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COMMONWEALTH COURT  
OF PENNSYLVANIA  
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IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MONICA MOYER; ROBERT A. GLEASON, JR;  
JOYCE HAAS; ADRIENNE MITFORD; JOSEPH B.  
MAGUIRE; W. CRAIG WILLIAMS; and the  
REPUBLICAN PARTY OF PENNSYLVANIA

Plaintiffs,

v.

Case No. 497 MD 2008

PEDRO A. CORTES, Secretary of the Commonwealth;  
ASSOCIATION OF COMMUNITY  
ORGANIZATIONS FOR REFORM NOW (ACORN);  
PHILADELPHIA ACORN; ALLEGHENY COUNTY  
ACORN; ERIE COUNTY ACORN; HARRISBURG  
ACORN; LEHIGH VALLEY ACORN;  
SOUTHEASTERN PA ACORN; PROJECT VOTE/  
VOTING FOR AMERICA, INC.; CITIZENS  
SERVICES, INC.; and ALL OTHER ACORN  
AFFILIATES AND SUBSIDIARIES OPERATING IN  
PENNSYLVANIA, the identity of which are currently  
unknown,

Defendants.

DEFENDANTS' ANSWER TO  
PLAINTIFFS' EMERGENCY MOTION FOR EXPEDITED DISCOVERY

Defendants Association of Community Organizations for Reform Now, Inc. (“ACORN”), Citizens Services, Inc. (“Citizens Services”), and Project Vote/Voting For America, Inc. (“Project Vote”) (together, the “Private Defendants”), by their counsel, Mette, Evans & Woodside, respectfully oppose the Plaintiffs’ Emergency Motion for Expedited Discovery, and aver as follows:

### INTRODUCTION

Plaintiffs’ Motion—and this action as a whole—are a regrettable and transparent ploy by political actors to gum up the works of their political opponents in the weeks before a hotly contested election. The sole count directed at the Private Defendants states simply that ACORN, by allegedly submitting false or duplicative voter registration forms, has “deceive[d] the Commonwealth of Pennsylvania and its citizens, including Plaintiffs.” Complaint ¶ 139. Plaintiffs appear to presume that a private litigant may sue another private party for allegedly fraudulent activity directed entirely at the government. Of course, that is not the law, and Plaintiffs have no standing for their absurd claim. “[A] litigant may assert only his own legal rights or interest, and can not ‘rest a claim to relief on the legal rights or interests of third parties.’” *Storino v. Borough of Point Pleasant Beach*, 322 F.3d 293, 298 (3d Cir. 2003) (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). If there were a fraud perpetrated here—and there is not—it could have been directed only at the government, and the power to prosecute it would lie exclusively with the Commonwealth of Pennsylvania and the federal government. Were the Court to countenance any other interpretation, it would yield chaos. Any voter could

bring a claim against any other voter—or any taxpayer could sue any other taxpayer, for that matter. This is not the law.<sup>1</sup>

In order to state a claim for fraud, a plaintiff must plead the following elements with particularity in its complaint: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance. *Huddleston v. Infertility Ctr. of America*, 700 A.2d 453, 461 (Pa. Super. 1997) citing *Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994). The complaint must provide sufficient facts to show, as a *prima facie* matter, that the defendant intended to induce the plaintiff to act based on the misrepresentation. *Bash v. Bell Telephone Co. of Pennsylvania*, 601 A.2d 825, 832 (Pa. Super. 1992). Here, Plaintiffs cannot in good faith argue that they justifiably have relied upon a misrepresentation by the Private Defendants that induced them to act in a certain way, as is necessary to state a *prima facie* common law fraud claim. The entire premise is woefully, painfully, and fundamentally deficient. The Private Defendants intend to develop fully these arguments and others in greater detail in the course of preliminary objections to this frivolous complaint and the motion for injunctive relief. For now, however, it suffices to alert the Court to these core deficiencies at the root of the action.

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<sup>1</sup> In their brief in support of the motion for injunctive relief, Plaintiffs cite *Pierce v. Allegheny County Bd. of Elections*, 324 F. Supp. 2d 684 (W.D. Pa. 2003), in support of their supposed standing. Br. in Supp. of Pl's. Mot. for Special, Preliminary and Permanent Injunction at 8. But in *Pierce*, the plaintiff had sued a public agency, whereas in this suit, Plaintiffs have sued other private actors. *Pierce* is no support for Plaintiffs' assertion of standing for a claim of voter fraud against *another private person*.

Plaintiffs propose expedited discovery in order to develop their simultaneously-filed Motion for Special and Preliminary Injunction. However, they cannot get a preliminary injunction regardless of whether they obtain the discovery they propose, because they cannot satisfy the test for preliminary injunctive relief: (1) the need for relief to prevent immediate and irreparable harm; (2) that greater injury will occur from refusing the injunction than from granting it; (3) that the injunction will restore the parties to the *status quo ante*; (4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; (5) that the plaintiff's right to relief is clear; and (6) that they have a reasonable likelihood of prevailing on the merits. *Pa. Gaming Control Board v. City Council*, 928 A.2d 1255, 1277 (Pa. 2007); *Moscatiello v. Whitehall Borough*, 848 A.2d 1071, 1074 (Pa. Commw. 2004). For a preliminary injunction to issue, every one of the prerequisites must be established. *Pa. Gaming Control Board*, 928 A.2d at 1277. Regardless of the discovery sought, Plaintiffs' motion necessarily fall so far short of the mark in their request for equitable relief that the need for discovery is altogether obviated.

For one thing, Plaintiffs claim that immediate and irreparable harm will ensure absent an injunction. Yet they offer no reason why they could not obtain their desired relief in the event of actual voter fraud at the time of the election. The Private Defendants anticipate that the Commonwealth will fully demonstrate that the safeguards are in place to ensure an election where the individual voter's rights will be protected and actual voter fraud will be vigorously guarded against.

For better or for worse, phalanxes of lawyers have amply demonstrated an ability to challenge election results *after* the fact, and Plaintiffs offer no reason why their disruptive and

harassing equitable remedy is necessary in anticipation of something that might not happen. And the intrinsic deficiencies in Plaintiffs' sole, common law fraud claim against the Private Defendants—outlined briefly above—vitiates any possibility that Plaintiffs will be able to show a reasonable likelihood of prevailing on the merits, with or without discovery.<sup>2</sup>

The real game here is not subtle. Drag a political opponent into court on three days notice with a set of overwhelming and burdensome discovery demands filed as an “Emergency Motion,” and perhaps you can interrupt their activities enough to throw them off their feet. One side in this outrageous action truly is attempting to disrupt a fair proceeding in the upcoming election, and it is not the Defendants.

#### ANSWER WITH NEW MATTER

With respect to the allegations in Plaintiffs' supposed “Emergency Motion,” the Private Defendants aver further as follows:

1. Denied. ACORN has no subsidiaries operating in Pennsylvania. The various ACORN-related defendants listed in the caption (other than ACORN itself) have no legal status. The Private Defendants further are without sufficient knowledge or information sufficient to admit or deny Plaintiffs' characterization of their own filings.

2. Denied. To the contrary, the burdensome and oppressive discovery that Plaintiffs propose is not merited where (a) ample election safeguards are in place to prevent any individuals from voting who is legally barred from doing so, and (b) Plaintiffs have alleged nothing more than a common law fraud claim (on extraordinarily dubious legal grounds) against

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<sup>2</sup> The Private Defendants separately and in fuller detail will oppose the Motion for Special and Preliminary Injunction. The brief argument above is intended only to show that Plaintiffs have sufficient basic legal hurdles to overcome that the imposition of oppressive discovery on the Private Defendants is unwarranted and inappropriate under these circumstances.

the Private Defendants. Plaintiffs allege (often “upon information and belief” based primarily on news reports) that there has been a practice of *voter registration* fraud, and on that basis they have tried to patch together claims for relief based on *voter* fraud, which they fail to allege—and cannot, since the election has not yet happened. As the Complaint itself acknowledges, those instances of voter registration fraud by former employees of Defendant ACORN—which defrauded ACORN itself—are being fully investigated and have caused no harm to the rights of duly-registered voters. *Voter registration fraud is not voter fraud. If an ACORN employee cheated ACORN by sitting at home and filling out cards with imaginary names and addresses rather than by doing his job and canvassing, that does not mean that those imaginary people will show up on Election Day.* Plaintiffs’ discovery requests are one big *non sequitur* when it comes to Plaintiffs’ purported concerns about voter fraud. In any event, since voter fraud cannot exist until the election, and since Plaintiffs will have the capability and opportunity to remedy any such fraud at that time, there is no even theoretical possibility of irreparable injury such as would warrant intrusive and burdensome discovery of the sort Plaintiffs propose.

3. Denied. The answer to paragraph 2 is incorporated by reference. The enumerated discovery is extraordinarily overbroad, burdensome and incapable of completion within Plaintiffs’ arbitrary deadline.

4. Denied. The answers to paragraphs 2 and 3 are incorporated by reference.

5. Denied. The answers to paragraphs 2, 3 and 4 are incorporated by reference.

#### NEW MATTER

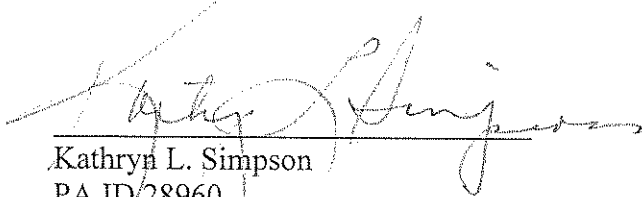
6. As set forth above, the Private Defendants believe that expedited discovery is not merited—indeed, that no discovery is merited at all for this frivolous suit. However, should the

Court disagree, the Private Defendants respectfully request that all discovery ordered should be entirely reciprocal.

WHEREFORE, Private Defendants respectfully request that this Honorable Court deny Plaintiffs' motion for expedited discovery or, in the alternative, provide that Defendants may serve upon Plaintiffs discovery requests to be completed within the same time period imposed on Defendants.

Respectfully submitted,

METTE, EVANS & WOODSIDE



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Dated: October 23, 2008

CERTIFICATE OF SERVICE

I certify that I am this day serving a copy of the foregoing document upon the person(s) by U.S. First Class mail addressed as follows, which service satisfies the requirements of the Pennsylvania Rules of Civil Procedure as well as via e-mail where noted, below:

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