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April 8, 2008

OUR FILE NO. 008276 -

Via Hand Delivery/Messenger Service

Civil Case Processing/Finance
Superior Court of New Jersey
Mercer County Court House
175 S. Broad Street
Trenton, New Jersey 08650

Re: . Gusciora, et al., Plaintiffs v. James E. McGreevy, et al., Defendants
Docket No. MER-L-2691-04 (N.J. Super. Ct. Law Div.)

Dear Sir or Madam:

This office represents Sequoia Voting Systems, Inc. ("Sequoia") with respect to the above-referenced matter. Enclosed for filing are the originals and one copy of each of the following documents:

- 1) Notice of Motion by Sequoia Voting Systems, Inc. to Quash or Enjoin Enforcement of Subpoenas Served Upon Counties;
- 2) Certification of Counsel in Support of Sequoia's Motion to Quash or Enjoin Enforcement of Subpoenas;
- 3) Certification of Edwin Smith III in Support of Sequoia's Motion to Quash or Enjoin Enforcement of Subpoenas;

Thirty-Eight Years of Service

Civil Case Processing
April 8, 2008
Page 2

- 4) Memorandum of Law in Support of Sequoia's Motion to Quash or Enjoin Enforcement of Subpoenas;
- 5) Proposed Form of Order.

Please file the original documents and return the copies stamped "Filed," in the enclosed, postpaid envelope.

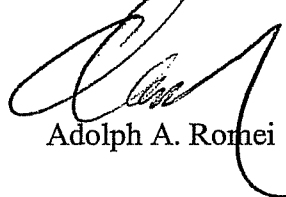
Our check in the amount of \$30.00 is enclosed for the required filing fee.

Please note that we are also delivering a set of the motion papers to the Hon. Linda R. Feinberg, A.J.S.C. who has been specially assigned to this matter by the Appellate Division.

If there are any questions regarding the enclosed application, please do not hesitate to contact me. Thank you for your assistance.

Very truly yours,

BEATTIE PADOVANO, LLC.



Adolph A. Romei

/sav

Enclosures

cc: The Hon. Linda R. Feinberg, A.J.S.C. (w/enc.) (via Hand Delivery)
All Counsel on Certificate of Service attached to
Notice of Motion (w/enc.) (via FedEx/Overnight Delivery)

BEATTIE PADOVANO, LLC
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Attorneys for Sequoia Voting Systems, Inc.

ASSEMBLYMAN REED GUSCIORA,
STEPHANIE HARRIS, COALITION FOR PEACE
ACTION, and NEW JERSEY PEACE ACTION,

Plaintiffs,

vs.

JAMES E. MCGREEVEY, GOVERNOR OF THE
STATE OF NEW JERSEY (in his official capacity)
and PETER C. HARVEY, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY (in his official
capacity),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

DOCKET NO. MER-L-2691-04

CIVIL ACTION

NOTICE OF MOTION BY SEQUOIA
VOTING SYSTEMS, INC. TO QUASH
OR ENJOIN ENFORCEMENT OF
PLAINTIFFS' SUBPOENAS TO
COUNTY GOVERNMENTS FOR
PRODUCTION OF VOTING
MACHINES AND RELATED
MATERIALS

TO: John McGahren, Esq.
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The Legal Center
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Newark, NJ 07102
Co-counsel for Plaintiffs

Penny Venetis, Esq.
Rutgers Constitutional Litigation Clinic
123 Washington Street
Newark, NJ 07102
Co-counsel for Plaintiffs

ON NOTICE TO:

Karen A. Dumars, Esq.
Assistant Deputy Attorney General
Department of Law and Public Safety
Division of Law
Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625
Attorneys for the Defendants

BERGEN COUNTY:

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Bergen County Clerk
One Bergen County Plaza
Hackensack, NJ 07601-7076
Phone: 201-336-7000
Fax: 201-336-7002
Election Division, Room 130: (201)336-7020
Internet: www.co.bergen.nj.us/county/clerk

County Counsel: Esther Suarez, Esq.
Bergen County Counsel
One Bergen County Plaza, Room 580
Hackensack, NJ 07601-7076
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GLOUCESTER COUNTY:

County Clerk: James Hogan
Gloucester County Clerk
Courthouse, 1st Floor
1 N. Broad Street
P.O. Box 129
Woodbury, NJ 08096-0129
Phone: 856-853-3237
Records Room: 856-853-3230
Fax: 856-853-3327
Email: jhogan@co.gloucester.nj.us

County Counsel: Samuel J. Leone, Esq.
Gloucester County Counsel
155 Budd Boulevard
P.O. Box 337
Woodbury, NJ 08096

Phone: 856-384-6892
Fax: 856-384-6894
Email: countycounsel@cp.gloucester.nj.us
Internet: www.co.gloucester.nj.us

MERCER COUNTY:

County Clerk: Paula Sollami Covello
Mercer County Clerk
100 Courthouse Annex
209 W. Broad Street
P.O. Box 8068
Trenton, NJ 08650-0068
Phone: 609-989-6998
Fax: 609-989-1111
Email: psollami_covello@mercercounty.org

County Counsel: Arthur R. Sypek, Jr., Esq.
Mercer County Counsel
McDade Admin. Bldg.
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Trenton, NJ 08650-0068
Phone: 609-989-6513
Fax: 609-392-8625

MIDDLESEX COUNTY:

County Clerk: Elaine Flynn
Middlesex County Clerk
Administration Bldg., 4th Floor
75 Bayard Street
P.O. Box 1110
New Brunswick, NJ 08903-1110
Phone: 732-745-3005
Fax: 732-745-3005

County Counsel: Thomas F. Kelso, Esq.
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Room 230
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New Brunswick, NJ 08901
Phone: 732-745-3228
Fax: 732-745-4539

OCEAN COUNTY:

County Clerk: Carl W. Block
Ocean County Clerk
Court House
118 Washington Street
P.O. Box 2191
Toms River, NJ 08754
Phone: 732-929-2018
Fax: 732-349-4336
Internet: www.oceancountyclerk.com

County Counsel: John C. Sahradnik, Esq.
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212 Hooper Avenue
P.O. Box 757
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Fax: 732-349-1983
Email: jsahradnik@bskrb.com

UNION COUNTY:

County Clerk: Joanne Rajoppi
Union County Clerk
Union Co. Courthouse, Room 115
2 Broad Street
Elizabeth, NJ 07207
Phone: 908-527-4787
Deputy County Clerk: 908-527-4786
Fax: 908-558-2589
Email: jrajoppi@ucnj.org

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Union County Counsel
Union County Admin. Bldg.
Elizabethtown Plaza
Elizabeth, NJ 07207
Phone: 908-527-4250
Fax: 908-289-4230

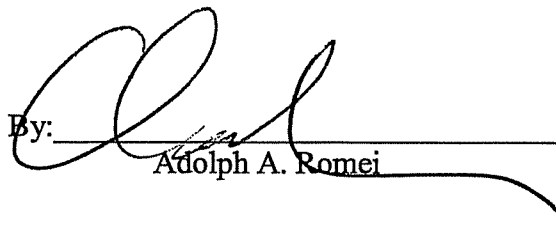
PLEASE TAKE NOTICE that on April 25, 2008 at 9:00 a.m., or as soon thereafter as counsel may be heard, the undersigned attorneys for Sequoia Voting Systems, Inc. ("Sequoia") will move before the Honorable Linda R. Feinberg, A.J.S.C., of the Superior Court of New Jersey, Law Division

(specially assigned), at the Mercer County Civil Courts Building, 175 South Broad Street, P.O. Box 8068, Trenton, NJ 08650-0068 New Jersey, for an Order pursuant to N.J. Court Rule 1:9-2, 4:10-2 (and subparagraphs (f) and (g) thereof), 4:10-3, 4:14-7 and/or the common law of New Jersey for an Order: (1) quashing Subpoena[s] Duces Tecum and Ad Testificandum served upon Bergen Gloucester, Mercer, Middlesex, Ocean and Union Counties on or about March 27, 2008 and made returnable April 8, 2008 and which seek, inter alia, voting machines, equipment and other materials supplied to those Counties by Sequoia, and other materials relating to the voting process in said Counties, and/or (2) enjoining the enforcement of and compliance with those subpoenas.

In support of this application Sequoia will rely upon the Certification of Counsel, the Certification of Edwin B. Smith III, together with the exhibits thereto, and Memorandum of Law served herewith.

Pursuant to R. 1:6-2, oral argument is respectfully requested. A proposed form of Order is also supplied in connection with this application. Trial of this matter has been scheduled for May 19, 2008.

BEATTIE PADOVANO, LLC
Attorneys for Sequoia Voting Systems, Inc.

By: 
Adolph A. Romei

Dated: April 8, 2008

CERTIFICATION OF SERVICE

I, Kevin J. Connell, certify as follows:

1. The original and one copy of the within Notice of Motion to Quash, etc., by Sequoia Voting Systems, Inc and all supporting papers, together with an original and three copies of a proposed form of order were delivered to the Clerk of the Superior Court of New Jersey, Law Division, Civil Part for Mercer County by hand-delivery on April 8, 2008.

2. On April 8, 2008 true copies of all the above-referenced moving papers were served upon counsel for the other parties to this action listed below by a commercial, overnight delivery service:

John McGahren, Esq.
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The Legal Center
One Riverfront Plaza
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Co-counsel for Plaintiffs

Penny Venetis, Esq.
Rutgers Constitutional Litigation Clinic
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Newark, NJ 07102
Co-counsel for Plaintiffs

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Assistant Deputy Attorney General
Department of Law and Public Safety
Division of Law
Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625
Attorneys for the Defendants

BERGEN COUNTY:

County Clerk: Kathleen A. Donovan
Bergen County Clerk
One Bergen County Plaza
Hackensack, NJ 07601-7076
Phone: 201-336-7000
Fax: 201-336-7002
Election Division, Room 130: (201)336-7020
Internet: www.co.bergen.nj.us/county/clerk

Bergen

County Counsel: Esther Suarez, Esq.
Bergen County Counsel
One Bergen County Plaza, Room 580
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County Clerk: James Hogan
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Phone: 856-853-3237
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Fax: 856-853-3327
Email: jhogan@co.gloucester.nj.us

County Counsel: Samuel J. Leone, Esq.
Gloucester County Counsel
155 Budd Boulevard
P.O. Box 337
Woodbury, NJ 08096
Phone: 856-384-6892
Fax: 856-384-6894
Email: countycounsel@cp.gloucester.nj.us
Internet: www.co.gloucester.nj.us

MERCER COUNTY:

County Clerk: Paula Sollami Covello
Mercer County Clerk
100 Courthouse Annex
209 W. Broad Street
P.O. Box 8068
Trenton, NJ 08650-0068
Phone: 609-989-6998
Fax: 609-989-1111
Email: psollami_covello@mercercounty.org

Mercer

County Counsel: Arthur R. Sypek, Jr., Esq.
Mercer County Counsel
McDade Admin. Bldg.
640 S. Broad Street
P.O. Box 8068
Trenton, NJ 08650-0068
Phone: 609-989-6513
Fax: 609-392-8625

MIDDLESEX COUNTY:

County Clerk: Elaine Flynn
Middlesex County Clerk
Administration Bldg., 4th Floor
75 Bayard Street
P.O. Box 1110
New Brunswick, NJ 08903-1110
Phone: 732-745-3005
Fax: 732-745-3005

County Counsel: Thomas F. Kelso, Esq.
Middlesex County Counsel
Admin. Bldg.
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OCEAN COUNTY:

County Clerk: Carl W. Block
Ocean County Clerk
Court House
118 Washington Street
P.O. Box 2191
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Phone: 732-929-2018
Fax: 732-349-4336
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Ocean

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UNION COUNTY:

County Clerk: Joanne Rajoppi
Union County Clerk
Union Co. Courthouse, Room 115
2 Broad Street
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Deputy County Clerk: 908-527-4786
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County Counsel: Robert E. Barry, Esq.
Union County Counsel
Union County Admin. Bldg.
Elizabethtown Plaza
Elizabeth, NJ 07207
Phone: 908-527-4250
Fax: 908-289-4230

3. On April 8, 2008 true copies of the moving papers were also hand-delivered to the Honorable Linda R. Feinberg, A.J.S.C., at the Mercer County Civil Courts Building, 175 S. Broad Street, P.O. Box 8068, Trenton, NJ 08650-0068.

4. The foregoing statements made by me are true. I am aware that if any of the statements are willfully false, I am subject to punishment.

By: Kevin J. Connell
Kevin J. Connell

Dated: April 8, 2008

BEATTIE PADOVANO, LLC
50 Chestnut Ridge Road
P.O. Box 244
Montvale, New Jersey 07645-0244
201-573-1810
Attorneys for Sequoia Voting Systems, Inc.

ASSEMBLYMAN REED GUSCIORA,
STEPHANIE HARRIS, COALITION FOR PEACE
ACTION, and NEW JERSEY PEACE ACTION,

Plaintiffs,

vs.

JAMES E. MCGREEVEY, GOVERNOR OF THE
STATE OF NEW JERSEY (in his official capacity)
and PETER C. HARVEY, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY (in his official
capacity),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

DOCKET NO. MER-L-2691-04

CIVIL ACTION

**CERTIFICATION OF COUNSEL IN
SUPPORT OF MOTION BY SEQUOIA
VOTING SYSTEMS, INC. TO QUASH
OR ENJOIN ENFORCEMENT OF
PLAINTIFFS' SUBPOENAS TO
COUNTY GOVERNMENTS FOR
PRODUCTION OF VOTING
MACHINES AND RELATED
MATERIALS**

I, Adolph A. Romei, hereby certify as follows:

1. I am an attorney at law of the State of New Jersey and a member of the firm of Beattie Padovano, LLC, attorneys for Sequoia Voting Systems, Inc. ("Sequoia"). I make this Certification in support of Sequoia's motion for an Order pursuant to N.J. Court Rule 1:9-2, 4:10-3, 4:14-7 and/or the common law of New Jersey: (1) quashing the Subpoenas Duces Tecum and Ad Testificandum served by the plaintiffs upon Bergen, Gloucester, Mercer, Middlesex, Ocean and Union Counties (hereinafter, collectively, the "Counties") on or about March 27, 2008 and made returnable April 8, 2008 and which seek, inter alia, voting machines, equipment and other materials supplied to the Counties by Sequoia, as well as other materials relating to the voting process in the Counties, and/or (2) enjoining the enforcement of and compliance with those subpoenas. I am fully familiar with the facts set forth herein.

2. In the case at bar the plaintiffs filed a "Complaint in Lieu of Prerogative Writ" dated October 19, 2004 against former Governor James E. McGreevey ("in his official capacity") and Peter C. Harvey, the former Attorney general of New Jersey ("in his official capacity"). That Complaint includes six counts, all of which relate to actions allegedly taken, or which allegedly were not taken, by those government officials that contravene constitutional or statutory requirements pertaining to the conduct of elections. Many of those counts contain allegations directed toward the government officials' approval of the use of electronic voting machines (which the plaintiffs often refer to as "DREs" [Direct Recording Electronic voting machines]). The Complaint seeks entry of a judgment that would enjoin the use of certain voting machines and/or require the retrofitting of certain voting machines.

3. My office recently received a copy of a "Subpoena Duces Tecum and Ad Testificandum" dated March 27, 2008, that the plaintiffs served on Kathleen A. Donovan, the Clerk of Bergen County (hereinafter, the "Subpoena"). Upon information and belief the plaintiffs served that Subpoena upon the Bergen County Clerk on March 27, 2008 and, also upon information and belief, substantially similar subpoenas were also served on the balance of the Counties on the same day. A copy of the Subpoena to the Bergen County Clerk and two transmittal letters also dated March 27, 2008, from plaintiffs' counsel are attached hereto as **Exhibit "A"**.

4. A review of the Subpoena's "Requests for Objects and Documents" discloses that a number of the plaintiffs' requests expressly refer to voting machines supplied to Bergen County by Sequoia and other information and materials related to those voting machines and their use in various elections. See, e.g., the Requests for Objects and Documents section of the Subpoena at paragraphs 2, 3 and 4. Other requests, not expressly referring to Sequoia, that

pertain to DRE voting machines also would require the production of Sequoia machines and related materials in so far as Sequoia supplied such machines to Bergen County and Bergen County still possesses and uses Sequoia machines.

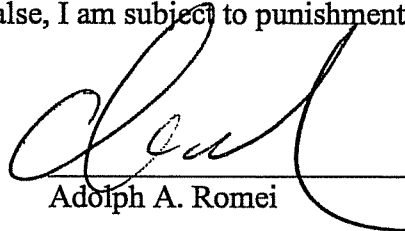
5. As described in detail in the accompanying certification of Edwin B. Smith III, Vice President for Compliance, Quality and Certification for Sequoia, Sequoia supplied electronic voting machines and equipment to Bergen County and the other Counties, pursuant to various contracts of sale and licensing agreements. Those agreements, as well as state and federal statutory and common law, provide protection for Sequoia's trade secrets, proprietary information and other intellectual property rights associated with those machines as well as certain equipment, software and other things required for the operation of Sequoia voting machines, (hereinafter collectively Sequoia's "Intellectual Property" or "IP").

6. Sequoia maintains on this motion that if Bergen and the other Counties comply in full with demands of the Subpoena they will be violating a number of Sequoia's IP rights and causing Sequoia significant and irreparable harm. (The irreparable nature of the harm, of course, stems from the fact that secret or proprietary information once revealed is generally impossible to recover). Accordingly, Sequoia has filed the instant motion to quash to protect its rights. As stated in the accompanying Smith Certification, the Counties' compliance with Request Nos. 2, 3, 4, 5, 6, 7 and 9 in the Subpoena would infringe Sequoia's IP rights and Sequoia therefore respectfully requests that the Court quash or enjoin enforcement of the Subpoena to Bergen County and the other Counties with respect to those Requests. To the extent that the subpoenas to the Counties other than Bergen have different, or differently numbered, Requests, Sequoia respectfully requests that the subpoenas to those Counties be quashed or enjoined in full until Sequoia has an opportunity to review those documents.

7. The plaintiffs' service of the Subpoena on Bergen and the other Counties has serious implications for Sequoia's rights and property interests. Indeed, if the plaintiffs' subpoenas are enforced as propounded, Sequoia would experience considerable and irreparable harm from the compromise of its IP rights.

8. Accordingly, for the foregoing reasons and those set forth in the accompanying Smith Certification, Sequoia respectfully requests that the Court enter an Order pursuant to N.J. Court Rule 1:9-2, 4:10-3, 4:14-7 and/or the common law of New Jersey: quashing, or enjoining enforcement of, the Subpoena Duces Tecum and Ad Testificandum served by the plaintiffs on or about March 27, 2008 with respect to the Requests set forth in paragraphs 2, 3, 4, 5, 6, 7 and 9.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.


Adolph A. Romei

Dated: April 8, 2008

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Tel: (973) 353-5687

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Attorneys for Plaintiffs

ASSEMBLYMAN REED GUSCIORA,
STEPHANIE HARRIS, COALITION FOR
PEACE ACTION, and NEW JERSEY
PEACE ACTION,

Plaintiffs,

v.

JON S. CORZINE, GOVERNOR OF THE
STATE OF NEW JERSEY, (in his official
capacity) and ANNE MILGRAM,
ATTORNEY GENERAL OF THE STATE
OF NEW JERSEY (in her official capacity),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
DOCKET NO.: L-2691-04

CIVIL ACTION

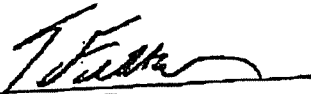
SUBPOENA DUCES TECUM
AND AD TESTIFICANDUM

To: BERGEN COUNTY, State of New Jersey
c/o Kathleen A. Donovan, Bergen County Clerk
One Bergen County Plaza, Room 130
Hackensack, New Jersey 07601-7000

YOU ARE HEREBY COMMANDED to attend and give testimony before the above
named Court at the Bergen County Justice Center, 10 Main Street, Hackensack, New Jersey
07601 on Tuesday, April 8, 2008 at 10:00 a.m. in the above-entitled action, and to bring with you
and produce at the same time and place, the following: See Requests for Objects and Documents
set forth in the Rider attached hereto.

PLEASE TAKE FURTHER NOTICE that you are not to produce or release any objects or documents requested by this Subpoena until the date specified above. If you are notified that a motion to quash this Subpoena has been filed, you will not produce or release the subpoenaed documents until ordered by the Court or the release is consented to by all parties to this action.

Failure to appear according to the command of this Subpoena will subject you to the penalties provided by law.


Theodore J. Fetter
Acting Clerk of the Superior Court

Dated: March 27, 2008

RIDERINSTRUCTIONS

1. Pursuant to New Jersey Rule of Court 4:14-2(c), you shall designate to testify on your behalf, at the time and place set forth in this Subpoena, one or more officers, directors, managing agents, or other persons who possess knowledge related to the below Requests for Objects and Documents (hereinafter, the "Requests").

2. Pursuant to New Jersey Rules of Court 4:14-7(a), you are required to furnish all objects and documents called for in the Requests.

3. The Requests are intended to be continuing and you are instructed to make prompt, further and supplemental production whenever an additional object or document is discovered that is responsive hereto.

4. All objects and documents called for in the Requests shall be produced in the form in which they are maintained or used in the ordinary course of business, and shall not be altered, ameliorated or otherwise tampered with prior to their production. To the extent possible, all documents and objects called for in the Requests shall be produced in the precise state that such document or object was in upon the Bergen County Clerk's receipt of election records immediately following the New Jersey Presidential Primary Election held on February 5, 2008.

5. If any object or document called for by the Requests is withheld on the ground that it is privileged, constitutes attorney work product, or is for any other reason exempt from discovery:

- a) Identify the object or document. In the case of a document, set forth the type of document, its date, author(s), addressee(s), if different from its recipient(s), and its general subject matter;
- b) Set forth the privilege and the factual basis upon which the privilege is claimed; and
- c) State the paragraph of the Requests to which each withheld object or document is responsive.

6. If objection(s) is/are made to any of these Requests, please state with specificity the reasons for the objection and the paragraph or part of the Requests to which the objection is made, and produce those objects or documents called for in the Request to which such objection does not apply.

7. Where anything has been deleted from a document produced, or where any component of or attachment to any object has been removed or otherwise not included in the production, specify: (1) the nature of the material, component, or attachment deleted, removed or otherwise not included; (2) the reason for the deletion, removal or non-inclusion; and (3) the identity of the person responsible for the deletion, removal or non-inclusion.

8. Where any documents or objects (including any component thereof or attachment thereto) responsive to the Requests has been destroyed or lost, please identify such objects, documents, or components/attachments as described at Instruction 5(a) herein, and set forth the approximate date and cause of or reason for the destruction or loss.

9. "And" or "or" shall be construed conjunctively or disjunctively as necessary to make the Request more inclusive rather than less inclusive; the singular includes the plural and the plural includes the singular.

10. The use of a verb in any tense shall be construed as the use of the verb in all other tenses, wherever necessary to bring within the scope of the specification any document that might otherwise be construed to be outside its scope.

11. If you find there to be ambiguity in construing any of the Requests, you are to identify the matter deemed ambiguous and set forth the construction chosen or used in responding to the Request.

DEFINITIONS

1. "Ballot Cartridge" means the memory cartridge that contains the vote records from the DRE Voting Machine into which the cartridge has been inserted during the course of an election. The cartridge is removed when the polls close and is then either physically transported to a tabulation facility, or alternatively, its contents are transmitted for tabulation via modem.

2. "Ballot Cartridge Reader" means an electronic device that is capable of reading the contents of a Ballot Cartridge and transmitting the vote records stored in such cartridge to a tabulation facility, by way of a modem. The Ballot Cartridge Reader may also be used to print out a results tape of all votes cast in a given precinct.

3. "Ballot Definitions" or "Ballot Definition Files" means the electronic files constructed for each specific election, which contain the details about that election, and which govern how DRE Voting Machines will display ballot information on the screen, interpret a voter's touches on a button or screen, and record and tally those selections as votes.

4. "Direct Recording Electronic ("DRE") Voting Machine" means a voting machine that records votes by utilizing a ballot display provided with mechanical or electro-optical components that the voter can activate and utilizes a computer program to process data. The machine also records voting data and ballot images in internal and external memory components. A DRE voting machine also produces a tabulation of the voting data stored within a removable memory component and a printed paper list of each vote allegedly cast.

5. "Operating Manual" means any manual, book, pamphlet, brochure, or text of any kind, whether printed or in electronic format, as well as any audio or video recording of any kind, that purports to provide instruction or insight into the proper usage, function, or means of operation of a device or program.

6. "Poll Book(s)" means the book(s) present at a polling place on the day of an election that contain information about persons eligible to vote in a given district for a given election, including the name, address, and signature (and party affiliation, in the case of a primary election) of those persons, and which a voter must sign upon checking in at his or her polling place.

7. "Presidential Primary" means the New Jersey Presidential Primary Election held on February 5, 2008.

8. "Results Report" means the summary tape that is customarily printed from a Sequoia AVC Advantage DRE Voting machine upon the closing of the polls. This summary tape printout contains "Option Switch Totals" for "Party Turnout Totals" data, which indicates the number of times a party's ballot was activated, as well as "Candidate Totals" data, which indicates the number of votes cast for each candidate.

9. "Results Report Discrepancy" means an instance where the "Candidate Totals" recorded on the Results Report for all candidates in any one political party differed from the number of votes reported for that same party in the "Option Switch Totals" or "Party Turnout Totals" section of the report. Exhibit "A" is attached hereto for the purpose of further identifying this phenomenon.

10. "Voting Authority Slip" means the perforated 'ticket' that a voter receives upon checking it at his or her polling place, and which the voter must present to the poll worker who is operating the voting machine. The poll worker places the Voting Authority Slip, in the order in which it was received, on a string or wire provided for that purpose.

11. "WinEds Software" means the software application used in conjunction with the Sequoia AVC Advantage, among other DRE Voting Machines, that is responsible for tasks such as the management of the election process, including the programming and configuring of the election, the creation of Ballot Definitions, and the tabulation and reporting of the results.

12. "You," "your" or "yours" means Bergen County, to which the below Requests for Documents and Objects are directed, and any of Bergen County's current or former employees, agents, officers, directors and representatives.

REQUESTS FOR OBJECTS AND DOCUMENTS

1. All Results Reports from each of Bergen County's DRE Voting Machines that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

2. One Sequoia AVC Advantage DRE Voting Machine that was used in Bergen County for the Presidential primary and that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

3. One Sequoia AVC Advantage DRE Voting Machine that was used in Bergen County for the Presidential Primary and that did not experience a Results Report Discrepancy regarding votes cast during the Presidential Primary.

4. For each Sequoia AVC Advantage DRE Voting machine supplied pursuant to Requests No.2 and No.3 above: The complete source code (in electronic form), including libraries and all related technical documentation, for all the software (or firmware, as the case may be) in the voting machine, complete with all configuration files and build tools. Your production pursuant to this Request must be such that would allow the recipient to reproduce the binary images currently loaded into the voting machines in use in New Jersey, and sufficient to enable the building and execution of modifications to the software made for testing and analysis purposes.

5. All Ballot Cartridges used in the Presidential Primary from each and every one of Bergen County's DRE Voting Machines that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

6. Five functional Ballot Cartridges that were used in Bergen County for the Presidential Primary and that did not experience a Results Report Discrepancy regarding votes cast during the Presidential Primary.

7. All Ballot Definition Files (in electronic form) that were used in Bergen County for the Presidential Primary, for any DRE Voting Machines that experienced a Results Report Discrepancy during the Presidential primary.

8. One Ballot Cartridge Reader used in or by Bergen County for purposes of the Presidential Primary. *Note that this Request is applicable only if Bergen County does not use card-size Ballot Cartridges, but rather, uses Ballot Cartridges that are similar in appearance to 8-track cassette tapes.*

9. One computer (with the actual programs and files intact) that was used in or by Bergen County to run the WinEds Software for purposes of the Presidential Primary.

10. A copy of the AVC Advantage Operating Manual that is relied upon by or in the possession of Bergen County.

11. A copy of the WinEds Software Operating Manual that is relied upon by or in the possession of Bergen County.

12. A copy of all current poll worker manuals and all other poll worker training materials distributed to, made available to, used or relied upon by poll workers in Bergen County.

13. All service records of any kind, dated anywhere between January 1, 1980 and the present, for any and all DRE Voting Machines that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary in Bergen County.

14. All Voting Authority Slips (still attached to the string or wire affixed to each relevant DRE Voting Machine) for any and all DRE Voting machines in Bergen County that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

15. All of the Poll Book(s) used for the Presidential Primary at those polling places in Bergen County where a DRE Voting machine experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

RECEIVED TIME APR 1 12:56PM

ATTACHMENT "A"

MAR-11-2008 10:53

P.04



The Times

County finds vote errors

Discrepancies discovered in 5% of machines

Saturday, February 23, 2008

BY ROBERT STERN

Five percent of the 600 electronic voting machines used in Mercer County during the Feb. 5 presidential primary recorded inaccurate voter turnout totals, county officials said yesterday.

County officials said the miscues did not affect the election results but expressed renewed concerns over the reliability of the machines.

"I am deeply concerned about the discrepancies seen in the voting returns from the Sequoia voting machines in this month's New Jersey primary elections," Mercer County Executive Brian M. Hughes wrote in a letter yesterday to state Attorney General Anne Milgram.

"Although the discrepancies do not affect the outcome of the election, it certainly undermines the confidence in the voting public when they hear that the reliability of the electronic voting machines is in question," Hughes wrote.

Problems with the numbers cropped up in 30 of Mercer County's 600 Sequoia Voting Systems machines, Hughes said.

In each case, the problem isn't one of miscounted votes, but a mismatch between the total Democratic and Republican ballots cast as recorded by the machine and the numbers that should have been recorded, officials said.

In other words, while the malfunctioning machine correctly recorded each vote cast for the right candidate, it miscalculated the numbers of total Republican and total Democratic ballots, county Clerk Paula Sollami-Covello said.

Apparently through some kind of software or hardware glitch, each malfunctioning machine in Mercer County showed one fewer Democratic voter than it should have and one extra Republican voter, Sollami-Covello said.

In other counties with the problem, the reverse occurred -- each malfunctioning machine showed one fewer Republican voter and one extra Democratic voter than it should have, Sollami-Covello said.

Mercer County had more than half of the statewide total of 59 machines with the glitch, said David Wald, spokesman for the state Attorney General's Office, which oversees New Jersey elections. Five counties in addition to Mercer had problem machines, although they represent a tiny percentage of the 10,000 Sequoia voting machines the state uses.

The other counties are Middlesex, Bergen, Gloucester, Ocean and Union.

"The problem was in the summary report in the partisan breakout for vote totals," Wald said.

"We do share Mr. Hughes' concern and need to find out from Sequoia why this is," he said.

PATTON BOGGGS
ATTORNEYS AT LAW

The Legal Center
One Riverfront Plaza
Newark, New Jersey 07102
973-848-5600

Facsimile 973-848-5601
www.pattonbogggs.com

973-848-5610
jmcgahren@pattonbogggs.com

March 27, 2008

VIA HAND DELIVERY

Bergen County, State of New Jersey
c/o Kathleen A. Donovan,
Bergen County Clerk
One Bergen County Plaza, Room 130
Hackensack, New Jersey 07601-7000

Re: Assemblyman Reed Gusciora et al. v. Jon S. Corzine et al.
Docket No. MER-L-2691-04

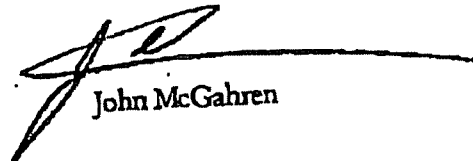
Dear Ms. Donovan:

This office serves as co-counsel for the Plaintiffs in the matter captioned above, which, generally speaking, is an action challenging the constitutionality of New Jersey's voting machines and systems. Accompanying this letter, you will find a Subpoena related to inconsistencies in the Results Reports printed from certain Direct-Recording Electronic ("DRE") voting machines in Bergen County during the February 2008 Presidential Primary Election.

I ask that you please contact the office of Patton Boggs LLP at your very earliest convenience, at the phone number above, to discuss the logistics of the Requests set forth in the Subpoena.

Thank you.

Very truly yours,



John McGahren

cc: Patricia A. DiCostanzo, Superintendent of Elections (via Federal Express)
Karen Du Mars, Esq., Deputy Attorney General (via hand delivery)
Penny M. Venetis, Esq., Rutgers Constitutional Law Clinic (via facsimile, 973-353-1249)

RECEIVED TIME APR 12:56PM
Hand Delivered

PATTON BOGGGS
ATTORNEYS AT LAW

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March 27, 2008

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VIA HAND DELIVERY

Karen Du Mars, Esq.
Assistant Deputy Attorney General
Department of Law and Public Safety
Division of Law
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

Re: Assemblyman Reed Gusciora et al. v. Jon S. Corzine et al.
Docket No. MER-L-2691-04

Dear Ms. Du Mars:

Accompanying this letter, you will find copies of the Subpoenas served today upon each of the six counties in New Jersey (Bergen, Gloucester, Mercer, Middlesex, Ocean and Union) that experienced inconsistencies in the Results Reports printed from certain DRE Voting machines in the context of the February 2008 Presidential Primary Election.

Pursuant to Judge Feinberg's instructions at the March 25, 2008 conference, we would like to set up a meeting in order to confer with you regarding the content of these Subpoenas, and invite you to contact us in that regard as soon as possible. As also indicated at the March 25 conference, no confidentiality agreement has been produced in reference to the items and documents requested by the Subpoenas, and Plaintiffs therefore intend to move forward with their examination of these items and documents as soon as allowable by law.

Very truly yours,


John McGahren

cc: Penny M. Venetis, Esq. (via facsimile)

BEATTIE PADOVANO, LLC
50 Chestnut Ridge Road
P.O. Box 244
Montvale, New Jersey 07645-0244
201-573-1810
Attorneys for Sequoia Voting Systems, Inc.

**ASSEMBLYMAN REED GUSCIORA,
STEPHANIE HARRIS, COALITION FOR PEACE
ACTION, and NEW JERSEY PEACE ACTION,**

Plaintiffs,

vs.

**JAMES E. MCGREEVEY, GOVERNOR OF THE
STATE OF NEW JERSEY (in his official capacity)
and PETER C. HARVEY, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY (in his official
capacity),**

Defendants.

**SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY**

DOCKET NO. MER-L-2691-04

CIVIL ACTION

**CERTIFICATION OF EDWIN B.
SMITH III, VICE PRESIDENT OF
SEQUOIA VOTING SYSTEMS, INC.,
IN SUPPORT OF SEQUOIA'S
MOTION TO QUASH OR ENJOIN
ENFORCEMENT OF PLAINTIFFS'
SUBPOENAS TO COUNTY
GOVERNMENTS FOR PRODUCTION
OF VOTING MACHINES AND
RELATED MATERIALS**

I, Edwin B. Smith III, hereby certify as follows:

1. I am Vice President for Compliance, Quality and Certification for Sequoia Voting Systems, Inc. ("Sequoia") and have been employed by Sequoia since 2006. I make this Certification in support of Sequoia's motion pursuant to N.J. Court Rule 1:9-2, 4:10-3, 4:14-7 and/or the common law of New Jersey for an Order: (1) quashing Subpoena[s] Duces Tecum and Ad Testificandum served by the plaintiffs upon Bergen, Gloucester, Mercer, Middlesex, Ocean and Union Counties (collectively, the "Counties") on or about March 27, 2008 and made returnable April 8, 2008 and which seek, inter alia,

voting machines, equipment and other materials supplied to the Counties by Sequoia, and other materials relating to the voting process in said Counties, and/or (2) enjoining the enforcement of and compliance with those subpoenas. I am fully familiar with the facts set forth herein.

2. Sequoia has supplied Sequoia's Advantage voting machines and related equipment and materials including, but not limited to, software and firmware (hereinafter collectively Sequoia "Voting Machines" or "Products") to a number of counties in New Jersey, including the Counties identified in paragraph 1. The Voting Machines have been certified as complying with the 2002 Federal Voting Systems Standards promulgated by the Federal Election Commission following testing by federally approved independent testing laboratories, and have also been certified for use in the State of New Jersey. In my position as Vice President for Compliance, Quality and Certification for Sequoia, I am familiar with the Sequoia products supplied to various counties in New Jersey.

3. I recently received a copy of a "Subpoena Duces Tecum and Ad Testificandum" dated March 27, 2008 that the plaintiffs served upon the Clerk of Bergen County, New Jersey (hereinafter, the "Subpoena"). Upon information and belief, the plaintiffs served the Subpoena on the Bergen County Clerk on March 27, 2008 and also served substantially similar subpoenas upon the County Clerks of Gloucester, Mercer, Middlesex, Ocean and Union Counties at the same time. A copy

of that Subpoena, along with two accompanying letters dated March 27, 2008 from counsel for the plaintiffs to Karen Du Mars, D.A.G and Bergen County Clerk Kathleen A. Donovan, are attached hereto as **Exhibit "A"**.

4. In reviewing the "Requests for Objects and Documents" section of the Subpoena I found that Bergen County's production of many of the items or categories of information requested would violate various rights that Sequoia has in its proprietary information, trade secrets and confidential or other intellectual property connected to those items or categories (hereinafter, Sequoia's "Proprietary Information" or "IP"). While I am not an attorney, my job responsibilities at Sequoia have made me familiar with the kinds of proprietary IP that pertain to Sequoia's Products.

5. The Voting Machines contain software (in effect the operating instructions for the machine) which are embedded on the electronic chips which control and operate the Voting Machine. Because the software is embedded on the chip and cannot be installed and removed, it is technically known as "firmware." The firmware was developed over the years by Sequoia through a considerable investment of time, effort and money. The firmware is what permits Sequoia's machines to operate as a unique product and therefore provides a competitive advantage to Sequoia. The history of development, testing and certification of the firmware reveals that Sequoia has invested considerable sums during the history of this product, including a sum

in excess of \$2,000,000 in its firmware over the last five (5) years alone. Any person seeking to develop a similar product would also need to expend a considerable amount of time, effort and expense.

6. As with any software, the most basic component or code of the firmware (known as the "source code") consists of the human readable binary code of firmware. Review of the source code by a qualified computer programmer would reveal the unique characteristics of the code which cause it to operate the way it does, and which provide Sequoia with a competitive advantage. For this reason the source code is not disclosed to Sequoia's customers and knowledge of the source code is limited to select technical personnel within Sequoia.

7. The source code, once compiled using another computer program, becomes "object code," which is the form of code that actually operates the Voting Machine. The object code version of the software is that embedded into the electronic chips which operate the Voting Machines. In order to protect the secrecy of the firmware (including both the source code and object code), Sequoia does not make these materials publicly available. Sequoia requires that any customer purchasing the Voting Machines sign a license agreement restricting use of the firmware to operation of the Voting Machine, and not to other purposes.

8. The definitions contained in the section of the Subpoena entitled "Definitions" also mentions the "WinEDS Software," which is

software developed by Sequoia and licensed by Sequoia to its customers for the purpose of operating the election management system. The WinEDS Software was also developed by Sequoia and its predecessor companies through a considerable investment of time, effort and expense throughout the history of the product. I estimate that Sequoia has invested in excess of \$3,000,000 in development, testing and certification of the WinEDS Software over the last five (5) years alone. The WinEDS Software is not made publicly available, and is licensed to customers under a license agreement which restricts use of that software.

9. Paragraphs 2 and 3 of the Subpoenas under the section entitled "Requests for Objects and Documents" seek possession of two Sequoia Advantage Voting Machines. Delivery of these machines will, of course include the electronic chip on which the firmware is embedded.. A sophisticated computer expert, given unfettered access to the Voting Machines, could "crack the chip" by decoding the firmware. This disclosure of the firmware could cause irreparable damage to Sequoia by its attendant disclosure of the trade secrets incorporated within the firmware.

10. As we understand them, the essence of the plaintiffs' concern is the accuracy of the machines in recording votes. Sequoia would not object to the plaintiffs' experts testing the machine for accuracy purposes provided that release and testing of the machines is undertaken pursuant to a protective order of the Court, acceptable

to Sequoia, designed to prevent loss of Sequoia's trade secret protections and imposing reasonable parameters to limit the proposed testing to the current issue (i.e., accuracy of vote count).

11. The materials requested under item 4 of the "Requests" section seeks "the complete source code (in electronic form) including libraries and all related technical documentation for all the software (or firmware as the case may be) in the voting machine, complete with all configuration files and build tools." The request clearly states the plaintiffs' intentions in the requirement that disclosure be "sufficient to enable the building and execution of modifications to the software made for testing analysis purposes." Compliance with this request would constitute the clearest possible violation of Sequoia's trade secret rights in the software, as well as violating the terms of the license between Sequoia and the Counties..

12. Items 5, 6 and 7 of the Subpoenas' "Requests" seek "Ballot Cartridges" and "Ballot Definition Files (in electronic form)." The Ballot Cartridge is a memory cartridge used in connection with the Voting Machines. It works in conjunction with both the firmware and the WinEDS Software to permit votes to be counted and tabulated. The Ballot Definition Files are electronic files which are constructed using WinEDS Software to operate the Voting Machines in an election. Review of the Ballot Cartridges and Ballot Definition Files would provide a qualified computer programmer with the ability to determine

how the unique features of the firmware and WinEDS Software function, thereby also resulting in a disclosure of Sequoia's trade secrets.

13. Request number 9 of the Subpoena seeks "One computer (with the actual programs and files intact) that was used in or by Bergen County to run the WinEDS Software for purposes of the presidential primary." Essentially the plaintiffs are once again requesting, albeit in another form, the WinEDS Software itself. This is a clear violation of the license agreements between the Counties and Sequoia which would also result in disclosure of the WinEDS Software and its inherent trade secrets.

14. Sequoia takes no position concerning release of the information requested in items 1, 8 and 10 through 15 inclusive of the Subpoena's "Requests."

15. Sequoia fully supports the public interest in assuring the accuracy and security of elections and instilling public confidence that each vote is counted. For this reason Sequoia has cooperated with and continues to cooperate with governmental officials charged with testing and certifying voting equipment (in this case the Attorney General, as transitioning to the Secretary of State) under appropriate non-disclosure agreements. Sequoia does, however, object to testing by unauthorized persons who may employ test procedures completely irrelevant to the practical conduct of elections which, aside from jeopardizing Sequoia's legitimate trade secret and proprietary competitive information, serves only to unfairly

undermine the public's confidence in election results. Accordingly, Sequoia has moved to quash or enjoin the enforcement of the Subpoenas issued to the Counties.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

A handwritten signature in cursive script, reading "Edwin B. Smith, III". The signature is written in dark ink and is positioned above the printed name.


Edwin B. Smith III

Dated: April 7, 2008

CERTIFICATION PURSUANT TO RULE 1:4-4

I hereby certify that the facsimile signatures of Edwin Smith III affixed to the attached verification has been acknowledged by the respective deponent as his genuine signature. A copy of the verification, with the original signature affixed, will be provided, if requested by the Court or by any party.

I certify that the foregoing statement made by me is true to the best of my knowledge. I am aware that if the foregoing statement made by me is willfully false, I am subject to punishment.



Adolph A. Romei, Esq.

Dated: April 8, 2008

PENNY M. VENETIS, ESQ.
RUTGERS CONSTITUTIONAL LITIGATION CLINIC
123 Washington Street
Newark, New Jersey 07102
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Fax: (973) 848-5601
Attorneys for Plaintiffs

ASSEMBLYMAN REED GUSCIORA,
STEPHANIE HARRIS, COALITION FOR
PEACE ACTION, and NEW JERSEY
PEACE ACTION,

Plaintiffs,

v.

JON S. CORZINE, GOVERNOR OF THE
STATE OF NEW JERSEY, (in his official
capacity) and ANNE MILGRAM,
ATTORNEY GENERAL OF THE STATE
OF NEW JERSEY (in her official capacity),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
DOCKET NO.: L-2691-04

CIVIL ACTION

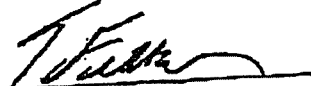
SUBPOENA DUCES TECUM
AND AD TESTIFICANDUM

To: BERGEN COUNTY, State of New Jersey
c/o Kathleen A. Donovan, Bergen County Clerk
One Bergen County Plaza, Room 130
Hackensack, New Jersey 07601-7000

YOU ARE HEREBY COMMANDED to attend and give testimony before the above
named Court at the Bergen County Justice Center, 10 Main Street, Hackensack, New Jersey
07601 on Tuesday, April 8, 2008 at 10:00 a.m. in the above-entitled action, and to bring with you
and produce at the same time and place, the following: See Requests for Objects and Documents
set forth in the Rider attached hereto.

PLEASE TAKE FURTHER NOTICE that you are not to produce or release any objects or documents requested by this Subpoena until the date specified above. If you are notified that a motion to quash this Subpoena has been filed, you will not produce or release the subpoenaed documents until ordered by the Court or the release is consented to by all parties to this action.

Failure to appear according to the command of this Subpoena will subject you to the penalties provided by law.


Theodore J. Fetter
Acting Clerk of the Superior Court

Dated: March 27, 2008

RIDERINSTRUCTIONS

1. Pursuant to New Jersey Rule of Court 4:14-2(c), you shall designate to testify on your behalf, at the time and place set forth in this Subpoena, one or more officers, directors, managing agents, or other persons who possess knowledge related to the below Requests for Objects and Documents (hereinafter, the "Requests").

2. Pursuant to New Jersey Rules of Court 4:14-7(a), you are required to furnish all objects and documents called for in the Requests.

3. The Requests are intended to be continuing and you are instructed to make prompt, further and supplemental production whenever an additional object or document is discovered that is responsive hereto.

4. All objects and documents called for in the Requests shall be produced in the form in which they are maintained or used in the ordinary course of business, and shall not be altered, ameliorated or otherwise tampered with prior to their production. To the extent possible, all documents and objects called for in the Requests shall be produced in the precise state that such document or object was in upon the Bergen County Clerk's receipt of election records immediately following the New Jersey Presidential Primary Election held on February 5, 2008.

5. If any object or document called for by the Requests is withheld on the ground that it is privileged, constitutes attorney work product, or is for any other reason exempt from discovery:

- a) Identify the object or document. In the case of a document, set forth the type of document, its date, author(s), addressee(s), if different from its recipient(s), and its general subject matter;
- b) Set forth the privilege and the factual basis upon which the privilege is claimed; and
- c) State the paragraph of the Requests to which each withheld object or document is responsive.

6. If objection(s) is/are made to any of these Requests, please state with specificity the reasons for the objection and the paragraph or part of the Requests to which the objection is made, and produce those objects or documents called for in the Request to which such objection does not apply.

7. Where anything has been deleted from a document produced, or where any component of or attachment to any object has been removed or otherwise not included in the production, specify: (1) the nature of the material, component, or attachment deleted, removed or otherwise not included; (2) the reason for the deletion, removal or non-inclusion; and (3) the identity of the person responsible for the deletion, removal or non-inclusion.

8. Where any documents or objects (including any component thereof or attachment thereto) responsive to the Requests has been destroyed or lost, please identify such objects, documents, or components/attachments as described at Instruction 5(a) herein, and set forth the approximate date and cause of or reason for the destruction or loss.

9. "And" or "or" shall be construed conjunctively or disjunctively as necessary to make the Request more inclusive rather than less inclusive; the singular includes the plural and the plural includes the singular.

10. The use of a verb in any tense shall be construed as the use of the verb in all other tenses, wherever necessary to bring within the scope of the specification any document that might otherwise be construed to be outside its scope.

11. If you find there to be ambiguity in construing any of the Requests, you are to identify the matter deemed ambiguous and set forth the construction chosen or used in responding to the Request.

DEFINITIONS

1. "Ballot Cartridge" means the memory cartridge that contains the vote records from the DRE Voting Machine into which the cartridge has been inserted during the course of an election. The cartridge is removed when the polls close and is then either physically transported to a tabulation facility, or alternatively, its contents are transmitted for tabulation via modem.

2. "Ballot Cartridge Reader" means an electronic device that is capable of reading the contents of a Ballot Cartridge and transmitting the vote records stored in such cartridge to a tabulation facility, by way of a modem. The Ballot Cartridge Reader may also be used to print out a results tape of all votes cast in a given precinct.

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10. "Voting Authority Slip" means the perforated 'ticket' that a voter receives upon checking it at his or her polling place, and which the voter must present to the poll worker who is operating the voting machine. The poll worker places the Voting Authority Slip, in the order in which it was received, on a string or wire provided for that purpose.

11. "WinEds Software" means the software application used in conjunction with the Sequoia AVC Advantage, among other DRE Voting Machines, that is responsible for tasks such as the management of the election process, including the programming and configuring of the election, the creation of Ballot Definitions, and the tabulation and reporting of the results.

12. "You," "your" or "yours" means Bergen County, to which the below Requests for Documents and Objects are directed, and any of Bergen County's current or former employees, agents, officers, directors and representatives.

REQUESTS FOR OBJECTS AND DOCUMENTS

1. All Results Reports from each of Bergen County's DRE Voting Machines that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

2. One Sequoia AVC Advantage DRE Voting Machine that was used in Bergen County for the Presidential primary and that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

3. One Sequoia AVC Advantage DRE Voting Machine that was used in Bergen County for the Presidential Primary and that did not experience a Results Report Discrepancy regarding votes cast during the Presidential Primary.

4. For each Sequoia AVC Advantage DRE Voting machine supplied pursuant to Requests No.2 and No.3 above: The complete source code (in electronic form), including libraries and all related technical documentation, for all the software (or firmware, as the case may be) in the voting machine, complete with all configuration files and build tools. Your production pursuant to this Request must be such that would allow the recipient to reproduce the binary images currently loaded into the voting machines in use in New Jersey, and sufficient to enable the building and execution of modifications to the software made for testing and analysis purposes.

5. All Ballot Cartridges used in the Presidential Primary from each and every one of Bergen County's DRE Voting Machines that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

6. Five functional Ballot Cartridges that were used in Bergen County for the Presidential Primary and that did not experience a Results Report Discrepancy regarding votes cast during the Presidential Primary.

7. All Ballot Definition Files (in electronic form) that were used in Bergen County for the Presidential Primary, for any DRE Voting Machines that experienced a Results Report Discrepancy during the Presidential primary.

8. One Ballot Cartridge Reader used in or by Bergen County for purposes of the Presidential Primary. *Note that this Request is applicable only if Bergen County does not use card-size Ballot Cartridges, but rather, uses Ballot Cartridges that are similar in appearance to 8-track cassette tapes.*

9. One computer (with the actual programs and files intact) that was used in or by Bergen County to run the WinEds Software for purposes of the Presidential Primary.

10. A copy of the AVC Advantage Operating Manual that is relied upon by or in the possession of Bergen County.

11. A copy of the WinEds Software Operating Manual that is relied upon by or in the possession of Bergen County.

12. A copy of all current poll worker manuals and all other poll worker training materials distributed to, made available to, used or relied upon by poll workers in Bergen County.

13. All service records of any kind, dated anywhere between January 1, 1980 and the present, for any and all DRE Voting Machines that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary in Bergen County.

14. All Voting Authority Slips (still attached to the string or wire affixed to each relevant DRE Voting Machine) for any and all DRE Voting machines in Bergen County that experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

15. All of the Poll Book(s) used for the Presidential Primary at those polling places in Bergen County where a DRE Voting machine experienced a Results Report Discrepancy regarding votes cast during the Presidential Primary.

ATTACHMENT "A"

MAR-11-2008 10:53

P.04



The Times

County finds vote errors

Discrepancies discovered in 5% of machines

Saturday, February 23, 2008

BY ROBERT STERN

Five percent of the 600 electronic voting machines used in Mercer County during the Feb. 5 presidential primary recorded inaccurate voter turnout totals, county officials said yesterday.

County officials said the miscues did not affect the election results but expressed renewed concerns over the reliability of the machines.

"I am deeply concerned about the discrepancies seen in the voting returns from the Sequoia voting machines in this month's New Jersey primary elections," Mercer County Executive Brian M. Hughes wrote in a letter yesterday to state Attorney General Anne Milgram.

"Although the discrepancies do not affect the outcome of the election, it certainly undermines the confidence in the voting public when they hear that the reliability of the electronic voting machines is in question," Hughes wrote.

Problems with the numbers cropped up in 30 of Mercer County's 600 Sequoia Voting Systems machines, Hughes said.

In each case, the problem left one of miscounted votes, but a mismatch between the total Democratic and Republican ballots cast as recorded by the machine and the numbers that should have been recorded, officials said.

In other words, while the mal functioning machine correctly recorded each vote cast for the right candidate, it miscalculated the numbers of total Republican and total Democratic ballots, county Clerk Paula Sollami-Covello said.

Apparently through some kind of software or hardware glitch, each malfunctioning machine in Mercer County showed one fewer Democratic voter than it should have and one extra Republican voter, Sollami-Covello said.

In other counties with the problem, the reverse occurred — each malfunctioning machine showed one fewer Republican voter and one extra Democratic voter than it should have, Sollami-Covello said.

Mercer County had more than half of the statewide total of 59 machines with the glitch, said David Wald, spokesman for the state Attorney General's Office, which oversees New Jersey elections. Five counties in addition to Mercer had problem machines, although they represent a tiny percentage of the 10,000 Sequoia voting machines the state uses.

The other counties are Middlesex, Bergen, Gloucester, Ocean and Union.

"The problem was in the summary report in the partisan breakout for vote totals," Wald said.

"We do share Mr. Hughes' concern and need to find out from Sequoia why this is," he said.

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March 27, 2008

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VIA HAND DELIVERY

Bergen County, State of New Jersey
c/o Kathleen A. Donovan,
Bergen County Clerk
One Bergen County Plaza, Room 130
Hackensack, New Jersey 07601-7000

Re: Assemblyman Reed Gusciora et al. v. Jon S. Corzine et al.
Docket No. MER-L-2691-04

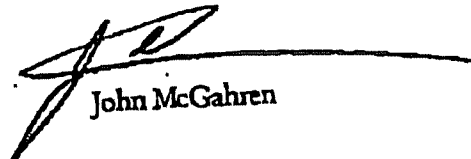
Dear Ms. Donovan:

This office serves as co-counsel for the Plaintiffs in the matter captioned above, which, generally speaking, is an action challenging the constitutionality of New Jersey's voting machines and systems. Accompanying this letter, you will find a Subpoena related to inconsistencies in the Results Reports printed from certain Direct-Recording Electronic ("DRE") voting machines in Bergen County during the February 2008 Presidential Primary Election.

I ask that you please contact the office of Patton Boggs LLP at your very earliest convenience, at the phone number above, to discuss the logistics of the Requests set forth in the Subpoena.

Thank you.

Very truly yours,



John McGahren

cc: Patricia A. DiCostanzo, Superintendent of Elections (via Federal Express)
Karen Du Mars, Esq., Deputy Attorney General (via hand delivery)
Penny M. Venetis, Esq., Rutgers Constitutional Law Clinic (via facsimile, 973-353-1249)

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March 27, 2008

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VIA HAND DELIVERY

Karen Du Mars, Esq.
Assistant Deputy Attorney General
Department of Law and Public Safety
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25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

Re: Assemblyman Reed Gusciora et al. v. Jon S. Corzine et al.
Docket No. MER-L-2691-04

Dear Ms. Du Mars:

Accompanying this letter, you will find copies of the Subpoenas served today upon each of the six counties in New Jersey (Bergen, Gloucester, Mercer, Middlesex, Ocean and Union) that experienced inconsistencies in the Results Reports printed from certain DRE Voting machines in the context of the February 2008 Presidential Primary Election.

Pursuant to Judge Feinberg's instructions at the March 25, 2008 conference, we would like to set up a meeting in order to confer with you regarding the content of these Subpoenas, and invite you to contact us in that regard as soon as possible. As also indicated at the March 25 conference, no confidentiality agreement has been produced in reference to the items and documents requested by the Subpoenas, and Plaintiffs therefore intend to move forward with their examination of these items and documents as soon as allowable by law.

Very truly yours,


John McGahren

cc: Penny M. Venetis, Esq. (via facsimile)

ASSEMBLYMAN REED GUSCIORA,
STEPHANIE HARRIS, COALITION FOR PEACE
ACTION, and NEW JERSEY PEACE ACTION,

Plaintiffs,

vs.

JAMES E. MCGREEVEY, GOVERNOR OF THE
STATE OF NEW JERSEY (in his official capacity)
and PETER C. HARVEY, ATTORNEY GENERAL
OF THE STATE OF NEW JERSEY (in his official
capacity),

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MERCER COUNTY

DOCKET NO. MER-L-2691-04

CIVIL ACTION

**MEMORANDUM OF LAW FOR SEQUOIA VOTING SYSTEMS, INC. IN SUPPORT OF ITS
MOTION TO QUASH OR ENJOIN ENFORCEMENT OF SUBPOENAS SERVED ON SIX
COUNTIES FOR VOTING MACHINES AND RELATED MATERIALS**

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TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF PROCEDURAL HISTORY AND FACTS	2
A. The Complaint	2
B. The March 25, 2008 Hearing.....	2
C. Plaintiffs' Subpoena to the Counties Returnable April 8, 2008.....	4
D. The Subpoenas' "Requests for Objects and Documents"	5
 ARGUMENT	
 POINT I	
THE COURT SHOULD QUASH THE SUBPOENAS SERVED BY PLAINTIFFS UPON THE SIX COUNTIES, OR ENTER A PROTECTIVE ORDER PREVENTING THEIR ENFORCEMENT	7
A. The Relevant Rules of Court.....	7
B. A Protective Order or Order Quashing the Plaintiffs' Subpoena to the Counties is Warranted Under the Facts at Bar	8
1. Factors Relevant to Trade Secret Determinations	9
2. Sequoia's Software and Computer Source Code Constitute Trade Secrets Under the Six-Factor <u>Hammock</u> Test.....	10

POINT II

AN INJUNCTION SHOULD ISSUE AGAINST ENFORCEMENT
OF PLAINTIFFS' SUBPOENAS TO THE SIX COUNTIES
REQUESTING VOTING MACHINES AND RELATED ITEMS13

A. Sequoia Has a Reasonable Probability of Success on
the Merits13

B. Sequoia Will Suffer Irreparable Harm if Plaintiffs'
Subpoenas are Enforced.....13

C. The Balance of Hardships Favors an Injunction Against
Enforcement of the Plaintiffs' Subpoenas to the Counties14

CONCLUSION.....16

TABLE OF AUTHORITIES

	<u>Page</u>
 CASES	
<u>CMAX/Cleveland, Inc. v. UCR, Inc.</u> , 804 F. Supp. 337 (D. Ga. 1992)	11
<u>Computer Assocs. Int'l v. Quest Software, Inc.</u> , 333 F. Supp.2d 688 (D. Ill. 2004)	10
<u>Computer Print Systems, Inc. v. Lewis</u> , 281 Pa. Super. 240 (Pa. Super. Ct. 1980)	12
<u>Com-Share, Inc. v. Computer Complex, Inc.</u> , 338 F.Supp. 1229 (E.D. Mich. 1971)	11
<u>Crowe v. De Gioia</u> , 90 N.J. 126, 132 (1982)	13-15
<u>Cybertek Computer Products, Inc. v. Whitfield</u> , 203 USPQ 1020 (Cal. 1977)	10
<u>Dickerman Associates, Inc. v. Tiverton Bottled Gas Co.</u> , 594 F. Supp. 30 (D. Mass. 1984))	10
<u>Hammock v. Hoffmann-La Roche, Inc.</u> , 142 N.J. 356, 384 (1995)	9-12
<u>Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.</u> , 920 F.2d 171 (2d Cir. 1990)	11
<u>Q-CO Industries, Inc. v. Hoffman</u> , 625 F. Supp. 608 (S.D.N.Y. 1985)	10
<u>Smith v. Bic Corp.</u> , 869 F.2d 194 (3d Cir. 1989)	10
<u>Trump's Castle Associates v. Tallone</u> , 275 N.J. Super. 159 (App. Div. 1994)	8-9
<u>Wasserstein v. Swern and Co.</u> , 84 N.J. Super. 1 (App. Div. 1964)	7

COURT RULES

N.J. Court Rule 1:9-1	7
N.J. Court Rule 1:9-2	7
N.J. Court Rule 4:10-2(g)	8
N.J. Court Rule 4:10-3	8
N.J. Court Rule 4:10-3(g)	8
N.J. Court Rule 4:14-7(c).....	7

OTHER AUTHORITIES

Restatement of Torts sec. 757	9
Restatement (Third) of Unfair Competition sec. 39	9

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of Sequoia Voting Systems, Inc. ("Sequoia"), one of the vendors that supplied voting machines to a number of different counties in this state.

In the instant application, Sequoia is moving to quash or enjoin enforcement of six Subpoenas Duces Tecum and Ad Testificandum that were served by the plaintiffs upon the County Clerks of Bergen, Gloucester, Mercer, Middlesex, Ocean and Union Counties on or about March 27, 2008 and that are returnable on Tuesday, April 8, 2008. Those Subpoenas demand that the Counties turn over to the plaintiffs actual voting machines and related documents, data, software codes and other materials. Since the Counties' compliance with many of the demands contained in those subpoenas would infringe upon and result in a possible loss of Sequoia's trade secrets, proprietary information and other intellectual property, and since the plaintiffs' subpoenas do not provide for safeguarding the demanded voting machines and materials (as contemplated by the Court in its March 25, 2008 hearing), Sequoia has filed the instant motion to quash them, or, in the alternative, enjoin their enforcement.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

A. The Complaint

In the case at bar the plaintiffs filed a “Complaint in Lieu of Prerogative Writ” dated October 19, 2004 against only former Governor James E. McGreevey (“in his official capacity”) and Peter C. Harvey, the former Attorney general of New Jersey (“in his official capacity”).¹ Sequoia, nor any other voting machine vendor, is named as a defendant in that Complaint.

The Complaint includes six counts, all of which relate to actions allegedly taken, or failed to be taken, by the Governor and Attorney General that contravene constitutional or statutory requirements pertaining to the conduct of elections. Many of those counts contain allegations directed toward the government officials’ approval and supervision of the use of electronic voting machines (which the plaintiffs often refer to as “DREs” [Direct Recording Electronic voting machines]). The Complaint’s “Prayer for Relief” seeks entry of a judgment that would enjoin the use of certain voting machines and/or require the retrofitting of certain voting machines.²

B. The March 25, 2008 Hearing

On March 25, 2008, a hearing was held in the case before the Honorable Linda R. Feinberg, A.J.S.C. At that hearing counsel for the plaintiffs indicated that their clients sought various categories of information about certain DREs used in New Jersey and counsel for the defendants [hereinafter “defendants,” the “State of New Jersey” or the “State”] indicated that they believe, but are not certain, that they are required to withhold certain access to and

¹ Sequoia is not aware of any subsequent pleading filed by the plaintiffs.

² See, e.g., Complaint at p. 45: “WHEREFORE, Plaintiffs respectfully ask this Court[:] 1. To enjoin the use of DREs for the upcoming November 2004 election; 2. To require all DREs be retrofitted to provide a voter verified paper ballot after the November 2004 election; 3. To require that all new DREs purchased in the state require a voter verified paper ballot, produced using the ‘Mercuri Method....’”

information about the DREs due to confidentiality agreements pertaining to those machines, or on the ground that the information sought constitutes protected trade secrets of the vendors of the voting machines. See, e.g., Transcript of Proceedings, Mar. 25, 2008 at p. 7, lines 7-20; p. 12, line 25 to p. 13, lines 1-2. [Hereinafter cited as “Transcript 03/25/08”]. (A copy of that transcript is attached to this brief as **Exhibit A**).

Apparently in light of the complexity of the discovery issues and the presumptive existence of agreements and other protections for the IP rights of the voting machine vendors, the Court repeatedly stated at the March 25, 2008 hearing that that if access to, or information about, the DREs were to be granted to the plaintiffs, the Court would be inclined to do so only under a carefully drawn and executed confidentiality agreement. See, e.g., Transcript 03/25/08 at p. 11, lines 23-25 and p. 12, lines 1-2 (“But what I see is, that there should be a protective order that should be entered into. It should be very carefully written and very carefully executed. Very limited in its scope in terms of who can look at the documents....”)

Regarding the plaintiffs’ requests for discovery as to the voting machines the Court also stated:

THE COURT: “**So it’s critical that you [the parties’ attorneys] talk to the vendors and see if you can work out a confidentiality agreement or protective order. That protective order would be very limited. It would be to just the attorneys in the case. The two of you. Nobody else. And your experts. That’s what it would be limited to. No students, either. Just the two attorneys and the experts.**” Transcript 03/25/08, p. 9, lines 13-20.

THE COURT: “**The machines themselves would have to be carefully guarded and it would have to be done in a controlled environment, but that all can be done. But I want that issued explored about entering into a protective order. But if it can’t be resolved amicably, then I want it briefed and I want the vendors to be parties and I want it to be initiated by the State and I want that done within 14 days.**” Transcript 03/25/08, p. 10, lines 13-20 (emphasis supplied).

Although (as quoted above) the Court stated that it was “critical” that counsel for the

parties talk to counsel for the vendors to try to work out a confidentiality agreement or protective order under which certain discovery could occur, counsel for the plaintiffs did not contact counsel for Sequoia to do so before serving its Subpoena.

The Court further stated that some items sought by the plaintiff might be producible in redacted form.³ The Court also indicated that if counsel for the plaintiffs and counsel for the defendants could not resolve the discovery issues within approximately thirty days, the Court could “appoint a discovery master” (compensated by both parties) to deal with the intricate issues. Transcript 03/25/08 at p. 13, lines 13-18.

C. Plaintiffs’ Subpoenas to the Counties Returnable April 8, 2008

Although not served with copies of the document, Sequoia recently learned that the plaintiffs served a “Subpoena Duces Tecum and Ad Testificandum” dated March 27, 2008 upon the Clerk of Bergen County New Jersey (i.e., “BERGEN COUNTY, State of New Jersey, c/o Kathleen A. Donovan, Bergen County Clerk”).⁴ [Hereinafter cited as the “Subpoena”]. Upon information and belief, the plaintiffs served that Subpoena upon the Bergen County Clerk on March 27, 2008, and the plaintiffs also served substantially similar Subpoenas upon the County Clerks of Gloucester, Mercer, Middlesex, Ocean and Union Counties on that same day.

³ See Transcript 03/25/08 at p. 12, line 25 to p. 13, 9 (when counsel for State stated that voting machine training manuals might contain trade secrets, the Court stated that such information could be redacted).

⁴ A copy of the Subpoena to the Bergen County Clerk obtained by counsel for Sequoia is attached to Sequoia's Certification of Counsel as Exhibit A.

D. The Subpoena's "Requests for Objects and Documents"

A review of the "Requests for Objects and Documents" ("Requests") section of the Subpoena⁵ shows that a number of the plaintiffs' Requests expressly refer to voting machines supplied to Bergen County by Sequoia, as well as other information and materials related to those voting machines and their use in various elections. See, e.g., the Requests for Objects and Documents section of the Subpoena at paragraphs 2, 3, 4, etc. Other Requests (not expressly referring to Sequoia) effectively require production of Sequoia voting machines and related materials. For example, Requests that pertain to "DRE voting machines" also would require the production of Sequoia machines and related materials in that Sequoia supplied such machines to Bergen County and Bergen County still possesses and uses Sequoia machines.⁶

As explained in the accompanying Certification of Edwin B. Smith III, Vice President of Sequoia for Compliance, Quality and Certification [hereinafter "Certification of Edwin Smith"], Sequoia supplied electronic voting machines and equipment to Bergen County (and the other five counties listed above) pursuant to various contracts of sale and license agreements. Those agreements contain a number of provisions protecting (and requiring the Counties to protect) Sequoia's trade secrets, intellectual property and contractual rights associated with those machines as well as certain equipment, software and other things required for the operation of Sequoia voting machines. [Hereinafter collectively Sequoia's "Intellectual Property" or "IP"]. As further explained in the Certification of Edwin Smith, if Bergen and the other counties comply in full with the Subpoena they will be violating a number of Sequoia's IP rights and

⁵ Since plaintiffs' Subpoena is unpaginated, no page references can be supplied.

⁶ See the accompanying Certification of Counsel and Certification of Ed Smith, Vice President of Sequoia.

causing Sequoia significant harm – much of it irreparable in nature. See Certification of Edwin Smith at paragraphs 9 and 10.

In an effort to promote the Court's goal of cooperation in the discovery process, Sequoia has reviewed the Requests set forth in the plaintiffs' Subpoena to ascertain whether Sequoia could consent to some of them. As a result of that review, Sequoia has determined that it can consent to eight of the fifteen Requests (1, 8, 10-15) and that it must object to seven of them (2, 3, 4, 5, 6, 7 and 9). See Certification of Edwin Smith. Since, however, the plaintiffs' Subpoena does contain Requests that would, if complied with, violate Sequoia's IP rights, Sequoia has been compelled to file the instant motion to quash or enjoin enforcement of the Subpoena as written. As explained in the accompanying Certification of Counsel, since Sequoia has received a copy only of the Subpoena served upon Bergen County, and cannot be sure of the content and numbering of the Requests in the subpoenas served on the other five counties, Sequoia is asking the Court to: (1) quash or enjoin enforcement of the objectionable Requests set forth in the Subpoena to Bergen County and (2) quash or enjoin enforcement of all Requests set forth in the subpoenas served upon the other five counties if the Requests they contain are not identical to those appearing in the Subpoena to Bergen County. The latter request will give Sequoia time to obtain and review those subpoenas and determine which Requests are acceptable and which are objectionable.

ARGUMENT

POINT I

THE COURT SHOULD QUASH THE SUBPOENAS SERVED BY PLAINTIFFS UPON THE SIX COUNTIES, OR ENTER A PROTECTIVE ORDER PREVENTING THEIR ENFORCEMENT

Sequoia respectfully requests that this Court quash, or issue a protective order against the enforcement of, the Subpoenas served by the plaintiffs upon the six counties.

A. The Relevant Rules of Court

N.J. Court Rule 1:9-2 authorizes this Court to “quash or modify” a “subpoena, or, in a civil action, a notice in lieu of subpoena as authorized by R. 1:9-1....” See, e.g., Wasserstein v. Swern and Co., 84 N.J. Super. 1 (App. Div. 1964) (reversing trial court decision denying defendant’s motion to quash subpoenas served on agents of his insurance carrier on grounds that they were unreasonable and oppressive). Rule 1:9-2 also provides that, “Except for pretrial production directed by the court pursuant to this rule, subpoenas for pretrial production shall comply with the requirements of Rule 4:14-7(c).” Rule 4:14-7(c) (“Notice; Limitations”) provides in pertinent part:

A subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of a deposition is simultaneously compelled. **The subpoena shall state that the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action.**

Rule 4:14-7(c) (emphasis supplied). Since the Court did not order pretrial production of the materials sought by plaintiffs’ Subpoenas to the Counties pursuant to Rule 1:9-2, the provisions of 4:14-7(c) apply to the situation at bar. Accordingly, upon the filing of the instant motion, the

six county deponents should withhold their responses until the conditions specified in the court rules are satisfied.

In addition, to the foregoing provisions, Rule 4:10-3 (“Protective Orders”) gives the Court broad powers to preclude or limit discovery, both generally and with respect to particular categories of information. See, e.g., Rule 4:10-3(g) (court can enter protective order that “a trade secret or other confidential research, development, or commercial information not be disclosed or disclosed only in a designated way”). See also the following subparagraphs of 4:10-3 which provide that a court can enter protective orders that: (a) (“discovery not be had”); (b) (“discovery may be had only on specified terms and conditions....”); (c) (“discovery may be had only by a method of discovery other than that selected by the party seeking discovery”); (d) (“certain matters not be inquired into, or that the scope of discovery be limited to certain matters.”) Furthermore, Rule 4:10-2(g) empowers the court limit discovery in a number of different ways pursuant to motions filed by the litigants, “or on its own initiative after reasonable notice to the parties.”

B. A Protective Order or Order Quashing the Plaintiffs’ Subpoenas to the Counties is Warranted Under the Facts at Bar

A protective order or order quashing the plaintiffs’ subpoenas to the Counties should issue in the case at bar to protect Sequoia’s trade secret and confidential information referenced in the accompanying Certification of its Vice President, Edwin Smith.

New Jersey decisional law clearly shows that trade secrets can be protected from disclosure during the discovery process. See, e.g., Trump’s Castle Associates v. Tallone, 275 N.J. Super. 159 (App. Div. 1994) (reversing trial court ruling that data regarding gambling revenues generated by discharged employee did not qualify as trade secrets and remanding case

for development of detailed factual record). The Trump's Castle Court explained that a variety of confidential business information can qualify as trade secrets:

TropWorld immediately **moved to quash the discovery subpoena** under R. 4:10-3(g), claiming that compliance would **"require production of confidential trade secrets,"** replying on the definition in the Restatement of Torts sec. 757 (1939). The current Restatement definition is contained in the Restatement (Third) of Unfair Competition sec. 39 (Tentative Draft No. 4, March 25, 1993), **which defines a trade secret in "black letter" as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others."**

The Restatement, *supra*, sec. 39 comment d at 28 states in pertinent part: d. Subject matter. A trade secret can consist of a formula, pattern, **compilation of data, computer program**, device, method, technique, process, **or other form or embodiment of economically valuable information**. A trade secret can relate to technical matters such as the composition or design of a product, a method of manufacture, or the know-how necessary to perform a particular operation or service. A trade secret can also relate other aspects of business operations such as pricing and marketing techniques or the identity and requirements of customers (see sec. 42, Comment f).

Trump's Castle, 275 N.J. Super. at 162. See also Hammock v. Hoffmann-La Roche, Inc., 142 N.J. 356, 384 (1995) (referring to definition of trade secret in Restatement of Torts sec. 757).

1. Factors Relevant to Trade Secret Determinations

In Hammock, the New Jersey Supreme Court, drawing on the Restatement of Torts, enumerated some factors that may be used to determine whether a particular piece of business information constitutes a trade secret:

(1) the extent to which the information is known outside of the owner's business; (2) the extent to which it is known by employees and others involved in the owner's business; (3) the extent of measures taken by the owner to guard the secrecy of the information; (4) the value of the information to the owner and to his competitors; (5) the amount of effort or money expended by the owner in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Hammock v. Hoffmann-La Roche, Inc., 142 N.J. 356, 384 (1995) (citing Smith v. Bic Corp., 869 F.2d 194, 200 (3d Cir. 1989) and Restatement of Torts § 757, comment b (1939)).

Jurisdictions like New Jersey that employ the Restatement's standards have found computer software and source code to be protectable trade secrets. Cybertek Computer Products, Inc. v. Whitfield, 203 USPQ 1020 (Cal. 1977); Q-CO Industries, Inc. v. Hoffman, 625 F. Supp. 608 (S.D.N.Y. 1985); Computer Assocs. Int'l v. Quest Software, Inc., 333 F. Supp.2d 688 (D. Ill. 2004).

2. Sequoia's Software and Computer Source Code Constitute Trade Secrets Under the Six-Factor Hammock Test

Application of the six-factor Hammock test to Sequoia's software and source code establishes that they are trade secrets that should be protected during the discovery process.

Sequoia's software and source code meet the requirements of the first Hammock factor (the extent to which the information is known outside the business) in that Sequoia does not disclose its source code to the public, or even its own customers. See Q-CO Industries, Inc. v. Hoffman, 625 F. Supp. at 617 (fact that program is not accessible to public supports trade secret finding). The fact that an expert in computer programming could discern such a code does not deprive it of trade secret protection. Dickerman Associates, Inc. v. Tiverton Bottled Gas Co., 594 F. Supp. 30, 36 (D. Mass. 1984).

The second Hammock factor (the extent to which the information is known within the business) also supports the finding of a trade secret. Indeed, Sequoia limits knowledge of its source code to select technical personnel within the company. See Certification of Edwin Smith at par. 6. See also Computer Assocs. Int'l v. Quest Software, Inc., 333 F. Supp.2d 688, 696 (D. Ill. 2004) (company limited access to code to certain employees).

The third Hammock factor (the extent of measures taken to guard the information), also strongly supports a trade secret finding in that Sequoia routinely requires its customers to enter into license agreements regarding all of its software and source code that prohibits them from disclosing, reproducing or transferring it. See Certification of Edwin Smith at par. 7. See CMAX/Cleveland, Inc. v. UCR, Inc., 804 F. Supp. 337, 357 (D. Ga. 1992) (fact that company requires customers to sign license agreements prohibiting disclosure, reproduction or assignment of software or code strongly supports classification as a trade secret).

The fourth Hammock factor (the value of the information to the company and its competitors), clearly supports the finding of a trade secret in the case at bar. Like the litigant in Com-Share, Inc. v. Computer Complex, Inc., 338 F.Supp. 1229, 1236 (E.D. Mich. 1971), Sequoia's software and source code are principal business assets that are key to: (1) the operation of its products, (2) its ability to distinguish itself from competitors, and (3) its ability to win new customers and retain existing customers. See Certification of Edwin Smith at pars. 5, 6 and 7. See Com-Share, Inc. v. Computer Complex, Inc., 338 F. Supp. 1229 (E.D. Mich. 1971) (fact that software and source code constituted company's principal business assets and served as significant source of customer recruitment, retention and servicing business supported trade secret finding).

The fifth Hammock factor (the time and money spent in development of the purported trade secret), will support a trade secret finding in favor of Sequoia in that it spent years and considerable sums of money to develop its software. See Certification of Edwin Smith at pars. 5 and 8. See Integrated Cash Management Services, Inc. v. Digital Transactions, Inc., 920 F.2d 171, 174 (2d Cir. 1990) (large investment of time and money in developing product supports trade secret finding).

Finally, the sixth Hammock factor (the ease or difficulty with which the information could be duplicated) also argues in favor of a trade secret ruling in the case at bar in that only a sophisticated computer expert could crack the code embedded in Sequoia's voting machines. See Computer Print Systems, Inc. v. Lewis, 281 Pa. Super. 240, 251 (Pa. Super. Ct. 1980) (fact that skilled programmer could determine code through extensive effort did not undermine trade secret finding with respect to sixth factor).

In conclusion, given that all six Hammock factors support a trade secret finding, Sequoia respectfully requests that the Court grant the instant motion and quash the plaintiffs' Subpoenas to the Counties.

POINT II

AN INJUNCTION SHOULD ISSUE AGAINST ENFORCEMENT OF PLAINTIFFS' SUBPOENAS TO THE SIX COUNTIES REQUESTING VOTING MACHINES AND RELATED ITEMS

In addition to the remedies provided by the New Jersey Rules of Court, the common law of this State provides an additional, alternative method for preventing enforcement of the plaintiffs' Subpoenas to the Counties. Sequoia respectfully maintains that it is entitled to an injunction against enforcement of those Subpoenas because in the absence of such relief it faces substantial, immediate and irreparable harm from the release of its trade secret, proprietary and other confidential information.

The factors for granting injunctive relief are set forth in Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). In determining whether to grant injunctive relief, the Court considers whether the moving party (1) has a reasonable probability of success on the merits, (2) will suffer irreparable harm, and (3) whether the balance of hardships favors the grant of injunctive relief.

A. Sequoia Has A Reasonable Probability of Success on the Merits

As demonstrated in the foregoing points of this Memorandum of Law and in the Certifications offered in support of its motion, Sequoia has trade secret, proprietary and other confidential information connected with the voting machines it supplied to the six counties at issue in this application. Furthermore, based upon the decisional law of this State cited above under Point I, it is more than reasonably probable that Sequoia's interests will be found worthy of protection.

B. Sequoia Will Suffer Irreparable Harm if Plaintiffs' Subpoenas are Enforced

Given the nature of the trade secret, proprietary and other confidential information Sequoia has at risk, it is clear that Sequoia will suffer substantial, immediate, and irreparable

harm if the plaintiffs' Subpoenas to the Counties are enforced. See Crowe v. De Gioia, 90 N.J. 126, 132-33 (1982) ("Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages.") That the harm will be substantial is obvious when one considers that Sequoia's intellectual property is a major factor in its ability to operate its business, and also represents a substantial investment of company resources. The immediate and irreparable nature of the harm is also clear in that once Sequoia's intellectual property is revealed to third parties it can be widely disseminated in a matter of minutes and made essentially impossible to recapture. Indeed, trying to recapture such information can be like trying to unring a bell. Sequoia does not have an adequate remedy at law with respect to the harm that would be caused by enforcement of the plaintiffs' subpoenas in that the release could cause the disruption, and even destruction of its business. This, in turn, would harm not only the owners and employees of the company, but also the public that votes on Sequoia machines.

C. The Balance of Hardships Favors an Injunction Against Enforcement of the Plaintiffs' Subpoenas to the Counties

As indicated above, in determining whether to grant preliminary relief, a court must also balance the relative hardships to and equities of the parties. Crowe, 90 N.J. at 134. This factor is sometimes expressed in terms of whether the harm to the movant if the injunction does not issue will be more severe than the harm to the party resisting the motion if the injunction is granted. In the case at bar, it is clear that the harm to Sequoia if the injunction does not issue is more severe than that facing the plaintiffs.

If the injunction does not issue, Sequoia faces the irretrievable loss of its unique intellectual property. If the injunction does issue, the plaintiffs in the case will be in the same position they were the day before the injunction. The plaintiffs waited almost four years after filing their Complaint to try to compel production of the information they now seek. Having to

wait a short period of time so the Court can consider Sequoia's claim for protection of its intellectual property is obviously less of a hardship than that facing Sequoia. Furthermore, an injunction against enforcement of the plaintiffs' Subpoenas would preserve the status quo ante. As the New Jersey Supreme Court has noted, "the point of temporary relief is to maintain the parties in substantially the same condition when the final decree is entered as they were when the litigation began." Crowe, 90 N.J. at 134.

Since it is clear that Sequoia meets the standard for issuance of an injunction in its favor, Sequoia respectfully requests that the Court enter an injunction against enforcement of the plaintiffs' Subpoenas.

CONCLUSION

For all the foregoing reasons, Sequoia Voting Systems, Inc. respectfully requests that the Court grant Sequoia's motion and enter an Order quashing and/or enjoining enforcement of the Subpoenas that the plaintiffs served upon the six Counties. If the Subpoenas served on Gloucester, Mercer, Middlesex, Ocean and Union Counties contain the same "Requests for Objects and Documents" as the Subpoena served upon Bergen County, Sequoia requests that the Court quash or enjoin enforcement of Requests Nos. 2, 3, 4, 5, 6, 7 and 9. If, however, the Subpoenas served on Bergen County has different Requests than those served on the other five counties, then Sequoia requests that the Court quash and/or enjoin enforcement of all the Requests set forth in the Subpoenas served upon those five entities, and only Requests 2-7 and 9 in the Subpoena to Bergen County.

Respectfully submitted,
BEATTIE PADOVANO LLC

By: 

Adolph A. Romei

Dated: April 8, 2008

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
MERCER COUNTY, NEW JERSEY
DOCKET NO. MER-L-2691-04
A.D. # _____

REED GUSCIORA,

Plaintiff,

v.

JAMES E. MCGREEVEY,
et al.,

Defendant.

)
) TRANSCRIPT
)
) OF
)
) MOTION
)
)
)
)

Place: Mercer County Civil
Courthouse
175 South Broad Street
Trenton, NJ 08650

Date: March 25, 2008

BEFORE:

THE HON. LINDA R. FEINBERG, A.J.S.C.

TRANSCRIPT ORDERED BY:

ANNALISA SIRACUSA, ESQ. (Beattie Padovano, LLC)

APPEARANCES:

JOHN MCGAHREN, ESQ. (Patton Boggs LLP)
PENNY VENETIS, ESQ. (Rutgers Law School)
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Audio Operator, K. Hougland

1 THE COURT: Gusciora versus Corzine. And for
2 the record it's MER-L-2691-04, and good morning.
3 Counsel, your appearances for the record.

4 MS. VENETIS: Your Honor, Penny Venetis from
5 Rutgers Law School for the plaintiff. And I have with
6 me two of my students, Heidi Alexander and Nick Parr
7 who've been working on the case with me.

8 THE COURT: Okay.

9 MR. MCGAHREN: John McGahren from Patton
10 Boggs for the plaintiff, Your Honor.

11 THE COURT: Okay. Thank you.

12 MS. GORE: Leslie Gore, Deputy Attorney
13 General on behalf of the State.

14 MS. DUMARS: Karen Dumars, Deputy Attorney
15 General for the State.

16 THE COURT: Okay. For the record, this Court
17 held a case management conference on February 8th of
18 2008, and I entered an order on March 4th that by March
19 10th the State would provide to plaintiffs a list
20 identifying no more than two election officials for
21 each county which it intended to call as witnesses, but
22 with no limitation as to the number of other witnesses
23 the State had listed.

24 It's further ordered that by March 10th the
25 State will provide the Court with a list of questions

1 that it intends to ask the county election official
2 witnesses, however, the Court will not limit the State
3 to eliciting testimony as to only those questions. I'd
4 indicate for the record, I know we had a case
5 management conference on the record that, in the end,
6 was responsible for generating, I believe, this order
7 because there was some questions that had arose.

8 I also do have a list from Ms. Dumars. It's
9 dated February 15th of 2008. It includes -- you will
10 find our witness list pursuant to the Court's order.
11 And I have a list of the county representatives, and
12 also representatives from AT&T Technology, ES&S
13 Sequoia, State Voting Machine Examination Committee and
14 some other witness, a total of 47.

15 There was also a prior case management order
16 that was entered in January of '08 with regard to
17 interrogatories and the production of documents and
18 depositions. I have received a number of documents
19 over the last day or so from the parties.

20 I have to tell you, I've been involved in --
21 in addition to this election case, probably four or
22 five very serious complex orders to show cause and one
23 case involving the Santiago matter which is also
24 returnable today with regard to a stay application, so
25 I have looked at them very quickly. I've not digested

1 them real well. I would ask you this morning to
2 perhaps articulate what concerns you may have.

3 It is my understanding, and I don't know the
4 status of it, but I think that the legislature -- I
5 don't know if the governor has signed the legislation
6 and extended the deadline to 2009. Do we know?

7 MS. GORE: It did pass through both houses,
8 Your Honor, and it's on the governor's desk waiting to
9 be signed.

10 THE COURT: Okay. Irrespective of that, it
11 is my intention to go forward with this trial. And so,
12 why don't I have the parties bring me up to date in
13 terms of where you are so we can begin to identify
14 trial dates. Ms. Venetis.

15 MS. VENETIS: Yes, Your Honor. We have made
16 very little progress with discovery. I must say, it
17 has been incredibly frustrating as my letters to -- of
18 Ms. Dumars and the Court have indicated.

19 What's been happening is that the Attorney
20 General's Office has been sending stacks of documents
21 to my office. We've been reviewing them. I've sent
22 Ms. Dumars now on five separate occasions letters
23 talking about the deficiencies of the production. And,
24 you know, there's some general sloppiness of documents
25 and the same documents having two bates numbers, but

1 there's really some serious problems such as
2 discoverable documents not being produced. They still
3 have not provided any written responses to our request
4 for the production of documents or our request for
5 admissions. They were due several months ago.

6 And so, Ms. Dumars sends me documents. We
7 review them. I sent her letters outlining
8 deficiencies. She sends me more documents. This has
9 happened five times. The last batch came only a few
10 days ago on March 17th with a cover letter that stated
11 very clearly these are new documents. These are
12 documents that were previously labeled as privileged.

13 I allocated several students to spend an
14 entire day going through the documents to analyze them,
15 and we discovered after doing that that they were the
16 same exact documents that had been produced another
17 time, but with different bates numbers. So, it really
18 was a tremendous waste of time on our part for no
19 reason, and there are still many outstanding discovery
20 issues.

21 There are documents that we believe we should
22 have that the State is claiming non-existing
23 proprietary privileges on. Those documents concern any
24 sort of testing that was done on the machines. The
25 reason that we are -- first of all --

1 THE COURT: If there's any privilege issue
2 that's going to have to be briefed.

3 MS. VENETIS: Well, Your Honor, that's what I
4 was going to ask you because the State keeps asserting
5 a proprietary privilege. Case law doesn't recognize
6 proprietary privilege. Any party that might
7 conceivably have that privilege is not a party to this
8 lawsuit. And I do believe that we need those documents
9 because our experts really do need to see what tests
10 were performed on the machines. Based on documents --

11 THE COURT: Well, if documents were given to
12 the State under a confidentiality agreement then you'd
13 probably have to name the party as well and get them
14 involved in the issue as well.

15 MR. McGAHREN: Your Honor, would it be
16 possible to seek a protective order to allow us to
17 review those documents?

18 THE COURT: Well, a protective order is --
19 one way of resolving it is to get a protective order
20 that would only allow your experts to review these
21 documents. Certainly have done that kind of thing in
22 the past.

23 MR. McGAHREN: It would also allow us, Your
24 Honor, to challenge the confidential nature of the
25 document upon our review. But, it's important for us

1 to see the documents.

2 MS. VENETIS: And to see them quickly, Your
3 Honor, because as Mr. McGahren stated, you know, we
4 want --

5 THE COURT: Well, let me just ask. What
6 about a protective order?

7 MS. GORE: Well, I think, Your Honor, it's
8 imperative that the vendors are involved in this
9 process because these documents pertain to trade
10 secrets and things of that nature that they need to be
11 a party and they may have -- they may want to put forth
12 some evidence as to why these documents should be
13 turned over.

14 MS. VENETIS: Your Honor --

15 THE COURT: Is there a confidentiality
16 agreement that the State has with these vending machine
17 companies -- with these companies?

18 MS. GORE: I'm not sure, Your Honor, if we do
19 have a confidentiality agreement with them or not.
20 That's something I can check.

21 MR. McGAHREN: Your Honor, any
22 confidentiality agreement with a commercial vendor
23 would have provisions and it -- allowing the parties to
24 produce things pursuant to a court order are probably
25 served subpoenas, so --

1 THE COURT: Right. I understand that, but I
2 would want the -- I would want this done on motion.
3 If, in fact, the machines are being challenged, I think
4 it's important for the plaintiffs to have their experts
5 have access to certain information as long as it's
6 protected.

7 MS. VENETIS: Your Honor, first of all, if I
8 may say, I find it rather surprising that the Attorney
9 General's Office doesn't know if these machines are
10 protected by any sort of protective order --
11 confidentiality order.

12 THE COURT: Well, I want to get --

13 MS. VENETIS: We're four years into this
14 case.

15 THE COURT: -- past that because I'm a
16 problem solver so that's what I want to do. My
17 position right out of the box would be that if this is
18 a case that's going to deal with the integrity of the
19 voting machines, that the experts who are employed by
20 both sides should have access to as much information as
21 possible, and a very carefully drawn and executed
22 confidentiality agreement.

23 So, I'm going to ask the parties to explore
24 entering into that agreement, working on that over the
25 next week. In the event that's not able to occur, then

1 there probably should be a motion by the State because
2 they've been asked for documents claiming some type of
3 a privilege and giving notice to the vendors.

4 But, once again, I'm going to come back to
5 this. When you do business in New Jersey and you are
6 certified in New Jersey and you are in litigation in
7 New Jersey and the subject matter of the litigation is
8 the integrity of the machine, the opposing parties
9 should have the right to have available information to
10 them so that they can effectively build their case. I
11 can't tell you which way it's going to come out. And
12 that's on both sides of the aisle.

13 So, it's critical that you talk to the
14 vendors and see if you can work out a confidentiality
15 agreement or a protective order. That protective order
16 would be very limited. It would be to just the
17 attorneys in the case. The two of you. Nobody else.
18 And your experts. That's what it would be limited to.
19 No students, either. Just two attorneys and the
20 experts.

21 MS. VENETIS: Your Honor, so -- just so that
22 I'm clear, we also then would want access to the DRES
23 that malfunctioned. I sent you a copy --

24 THE COURT: I have no problems with that.

25 MS. VENETIS: Okay.

1 THE COURT: Okay. No problems with that.

2 MS. VENETIS: And we have a list of -- we
3 actually have -- we were intending to raise this with
4 the Court, but we were intending to serve subpoenas
5 today to the counties to get those DREs, training
6 manuals, other things that are related to the operation
7 of the DREs that malfunctioned.

8 THE COURT: Well, training manuals are
9 probably a matter of public record anyway. I don't
10 think that's very difficult. The machines --

11 MS. VENETIS: Well, the State has withheld
12 them.

13 THE COURT: The machines themselves would
14 have to be carefully guarded and it would have to be
15 done in a controlled environment, but that all can be
16 done. But, I want that issue explored about entering
17 into a protective order. But, if it can't be resolved
18 amicably, then I want it briefed and I want the vendors
19 to be parties and I want it to be initiated by the
20 State and I want that done within 14 days.

21 MS. VENETIS: Your Honor, first, if I may
22 say, if there's no confidentiality agreement -- the
23 State is unsure -- then there's absolutely no reason
24 for the vendor to be involved. If they really have not
25 obliged the State to keep any of this information out

1 of the public's reach --

2 THE COURT: Well, I've been involved in -- oh
3 my gosh, I just got done with a case under the Open
4 Public Records Act involving the entire Alternative
5 Investment Program in New Jersey which involves very
6 sophisticated complex private equity agreements that
7 the State has entered into with regard to pensions in
8 New Jersey. And the pension private equity funds moved
9 to intervene and that's probably what they should do.
10 They should move to intervene. Maybe you should tell
11 them that absent a motion for intervention, the Court
12 would be inclined to enter into a protective order.
13 That's probably the way it should go.

14 MS. GORE: We could do that, Your Honor.

15 THE COURT: They should -- that's exactly
16 what happened in the private equity firms. They moved
17 to intervene very complex cases involving under OPRA
18 commercial and proprietary financial information and
19 trade secrets and the application of a Hammock test
20 which is a six-part test which, quite frankly, is a
21 judicial nightmare because it is just very complex to
22 apply.

23 But, what I see is, that there should be a
24 protective order that should be entered into. It
25 should be very carefully written and very carefully

1 executed. Very limited in its scope in terms of who
2 can look at documents and perhaps you should tell the
3 vendors that's what the Court is inclined to do. If
4 they want to move to intervene they should do that
5 within ten days. I think that's probably the best way
6 to handle it.

7 MS. GORE: Okay, Your Honor. We can do that.

8 MS. VENETIS: So, Your Honor, that is really
9 terrific because we do need access to these materials.
10 There are other outstanding discovery issues that are
11 outlined in a letter that I sent to you.
12 Unfortunately, I did send it yesterday.

13 THE COURT: Well, you're going to have to
14 work that out.

15 MS. VENETIS: We've been trying, Your Honor.

16 THE COURT: You're just going to have to work
17 out that discovery issue, otherwise I'll have to
18 appoint a discovery master.

19 MS. VENETIS: Your Honor, we've been trying
20 to, but Your Honor just said that we should be getting
21 things like training manuals. The State has withheld
22 those as protective --

23 THE COURT: Training manuals, I think, are
24 something that's fair game, a training manuals.

25 MS. GORE: But, I think some of the training

1 manuals actually have trade secrets in them also, Your
2 Honor.

3 THE COURT: Okay. Well, I mean, I don't know
4 whether that's true, but -- I mean, I can't --

5 MS. GORE: We'll clarify that.

6 THE COURT: -- imagine a training manual
7 because there's so many people who are trained, would
8 have sophisticated trade secrets. But, if you think
9 that there are some trade secrets, then redact it --

10 MS. GORE: Okay.

11 THE COURT: -- or whatever. But, if the --

12 MS. VENETIS: And the same holds --

13 THE COURT: -- discovery issues are not
14 resolved within, say, 30 days, I'm going to appoint a
15 discovery master and both sides are going to have to
16 pay for that. Both sides are going to have to pay
17 because I have too much on my plate to get involved in
18 the intricacies of massive discovery issues.

19 MS. VENETIS: Your Honor, there's some basic
20 discovery issues that perhaps we can resolve today.
21 The two that I mentioned earlier that I think can be
22 resolved today is, we still have not received responses
23 to our request for admissions that were served on
24 January 3rd. We would actually like to declare those,
25 whatever questions we've asked, as admissions

1 because --

2 THE COURT: Well, you're -- okay, well --

3 MS. VENETIS: -- the deadline has passed.

4 THE COURT: -- what's the status with that,
5 the --

6 MS. VENETIS: I've notified the attorney
7 general many times that we don't have these answers.

8 THE COURT: Ten days. Ten days.

9 MS. VENETIS: And the same for --

10 THE COURT: Ten days.

11 MS. VENETIS: -- written responses to our --

12 THE COURT: Listen to me. Ten days. Is
13 there an acknowledgment that it was received?

14 MS. GORE: Yes. We did receive them.

15 THE COURT: All right. Ten days. Ten days.
16 What's the next issue?

17 MS. VENETIS: Well, the next one is the same.
18 We still have not received any written responses to our
19 request for the production of documents. So, we have
20 no assurances.

21 THE COURT: Well, they've produced a lot of
22 documents because --

23 MS. VENETIS: They have.

24 THE COURT: -- you're saying they even have
25 duplicate batch numbers, so --

1 MS. VENETIS: Right, right. But, Your Honor,
2 we don't know whether or not they've responded to each
3 questions, that's the thing. That's why -- the rules
4 require that there be a written --

5 THE COURT: Well, then, you're going to have
6 to sit down and take a look and have a meeting and try
7 to see if you can work that out.

8 MS. VENETIS: Okay. I mean --

9 THE COURT: I don't know how to solve that
10 problem for you.

11 MS. VENETIS: It's very simple, Your Honor.
12 I mean, we just want them to say -- to give us a
13 response -- a written response saying, you know, see
14 document bates numbered blah, blah, blah for the
15 response to each question so that we know --

16 MS. GORE: Your Honor, we can do that.

17 THE COURT: You can do that?

18 MS. GORE: We can do that.

19 THE COURT: In ten days?

20 MS. GORE: Yes.

21 THE COURT: Ten days.

22 MS. VENETIS: And another similar issue that
23 I think we can resolve today, Your Honor, is that the
24 person certifying the answers state that she has no
25 knowledge that the answers given are actually true.

1 And she would not reveal who, indeed, supplied her with
2 the information. She says that's protected by the
3 attorney work-product privilege. The rules are very
4 clear and the case law is very clear that if you don't
5 personally know of the information that is responsive
6 to interrogatories, then you have to give the name of
7 the person that gave you the information. It should
8 not be protected under the attorney work-product
9 privilege.

10 THE COURT: Right.

11 MS. VENETIS: We need that information.

12 THE COURT: What's your response to that?
13 She's entitled to know who gave the answers.

14 MS. GORE: On the certification to the
15 answers to interrogatories?

16 THE COURT: Yes.

17 MS. GORE: I would have to look into --

18 THE COURT: They have to be certified to be
19 true.

20 MS. GORE: Well, we generally use a standard
21 certification when our office responds to --

22 THE COURT: Well, why don't you just list the
23 people who provided you information? List the people
24 who provided information.

25 MS. VENETIS: It's -- the other thing, Your

1 Honor, is, can we please set some firm deadlines? We
2 haven't taken any depositions yet in the case. We'd
3 like to get moving.

4 THE COURT: Well, all right. Normally the
5 paper discovery is first. We've resolved the paper
6 discovery. Start taking your depositions. You know
7 the witnesses, who they are, and depositions on both
8 sides because, quite frankly, my goal is to start this
9 trial -- we had a March date, but that's not going to
10 work. Is that a cell phone or is that a camera? Okay.
11 Thank you. Are you here for this case or the Santiago
12 case?

13 UNIDENTIFIED SPEAKER: Santiago.

14 THE COURT: Okay, fine. I'd like to start
15 this case in May if I could.

16 MS. VENETIS: That would be terrific, Your
17 Honor.

18 THE COURT: I'd like to start this case in
19 May. That would be my goal, to start it in May. It's
20 not going to necessarily go continuously. We may have
21 to go through the summer and into September, but I
22 would like to have it done by September. So, let's
23 shoot for May. Let's shoot to get all the depositions
24 done and shoot for May. Maybe I should even give you a
25 tentative trial date just to have a target.

1 MS. VENETIS: That would be great, Your
2 Honor.

3 THE COURT: Let's do that. Okay, May. Let's
4 see here. How about the third week in May? That's the
5 19th of May. I'm going to call my secretary.

6 (Judge conferring with chambers)

7 THE COURT: Well, we could target it for the
8 12th, 13th, 14th and 19th, 20th and 21st.

9 MS. VENETIS: Your Honor, the 12th -- I mean,
10 if -- I'd be happy to start as soon as possible. I'm
11 just concerned --

12 THE COURT: Yes.

13 MS. VENETIS: -- that if we're going to have
14 Sequoia possibly intervening and our experts reviewing
15 actual machines.

16 THE COURT: Well, let's give it a date of the
17 19th. A trial date.

18 (Judge conferring with chambers)

19 MS. VENETIS: So, Your Honor --

20 THE COURT: And I would suggest that when you
21 do the depositions try to do a bunch of them in a day.
22 It should be real fast. Maybe do north central south,
23 however it works. Yes, however it works best.

24 MS. VENETIS: Okay. Obviously, if we -- if
25 there is information that we discover through the

1 analysis of the documents then we would reserve our
2 right to continue the depositions if we needed to ask
3 additional questions or --

4 THE COURT: I don't have any problem with
5 that. Yes. So, that'll give us a nice starting point.

6 MS. VENETIS: How about things like Daubert
7 motions? Will the Court allow us to file --

8 THE COURT: Whatever questions with regarding
9 admissibility will be heard by the Court.

10 MS. VENETIS: Okay. And how about
11 dispositive motions such as motions for summary
12 judgment?

13 THE COURT: Well, I don't think there's going
14 to be any summary judgment motions here. This is going
15 to be a full record you're challenging. I mean, maybe
16 summary judgment on a specific issue, but as to whether
17 or not DREs are scientifically reliable is a question
18 that the Court's going to have to conduct a hearing,
19 and I don't think I would entertain -- I'd entertain
20 it, but I can tell you what the outcome would be. This
21 is a long time coming. There's a lot of witnesses. I
22 think the public has the right to know and there might
23 be summary judgment on a specific issue --

24 MS. VENETIS: Okay.

25 THE COURT: -- but other than that --

1 MS. VENETIS: And finally, Your Honor, just
2 because, as I said, we were poised to serve subpoenas
3 today, should we hold back on those because Your Honor
4 has determined that we would be given access to the
5 voting machines that malfunctioned on Super Tuesday?

6 THE COURT: You would be given access in a
7 very controlled setting and you'd have to go maybe to
8 the warehouse where they're located, but I would allow
9 you to do that.

10 MS. VENETIS: I think, Your Honor, our
11 computer scientists also need to run tests on the
12 machines. I don't know that they would be able to run
13 any tests in a warehouse.

14 THE COURT: I don't know.

15 MS. VENETIS: They would if I made -- because
16 I've explored this issue with them. They have a secure
17 laboratory at Princeton that was good enough for the
18 State of California when -- California did
19 commission --

20 THE COURT: I don't know. You have to
21 explore this. I know that all the voting machines are
22 kept at the warehouse. I don't know what kind of
23 equipment you're talking about. I would suggest that
24 the parties confer. Find out what they think is
25 appropriate. These are machines. They travel all over

1 the county because I know I've been on the phone in
2 snowy weather. Do we put them on the truck or not put
3 them on the truck? Some, they go all over. So, a stop
4 in Princeton certainly wouldn't -- but there's going to
5 have to be control mechanisms in place, obviously,
6 because these are machines that need to be monitored.
7 So, I will leave it to you, you know. You're
8 experienced practitioners who have certainly been
9 involved in litigation before and should be able to
10 work out the logistics of those kinds of issues.

11 MS. VENETIS: Okay. And you would be --
12 obviously be available for a conference call if we
13 need --

14 THE COURT: I'm available for telephone
15 conference anytime.

16 MS. VENETIS: All right, Your Honor. Thank
17 you very much.

18 MS. GORE: Thank you, Your Honor.

19 THE COURT: Okay. Thank you. And who will
20 prepare an order? We've talked a lot.

21 MS. VENETIS: I will, Your Honor.

22 THE COURT: Okay. See if you can get it to
23 agree by consent.

24 MS. VENETIS: Sure.

25 THE COURT: That will be wonderful.

1 MS. VENETIS: Okay. Thanks, Your Honor.

2 THE COURT: All right. Great. Have a good
3 one.

4 MS. GORE: All right. Thanks.

5 THE COURT: Bye-bye now.

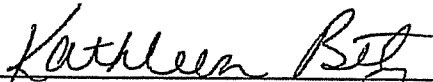
6 MS. VENETIS: Thank you very much.

7 MR. McGAHREN: Thank you, Your Honor.

8 * * * * *

9 C E R T I F I C A T I O N

10
11 I, Kathleen Betz, the assigned transcriber,
12 do hereby certify the foregoing transcript of
13 proceedings on tape number CI-28-08, index number 36 to
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