UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ROBERT L. SCHULZ and JOHN P. LIGGETT,	)	
	)	**No. 07-cv-0943**
Plaintiffs,	)	**LEK-DRH**
	)	
vs.	)	
	)	
STATE OF NEW YORK, *et al.*,	)	
	)	
Defendants,	)	

PLAINTIFFS' REPLY RE OBJECTIONS TO CONFIDENTIALITY ORDER

Plaintiffs reply to State defendants' response to their Objections to the Magistrate Judge's Confidentiality Order as follows:

CONFIDENTIALITY ORDER IS DISPOSITIVE

Contrary to the State's argument (par. 14), the Confidentiality Order is not a non-dispositive order. It is a dispositive order.

Plaintiffs have petitioned the Court to prohibit the State from utilizing certain voting systems that record and count votes in secret. Plaintiffs claim the Right to *know,* absent any special knowledge, that their votes are being accurately recorded and counted

As part of the discovery process, Plaintiffs have asked the State to produce documents that would help Plaintiffs understand just how accurately their votes would be recorded and counted, and that no special knowledge is required, as well as documents relevant to the Defendants' administration of the NY election systems, machines and procedures.

The State has consistently and uniformly refused to produce ANY of the requested documents, absent a Confidentiality Order saying, in effect, that those documents contain special, non-public knowledge, so special, so secret, so private, so intellectual, so confidential

that Plaintiffs would not be able to convey any of it to their spouses, friends and neighbors to help them understand the process by which their votes for those who would wield governmental power over them would be recorded and counted.

Plaintiffs are entitled to the information under the rules of discovery, without first having to agree to keep the information to themselves because of its unusual, uncommon, exceptional, extraordinary, distinctive, peculiar, unique or special nature.

Plaintiffs filed a motion for injunctive relief, seeking to restrain the State from continuing to avoid their duty to comply with Plaintiffs' First Notice to Produce.

The Magistrate Judge issued a Confidentiality Order, denying the motion for injunctive relief.

The Confidentiality Order amounts to an admission by the State, and the Court dispositively, that the State's voting systems require a special and secretive knowledge (intellectual and not part of the public record) regarding how votes are recorded and counted, and that these requirements are *de facto* violations of Plaintiff's voting rights.

In other words, the Confidentiality Order is decisive of the controversy at bar.

REPLY TO RESPONSE TO FIRST OBJECTION

Contrary to the State's allegation, the burden of proving each document is or is not confidential would fall on the Plaintiffs under the terms of the Order; the State would be free to place a "Confidential" label on each and every document (**as it has already done**), and the burden would then fall upon the Plaintiffs to argue and prove each document is not confidential, with the Court available as a final judge.

Even if any document regarding the recording and counting of votes in a public election could be considered confidential, which is not the case, the improperly broad Confidentiality

Order would deny access by Plaintiffs to virtually **all** documents unless Plaintiffs could prove the documents do not contain any trade secrets or intellectual property.

While it may be true the Magistrate Judge has rejected Plaintiffs' claim that nothing in the process of recording and counting votes in a public election can be subject to any confidentiality, the Magistrate has not "rejected Plaintiffs' claims as to the merits of their case." (par. 15).

Contrary to the State's allegation (par. 16), Plaintiffs have not claimed the Court may not impose any discovery restrictions in this case.

Contrary to the State's indirect suggestion (par. 17), Congress never considered the constitutionality of electronic voting systems in adopting the Help America Vote Act ("HAVA"). All Congress did was set forth requirements for voting systems, with the disabled voter in mind. Under HAVA, the States were to choose a compliant voting system(s). In the process of choosing which voting system it would certify, the NY State Defendants failed to give any consideration to the fundamental Right of the voter to know that his vote is being accurately recorded and counted, and his fundamental Right to a State that does everything in its power to eliminate the possibility of confusion, frustration, error and fraud in the election process. As articulated in the Complaint, Defendants failed to factor the Constitution for the United States of America (and the NY Constitution) into the selection and evaluation process that caused them to select the Sequoia and ES&S voting systems.

Contrary to the State's allegation (par. 18), the Order is dispositive (see argument above) and it is detrimentally affecting Plaintiffs' ability to litigate the case. For instance, Plaintiffs are unable to satisfy the requirements of Rule 26 (a)(2). Without the documents requested nearly six months ago, in their First Notice to Produce, dated September 30, 2009, Plaintiffs are unable to

identify their final expert witness(es), much less have them prepare a report containing the information required under Rule 26(a)(2)(B). Plaintiffs find themselves even at disadvantage in arguing *a priori* against the propriety of the blanket Confidentiality Order as part of this appeal itself because Defendants have still not fully disclosed the full nature of the specific documents held in their secret possession pending judicial resolution of the matter.

REPLY TO RESPONSE TO SECOND OBJECTION

Contrary to the State's allegation (par. 19), Plaintiffs have not said the "final arbiter" of the confidentiality of any document would be the Defendants. In fact, Plaintiffs wrote (page 8):

> "The Confidentiality Order authorizes the State to refuse to provide **any** of the documents requested by Plaintiffs in their First Notice to Produce, whether the document is vendor sensitive or not. The Order authorizes the State to label **any and all** of the documents as "Confidential," for certain, specified, limited "eyes only". The Order requires the Plaintiffs to object to any such label, on a document by document basis, and to prove to the State's unilateral satisfaction that the information in the document is not someone's Intellectual Property or Trade Secret."

In other words, between the parties, the State is free to label all documents, even those that are legitimately public records, as "confidential," Plaintiffs would then be under the burden of proving to the State's unilateral **(as between the parties)** satisfaction, that each document was not someone's trade secret of intellectual property, and the Court would be the final arbiter.

REPLY TO RESPONSE TO THIRD OBJECTION

In Plaintiffs' First Notice to Produce (Feb 3, 2010, Motion for Restraining Order, Exh B), Plaintiffs demanded at least 26 items the State defendants had the legal and constitutional authority to obtain from the counties (if they needed to because they were not already in possession of the items). [1]

[1] Items 6-8, 17, 19, 21, 23, 25, 27, 29, 32-35, 37, 42, 43, 45-48, 53, 60-64.

The State had refused to provide **any** of the items, saying it had **no authority** to order the counties to produce the documents. Amazingly, in their refusal to turn over any documents, whatsoever without a Confidentiality agreement, Defendants have directly implied under oath that, despite the general statutory record keeping requirements of New York law, that they are in possession of NOT a single relevant document, *public record or otherwise*, involving the day-to-day administration of the NY election laws or systems that **is not in some way confidential**. To be kind, this stretches credulity.

On February 3, 2010, Plaintiff moved the Court for an order "Restraining Defendants from avoiding their duty to respond to Plaintiffs' **full production request** in an orderly, organized and expeditious manner …..," including the request for documents that may be in the possession or control of the counties and which may patently otherwise exist as public records. (emphasis added).

In addition to Plaintiffs' other objections, Plaintiffs specifically objected to the fact that the Magistrate's Orders of February 16 and 18, 2010 did not address the "county" issue.

Here, the State, in bad faith, incorrectly suggests Plaintiffs waived their Right, as articulated in their Motion, to any of the documents that may be in the possession of the counties merely because Plaintiffs failed to raise the issue during the Conference held on February 16, 2010.

STATEMENT OF FACTS

For the record, Plaintiffs object to the State's Statement of Facts (the first thirteen paragraphs of the State's Response), which suggest the State was unaware of Plaintiffs' objection to the Confidentiality Order.

Plaintiffs incorporate here by reference the statement of facts presented in their MEMORANDUM IN SUPPORT OF MOTION FOR RESTRAINING ORDER, dated February 3, 2010,

In addition, Plaintiffs add these two facts: 1) during a phone conversation with Mr. Collins, early January, 2009, Mr. Schulz informed Collins that the Confidentiality agreement was unacceptable as it cast an unjustifiable wide, wide net over government documents that are properly discoverable without a confidentiality agreement. Mr. Collins said the Confidentiality agreement was a standard, routine agreement and he showed no interest in modifying or moving ahead without it; and 2) Plaintiff Schulz made arrangements to meet with Mr. Collins at his office to inspect the "Kellner documents" on February 3, 2010. Upon his arrival, Mr. Collins refused to let Mr. Schulz inspect the Kellner materials, which were in boxes on a table, unless Mr. Schulz first agreed to the Confidentiality agreement. Mr. Schulz specifically asked, "Are you saying I cannot inspect the materials unless and until I agree to the Confidentiality agreement?" Mr. Collins answered, saying, "That is correct." Mr. Schulz then served Mr. Collins with the motion for a restraining order and supporting papers, including a REPLY to the State's evasive, incomplete and non-responsive responses to Plaintiffs Notice to Produce (Memo, Exhibit H).

Finally, on December 1, 2009, eight weeks after being served with Plaintiffs' First Notice to Produce (requesting 64 documents), the State responded with nothing more than a proposed Confidentiality Order: no documents, no hint of any documents, only a Confidentiality Order.

CONCLUSION

Plaintiff respectfully requests an order overruling the Magistrates' Confidentiality Order. Plaintiffs respectfully request an Order:

a. restraining Defendants from avoiding their duty to respond to Plaintiffs' full production request in an orderly, organized and expeditious manner, and

b. directing Defendants to timely inform Plaintiffs and the Court, for each document or other requested information that Defendants assert is privileged or not discoverable, of the specific identity and nature of that document or other requested information, and state the specific grounds for the claim of privilege or other ground for exclusion, and

c. for such other and further relief as to the Court may seem just and proper to insure that the ends of Truth and Justice are secured in this most important controversy involving the very cornerstone of our political process and the Fundamental Rights of the People.

Dated: March 17, 2010

ROBERT L. SCHULZ
2458 Ridge Road
Queensbury, NY 12804

JOHN LIGGETT
1040 1st Ave #351
New York, NY 10022