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.

MEMORANDUM OF LAW

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

This memorandum of law is submitted in support of the motion of Avante International Technology, Inc. to appear as amicus curiae to petition the Court for limited relief from the order of this Court dated January 16, 2008 (Docket # 188) insofar as it directs the New York State Board of Elections ("NYSBE") to comply with each of the dates that the NYSBE proposed in the timetable that it submitted for HAVA compliance in its submission of January 4, 2008 (Docket # 179). It is believed that Liberty Election Systems, LLC is also joining in this motion.

Your movants are vendors of electronic voting machines that may be effectively deprived of the opportunity to sell their products in the State of New York by reason of the NYSBE's adherence to the date described in line 38 of Exhibit C (Docket # 179), which requires County Boards of Elections to designate their preferences for Ballot Marking Devices by February 8, 2008.

A Federal District Court's decision to grant amicus status to an individual, or an

organization, is purely discretionary. *See Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D.Ill. 1982); *see also United States v Louisiana* 751 F. Supp. 608, 620 (E.D. La. 1990). Relevant factors in determining whether to allow an entity the privilege of being heard as an amicus include whether the proffered information is "timely, useful, or otherwise." *Leigh*, 535 F. Supp. at 420. In exercising its broad discretion, a court may deny a movant amicus curiae status upon determining that the movant's proposed contribution is unnecessary. *See Elm Grove v. Py*, 724 F. Supp. 612, 613 (E.D. Wis. 1989).

In this case, the amici seek to provide information concerning State litigation declaring and to declare that the NYSBE's rejection of the amici's voting systems was arbitrary and capricious. This timing of the NYSBE's action in denying certification to amici's voting machines, so close to the deadline established for counties to list their rankings of desired and approved vendors, has severely limited the ability of the State Supreme Court to fashion appropriate remedies to prevent manifest prejudice. Additionally, the NYSBE has taken action as late as this afternoon which has frustrated the effect of State Court orders to the substantial prejudice of the proposed amici. For the reasons set forth in the accompanying affirmation and exhibits, proposed amici respectfully request that this Court grant their motion.

Dated: February 8, 2008

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