

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ROBERT L. SCHULZ and JOHN P. LIGGETT,)	
)	No. 07-cv-0943
Plaintiffs,)	LEK-DRH
)	
vs.)	
)	
STATE OF NEW YORK, <i>et al.</i>,)	
)	
Defendants,)	

**PLAINTIFF’S MEMORANDUM IN SUPPORT OF
MOTION FOR RESTRAINING ORDER**

In support of this motion, based on the Declaration by Robert Schulz and the prior pleadings, Plaintiff, who is *pro se*, states as follows:

RELIEF REQUESTED

Plaintiffs respectfully request an Order restraining State Defendants from avoiding their duty to respond to Plaintiffs’ discovery requests. Plaintiffs respectfully request an Order:

- a. restraining Defendants from avoiding their duty to respond to Plaintiffs’ full production request in an orderly, organized and expeditious manner, and
- b. directing Defendants to timely inform the Court, for each document or other requested information that Defendants assert is privileged or not discoverable, of the identify of that document or other requested information, and state the specific grounds for the claim of privilege or other ground for exclusion, and
- c. for such other and further relief as to the Court may seem just and proper.

THE URGENCY

This memorandum is in support of Plaintiffs’ proposed Show Cause Order to restrain Defendants from avoiding their duty to respond to Plaintiffs’ Notice to Produce in an orderly,

organized and expeditious manner. The parties are in Discovery, now scheduled to be completed by March 1, 2010. Trial is scheduled for September 2010. Plaintiffs are not able to go forward with discovery unless Defendants respond to Plaintiffs' Notice to Produce.

STATEMENT OF FACTS

On September 30, 2009, Plaintiffs served their RESPONSE to Defendants' (the "State's") First Notice to Produce, which RESPONSE included 105 meticulously assembled and labeled documents. Copy of RESPONSE is attached as Exhibit A (without the 105 documents, themselves, but with a copy of their labels).

Also on September 30, 2009, Plaintiffs served their First Notice to Produce, including INSTRUCTIONS and DEFINITIONS. Copy attached as Exhibit B. Importantly, for purposes of this motion, Instruction No. 2 read:

"For each document or other requested information that defendants assert is privileged or is not discoverable, identify that document or other requested information, and state the specific grounds for the claim of privilege or other ground for exclusion."

On October 6, 2009, Magistrate Judge Homer held a telephone mid-discovery status conference with the parties and was apprised of the fact that Plaintiffs had served their RESPONSE to the State Defendants' Notice to Produce, and that State Defendants were preparing their RESPONSE to Plaintiffs' Notice to Produce. Judge Homer appeared satisfied that the parties were cooperating and making progress.

However, on October 30, 2009, the day the State's RESPONSE was due, the State telephoned Plaintiff Schulz, requesting an enlargement of the time (an additional six weeks) to respond to Plaintiffs' Notice to Produce. Plaintiffs reluctantly agreed to a four week enlargement, to December 1, 2009. See Exhibit C.

In responding on December 1, 2009, the State wrote (See Exhibit D),

“I enclose herewith the remaining Defendants’ response to the Plaintiffs’ First Demand to Produce. We are still searching our records for additional responsive documents but clearly most of what you seek lies with the county boards... I also enclose a draft Confidentiality Order for your review.”

With its December 14, 2009 letter response (copy attached as Exhibit E), the State failed to provide any documents it may have discovered as a result of its alleged on-going “search for additional responsive documents.” Instead, the State alluded to having “material which would be responsive to your demands as SBOE has received test results in the past couple of weeks and is scheduled to make a determination on certification tomorrow.” Once again, the State would not produce any documents unless Plaintiffs first agreed to the State’s oppressive Confidentiality agreement.

With its December 31, 2009 letter response (copy attached hereto as Exhibit F), the State failed to provide any documents it may have discovered as a result of its alleged on-going “search for additional responsive documents.” Instead, the State informed Plaintiffs that it had “made a determination on certification” of the two electronic voting systems that are the subject of this lawsuit, and directed Plaintiffs to a website where Plaintiffs could find the State’s “testing protocol.” In addition, the State informed Plaintiffs that it has various, voluminous documents from Commissioner Kellner relating to trouble calls years ago on mechanical voting machines and polling places in New York City, but before they could be viewed, Plaintiffs had to execute the Confidentiality agreement.

With its January 13, 2010 letter response (copy attached hereto as Exhibit G), the State again failed to provide any documents it may have discovered as a result of its alleged on-going “search for additional responsive documents.” Instead, the State wrote that it “might produce confidential and proprietary materials” if Plaintiffs would agree to the Confidentiality agreement.

Thus far, the State has produced none of the documentation requested.

On February 3, 2010, Plaintiffs served their REPLY to the State's evasive, incomplete and non-responsive responses to Plaintiffs Notice to Produce. Copy attached as Exhibit H.

ARGUMENT

The State's "response" to Plaintiffs' notice to produce, consisting of four letters, and no documents, is evasive, incomplete and NON-RESPONSIVE in the extreme.

In responding on December 1, 2009, the State wrote (See Exhibit D),

"I enclose herewith the remaining Defendants' response to the Plaintiffs' First Demand to Produce. We are still searching our records for additional responsive documents but clearly most of what you seek lies with the county boards... I also enclose a draft Confidentiality Order for you review."

Remaining? There was no prior response to Plaintiffs' First Demand to Produce.

Enclosing? There were no responses or documents enclosed. The only enclosures were an 8 page Confidentiality agreement and 20 pages of patently evasive objections to each of Plaintiffs' sixty-four demands to produce.

Regarding the proposed Confidentiality Order, the State would have the Court cast a very, very wide confidentiality net (covering unidentified documents the State said it was still searching for), saying, in effect, that most everything Plaintiffs have asked for, even if "found," would be treated as confidential. Rather than identifying a document in response to a particular demand, and justifying the need to protect that document, the State has demanded Plaintiffs sign a sweeping, "one agreement covers all of the State's documents," disallowing the release of any of the information to anyone, presumably that would include the members of the jury and all whom Plaintiffs may depose and interrogate. That virtually everything requested by Plaintiffs in their production request is quite properly a public record of the State of New York and certainly

within the reach of their legal authority makes Defendants' evasive response simply reprehensible.

The State appears determined to keep sequestered and out of public view critical (and likely damning) information that would demonstrate the constitutional shortcomings of New York's existing voting systems as unambiguously asserted by Plaintiffs.

Regarding its 20 pages of General and Specific Objections, the State is attempting to distance itself from the county election officials, claiming absolutely no knowledge of, and no constitutional or legal authority to direct the counties to produce, administrative documents and official communications regarding county voting system policies, procedures, programs, recounts, polling places, equipment or test results.

This attitude and positioning by the State is contrary to the law of this case. See the Court's decision, dated June 4, 2008. State Defendants play a role in the **direct** enforcement of the acts complained of, namely the official selection, sanction and implementation of voting methods and the official oversight and execution of New York's public elections. For instance, the State Defendants are specifically authorized to investigate alleged violations of the [Constitution] and Election law and enforce the applicable provisions. See N.Y Election Law Section 3-107. In addition, the State Defendants have "jurisdiction of, and are responsible for, the execution and enforcement of ...statutes governing campaigns, elections and related procedures." See N.Y Election Law Section 3-104. In addition, the State Defendants approve voting systems (see, e.g., N.Y. Election Law Section 7-200, 7-202) and issues regulations regarding contracts for the purchase of voting machines (Section 7-204).

In its objections, the State Defendants disingenuously imply the presence of an "impenetrable veil" between them and their suppliers of mechanical and electronic voting

systems, requiring a top secret, “for your eyes only” confidentiality agreement before **ANY** of the documents demanded by Plaintiffs can be viewed, much less obtained. The overly-broad (and quite outrageous) skirt of confidentiality Defendants seek to hide behind would appear to cover not only official documents and communications created during the normal and direct course of the state’s official evaluation and selection of voting systems, it is clear the shield sought would (as evidenced by Defendants failure to produce) cover virtually every other aspect of the administration of New York’s election law. Even if such a confidentiality shield could narrowly be applied, (e.g., in protecting a vendor’s proprietary computer source code) such a shield could never properly be applied to hide documents, evidence and other data that are duly a part of the public records of the State of New York.

In effect, State Defendants claim no constitutional or legal authority to direct their vendors, or anyone else involved with the election process it seems – including state government employees, to produce any documents regarding any aspect of their mechanical or electronic voting systems. Additionally, the State also asserts it does not have to produce specific documents relating to New York’s mechanical Voting Systems on the ground that the use of those machines has been discontinued. In fact, the State is in no position to guarantee that the mechanical voting system would never again be relied upon in New York State, especially if Plaintiffs’ were to prevail in an action limited to electronic voting systems and in light of the most critical fact that mechanical voting machines suffer the same specific failings alleged by Plaintiffs. If mechanical systems are allowed to escape the domain of this lawsuit, they could be implemented again sometime in the future against the Constitutional interests of the People.

Finally, for the record, it needs to be noted that the State failed to re-state the specific language of each of the sixty-four demands that the State was objecting to. This fact, coupled

with the State's frequent reference to and reliance upon one of its earlier (and nonresponsive) objections, further underscores the evasiveness of the State's "response."


In summary, Defendants should be restrained from any further evasiveness. Not only have Defendants' acts directly interfered with the ability of Plaintiffs to timely move forward in the discovery process, their actions speak volumes regarding their bad-faith intent to conceal fundamental, (and likely damaging) official public records not only from this Court and this jury – but the People of New York state. The Court should Order Defendants to comply, in an orderly and organized manner, with Plaintiffs' full production request ASAP and be warned regarding further specious attempts to withhold relevant evidence.

CONCLUSION

Plaintiffs respectfully request an Order:

- a. restraining Defendants from avoiding their duty to respond to Plaintiffs' full production request in an orderly, organized and expeditious manner, and
- b. directing Defendants to timely inform the Court, for each document or other requested information that Defendants assert is privileged or not discoverable, of the identify of that document or other requested information, and state the specific grounds for the claim of privilege or other ground for exclusion, and
- c. for such other and further relief as to the Court may seem just and proper.

Dated: February 3, 2009



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