

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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ROBERT L SCHULZ and JOHN LIGGETT

*Plaintiffs,*

-against-

NEIL KELLEHER(Deceased), et al

*Defendants.*

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Defendants Response to  
Plaintiffs' First Demand  
for Production  
07-cv-0943

For its objections and responses to the Plaintiffs' First Request for Production dated September 28, 2009 (the "Request"), Defendants state the following:

**GENERAL OBJECTIONS**

1. Defendants object to the Requests to the extent that they seek information protected from disclosure by the attorney client privilege, work product doctrine, and/or any other legally cognizable privilege that pertains to Defendants' trial strategy or preparation. Any production by Defendants of documents containing information protected from disclosure by the attorney-client privilege, work product doctrine, or other applicable privilege, shall not constitute a waiver by Defendants of such protection.
2. Defendants object to the Requests to the extent that they purport to impose obligations beyond those set forth in the Federal Rules of Civil Procedure.
3. Defendants object to the Requests to the extent that they call for information that is otherwise exclusively within the possession, custody or control of third parties.

4. Defendants object to the Requests to the extent that they seek information that is already within the possession, custody or control of Plaintiffs.
5. Defendants object to the Requests to the extent that they purport to impose a duty on Defendants to produce documents or things presently in the possession of former employees, distributors, agents or representatives of Defendants.
6. Defendants object to the Requests to the extent that they seek information relating to matters that are not raised in the Complaint on the grounds that such information is neither relevant to this action nor reasonably calculated to lead to the discovery of admissible evidence in this action.
7. Defendants object to the Requests to the extent that they seek documents or things not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence.
8. Defendants object to the Requests to the extent that they are vague, ambiguous, overly broad, cumulative and/or unduly burdensome.
9. Defendants object to the Requests to the extent that they purport to impose a duty on Defendants to undertake a search for documents or things beyond a diligent search of its files where documents responsive to the Requests would reasonably be found.
10. None of Defendants' Responses are an admission relative to the existence of any documents or things, or to the relevance or admissibility of a document or thing, or to the truth or accuracy of any statement or characterization contained in the Requests.

11. Defendants object to the Requests to the extent that they are not limited to a reasonable time period during which responsive and relevant documents or things would have been created.

12. Defendants object to the Requests to the extent they seek proprietary, trade secret, commercially confidential or competitively sensitive documents.

13. The following Responses reflect Defendants' present knowledge, information and belief and may be subject to change or modification based on Defendants' further discovery, or facts or circumstances which may come to Defendants' knowledge. Defendants specifically reserve the right to further supplement, amend or otherwise revise its Responses to the Requests.

14. Defendants specifically object to the production of any documents as to the lever voting system previously used in New York as the November 2009 Election was the last election in New York that the old lever machines could be used under both state law and the Order of this Court (Sharpe, J). At this point in time the only relevant voting systems are the new HAVA compliant systems presently undergoing certification procedures to be completed by December 15, 2009 under the Order of Judge Sharpe and the "hand count system" so erroneously urged upon the court by Plaintiffs. Documents as to a prior voting system are not relevant and not likely to lead to the discovery of any admissible evidence.

The Defendants, by and through their attorney, Paul M. Collins, Esq., as and for their Response to Plaintiff's First Request for Production:

## RESPONSES AND SPECIFIC OBJECTIONS

Subject to and without waiver of the foregoing General Objections, DEFENDANTS responds to the Requests as follows:

1. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information.

There are no records in the possession of the answering Defendants responsive to this request which is an inappropriate request in the context of a Notice to Produce under Rule 34. Other than absentee, affidavit and emergency ballots, all votes cast in the State of New York were cast on a lever voting machine from 1990 through 2008. In 2009 some votes in the Special 23<sup>rd</sup> Congressional Election were cast on lever machines and some on electronic voting systems pursuant to an Order of Hon. Gary Sharpe, USDCJ in the related case of United States v. State of New York et al, 06-cv-0263. For a list of which counties participated in electronic voting in that election Plaintiffs are directed to the web site of the State Board of Elections where the Order of Judge Sharpe is posted ([www.elections.state.ny.us](http://www.elections.state.ny.us)).

Without waiving any objection, Defendants attach a list of polling places within the state, outside of the City of New York for the 2009 election, which is the only responsive document in the possession of Defendants.

2. See Response 1 hereinabove as to general and specific objections. It is anticipated that, pursuant to an order of this court (Sharpe, J.), all votes will be cast and counted on electronic voting systems in 2010 and beyond with the exception of affidavit ballots, absentee ballots and emergency ballots which may or may not be counted by hand. Beyond that, Defendants are unable to produce documents which will possibly be created at a future date.

3. See Response 1 hereinabove as to general and specific objections. This information is in the possession of the various County Boards of Elections which are responsible for selecting polling sites. See list of polling places attached to Response 1 above.

4. See Response 1 hereinabove as to general and specific objections. Pursuant to the Order of Hon Gary Sharpe, USDCJ in United States of America v. State of New York (96-cv-0263) it is anticipated that there will be full HAVA complaint voting throughout New York in 2010 and thereafter. The polling places are as yet undesignated and that designation is made by County Boards of Elections.

5. See Response 1 hereinabove as to general and specific objections. This is an inappropriate demand under Rule 34 and is more properly the subject of interrogatories. Without waiving this objection the website of the State Board of

Elections contains the information requested in that all counties participating the 2009 Pilot Program, other than Albany, Schenectady and Erie counties are, to the extent of their participation on a limited or county wide basis are using Dominion Voting Systems. See: <http://www.elections.state.ny.us/HAVA.html#Pilot> (2009 Pilot Plan). The location of polling sites is within the purview of the respective County Boards of Elections and each County Board maintains a web site where this information may be obtained. The extent of each county's participation in the Pilot Program is set forth on such web posting and all counties, save Schenectady and Erie, used Dominion machines.

Prior to the implementation of the state-wide voter registration data base in accordance with HAVA, the State Board of Elections did not maintain this information. With the voter look up feature, any voter can determine his/her polling place in real time by accessing the State Board's web site. Historic records are not maintained by the State Board of Elections as the date base operates real time. The NYSVoter look up system went on-line in 2008 and the only records in the possession of the Defendants have been attached to Response 1.

6. See Response 1 hereinabove as to general and specific objections. This is an inappropriate demand under Rule 34 and is more properly the subject of interrogatories. Without waiving this objection, the number of polling sites and there locations are determined by the various County Boards of Elections in the years of the elections so no documents responsive to this request could exist at this time. Additionally, at this point in time no Sequoia or Dominion machines have been certified as HAVA compliant.

7. See Response 1 hereinabove as to general and specific objections. This is an inappropriate demand under Rule 34 and is more properly the subject of interrogatories. Without waiving this objection, no such documents exist.

8. See Response 1 hereinabove as to general and specific objections. This is an inappropriate demand under Rule 34 and is more properly the subject of interrogatories. Without waiving this objection, the number of polling sites and their locations are determined by the various County Boards of Elections in the years of the elections so no documents responsive to this request could exist at this time. Additionally, at this point in time no ES&S machines have been certified as HAVA compliant.

9. See Response 1 hereinabove as to general and specific objections. This is an inappropriate demand under Rule 34 and is more properly the subject of interrogatories. Without waiving this objection, upon information and belief, reading the Plaintiffs' Amended Complaint (assuming same to be correct) only a portion of the State of New Hampshire used human counts and the answering Defendants have no records responsive to this demand. Pursuant to New York Election law, votes other than emergency ballots were counted by machine at all polling places within the state.

10. See Response 1 hereinabove as to general and specific objections. Answering Defendants have no records in their possession responsive to this demand.

11. See Response 1 hereinabove as to general and specific objections. This is an inappropriate demand under Rule 34 and is more properly the subject of interrogatories. Without waiving that objection, Answering Defendants have no records in their possession responsive to this demand.

12. See response 11 hereinabove.

13. See response 11 hereinabove.

14. See response 11 hereinabove.

15. See response 11 hereinabove.

16. See response 11 hereinabove.

17. See Response 1 hereinabove as to general and specific objections.

Answering Defendants have no documents in their possession responsive to this request.

18. See response 17 hereinabove.

19. See Response 1 hereinabove as to general and specific objections.

Answering Defendants have no documents in their possession responsive to this request.

20. See Response 1 hereinabove as to general and specific objections.

Answering Defendants have no documents in their possession responsive to this request.

21. See Response 1 hereinabove as to general and specific objections.

Answering Defendants have no documents in their possession responsive to this request. From time to time counties forward amended certifications of vote counts but same are not segregated in a fashion responsive to this demand. Upon



information and belief, the following documents, attached hereto, may be responsive to this demand: Email from Douglas A. Kellner to Commissioners of the St. Lawrence County Board of Elections as to issues with the vote count in the 23<sup>rd</sup> Congressional race of November, 2009, press release from John W. Conklin of the State Board of Elections as to the 23<sup>rd</sup> Congressional District race as reported in the Gouverneur Times, email form Douglas A. Kellner to John Conklin as to the 23<sup>rd</sup> Congressional District race issues, email from Bo Lapari dated November 20, 2009 as to the 23<sup>rd</sup> Congressional District race issues, draft email from Douglas Kellner addressing issued raised in Gouverneur Times based upon reports of Richard Hayes Phillips, PhD and retraction of claims of voting machine malfunctions by Richard Hayes Phillips, PhD by letter to Editor of Gouverneur Times dated November 30, 2009 and November 20, 2009 article in the Northern Times written by Nathan Barker. Additionally, the State Board of Elections web site has archived broadcasts of Board Meetings at which Anna Svizzero, Director of Election Operations reported on the 2009 pilot program.

22. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as being overly broad and incomprehensible.

23. See Response 1 hereinabove as to general and specific objections. As no memory cards were used in New York prior to the 2009 Pilot Program and there were no failures during that program, there are no records in existence responsive to this demand. Defendants have not as yet received the results of the machine

audits in the counties in the 23<sup>rd</sup> Congressional District which were participating in the 2009 Pilot program

24. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as being overly broad. Without waiving that objection, Answering Defendants have no documents in their possession responsive to this demand.

25. See Response 1 hereinabove as to general and specific objections. See Response 23 hereinabove.

26. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as being overly broad. Without waiving that objection, Answering Defendants have no documents in their possession responsive to this demand.

27. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as being overly broad. Without waiving that objection, Answering Defendants have no documents in their possession responsive to this demand.

28. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as being overly broad. Without waiving that objection, Answering Defendants have no documents in their possession responsive to this demand.

29. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as being overly broad. Answering

Defendants object to this demand as being overly broad, without temporal limits and incomprehensible and decline to attempt to respond to same.

30. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as being overly broad. The design schematics of lever machines are no longer relevant as pursuant to an Order of this Court (Sharpe, J.) new electronic voting systems must be in place for the 2010 elections and thereafter. No such records as to the systems are in the possession of the Answering Defendants. If same were in the possession of the Answering Defendants they would be reviewed and objections made to the extent that trade secrets or other proprietary information might be contained in such documents. Upon the delivery of such information to the Defendants, the Defendants will only produce same upon the execution of a Confidentiality Order as same will be conditionally delivered to them.

31. See Response 1 hereinabove as to general and specific objections. See response 30 hereinabove.

32. See Response 1 hereinabove as to general and specific objections. Such demand is unduly board and burdensome. Without waiving such objection, no such records are in the possession of the Answering Defendants.

33. See Response 1 hereinabove as to general and specific objections. See response 32 hereinabove.

34. See Response 1 hereinabove as to general and specific objections. See response 32 hereinabove.

35. See Response 1 hereinabove as to general and specific objections. See response 30 hereinabove.

36. See Response 1 hereinabove as to general and specific objections. See response 30 hereinabove.

37. See Response 1 hereinabove as to general and specific objections. This demand is incomprehensible and Answering Defendants are unable to respond thereto.

38. See Response 1 hereinabove as to general and specific objections. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information. Defendants can not produce such documents as may be in their possession without an appropriate Confidentiality Order as to same issued by the Court.

39. See Response 1 hereinabove as to general and specific objections. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or

unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information. Defendants will not produce any such documents without an appropriate Confidentiality Order.

40. See Response 1 hereinabove as to general and specific objections. Such demand is unduly board and burdensome. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information.

Without waiving such objection, no such records are in the possession of the Answering Defendants. As to the records sought from 1990 to 2008, none exist as the Sequoia electronic machines were not used in such elections and with respect to records for "elections in 2010 and beyond", there can be no record. As to those records for the 2009 Pilot Program, same are not in the possession of the Answering Defendants.

41. See Response 1 hereinabove as to general and specific objections. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information.

See response 40 hereinabove.

42. See Response 1 hereinabove as to general and specific objections. See response 40 hereinabove. Defendants are in possession of Dominion Election Day Summary for the 2009 Pilot Project (ImageCast Election Day Report, NYS November 3, 2009 General Election) which will be produced upon the entry of an appropriate Confidentiality Order.

43. See Response 1 hereinabove as to general and specific objections. As to Sequoia electronic voting systems, see response 40 hereinabove. As to other Sequoia products, same are not in the possession of the Answering Defendants. Answering Defendants direct the Plaintiffs to the following documents:

<http://www.elections.state.ny.us/HAVAVotingMachines.html#HAVAVSTD>.

Defendants decline to produce records of their acceptance testing of those units used in the 2009 Pilot Project in the absence of a Confidentiality Order as those documents would contain privileged and proprietary information.

44. See Response 1 hereinabove as to general and specific objections. No documents responsive to this demand are in the possession of the Answering Defendants.

45. See Response 1 hereinabove as to general and specific objections. No documents which are responsive to this demand are in the possession of the Defendants.

46. See Response 1 hereinabove as to general and specific objections. See response 44 hereinabove.

47. See Response 1 hereinabove as to general and specific objections. See response 44 hereinabove.

48. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as overly broad, calling for, at least in part, proprietary information of not only the testing laboratory but also Dominion Voting Systems. Taken literally, there were no Sequoia electronic Voting Systems used in 2009 other than in the previously referenced Pilot Program and such systems and going forward there may be no such systems used as certification has not been completed. Answering Defendants are not in the possession of records of such testing in states other than New York. Without waiving any objections to this demand, Answering Defendants direct Plaintiffs to the following documents:

[http://www.elections.state.ny.us/NYSBOE/news/2009\\_Voting%20System%20Certification%20Testing%20September%202009.pdf](http://www.elections.state.ny.us/NYSBOE/news/2009_Voting%20System%20Certification%20Testing%20September%202009.pdf). Answering Defendants

decline to produce any testing documents without a Confidentiality Order issued

upon a demonstration that such documents will lead to the discovery of relevant evidence.

49. See Response 1 hereinabove as to general and specific objections. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information.

No such records are in the possession of the Answering Defendants. If same were in the possession of the Answering Defendants they would be reviewed and objections made to the extent that trade secrets or other proprietary information might be contained in such documents and same would not be produce in the absence of a Confidentiality Order.

50. See Response 1 hereinabove as to general and specific objections. See response 49 hereinabove. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants



further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information.

Further there were no ES&S electronic voting systems used in any federal elections in New York and there may not be any in the future as the certification process is not completed.

51. See Response 1 hereinabove as to general and specific objections. Such demand is unduly board and burdensome. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information.

Without waiving such objection, no such records are in the possession of the Answering Defendants. As to the records sought from 1990 to 2008, none exist as the ES&S electronic machines were not used in such elections and with respect to records for "elections in 2010 and beyond", there can be no record.

52. See Response 1 hereinabove as to general and specific objections. In addition to the General Objections set forth above, which Defendants specifically incorporates into its Response to this Request, Defendants objects to this Request on the grounds that it is vague, ambiguous, overly broad, cumulative and/or unduly burdensome, and seeks the production of documents not relevant to the

subject matter of this litigation and/or not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object on the grounds that this request seeks documents that contain proprietary, confidential and/or trade secret information.

See response 51 hereinabove.

53. See Response 1 hereinabove as to general and specific objections. See response 51 hereinabove.

54. See Response 1 hereinabove as to general and specific objections. As to ES&S electronic voting systems, see response 51 hereinabove. Answering Defendants direct the Plaintiffs to the following documents:

<http://www.elections.state.ny.us/HAVAVotingMachines.html#HAVAVSTD>.

Defendants decline to produce records of their acceptance testing of those units used in the 2009 Pilot Project in the absence of a Confidentiality Order as those documents would contain privileged and proprietary information.

As to other ES&S products, same are not in the possession of the Answering Defendants.

55. See Response 1 hereinabove as to general and specific objections. No documents responsive to this demand are in the possession of the Answering Defendants.

56. See Response 1 hereinabove as to general and specific objections. No documents responsive to this demand are in the possession of the Answering Defendants.

57. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as overly broad and burdensome. Without waiving that objection, no documents responsive to this demand are in the possession of the Answering Defendants.

58. See Response 1 hereinabove as to general and specific objections. See response 57 hereinabove.

59. See Response 1 hereinabove as to general and specific objections.

Answering Defendants object to this demand as overly broad, calling for, at least in part, proprietary information of not only the testing laboratory but also ES&S. Taken literally, there were no ES&S electronic Voting Systems used prior to the limited Pilot program in 2009. As certification has not yet been completed it is impossible to identify any ES&S electronic voting systems which might be used in the future in New York State. Answering Defendants are not in the possession of records of such testing in states other than New York. Without waiving any objections to this demand, Answering Defendants direct Plaintiffs to the following documents:

[http://www.elections.state.ny.us/NYSBOE/news/2009\\_Voting%20System%20Certification%20Testing%20September%202009.pdf](http://www.elections.state.ny.us/NYSBOE/news/2009_Voting%20System%20Certification%20Testing%20September%202009.pdf). Defendants decline to

produce such documents as may come into their possession in the absence of a Confidentiality Order entered upon a showing that such records might lead to the discovery of relevant evidence in this litigation.

60. See Response 1 hereinabove as to general and specific objections.

Answering Defendants are not in possession of any documents responsive to this demand.

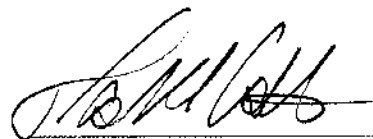
61. See Response 1 hereinabove as to general and specific objections. The answering defendants are not in the possession of any such machine and direct the Plaintiffs to the Washington County Board of Elections in this regard.

62. See Response 1 hereinabove as to general and specific objections. New York City Board of Elections has not as yet chosen which electronic voting system it will employ in 2010. Upon the New York City Board of Elections making such choice, Plaintiffs are directed to that Board which will have possession of the units.

63. See Response 1 hereinabove as to general and specific objections. The answering defendants are not in the possession of any such machine and direct the Plaintiffs to the Washington County Board of Elections in this regard.

64. See Response 1 hereinabove as to general and specific objections. The answering defendants are not in the possession of any such machine and direct the Plaintiffs to the New York City Board of Elections in this regard.

DATED: Albany, New York  
December 1, 2009



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**(101384)**

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