U.S. Department of Justice

Civil Rights Division

Voting Section – Room 7254 NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

February 11, 2008

Honorable Gary L. Sharpe
United States District Court
for the Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway, Room 441
Albany, NY 12207

Re: *United States v. New York State Board of Elections, et al.*
Civil Action No. 06-CV-0263 (GLS)

Dear Judge Sharpe:

The United States files this letter in brief response to the motion to appear *amicus curiae* filed late Friday, February 8, 2008, by Avante International Technology, Inc. (Avante) by means of a proposed order to show cause (Docket #200). The Court should deny Avante's motion and the remedial process in this case should proceed without delay. In particular, the United States is very strongly opposed to Avante's request that this Court delay certain remedial deadlines set forth in this Court's January 16 order by 20 days, as the granting of such a request would do great damage to New York's HAVA compliance efforts.

We are filing this response on short notice, and before this Court has set a response and return date (if determined necessary), in an effort to advise the Court of the current status of this litigation and our continuing concern about any further delay in the remedial process. If this Court should decide to entertain further petitioner's motion, we request the opportunity for a full response.

Pursuant to this Court's Supplemental Remedial Order entered January 16, 2008 (Docket #188), and the strict, necessary timetables incorporated therein aimed at much-delayed HAVA compliance by New York, the defendants have been moving toward certification of Plan B accessible ballot marking devices and implementation of such devices in all polling places in the State by the time of the fall 2008 federal elections. As set forth in the Status Reports filed to date by the New York State Board of Elections (SBOE) pursuant to that Order, the SBOE is on schedule with regard to Plan B implementation (Docket ## 189, 194, 195, 196 and 199).

The State court litigation referenced by Avante in its papers has been filed by various

third-party voting systems vendors that have submitted their Plan A and Plan B voting systems to the State for approval for use in New York. These lawsuits take issue with actions to date of the SBOE in recommending Plan B ballot marking devices to the county boards of elections for selection for use in the fall 2008 elections. In such litigation, all pending before the same State court judge, the SBOE has made the State court aware of the deadlines imposed by Orders of this Court, and the State court has been solicitous about such deadlines and has taken no action which has caused a delay in the SBOE's compliance with this Court's outstanding orders. Rather, the State court action has resulted in the county boards of elections being allowed to choice-rank numerous voting systems, including that of Avante, by this Court's deadline of February 8, 2008.

As indicated in Avante's papers, the county boards of election were advised on February 6, 2008 by the SBOE that an Avante ballot marking device was available for county boards of elections to rank among other such devices recommended by the SBOE (Avante Appendix D). That availability was not changed by the SBOE resolution of February 8, 2008, which was passed in response only to litigation concerning other voting systems vendors (Avante Appendix E). Based on discussions with counsel for defendants and on further information and belief, almost all county boards of elections have made their ranked choices of Plan B voting systems known to the SBOE by the February 8, 2008 deadline. SBOE has advised county boards of election to reaffirm those choices by February 12, 2008 (Avante Appendix E). For those county boards of election that have not made a choice by that time, pursuant to this Court's Orders, the SBOE will make such choice for them by February 15, 2008.

Avante's claim in its papers (Potter affidavit, p. 6) that the February 8 date for county boards of election to express a ranked choice to the SBOE is "inconsequential," is incorrect. Given the short timeline involved in the remedial process, necessitated by the noncompliance by the State with HAVA and this Court's Orders, the process cannot tolerate further delay, however minimal. During the period of time between initial county choices of ballot marking devices and ultimate certification of such devices by the SBOE on February 27, 2008, the SBOE must, among other things, process the county choices, mediate with those county boards of election that have not made choices, and prepare for the ordering process to occur immediately after certification. Given the fact that there are 58 county boards of elections involved, including New York City, this is not a simple process. Avante's request that the February 8 deadline for county choices of Plan B voting systems be delayed until February 28 would have tremendous and negative effect on timely implementation of this Court's Remedial Orders.

In the end, as we have stressed previously and as the Court has stated, this is a matter of compliance with federal law. The State court process has proceeded to date with appropriate concern for ultimate compliance with the lawful orders of this Court. We expect that will continue to be the case. However, the remedial process in this federal court litigation cannot in effect be held hostage by attempts to delay the process based in state law. The bottom line, as this Court has made clear, is that federal law is paramount where state law or procedure is inconsistent with the implementation of federal law mandates. The remedial process here must proceed unhampered. To date, that is the case, and the United States stands ready to take immediate action to enforce this Court's Remedial Orders as appropriate.

As we have emphasized on several occasions before this Court, participation by other parties in this litigation is not warranted. As indicated in petitioner's papers, this Court has ample discretion concerning requests for *amicus* participation. Petitioner's motion should be denied.

Sincerely,

/s/

Brian F. Heffernan
Attorney, Voting Section
Bar No. 513721

cc: All Counsel