

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

GARLAND FAVORITO, MARK SAWYER, *
RICARDO DAVIS, AL HERMAN, FRIEDA SMITH, *
KATHRYN WEITZEL, ADAM SHAPIRO, and *
CATHIE CALABRO, *

PLAINTIFFS, *

vs. *

KAREN HANDEL, SECRETARY OF STATE OF GEORGIA *

SONNY PERDUE, GOVERNOR OF GEORGIA *

GEORGIA STATE ELECTION BOARD, *

DEFENDANTS. *

CIVIL ACTION FILE NO.

2006CV119719

**PLAINTIFFS' RESPONSE TO DEFENDANTS' ASSERTIONS AS TO FACTS
THAT THEY ALLEGE ARE UNDISPUTED**

COME NOW, the Plaintiffs, by and through the undersigned counsel and file this their **RESPONSE TO DEFENDANTS' ASSERTIONS AS TO FACTS THAT THEY ALLEGE ARE UNDISPUTED** in the above-styled case and show that for the reasons set forth following each disputed fact appearing urge the court to reject any adoptions thereof for the purposes of ruling in favor of Defendants' Motion for Summary Judgment or for ruling against Plaintiffs' motions.

WHEREFORE, Plaintiffs request that the Court rule in their favor all matters at issue in their Motion For Summary Judgment heretofore filed..

Respectfully submitted,

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DISPUTATION OF DEFENDANTS ASSERTED FACTS

Defendants' asserted Fact 5

The Defendant's statement of fact contains a blanket unsupported claim that many people in the United States became concerned about the state of voting systems used in various States due to extraordinary difficulties in determining the winner of the Presidential electoral vote in Florida. No evidence is cited to support this claim and admissions by Mr. Williams show that many Georgians were already concerned about the perils of unverifiable elections even before it was implemented. Mr. Williams has admitted that a lot of people expressed concern about the lack of external audit trails for the voting machines that were under evaluation (Williams Depo, pg 30, ln 23) and went on to admit that they "were getting hit from all directions" and were spending an enormous amount of time answering complaints (*ibid.* ,pg 31, 11).

The Defendant's also state that a Supreme Court issued a ruling to resolve the dispute as to who was President. No evidence is cited that indicates a Supreme Court ruling regarding a Florida recount was specifically and exclusively made to resolve the dispute as to who was President. Furthermore, Defendant's statement of fact erroneously contends that "hanging chads of voter punch-cards... ultimately led to an election which required the Supreme Court to issue a ruling to resolve the dispute as to who was President." when in fact, the primary obstacles to a successful recount of paper ballots in Florida 2000 were ones of legal circumvention (eg. *Siegel vs. LePore* 11/11/00; *Harris vs. Circuit Judges, et. al* 11/15/00 and *Bush et. al vs. Gore et. al.*)

Defendants' asserted Fact 8

The Defendant's make as a statement of fact that only Diebold met the requirements and could deliver voting machines in a timely manner to meet the State's

needs for the 2002 elections. The law. (O.C.G.A. 21-2-379.3), allowed for implementation of the equipment by 2004, which other vendors could have met according to the deposition testimony referenced by the Defendants. No other compelling need for an implementation is cited in any of the referenced depositions other than a simple desire for a 2002 election implementation on the part of the office of the Secretary of State. Thus the Defendant's claim for an undisputed statement of fact is inappropriate.

Defendants' asserted Fact 10

The claim that the Kennesaw State University Center for Election Systems has become a world leader on election systems is a highly subjective opinion not a statement of fact. The Defendants have provided little or no evidence of legislative oversight, procedures of accountability or transparency of operations that would even begin to support such a subjective conclusion. The Plaintiffs further disagree that leadership can be provided by any organization that advocates voting equipment and methods that have resulted in the violations alleged in this complaint. Such a claim as made by the Defendants will likely be in dispute until elections can be properly verified, audited and recounted as stated in the Complaint.

Defendants' asserted Fact 11

Kennesaw State's Elections Center cannot monitor voting systems independently as claimed since it is part of the University System of Georgia, as stated on its web site.

Defendants' asserted Fact 12

The Plaintiffs dispute the Defendant's implication that the voting equipment hardware and software was properly certified at the federal and state level for the reasons stated in the corresponding footnote ¹. Furthermore, Defendant's assertion that Georgia's

¹ Defendant's have been unable to produce state certification reports for the electronic voting machines, GEMS tabulation servers or optical scan machines acquired and used since 2001. The Defendant's have also not produced the dates and descriptions of the software updates that have been applied to the equipment since the original procurement in 2001. The Plaintiffs have explained via letter that they were unable to locate state certification reports that were expected to be similar in content to the federal software qualification test report already produced by the Defendants (Exhibit N). Counsel for the Defendants has responded consistently that the

Defendants have produced all the documents in their possession. The Plaintiffs have no reason to doubt counsel's reply and point out that certification reports for the following are missing:

- Machines from the six vendors certified to participate in the 2001 pilot project;
- The Diebold Accuvote TS-R6 voting machines acquired on May 3, in 2002;
- The GEMS tabulation servers acquired on or after May 3, in 2002;
- Any Diebold optical scan equipment acquired on or after May 3, 2002;
- A software upgrade that was applied to the Diebold AccuVote TS-R6 machines in 2002;
- A software upgrade that was applied to the Diebold AccuVote TS-R6 machines in 2005;
- The Diebold Accuvote TS-X voting machines used in the 3 precinct 2006 audit trail pilot;

In regards to federal certification that the voting machines certification process was incomplete and that the GEMS tabulation servers do not comply federal guidelines because:

- the DVMS does not comply with 1990 Performance and Test Standards including those to prevent fraudulent manipulation of the vote,
- the DVMS did not comply with the 2002 Voting Systems Standards including those that require them to identify each person to whom access is granted,
- the methods of attack to which the DVMS is vulnerable were never identified as expected by the Independent Testing Authority who performed federal certification

Professor Williams has admitted in deposition that the GEMS database, which resides on the tabulation servers and stores the votes, can be altered without leaving a record and therefore, cannot detect or prevent fraudulent manipulation of the votes (Williams Deposition, pg 64, ln 21) The 1990 federal Voting System Standards require that "All types of equipment shall incorporate appropriate physical provisions to prevent fraudulent manipulation of the vote recording, counting, and reporting processes". The 2002 standards corroborate that this is still, an objective and mandate that state voting system vendors shall: "Identify each person to whom access is granted, and the specific functions and data to which each person holds authorized access". (See Section 4.8, System Audit Requirements of the 1990 Performance and Test Standards for Punch Card, Marksense and Direct Recording Electronic Voting Systems which was published by the Federal Election Commission on January 1990 and in the Defendant's custody; Also see Section 6.1, Security Standards Scope, in the Voting System Performance and Test Standards, dated December 13, 2001 released by the Federal Elections Commission in April, 2002 which is available through the Elections Assistance Commission and was produced by the Defendants)

Furthermore, the federal Software Qualification Test Report, indicates that no Penetration Analysis for the DVMS was conducted or evaluated by the Independent Testing Authority. This report produced by Ciber Inc. on 7/25/01 for Gems 1-17-15 and revised on 10/22/01 with Addendum 1 for GEMS 1-17-17 is in the Defendant's custody and states: "Penetration Analysis not reviewed by Software ITA". The aforesaid Software Qualification Test Report also states in pertinent part that: "The vendor shall provide a penetration analysis relevant to the operating status of the system and its environment. The analysis shall cover the individual use of program units, the planned or inadvertent sharing of units and the resulting transitivity relationships. It shall identify all entry points and the methods of attack to which each is vulnerable". (Exhibit N),

Professor Williams admitted that federal Independent Testing Authorities are funded by the vendors who present them with machines to certify (pg 48, ln 16). Therefore, these aforesaid authorities are not truly independent of the voting machine vendors whose products they are paid by the vendors to certify. It is highly unlikely that a truly independent testing agency would have certified a voting system for use throughout America if such a system possessed the flaws that have been identified in this Complaint.

In regards to state certification, the DVMS, Accuvote TS-R6, that was certified to participate in the 2001 pilot and eventually acquired on May of 2002 should not have been certified at the state level in 2001 or later because it did not comply with the law dictating that it produce an independent audit trail of every vote cast. The state's expert witness, Ray Cobb, has admitted that no such audit trails exist that are independent of the machines (pg 33, ln 13). These machines are still in use and the lack of an independent audit trail is the single core reason for the allegations stated in the Complaint.

Secondly, a software upgrade commonly referred to as a "patch" was applied to the DVMS in 2002 without recertification even though it was required. Professor Williams has admitted that:

- A software patch was applied to the electronic voting systems in 2002 (pg 59 ln 14),
- Such a patch could affect "most anything" and should have been recertified (pg 59 ln 21),
- The re-certification was not performed (pg 59 , ln 16),
- He believes the failure to recertify such a patch is a violation of law (pg 59 , ln 23)

Thirdly, the evidence indicates that the Defendants were waiting for key certification information concerning this patch from the voting equipment vendor, Diebold, even after the 2002 election was conducted. The letter dated December 3, 2002, from Robert Ray of the Secretary of State's office to Bob Urosevich of Diebold, which was produced by the Defendants and included as Exhibit O, specifically requests from Diebold: A verifiable analysis of the overall impact of the patch to the voting system.

- Confirmation that the statewide voting system is appropriately certified,
- Confirmation that the '0808' patch was not grounds for requiring system to be recertified at the national and state level

Furthermore, the assertion that Georgia's "unique" combination of hardware and software is protected by "unique" protocols and procedures is unsupported by evidence other than statements. In fact, the security flaws that Mr. Williams admitted exist for machines used in Georgia (depo pg 64) and (depo pg 65) were originally identified in reports commissioned by Ohio and Maryland, respectively. The Plaintiffs provided these reports to the Defendants and they are in the Defendant's custody.

“unique” combination of hardware and software is protected by “unique” protocols and procedures is unsupported by evidence other than statements. In fact, the security flaws that Mr. Williams admitted exist for machines used in Georgia were originally identified in reports commissioned by other states or academic institutions such as Ohio (pg 64) and Maryland (pg 65).

Defendants’ asserted Fact 13

The Defendant’s claim that the chances of electronic compromise happening are “miniscule” is backed by no evidence and cannot be accepted as an undisputed fact.

The Defendant’s assertion that “no electronic compromise or hacking of any voting machine in Georgia has ever been discovered” is misleading when the state has made no attempt to discover that such hacking occurred to actual ballot data on Election Day and it would not be impossible to make such a determination because independent audit trail capabilities do not exist.

The Plaintiffs further dispute the contention by the Defendants that the voting equipment is always stored under lock and key in highly regulated conditions. Defendant Cox has already admitted that voting equipment was stolen from a hotel in Bibb County during 2002. (pg 20, ln 17) and the Plaintiffs have provided the corresponding Bibb County police report, Exhibit NEW). The State Election Board also heard testimony at the March 2007 that conflicts with the Defendant’s claim. At that meeting, extensive discussions and pictures were shown in regards to 2,700 voting machines that were left improperly secured under tarps in a Dekalb County building with a partially open roof that jeopardized both the security and reliability of the machines. Discussion also mentioned that 40 Dekalb County voter access cards and some ballot encoders were auctioned on the Internet. The board considered fining Dekalb County \$15,000 but voted to refer the case to the Attorney General’s office. Plaintiffs Sawyer and Favorito attended the meeting and believe that State Election Board minutes in the custody of the Defendants will corroborate their recollection. Plaintiffs further recall that the Secretary of State, all State Election Board members and the counsel for the Defendants were present. Given that those Defendants and their counsel were well aware of the details of

this meeting, the Plaintiffs find it inconceivable that they could put forth such a statement of fact.

Defendants' asserted Fact 14

The Defendants have provided no evidence other than statements that each piece of equipment in the system is tested again at the time of an election.

Defendants' asserted Fact 16

The Defendant's claim that the touchscreen voting equipment is tamperproof because a perpetrator would have to know the ballot design in advance and could not know that is incorrect and refuted in part by the very deposition testimony that the Defendant's quote to support the claim. First, the state's expert witness, Ray Cobb, explains that a perpetrator would have to have knowledge of the party to which a candidate on the ballot belongs. Mr. Cobb's own testimony identifies how the perpetrator could have such knowledge. He states that candidates from the party of the governor appear first on the ballot in their respective races. He then explains that the software was first installed in 2002. From 1998 through 2002, it was public knowledge that Georgia had a governor from the Democratic Party and therefore, Democratic Party candidates would be listed first on the ballot in the 2004 elections. He also explains that the software that is now used was installed in 2005. From the 2003 through 2005, it was public knowledge that Georgia had a governor from the Republican Party and therefore, Republican Party candidates would be listed first on the ballot in the 2006 elections.

The Defendants claim that a perpetrator must know the ballot design is unsupported by evidence. Mr. Cobb clearly explained in his deposition that the images stored are images of the votes, not of the actual ballot. (Cobb Depo, pg 8, ln 9) He also explained in the same paragraph that images are recreated and therefore, not stored. Thus, a perpetrator needs only to determine the party of the candidate of a given race not necessarily the design of the ballot. No evidence or explanation or Mr. Cobb's statement is cited to support the Defendant's claim. Any further testimony of Mr. Cobb also cannot support the claim since he has already admitted that he does not know the formats of the records of votes cast as stored within the machines. (*ibid* Pg 18, ln 12)

Defendants' asserted Fact 17

As the Plaintiffs explained in their previous response to the Defendant's Statement of Fact 16, the Defendants have not provided evidence that proves a perpetrator must find the right place on the touchscreen or mimic the actual ballot to create malicious software that can yield certain results on the machines. The Defendants also have provided no evidence other than blanket assurances that Diebold representatives cannot obtain access to the ballot designs nor have they defined the activities performed by Diebold in the conduct of elections in Georgia. Therefore, the Plaintiffs dispute the suggestion that the possibility of a Diebold representative tampering with election results is untenable.

Defendants' asserted Fact 19

The Defendants have provided inadequate evidence that ensures a parallel test would discover state wide swapping out of software or results. They have not provided the parallel testing procedure requested by the Defendants at the deposition of Mr. Williams and the scope of the precincts and races that may have been involved in a parallel test has not even been defined. There is no evidence that the sample size statistically adequate, or how the machines are randomly drawn from throughout the state.

Defendants' asserted Fact 22

The Plaintiffs dispute the Defendant's general assertion that an elector's votes cannot be traced back to the elector simply because he or she is not identified with a particular voter access card. Specifically in regard to the Diebold Accuvote TSX that was used for the 2006 Audit Trail pilot, the Voter Verified Paper Audit Trail Pilot Project report produced in April of 2007 by the office of the Secretary of State concluded that: "The sequential printing of the VVPAT paper ballots does not guarantee voter anonymity as required by Georgia law."

Defendants' asserted Fact 23

The Plaintiffs dispute the Defendant's implication in this fact that the voter's ballot can be displayed and printed after the elections. While a ballot image may be displayed and printed after the election, the Defendants have provided no evidence that proves this image is the same ballot with the selections that the voter originally saw on the touchscreen before casting his or her vote on Election Day. Since those selections disappear when the vote is cast, there is no mechanism that could ever determine if the two so called ballots are actually the same. Mr. Cobb had admitted in deposition, there is also no way to be sure that the results of software tampering won't be passed along to those "ballot images". Cobb Depo, pg 40, ln 18) (pg 41, ln 10)

Defendants' asserted Fact 24

The Plaintiffs dispute the implication that the voting equipment properly allows their results to be physically audited. As the Defendant's admit even within this statement of fact, the audit trails are generated by the equipment. Mr. Cobb has already admitted that there are no independent audit trails as was required by law. (*ibid* pg 33, ln 13)

Defendants' asserted Fact 25

The Defendant's claim that any Georgia voter can vote with a mail-in absentee ballot is not correct. A voter choosing to vote in this manner must have pre-defined knowledge of who can provide the absentee ballot, from where the ballot can be requested, how the ballot can be obtained and when the ballot must be obtained and cast. It should be obvious that the vast majority of Georgia voters do not have access to such information and may not even know how to obtain the information. Therefore, any Georgia voter cannot vote via absentee ballot even if the law allows it.

Defendants' asserted Fact 26

The Defendant's incorrectly claim that the voter knows who he or she voted for at the time of voting because voters can check the touchscreen to make sure that votes are identified for the right candidates or issues. On the contrary, it is common, public knowledge that the votes shown on the touchscreen disappear when the ballot is cast. Once the votes are cast they are recorded on the flash card and in the touchscreen voting

machine as explained by Mr. Cobb. (Defendant's statement of Fact 21). The voter obviously cannot see these electronic bits as Mr. Cobb also explained (*ibid* pg 13, ln 9). Therefore, the voter has no such assurance that the votes on the flash card or internally stored within the voting machine are identified for the right candidates or issues as the Defendants claim.

The Plaintiffs further dispute the Defendant's claim that precinct vote totals cumulated from all the machines are "tabulated in public". The totals generated by each individual machine are tabulated *invisibly* by software inside each machine. The public is not privy as to how these totals are tabulated and whether or not they are correct.

Defendants' asserted Fact 27

The Plaintiffs dispute the Defendant's implication in this statement of fact that the voters confidence in the system is justified because electronic voting machines may improve the undervote or overvote rates. The under vote rate measures the completeness of the ballot not the accuracy of the vote recording mechanism in the machine, which cannot be determined with actual ballot data cast on Election Day. A voting machine could have perfect undervote and overvote rates but still record every vote in every race incorrectly.

Defendants' asserted Fact 28

The Defendant's falsely claim that the lawsuit is a culmination of a long standing effort by the Plaintiffs, notably Plaintiff Favorito, to oppose Georgia's electronic touchscreen voting system. Mr. Favorito's referenced Emails to Mr. Barnes and Mr. Williams during February of 2002 when the voting machines were under evaluation do not support the Defendant's claim and even contradict it. In these Emails, Mr. Favorito repeatedly explained that such machines need an external audit trail to allow voters to ensure that the machine has actually recorded the vote for the candidates that they chose. He explicitly pointed out to Mr. Barnes that such a requirement was left out of the Request for Proposal. He politely expressed his concern that the specific machines under evaluation lacked appropriate audit capabilities and made no opposition to Georgia's attempt to implement touchscreen voting in general. In fact, he even recommended in his

February 6, 2002 Email to Mr. Barnes, which he forwarded to Mr. Williams on February 7, that Georgia consider the Avante VoteTrakker, an electronic voting machine with a Voter Verified Paper Audit Trail (VVPAT). This machine type was subsequently installed and used successfully in Sacramento for the 2002 elections according to documents Mr. Favorito provided to the Defendants at his deposition. (Exhibit B, C).

It is also important for the Court to know in regard to this claim's attempt by the Defendants to paint Mr. Favorito as some type of lone, outside agitator, that Mr. Favorito's nearly identical concern was expressed previously or around the same time by a variety of government sources in Georgia as follows:

- First and foremost, the law established in 2001 for electronic voting systems used in the pilot, O.C.G.A. 21-2 301 (b), provided that. *"Such voting systems shall be required to have an independent audit trail of each vote cast"*.
- Secondly, Page 38 of the 21st Century Voting Commission Report commonly available on the Secretary of State's' web site further recommended on Page 38 that: *"The chosen system should have the capability to produce an independent and paper audit trail of every ballot cast."*
- Thirdly, on March 13, 2002 in a Senate State and Local Government Operations Committee hearing for HB1213. former State Senator Rusty Paul suggested that a paper trail be established in case of system failure according to the minutes of this meeting from the Georgia archives that Mr. Favorito provided to the Defendants at his deposition. (Exhibit D)
- Fourthly, on August 24 2001, Cynthia Welch, the chief of the Board of Registrations and Elections for Fulton County, Georgia's most populous county, in response to a letter from Defendant Cox, stated that paper ballots are vital and necessary for a recount in a letter to former County Commission Chairman, Mike Kenn, which was produced by the Defendants and is in their custody. (Exhibit L)
- Fifthly, Donzella James. the former vice chair of the Senate State and Local Government Operations Committee during 2001 and 2002, has demonstrated her concern by becoming a Plaintiff in this matter;

Mr. Favorito's support of electronic voting with appropriate audit trails that are used to conduct public precinct audits is demonstrated by his March 7th 2006, testimony before the House Governmental Affairs Committee. The committee allocated Mr. Favorito a generous amount of time for him to testify in favor of HB790, a bipartisan bill that:

- Required all electronic recording voting systems to produce an elector verified, permanent paper record of the votes recorded on such systems for each elector,
- Required that electors shall have an opportunity to verify such record after voting;
- Required a randomly selected, public audit of one race to be conducted in each precinct after the polls close to verify that votes were tabulated correctly on Election Day.

This bill and its successor bills, HB859 and HB858 are documented on the General Assembly web site. At his deposition, Mr. Favorito provided a video copy of the committee hearing to the Defendants along with a letter of authentication from the video producer, Mr. Richard Van Slyke (Exhibit U). HB790 and its predecessor bills offer relief that is nearly identical to what the Plaintiffs seek in this suit and if passed, would have avoided the need for the Plaintiffs to undergo the effort required to bring this Complaint.

WHEREFORE Plaintiffs having made this their **PLAINTIFFS' RESPONSE TO DEFENDANTS' ASSERTIONS AS TO FACTS THAT THEY ALLEGE ARE UNDISPUTED** respectfully request the Court to dismiss the Defendants' Motion for Summary Judgment.

Respectfully submitted,

Walker Chandler, Attorney for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that I have on the date written below served upon Senior Assistant Attorney General, Stefan Ritter, Counsel for the Defendants, a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' ASSERTIONS AS TO FACTS THAT THEY ALLEGE ARE UNDISPUTED** by U.S. with proper postage affixed so as to ensure delivery to:

STEFAN RITTER, Senior Assistant Attorney General
40 Capitol Square, SW
Atlanta, GA 30334-1300

This __21st day of April, 2008.

Walker L. Chandler