says:

1. I am a partner in the law firm of Davidoff Malito & Hutcher LLP, attorneys for
Petitioner ELECTION SYSTEMS & SOFTWARE, INC. ("ES&S"), and submit this affidavit in
support of the annexed Order To Show, which, *inter alia*, urgently seeks a stay pursuant to
CPLR Section 7805 pending the Court's hearing of the annexed Verified Petition (the
"Petition").

2. The affidavit is based upon my familiarity with the matters set forth herein,
discussions with employees of ES&S and my review of relevant documents.

3. The annexed Verified Petition seeks a judgment of the Court annulling, vacating
and setting aside a decision of the NEW YORK STATE BOARD OF ELECTIONS
("NYSBOE") that is memorialized in a letter to New York State's County Boards of Election,

dated January 29, 2008, from NYSBOE's Co-Executive Directors. A copy of the letter is annexed hereto as Exhibit "D".

4. The letter directs that the individual County Boards of Election in New York State may only purchase certain voting equipment known as a "ballot marking device" manufactured by a single vendor, known as the "Sequoia Image Cast." The ballot marking device is designed to aid persons with disabilities to participate in the electoral process by taking a paper ballot, inserting it into the device, and then utilizing video and audio technology to cast their votes. Respondents' January 29, 2008 letter states that ES&S' AutoMARK ballot marking device is not eligible for selection solely because the two co-executive directors of the NYSBOE could not agree on whether Petitioner's equipment complied with one of the design requirements for such devices established by the New York Election Law.

5. Specifically, Election Law Section 7-104 and 9 NYCRR Section 6902.2 requires that voting equipment in New York must feature a full ballot display that allows a voter to view the entire ballot at one time. The annexed Verified Petition and exhibits show that the ES&S system features a full ballot display, which had been duly confirmed and decided by the Commissioners of the NYSBOE on January 24, 2008. The January 29, 2008, letter is especially inexplicable, because since 2005 Petitioner's ballot marking device known as the "AutoMARK Voter Assistance Terminal (Model A200)" has been used in thirteen to fifteen counties in New York with the acquiescence of the Respondents.

6. The decision to eliminate ES&S as an approved vendor and limit the local elections boards' ballot marking display choice to a single vendor, clearly was arbitrary, capricious, and abuse of discretion and illegal for the following reasons:

- The January 29, 2008 letter to the county elections boards from the NYSBOE Co-Executive Directors was patently illegal because it was contrary to the action taken by the Commissioners on January 24, 2008, approving the ES&S AutoMARK with modification to provide for a full ballot display upon insertion of the paper ballot in the ballot marking device;
- The January 29, 2008 letter to the county elections boards also was illegal because it was contrary to the New York State Election Law, specifically Section 3-100(4) that requires any action of the NYSBOE must be by the affirmative vote of at least three Commissioners, and the co-executive directors did not have the power to act in place of the Commissioners to decide that ES&S' AutoMARK was non-compliant.
- Even if it was within the purview of the staff to act, insofar as the January 29, 2008 letter eliminated the ES&S AutoMARK from among the ballot marking devices that could be chosen by the local elections boards, the letter was arbitrary and capricious because the AutoMark A200 firmware modification conformed to the decision of the Commissioners that required full ballot display on the initial screen upon insertion of the paper ballot in the AutoMark device; and
- To the extent that the decision of the NYSBOE on January 24, 2008, may be construed to require review of the AutoMark firmware modification providing for full ballot display of the ballot upon insertion in Petitioner's ballot marking device, following the January 24, 2008 vote by the NYSBOE, then the action of the NYSBOE was arbitrary, capricious, and abuse of discretion and illegal, because the full ballot display provided to the voter on the paper ballot satisfied in

all respects the Election Law's full ballot requirement such that the full ballot display on the AutoMark screen was not required.

The Court's Immediate Intervention Is Required To Prevent Severe And Irreparable Harm To Petitioner

7. This application is most critical because all of New York State's county elections boards face a February 8, 2008 deadline for choosing a ballot marking device vendor for purchase of the voting equipment. Pursuant to an Order of United States District Court Judge Gary L. Sharpe issued on January 16, 2008, in an action brought by the United States Justice Department against the NYSBOE, entitled *U.S. v. New York State Board of Elections, et al*, Civil Action No. 06-CV-0263 (GLS) (N.D.N.Y.), New York is required to make available for use by the upcoming September 2008 primary elections ballot marking devices for use by persons with disabilities. The action was brought against the NYSBOE to compel New York's compliance with the federal Help America Vote Act, 42 U.S.C. Section 15301, *et seq.* ("HAVA"). *See*, Judge Sharpe's Order, Exhibit "A".

8. The February 8, 2008 county boards selection deadline under Judge Sharpe's order was based upon an "Action Plan" submitted by NYSBOE which, *inter alia*, mandated that all New York State counties complete their vendor selection process by February 8, 2008, and, in the case of those counties that have not chosen a ballot marking device vendor by February 8, 2008, then the NYSBOE will select the vendor for them. *See*, Respondents' Action Plan, Exhibit "B." Thus, the February 8, 2008 deadline for vendor selection was devised by the NYSBOE in furtherance of the District Court's mandate that the ballot display devices are available for use in New York for the September 2008 primary elections.

9. Without the immediate intervention of this Court, respondents will preclude the county boards from considering ES&S' ballot marking device by the February 8 deadline. As a

consequence, Petitioner is being barred from the New York State market to sell its voting equipment, notwithstanding that its equipment complies fully with all applicable legal requirements, and, as is explained more fully below, and in the annexed Verified Petition, ES&S made the modification to its equipment required by the NYSBOE on January 24, 2008, when the Commissioners of the NYSBOE voted unanimously to approve ES&S' AutoMARK with the modification.

10. Upon information and belief, the New York City County Board of Elections are set to select their respective vendors on Wednesday, February 8, 2008, making this matter all that more urgent.

11. As summarized below, the merits of ES&S' Verified Petition filed herewith are most compelling and certainly entitles Petitioner to obtain the court's intervention to maintain the *status quo* pending the hearing and determination of this proceeding.

**NYSBOE Approved Petitioner's AutoMARK
Ballot Marking Device On January 24, 2008**

12. On January 24, 2008 the NYSBOE voted to certify the ballot marking devices that could be selected by the county boards, and respondent's decision actually approved ES&S' AutoMARK ballot marking device with a minor modification to the equipment's firmware that would initially allow the voter to view the full face of the ballot when it is placed in the AutoMARK terminal. This modification was to be made and furnished to the NYSBOE by January 28, 2008. A copy of the transcript of the January 24, 2008 public NYSBOE meeting is annexed hereto as Exhibit "C"; the NYSBOE decision that is respectfully brought up for review is found at page 10.

13. As noted above, in fact the modification was not necessary. Indeed, insofar as the NYSBOE required that ES&S' AutoMARK firmware be altered to provide for an initial on

screen display of the full ballot upon insertion of the paper ballot into the device, after the voter already was furnished with the full ballot in paper form, respondents had imposed a requirement that went beyond the New York Election Law's full ballot mandate. Further, it is important to note that at the January 24, 2008 public meeting, the NYSBOE had determined that ES&S' product otherwise had met the specifications of the applicable Federal and New York State regulations. See, Exhibit "C" at page 10.

**NYSBOE Staff Thereafter Acted In Disregard Of The Decision
By Their Commissioners And Contrary To The Election Law**

14. Although Petitioner's AutoMARK already complied with the Election Law's full ballot display provisions, ES&S acceded to the Commissioners' decision and altered its firmware for the device to enable the voters to view the full ballot after placing it in the AutoMARK. ES&S delivered the modified ballot marking device to the NYSBOE on January 28, 2008.

15. Nevertheless, by letter dated January 29, 2008, the NYSBOE's Co-Executive Directors wrote to the county boards declaring that the only ballot marking device they could select would be the Canadian manufactured equipment.

16. The January 29, 2008 letter also informed the county boards that another vendor, had initiated a lawsuit challenging a determination that its equipment was non-compliant (a determination that was not limited to the full ballot display requirement at issue herein), and a hearing on that petition was scheduled to be heard on January 31, 2008. On January 30, 2008, the Co-Executive Directors sent any e-mail to the county boards modifying the January 29, 2008 letter, but only to the extent of noting that the pending litigation may affect the pool of ballot marking devices that may be ordered and advising that a decision was anticipated on February 4, 2008. A copy of the e-mail dated January 30, 2008, is annexed hereto as Exhibit "E."

17. Specifically, by the January 29, 2008 letter to the county boards, the NYSBOE Co-Executive Directors, without any authority whatsoever, unilaterally the ES&S AutoMARK as a certified ballot marking device. This unauthorized and illegal act was made despite the fact that on January 24, 2008, the NYSBOE Commissioners voted to approve the ES&S equipment. See, Exhibit "C" at page 10.

18. Further, it is clear on the record that to the extent the Commissioners desired verification of the ES&S modification with the full ballot display requirement, it was the Commissioners themselves who would view the modification and not staff. See Exhibit "C" at pages 14 – 16. Finally, by acting unilaterally and without authority, the NYSBOE Co-Executive Directors have violated Section 3-100(4) of the New York Elections Law, which mandates a three (3) commissioner vote for each official act of the NYSBOE.

19. Therefore, the NYSBOE's Co-Executive Directors' disqualification of the ES&S AutoMark ballot marking device, to preclude ES&S as a vendor that could be considered by the County Boards of Elections, was arbitrary, capricious and illegal.

The Equities Weigh In Favor Of Granting An Interim Stay To ES&S Until The Court Can Fully Review The Merits Of Its Petition

20. The harm to Petitioner in the absence of the requested temporary stay is clear and inarguable. On Friday, February 8, 2008, as a result of a schedule devised by respondents, New York's County Boards of Elections are required to select a ballot marking device vendor and, in the absence of choosing a vendor, then the NYSBOE will make the choice for them. Of course, as a result of the respondents' January 29, 2008 letter, in truth the county elections boards have not been provided a choice at all. Rather, they are compelled to choose Sequoia Image Cast ballot marking device, or the NYSBOE will choose the Sequoia Image Cast equipment for them.

Under either circumstance, ES&S is foreclosed from any opportunity to compete in the New York market for the selection of its AutoMARK ballot marking device.

21. In contrast, the NYSBOE cannot claim any harm whatsoever should the Court temporarily stay enforcement of the anticompetitive, arbitrary and illegal decision to restrict New York's counties to the selection of the Sequoia Image Cast. As noted above, the selection of the February 8, 2008 selection deadline was devised by the NYSBOE and accepted by the Federal District Court. The principal interest demonstrated by the Justice Department in its most recent prosecution of its action against NYSBOE, and the HAVA compliance directed by Judge Sharpe in his January 16, 2008 Order, concerned the assurance that ballot marking devices would be available for use in New York State no later than the September 2008 primary election.

22. Respondents would be hard-pressed to demonstrate that the requested interim stay, to maintain the *status quo* pending this Court's determination of the annexed petition, in any way would do violence to New York's ability to meet the ultimate deadline sought by the United States and directed by the Federal District Court, involving the use of ballot marking devices in New York State by the September 2008 primaries.

23. Certainly, it is in public interest to ensure the integrity of the selection process, which clearly has been tainted by the actions taken by respondents to restrict vendor selection to the Sequoia Vote Cast equipment, to the exclusion of ES&S' AutoMARK, particularly when the record shows that Petitioner's equipment complies with HAVA, complies with New York State Law, and the NYSBOE already decided with the firmware modification in place the AutoMARK would meet the full ballot display requirement.

24. Without the interim relief requested herein pursuant to CPLR Section 7805, Petitioner will be severely and irreparably harmed.

25. Petitioner does not have an adequate remedy at law.

26. This application has not been made to any other court or Justice.

Accordingly, Petitioner respectfully prays for an Order and Judgment upon the annexed Verified Petition, as follows:

(A) vacating and annulling decision of respondents as stated in the letter dated January 29, 2008 from the Co-Executive Director of the New York State Board of Elections to New York State's County Board of Elections, declaring Sequoia Image Cast as the sole ballot marking device eligible for selection;

(B) directing Respondents to (1) include ES&S as an approved ballot marking device vendor, and (2) notify forthwith the County Boards of Elections that ES&S is among the approved ballot marking device vendors that may be selected by the county boards, and

(C) granting Petitioner such other, further and different relief as to the Court may appear just, equitable and proper, together with costs and reasonable attorneys fees.

27. Petitioner further urgently asks that the Court enter an order pursuant to CPLR Section 7805, pending the Court's hearing of the annexed Verified Petition, as follows:


(A) staying respondents, their employees, all persons acting in concert with them or on their behalf, from enforcing the decision appealed from in this proceeding as set forth in the January 29, 2008 letter, from the New York State Board of Elections Co-Executive Directors to the County Boards of Elections, and

(B) directing that Respondents shall forthwith notify New York State's County Boards of Elections that Petitioner has commenced this proceeding, that this Court has temporarily stayed the enforcement of the January 29, 2008 decision, and, in the event the relief requested in the Verified Petition filed herein is granted, then Election Systems & Software, Inc.

will be an approved vendor for the purchase and use of its ballot marking device known as AutoMARK Model A200,

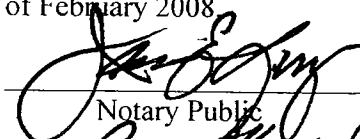
(C) staying the County Board's of Election in New York State, and each of them, including the New York City Board of Elections, their officials, employees, and all persons acting in concert with them or on their behalf, from choosing a ballot marking device vendor until further order of this Court, and

(D) directing that Respondents shall take all actions necessary to extend the deadline for the County Boards of Elections to choose a ballot marking device vendor, which presently is set for February 8, 2008, until this Court shall decide the merits of the Verified Petition filed herein and direct the entry of Judgment upon said petition.



Stephen A. Malito

Sworn to before me this 8th day
of February 2008.



Notary Public
Carm Anthony Correnti
Carm Egovici 1/30/11

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
NEW YORK STATE BOARD OF)
ELECTIONS; PETER S. KOSINSKI)
and STANLEY L. ZALEN, Co-Executive)
Directors of the New York State Board of)
Elections, in their official capacities; and,)
STATE OF NEW YORK;)
)
Defendants.)
_____)

Civil Action No. 06-CV-0263
(GLS)

SUPPLEMENTAL REMEDIAL ORDER

On November 5, 2007, plaintiff United States filed a Motion to Enforce this Court's June 2, 2006 Remedial Order, alleging defendants' continuing noncompliance with the Remedial Order and the Help America Vote Act, 42 U.S.C. 15301 et seq. ("HAVA") (Docket # 134). Following the defendants' filing of responses to the United States' Motion (Docket ## 151, 153-157), this Court held a hearing on December 20, 2007 (Docket ## 175, 176), at which arguments of the parties were heard. Pursuant to this Court's directive at that hearing, on January 4, 2008, the defendants filed with the Court a revised HAVA implementation plan (Docket # 179). On January 11, 2008, the defendants supplemented this plan (Docket #180). On January 11, 2008, the United States responded to these submissions of the defendants in a letter to the Court and submitted to the Court a proposed Order. The Court now enters this Supplemental Remedial Order, which, in conjunction with this Court's previous June 2, 2006 Remedial Order, is intended to direct the remedial course of this litigation in the future.

This Court, having carefully considered the filings of the parties in this matter, and the extensive arguments heard at the December 20, 2007 hearing, finds as follows:

1) This Court agrees fully with the United States and finds that the defendants have failed substantially to comply with the voting systems requirements of this Court's Remedial Order and that New York remains in noncompliance with the voting systems requirements of Section 301 of HAVA, 42 U.S.C. 15481;

2) As this Court made clear at the December 20, 2007 hearing, noncompliance with HAVA is not an option for defendants and, to the extent that State law and procedure stands in conflict with full compliance with HAVA's federal law mandates, such State law and procedure must give way to federal law requirements;

3) This Court finds that the defendants' unacceptable and continual delays in meeting the voting systems requirements of HAVA that became effective January 1, 2006, has made full compliance with these HAVA requirements in time for New York's February 2008 presidential preference primary, and for the September 2008 federal primary election and November 2008 federal general election, not currently possible;

4) This Court finds, based on the filings and arguments of the parties and consistent with the January 4, 2008 submission of defendants (Docket #179), and having considered relevant submissions of amicus curiae, that partial compliance with HAVA's voting systems requirements, in the form of ballot marking devices and/or voting systems accessible to persons with disabilities available for use in every polling place in the State of New York during the fall 2008 federal primary and general elections, is possible and must be accomplished;

5) This Court finds, based on the filings and arguments of the parties and consistent with

the January 4, 2008 and January 11, 2008 submissions of defendants (Docket ##179, 180), and having considered relevant submissions of amicus curiae, that full compliance with HAVA's voting systems requirements, and the replacement of all lever voting machines in the State of New York, must be accomplished as soon as possible but in no event later than in time for use of fully HAVA-compliant voting systems during the fall 2009 State primary and general elections.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that:

1. The United States Motion to Enforce is hereby GRANTED, as set forth below;

2. The defendants' Plan B for the deployment of ballot marking devices accessible to person with disabilities in every polling place in the State for use in the fall 2008 federal primary and general elections, as set forth in the defendants' January 4, 2008 filing with the Court and according to the specific timetable set forth in Exhibit C to that filing (Docket # 179), shall be implemented in full by the Defendants;

3. The defendants' Plan A for the deployment of fully HAVA-compliant voting systems throughout the State of New York, specifically including the replacement of all lever voting machines in the State, by the fall 2009 State primary and general elections, as set forth in the defendants' January 4 filing, as revised by the defendants' January 11, 2008 filing and according to the specific timetable set forth in the January 11, 2008 filing (Docket #180), shall be implemented in full by the Defendants, subject to the following:

a) Consistent with the January 11, 2008 submission of defendants (Docket #180), the defendants shall carry out certification of Plan A voting systems concurrently with certification of Plan B ballot marking devices;

b) It is the clear intent and Order of this Court that, where possible, New York

counties be able to utilize, for the fall 2008 federal elections, voting systems that are fully compliant with HAVA. Accordingly, consistent with defendants' January 11, 2008 submission (Docket #180), the defendants shall make all possible efforts to provide for certification of a Plan A voting system(s) in time for use of such system(s) in the fall 2008 federal primary and general elections by such counties as wish to utilize fully HAVA-compliant voting systems in such elections;

4. Beginning on the first Friday following the entry of this Supplemental Order, and continuing thereafter on each subsequent Friday until further order of this Court, the defendants shall file with this Court, and shall submit by electronic mail to counsel for the United States, a detailed report concerning the previous week's progress in implementing the terms of this Court's Orders;

5. The defendants shall provide immediate notice, by filing with this Court, and by electronic mail to counsel for the United States, concerning any deviation, no matter how minimal, from Plan A and/or Plan B as ordered implemented by this Court, including any deviation from the specific timelines set forth by defendants for those plans, such notice to include the nature and causes of such deviation, and the immediate steps the defendants propose to take to resolve the possible delay caused by such deviation and ensure that such delay does not recur in any part of the State of New York;

6. Time is of the essence in carrying out this remedial process. Accordingly, this Court, where possible, will make itself available on short notice by any party, to deal with any issues that may arise that threaten timely compliance with the Orders of this Court;

7. Unless superseded by more specific terms in this Order, all provisions of this Court's

June 2, 2006 Remedial Order are incorporated herein and shall be in effect until further order of this Court. Moreover, this Court retains jurisdiction to take any and all other actions, including specifically the appointment of a special master or other entity as necessary to ensure that the obligations imposed upon the defendants by HAVA and by this Court's Orders are carried out forthwith.

ENTERED this 16th day of January, 2008, at Albany, New York.

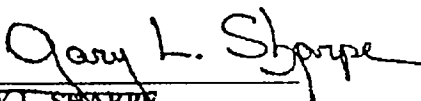

GARY L. SHARPE
UNITED STATES DISTRICT JUDGE

Exhibit B



State of New York
STATE BOARD OF ELECTIONS

Neil W. Kelleher
Chair
Douglas A. Kellner
Chair
Helena Moses Donohue
Commissioner
Evelyn J. Aquila
Commissioner

40 STEUBEN STREET
ALBANY, N.Y. 12207
Phone: 518/474-6367 Fax: 518/486-4546
www.elections.state.ny.us

Peter S. Kosinski
Executive Director
Stanley L. Zalen
Executive Director
Todd D. Valentine
Special Counsel
Paul Collins
Deputy Counsel

January 4, 2008

Hon. Gary L. Sharpe
United States District Judge
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, New York 12207

Re: *United States of America v New York State Board of Elections, et al.*
06-CV-0263 (GLS)

Dear Judge Sharpe:

Attached please find a copy of the plan assembled by the State Board of Election in response to the Court's December 20, 2007 order requiring the State Board to file with the Department of Justice and Court a plan for compliance with HAVA.

Respectfully submitted,

/s/

TODD D. VALENTINE (507572)
Special Counsel

/s/

PAUL M. COLLINS (191384)
Special Deputy Litigation Counsel

Attorneys for the New York State Board
of Elections and the Defendants
Kosinski and Zalen

cc: All Counsel of record

1 New York State Board of Elections Plan for HAVA Compliance
2 January 4, 2008
3

4 Pursuant to the December 20, 2007 direction of the Court, upon the
5 Record, the Defendant State Board of Elections (NYSBOE) offers the following
6 as its Plan of Compliance with the Court's June 2, 2006 Remedial Order:

7 A. Ballot Marking Device:

8 Since the submission of the two separate Plans of Compliance by NYSBOE
9 and the Defendants' submission in Opposition to the Department of Justice's
10 Motion to Enforce the June 2, 2006 Remedial Order, NYSBOE respectfully
11 advises the Court and the Department of Justice that:

- 12 • Attached as Exhibit "C", is a time line which identifies the tasks required to
13 achieve interim HAVA compliance in 2008, via the deployment and
14 implementation of at least one ballot marking device in each polling
15 location in the State of New York. Defendants NYSBOE, Kosinski and
16 Zalen are committed to this facet of the proposed Plan of Compliance
17 which they believe would address the minimum level of compliance which
18 the Court will accept, as indicated upon the Record on December 20,
19 2007.
- 20 • NYSBOE has completed initial tasks related to the re-bidding of contracts
21 for accessible ballot marking devices in order to allow the State to have in
22 place no later than February 29, 2008 a mechanism for increasing the
23 number of such devices from which county boards may make their
24 selections.

- 1 • To date the New York State Office of General Services (OGS) has
2 received submissions from the following vendors for both Lot 1 (full voting
3 systems) and Lot 2 (ballot marking devices) machines: Premier, ES&S,
4 Avante, IBS and Sequoia.
- 5 • NYSBOE and OGS have completed initial contract negotiations with
6 Premier, Avante and ES&S and negotiations with Sequoia are being
7 scheduled as set forth in Exhibit C attached hereto.
- 8 • Although much has been already accomplished to implement this Plan Of
9 Compliance, in many respects NYSBOE is at the mercy of the production
10 schedule of the vendors who have responded to the Notice to Bid and
11 their ability to produce a sufficient number of ballot marking devices in
12 time for the implementation of this Plan.

13

14 B. Testing, Certification and Selection of Voting Systems:

15 Moving forward, NYSBOE respectfully advises the Department of Justice that:

- 16 • NYSBOE has completed the tasks related to re-bidding to secure the
17 services of an Independent Testing Authority (ITA), for the purposes of
18 conducting certification testing for all voting systems being proposed for
19 sale in New York. A complete contract award has been made as of
20 December 11, 2007 to SysTest, Inc. of Colorado which is currently
21 working up testing protocols.
- 22 • NYSBOE is proceeding with voting system testing forthwith, by reason of
23 completion of a contract award to the successful ITA, and currently

1 anticipates the start of testing on or about January 10th as vendors deliver
2 their submission to SysTest, Inc.

3 • In order to comply with the Court's December 20, 2007 direction, the
4 testing to be undertaken in 2008 may not be full New York Compliance
5 Testing resulting in full certification at this time but rather testing to ensure
6 that the Ballot Market Devices meet the statutory requirements set forth in
7 42 USC 15481(a). As testing may not be sufficient to ensure compliance
8 with all New York statutory and regulatory requirements, NYSBOE will,
9 pursuant to New York Election Law 7-201(4) authorize the use, in 2008, of
10 ballot marking devices not formally certified by it upon an experimental
11 basis to insure that it is logistically possible to have a ballot marking
12 device at every polling place in accordance with the Court's December 20,
13 2007 Directive and 42 USC 15481(a)(3)(B).

14 • The time required to complete testing to enable NYSBOE to formally
15 certify such ballot marking devices pursuant to New York Election Law 7-
16 201(1) as compliant with New York's requirements 9 NYCRR Part 6209
17 which include New York Election Law Section 7-202 and the 2005
18 Voluntary Voting System Guidelines adopted by the US Election
19 Assistance Commission, is dependent upon each submitted system's
20 readiness to comply with same. NYSBOE estimates the time required to
21 test to the standards identified herein is approximately nine (9) months. It
22 is respectfully pointed out to the Department of Justice that no voting
23 system has as yet been certified by the US Election Assistance
24 Commission as being in compliance with the 2005 Voluntary Voting

1 System Guidelines adopted by the US Election Assistance Commission,
2 let alone the additional statutory requirements imposed by the New York
3 State Legislature in Election Law Title II, Sections 7-200ff. It is for that
4 reason that NYSBOE will authorize the counties to use machines pursuant
5 to New York Election Law 7-201(4) in 2008.

- 6 • In order to provide for this experimental authorization, Defendants are
7 interpreting New York Election Law 7-208 as not requiring the escrowing
8 of the source codes for nonproprietary commercial off the shelf software
9 for ballot marking devices but to require the escrowing of the Vendors'
10 proprietary source codes for such ballot marking devices.
- 11 • On January 23, 2008 the Commissioners of NYSBOE shall determine
12 which ballot marking device systems shall be offered to the counties for
13 their selection, subject to the approval of the contracts for their purchase
14 by the Office of State Comptroller and the Attorney General.
- 15 • Immediately following voting system authorization pursuant to New York
16 Election Law 7-201(4), the County Board selection processes will be
17 completed. The ultimate selection of a replacement voting system rests
18 with the commissioners in each County Board, and in the City of New
19 York, with the City Board of Elections. In view of the Court's December
20 20, 2007 directive, County Boards must complete their selection/purchase
21 process by February 8, 2008 and upon their failure to do so NYSBOE
22 shall select and order for them.

- 1 • For the purposes of this solicitation, the pricing information may be
2 disclosed to the counties upon the approval of the contract(s) by the New
3 York State Office of General Services.
- 4 • In order to affect a substantial time savings, acceptance testing will be
5 undertaken by NYSBOE at a central location rather than by the various
6 County and New York City Boards of Election as was originally proposed
7 by the Compliance Plans previously submitted.

8 C. Full HAVA Compliance for 2009:

- 9 • To implement lever machine replacement, NYSBOE has completed tasks
10 related to the re-bidding of contracts for complete voting systems,
11 including the publication of a Notice to Bid (appearing in the New York
12 State Contract Reporter on September 24, 2007), the drafting, adoption
13 and distribution of voting system requirements identified as 9 NYCRR Part
14 6209, and is drafting, in conjunction with the Office of General Services,
15 contracts with those bidders which have responded to the Notice to Bid to
16 date.
- 17 • Attached as Exhibit "E", is a time line which identifies the tasks required to
18 implement lever machine replacement and move the State to HAVA
19 compliance. Voting system certification includes testing, an independent
20 review of the testing, the creation and review of corresponding reports,
21 review of the voting devices by the Citizens Election Modernization
22 Advisory Committee, and final consideration by the State Board
23 Commissioners.

- 1 • In the event that a county does not make a selection in the time frame
2 established by NYSBOE, NYSBOE is statutorily authorized to determine
3 the type and number of systems to be purchased and implemented in
4 such county and shall order such voting systems for such county.²
- 5 • NYSBOE staff is crafting a program for the training of personnel on and
6 the deployment of an acceptance testing program for new voting systems
7 and ballot marking devices, as required by Election Law Section 7-206.
8 These tasks are represented in the time line.
- 9 • On September 20, 2007, the Commissioners of NYSBOE approved
10 proposed regulations related to the use of new voting systems. The
11 proposed regulations have been published and the 45-day Public
12 Comment Period will expire on January 22, 2008 after which the proposed
13 regulation may be formally adopted by NYSBOE.
- 14 • NYSBOE staff continues to draft and distribute for comment, procedures
15 related to the ownership and use of new voting systems. These initiatives
16 are represented in the time line.
- 17 • It is anticipated that these voting systems will be ready for implementation
18 statewide in time for the Fall 2009 elections.

19 **D. Conclusion:**

- 20 • NYSBOE appreciates that this proposed implementation plan is
21 extensively aggressive in order to comply with the Court's directive that, at
22 a minimum, there shall be one ballot marking device at every polling place
23 in time for the September, 2008 Primary. Although much has been

² Election Law Section 7-203 (3).

Exhibit C: Proposed NYSBOE Ballot Marking Certification Testing & Electronic Voting System Implementation Master Timeline (Plan B)

ID	Task Name	Estimated Start Date	Estimated Finish Date
1	Lot 2 - Electronic Ballot Marking Device Implementation Plan	Mon 8/13/07	Thu 7/31/08
2	Provide Contracts for Counties to procure voting systems	Wed 9/12/07	Tue 2/26/08
3	Resolve issues in contract language & Ballot Marking Requirements	Wed 9/12/07	Wed 10/10/07
4	Prepare & Distribute Solicitation	Thu 10/11/07	Wed 10/17/07
5	Advertisement in Contract Reporter (Done)	Mon 9/24/07	Mon 9/24/07
6	Bid Opening Date (duration mandated by law)	Thu 10/18/07	Thu 11/15/07
7	Contract negotiations with individual voting system vendors	Fri 11/16/07	Fri 1/18/08
8	BOE Review & Sign-off	Mon 1/21/08	Tue 1/22/08
9	Contract is sent to OSC for Approval (assumes 30 day approval process)	Wed 1/23/08	Mon 2/25/08
10	Contract is complete	Tue 2/26/08	Tue 2/26/08
11	Conduct NY State Testing of Electronic Ballot Marking Devices	Thu 12/27/07	Thu 2/26/08
12	Determine which Ballot Marking Devices will be in scope for testing and begin initial review	Thu 12/27/07	Fri 1/11/08
13	Vendors submit in scope systems for testing (10 days after bid opening date)	Thu 12/27/07	Thu 1/10/08
14	Planning for and testing may begin (ITA contract finalized and available for testing on 12/07/07)	Thu 1/10/08	Fri 1/11/08
15	Test Phase	Tue 1/8/08	Thu 2/21/08
16	Test Plan Preparation	Tue 1/8/08	Thu 1/10/08
17	Final Test Run (Run for Record - all changes frozen)	Mon 1/28/08	Thu 2/21/08
18	Test all Systems	Mon 1/28/08	Thu 2/21/08
19	Documentation Phase	Fri 2/22/08	Mon 2/25/08
20	Preparation of final test results	Mon 2/25/08	Fri 2/22/08
21	Submit final test results to SBOE Executive Board	Mon 2/25/08	Mon 2/25/08
22	Complete Recommendation of Vendor-Machines	Tue 2/26/08	Wed 2/27/08
23	System Recommendations	Tue 2/26/08	Wed 2/27/08
24	Review test results	Tue 2/26/08	Tue 2/26/08
25	Approve/reject machine	Wed 2/27/08	Wed 2/27/08
26	Deliver necessary software to escrow agent	Thu 2/28/08	Thu 2/28/08
27	State Board to approve and provide list of recommended machines to counties to be ordered	Thu 2/28/08	Thu 2/28/08
28	Ballot Marking Device Ordering, Delivery & Acceptance Testing	Fri 1/25/08	Fri 1/25/08
29	Assist Counties With Ordering Machines	Mon 8/13/07	Thu 7/31/08
30	Prepare Ordering Packet and informational materials for Counties	Mon 8/13/07	Fri 4/18/08
31	Create Informational Packet	Mon 8/13/07	Fri 10/12/07
32	Create cost lists & order forms	Mon 8/13/07	Fri 4/18/08
33	Develop process for collecting and accounting for 5% match (Done)	Mon 8/13/07	Mon 9/10/07
34	Collect 5% matching	Mon 1/28/08	Fri 4/18/08
35	Contracts Awarded and in Place (awaiting OSC approval)	Mon 1/28/08	Mon 1/28/08
36	Distribute packets to Counties	Fri 1/25/08	Fri 1/25/08
37	Define County requirements and obtain written proposals from vendors (Service & Support)	Fri 1/25/08	Mon 2/4/08
38	Return ordering information to OGS	Fri 2/1/08	Fri 2/8/08
39	Coordinate County Orders	Mon 2/11/08	Tue 3/11/08
40	BOE to Process Certificates at DOB to ensure funds are available to place orders	Mon 2/11/08	Fri 2/15/08
41	Create list of non-compliance & deliver to BOE	Mon 2/11/08	Mon 2/11/08
42	Select Machine for common submission Counties	Mon 2/11/08	Mon 2/18/08
43	Collect Orders for common submission counties from BOE	Mon 2/11/08	Mon 2/18/08
44	Record requisitions and purchase order processing	Mon 2/11/08	Fri 2/29/08
45	Issue Purchase Orders	Mon 2/11/08	Fri 2/29/08
46	County Board and Voting System Vendor negotiate individual delivery date(s)	Mon 3/3/08	Tue 3/11/08
47	Voting System Vendor accepts Purchase Order	Mon 3/3/08	Tue 3/11/08
48	Delivery - Note actual delivery date will be negotiated with machine vendor at time of PO	Thu 4/3/08	Thu 7/31/08
49	Estimated start time for delivery after PO is finalized (Thirty day estimate for first delivery - actual will)	Thu 4/3/08	Thu 7/31/08
50	Document inventory	Thu 4/3/08	Thu 7/31/08
51	Acceptance Testing of Ballot Marking Devices	Thu 4/3/08	Thu 7/31/08
52	Test each device	Thu 4/3/08	Thu 7/31/08
53	Accept or reject	Thu 4/3/08	Thu 7/31/08

Exhibit E: Lever Machine Replacement Time line (Plan A)

Task Name	Resource Names	Duration	Estimated Start	Estimated
Electronic Voting Machine Implementation Plan		632 days	Mon 8/6/07	Tue
Prepare Draft Master Timeline and present to SBOE	NYSTEC, BOE	41 days	Mon 8/6/07	Mon
Voting Machine Procurement - Planning		396 days	Mon 8/13/07	Mon
Develop Volume Requirements for ordering machines - AIR Study		66 days	Mon 8/13/07	Mon
Proposed draft regulation posted for public comment (done)	BOE Ops	1 day	Mon 8/13/07	Mon
Review comments and propose recommendation to State Board	BOE Ops	30 days	Tue 9/18/07	Mon
State Board meeting to adopt final regulation	BOE Executive	10 days	Tue 10/30/07	Mon
Develop Policies and Procedures for voting machine implementation		396 days	Mon 8/13/07	Mon
Develop Escrow Requirements		270 days	Tue 2/5/08	Mon
Develop SBOE Guidelines for Complaint Procedures	BOE Ops	135 days	Mon 8/13/07	Fri
Develop guidelines for county grants program using HAVA & state funding to improve access to Polling Places	BOE NVR/PIO	45 days	Mon 8/13/07	Fri
Create grant program for county participation in polling place access for disabled (Done)	BOE NVR/PIO	2 days	Mon 8/13/07	Tue
Assemble county feed back on polling place accessibility	BOE NVR/PIO	45 days	Mon 8/13/07	Fri
Allocate state and federal grant awards to counties for polling place modification to improve access	BOE NVR/PIO	45 days	Mon 8/13/07	Fri
Develop Training Guidelines for New Voting System	BOE NVR/PIO	207 days	Mon 8/13/07	Tue
Develop Public Communication Plan	BOE NVR/PIO	242 days	Mon 8/13/07	Tue
Develop Procedures relating to Voting Machines		243 days	Mon 8/13/07	Wed
Develop best practices manual for testing and acceptance of machines for counties		152 days	Mon 8/13/07	Tue
Create recommended acceptance testing procedures	NYSTEC	137 days	Mon 8/13/07	Tue
Create standardized forms for Logic and Accuracy (L&A) testing as required by SBOE	BOE Ops, NYSTEC	137 days	Mon 8/13/07	Tue
Validating voting machine vendors acceptance testing plans		36 days	Thu 12/20/07	Thu
Obtain Acceptance Testing does and checklists from voting machine vendors	BOE Ops	16 days	Thu 12/20/07	Thu
EMS	BOE Ops	16 days	Thu 12/20/07	Thu
Voting Machine & related devices	BOE Ops	16 days	Thu 12/20/07	Thu
Complete a dry run of accept testing procedures using actual voting machine (re-do as necessary to test revisions)	NYSTEC, BOE Ops	5 days	Fri 1/11/08	Thu
Write up findings on completeness of checklists and level of effort required	NYSTEC, BOE Ops	5 days	Fri 1/18/08	Thu
Evaluate Hash Checking requirements and the necessary tools & training skill set	NYSTEC, BOE Ops	5 days	Fri 1/18/08	Thu
Provide copies of draft to vendors for their review and revisions, if necessary	BOE Ops	5 days	Fri 1/25/08	Thu
Follow-up meetings with vendors to discuss findings	Voting Sys Vendor, BOE Ops	5 days	Fri 2/1/08	Th
Asset Management		162 days	Mon 8/13/07	Tue
Develop Acceptance Process	County	243 days	Mon 8/13/07	Wed
Develop guidelines for "best practices for room storage and use"		189 days	Mon 8/13/07	Wed
Develop Guidelines and Complete Vendor Survey of Polling Places	Voting Sys Vendor	140 days	Mon 8/13/07	Fri
Develop SBOE Guidelines for Quarterly Testing and Maintenance of Voting Machines		140 days	Mon 8/13/07	Fri
Conduct NY State Certification of Electronic Voting Machines		337 days	Mon 8/13/07	Tue
Voting Machine Ordering & Delivery		567 days	Mon 8/13/07	Tue
Assist Counties With Ordering Machines (Dates are TBD due to Suspended tests)		412 days	Mon 8/13/07	Tue
Provide Contracts for Counties to procure voting systems (New Solicitation)		105 days	Wed 9/12/07	Tu
Prepare Ordering Packet and Informational materials for Counties	BOE Ops & OGS	180 days	Mon 8/13/07	Fri
Return final ordering information to OGS (tied to when machines are certified)	County	30 days	Wed 9/24/08	Fri
Coordinate County Orders	BOE Ops & OGS	412 days	Mon 8/13/07	Tue
BOE to Process Certificates at DOB to ensure funds are available to place orders (Done)		22 days	Mon 8/13/07	Tue
Create list of non-compliance & deliver to BOE	OGS	1 day	Wed 11/5/08	Wed
Select Machine for common submission Counties	BOE Executive	5 days	Wed 11/5/08	Tue
Collect Orders for common submission counties from BOE	OGS	5 days	Wed 11/5/08	Tue
Record requisitions and purchase order processing	OGS	30 days	Wed 11/5/08	Tue
Issue Purchase Orders	OGS	30 days	Wed 12/17/08	Tue
Voting System Vendor accepts Purchase Order and negotiates individual county contracts including delivery dates	Voting Sys Vendor	30 days	Wed 12/17/08	Tue
Begin individual training program coordination with each county		207 days	Wed 1/28/09	Tue
Develop process for change notices (Done)	OGS	43 days	Mon 8/13/07	Wed
Develop Process for receiving (Done)	OGS	43 days	Mon 8/13/07	Wed
Delivery - Note actual delivery date will be negotiated with each system vendor and county at time of PO	Voting Sys Vendor	155 days	Wed 3/11/09	Tue
On-going Support Activities		60 days	Wed 10/14/09	Tu
Quarterly Maintenance of Voting Systems when not in use	County	60 days	Wed 10/14/09	Tu
Election Activities (All dates are TBD until Delivery dates are known)		30 days	Wed 10/14/09	Tue

Exhibit C

Capetanakis, Charles

From: LEE DAGHLIAN [LDAGHLIAN@elections.state.ny.us]
Sent: Friday, February 01, 2008 1:48 PM
To: Malito, Stephen A.
Subject: Fwd: transcript4.doc
Attachments: transcript4.doc

See Attachment(this is the last one).

Lee Daghlian
Director of Public Information
NY State Board of Elections
40 Steuben St.
Albany, NY 12207
518-474-1953

>> HELENA MOSES DONOHUE: How are you?

>> DOUGLAS KELLNER: Okay.

Good morning, everyone.

I am calling this meeting to order.

Present are Commissioners Donahue and Kelleher

Donahue and Kelleher.

We will avoid calling the roll of the staff again.

I take it we don't have minutes from yesterday's meeting yet?

>>: Not yet.

>> DOUGLAS KELLNER: We will not do that.

Are there any staff reports on anything new since yesterday?

We have four items of old business that we had put on for the agenda for the next meeting.

Is there a motion to continue them for the next meeting?

>> HELENA MOSES DONOHUE: I move that we continue them for the next meeting.

>> DOUGLAS KELLNER: Okay.

Those in favor say aye?

(All members responded "aye.")

>> DOUGLAS KELLNER: The old business is continued.

Are there any new items for this morning?

>> HELENA MOSES DONOHUE: Yes.

Before we go to the voting on the machines, I have a very brief statement in explanation of yesterday.

I had heard by the grapevine and in the halls that we the Republicans

renege on a deal to accept one machine.

I will tell you there was no deal, at least not one that included me.

If it were I wouldn't broadcast it because according to Mr. Freeman, it is illegal.

I have been consistent in my belief that there should be a choice.

If you end up without one, please remember who prohibited it.

I will not leave here today without a vote.

I will not afflict upon you a 40 minute dissertation on my reasonings for voting and the way I do it.

I was raised by a lovely Irish lady who reminded me from time to time that God created us with two ears and one mouth, and act appropriately.

>> NEIL KELLEHER: Thank you very much, Mr. Chairman.

Before we get into whatever vote is going to be placed before the board this morning, let me once again make sure

that you understand Commissioner Kelleher's position here.

A position I've stuck to for several weeks.

That is to make as many machines as possible available for you local Commissioners to make a choice.

Now, for some reason it seems that some people on the board, be they the Commissioners or part of staff,

seem to think that you're not capable of doing that.

That what we've got to do is make a decision for you and take away the possibility of your picking a machine

that you think might do a better job for you or your people.

You look at these people who are here with all this equipment.

Millions of dollars, evidently, have gone into the research and the engineering departments and so on to make equipment

available that they think will do the job.

These people have got to be exhausted, lugging those machines on and off of trucks, traveling all over,

following us like kids on a birthday party wondering what the heck we will do next and it will probably be the wrong thing.

We've certainly done some wrong things in the last 24, 48 hours.

And you know the one that we can all hang our hat on is the one that found most of you asleep by 3:15 yesterday afternoon.

I guess all I'm going to ask you before we get into this and I guess maybe in order to give you something to take home,

there's going to be some reluctant votes taken this morning.

I want you to understand as far as I'm concerned, there's something a lot worse than reluctant.

And I guess so I know just exactly whether or not I performed as you want me to perform, I would just ask you before

I turn the microphone over to Commissioner Kellner how many of you people here stick with me that you want to have the opportunity

to look at as many machines as possible?

Raise your hands.

Thank you very much.

>> DOUGLAS KELLNER: And Commissioner Kelleher, I just want to endorse that.

I agree that the county Commissioners should look at as many machines as possible.

The question now is what's possible.

Our decision is not a political decision.

It's a legal decision.

That at this point it is our job to make available to the county Commissioners for selection every machine that

complies with the New York rules and law.

And if a machine doesn't comply with the law and regulations by this point, then there comes a point where we have to say no,

they can't keep going on because we have to start making decisions and plan for the primary election in September.

So I had been very careful to base my decisions strictly on whether or not the machine complies with the law and regulations.

And the issue is not whether the machine is an optical scanner or whether it's a DRE, because I think each has their pros and cons.

The issue is whether the machine complies with the very detailed requirements that the legislature put into the statute.

And then, of course, we also have to consider whether or not the machines comply with the federal help America vote act as well.

All right, we've gone through those issues.

Is there a motion?

>>: I'm sorry, is that tape on?

Wait a minute.

Our

>> DOUGLAS KELLNER: All right, now it's on.

>>: Is that the solo owe all right, thank you.

>> HELENA MOSES DONOHUE: Yesterday we tried to put a vote up as a package.

It did not succeed.

So I am recommending that we put the machines up individually and we can vote on each one and that will be our vote.

Do you want me to read them?

>> DOUGLAS KELLNER: Let's do them one by one then.

>> HELENA MOSES DONOHUE: The first one I have here and it is by no coincidence or anything else how they got here.

It ain't political.

(Chuckles.)

>> HELENA MOSES DONOHUE: Avante DRE.

Should we vote as we go along or put them all up at once?

>> DOUGLAS KELLNER: No, I think we should do each one of them.

I think we should do each one of them and on the Avante DRE, maybe I should call on staff to go through the report on the legal issues

>> HELENA MOSES DONOHUE: I think they all know this.

>> DOUGLAS KELLNER: I'm trying to make a record, too, in case a vendor objects.

>> HELENA MOSES DONOHUE: Just vote.

>> DOUGLAS KELLNER: Well

I'm just going to state for the record that the Avante DRE did not comply with election law 7 104,

did not comply with the accessibility provisions of the help America vote act with respect to the independent verification.

Did not comply with the election law 7 2021e with respect to the verification requirement.

I add that I have nothing against it because it's a direct recording electronic machine.

It's just that it fails to comply with those legal requirements.

>> ALLISON: We have a statement.

>> TODD VALENTINE: You want to say it?

>> ALLISON: On the other hand, our position on the Avante DRE is that it does comply with New York State's election law.

It displays a full face ballot in the entirety.

They brought in a scanner for the independent verification when Kellner was referring to 7 2021e.

That's why we're voting yes.

>> HELENA MOSES DONOHUE: You want to call the vote?

>> DOUGLAS KELLNER: Okay.

We'll call a vote on the motion.

Those in favor?

Commissioner Donohue?

>> HELENA MOSES DONOHUE: Aye.

>> DOUGLAS KELLNER: Commissioner Kelleher?

>> NEIL KELLEHER: Let me just for a moment reiterate what I said a few moments ago.

That is, you heard Commissioner Kellner make some decisions having to do with whether or not this machine meets the legal requirements.

That's not our job to decide whether or not it meets legal requirements.

Our decision is to meet with you people and find out just exactly what your problems are and what we can do to help solve them.

And the most important one, as I say I'll be glad to listen to any one of you or all of you telling me I'm wrong.

I guess I have a respect for your people's ability to make sure it meets the legal requirements and everything else.

And I'm glad and I'm happy and I trust you enough to let these decisions be made by you.

But I guess up here we're going to have some people who do not want you to make your own choice.

The choice is going to be made by the State board and that's not

As a matter of fact, we may not even be legal in doing so, in preventing you from having the opportunity to vote or make the decision on more machines.

I'm not going to tell you you haven't got legal brain enough to make a decision on these machines.

I'm going to tell you as I told you yesterday and the last couple of weeks, let's have at least four or five machines.

We finally got there and now we are going to start tearing them apart because we are not going to

So up here we're going to have people not only going to do their job as Commissioners, but they're going to do your job.

They're going to make a decision as to what you should have the opportunity to inspect and review and make a decision

on because you don't have the ability, apparently, to perform accordingly.

I'm going to vote on this thing because we've got to take something home.

But I want to keep reminding you that my decision was to make sure that you were able to show just what kind of ability and talent,

legal or otherwise, that you people have got.

It's a real sad day when we have taking this kind of action after all the effort you put into trying to make this possible

and to move along with our responsibilities.

Aye.

>> DOUGLAS KELLNER: All right.

I vote no.

Therefore, the motion fails to attain a majority.

Want to do the next one, Commissioner?

>> HELENA MOSES DONOHUE: The second one that I would like to put up for a vote is the Premiere Automark.

Supposedly it is in the process of being delivered with the full face quality.

I put that up for a vote.

>> ALLISON: Give them until Monday

>> HELENA MOSES DONOHUE: Oh, they are supposed to be here by Monday, but I think it will be before then.

>> DOUGLAS KELLNER: I am going to vote in favor of this also.

I believe that the, it's my position that the submission that was already made does comply with the law in that it starts with a premarked,

a preprinted full face ballot and that it ends with a marked full face ballot.

Therefore, it complies with section 7 104 and that it also complies with the help America vote act disability access requirements.

I understand that they want to make a modification that has been requested by the Republican Commissioners.

In fact, I saw a version of that modification this morning which unlike the Avante did present a full face ballot that was legible and therefore,

I don't have any problem with that modification either.

So I will vote aye.

Commissioner Kelleher?

>> NEIL KELLEHER: Aye.

>> HELENA MOSES DONOHUE: I will vote aye with the improvement that we mentioned.

You want to do the next one?

>> DOUGLAS KELLNER: Go ahead.

>> HELENA MOSES DONOHUE: The third one is the Sequoia Dominion.

I would present that for a vote.

>> DOUG: Sequoia Image Cast produced by Dominion.

Okay.

I have no issues on that.

All right.

I believe that it does comply with the help America vote act disability provisions and the New York statute and so I vote aye.

>> NEIL KELLEHER: Aye.

>> HELENA MOSES DONOHUE: Aye.

The next one for consideration is Liberty.

>> DOUGLAS KELLNER: With respect to the Liberty machine, it is my view it does not comply with the help America vote act disability provisions

and the provisions of election law 7 2021E for independent verification of the ballot in a usable form.

And in addition, it does not produce a ballot that meets the requirements of election law 7- 104 and for that reason

I would also incorporate by reference into my remarks the memoranda that was submitted by the Brennan center of law and also by the League of Women Voters,

by the center for disability advocacy.

What is it?

Susan, what is the name of your group?

>>: New York State independent living council.

>> DOUGLAS KELLNER: Thank you.

The League of Women voters and the New Yorkers for verified voting.

So I'm voting opposed.

>> ALLISON: May I?

On the Liberty system, Liberty has brought in a new independent verification system.

We have no problem with accepting this modification which will allow the machine to meet 7- 2021E.

On producing the full face ballot we find no provision in 7 -104 which requires a machine to produce a full face ballot at the end of voting.

Therefore, I'm encouraging my Commissioners to vote yes.

>> NEIL KELLEHER: Don't you wish you had the opportunity to vote on this yourself?

(Chorus of yes and no.)

>> NEIL KELLEHER: But it's going to be taken away from you.

I vote aye.

>> HELENA MOSES DONOHUE: Aye.

And the fifth one.

>> DOUGLAS KELLNER: Let me announce the result.

Two votes in favor, one oppose the.

It fails to gain the required three votes.

>> HELENA MOSES DONOHUE: The last one is ES and S Automark with modification.

>> DOUGLAS KELLNER: All right.

I have the same remarks as with respect to the Premiere Automark, that the

It's my opinion that the system as originally submitted did comply with the help America vote act and New York legal requirements.

I have no objection to the modification and so I will vote aye.

>> ALLISON: With the modifications, vote yes with the modifications.

>> HELENA MOSES DONOHUE: With the modifications.

>> NEIL KELLEHER: And I vote aye with modifications.

>> HELENA MOSES DONOHUE: I'm sorry, there is one more.

The Avante ballot marking device ops scan.

>> ALLISON: No on that one.

>> DOUGLAS KELLNER: So, with respect to the Avante optical scan ballot marking device, it's the same issues that it presented what purported

to be a full face ballot for three seconds.

But if you actually freeze frame it and magnify it it's illegible because the pixels are so small that when they are magnified, they are not legible.

So it did not comply with the ballot requirements 7- 104 and then in addition there was no adequate means of independent verification

as required by election law 7- 2021E and did not comply with the help America vote act disabilities requirements.

>> HELENA MOSES DONOHUE: Just for interests sake, I agree with Doug and will also vote no.

(Laughter.)

>> HELENA MOSES DONOHUE: I want you to know there is an open minded person hanging out up here.

(Applause.)

>> NEIL KELLEHER: In case you're wondering which one of us up here has a closed mind, I guess it's me.

Because I'm on your side.

>> DOUGLAS KELLNER: So how are you voting?

>> NEIL KELLEHER: Vote no.

>> DOUGLAS KELLNER: That fails.

A no vote in favor.

Any other business?

We need to set our next meeting date.

>> HELENA MOSES DONOHUE: We may have to do that ...

>> ALLISON: Set your next meeting.

>> NEIL KELLEHER: Recess?

>> ALLISON: We need to meet on the day after counties are to select so that if they haven't selected, we can select for them.

>> DOUGLAS KELLNER: Right.

>> ALLISON: So February 9, February 10

>> DOUGLAS KELLNER: The 11th is the first day we have on the time line for doing that was Monday, February 11th.

>> NEIL KELLEHER: Mondays are bad for you.

>> HELENA MOSES DONOHUE: It doesn't make any difference ...

>> ALLISON: We can do

>>: Stay with that?

>> ALLISON: Yeah.

>> NEIL KELLEHER: February 11?

>> HELENA MOSES DONOHUE: Does that work for you?

>> DOUGLAS KELLNER: Whatever date it is.

>>: What role does the staff need after February 8 so the Commissioners have something to vote on.

I know we have timing issues

>>: We gave you

>>: Are we submitting the order for the county or are we submitting the products and the county submits the order?

>> DOUGLAS KELLNER: Do you remember what happened two years ago when we ended up.

(Overlapping speakers).

>> DOUGLAS KELLNER: Commissioners on the phone and we tried to

Do you want to do it the same way at least in the first instance?

>> HELENA MOSES DONOHUE: Whatever is legal.

>> DOUGLAS KELLNER: Strikes me that's probably the best way to start out because if it's partisan, it's going to be

>>: Quiet please!

>> DOUGLAS KELLNER: So if it's all right with you, I would announce to the county Commissioners that if they don't agree,

then what we've discussed is that the State Commissioners will inspect the two

>> AUDIENCE MEMBER: Would you tell us which machines were passed and which ones weren't?

>> DOUGLAS KELLNER: So the ones, there were three that were adopted.

The Sequoia Image Cast, the Premiere Automark with modification and the ES&S Automark with modification.

Have we got a date?

While the staff just reviews what the date options are, the three Commissioners suggest that what we would do in the event that the county

does not make a selection by the February 8th deadline is that we would attempt to mediate between the two county

Commissioners to help them reach a decision.

Obviously with the weight of the State Commissioners being able to

Hopefully break a dead lock if the dead lock exists.

So that whatever date we would select, if the county Commissioners have not put in their orders and are on that list where the State board

has to make the choice for them, we would ask they be available either to come to Albany to meet with us in person or to be available

by phone at the time the State Commissioners hold their meeting to determine what machines to order for the county.

Commissioners Scanapicio. Do you want to use the mic?

>>: I think I

>> DOUGLAS KELLNER: Come up here so you'll be on the camera, too.

>>: If the majority of this room thinks the same as you and can't

(Overlapping speakers).

>> DOUGLAS KELLNER: Each of the vendors has assured us that they would be able to meet the full requirements statewide.

My suggestion would be that if in fact the vendor doesn't do that, there will not be primaries at every single poll site in September.

So the first allocation that would be made would be to have those jurisdictions that don't have primaries in September give up their machines.

And if there are still

You know, I don't even see that scenario happening.

The vendors have all said that they are able to meet the schedule, even if all of the counties should choose the same vendor.

Does anybody else want to address that issue?

>> ALLISON: Well, they said 6500.

They didn't say the 8,000 because we already have a couple hundred out there.

>>: Are we going to see the

>>: Modifications, disapproved three machines, based upon modifications you were received. We have to make registration by February 8.

When are we going to see those modifications?

>> HELENA MOSES DONOHUE: They should be in tomorrow, Monday at the latest.

>>: Hopefully tomorrow we can see them here?

>> HELENA MOSES DONOHUE: Will they be here?

I don't know if they are sending them to our office or not.

>> ALLISON: Do you want to see them here?

>>: Of course!

>>: If they are here, we can

We have a choice of three, it will be helpful.

>> ALLISON: We can tell the vendors.

I'm sure that if they have a modification that they can make while they're here

>> DOUGLAS KELLNER: I believe that the Premiere machine already has the modification that's out there.

I want to make clear just for the legal record that the reason I went along with this is because in my view this machine already met the State legal

requirements and that the modification is a very minor change that is surplusage.

Essentially the only modification that I understand it that is going to be made is that the first screen that will appear to the voter

will be a full face ballot rather than simply a listing of candidates for the first office on the ballot, which is how it appears now.

But I believe if you want to see what it looks like, you can look at the Premiere machine that's here.

It is an example of what they are doing.

>> ALLISON: Well, again, we haven't seen the modifications yet.

We've got to make sure that we accept the modifications as well.

>> DOUGLAS KELLNER: I have agreed to that.

>> NEIL KELLEHER: Yeah.

>> DOUGLAS KELLNER: I've agreed.

>> TODD VALENTINE: Right.

>> DOUGLAS KELLNER: I'm not trying to block you from doing that.

I want to make it clear legally that the only reason I'm going along with this is because I believe it already complied, as distinguished

from other vendors who wanted to still submit modifications but did not meet the January 10 deadline.

>> ALLISON: We are not accepting it like it was.

We are accepting with modifications.

>> TODD VALENTINE: We've got it.

I see what you're saying.

>> DOUGLAS KELLNER: All right.

Date?

No, no, wait

All right, go ahead.

>>: I'll wait.

>> DOUGLAS KELLNER: Come up.

>>: Come up so

>> DOUGLAS KELLNER: Come up so you can appear on the screen.

>>: Shall I get a shave first or something?

(Chuckles.)

>>: If a county does work to go with the Image Cast and had the large amount of unspent capital money in the allocated funds,

are we going to be able to use that for bat lot printing purposes spread over more than one year?

Which I estimate we probably would have, should Essex county go that route, particularly if we consolidated poll sites.

We will have a lot of money left.

>> DOUGLAS KELLNER: Do you know the answer to that?

Go ahead and say it.

>>: I believe that will be an issue that will be talked about this afternoon in the OGS session and beyond, but it is my understanding

that when you see the contracts and the terms and the pricing that the vendors had proposed, that that would be something that you could buy through

the contract and to the extent you haven't, if you have funds available you can

That's an approved use of the funds.

>>: The contracts are five year contracts?

>>: And the contracts are five year contracts, Anna added.

>> DOUGLAS KELLNER: Let me take a moment to discuss one other issue with my fellow Commissioners here.

That is, there are six counties that have gone on record saying that they would like to replace the lever voting machines this year and it is my view

that that will be feasible for those six counties.

And for any other county that wishes to pursue that.

That thinks that they can do it in a way that they can complete the necessary training and poll worker recruitment in order to implement it this year.

What involved is that we are getting all of the plan A submissions.

The deadline is tomorrow for submitting the hardware for certification testing under plan A.

The some of the systems are much further along in the testing process than others.

For example, the Sequoia Image Cast submitted to the certification commission and that certification process is nearly complete.

We have agreed at the State Board of Elections that any tests that were done for the federal certification can also apply to the New York certification

so that all that sys test will have to do to finish testing for the Sequoia Image Cast is to do the additional tests required by New York's regulations

that are not already required by the federal regulations.

So that it's possible that New York will have full certification for the Sequoia Image Cast this summer.

Even if we don't have full certification, if the three Commissioners agree with any of the systems that they can be safely used on an experimental basis,

we also have the authority to authorize that and I would certainly be inclined to do it if there were no known problems with the system.

So for those counties that do want to do this all in one step and think that they can do it without any the problems that other states have experienced

in doing the transition, then certainly I have no problem in authorizing them to do that.

>> TODD VALENTINE: We agree.

That's certainly part of the plan we put forward to the Department of Justice was that if that machine got to the point where the testing satisfied

what we believed that it works, we're ready to approve that.

And that process has started.

We are looking at the machine now.

>> DOUGLAS KELLNER: Dates?

>>: Another question.

>> DOUGLAS KELLNER: Who has the question?

>> DOUGLAS KELLNER: Come on up.

>>: Prices before February 8.

>> DOUGLAS KELLNER: The prices are supposed to be released today.

So Bob and Anna are saying that the prices will be distributed to you this afternoon here in Saratoga.

Come on up, Dave.

(Applause.)

>> DOUGLAS KELLNER: Dave?

Dave, stand up here so that the camera

>>: That's a contract price.

>> DOUGLAS KELLNER: Go ahead, Todd.

>> TODD VALENTINE: There will be a session this afternoon by the office of general services explaining the terms of the contract.

The prices that have been set are a ceiling.

If you are able to come to lower terms with the vendor, you have that ability.

We've said set, you know, the top price that they can charge depending on if you want to negotiate a lower price, you are free to.

Prices can always go down.

They can't go up.

>> ALLISON:

One system.

>> DOUGLAS KELLNER: Sorry.

>> STANLEY ZALEN: Specifically

Sorry, Dave, you'll get it back.

Specifically OGS should be here the last third of the 2 to 3:00 o'clock hour that we were assigned.

So you'll want to be here for that when OGS shows up, somewhere between 2:30 and 3:00 o'clock specifically.

Okay.

>>: Anybody else?

(Chuckles.)

>>: No, I would just like to say, I think we have to put this into context a little bit.

We are being told that two weeks from tomorrow we have to make the choice.

I don't need to say that I'm very disappointed in the lack of choice because it really is lack of choice, but that said, to put it further into context,

not only are we asked to do this in two weeks without full information, we have a primary to run February 5.

And you're talking about us making a decision that will impact the voters, tax payers in all of our counties in two weeks when this process

has been going on for years.

I just think this is a bad day for the voters.

I think it's a bad day for us.

And you know, I'm very disappointed.

I do want to

People are putting things on the record.

To ask us to do this in two weeks because in the real world that we live in, our decision is going to be put under the microscope, as it should be.

We'll be asked for cost analysis, does this system cost X?

And it's a lot more than what the machine costs.

It's going to be warehousing, storage, manpower, people power.

We are going to be asked a lot of questions to justify the decision that we are going to make with a gun to our head.

Again, in just two weeks when it's right in the middle of running a Presidential primary.

So you know, again this is not the only board at the state or the only people in the State that put the gun to the localities,

and I'm confident that we are going to do our best job possible, but it's a really disappointing day when we are asked to do a job

like this in two weeks and run a Presidential primary.

Thank you.

(Applause.)

>> DOUGLAS KELLNER: Is there anyone else who wants to address the Commissioners?

Susan, you had asked

>>: We will know how much HAVA money we have?

>> HELENA MOSES DONOHUE: Yes.

>> DOUGLAS KELLNER: Yes, you will know what your HAVA fund availability is.

Susan, would you come up?

>>: Thank you.

>> DOUGLAS KELLNER: Introduce yourself.

>>: Thank you, Commissioner.

Thank you, Commissioner Kellner.

My name is Susan.

I'm with the New York State independent living council.

I also coordinate the statewide disability coalition called New Yorkers with disabilities getting equal voting access.

Its comprised of 20 major not for profit disability organizations.

I want to say first of all we take this issue very seriously.

I have worked night and day.

I worked as close to as many hours as you guys do.

Been working on it for four years.

We are very disappointed in the whole process.

I have been to every meeting for four years, both at the legislature and the State board.

It has been very difficult.

Individuals with disabilities want to vote.

They want to be part of the electoral process.

They don't want to vote absentee ballots.

They want to be part of the communities and be active citizens.

This help America vote act was our opportunity to do so and we have been very excited with the passage.

We have not been excited with the process, all of the lawsuits that have gone on.

The process ended up with three machines and we want to let the counties know we are there for you.

We have a strong network throughout the State.

There are independent living centers and other experts.

I will be sending you all of you an amicus brief we sent to Judge Sharp, talking about some of the technical issues, the pros and cons of the different systems,

the different accessibility features that we need.

All I ask from the group here, this is to consider

I know the speaker before said it very articulately.

You have a huge task.

All you want to

All we want to do is make it go as smoothly as possible.

It includes poll site access, includes transportation, poll worker training, all the aspects related to disability.

I want you to know that we are there to help.

We will sending you all packages as soon as I get the right e mail.

You can call us for technical assistance.

We want to help you make the best decision possible.

Know it's important to us and voters are dependent on your decisions.

We really care.

You are not alone.

Thank you very much for all your hard effort.

Thank you.

(Applause.)

>> DOUGLAS KELLNER: Thank you, Susan.

All right, I'm told that in terms of dates for our next meeting that we should meet February 11th or soon thereafter.

So should we agree on February 11th today?

>> NEIL KELLEHER: That's fine.

>> TODD VALENTINE: That's one day.

That's a Monday.

That's up to you.

>> DOUGLAS KELLNER: We will agree that February 11 is our next date.

Are there any other Commissioners that want to address this before we adjourn our meeting?

Go ahead, of course.

>> HELENA MOSES DONOHUE: I would like to tell you that Evelyn is not here.

Most of you know that she had serious surgery and then she fell.

>>: Oh, my gosh!

>> HELENA MOSES DONOHUE: So if any of you would like to send a card to her, I think she's going to her daughter's house,

but you can send it to the State Board of Elections and I know that Donna will send it on to her.

I'm sure she misses you as much as we misses her.

Thank you for your kindness.

I appreciate all the advice I got last night.

You're wonderful.

>>: Motion to adjourn.

>> HELENA MOSES DONOHUE: Motion to adjourn?

>> DOUGLAS KELLNER: Come on up.

>>: I'm from Avante.

>> DOUGLAS KELLNER: Come on up. Come on up here.

>> NEIL KELLEHER: The microphone

Could you go Doug the camera is there.

You can stand there if you want to try to address both the camera and us.

>>: Quiet, please.

>>: I'm Glen Beasley from Avante international. Our CEO Charlie is going to make a brief comment about what has been going on.

>>: Thank you very much for permitting me to make a comment.

Of course, as a company we are very disappointed.

However, we also think equally speaking there are two aspects.

I think Commissioner might have made mistake judgment in terms of how to read the code.

Here is two comments.

One is called independent verification of the vote.

Basically based on supposedly federal guidelines, so the software independent verifications.

All the current system have proved uses a bar code to retract that to get templates from the machine that map the device.

So therefore it's not software independent.

Legally that interpretation is totally false and mistaken.

So I believe that should be rejected at the end and we will put legal challenge against them.

Number two is that the same law requires full face presentation of the ballots.

Actually also requires should be in spirit full face presentation and selection by the voter at all times.

So if that's the case, our 42 inch ballot marking device is the only system that satisfies that requirement as well.

Again, I think the Commissioners probably in this case make a wrong judgment as well.

That's my comment.

Thank you very much.

(Applause.)

>> HELENA MOSES DONOHUE: Make a motion to adjourn.

>> DOUGLAS KELLNER: So those in favor, say aye?

Aye.

(Chorus of aye).

>> DOUGLAS KELLNER: We are adjourned until February 11.

(The meeting concluded.)

Exhibit D



State of New York
STATE BOARD OF ELECTIONS

Neil W. Kelleher
Chair
Helena Moses Donohue
Commissioner
Todd D. Valentine
Executive Director

40 STEUBEN STREET
ALBANY, N.Y. 12207-2108
Phone: 518-474-8100 Fax: 518-486-4068
www.elections.state.ny.us

Douglas A Kellner
Chair
Evelyn J. Aquila
Commissioner
Stanley L. Zalen
Executive Director

January 29, 2008


Dear County Boards of Election,

As you are aware, on January 24, 2008, the State Board met and pending the result of testing, voted to authorize the use of voting machines as ballot marking devices. The Sequoia Image Cast (aka Dominion) was approved by the Commissioners present. The Co-Executive Directors reviewed to determine if the ES&S and Premier AutoMark portion of their voting systems were modified so that they comply with the ballot display provisions. We have reviewed the modifications to those machines as offered by ES&S and Premier. We are constrained to find them to be non-compliant by a split determination, Stanley Zalen voting that the modification is compliant and Todd Valentine voting that the modification is not compliant.

It is also significant for you to take note of the fact that Liberty has sued us with regard to the determination made by the Board that their machine was non-compliant. A hearing on that matter is scheduled for Thursday January 31st. We will do our very best to keep you apprised of the developments with regard to this lawsuit as they occur.

At this time, the Counties' sole choice for purchase of a ballot marking device is the Sequoia Image Cast.

Sincerely,


Stanley L. Zalen


Todd D. Valentine

From: ALLISON CARR
To: All County Contacts
CC: brian.f.heffernan@usdoj.gov; CARR, ALLISON; COLLINS, PAUL; Dvorin, Je...
Date: 1/30/2008 4:11 PM
Subject: URGENT
Attachments: Automark letter 1-29-08.pdf; emails.pdf

Dear County Boards,

The attached e-mails from OGS dated January 28th and January 29th are hereby retracted with the consent of OGS, please ignore them. The attached State Board of Elections correspondence of January 29th, distributed via e-mail, is hereby modified in accordance with the following:

There is litigation brought by Liberty Election Systems, LLC which may affect the pool of ballot marking devices which may be ordered. We anticipate a decision from the Court on Monday, February 4, 2008. Further guidance will be provided at that time.

The February 8th deadline for ordering ballot marking devices remains valid, as it was established by Federal Court Order.

Sincerely,

NYSBOE and OGS

Weiss, Howard S.

From: LEE DAGHLIAN [LDAGHLIAN@elections.state.ny.us]
Sent: Friday, February 01, 2008 1:45 PM
To: Malito, Stephen A.
Subject: Fwd: Transcripts 2 and 3
Attachments: transcript3.doc; transcript2.doc

See attachments.

Lee Daghlian
Director of Public Information
NY State Board of Elections
40 Steuben St.
Albany, NY 12207
518-474-1953

>> NEIL KELLEHER: The first thing I'm going to do is something I don't think I should do.

If I care anything at all about my life. That is to apologize for what we did to you this afternoon and I guess what I'm saying is, I'm afraid to apologize because if I was out there with you, I wouldn't accept it.

>> AUDIENCE MEMBER: Oh, we accept it--
(Applause.)

>> NEIL KELLEHER: But there's only one steering wheel in this bus and it was my day to drive.

(Chuckles.)

>> NEIL KELLEHER: Our reason for the delay was because we were hung up in some communications with Albany having to do with language and perhaps improper language that was in something we were going to deal with today and some additions to it.

And that is primarily the reason why we waited that long.

And I want you to know that I promised my wife I would be home at 4:00 o'clock

(Chuckles.)

>> NEIL KELLEHER: Thank God, I'm 85 or she would --

She would probably by this time decide I ran off with one of the attractive Commissioners here.

(Laughter.)

>> NEIL KELLEHER: Incidentally, if there's anybody else got that kind of thought, at least share it with me.

(Laughter.)

>>: I'll go, I'll go.

(Chuckles.)

>> NEIL KELLEHER: I've got to tell you a story.

This is a true story.

I've got every kind of a doctor.

I've got nine doctors.

Every part of my body is covered by at least one doctor.

My urologist is a man from India.

An absolutely fantastic guy.

You talk about a guy who cares about his

patients.

He's too serious sometimes.

So over a period of seven or eight years, I had had just about everything available to the doctor in terms of examination without going right in and taking out my hoo ha.

(Laughter.)

>> NEIL KELLEHER: I had that treatment that you get --

It's an examination where you put your two legs over the top of these metal racks?

I think you women who have children had something to do with those.

This is a true story! This is a true story.

(Much general discussion and laughter in the audience.

).

>> NEIL KELLEHER: That's exactly what I'm talking about, the ones that go like this.

So anyway, on top of that after that bout, I guess a year later he decided that he wanted --

That was an outpatient exam.

The following year he gave me the roter-roter, which requires a certain exercise by the doctors and then you spend five days in the hospital walking up and down the hallways carrying a bag of you know what inside your bath robe.

I'll get right to the punch line because he said to me one day.

Very serious man and I'm telling you the truth.

He said to me, Mr. Kelleher, the monotones of the Indians, it's beautiful, the accent, whatever it may be.

He said you have had just about every examination possible.

He said you're coming along okay.

He said you're right at this age --

This is probably four or five years ago.

He said you're right at that age where I wonder what effect these treatments I'm giving you, these roter-roter things --

That's my language, not his.

He said I have to get some idea of how much damage I might have done in the process.

He said how would you feel if I asked you to

try a little Viagra.

>>: No!

>> NEIL KELLEHER: And it wasn't Viagra.

It was something called muse.

I thought the pronunciation was moose and I got me into a lot of trouble.

But it was called muse.

I said doctor, let me say this to you.

If this is very important to you in terms of my condition and perhaps for future reference with other patients, I probably would do it.

Unless it's absolutely necessary, I would just as soon not.

He got all apologetic.

Oh, Mr. Kelleher, no, no, he said it's fine.

I said okay, fine.

Let's talk about it another time.

He said do you mind?

I want to ask you a question, Mr. Kelleher.

He said do you mind telling me why you are reluctant?

He said there's no, there's nothing negative that can happen to you as a result of taking this medication.

Except I find --

I'm not going to go there.

But he said would you mind telling me why you decided that you would rather not?

Well, I said doctor, it's a very simple explanation.

I said if I tried that drug and it worked, I can't remember what the hell you do next.

(Laughter.)

(Applause.)

>>: Where the hell --

>> DOUGLAS KELLNER: You have any more stories?

>> NEIL KELLEHER: No.

>> HELENA MOSES DONOHUE: I don't have any stories.

I just also have an apology that we took so long today.

We were attempting and we have been attempting to resolve this issue.

It's imperative for us to do this because it will affect generations to come.

As you know better than most people.

Now, as soon as Allison comes in, we have worded this proposal and we will give it to you exactly the way we feel that it should be worded.

And then we will vote on it.

And whatever the results are, I hope that it works for you and I hope it works for the state of New York. We'll send somebody out to get her.

Just a second.

(Pause.)

(General discussion)

>> HELENA MOSES DONOHUE: Now, tell them now.

Enough is enough.

>> NEIL KELLEHER: Yeah. It really happened.

>>: Did you hear norm's story before about the infomercial.

>> NEIL KELLEHER: Did you hear that if you use it and such-and-such hasn't happened in so many hours, head for the hospital?

I wouldn't head for the hospital.

>>: You're going to be more famous than you thought because this is going to be webcast tomorrow.

(Chuckles.)

(Loud discussions in the audience.)

).

>> NEIL KELLEHER: We've got to come to the bottom of this shit later.

>> HELENA MOSES DONOHUE: I hope so.

>> NEIL KELLEHER: Did they find her?

(Pause.)

>> NEIL KELLEHER: You done good.

Dominion?

Dominion?

>>: Did you explain that this is an important decision?

>> NEIL KELLEHER: Thank you very, very much again for the --

(Applause.)

>> NEIL KELLEHER: I wish I could find a good reason for it, but I can't.

I thought the Assembly was crazy.

I was over there for 26 years and come over

here to get a little peace and quiet.

Apparently it gets too quiet sometimes.

Anyway, I would like to make the following proposal, introduce the following resolution, I believe it is, for the approval of four machines that has been the result of a great deal of conversation.

I'm speaking for those people you obviously are familiar with up here.

And some changes, as a matter of fact, today.

Or rather touching some bases to be sure what the impact, what the result will be.

I would like to have Allison, would you describe them?

>> ALLISON: Absolutely.

Resolution number --

The resolution is that the following voting machines shall be approved as ballot marking devices.

The Dominion, the Liberty, and the following ballot marking devices shall be approved with conditions.

The Avante DRE, pending approval by the co-executive directors of a scanner to be attached for independent verification.

And the Automark pending approval of a firm ware change to allow the system to display a full-face ballot.

>> NEIL KELLEHER: Do I have a second on the motion?

>> HELENA MOSES DONOHUE: Second.

>> NEIL KELLEHER: Seconded.

All those approved say eye?

>> HELENA MOSES DONOHUE: Aye.

>> DOUGLAS KELLNER: You going to discuss it at all?

>> NEIL KELLEHER: If you want to.

Don't be bashful.

Don't be bashful.

>> DOUGLAS KELLNER: Obviously I don't approve of the resolution as written.

While you were out, I know we had gotten word you were going to come back at 3:30.

While you were out I did go on for about half an hour explaining the outline of my views on the subject.

And just to repeat it for the record, I have no problem with approving the Dominion machine and I have no problem with approving the Automark.

I would approve the Automark unconditionally, but I can probably go along with your request that there be a firmware change.

The, it is somewhat inconsistent, however, to be having conditional approvals at this point because of the time line.

And that we are under serious pressure to keep the calendar moving and to get the selection process moving.

And that is why we had agreed to a January 10 deadline for the submission of the systems that would be considered by the State board for approvals to the Commissioners.

So --

So at this point I will vote against this resolution.

I will offer a separate resolution following that to approve the Dominion and Automark machines and if you are inclined to support that, then we could discuss whether to make it conditional on the firmware change.

>> NEIL KELLEHER: Thank you, Doug.

Do I hear a second?

Did you introduce an amendment by any chance in that language?

>> DOUGLAS KELLNER: No.

>> NEIL KELLEHER: All right.

>> TODD VALENTINE: Already seconded.

He voted.

>> NEIL KELLEHER: Okay.

On my motion or on Allison motion for the approval of the four machines, I'll call the roll call.

Doug?

>> DOUGLAS KELLNER: No.

>> NEIL KELLEHER: Helen?

>> HELENA MOSES DONOHUE: Yes.

>> NEIL KELLEHER: And the chair votes yes.

As far as I'm concerned, that's all the business we were going to deal with tonight unless you have some parting words to share --

>> DOUGLAS KELLNER: Well, I'm going to make

a motion that we approve the Dominion machine and then after we vote on that motion, I will make a separate motion with respect to the Automarks.

So I would call for a vote on the motion to approve the Dominion machine.

>> HELENA MOSES DONOHUE: Discussion on your motion.

>> DOUGLAS KELLNER: Actually, I'm sorry. We shouldn't be calling it Dominion because none of the paperwork that was submitted uses that name.

It's the Sequoia Image Cast.

>> NEIL KELLEHER: Is there a second on that motion?

(There is no response.)

>> NEIL KELLEHER: If not, it will not bring about a call for a vote.

>> DOUGLAS KELLNER: All right.

And then I will make a motion that we approve for selection by the counties the ES&S Automark submission and the premiere Automark submission.

>> NEIL KELLEHER: Do I have a second on that motion?

>>: No, no.

>> NEIL KELLEHER: If not, it obviously can't be voted on.

Any more, anything else to be brought before the board?

Doug?

>> DOUGLAS KELLNER: So at this point I just want to emphasize that at least on my part the decisions were made on the basis of my analysis of the statutes as I reported in summary fashion earlier.

I believe that we are under court order to proceed.

I would ask my fellow Commissioners if by their vote against or their refusal to vote on the Dominion machine they are indicating --

I'm sorry, I'm using Dominion again.

Their refusal to vote on the Sequoia Image Cast, they are indicating that they believe that the Sequoia Image Cast does not comply with the New York legal standards.

>> ALLISON: It was a package deal.

It was a package deal.

>> NEIL KELLEHER: Do you want to add on --

>> ALLISON: Commissioner, with all due respect, we too, our Commissioners reviewed every machine for its legal compliance with New York state statute.

We offered a deal of four machines that do pass New York state statutes.

Two of them with amendments.

We simply feel that this is a \$50 million expenditure and is the machine that is intended to be used by the disabled for the next generation.

We feel it is extremely important and that the county should have a choice.

These four machines are excellent options.

We offer them as a package deal.

>> DOUGLAS KELLNER: Okay.

Well, so I just want to emphasize that basically then I understand that the Republican Commissioners are arguing that the Dominion and the Liberty comply with New York law.

I've set forth my reasons why I believe that the --

I'm sorry, I did Dominion again.

The Sequoia Image Cast and the Liberty machine, that the Republicans are arguing comply with New York law.

I set forth my reasons on why I believe the Liberty machine does not comply with New York law because it does not produce a ballot and a ballot marking device needs to produce a ballot as New York law prescribes.

Secondly, because the Liberty machine does not provide for independent verification as required by seven-202.

So on that basis, I think we need to notify the Department of Justice that the Commissioners are not able to agree on sending a machine to the counties for selection and I would ask that we agree that that should happen first thing tomorrow morning.

>>: Do we agree on that?

>>: We agree.

>> TODD VALENTINE: We will agree to send a joint e-mail.

>> STANLEY ZALEN: Saying there's a failure

to select because it takes three votes?

>> TODD VALENTINE: Yes.

>> DOUGLAS KELLNER: Okay.

We should discuss the date for our next meeting.

>> NEIL KELLEHER: You understand, of course, that the intention of myself and Allison was to, after a great lengthy discussions over the past couple of weeks, was to make several machines available to you people that you can finally get your teeth into and make up your mind just what direction you want to go.

That's why we spent a great deal of time today talking about language that was involved in all four contracts having to do with the different manufacturers.

That's where I am right now, still am.

And I feel a lot better about what we did, in some instances did not do today.

I feel a lot better if I knew you would be able to take out of here tonight the opportunity to scan, look over your self those four machines and give you a chance to digest it and certainly you had to wait long enough to finally get something in your hands that you can consider and get on with your work.

The time, I know, is of the essence.

I'm sorry it worked out that way, but today we intended to give you a choice that was worthwhile.

That's why we came up with four machines.

And as far as I'm concerned, that's where we should leave it right there.

>> HELENA MOSES DONOHUE: The question was asked when our next meeting would be.

We are prepared to meet tomorrow.

>> DOUGLAS KELLNER: Okay, I'm here.

>> STANLEY ZALEN: 11:00 a.m.?

>> HELENA MOSES DONOHUE: 11:00 o'clock okay?

>> NEIL KELLEHER: That should be okay.

>> STANLEY ZALEN: Todd, if there's going to be a meeting of the Commissioners tomorrow at 11, then I don't believe we will be notifying DOJ until after that meeting.

Right?

Agreed?

Very good.

>> ALLISON: Okay, the meeting is tomorrow at 11.

Let them know --

>> NEIL KELLEHER: We'll meet tomorrow at 11.

The board will meet tomorrow at 11:00 o'clock.

And hopefully you won't have to sit in these same seats for a long length of time waiting for some kind of a product to come from this end.

Rest assured if that happens we'll make sure that we scatter through the corridors and make sure you're brought back in here.

We owe you at least that much.

So the board will now stand adjourned until 11:00 o'clock tomorrow morning right here.

Thank you.

Thank you very, very much.

(The meeting adjourned.)