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JUNE DUFFY
ASSISTANT ATTORNEY GENERAL IN CHARGE
LITIGATION BUREAU

VIA ECF

August 4, 2011

Hon. Robert M. Levy
United States Magistrate Judge,
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East
Brooklyn, New York

Re: NAACP v. N.Y. State Bd. of Elections
E.D.N.Y. 10 Civ. 2950 (FB) (RML)

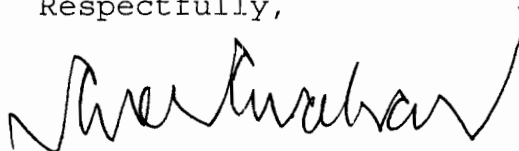
Your Honor:

We respectfully submit this letter to request, on consent of plaintiffs and State defendants, that Your Honor so-order the attached Stipulation and Order of Confidentiality, concerning "usability testing," by recognized experts, from August 5 to 8, for purposes of facilitating the possible settlement of this action, of alternative warning notices with respect to so-called "over vote" voting, which is the subject matter of this action. The testing is hoped to be conducted in New York City, in Schenectady County and in Saratoga County during these several days and possibly additional days.

We also submit this letter pursuant to Your Honor's Individual Motion Practices § 1(E) to request a further extension of time to respond to plaintiffs' outstanding discovery motion. A response is now due on August 5; plaintiffs agree to an extension to September 2. We regret burdening the Court with short extensions, as the parties continue to attempt to avoid the need for judicial intervention.

We appreciate Your Honor's consideration of this request.

Respectfully,

A handwritten signature in black ink, appearing to read 'Joel Graber', written in a cursive style.

JOEL GRABER
Special Litigation Counsel

cc: (via ECF)

Stephen L. Ascher, Esq.
Jenner & Block LLP
Attorney for Plaintiffs

Stephen Edward Kitzinger, Esq.
Assistant Corporation Counsel
New York City Law Department
Attorney for New York City Defendants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NAACP NEW YORK STATE CONFERENCE,
as an organization and representative : 10 Civ. 2950 (FB) (RML)
of its members, NATIONAL COALITION ON :
BLACK CIVIC PARTICIPATION, as an :
organization and representative of its members, :
FAMILIES UNITED FOR RACIAL AND :
ECONOMIC EQUALITY , VIVIAN BOSIER, :
ANITA BURSON, and SHEILA DUNCAN, :

Plaintiffs, :

-against- :

NEW YORK STATE BOARD OF ELECTIONS, :
JAMES A. WALSH, DOUGLAS A. KELLNER, :
EVELYN J.AQUILA, and GREGORY P. :
PETERSON, in their official capacities as :
Commissioners of the NEW YORK STATE :
BOARD OF ELECTIONS, TODD D. :
VALENTINE and ROBERT A. BREHM, :
in their official capacities as Executive Directors :
of the New York State Board of Elections, :
NEW YORK CITY BOARD OF ELECTIONS, :
and JOSE MIGUEL ARAUJO, NAOMI :
BARRERA, JULIE DENT, NANCY :
MOTTOLA-SCHACHER, JUAN CARLOS :
POLANCO, MICHAEL J. RYAN, J.P SIPP, :
GREGORY C. SOUMAS, JUDITH D. STUPP :
and FREDERIC M. UMANE, in their official :
capacities as Commissioners of the New York City :
Board of Elections, :

Defendants. :

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STIPULATION AND ORDER OF CONFIDENTIALITY

WHEREAS, Plaintiffs and Defendants the New York State Board of Elections, James A. Walsh, Douglas A. Kellner, Evelyn Aquila, and Gregory P. Peters, in their capacities as Commissioners of the New York State Board of Elections, Todd D. Valentine and Robert A. Brehm, in their official capacities as Executive Directors of the New York State Board of Elections (the “State Defendants”), have agreed to conduct usability testing from August 5-8, 2011 (the “August Usability Tests”) to evaluate voter behavior in response to overvote messages that are the subject of this litigation; and

WHEREAS the August Usability Tests may result in certain information, documents and things that Plaintiffs and State Defendants deem confidential, privileged, proprietary, sensitive, relating to the privacy interests of non-parties, or protected from disclosure pursuant to federal, state or local law; and

WHEREAS Plaintiffs and State Defendants agree that there is a need to protect the confidentiality of such information, documents and things concerning the August Usability Tests; and

WHEREAS Plaintiffs and State Defendants desire to facilitate the prompt resolution of disputes concerning confidentiality with respect to the August Usability Tests;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, BY AND BETWEEN THE PARTIES HERETO, AS FOLLOWS:

1. For purposes of this Stipulation and Order of Confidentiality, the term “Results of the August Usability Tests” shall mean both raw data and interpretative data, including all written materials concerning any aspect of the testing process and its results.
2. The Results of the August Usability Tests shall be deemed Confidential Material.

3. The Results of the August Usability Tests shall be provided to Plaintiffs and State Defendants simultaneously, and Plaintiffs and State Defendants each shall have full access to the consultants responsible for the August Usability Tests.

4. Except as provided in paragraph 7, the Results of the August Usability Tests shall be used for settlement purposes only, and the Results of the August Usability Tests shall not be used as evidence to support any claim or defense in this or any other litigation, nor for any business, commercial, competitive, personal, publicity, media or other purpose.

5. For purposes of this Stipulation and Order of Confidentiality, the term “Recipient of Confidential Material” shall mean Plaintiffs and State Defendants (or counsel and their agents) who receive Confidential Material.

6. Except as provided in paragraphs 7 and 8, the Results of the August Usability Tests can only be disseminated to Recipients of Confidential Material.

7. The sole circumstance under which the Results of the August Usability Tests can be disseminated to anyone other than the Recipients of Confidential Material is if any and all information identifying the Results of the August Usability Tests as pertaining to the State of New York, any jurisdiction or county thereof and the State Defendants is omitted. Such dissemination will not be authorized without prior notice (the “Notice”) to the State Board of Elections and its consent thereto, which consent cannot be unreasonably withheld. Plaintiffs will endeavor in good faith to provide the State Board advance warning of two weeks before serving the Notice. The State Board will endeavor in good faith to respond within two weeks of receiving the Notice. Failure of the State Board to object to the dissemination of the Results of the August Usability

Tests within two weeks of the Notice shall be deemed consent by the State Board to such dissemination.

8. The Recipient of Confidential Material shall use such information solely for settlement, and shall not disclose Confidential Material to any person except:

- a. The Court and its officers (including stenographers), and
- b. Experts or litigation consultants engaged by counsel for Plaintiffs and State Defendants.

9. The Recipient of Confidential Material shall disclose such information to a person identified in paragraphs 8(a) or 8(d) of this Stipulation and Order of Confidentiality only after: (a) advising such person that, pursuant to this Stipulation and Order of Confidentiality, he or she may not divulge such information to any other individual or entity, and (b) such person executes an acknowledgment of this Stipulation and Order of Confidentiality in the form annexed hereto as Exhibit A. The executed acknowledgment shall be maintained by the Recipient, and a signed duplicate copy of the acknowledgment shall be furnished to Plaintiffs and State Defendants within 10 days of the date of execution thereof.

10. Nothing contained in this Stipulation and Order of Confidentiality shall be deemed to be a limit or waiver of the attorney-client communication privilege, the work product privilege, or any other relevant privilege.

11. Inadvertent production of Confidential Material shall not be construed as a waiver in whole or in part of any privilege or of the terms of this Stipulation and Order of Confidentiality. If Confidential Material is inadvertently produced, the Recipient shall promptly return all copies of all Confidential Material, delete any versions of the

Confidential Material in any database or computer filing system it maintains, and make no use of the Confidential Material.

12. No Recipient or other person to whom Confidential Material is disclosed shall copy, transcribe, or otherwise reproduce in written or any other form any part or portion of any Confidential Material except for purposes of settlement.

13. If any Recipient discloses Confidential Material in a manner not authorized herein or becomes aware that any person identified in paragraphs 8(a) or 8(d) has made such an unauthorized disclosure, the Recipient must immediately and in writing notify counsel for Plaintiffs and State Defendants of all pertinent facts relating to such disclosure and, without prejudice to other rights and remedies of the parties, make every effort to prevent further disclosure by the Recipient or by the person to whom the Recipient disclosed such information.

IN WITNESS WHEREOF, the undersigned hereby acknowledge that they have read this Stipulation and Order of Confidentiality and accept and agree to the provisions contained herein, and have executed this Stipulation and Order of Confidentiality on the date indicated.

Dated: New York, New York
August 4, 2011

JENNER & BLOCK LLP
Attorneys for Plaintiffs
By:

_____/s/_____
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Dated: New York, New York
August 4, 2011

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State of New York
Attorney for State Defendants

By:



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SO ORDERED:

U.S.M.J.