

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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EILEEN JANIS and KIM COLHOFF, \*

Plaintiffs, \*

vs. \*

CIV. 09-5019

CHRIS NELSON, in his individual and \*  
official capacity as Secretary of State of \*  
South Dakota and as a member of the State \*  
Board of Elections; MATT MCCAULEY, \*  
CINDY SCHULTZ, CHRISTOPHER W. \*  
MADSEN, RICHARD CASEY, KAREN M. \*  
LAYHER, and LINDA LEA M. VIKEN, in \*  
their individual and official capacities as \*  
members of the State Board of Elections; \*  
SUE GANJE, in her official and individual \*  
capacity as Auditor for Shannon County; \*  
LA FAWN CONROY, in her individual and \*  
official capacity as a poll worker for \*  
Shannon County \*

**MEDIATION AGREEMENT**

Defendants. \*

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**IT IS AGREED BY THE PARTIES:**

1. No party shall be bound by anything said or done during the mediation unless an agreement is reached during the mediation and placed on the record or reduced to writing at the mediation. In the event the parties reach an agreement at the mediation and the agreement is placed on the record or reduced to writing at the mediation, the parties further agree that the mediation agreement shall be supplemented by more complete written settlement documents prepared by the parties or their lawyers. The final settlement agreement will be prepared and executed not later than 30 days following the mediation agreement, unless the parties agree to a different time. It is further agreed that a dispute about language in the final settlement documents shall not prevent the mediation agreement which was placed on the record or reduced to writing at the mediation from being enforced.
2. The U.S. District Court for the State of South Dakota shall retain jurisdiction of this case subsequent to a mediated agreement in order to resolve any disputes which might occur

regarding the agreement reached at the mediation. The parties are not hereby agreeing to retained jurisdiction as defined or allowed by any claims asserted by Plaintiffs in their current or future Amended Complaints. The Parties agree that the issue of retained jurisdiction as defined or allowed under any of Plaintiffs' claims is an issue to be mediated. The terms of this paragraph are subject to any terms of the final settlement agreement.

3. Information provided to the mediator whether in writing or orally shall be confidential and shall not be revealed by the mediator without prior consent. It is understood, however, that information which is already known by all the parties may be discussed with the parties by the mediator without prior consent.

The mediator may meet in private with less than all the parties, or with the lawyers in the absence of the parties, or with the parties in the absence of the lawyers.

4. This mediation is a settlement negotiation for the purpose of all federal and state rules protecting disclosures made during the mediation from later discovery or from use as evidence. The entire mediation process shall be confidential. No stenographic or other record shall be made except to memorialize a mediation agreement. All communications made during the mediation, written or oral, are confidential and, when applicable, are work product and privileged in order to be protected from later discovery or use as evidence. Mediation communications, statements, promises, offers, views, and opinions shall not be subject to any discovery or admissible for any purpose, including impeachment in any litigation or other proceeding involving the parties, or any of them. Evidence otherwise discoverable or admissible is not excluded from discovery or from being used as evidence simply as a result of the evidence having been used in connection with this mediation process.
5. The parties shall not call or subpoena the mediator as a witness in any proceeding. The parties shall not subpoena or use any notes, documents, or other material prepared by the mediator in connection with the mediation in any proceeding.
6.
  - (a) A person who has complete and final authority to bind a respective party shall attend the mediation. During the mediation, persons attending the mediation shall not communicate with others not attending the mediation for the purpose of making decisions at the mediation. These respective persons attending the mediation shall have unfettered discretion to make decisions to settle for any amount of money and upon any terms the person believes appropriate.
  - (b) In the event a governmental entity or agency is a party to the mediation and requires a mediation agreement to be ratified through various levels, it is understood paragraph 6(a) does not apply. The parties nevertheless agree that the persons representing the governmental entity or agency will have the unfettered discretion and authority to make decisions to settle for any amount of money and

upon any terms the person believes appropriate to reach a conditional mediation agreement without communicating with others not attending the mediation. The government's representatives will not only recommend ratification of the conditional mediation agreement, but will advocate in support of the conditional mediation agreement throughout the ratification process.

- (c) The parties agree the magistrate judge/mediator may impose sanctions upon an offending party for failure to have a person present who possesses unfettered discretion to make a mediation agreement or conditional mediation agreement during the mediation. The sanctions will be limited to travel expenses, miscellaneous costs, and professional fees directly associated with the mediation. Sanctions may be imposed only after a motion by a party seeking sanctions and only after the party against whom sanctions are sought has an opportunity to be heard.
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- (a) In the event there is a subrogation claim(s), the party who is responsible to satisfy the subrogation claim(s) will make an agreement before the mediation about the subrogated claim(s) with the holder of the subrogation claim(s) so that the subrogation claim(s) will not interfere with any agreement which is reached during the mediation process. This agreement is between the pertinent party to the mediation and the subrogation holder and need not be disclosed during the mediation, other than to assure that an agreement has been made to satisfy the subrogation claim.
  - (b) In the event an agreement has not or cannot be reached about the subrogation claim(s) before the mediation begins, then the person or entity holding the subrogated interest shall participate in the mediation and shall sign and agree to be bound by this pre-mediation agreement.
8. The phrase "mediation agreement" means the agreement placed on the record or reduced to writing at the mediation.
- The phrase "conditional mediation agreement" means the agreement placed on the record or reduced to writing at the mediation by a governmental entity or agency which needs to be ratified through various levels by the governmental entity or agency.
- The phrase "settlement agreement" means the more complete settlement documents prepared by the lawyers following the mediation agreement.
9. The parties understand that if the settlement agreement is filed with the clerk of court, the settlement agreement is a document available to the public.
10. The parties mutually request the mediator to schedule a mediation at a mutually


acceptable time.

Dated: 3-3-10

Eileen Jewist Kim Colhoff  
Plaintiff

  
Counsel for Plaintiff

Sue Ganje & LaFawn Conroy  
Defendant

  
Counsel for Defendant