UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

NEW YORK STATE BOARD OF ELECTIONS; PETER S. KOSINSKI and STANLEY L. ZALEN, Co-Executive Directors of the New York State Board of Elections, in their official capacities; and, STATE OF NEW YORK,

Defendants.

AFFIRMATION

Civil Action No.
06-CV-0263 (GLS)

JAMES T. POTTER, being a duly licensed and practicing attorney of the State of New York and of the United States District Court for the Northern District of New York, affirms under penalty of perjury as follows:

1. I am the attorney for Avante International Technology, Inc. ("Avante"). This affidavit is made in support of the motion to intervene as amicus curiae in this action, to request from this Court a minor modification of the timetable for Defendants' compliance with HAVA to prevent Defendants from perpetrating a manifest injustice.

2. I am informed by Michael Mackey, attorney for Liberty Election Systems, LLC, ("Liberty"), that his client also joins in this motion to intervene as amicus. Upon information and belief, Mr. Mackey will be filing a notice of appearance in this case on Monday.

3. Avante is a manufacturer of electronic voting machines. Its machines are currently being used in all five boroughs of New York City and in numerous other counties including Albany, Suffolk, Nassau, Westchester, Rockland, Putnam, Orange, Dutchess, and

Sullivan.

4. Avante and four other manufacturers submitted responses to the Request for Proposals published by the New York State Board of Elections ("NYSBE") for Ballot Marking Devices ("BMD") for use in connection with the Lot 2 program. Pursuant to this Court's order, these BMDs are to be available for use by disabled voters in the State of New York in time for the Federal and State primaries in the fall of 2008.

5. Avante proposed three machines that could be used. The first machine, the EVC 308 SPR BMD, utilizes a 15 inch screen and prints a full face ballot. The second machine, the EVC 308 FF 42, utilizes a 42 inch screen and prints a ballot record. The third machine, the EVC 308-FF-BMD, utilizes a 42 inch screen and prints a full faced ballot.

6. Machines were also proposed by Liberty, Premier Elections Solutions, Inc ("Premier"), Election Systems and Software, Inc ("ES&S") and Sequoia Voting Systems ("Sequoia").

7. On January 24, 2008, the NYSBE met to approve these machines so that the County Boards of Elections could rank their preferences. The NYSBE approved the Sequoia System unconditionally, approved the Premier and ES&S Systems conditionally, and denied approval to the Avante and Liberty machines.

8. On January 29, 2008, the Executive Directors of the NYSBE sent a letter to the County Boards of Elections informing them that the Premier and ES&S machines were no longer on the approved list. This left only the Sequoia machine remaining. As a result, County Boards only had one vendor to choose.

9. Thereafter, separate Article 78 proceedings were commenced by Avante, Liberty, Premier and ES&S in the Supreme Court, Albany County.

10. The timing of the NYSBE's actions was particularly problematic. The NYSBE had submitted a proposed schedule to this Court to ensure that it would comply with HAVA by having ballot marking devices for use by disabled New York voters in time for the State and Federal primaries in the fall of 2008 (Docket # 179, Schedule C). The schedule itself contained 53 separate steps, each with implementation dates. The Court ordered defendants to comply with this schedule in its order of January 16, 2008 (Docket # 188).

11. Line entry #38 on the schedule that defendants proposed specifies that County Boards of Elections must provide their machine ordering information to the New York State Office of General Services ("OGS") by February 8, 2008. By waiting so long to approve and disapprove machines, the NYSBE effectively left no time for the vendors to have their day in court to challenge NYSBE's arbitrary and capricious denial of approval to all but one vendor. Worse yet, NYSBE then disregarded the language and spirit of orders issued by the State Supreme Court to add these vendors to the list from which counties could select.

12. A brief review of this litigation will assist the Court in appreciating how the NYSBE is using the February 8 date provided in this Court's order to perpetrate such an injustice.

13. Liberty commenced its Article 78 proceeding on January 28, 2008 by order to show cause. Justice Kimberly O'Connor heard the Liberty case on January 31. The Court rendered a decision in the Liberty case on February 4, 2008, finding that the NYSBE had arbitrarily and capriciously kept Liberty off the approved list. The Court ordered that the NYSBE approve Liberty's voting machine on or before February 8, 2008. A copy of this decision and order is annexed as Exhibit "A."

14. Premier commenced its Article 78 proceeding by order to show cause on

February 1, 2008. Justice O'Connor heard the Premier case on February 6. On February 7, Justice O'Connor handed down a decision and order determining the NYSBE's disapproval of the Premier machine was arbitrary and capricious. A copy of this decision and order is annexed as Exhibit "B."

15. ES&S commenced its Article 78 proceeding by order to show on February 5, 2008. Upon information and belief, Justice O'Connor signed a Temporary Restraining Order directing that ES&S's machine be added to the list.

16. Avante also commenced its Article 78 proceeding by order to show cause on February 5, 2008. Avante had previously filed an administrative appeal with OGS on January 25, 2008. OGS denied this appeal on January 29, claiming that it was the decision of the NYSBE, not OGS that was at issue.

17. On February 5, 2008, Justice O'Connor issued a Temporary Restraining Order directing that one of Avante's three machines must be added to the list. The Court then set the return date of the Article 78 proceeding for Monday, February 11, at 1:30 p.m. so that all three machines could be considered A copy of this order is annexed as Exhibit "C." I personally served this order on both counsel for the Article 78 Respondents at the NYSBE that afternoon.

18. In response to the Justice O'Connor's order, the NYSBE sent an e-mail to the County Boards of Elections on the evening of February 6. A copy of an e-mail from counsel advising of this notification is annexed as Exhibit "D."

19. On the afternoon of February 8, 2008, the day when County Boards were to make their ranking designations, I learned that the NYSBE had sent a letter to the County Boards via e-mail that completely undermined Justice O'Connor's order adding Avante's machine to the list. The letter stated that the Liberty, ES&S and Premier systems were added to

the list, but made no mention of the Avante system. A copy of this letter is annexed as Exhibit "E."

20. As a result of the NYSBE's actions, County Boards of Elections, which were notified that they had to make their selections by February 8, 2008, could not reasonably have believed that Avante was an option they could have chosen. The net effect of this outrageous conduct is that, absent some relief from the strict February 8 date, Avante will effectively be shut out of New York. Counties selecting machines under the Lot 2 program for disabled voters are likely to select the same manufacturer's machines for use by the general voting public under the Lot 1 program so that poll workers and maintenance personnel will only have to learn one type of machine. The further effect is that County Boards of Election will be deprived of the opportunity to use the Avante technology that they have grown accustomed to through their use of the Avante machines for the past two years.

21. The other vendors, other than Sequoia, may have experienced similar problems. The court orders in the Article 78 proceedings came so late that, undoubtedly, many counties have mistakenly believed that their options are severely limited, and perhaps are limited to selecting the Sequoia machine alone.

22. Liberty has filed a motion for contempt against the NYSBE that is returnable on Monday February 11, 2008. Upon information and belief, Liberty is also maintaining that the NYSBE's actions have caused significant prejudice and harm. A copy of Liberty's order to show cause for contempt is annexed as Exhibit "F.

23. NYSBE has argued repeatedly in State Court that it is bound by this Court's interim order of January 16, 2008, which directed at numbered paragraph "2" that the NYSBE shall implement in full the time table that it provided to the Court in Exhibit "C" to its filing of

January 4, 2008 (Docket #179). Specifically, they argued that it was bound by the date set forth in line 38 of Exhibit "C", which appears to require counties to return their ordering information to the Office of General Services by February 8, 2008. Despite the manifest injustices that are occurring, the NYSBE has made no effort to apply to this Court for relief from this Court's order. In fact, they have argued that the Supreme Court cannot change the date for County action, because of the order of this Court. For this reason, Avante and Liberty are seeking to intervene as amici.

24. It is submitted that a change of this date will have absolutely no effect upon New York's compliance with the Court's direction to have Lot 2 machines available for the disabled for the September 2008 primary.

25. Step number 38 (Docket #179, Ex. C), requiring counties to designate their selections from the NYSBE approved list by February 8, 2008, is largely an inconsequential date. As Step 11 shows, testing of the machines is not scheduled to be completed by New York until February 28, 2008. As Step 28 shows, ordering, delivery and acceptance testing does not have to be completed until July 31, 2008. If the Court were to extend the time for counties to designate their selections, those selections could still be made before the NYSBE completes its testing of the machines. Thus, extending the date for county preference designation will not negatively impact in any material way the timetable for acquisition of the machines.

26. Avante is respectfully requesting that the date for county Boards of Election to make their rankings from the list prepared by the NYSBE be extended until at least February 28, 2008. It is believed that this would give Judge O'Connor sufficient time to determine the merits of Avante's petition in State Supreme Court. Avante's three machines could then be included on the list, and counties would have the opportunity to make their selection of

Avante's qualified machines. Absent this relief, Avante will effectively be shut out of the process for two of its well-qualified voting machines, even if it is determined shortly after February 8, 2008, that the NYSBE acted arbitrarily and capriciously in keeping Avante's machines off the list.

27. Additionally, it is respectfully requested that the Court review with defendants the full schedule for compliance, to ensure that the schedule will not work further injustices to third parties.

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EXHIBIT A

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
LIBERTY ELECTION SYSTEMS, LLC,

Petitioner,

DECISION AND JUDGMENT

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Index No. 789-08
RJI # 01-08-092009

-against-

NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA.
NEILL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

(Supreme Court, Albany County, Special Term)

APPEARANCES:

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O'Connor, J.:

Petitioner commenced the instant article 78 proceeding seeking review of a determination of the New York State Board of Elections, which by a vote of two to one in favor of approval, failed to approve the ballot marking device voting system which petitioner seeks to sell to the various counties within the State of New York. Respondent New York State Office of General Services has moved to dismiss the proceeding as to it on the ground that it has already performed all of the acts sought in the petition and that therefore the application is moot as to it.

While the apparent anomaly of denial of approval based upon a majority vote in favor of approval has been characterized as unique by some of the litigants, it is not without precedent. Indeed, a unanimous affirmative vote by less than the required number of members has been held insufficient to constitute an effective action (*see e.g. Matter of Squicciarini v Planning Bd. of Town of Chester*, 38 NY2d 958 [1976]). Election Law § 7-201 requires the Board of Elections to determine whether a voting machine complies with the requirements of Election Law § 7-202 and can be safely and properly used by voters and local boards of election. Pursuant to Election Law §§ 3-100 (4) and 7-201(1), approval of a voting machine must be made by affirmative vote of at least three of the four Commissioners. Even though at the time of the vote the Board had a quorum of three Commissioners, the affirmative vote of two of the three present Commissioners was insufficient to constitute an action by the Board approving petitioner's machine for use in New York.

Such lack of action is indistinguishable from the failure to act caused by the tie vote in *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, (97 NY2d 86, 91-93 [2001]). In such proceeding, the Court made it clear that such inaction could not preclude or interfere with judicial review. Thus, even where there are no factual findings or a statement of reasons for denial, the Court may consider the entire record, including transcripts of the meetings at which votes were taken as well as affidavits submitted in the article 78 proceeding (id. at 93). In the instant proceeding, the approval was effectively denied by the negative vote of Commissioner Kellner. The transcripts of the meetings contain specific statements of the grounds for his negative vote. Under the circumstances, the Court finds that such statements will be considered as the reasoning for denial of approval. Moreover, review of the determination shall be limited to those grounds raised by Commissioner Kellner at the time of the denial (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs* ., 77 NY2d 753, 758 [1991]; *Matter of Police Benevolent Assn of N. Y. State Troopers v Vacco* , 253 AD2d 920, 921 [3d Dept 1998]).

The primary ground for denial of approval asserted by Commissioner Kellner was that the petitioner's ballot marking device did not produce or create a ballot in compliance with the requirements of the Election Law. In general, an interpretation of a statute by an administrative agency charged with its administration is entitled to great deference. However, "[w]here 'the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required' (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419)." (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997]; *see also Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 [1980]). Moreover, in the instant proceeding, two of the three Commissioners present construed the Election Law differently. As such, Commissioner Kellner's interpretation of the statute is not entitled to any

deference. It is also noted that the record contains responses to inquiries from vendors as to whether the ballot marking device was required to produce a "paper ballot" or whether the machine interface could be considered as the "ballot." The response was consistently that the "ballot" must comply with the Election Law with no further detail given. Petitioner has paid at least $170,000 to respondents for testing to ensure that its machine complies with the statute. Clearly no testing is required to determine whether petitioner's machine's "ballot" complies with the Election Law.

Petitioner's machine is a modified voting machine rather than a dedicated paper ballot marking device. The machine itself has a large "ballot" displayed with provision for the voter to choose candidates and vote on proposals. The machine then prints a paper receipt indicating the choices that were made. The paper receipt does not include, inter alia, the names of all the candidates and their parties, nor does it include the text of any proposals. It clearly does not constitute a paper ballot within the meaning of Election Law § 7-106.

However, a "ballot marking device" is not defined in the Election Law. The only time the phrase is used in a New York statute is in the Election Reform and Modernization Act of 2005, (L. 2005, c. 181, § 11). Such statute provides:

> "Up to and until the replacement of existing voting machines by voting machines or voting systems which meet the requirements of section 7-202 of the election law, each county shall provide at least one location with one or more ballot marking devices which are equipped for individuals with disabilities and provide individuals with disabilities with the same opportunity for access and participation as other voters and which are authorized by the state board of elections pursuant to subdivision 4 of section 7-201 of the election law."

Clearly, a voting machine or voting system which meets the requirements of Election Law § 7-202 will constitute an appropriate "ballot marking device." Moreover, nothing in the Election Reform and Modernization Act of 2005 can be construed as requiring a "paper ballot marking device."

Certainly, if the Legislature had intended such a requirement, it could have included it in the statute.

Election Law § 1-104 is entitled "Definitions." Subdivision 8 thereof provides: "The term 'official ballot' refers to the paper ballot on which the voter casts his vote, or the face of a voting machine as prepared for the voter to cast his vote at any election held in accordance with the provisions of this chapter." Subdivision 18 thereof provides:

> "The word "ballot" when referring to voting machines or systems means that portion of the cardboard or paper or other material or electronic display within the ballot frame containing the name of the candidate and the emblem of the party organization by which he was nominated, of the form of submission of a proposed constitutional amendment, proposition referendum or question as provided in this chapter, with the word "yes" for voting for any question or the word "no" for voting against any question except that where the question or proposition is submitted only to the voters of a territory wholly within a county or city, such form shall be determined by the county board of elections. Such statement and the title shall be printed and/or displayed in the largest type or display which it is practicable to use in the space provided."

Election Law § 7-104 contains numerous requirements for the form of a ballot in a voting machine. An entirely separate section, Election Law § 7-106, provides the requirements for a paper ballot. It appears uncontroverted that the instant proceeding involves a challenge to a determination made pursuant to Election Law § 7-201, which is entitled "Voting machines and systems; examination of." The Commissioners were voting on whether the ballot marking devices met the requirements of Election Law § 7-202, entitled "Voting machine or system; requirements of." Election Law § 7-202 (1) (j) requires that a voting machine or system shall:

> "retain all paper ballots cast or produce and retain a voter verified permanent paper record which shall be presented to the voter from behind a window or other device before the ballot is cast, in a manner intended and designed to protect the privacy of the voter; such ballots or record shall allow a manual audit and shall be preserved in accordance with the provisions of section 3-222 of this chapter."

The Court therefore finds that this proceeding involves the approval of a voting machine or system, and not approval of a paper ballot. The statute expressly and clearly contemplates that the

"ballot" be printed or displayed on the machine or system, not that it be a "paper ballot." Moreover, the statute specifically authorizes a machine which produces a permanent paper record of the vote rather than a "paper ballot." Commissioner Kellner has argued that the phrase "ballot marking device" contemplates marking a paper ballot. However, nothing in the phrase or anywhere else in the statute indicates an intent to exclude the virtual marking of a machine ballot. It is therefore determined that the Election Law does not require a ballot marking device to produce a paper ballot as such is defined in the Election Law. Accordingly, Commissioner Kellner's primary ground for voting against approval is based upon an erroneous construction of the applicable statutes and therefore that portion of the determination is contrary to law.

Commissioner Kellner's other ground for disapproval was that the petitioner's machine did not adequately provide for a disabled person's independent verification of the vote before it was cast. Petitioner initially supplied a machine with a digital pen reader which required a voter to unplug headphones from the main voting machine and plug them into the digital pen reader. The voter was then required to scan a specific area of the paper receipt with the pen reader by passing the pen over designated lines. It is clear that this form of verification was intended to be utilized by persons with limited or no eyesight. The record indicates that this proved difficult to perform even for people without any disability. However, on January 22, 2008 petitioner provided an alternate independent verification device which would automatically scan the paper receipt. Commissioner Kellner did not consider such device in his review of petitioner's machine.

The bid requirements provided for an open recruitment with no fixed time for submission of bids. They did require that a bidder submit a sample voting machine or system to the Board of Elections before 11:00 am. of the tenth business day after its bid was submitted. Petitioner's bid was

submitted on January 7, 2008. The date for final submission of the equipment, as verified by email from the Office of General Services, was January 22, 2008. While petitioner has submitted a receipt for delivery of the new independent verification device on January 22, 2008, the receipt does not indicate the time of delivery. Respondents have submitted an affidavit indicating that the device was received at approximately 3:30 pm., 4 ½ hours after the 11:00 am. deadline. Petitioner has not offered any proof to the contrary.

As noted above, respondents are limited to the grounds they raised in support of their determination. Commissioner Kellner stated that the deadline for submission of petitioner's device was January 10, 2008 and that it was not fair to delay the determination by a late submission. The record establishes that Commissioner Kellner was in error with respect to the deadline. Clearly the factors to be considered in excusing a delay of a few hours are significantly different from those applicable to a delay of almost two weeks. Moreover, the record reflects that the Commissioners voted to approve two voting machines subject to subsequent modification to meet certain requirements. Allowing two of the bidders to modify their machines after the final submission date, while refusing to consider petitioner's modification which was already submitted, appears substantially similar to allowing a deviation from a bid specification. Such deviations are only allowed when they do not place any of the bidders at a competitive disadvantage (*see Matter of Cataract Disposal v Town Bd. of Town of Newfane*, 53 NY2d 266, 272 [1981]; *Matter of Hungerford & Terry, Inc. v Suffolk County Water Auth.*, 12 AD3d 675 [2d Dept 2004]; *Eldor Contr. Corp. v Suffolk County Water Auth.*, 270 AD2d 262 [2d Dept 2000]). The Court finds that allowing two of the bidders to make subsequent modifications while refusing to consider petitioner's modification submitted only a few hours late placed petitioner at a competitive disadvantage.

It further appears that the other two Commissioners did consider the petitioner's new independent verification device and found it sufficient to meet the statutory specifications. There was no vote to reject petitioner's submission and no determination by three Commissioners to that effect. It is therefore determined that Commissioner Kellner's determination that petitioner's machine did not have a compliant independent verification device based upon a refusal to consider the modification, which refusal was based upon an error of fact and improper disparate treatment of bidders, was arbitrary and capricious.

Accordingly the Court finds that the determination to deny approval to petitioner's machine was arbitrary and capricious and contrary to law, requiring that it be vacated and set aside. The matter shall be remitted to the Board of Elections with a direction that they issue an initial approval of petitioner's voting machine on or before February 8, 2008 (see CPLR § 7506; *Matter of McCambridge v McGuire*, 62 NY2d 563, 568-569 [1984]; *Matter of Hauser v Town of Webb*, 34 AD3d 1353, 1354 [4th Dept 2006]). Under the circumstances herein, in which the State of New York is under a very strict timetable imposed by the United States District Court and the initial approval is still subject to further testing to ensure that the voting machines and systems actually perform properly, the Board of Elections respondents shall be preliminarily enjoined immediately to treat petitioner's voting machine as if it has received their approval pending their formal approval, including being examined and included in the vendor selection process and distributing the information with respect to petitioner's machines to all County Boards of Election.

It further appears that all of the relief requested with respect to the Office of General Services is moot, as such agency has already submitted petitioner's bid documents to the Office of the State Comptroller. As such, the motion to dismiss shall be granted.

Accordingly it is,

ORDERED, that the petition is hereby granted to the extent that the determination to disapprove the petitioner's voting machine is vacated and annulled, and it is further

ORDERED, that the Board of Elections is directed to approve petitioner's voting machine on or before February 8, 2008, and it is further

ORDERED, that pending such approval, the Board of Elections is directed immediately to examine petitioner's machines, to include them in the vendor selection process and to distribute the information with respect to petitioner's machines to all County Boards of Election, and it is further

ORDERED, that the motion to dismiss by respondent Office of General Services is hereby granted.

This shall constitute both the decision and judgment of the Court. All papers, including this decision and judgment, are being returned to the attorneys for petitioner. The signing of this decision and judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ADJUDGED.

ENTER.

Dated: February 4, 2008
Albany, New York

Hon. Kimberly O'Connor
Acting Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause dated January 28, 2008; Petition verified January 28, 2008;
2. Notice of Motion dated January 31, 2008;
3. Affidavit of Michele M. Reale, Esq. sworn to January 30, 2008 with Exhibits A and B annexed;

4. Answer of respondents Commissioners Kelleher and Donohue verified January 31, 2008;
5. Affirmation of Allison M. Carr, Esq. dated January 31, 2008;
6. Answer of respondents Commissioners Kellner and Aquila verified January 31, 2008 with Exhibit A annexed;
7. Affidavit of Douglas A. Kellner sworn to January 31, 2008 with Exhibits A-C annexed;
8. Affidavit of Robert E. Warren sworn to February 1, 2008.

EXHIBIT B

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
PREMIER ELECTION SOLUTIONS, INC.,

Petitioner,

DECISION AND JUDGMENT

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Index No. 923-08
RJI # 01-08-092052

-against-

NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

(Supreme Court, Albany County, Special Term)

APPEARANCES:

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O'Connor, J.:

Petitioner commenced the instant article 78 proceeding seeking review of a determination of the New York State Board of Elections, which denied approval of the ballot marking device voting system which petitioner seeks to sell to the various counties within the State of New York. Respondents Donohue and Kelleher have moved to dismiss the petition on the ground that it fails to state a cause of action. For the reasons that follow, the Court finds that the petition does state a cause of action. The motion to dismiss is therefore denied. The parties have stipulated that the Court treat the motion to dismiss as respondents' answer consisting of a general denial of the allegations of the petition. The issues are therefore ripe for adjudication.

At the meeting of the Board of Elections held on January 24, 2008 one Commissioner imposed an ambiguous condition on approval of the petitioner's voting system. Commissioner Donohue stated that the petitioner's system was "in the process of being delivered with the full face quality. I put that up for a vote." No condition was expressly imposed in the vote. Commissioner Kellner stated that he did not have any problem with the proposed modification, but that it was unnecessary. He then voted "aye." Commissioner Kelleher voted "aye" without discussion or condition imposed. Thereafter Commissioner Donohue voted "aye with the improvement that we mentioned." She was the only Commissioner to impose a condition on the approval. However, she did not provide any detail as to the nature of the condition. Shortly after the votes, Commissioner Kellner discussed the nature of the conditions imposed on two voting systems, including petitioner's system. He stated "[E]ssentially, the only modification that I understand it that is going to be made is that the first screen that will appear to the voter will be a full face ballot rather than simply a listing of candidates for the first office on the ballot, which is how it appears now." Such understanding was not controverted by either Commissioner Donohue or Kelleher. After the approval the

Feb 07 2008 4:26PM HP LASERJET 3330 p.4

petitioner's voting system was rejected by a letter from the co-executive directors of the Board of Elections stating that they were unable to agree on whether the modification was compliant. No statement of the basis for such determination was provided. Respondents have submitted an affidavit from the co-executive director of the Board of Elections who rejected petitioner's system stating that the ground for rejection was that petitioner's ballot marking device was required to allow a voter to mark the ballot using only a single screen for the entire ballot, rather than allowing successive screens for each office.

The instant proceeding is essentially the converse of the facts in *Matter of Liberty Election Systems v New York State Board of Elections*, (Sup Ct, Albany County, O'Connor, J. February 4, 2008). In such case, one of the Commissioners voted to disapprove a voting machine because it did not create a full face paper ballot. In that case, the ballot was semi-permanently displayed as part of the voting machine. The voting system in the instant proceeding utilizes a full face paper ballot, with the machine component used only to mark such ballot.

Petitioner challenges the imposition of a condition by a single Commissioner, as well as the rejection of the petitioner's system by a single co-executive director. As in *Liberty Election Systems*, the vote of the Commissioners of the Board of Elections is subject to judicial review pursuant to the procedures set forth in *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, (97 NY2d 86, 91-93 [2001]). Thus, even where there are no factual findings or a statement of reasons for denial, the Court may consider the entire record, including transcripts of the meetings at which votes were taken as well as affidavits submitted in the article 78 proceeding (id. at 93). In the instant proceeding, the approval was purportedly made subject to a condition by the vote of Commissioner Donohue. As noted above, the transcripts of the meetings do not contain any

Feb 07 2008 4:26PM HP LASERJET 3330 p.5

clear statements of the grounds for her conditional vote or even the nature of the condition. However, it appears that Commissioner Donohue based the vote upon a requirement that the petitioner's voting system must electronically display a full face ballot on its display screen. Under the circumstances, the Court finds that such statement will be considered as the reasoning for conditioning the approval. Moreover, review of the determination shall be limited to the ground raised by Commissioner Donohue at the time of the vote (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs .*, 77 NY2d 753, 758 [1991]; *Matter of Police Benevolent Assn of N. Y. State Troopers v Vacco* , 253 AD2d 920, 921 [3d Dept 1998]).

In general, an interpretation of a statute by an administrative agency charged with its administration is entitled to great deference. However, "[w]here 'the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required' (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419)." (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997]; *see also Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 [1980]). Moreover, in the instant proceeding, one of the three Commissioners present construed the Election Law differently. As such, Commissioner Donohue's interpretation of the statute is not entitled to any deference. It is also uncontroverted that petitioner has been informed by staff of the Board of Elections on repeated occasions that the Election Law does not require the ballot marking device to present all ballot choices on a single screen.

In contrast to the modified voting machine involved in *Liberty Election Systems*, petitioner's machine is a dedicated paper ballot marking device. The voting system utilizes a full face paper ballot with provision for the voter to choose candidates and vote on proposals by marking designated spots on the paper ballot. The "ballot" constitutes a paper ballot within the meaning of Election Law

Feb 07 2008 4:26PM HP LASERJET 3330 p.6

§ 7-106. The machine portion of the system provides an interface to allow a visually impaired or physically disabled person to mark the paper ballot accurately.

A "ballot marking device" is not defined in the Election Law. The only time the phrase is used in a New York statute is in the Election Reform and Modernization Act of 2005, (L. 2005, c. 181, § 11). Such statute provides:

> "Up to and until the replacement of existing voting machines by voting machines or voting systems which meet the requirements of section 7-202 of the election law, each county shall provide at least one location with one or more ballot marking devices which are equipped for individuals with disabilities and provide individuals with disabilities with the same opportunity for access and participation as other voters and which are authorized by the state board of elections pursuant to subdivision 4 of section 7-201 of the election law."

Clearly, a voting machine or voting system which meets the requirements of Election Law § 7-202 will constitute an appropriate "ballot marking device." Moreover, nothing in the Election Reform and Modernization Act of 2005 can be construed as requiring a voting machine rather than a paper ballot marking device.

Election Law § 1-104 is entitled "Definitions." Subdivision 8 thereof provides: "The term 'official ballot' refers to the paper ballot on which the voter casts his vote, or the face of a voting machine as prepared for the voter to cast his vote at any election held in accordance with the provisions of this chapter." Election Law § 7-104 contains numerous requirements for the form of a ballot in a voting machine. An entirely separate section, Election Law § 7-106, provides the requirements for a paper ballot. It appears uncontroverted that the instant proceeding involves a challenge to a determination made pursuant to Election Law § 7-201, which is entitled "Voting machines and systems; examination of" (emphasis added). The Commissioners were voting on whether the ballot marking devices met the requirements of Election Law § 7-202, entitled "Voting machine or system; requirements of" (emphasis added). Petitioner's machine is part of a voting

Feb 07 2008 4:26PM HP LASERJET 3330 p.7

system which relies upon a paper ballot. In petitioner's system the machine does not contain or constitute the "ballot" within the meaning of Election Law §§ 1-104 (18) and 7-104.

The Court therefore finds that this proceeding involves the approval of a voting machine or system which may use a paper ballot. The statute expressly and clearly contemplates that the "ballot" be either printed or displayed on the machine or that it be a paper ballot. Nothing in the statute indicates an intent to require that a ballot marking device which marks a paper ballot also contain a "machine ballot," that is, a full face display of the ballot. It is therefore determined that the Election Law does not require a ballot marking device which marks a paper ballot as such is defined in the Election Law to also include an electronic or other display of the entire ballot. Accordingly, Commissioner Donohue's reason for imposing a condition on approval is based upon an erroneous construction of the applicable statutes and therefore is contrary to law.

It further appears that one of the co-executive directors has overruled the Board's approval and rejected petitioner's machine based upon an additional requirement that the machine use only one screen to mark the paper ballots rather than a series of successive touch screens. Such additional requirement was not made part of the condition during the Commissioners' vote and can not be found anywhere in the Election Law. There is simply no requirement as to the specific manner in which a ballot marking device is used to mark a ballot. In addition, for the reasons stated above, there is not even a requirement in the Election Law to provide a full face display of the ballot on a ballot marking device, let alone a requirement that it be visible at all times.

Moreover, it is questionable whether the Commissioners of the Board of Elections have any authority to delegate such a determination to their co-executive directors. The Election Law expressly requires the Commissioners to approve the machines by an affirmative vote of at least

Feb 07 2008 4:26PM HP LASERJET 3330 P.8

three Commissioners. In fact, petitioner's system was approved by three Commissioners. Respondents have not offered any statutory authority for a delegation of authority for a vote in which a single co-executive director has effectively overridden the vote of three Commissioners. There is also no statutory procedure setting forth which outcome will prevail upon a deadlocked vote of the co-executive directors under these circumstances.

Accordingly the Court finds that the determinations to condition approval of and thereafter to rescind approval of petitioner's machine were arbitrary and capricious and contrary to law, requiring that they be vacated and set aside. The matter shall be remitted to the Board of Elections with a direction that they issue an initial approval without additional conditions of petitioner's voting system on or before February 8, 2008 (see CPLR § 7506; *Matter of McCambridge v McGuire*, 62 NY2d 563, 568-569 [1984]; *Matter of Hauser v Town of Webb*, 34 AD3d 1353, 1354 [4th Dept 2006]). Under the circumstances herein, in which the State of New York is under a very strict timetable imposed by the United States District Court and the initial approval is still subject to further testing to ensure that the voting machines and systems actually perform properly, the respondents shall be preliminarily enjoined immediately to treat petitioner's voting system as if it has received their initial unconditional approval pending their formal approval, including being examined and included in the vendor selection process and distributing the information with respect to petitioner's system to all County Boards of Election.

Accordingly it is,

ORDERED, that the petition is hereby granted to the extent that the determinations to condition approval and thereafter rescind approval of the petitioner's voting system are vacated and annulled, and it is further

Feb 07 2008 4:27PM HP LASERJET 3330 p.9

ORDERED, that the Board of Elections is directed to approve petitioner's voting system without any additional conditions on or before February 8, 2008, and it is further

ORDERED, that pending such approval, the Board of Elections is directed immediately to examine petitioner's system, to include it in the vendor selection process and to distribute the information with respect to petitioner's system to all County Boards of Election, and it is further

ORDERED, that this determination shall not affect the general condition applicable to all approved ballot marking devices that petitioner's system must still pass the performance testing to be conducted upon all initially approved machines and systems.

This shall constitute both the decision and judgment of the Court. All papers, including this decision and judgment, are being returned to the attorney for petitioner. The signing of this decision and judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ADJUDGED.

ENTER.

Dated: February 7, 2008
Albany, New York

Kimberly A. O'Connor
Hon. Kimberly A. O'Connor
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated February 1, 2008; Petition verified February 1, 2008;
2. Affidavit of Buck Jones sworn to February 6, 2008;
3. Notice of Motion, undated;
4. Affidavit of Todd D. Valentine, Esq. sworn to February 4, 2008 with Exhibits B and C annexed.

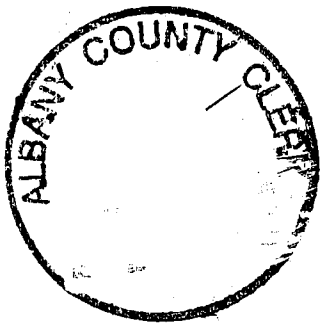
Feb 07 2008 4:27PM HP LASERJET 3330 P.10

EXHIBIT C

At a term of the Supreme Court held in and for the County of Albany at the Albany County Courthouse, Eagle Street, Albany, New York on the 6th day of February, 2008.

PRESENT:

HON. KIMBERLY O'CONNOR,
Acting Justice.



AVANTE INTERNATIONAL TECHNOLOGY, INC.,

Petitioner,

-against-

NEW YORK STATE BOARD OF ELECTIONS and DOUGLAS A. KELLNER, EVELYN J. AQUILA, NEIL W. KELLEHER and HELENA MOSES DONOHUE, SAID COMMISSIONERS TOGETHER CONSTITUTING THE NEW YORK STATE BOARD OF ELECTIONS, ~~and THE NEW YORK STATE OFFICE OF GENERAL SERVICES,~~

Respondents.

ORDER TO SHOW CAUSE

Index No. 1055-08

(180)

Upon reading and filing the verified petition of Avante International Technology, Inc. ("Avante"), and all the proceedings heretofore had herein, it is hereby

ORDERED, that respondents show cause before this Court at the Albany County Courthouse, in the City and County of Albany, New York on the 11th day of February, 2008 at 1:30 p.m. of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein:

1. Directing that respondents take any and all actions necessary to approve and otherwise permit petitioner Avante's three machines (EVC 308 SPR BMD; EVC 308 FF42; EVC 308-FF-BMD) to be among those ballot marking devices that were approved by respondents on January 24, 2008 to be examined and included for the vendor selection process for 2008 elections including primaries in the State of New York, and/or

2. Restraining the respondents until further order of this Court from taking any action, including but not limited to issuing list(s) of ballot marking devices approved by respondents to be examined and included in the final vendor selection process for the 2008 elections, including primaries in the State of New York, and

3. Directing the respondents to immediately distribute all petitioner's bid information, including but not limited to petitioner's offered systems and price information, to all County boards of elections, relevant to support the selection of their preferred Ballot Marking Device for use in the 2008 elections, and

4. Directing the Office of General Services to forward to the Office of the State Comptroller a contract for petitioner Avante's machine in accordance with proper procedures, and

5. Granting such other and further relief as to the Court may seem just and proper, and it is further

ORDERED, that respondents are to produce upon the return date of this proceeding any and all original determinations, certifications, resolutions, minutes, audio and video recordings, reports and records of any kind of or relating to respondents' meetings and determinations concerning the subject matter of this proceeding, and it is further

ORDERED, that leave is hereby granted to petitioner upon the return date of this proceeding or any adjourned date thereof to submit such additional proof, by way of affidavits, exhibits or other evidence in support of the petition, and it is further

ORDERED, that until further Order of this Court respondents shall include petitioner Avante's ~~three~~ machines ~~(EVC 308-SPR-BMD; EVC 308-FF42;~~ EVC 308-FF-BMD) on the approved list of ballot marking devices to be tested for use in the 2008 elections including primaries in New York State and the County Boards of Elections shall be notified of this ☒ by email immediately;

~~**ORDERED**, that respondents shall suspend for one week, until February 15, 2008, the Board's certification of the list of machines available for purchase by the counties.~~

Sufficient cause appearing therefor, it is further

ORDERED, that service of this Order to Show Cause and the Petition upon which it was granted upon respondents New York State Board of Elections and Commissioners Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher and Helena Moses Donohue, be made by delivering a copy thereof to the New York State Board of Elections, 40 Steuben Street, Albany, New York, and giving such papers to a person authorized to accept such papers on behalf of said New York State Board of Elections on or before February 7, 2008, and upon respondent New York State Office of General Services by delivering a copy thereof to the New York State Attorney General's Office in Albany, New York on or before February 7, 2008; and that such service shall constitute good and sufficient service of the within proceeding.

Signed this 6th day of February 2008 at Albany, New York.

Hon. Kimberly O'Connor
Acting Justice of the Supreme Court

EXHIBIT D

James T. Potter

From: ALLISON CARR [ACARR@elections.state.ny.us]
Sent: Wednesday, February 06, 2008 5:38 PM
To: David Novak; James T. Potter
Cc: PAUL COLLINS
Subject: Email to Counties

Gentlemen,

Here is a copy of the email that just went out to the Counties:

Avante has brought litigation against the New York State Board of Elections and its Commissioners. Pursuant to a Court Order issued today, please be advised that pending the outcome of the litigation in this matter, the Petitioners Avante EVC 308-FF-BMD (the 42" touchscreen DRE) ballot marking device is to be included in the list of ballot marking devices that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services.

EXHIBIT E

RESOLUTION ON COURT ORDERED VOTE ON VOTING MACHINES

We are here today solely to comply with the Court's order on voting machines.

The Court has ordered that the State Board's prior determinations regarding LIBERTY, ES&S and PREMIER are vacated and annulled.

The Court has directed the State Board of Elections to approve the Liberty voting system on or before February 8, 2008.

The State Board of Elections concludes that with respect to Liberty that this determination shall not affect the general condition applicable to all approved ballot marking devices that petitioners' system must still pass the performance testing to be conducted upon all initially approved machines and systems.

The Court has directed the State Board of Elections to approve the ES&S and Premier voting systems without any additional conditions on or before February 8, 2008.

The Court further ordered that with respect to ES & S and Premier that this determination shall not affect the general condition applicable to all approved ballot marking devices that petitioners' systems must still pass the performance testing to be conducted upon all initially approved machines and systems.

The Court further ordered that pending such approval, the Board of Elections is directed immediately to examine petitioners' systems, to include them in the vendor selection process and to distribute the information with respect to petitioners' systems to all County Boards of Election.

As such:

In furtherance of the Court orders set out above, reserving all rights previously set forth, be it resolved that:

Liberty voting system: LibertyMark BMD with LibertyProof- IVD
E S & S voting system ES&S AutoMARK 1.3 A200
Premier voting system Premier AutoMARK Voter Assist Terminal A300

are immediately included in the vendor selection process and that any information regarding these systems not previously disseminated to the counties be done so immediately.

The Board directs that any counties which have previously submitted an order should re-affirm their order no later than 5 PM on Tuesday February 12.

EXHIBIT F

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LIBERTY ELECTION SYSTEMS, LLC
Petitioner,

-against-

ORDER TO SHOW CAUSE
Index #789-08

NEW YORK STATE BOARD OF ELECTIONS, and DOUGLAS A. KELLNER, EVELYN J. AQUILA, NEIL W. KELLEHER and HELENA MOSES DONOHUE, SAID COMMISSIONERS TOGETHER CONSTITUTING THE NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

PRESENT: Hon. Kimberly O'Connor

Upon reading and filing the Affirmation of Daniel J. Centi dated February 6, 2008,

Let respondents New York State Board of Elections, and Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher and Helena Moses Donohue show cause before this Court held in and for the County of Albany at the Albany County Courthouse in Courthouse in Albany New York on the 11th day February, 2008 at 1:30 p.m, or as soon thereafter as said respondents or counsel can be heard, why an order should not be made and entered herein: A) Enforcing the Decision and Judgment dated February 4, 2008 of this Court, B) Holding respondents in contempt of Court, the purpose of the hearing being to punish plaintiff for contempt of Court, and such punishment may consist of fine or imprisonment, or both, according to law.

WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT,

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BOARD OF ELECTIONS
ALBANY, NEW YORK
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C) Awarding attorneys' fees, damages and costs to petitioner and D) Such other and further relief the Court deems just and proper.

Sufficient cause appearing therefor, let service of a copy of this order and the papers on which it is based, be made upon counsel for the aforesaid respondents by delivering a copy thereof to the New York State Board of Elections, 40 Steuben Street, Albany, New York, and giving such papers to a person authorized to accept such papers on behalf of said New York State Board of Elections on or before February 6, 2008, and that same be good and sufficient service thereof.

Signed this 6th day of February, 2008 at Albany, New York.

Clarkson S. O'Connor
J.S.C.

ORDERED, that the Respondents notify the County Boards of Elections no later than 5:00 p.m. on February 6, 2008 that ~~[redacted]~~ the Petitioner's Ballot Marking Device, is to be included in the list of Ballot Marking Device systems that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services.

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