3/9/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L SCHULZ and JOHN LEGGETT

Plaintiffs,

-against-

NEIL KELLEHER(Deceased), Individually, DOUGLAS KELLNER, Individually and as Commissioner of the New York State Board of Elections, EVELYN AQUILA, Individually and as Commissioner of the New York State Board of Elections, HELENA MOSES DONAHUE Individually, JAMES A.WALSH as Commissioner of the New York State Board of Elections and GREGORY P. PETERSON, as Commissioner of New York State Board of Elections

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' RULE 72(b) OBJECTION

07-CV-0943

LEK/RFT

The Defendants, as and for their Response to the Plaintiffs' Rule 72(b) Objection to the February 16, 2010 Order of Hon. David N. Homer, USMJ :

1. That the Objection is improper as it is styled an Objection under Rule 72(b) which is the vehicle to object to a *Dispositive* Ruling of a Magistrate Judge, the February 16, 2010 Confidentiality Order was clearly not as it did not dispose of any of the Plaintiffs' claims but rather dealt with a rather routine application by the Defendants for a limitation upon the scope of the

Plaintiffs' discovery demands and a Confidentiality Order as to documents designated as such by the Defendants.

2. It is important that the Court be aware of the procedural history of the Defendants' application to the Magistrate for intervention, that is the refusal of the Plaintiffs to enter into any good faith discussions as to the proposed Confidentiality Order which the Defendants had provided the Plaintiffs on December 1, 2009 (See December 1, 2009 cover letter of Paul M. Collins, Esq. Attached to the Plaintiffs' Order to Show Cause as Exhibit "D").

3. Defendants had first advised the Plaintiffs of their desire to enter into a Confidentiality Order by consent on October 30, 2009 (See October 30, 2009 letter of Paul M. Collins, Esq. attached to the Plaintiffs' Order to Show Cause as Exhibit "C").

4. As the Plaintiffs refused to respond in any manner to the Defendants' request for a Confidentiality Order, despite an additional written request on December 14, 2009 (See December 14, 2009 letter of Paul M. Collins, Esq. attached to the Plaintiffs' Order to Show Cause as Exhibit "E") Defendants had no choice but to threaten to invoke the authority of the Magistrate in an attempt to move discovery along, which was done on December 31, 2009 (See December 31, 2009 letter of Paul M. Collins, Esq. attached to the Plaintiffs' Order to Show Cause as Exhibit "F").

5. The threat of seeking the intervention of the Magistrate was to no avail so that on January 13, 2010 a final letter was sent to the Plaintiffs, together with the Court outlining the attempts to resolve the outstanding discovery issues of the Plaintiffs' inadequate Expert Disclosure and the need for a Confidentiality Order (See January 13, 2010 letter of Paul M. Collins, Esq. attached to the Plaintiffs' Order to Show Cause as Exhibit "G").

6. The January 13th letter seemed to produce some results as Plaintiff Schulz called counsel for the Defendants and arranged a meeting to discuss the Confidentiality Order, Plaintiffs' Expert Disclosure and to review volumes of documents which would be responsive to some of the Plaintiffs' Discovery Demands.

7. The meeting occurred on February 3rd at 1:30 p.m. at which time, rather than discuss the outstanding discovery issues or review the documents which the Defendants had available, the Plaintiff Schulz served a purported Order to Show Cause upon counsel for the Defendants, as is evidenced by the Declaration of Service which was executed by Robert Schulz in connection with the presentation of his Order to Show Cause (See Declaration by Robert Schulz in Support of Show Cause Order dated February 3, 2010 (A copy of which is annexed hereto as Exhibit "A").

8. The purported Order to Show Cause was sought without any attempt by the Plaintiffs to comply with Local Rule 7.1(b)(2) or enter into any meaningful discussions with the Defendants on the issues upon which the Plaintiffs sought relief.

9. Additionally, the purported Order to Show Cause was in direct violation of the Amended Uniform Scheduling Order in this case issued after the Rule 16 Conference by Judge Horne on May 4, 2009 (See Paragraph 7 a of such Order a copy of which is annexed hereto as Exhibit "B").

10. In an attempt to avoid the mandatory conference with the Magistrate, the Plaintiffs have styled their discovery motion as one seeking injunctive relief so as to fall within the directly returnable before the District Court Judge section of Paragraph 7 of the Amended Uniform Scheduling Order. It is, however clearly a nondispositive discovery motion properly the subject of a Magistrate's Conference as is evidence that the minute entry on the docket refers the application,

construed by the Court as a "discovery motion" to Judge Homer to be "taken up" at the previously scheduled Discovery Conference (See Items 346 through 350 on the docket report annexed hereto as Exhibit "C").

11. Clearly the purported Order to Show Cause was an discovery application made to the District Court without the consent of the Magistrate in violation of General Order 25.

12. At this point in time, the Plaintiffs have never postulated any specific objection as to any of the language in the Confidentiality Order proposed by the Defendants and executed by the Court. The language of the Order was discussed at the Conference held before the Magistrate and the Plaintiffs were given an opportunity to object to same by Magistrate Judge Homer, which they failed to do other than making the argument contained in their Complaint that the entire voting process must be accomplished in the public view without anything being confidential. When specifically asked by the Court as to any particular language which the Plaintiffs found troubling, the Plaintiffs refused to specify and such language, merely reiterating their view that there could be no confidentiality in any voting processes.

13. Upon information and belief, the Confidentiality Order executed by the Court is a standard confidentiality order routinely issued when proprietary software is being disclosed. Here, there is a further consideration, the need to maintain the security of the voting systems chosen by the state in fulfillment of its obligations under HAVA as so forcefully pointed out in the various orders of Judge Sharpe in the presently pending action of United States of America v. State of New York et al, 06-cv-263 wherein the Defendants here are under specific order to implement the new HAVA compliant electronic voting systems in New York state for the fall 2010 elections.

STANDARD OF REVIEW:

14. This Court need not be reminded that the review of a Magistrate's Discovery Order by the District Court is a "clearly erroneous or contrary to law" standard pursuant to FRCP Rule 72(a) and that a Confidentiality Order is the type of non-dispositive order which falls within this scope of review. That standard of review affords the Magistrate broad discretion and allows for a reversal of a Magistrate's non-dispositive orders only if that broad discretion has been abused (*Thomas. E. Hoar, Inc. v. Sara Lee Corp.*, 900 F 2d 522{2nd Cir. 1990}).

PLAINTIFFS' FIRST OBJECTION:

15. Plaintiffs' First Objection to the February 16, 2010 Confidentiality Order issued by Magistrate Judge Homer is simply that, given the gravamen of their complaint, there can be no Confidentiality Orders issued in this case. Plaintiffs advanced this argument at the Discovery Conference held on February 10, 2010 and Magistrate Judge Homer indicated that there was no attempt to deny the Plaintiffs' access to any documents needed in the prosecution of their case, but merely to restrict the use of confidential documents to the prosecution of this case, at this point in time. Magistrate Judge Homer made it clear that the burden of establishing the confidentiality of any documents indicated as such by the Defendants would remain with the Defendants and that the Plaintiffs would have an opportunity to contest such claim in a timely fashion. Magistrate Judge Homer rejected, at this stage of the case, Plaintiffs' as yet unsubstantiated claims as to the merits of their case and the rule of law which Plaintiffs would seek to impose: that nothing in the election process can be subject to any confidentiality at any time.

16. Plaintiffs cite no specific authority for their claim that a court may not impose any discovery restrictions upon discovery in a case where an as yet unestablished and novel constitutional claim is being litigated. Rather Plaintiffs would seek to have the case conducted as though there had been a ruling upon the merits of their claim in their favor and the matter was just an enforcement matter.

17. Congress, in enacting the Help America Vote Act (42 U.S.C. §15301 *et sec*), certainly did not share the Plaintiffs' perspective that any voting tabulation system other than the manual count proposed by the Plaintiffs' is unconstitutional as is evidenced by HAVA's funding for electronic voting systems such as those certified for use in the state of New York pursuant to the Orders of this Court in United States of American v. State of New York *et al*, 06-cv-263 (Sharpe, J). Similarly, the Plaintiffs have failed to provide any judicial precedent for their claim that any voting system other the hand count system proposed by them violates their voting rights, *even after approximately a century of level machine voting*, which the Plaintiffs also find constitutionally infirm.

18. However, the merits of Plaintiffs' claims are not at issue here, rather it is the ability of the Magistrate Judge to effectively and efficiently manage discovery, which in issuing the Confidentiality Order, he has done. That order is not a final or dispositive order and does not effect the ability of the Plaintiffs to litigate their claims. What it does is provide a mechanism for the Defendants to assert a claim of privilege, on a document by document basis, with each such claim subject to judicial review.

PLAINTIFFS' SECOND OBJECTION:

19. Plaintiffs' Second Objection misconstrues the Confidentiality Order and Defendants' respectfully direct the Court to the Order itself for its terms and conditions. The final arbiter of the confidentiality of any document is not, as Plaintiffs assert, the Defendants, but rather the Court as is the custom with all confidentiality orders, as is clearly set forth in Paragraph "12" of the Confidentiality Order.

20. As to Plaintiffs' "well justified fear" that the Confidentiality Order will "set an improper precedent for justifying the barring the examination (*sic*) of vital evidence by both the public and/or jury at trial", Defendants are confident that the trial judge will handle all such issues at trial in accordance with prevailing law.

PLAINTIFFS' THIRD OBJECTION:

21. Plaintiffs' Third Objection deals with an issue neither covered by the Febraury 16, 2010 Confidentiality Order nor raised at the February 10, 2010 Discovery Conference, notwithstanding the unambiguous inquiry of Magistrate Judge Homer as to whether there were any other issues which needed to be addressed as a Transcript of the Discovery Conference will show, the production of documents and instrumentalities not in the possession of the Defendants.

22. The only time a County Board of Elections was discussed in the Discovery Conference was when the Defendants raised their lack of knowledge as to which voting machines the Plaintiffs had voted upon in the 2008 Election in Washington and New York counties respectively. As the Plaintiffs had demanded that the Defendants produce a duplicate of the lever operated machine used in Washington and New York counties in the 2008 federal election,

including all parts and accessories, and operating and maintenance instructions (See Demands "63" & "64" of Plaintiffs' First Notice to Produce dated September 30, 2010 attached to Plaintiffs' Order to Show Cause as Exhibit "B") Defendants inquired as to what type of machine the Plaintiffs had voted upon and agreed to allow access to that type of machine if one was in the possession of the State Board of Elections. Plaintiff Schulz *agreed* to make inquiry of the Washington County Board of Elections and the New York County Board of Elections to ascertain the make and model of the machine which these Plaintiffs had voted upon in the 2008 Federal Election and to advise Defendants of that information. Now, the Plaintiffs, having failed to provide the Defendants with the information which they represented to the Court they would, seek to be relieved of that obligation. Again, a transcript of the Discovery Conference will substantiate Defendants' response to this objection.

23. Having failed to raise any objection to the response of the Defendants as to items and information in the possession of the various county boards at the Discovery Conference, the Plaintiffs can not now seek to avoid all of the Local Rules and General Orders of this Court and bring issues to this Court *de novo* in derogation of the Magistrate guided discovery system established by the Court.

24. More to the point, the issue of which voting machines the Plaintiffs may inspect is not dealt with at all in the February 16, 2010 Confidentiality Order (Docket Entry 347) which the Plaintiffs have objected to in this application, but rather in a February 18, 2010 Scheduling Order (Docket Entry 349) to which the Plaintiffs have filed no Objections.

25. FRCP Rule 72 requires that an objecting party may not assign as error a defect in the order not timely objected to, and here the February 18, 2010 Scheduling Order has not been the subject of any objection, timely or untimely.

26. Plaintiff Robert Schulz is the Chair of an advocacy group, We the People, and is listed as such upon its web site: http://www.wethepeoplefoundation.org/default.htm.

27. While the Plaintiffs use the judicial process as fodder for their web site: http://www.wethepeoplefoundation.org/PROJECTS/NCEL/CourtDocs.htm, Defendants are seeking to avoid unnecessary motion practice by complying with the Local Rules and General Orders of this Court. An egregious example of this behavior can be found at: http://www.wethepeoplefoundation.org/PROJECTS/NCEL/NCEL.htm, wherein the Plaintiffs' report on the Rule 16 Conference at which the original Scheduling Order was issued which, as a matter of routine, included a trial date, reads:

> DRAMATIC DEVELOPMENT:
> WTP Federal Lawsuit to Ban All Electronic Voting Heads for Trial
> **Discovery Begins, Jury Will Decide the Law**

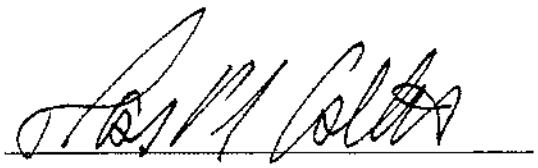
28. The link from that page proclaims:

> It must be noted that this is the first federal lawsuit *ever* to be approved for trial directly challenging the constitutional integrity of a state's official election procedures which are totally dependent, almost without exception, upon machine-based vote counting.

29. A routine scheduling order is certainly not an *approval for trial* and Defendants raise this in support of their request that the Court, *before determining any factual matters raised in the Plaintiffs' Objections*, review the transcript of the Discovery Conference, which transcript was ordered by the Defendants on the day following the Conference (See Docket Entry 348).

WHEREFORE, defendants pray that the Objections of the Plaintiffs' to the February 16, 2010 Confidentiality Order be, in all respects, dismissed.

DATED: Albany, New York
March 9, 2010



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