

JENNER & BLOCK

May 11, 2012

Jenner & Block LLP
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37th Floor
New York, NY 10022
Tel 212-891-1600
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Chicago
Los Angeles
New York
Washington, DC

VIA ECF

Hon. Frederic Block
Senior District Judge
U.S. District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Michael W. Ross
Tel (212) 891-1669
Fax (212) 909-0840
mross@jenner.com

Hon. Robert M. Levy
Magistrate Judge
U.S. District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *NAACP New York State Conference v. N.Y.S. Board of Elections*,
No. 10-cv-2950(FB)(RML) (E.D.N.Y.)

Dear Judges Block and Levy:

On behalf of Plaintiffs, we respectfully submit this letter to update the Court regarding Plaintiffs' request that the Court discontinue this case against the City Defendants without prejudice to Plaintiffs reopening this matter should the City Defendants decline to implement the State's new overvote message. The New York State Board of Elections ("State Board") has recently obtained "pre-clearance" from the U.S. Department of Justice ("DOJ") under Section 5 of the Voting Rights Act to proceed with statewide use of the revised overvote message set forth in Plaintiffs' settlement with the State Board, *see* Dkt. No. 36. Attached to this letter are the State Board's application for pre-clearance and the DOJ's notification granting pre-clearance. Although we expect DOJ pre-clearance to mean that the City Defendants will fully implement the revised overvote message, *see* Dkt. No. 38, Plaintiffs reiterate their request for dismissal without prejudice for the reasons set forth in letters dated February 22, 2012 and March 1, 2012, *see* Dkt. Nos. 37, 39.

Sincerely,



Michael W. Ross

cc: counsel of record (via ECF)



State of New York
STATE BOARD OF ELECTIONS

James A. Walsh
Chair
Douglas A. Kellner
Chair
Gregory P. Peterson
Commissioner
Evelyn J. Aquila
Commissioner

40 STEUBEN STREET
ALBANY, N.Y. 12207
Phone: 518/474-6367 Fax: 518/486-4546
website: www.elections.state.ny.us

Todd D. Valentine
Executive Director
Robert A. Brehm
Executive Director
Kimberly A. Galvin
Special Counsel
Paul M. Collins
Deputy Counsel

February 24, 2012

T. Christian Herren, Jr.
Chief, Voting Section
Civil Rights Division
Room 7254 - NWB
Department of Justice
1800 G St., N.W.
Washington, DC 20006

RE: Section 5 Preclearance Supplemental Submission
Over Vote Screens Pursuant to So Ordered Stipulation
10-cv- 2950

Dear Mr. Herren:

Pursuant to Section 5 of the Voting Rights Act of 1965, as amended, please receive this as a request for Pre-Clearance of the enclosed screen shots attached to the Stipulation of Settlement as Appendix "A". These screens will replace the existing Over Vote Screens which was submitted and Pre-Cleared in August of 2010 under Submission 2010-2872 and the interim Over Vote screens submitted to you on January 31, 2012 when they are implemented.

This submission is part of the settlement of litigation brought by the NAACP in connection with the State's over vote messages and the new screens result in the termination of that litigation as the Stipulation indicates.

I have been advised by the Office of the New York State Attorney General

that the United States District Court Judge assigned to this case does not actually sign the So Ordered Stipulation but rather enters a Minute Order on the case docket which has the same effect as his signing the paper Stipulation.

I have enclosed a copy of the relevant portion of the case docket which references the submission of the Stipulation on February 10, 2012 (Docket No. 36) and its attachments which are the screens (Docket No. 36-1).

I would direct your attention to the docket entry of February 13, 2012 which was entered by the District Court Judge resolving the case upon the terms of the Stipulation as against the State Defendants.

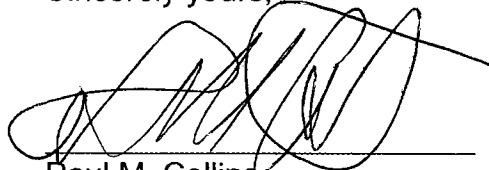
Thus I am submitting the screens attached to the Stipulation for Pre-Clearance as the ES&S screens will be used in the counties of Kings, Bronx and New York which are subject to Section 5 Pre-Clearance (See pages 10-13 of Docket 36-1). The screen shot language has been sent to the vendors for implementation and as soon as the final shots are available I shall submit them if they differ in any way from these submitted today. If there is no difference, this will constitute our final request for Pre-Clearance I this matter.

The Stipulation of Settlement calls for the implementation of the agreed upon screens for the November, 2012 Election. The reason for the November implementation date is that the state's voting system vendors must develop the software changes and have same certified by an Independent Testing Agency before the State Board may adopt the changes, a process which will take a few months.

We are again asking for an expedited decision as we wish to ensure that Justice has no objection to these screens before they are fully developed by the vendors.

Please do not hesitate to contact me if you have any questions.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Paul M. Collins', written over a horizontal line.

Paul M. Collins
Deputy Special Counsel

PMC: me
Enclosures

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

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, as an :
organization and representative of :
its members, 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.

-----X

**STIPULATION OF SETTLEMENT,
GENERAL RELEASE AND ORDER OF DISMISSAL**

WHEREAS plaintiffs commenced this action against, *inter alia*, the New York State Board of Elections (the "State Board"); James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, and Gregory P. Peterson, in their official capacities as Commissioners of the State board; Todd D. Valentine and Robert A. Brehm, in their official capacities as Executive Directors of the State Board ("State defendants"), challenging, *inter alia*, their practice and procedure for handling overvotes under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973;

WHEREAS plaintiffs and State defendants previously reached an agreement-in-principle to settle this matter and, accordingly, executed an Interim Standstill Agreement Pending Final Stipulation Of Settlement dated December 1, 2011 ("Interim Agreement");

WHEREAS counsel for plaintiffs and State defendants having conferred on the issue of reasonable attorneys' fees, expenses and costs, and reviewed applicable record evidence and documentation in support thereof; and

WHEREAS the parties desire to resolve this matter without the further expense, delay, inconvenience and uncertainty of protracted litigation;

NOW, THEREFORE, IT IS HEREBY STIPULATED, AGREED AND ORDERED as follows:

1. Subject to the terms of this stipulation, this action is dismissed with prejudice as against State defendants.

2. State defendants shall provide for the optical scan voting machines in use in the state to be upgraded so that each voter receives clear notice when the voter has overvoted. Specifically, the voting machines in use throughout New York State shall display the following overvote message, containing the exact language and substantially the same layout (the "Overvote Message"), as the overvote messages described in subparagraph 2a and 2b as follows:

- a. For any overvote cast on a DS-200 voting machine, the voting machine shall display the overvote message contained in Appendix A attached hereto.
- b. For any overvote cast on an ImageCast voting machine, the voting machine shall display the overvote message contained in Appendix B attached hereto.

3. State defendants shall endeavor in good faith to ensure that all optical scan voting machines that are upgraded in accordance with paragraph 2 of this stipulation are certified for use as soon as reasonably possible. If the upgrading and certification processes are not completed by September 1, 2012, State defendants shall notify plaintiffs on that date.

4. Once the voting machines are upgraded in accordance with paragraph 2 above, and certified for use in accordance with paragraph 3 above, State defendants shall use their best efforts to direct the county boards of election, and the New York City Board of Elections, to implement the new Overvote Message as soon as practicable.

5. State defendants shall endeavor in good faith to have all optical scan voting machines upgraded in accordance with paragraph 2 above, certified in accordance with paragraph 3 above, and fully implemented in accordance with paragraphs 4 above, in time for the 2012 General Election.

6. State defendants will notify plaintiffs' counsel by September 1, 2012 if they are unlikely to implement the terms of paragraphs 2 through 5 of this stipulation in time for the 2012 General Election. In that situation, State defendants shall work with plaintiffs in good faith to develop a temporary, alternative method to notify voters about overvoting, in a form that is reasonably consistent with the Overvote Message, before and during the 2012 General Election.

7. Plaintiffs and State defendants acknowledge that the changes in voting procedures in New York State pursuant to this stipulation are subject to preclearance pursuant to

Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Both counsel for plaintiffs, the Brennan Center for Justice at New York University School of Law (the "Brennan Center"), and Jenner & Block LLP ("Jenner & Block"), agree not to seek attorneys' fees, expenses and costs in connection with Voting Rights Act § 5 preclearance, notwithstanding the payment set forth in paragraph 8 below. State defendants will submit an application for preclearance under Section 5 of the Voting Rights Act of 1965 to the United States Department of Justice within five (5) business days of this stipulation being so-ordered.

8. Within 120 days of receipt by counsel for State defendants of a copy of this fully executed stipulation so-ordered by this Court, State defendants shall pay co-counsel for plaintiffs the Brennan Center the sum of \$71,000, and shall pay co-counsel for plaintiffs Jenner & Block the sum of \$4,728.02.

9. The payments to be made pursuant to paragraph 8 above shall be in full satisfaction of all of plaintiffs' claims for attorneys' fees, expenses and costs in this action as against State defendants, with respect to both the Brennan Center and Jenner & Block, through and including the date that this stipulation is so-ordered.

10. Payment of the sums set forth in paragraph 8 is subject to the approval of all appropriate State officials pursuant to N.Y. Public Officers Law § 17.

11. Plaintiffs release and forever discharge State defendants, more specifically, the State Board (including but not limited to any units, subdivisions or bureaus thereof), and all individually-named State officials in their individual and official capacity, as well as their present, future and former agents, from any and all claims that were brought in this action under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(a), or that could have been brought at the time this action was filed to challenge the overvote message in use in New York under 42 U.S.C. §§ 1983, 1988, 2201 and 2202; the N.Y. Election Law; the New York State Code of Rules & Regulations; and the United States Election Assistance Commission's Voluntary Voting System Guidelines. Plaintiffs and their counsel hereby release the State defendants from any and all claims for attorneys' fees, expenses and costs arising in connection with this action and incurred through and including the date this stipulation is so-ordered.

12. Nothing herein shall constitute an admission by any State defendant of any act or omission by any such State defendant that deprived plaintiffs of any right, or

of failing to perform any duty, under the constitutions,
statutes, rules, regulations or other laws of the United
States or the State of New York.

Dated: New York, New York
February 10, 2012

BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW

Attorneys for Plaintiffs

By:

A handwritten signature in black ink, appearing to read "Wendy Weiser", written over a horizontal line.

WENDY WEISER, ESQ.

LAWRENCE NORDEN, ESQ.

161 Avenue of the Americas,
12th Floor

New York, NY 10013


(212) 998-6730

Dated: New York, New York JENNER & BLOCK LLP
February 10, 2012 Attorneys for Plaintiffs
By:

Michael Ross / RTA

STEPHEN L. ASCHER
MICHAEL W. ROSS
919 Third Ave., 37th Floor
New York, NY 10022
(212) 891-1600

Dated: New York, New York ERIC T. SCHNEIDERMAN
February 10, 2012 Attorney General of the
State of New York
Attorney for State Defendants
By:



LISA R. DELL
JOEL GRABER
Assistant Attorneys General
120 Broadway - 24th Floor
New York, NY 10271-0332
(212) 416-8645
FAX (212) 416-6009

Dated: Brooklyn, New York
February __, 2012

SO ORDERED:

U.S.D.J.

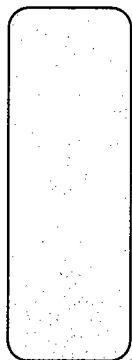
Appendix A

Page 1 of 2

**You filled in too many ovals in 6 contests
These votes will not count:**

In the contest for	You chose	You are allowed
Governor/Lt Governor	3 candidates	1
Representative in Congress	2 candidates	1
State Senator	2 candidates	1

There are 3 other errors on this ballot. To proceed, press Next.



03/08/2011 03:47:00pm

**You filled in too many ovals in 3 contests
These votes will not count:**

In the contest for	You chose	You are allowed
Governor/Lt Governor	3 candidates	1
Representative in Congress	2 candidates	1
State Senator	2 candidates	1


Return your ballot

Press RETURN to get your ballot back and ask an inspector for a new one.

Ignore message, Cast ballot

Ignore this message and cast your ballot with votes that will not count.



Appendix B

 You filled in too many ovals in this many contests: 6

These votes will not count

Governor/Lt Governor
You chose 3
You are allowed 1

Representative in Congress
You chose 2
You are allowed 1


Ballots cast: 65535

You filled in too many
ovals in 4
more contests.


These votes will not count

State Senator
You chose 2
You are allowed 1

Town Supervisor
You chose 3
You are allowed 1.

PREV  NEXT

Ballots cast: 65535






You filled in too many
ovals in 2
more contests.

These votes will not count

Town Clerk
You chose 2
You are allowed 1

Member of Town Council
You chose 5
You are allowed 4

Ballots cast: 65535


Press RETURN to get your ballot back and ask an inspector for a new one.

To ignore this message and cast your ballot with votes that will not count, press CAST.

PREV

APPEAL

Ballots cast: 65535






You filled in too many
ovals in this many
contests: 1


These votes will not count

State Senator
You chose 2
You are allowed 1



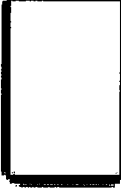
Press RETURN to get your
ballot back and ask an
inspector for a new one.

Ballots cast: 65535



To ignore this message and cast your ballot with votes that will not count, press CAST.

Ballots cast: 65595

JENNER & BLOCK

February 10, 2012

VIA ECF

Jenner & Block LLP
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Hon. Frederic Block
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Brooklyn, New York 11201

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Hon. Robert M. Levy
Magistrate Judge
U.S. District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ***NAACP New York State Conference v. N.Y.S. Board of Elections,***
No. 10-cv-2950(FB)(RML) (E.D.N.Y.)

Dear Judges Block and Levy:

We respectfully submit this letter to advise the Court that Plaintiffs in the above-captioned matter have reached a settlement agreement with the "State Defendants"¹ in this matter.

As set forth in the Amended Complaint, Plaintiffs brought this action to challenge the use of a display message that appears on optical-scan voting machines that increases the risk that

¹ State Defendants are the New York State Board of Elections (the "State Board"), as well as State Board Commissioners James A. Walsh, Douglas A. Kellner, Evelyn J. Aquila, and Gregory P. Peterson, and State Board Co-Executive Directors Todd D. Valentine and Robert A. Brehm.

The "City Defendants" are the New York City Board of Elections (the "City Board"), as well as City Board Commissioners 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. Umame. Plaintiffs have not reached a settlement with respect to their claim against the City Defendants.

February 10, 2012

Page 2

voters will inadvertently cast "overvotes." Machines record overvotes when they read a voter's ballot as including more than the permitted number of votes for a particular contest. The result of an overvote is that the voter's vote is not counted for that contest.

Since the status conference before the Court on November 3, 2010, Plaintiffs and the State Defendants have worked cooperatively toward settlement. This cooperation resulted in the development of a new "overvote message" that provides voters with an opportunity to correct a ballot which contains overvotes and "usability testing" of that message by recognized experts to evaluate voter behavior in response to the message. The new overvote message should significantly reduce the risk that voters mistakenly cast more than the permitted number of votes for a given contest.

Plaintiffs and the State Defendants jointly and respectfully request that the Court "so order" the attached "Stipulation Of Settlement, General Release And Order Of Dismissal" and dismiss Plaintiffs' claims against the State Defendants.

Sincerely,

Michael W. Ross / RJA

Michael W. Ross

cc: counsel of record (via ECF)

U.S. District Court
Eastern District of New York (Brooklyn)
CIVIL DOCKET FOR CASE #: 1:10-cv-02950-FB-RML

NAACP New York State Conference et al v. New York
State Board of Elections et al
Assigned to: Senior Judge Frederic Block
Referred to: Magistrate Judge Robert M. Levy
Cause: 28:1331 Fed. Question

Date Filed: 06/28/2010
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

Date Filed	#	Docket Text
01/23/2012	<u>34</u>	First MOTION for Extension of Time to File <i>STATUS REPORT</i> by Evelyn J. Aquila, Robert A. Brehm, Douglas A. Kellner, New York State Board of Elections, Gregory P. Peterson, Todd D. Valentine, James A. Walsh. (Graber, Joel) (Entered: 01/23/2012)
01/23/2012		ORDER granting <u>34</u> Motion for Two Week Extension of Time to File Stipulation of Discontinuance. Ordered by Magistrate Judge Robert M. Levy on 1/23/12. (Levy, Robert) (Entered: 01/23/2012)
02/08/2012	<u>35</u>	Letter from Michael Ross to Judge Levy dated 02/08/2012, regarding the status of settlement discussions with the State Defendants by Vivian Bosier, Anita Burson, Sheila Duncan, Families United for Racial and Economic Equality, NAACP New York State Conference, National Coalition On Black Civic Participation (Ross, Michael) (Entered: 02/08/2012)
02/09/2012		ORDER re <u>35</u> Letter: Application GRANTED. The Stipulation of Settlement and request for dismissal with respect to the State Defendants shall be filed by 2/10/12. Counsel notes that plaintiffs have not settled with respect to the City Defendants. Ordered by Magistrate Judge Robert M. Levy on 2/9/2012. (Levy, Robert) (Entered: 02/09/2012)
02/10/2012	<u>36</u>	STIPULATION of Settlement, General Release, and Proposed Order of Dismissal by Vivian Bosier, Anita Burson, Sheila Duncan, Families United for Racial and Economic Equality, NAACP New York State Conference, National Coalition On Black Civic Participation (Attachments: # <u>1</u> Stipulation) (Ross, Michael) (Entered: 02/10/2012)
02/13/2012		ELECTRONIC Order Dismissing: Defendants Douglas A. Kellner, New York State Board of Elections, Gregory P. Peterson, Todd D. Valentine, James A. Walsh, Evelyn J. Aquila and Robert A. Brehm, only. See entry <u>36</u> stipulation between plaintiffs and NYS defendants. Ordered by Senior Judge Frederic Block on 2/13/2012. (Innelli, Michael) (Entered: 02/13/2012)
02/22/2012	<u>37</u>	Letter MOTION to Dismiss <i>Plaintiffs' claim against the City Defendants</i> by Vivian Bosier, Anita Burson, Sheila Duncan, Families United for Racial and Economic Equality, NAACP New York State Conference, National Coalition On Black Civic Participation. (Ross, Michael) (Entered: 02/22/2012)



U.S. Department of Justice
Civil Rights Division

TCH:RSB:JR:JOR:maf
DJ 166-012-3
2012-0858

Voting Section - NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

April 25, 2012

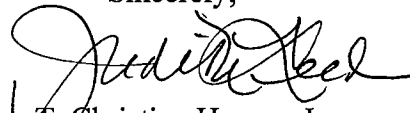
Paul M. Collins, Esq.
Deputy Special Counsel
State Board of Elections
40 Steuben Street
Albany, New York 12207

Dear Mr. Collins:

This refers to the changes to over vote screen notification for the State of New York, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submission on February 27, 2012.

The Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.41.

Sincerely,



T. Christian Herren, Jr.
Chief, Voting Section

2012 MAY -2 PM 2:49

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION
WASHINGTON, DC 20530