

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Mark Banfield et al., | : | |
| | : | |
| Petitioners | : | |
| | : | |
| v. | : | No. 442 M.D. 2006 |
| | : | |
| Pedro Cortes, | : | |
| Secretary of the Commonwealth, | : | |
| | : | |
| Respondent | : | |

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**MOTION TO DISSOLVE VOLUNTARY STAY OF PROCEEDING
AND TO SET A DISCOVERY AND TRIAL SCHEDULE**

Petitioners hereby make this motion asking this Court to dissolve the stay of proceedings entered on May 11, 2007 by agreement of the parties and, thereafter, to set out a discovery and trial schedule which would allow this case to be resolved as soon as possible, but no later than July 2008. In support hereof, Petitioners aver as follows:

1. Petitioners filed this litigation in August 2006 and alleged that the Secretary of State had certified certain Direct Electronic Recording (“DRE”) voting systems which did not meet the requirements of the Pennsylvania Election Code.

2. On April 12, 2007, this Court denied the Secretary’s preliminary objections. The Court determined that the Petitioners’ allegations, if proven at trial, would establish that the Secretary had certified voting machines for use in Pennsylvania which failed to comply with the Election Code in, *inter alia*, the following particulars: the DREs did not create a permanent

physical record, nor one where the votes recorded could be audited in a manner different from the way they were originally tallied; the DREs are neither safe nor reliable; and the certification process was patently inadequate to determine whether the DREs met the requirements of Pennsylvania law.

3. After this Court's decision denying the Secretary's preliminary objections, Respondent applied for leave to file an interlocutory appeal and an emergency application for "Stay and Supersedeas of Proceedings." On April 30, 2007 this Court amended its order of April 12, 2007 to permit an interlocutory appeal but denied Respondent's application for a stay of supersedeas. On May 12, 2007 Respondent filed a petition for review with the Pennsylvania Supreme Court.

4. Thereafter Petitioners voluntarily agreed to the entry of a stay upon the application of Respondent, conditioned upon production of certain agreed to discovery and the unopposed application was submitted to this Court. On May 11, 2007, the Court entered an Order stating "upon consideration of the unopposed request for a stay, it is hereby ordered that a stay is granted until further order of this court." See Exhibit A.

5. The Pennsylvania Supreme Court has not made any determination regarding the Secretary's petition for review and there is no way to know when it will make a determination.

6. Since Petitioners agreed to the entry of the stay, two states, California and Ohio, conducted thorough evaluations of DREs, including four of the six machines whose certifications are challenged in this case, which concluded the machines present reliability and safety risks.

7. Since Petitioners agreed to the entry of the stay, the Secretary himself has discovered that at least one of the machines identified in the Petition – the Advanced Voting


Solutions (AVS) – in fact had the flaws alleged by Petitioners, and more, and was indeed certified for use in Pennsylvania despite the fact that it did not comply with the requirements of the Pennsylvania Election Code. The Secretary has decertified that machine, requiring the three Pennsylvania counties which were using it to purchase new machines. Two of those three counties purchased other DRE machines challenged by Petitioners in this litigation. The now decertified AVS machines were used in the three Pennsylvania counties during the 2006 General Election, as well as previous elections. The six remaining DRE machines that are the subject of the Petition will be used not only in Pennsylvania’s April 2008 primary but also in the November 2008 Presidential election unless this case can be resolved prior to that date. The passage of time since May 2007, when the parties agreed to the stay, the increasing flood of evidence from around the nation suggesting that the machines challenged in the Petition do not meet the requirements of Pennsylvania’s Election Code and were not adequately tested before being certified for use in Pennsylvania and the fact that Pennsylvania citizens are now entering an important election year justifies providing Petitioners the relief they seek from the stay and allowing the case to proceed. Indeed, the fact that this Court entered the stay with the caveat that the stay would continue only “until further order” of the Court suggests that it was aware that the passage of time, coupled with the change in the factual knowledge available to the parties, might merit relief from the stay.

8. Finally, and upon removal of the stay, Petitioners ask that this Court hold a scheduling/status conference during which the Court can set a discovery and trial schedule that would allow this matter to be tried and resolved before July 2008. If the matter can be resolved before that date, the counties will have ample opportunity to arrange to use voting methods during the November 2008 election that do not involve the illegal DRE machines.

Wherefore Petitioners respectfully request this Court to lift the stay and to schedule an immediate scheduling conference to set all applicable trial and discovery deadlines.

Dated: February 22, 2008

Respectfully submitted,



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