

**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ALBANY**

**LIBERTY ELECTION SYSTEMS, LLC  
Petitioner,**

**-against-**

**ORDER TO  
SHOW CAUSE  
Index #**

**NEW YORK STATE BOARD OF ELECTIONS, and  
DOUGLAS A. KELLNER, EVELYN J. AQUILA,  
NEIL W. KELLEHER and HELENA MOSES DONOHUE,  
SAID COMMISSIONERS TOGETHER CONSTITUTING  
THE NEW YORK STATE BOARD OF ELECTIONS, and  
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,  
Respondents.**

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Present: Hon.

Upon reading and filing the verified petition of Liberty Election Systems, LLC and all the proceeding heretofore had herein, it is hereby

**ORDERED**, that respondents show cause before this Court at the Albany County Courthouse, in the City and County of Albany, New York on the 31<sup>st</sup> day of January, 2008 at 1:30 p. m. of that day or as soon thereafter as counsel can be heard why an order should not be made and entered herein:

1. Directing that respondents take any and all actions necessary to approve and otherwise permit petitioner's LibertyMark to be among those ballot marking devices that were approved by respondents on January 24, 2008 to be examined and included for the vendor selection process for 2008 elections including primaries in the State of New York, and/or

2. Restraining the respondents until further order of this Court from taking any action, including but not limited to issuing list(s) of ballot marking devices approved by respondents to be examined and included in the final vendor selection process for the 2008 elections including primaries in the State of New York, and

3. Directing the respondents to immediately distribute all petitioner's bid information, including but not limited to petitioner's offered systems and price information, to all County boards of elections, relevant to the to support the selection of their preferred Ballot Marking Device for use in the 2008 elections.

4. Directing the Office of General Services to forward to the Office of State Comptroller a contract for petitioner's LibertyMark in accordance with proper procedures

5. Granting such other and further relief as to the Court may seem just and proper, and it is further

**ORDERED**, that respondents are to produce <sup>at 9:30 a.m.</sup> upon the return date of this proceeding any and all original determinations, certifications, resolutions, minutes, audio and video recordings, reports and records of any kind of or relating to respondents' meetings and determinations concerning the subject matter of this proceeding, and it is <sup>in the possession and control of the respondents NYS Board of Electw</sup> further

**ORDERED**, that respondents are to produce <sup>at 9:30 a.m.</sup> upon the return date of this proceeding all original records including but not limited to memorandums, computer records, e-mails, correspondence, notes, reports, tests, invoices, checks, and receipts concerning the services of Ciber Laboratories Inc. including subcontractors but not

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limited to, Wyle Laboratories, NYSTEC and American Institute of Research performed in connection with the testing of petitioner's voting systems, and it is further <sup>in the possession and control of the defendants/issuance NYS Board of Elections</sup>

**ORDERED**, that leave is hereby granted to petitioner upon the return date of this proceeding or any adjourned date thereof to submit such additional proof, by way of affidavits, exhibits, or other evidence in support of the petition, and it is further <sup>AS IT RELATES TO THE DETERMINATION OF THE RESPONDENTS</sup>

~~**ORDERED**, that until further Order of this Court respondents shall include petitioner's LibertyMark on the approved list of ballot marking devices to be tested for use in the 2008 elections including primaries in New York State,~~

Sufficient cause appearing therefor, it is further

**ORDERED**, that because the Court finds that the circumstances in this case prevent the immediate filing of the Order to Show Cause and Petition herein, permission is therefore granted to the petitioners pursuant to CPLR 304 to file the application for an index # and RJ1 on or before 5:00 p.m. January 29, 2008 with the Albany County Clerk, and it is further <sup>on January 24, 2008;</sup>

**ORDERED**, that service of this Order to Show Cause and the Petition upon which it was granted upon <sup>counsel for</sup> respondents 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, 40 Steuben Street, Albany, New York and giving such papers to a person authorized to accept such papers on behalf of said New York State Board of Elections on or before January 29, 2008, and upon <sup>counsel for</sup> respondent New York State Office of General Services by delivering a copy thereof to the New York State Attorney General's Office in Albany, New York on

or before January 29, 2008; and that such service shall constitute good and sufficient service of the within proceeding.

Signed this 28<sup>th</sup> day of January 2008 at Albany, New York.

Wanda J. O'Connell  
J.S.C.

**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF ALBANY**

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**LIBERTY ELECTION SYSTEMS, LLC  
Petitioner,**

**-against-**

**VERIFIED  
PETITION  
Index #**

**NEW YORK STATE BOARD OF ELECTIONS, and  
DOUGLAS A. KELLNER, EVELYN J. AQUILA,  
NEIL W. KELLEHER and HELENA MOSES DONOHUE,  
SAID COMMISSIONERS TOGETHER CONSTITUTING  
THE NEW YORK STATE BOARD OF ELECTIONS, and  
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,  
Respondents.**

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**PARTIES**

1. Petitioner Liberty Election Systems, LLC is a New York limited liability company with office in Albany County, New York and brings this proceeding pursuant to CPLR Article 78.

2. Respondents Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher, and Helena Moses Donohue are the Commissioners of the New York State Board of Elections and are named as respondents in their official capacity.

3. Respondent New York State Board of Elections is a New York State Agency and is amongst others, responsible for administration and enforcement of all laws relating to elections in the State of New York.

4. Respondent New York State Office of General Services is a New York State Agency and is responsible for preparing and awarding certain bids to vendors doing business with the State of New York.

#### **SYNOPSIS OF THE CASE**

5. On October 17, 2007 the Office of General Services (“OGS”) published bid specifications for companies to bid on a Ballot Marking Device (“BMD”) to assist people with disabilities to vote independently beginning with the 2008 fall primary and general election.

6. The bid specifications did not envision an award to any one company. Rather, they were designed to encourage the approval of several different companies’ machines, providing the County Boards of Elections with choices as required by Election Law 7-202(4).

7. Petitioner submitted a bid, which OGS has certified as responsive to the bid specifications. The next step in the process, pursuant to the bid specifications, is to have petitioner’s BMD, known as LibertyMark, examined by Systest Laboratories (“Systest”), the laboratory certified by the New York State Board of Elections (“Board”) to conduct mandatory system examination pursuant to the bid specifications.

8. On January 24, 2008, however, the Board met to discuss the bids before any examination by Systest Laboratories. Two commissioners (Kelleher and Donohue) voted in favor of having the LibertyMark included in the examination and vendor selection process and one (Kellner) voted against. One Commissioner (Aquila) was absent.

9. Because the affirmative vote of three Commissioners is required for any action, Mr. Kellner's negative vote effectively blocked the LibertyMark from being examined against the specifications and the vendor selection process.

10. In summary, petitioner has submitted a bid that has been certified by OGS as responsive to the bid specifications. Pursuant to the bid specifications, the LibertyMark should now undergo the required examination and be included in the vendor selection process. As detailed below, the actions of commissioner Kellner circumvented the process and arbitrarily and capriciously excluded the LibertyMark from consideration. We are asking that the LibertyMark be added to the list of BMDs to be examined by Systest and included in the vendor selection process.

#### **FACTUAL BACKGROUND**

11. As the Court is undoubtedly aware, in 2002 Congress enacted the Help America Vote Act ("HAVA") as a result of difficulties experienced in the 2000 presidential election. Section 301 of HAVA mandated that, by January 1, 2006, all states have in place voting systems that fully comply with the technical requirements of HAVA. Those requirements are set forth in Subtitle A of Title III of HAVA. All states other than New York are now in compliance with HAVA.

12. The petitioner is a company that was created for the purpose of developing, marketing and supporting electronic voting systems for use in the State of New York. Toward that end petitioner has expended sums in excess of Five Million dollars and has been certified as having developed a HAVA compliant voting system, known as the LibertyVote and LibertyControl. Petitioner wishes to market its voting system to

Counties in New York State and some 20 Counties have indicated that it is their preferred system. Additionally, numerous other Counties have expressed a serious interest in considering to use petitioner's systems. Absent relief from this Court, however, those Counties will not have the option of purchasing petitioner's voting machine. The NYS Board of Elections ("Board") met to consider ballot marking devices on January 23 and January 24, 2008. Two Commissioners voted in favor of having petitioner's LibertyMark included for examination and the vendor selection process, one voted against, and one was absent. Because 3 affirmative votes are required (Election Law 3-100), petitioner's machine was not approved. For the reasons set forth below, that action was unlawful, arbitrary and capricious.

13. Pursuant to HAVA, certain companies have been designated by the Federal government to evaluate and test proposed voting systems for HAVA compliance. In November of 2004 petitioner obtained federal certification that their voting system fully complied with HAVA. Petitioner filed on December 22, 2004 an application for certification at NYSBOE to meet New York State Election Law for Voting System Requirements in force at that date. In June of 2005 Wyle Laboratories, a laboratory duly accredited by the Election Assistance Commission, again attested that petitioner's voting system complied with HAVA and further attested that it also complied with all New York State requirements. Subsequently, however, New York State adopted, by law and regulation, certain technical requirements that were not contained within HAVA, the preceding New York State voting system standards and the LibertyVote system of petitioner.



14. Said law known as the New York Voting Systems Reform Act, was adopted in July of 2005 and provided the legal basis at state level to implement HAVA in New York. Petitioner again modified its proposed voting system to incorporate those requirements, including but not limited to, a voter verified paper audit trail provision, a 'Sip N Puff' device for disabled voters and an internal resident memory. After July 2005 it took the New York State Board of Elections until May 2006 to revise and adopt a revised version of the New York voting system standards. In July 2006 petitioner submitted its voting system for approval by the New York State Board of Elections. The Board designated Ciber Laboratories to conduct testing on petitioner's proposed voting system. That testing was done at petitioner's expense and the Board required petitioner to deposit with the Board the sum of \$170,000.00. To date, petitioner has never received a complete and satisfactory accounting as to how the total sum of \$170,000.00 paid by them to the Board for testing by Ciber Laboratories has been spent.

15. In February of 2007 the Board advised petitioner that it was discontinuing use of Ciber Laboratories as an accredited laboratory and would not be honoring the successful completed certification test results provided concerning petitioner's system. The Board advised that it would in due course designate a new laboratory to provide those services and that petitioner would be notified when the decision regarding the identity of the new laboratory was made. On or about December 7, 2007 the Board certified Systest Laboratories as the new entity to determine a voting system's compliance.

16. Unfortunately the Board had done practically nothing to certify any voting system to be in compliance with both federal and state law.

17. Upon information and belief, New York State is the only state in the country that is not in compliance with HAVA. Because of this fact the Justice Department has proceeded against the Board in Federal Court for the Northern District of New York on at least two occasions seeking to compel New York's compliance. On January 16, 2008 the Honorable Gary L. Sharpe, United States District Judge for the Northern District of New York, issued a Supplemental Remedial Order compelling New York to be in full compliance with HAVA by 2009 and to be at least partially compliant by the fall of 2008. A copy of Judge Sharpe's order is appended as Exhibit A. Among other things, that order mandated that the Board "make all possible efforts to provide for certification of a [HAVA compliant] voting system(s) in time for use of such system(s) in the fall of 2008 federal primary and general elections by such counties as wish to utilize fully HAVA-compliant voting systems in such elections." Despite the fact that petitioner has developed and had certified a fully HAVA compliant voting system, Commissioner Kellner's dissenting vote will prevent any Counties from using the LibertyMark for the 2008 elections in New York and as a consequence hereof also from using the Liberty Vote thereafter.

18. On October 17, 2007 the Office of General Services ("OGS") published bid specifications for companies to bid on a Ballot Marking Device ("BMD") for temporary use in the 2008 election. A Ballot Marking Device is a sophisticated device with the object to allow voters with disabilities to vote. A BMD is not defined in HAVA, New

York State Law, or New York State regulations. The Board prepared bid specifications for such a device in response to Judge Sharpe's order. Subsequently the petitioner complied with all specified submission requirements necessary and within the specified timelines to be included in evaluation to be considered as a successful bidder in the RFI 21231 process. As of Friday, January 18, 2008 it was confirmed by the Office of General Services that their recommendation of our award to the NYS Comptroller's Office was finalized.

19. Section 3-100 of the Election Law requires the "affirmative vote of three commissioners" for any official action of the Board. At the Board's January 23 and 24, 2008 meetings one commissioner was absent and three commissioners appeared. Two commissioners voted in favor of approving petitioner's LibertyMark and one commissioner (Commissioner Kellner) voted against it. Thus, LibertyMark was approved by a majority of the state board commissioners attending the meeting. Moreover, it was at this point of the meeting that the Co-Chair Commissioner Kelleher voiced the opinion that choices should be given to county boards of elections and asked the county commissioners by a show of hands if they support the LibertyMark system to be included on the list. There was overwhelming support for the LibertyMark.

20. Upon information and belief, the respondents intend to publish a list of vendors approved to sell voting systems to counties. Petitioner's voting system, by virtue of the lone dissenting vote of Commissioner Kellner will not be on that list for examination and the final vendor selection process. As a result, petitioners will suffer

immediate, severe and irreparable financial harm. Accordingly, petitioner requests that this Court issue a temporary restraining order and preliminary injunction, directing respondents to include petitioner's LibertyMark on the list of machines to be tested by Systest.

### **RESPONDENTS' CONDUCT WAS UNLAWFUL**

21. Respondents failed to perform duties enjoined upon them by law; or respondents are proceeding and/or are about proceed without or in excess of jurisdiction; or respondents' determinations were made in violation of lawful procedure, were affected by an error of law, or were arbitrary and capricious or an abuse of discretion in that:

A. Petitioner complied in all respects with bid specifications.

B. The machines of two vendors were conditionally approved and such Vendors were granted leave to modify their machines (Premier Automark and ES&S Automark) at a later date, but petitioner was not accorded such opportunity. Moreover, the purported objections of Commissioner Kellner could easily be addressed by modification. This disparate treatment of petitioner is violative of Procurement Stewardship Act. Additionally, such disparate treatment of petitioner was violative of due process and equal protection.

C. Respondent's bid specifications did not permit such a determination to be made.

D. The determination was contrary to HAVA mandates and the New York State Election Law.

E. The respondent's bid specifications and procedures were contrary to law including HAVA mandates and were impermissibly vague and violative of due process.

F. The aforesaid determinations and the process leading to same including the respondents' bid specifications are violative of the orders of the United State District Court for the Northern District of New York in United States of America v. New York State Board of Elections et al, Civil Action No. 06-CV-0263 (GLS) including but not limited to the Supplemental Remedial Order dated January 16, 2008, Hon. Gary L. Sharpe, presiding, which provided that "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..."

G. The aforesaid determination and process leading thereto including bid specifications were violative of State Finance Law §163 including but not limited to that the process shall be guided by among other principles, that it "be based on clearly articulated procedures which require a clear statement of product specifications, requirements or work to be performed; a documentable process for soliciting bids, proposals or other offers; a balanced and fair method, established in advance of the receipt of offers, for evaluating offers and awarding contracts; contract terms and conditions that protect the state's interests and promote fairness in contracting with the business community; and a regular monitoring of vendor performance," and "To encourage the investment of the private and not-for-profit sectors in New York state by making reasonable efforts to ensure that offerers are apprised of procurement opportunities; by specifying the elements of a responsive bid and disclosing the process

or awarding contracts including, of applicable, the relative importance and/or weight of cost and the overall technical criterion for evaluating offers; and by ensuring the procurement is conducted accordingly.” [§ 163(2)(b),(c)].

H. The aforesaid determinations and process leading to same including bid specifications are violative of law and respondents’ own regulations including but not limited to 9 NYCRR Part 6209, and §6209.2 thereof governing Polling Place voting system requirements, which mandates a full ballot display on a single surface [9 NYCRR 6209.2 (a)(1)]. Moreover, petitioner is upon information and belief the only entity to be offering a voting machine that complies with the font size requirement of such regulations [9 NYCRR 6209.2 (f)(1)(iii)].

I. The aforesaid determinations and process leading thereto, including bid specifications were violative of State Administrative Procedure Act provisions for rule making in that, among other things, respondents have sought to avoid compliance with rule making procedures in connection with adopting voting machines mandated by HAVA.

22. Accordingly, the aforesaid determinations of the respondents should be annulled or modified so that petitioner’s LibertyMark be approved and may be used in the 2008 elections in New York State, and until an order is obtained herein to that effect, respondents ought to be enjoined from taking any actions that would prejudice petitioner’s rights such as the release of an approved list of systems which omits the LibertyMark.

**WHEREFORE**, petitioner demands judgment annulling or modifying the aforesaid administrative determinations of respondents so that petitioner's voting machine LibertyMark is contained on the approved list of Ballot Marking Devices that may be used in 2008 elections in New York State, and that respondents be enjoined from releasing a list of approved systems that does not contain petitioner's LibertyMark, and directing the respondents to forward to the Office of State Comptroller a contract for petitioner's LibertyMark in accordance with proper procedures, and directing respondents to immediately distribute all petitioner's bid information to all County boards of elections relevant to support the selection of their preferred Ballot Marking Device for use in the 2008 elections, together with such other relief the Court deems just and proper.

Dated: January <sup>28</sup>~~25~~, 2008

  
L. MICHAEL MACKEY  
FEENEY, CENTI & MACKEY

Attorneys for Petitioner  
Office and P.O. Address  
116 Great Oaks Blvd.  
Albany, New York 12203  
(518) 452-3710


**and of counsel:**

John L. Cordo  
Cordo & Company, LLC  
Office and P.O. Address  
90 State Street, Suite 1507  
Albany, New York 12207  
(518) 445-2535

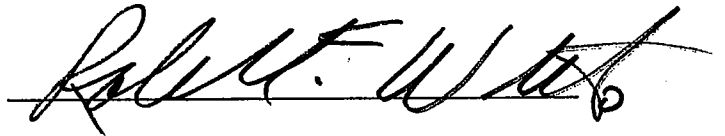
STATE OF NEW YORK)  
COUNTY OF ALBANY) SS.:

**Robert F. Witko**, being duly sworn, states that deponent is the President of Liberty Election Systems, LLC , the petitioner herein, which is a Limited Liability Company created under, and by virtue of the laws of the State of New York; that deponent has read the foregoing and the same is true to the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

Sworn to before me this 28<sup>th</sup>  
day of January 2008.

  
\_\_\_\_\_  
Notary Public

**DANIEL J. CENTI**  
Notary Public, State of New York  
No. 4713644  
Qualified in Albany County 6/30/10  
Commission Expires \_\_\_\_\_





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

UNITED STATES OF AMERICA, )

Plaintiff, )

v. )

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

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. )

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.

EXHIBIT A

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;

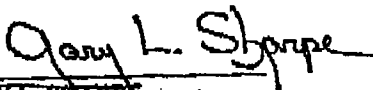
5. The defendants shall provide immediate notice, by filing with this Court, and by electronic mail to counsel for the United States, concerning any deviation, no matter how minimal, from Plan A and/or Plan B as ordered implemented by this Court, including any deviation from the specific timelines set 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 16<sup>th</sup> day of January, 2008, at Albany, New York.

  
GARY L. SHARPE  
UNITED STATES DISTRICT JUDGE