

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *et al.*,

*Plaintiffs,*

v.

ELECTION SYSTEMS AND SOFTWARE, INC.,

*Defendant.*

CASE NO.: 10 0380

JUDGE:

**FILED**

MAR 17 2010

DECK TYPE: Antitrust NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

DATE STAMP:

**ASSET PRESERVATION STIPULATION AND ORDER**

It is hereby stipulated and agreed by and between the undersigned parties, subject to approval and entry by the Court, that:

**I. DEFINITIONS**

As used in this Asset Preservation Stipulation and Order:

A. "Acquirer" means the entity to whom Defendant divests the Divestiture Assets.

B. "ES&S" means Defendant Election Systems & Software, Inc., a Delaware corporation with its headquarters in Omaha, Nebraska, its successors and assigns, its subsidiaries, including Premier Election Solutions, Inc. and PES Holdings, Inc., both Delaware corporations (collectively, "Premier"), and its divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Premier Voting Equipment System Products" means all versions, past, present, and in development, of Premier hardware, software, and firmware used to record, tabulate, transmit or report votes, including all such systems certified by federal certification authorities (including, but not limited to the Assure 1.2 system that was certified by the United States Election Assistance Commission on August 6, 2009), and all such systems certified by the

election authorities of any state.

D. “AutoMARK Products” means ES&S’s ballot marking device that allows voters with disabilities to privately and independently mark a ballot.

E. “Divestiture Assets” means:

(1) all intangible assets related to the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products, including, but not limited to, intellectual property (including, but not limited to, patents, patent applications, licenses, sublicenses, copyrights, databases containing design information and, with respect to the Assure 1.2 suite of products only, trademarks, trade secrets, trade names, service marks, service names, slogans, domain names, logos and trade dress) the unregistered trademark “Premier”; data related to the use, operation, certification testing, internal testing, and beta testing; documentation of pending and current certification efforts with the United States Election Assistance Commission (“EAC”) and the election authorities of any state; technical information, software, software source code and related documentation, know-how, drawings, blueprints, designs, design tools and simulation capability, and specifications for materials, parts, and devices; safety procedures for the handling of materials and substances; quality assurance and control procedures; all manuals, performance, financial, operational, and other records Defendant provides to its own employees, customers, suppliers, agents, dealers or licensees; and all available research data concerning historic and current research and development efforts relating to the Premier Voting Equipment System Products, including, but not limited to, designs of experiments and the results of successful and unsuccessful designs and experiments;

- (2) tangible assets, including:
- (a) all tooling and fixed assets owned by Seller and used in connection with the manufacture, assembly, production, service and repair of the Premier Voting Equipment System Products, as detailed in Section 2.7 and Schedule 2.7(a) of the Purchase Agreement by and among ES&S, Diebold, Inc., Premier Election Solutions, Inc., PES Holdings, Inc., and Premier Election Solutions Canada ULC, dated September 2, 2009.
  - (b) inventory, parts and components for both the Premier Voting Equipment Products and the AutoMARK Products, including those that are not commercially available, sufficient for the Acquirer to assemble, manufacture, produce, service and repair the Premier Voting Equipment System Products and the AutoMARK Products.
- (3) a fully paid-up, non-exclusive, perpetual, transferable license to certify, produce, modify, enhance, distribute, sell, repair and service the AutoMARK Products. Such license shall include all intellectual property (including, but not limited to, patents, patent applications, licenses, sublicenses, copyrights, trademarks, trade names, trade secrets, service marks, service names, slogans, domain names, logos, and trade dress), data, drawings, ideas, concepts, know-how, procedures, processes, technical information, software, software source code and related documentation, blueprints, specifications, manuals, and any other intangible assets related to the use, operation, certification, production, modification, enhancement, distribution, sale, repair or service of the AutoMARK Products.

## **II. OBJECTIVES**

The Final Judgment filed in this case is meant to ensure Defendant's prompt divestiture of the Divestiture Assets for the purpose of establishing a viable competitor in the provision of voting equipment systems and services in order to remedy the effects that the United States alleges resulted from ES&S's acquisition of Premier. This Asset Preservation Stipulation and Order ensures, prior to such divestiture, that the Divestiture Assets will remain economically viable and will be able to be utilized effectively by an Acquirer to compete in the provision of voting equipment systems and services.

## **III. JURISDICTION AND VENUE**

The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

## **IV. COMPLIANCE WITH AND ENTRY OF FINAL JUDGMENT**

A. The parties stipulate that a Final Judgment in the form attached hereto as Exhibit A may be filed with and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that the United States has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on Defendant and by filing that notice with the Court.

B. Defendant shall abide by and comply with the provisions of the proposed Final Judgment, pending the entry of the Final Judgment by the Court, or until expiration of time for

all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though the same were in full force and effect as an order of the Court.

C. This Asset Preservation Stipulation and Order shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court.

D. In the event: (1) the United States has withdrawn its consent, as provided in Section IV(A) above; or (2) the proposed Final Judgment is not entered pursuant to this Asset Preservation Stipulation and Order, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Asset Preservation Stipulation and Order, and the making of this Asset Preservation Stipulation and Order shall be without prejudice to any party in this or any other proceeding.

E. Defendant represents that the divestiture ordered in the proposed Final Judgment can and will be made, and that it will later raise no claim of mistake, hardship, or difficulty of compliance as grounds for asking the Court to modify any of the provisions contained therein.

#### **V. ASSET PRESERVATION PROVISIONS**

Until the divestiture required by the Final Judgment has been accomplished:

A. Defendant shall preserve and maintain the Divestiture Assets, including but not limited to, the Premier software source code, so that the Divestiture Assets may be used by an

Acquirer to effectively certify, design, reproduce, modify, enhance, distribute, sell, repair and service the Premier Voting Equipment System Products and the AutoMARK Products.

B. Defendant shall not close any locations involved in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products or the AutoMARK Products.

C. Defendant shall not terminate any employees involved in the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products or the AutoMARK Products. Defendant's employees with primary responsibility for the use, operation, certification, design, production, modification, enhancement, distribution, sale, repair or service of the Premier Voting Equipment System Products or the AutoMARK Products shall not be transferred or reassigned to other areas of ES&S except for transfer bids initiated by employees pursuant to Defendant's regular, established job-posting policy. Defendant shall provide the United States with ten (10) calendar days notice of such transfer.

D. Defendant shall not provide to any ES&S employees who did not have access to the Premier software source code prior to the date that this Asset Preservation Stipulation and Order is signed by counsel for Defendant access to the Premier software source code unless such access is reasonably necessary to resolve customer service issues. Defendant shall not make any additional copies of the Premier software source code.

E. Defendant shall not, except as part of a divestiture approved by the United States in accordance with the terms of the proposed Final Judgment, sell, lease, assign, transfer, pledge, or otherwise dispose of any of the Divestiture Assets, other than parts and inventory described in

Section I(E)(3) above in the ordinary course of Defendant's business.

F. Defendant shall take no action that would jeopardize, delay, or impede the sale of the Divestiture Assets.

G. Defendant shall take no action that would interfere with the ability of any trustee appointed pursuant to the Final Judgment to complete the divestiture pursuant to the Final Judgment to an Acquirer acceptable to the United States.

**VI. DURATION OF ASSET PRESERVATION OBLIGATIONS**

Defendant's obligations under Section V of this Asset Preservation Stipulation and Order shall remain in effect until: (1) consummation of the divestiture required by the proposed Final Judgment; or (2) further order of the Court. If the United States voluntarily dismisses the Complaint in this matter, Defendant is released from all further obligations under this Asset Preservation Stipulation and Order.

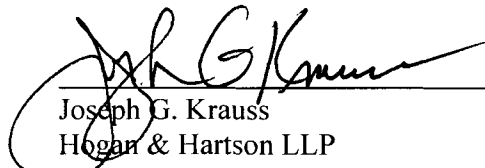
Dated: March 8, 2010

FOR PLAINTIFF  
UNITED STATES OF AMERICA



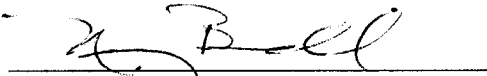
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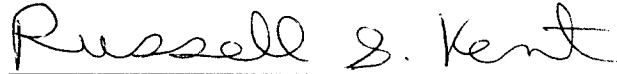
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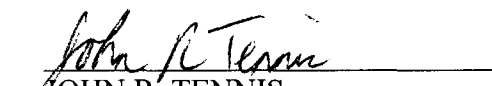
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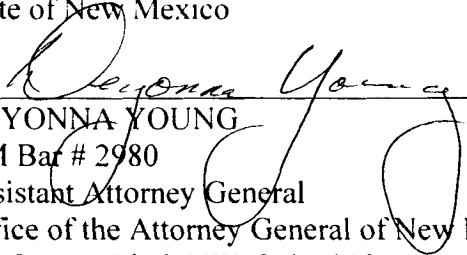
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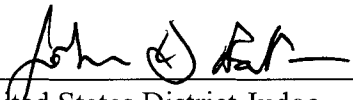
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**ORDER**

IT IS SO ORDERED by the Court, this 17<sup>th</sup> day of March, 2010.

  
\_\_\_\_\_  
United States District Judge