

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

LIBERTY ELECTION SYSTEMS, LLC
Petitioner,

-against-

ORDER TO
SHOW CAUSE
Index #789-08

NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

PRESENT: Hon. Kimberly O'Connor

Upon reading and filing the Affirmation of Daniel J. Centi dated February 6,
2008,

Let respondents New York State Board of Elections, and Douglas A. Kellner,
Evelyn J. Aquila, Neil W. Kelleher and Helena Moses Donohue show cause before
this Court held in and for the County of Albany at the Albany County Courthouse
Courthouse in Albany New York on the 11th day February, 2008 at
1:30 p.m., or as soon thereafter as said respondents or counsel can be heard, why an
order should not be made and entered herein: A) Enforcing the Decision and
Judgment dated February 4, 2008 of this Court, B) Holding respondents in contempt
of Court, the purpose of the hearing being to punish plaintiff for contempt of Court,
and such punishment may consist of fine or imprisonment, or both, according to law.

WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR
IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT,

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NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK
2008 FEB -6 PM 1:17

C) Awarding attorneys' fees, damages and costs to petitioner and D) Such other and further relief the Court deems just and proper.

Sufficient cause appearing therefor, let service of a copy of this order and the papers on which it is based, be made upon counsel for the aforesaid respondents by delivering a copy thereof to the New York State Board of Elections, 40 Steuben Street, Albany, New York, and giving such papers to a person authorized to accept such papers on behalf of said New York State Board of Elections on or before February 6, 2008, and that same be good and sufficient service thereof.

Signed this 6th day of February, 2008 at Albany, New York.

Richard A. O'Connor
U.S.C.

ORDERED, that the Respondents notify the County Boards of Elections no later than 5:00 p.m. on February 6, 2008 that ~~the~~ ~~the~~ the Petitioner's Ballot Marking Device, is to be included in the list of Ballot Marking Device systems that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS office of General Services.

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NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF ALBANY

LIBERTY ELECTION SYSTEMS, LLC

Petitioner,

-against-

**AFFIRMATION
OF DANIEL J. CENTI
Index #789-08**

**NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.**

Daniel J. Centi, an attorney at law duly admitted to practice in the State of New York, hereby affirms under penalties of perjury:

1. I am a member of the firm of Feeney, Centi and Mackey, attorneys for petitioner Liberty Election Systems, LLC. I make this affirmation in support of our application to enforce this Court's Judgment and to hold in contempt the respondents New York State Board of Elections and Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher and Helena Moses Donohue. Such respondents are disobeying the Decision and Judgment dated February 4, 2008, copies annexed as Exhibit A along with affidavits of service with notice of entry upon said respondents.

2. According to information conveyed to my partner L. Michael

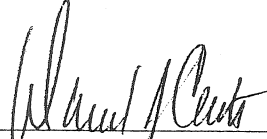
Mackey by attorney Paul Collins a Notice of Appeal will be filed on behalf of at least one of the respondents Douglas A. Kellner. Upon information and belief, the respondents do not intend to comply with the Court's decretal paragraphs of the Judgment including but not limited to "that the Board of Elections is directed to approve petitioner's voting machine on or before February 8, 2008," and "that pending such approval, the Board of Elections is directed immediately to examine petitioner's machines, to include them in the vendor selection process and to distribute the information with respect to petitioner's machines to all County Boards of Election." We understand that Attorney Collins will claim that a stay will exist as a result of the Notice of Appeal respondents intend to file.

3. Respondents' conduct is willful and constitutes an attempt to defeat, impair, impede or prejudice the right of petitioner. Respondents' conduct is especially egregious because of their previous express representations to the Court that the approval process could not be delayed for any reasons because of federal court order. Also, every minute that goes by without compliance by respondent causes irreparable injury to petitioner because of the desire of the County Boards of Elections to make purchases of ballot marking devices as soon as possible.

WHEREFORE, your affiant respectfully requests an order of enforcement and holding respondents in Contempt of Court for failure to comply with this Court's Decision and Judgment dated February 4, 2008, awarding petitioner attorneys' fees, damages and costs, together with such and other and further relief

the Court deems just and proper.

Dated: February 6, 2008



DANIEL J. CENTI
FEENEY, CENTI AND MACKEY
Attorneys for Petitioner
116 Great Oaks Blvd.
Albany, New York 12203
(5180 452-3710)

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NEW YORK STATE
BOARD OF ELECTIONS
ALBANY, NEW YORK

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Exhibit A

Law Offices
FEENEY, CENTI & MACKEY
116 Great Oaks Boulevard
Albany, New York 12203

(518) 452-3710
Fax (518) 452-3925

Daniel J. Centi
L. Michael Mackey
Dennis A. Feeney

Anthony J. Feeney, Jr.
(1948-1992)
Simon Rosenstock
(1935-1998)

February 6, 2008

Hand Delivered

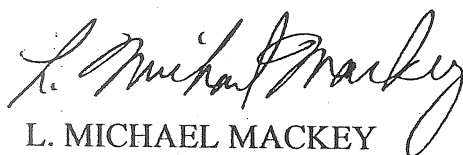
Paul M. Collins, Esq.
Deputy Special Counsel
New York State Board of Elections
40 Steuben Street
Albany, New York 12207

Allison M. Carr, Esq.
Deputy Special Counsel
New York State Board of Elections
40 Steuben Street
Albany, New York 12207

Dear Counselors:

Enclosed please find a copy of Judge O'Connor's February 4, 2008 Decision and Judgment, the original of which was duly entered in the Albany County Clerk's Office on February 6, 2008.

Very truly yours,


L. MICHAEL MACKEY

LMM/nwc
Encls.

cc: Bruce J. Boivin, Esq. with enclosure via First Class Mail

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
LIBERTY ELECTION SYSTEMS, LLC,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

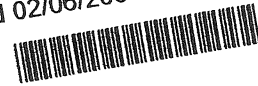
DECISION AND JUDGMENT

Index No. 789-08
RJI # 01-08-092009

NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA,
NEILL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

(Supreme Court, Albany County, Special Term)

Albany County Clerk
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APPEARANCES:

FEENEY, CENTI AND MACKEY
Attorneys for Petitioner
(L. Michael Mackey and John L. Cordo, Esqs. of Counsel)
116 Great Oaks Blvd.
Albany, New York 12203

PAUL M. COLLINS, ESQ.
Deputy Special Counsel
Attorney for Respondents Kellner and Aquila
New York State Board of Elections
40 Steuben Street
Albany, New York 12207

ALLISON M. CARR, ESQ.
Special Counsel
Attorney for Respondents Kelleher and Donohue
New York State Board of Elections
40 Steuben Street
Albany, New York 12207

Such lack of action is indistinguishable from the failure to act caused by the tie vote in *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, (97 NY2d 86, 91-93 [2001]). In such proceeding, the Court made it clear that such inaction could not preclude or interfere with judicial review. Thus, even where there are no factual findings or a statement of reasons for denial, the Court may consider the entire record, including transcripts of the meetings at which votes were taken as well as affidavits submitted in the article 78 proceeding (*id.* at 93). In the instant proceeding, the approval was effectively denied by the negative vote of Commissioner Kellner. The transcripts of the meetings contain specific statements of the grounds for his negative vote. Under the circumstances, the Court finds that such statements will be considered as the reasoning for denial of approval. Moreover, review of the determination shall be limited to those grounds raised by Commissioner Kellner at the time of the denial (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]; *Matter of Police Benevolent Assn of N. Y. State Troopers v Vacco*, 253 AD2d 920, 921 [3d Dept 1998]).

The primary ground for denial of approval asserted by Commissioner Kellner was that the petitioner's ballot marking device did not produce or create a ballot in compliance with the requirements of the Election Law. In general, an interpretation of a statute by an administrative agency charged with its administration is entitled to great deference. However, "[w]here 'the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required' (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419)." (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997]; *see also Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 [1980]). Moreover, in the instant proceeding, two of the three Commissioners present construed the Election Law differently. As such, Commissioner Kellner's interpretation of the statute is not entitled to any

deference. It is also noted that the record contains responses to inquiries from vendors as to whether the ballot marking device was required to produce a "paper ballot" or whether the machine interface could be considered as the "ballot." The response was consistently that the "ballot" must comply with the Election Law with no further detail given. Petitioner has paid at least \$170,000 to respondents for testing to ensure that its machine complies with the statute. Clearly no testing is required to determine whether petitioner's machine's "ballot" complies with the Election Law.

Petitioner's machine is a modified voting machine rather than a dedicated paper ballot marking device. The machine itself has a large "ballot" displayed with provision for the voter to choose candidates and vote on proposals. The machine then prints a paper receipt indicating the choices that were made. The paper receipt does not include, inter alia, the names of all the candidates and their parties, nor does it include the text of any proposals. It clearly does not constitute a paper ballot within the meaning of Election Law § 7-106.

However, a "ballot marking device" is not defined in the Election Law. The only time the phrase is used in a New York statute is in the Election Reform and Modernization Act of 2005, (L. 2005, c. 181, § 11). Such statute provides:

"Up to and until the replacement of existing voting machines by voting machines or voting systems which meet the requirements of section 7-202 of the election law, each county shall provide at least one location with one or more ballot marking devices which are equipped for individuals with disabilities and provide individuals with disabilities with the same opportunity for access and participation as other voters and which are authorized by the state board of elections pursuant to subdivision 4 of section 7-201 of the election law."

Clearly, a voting machine or voting system which meets the requirements of Election Law § 7-202 will constitute an appropriate "ballot marking device." Moreover, nothing in the Election Reform and Modernization Act of 2005 can be construed as requiring a "paper ballot marking device."

Certainly, if the Legislature had intended such a requirement, it could have included it in the statute.

Election Law § 1-104 is entitled “Definitions.” Subdivision 8 thereof provides: “The term ‘official ballot’ refers to the paper ballot on which the voter casts his vote, or the face of a voting machine as prepared for the voter to cast his vote at any election held in accordance with the provisions of this chapter.” Subdivision 18 thereof provides:

“The word “ballot” when referring to voting machines or systems means that portion of the cardboard or paper or other material or electronic display within the ballot frame containing the name of the candidate and the emblem of the party organization by which he was nominated, of the form of submission of a proposed constitutional amendment, proposition referendum or question as provided in this chapter, with the word “yes” for voting for any question or the word “no” for voting against any question except that where the question or proposition is submitted only to the voters of a territory wholly within a county or city, such form shall be determined by the county board of elections. Such statement and the title shall be printed and/or displayed in the largest type or display which it is practicable to use in the space provided.”

Election Law § 7-104 contains numerous requirements for the form of a ballot in a voting machine.

An entirely separate section, Election Law § 7-106, provides the requirements for a paper ballot. It appears uncontroverted that the instant proceeding involves a challenge to a determination made pursuant to Election Law § 7-201, which is entitled “Voting machines and systems; examination of.”

The Commissioners were voting on whether the ballot marking devices met the requirements of Election Law § 7-202, entitled “Voting machine or system; requirements of.” Election Law § 7-202

(1) (j) requires that a voting machine or system shall:

“retain all paper ballots cast or produce and retain a voter verified permanent paper record which shall be presented to the voter from behind a window or other device before the ballot is cast, in a manner intended and designed to protect the privacy of the voter; such ballots or record shall allow a manual audit and shall be preserved in accordance with the provisions of section 3-222 of this chapter.”

The Court therefore finds that this proceeding involves the approval of a voting machine or system, and not approval of a paper ballot. The statute expressly and clearly contemplates that the

“ballot” be printed or displayed on the machine or system, not that it be a “paper ballot.” Moreover, the statute specifically authorizes a machine which produces a permanent paper record of the vote rather than a “paper ballot.” Commissioner Kellner has argued that the phrase “ballot marking device” contemplates marking a paper ballot. However, nothing in the phrase or anywhere else in the statute indicates an intent to exclude the virtual marking of a machine ballot. It is therefore determined that the Election Law does not require a ballot marking device to produce a paper ballot as such is defined in the Election Law. Accordingly, Commissioner Kellner’s primary ground for voting against approval is based upon an erroneous construction of the applicable statutes and therefore that portion of the determination is contrary to law.

Commissioner Kellner’s other ground for disapproval was that the petitioner’s machine did not adequately provide for a disabled person’s independent verification of the vote before it was cast. Petitioner initially supplied a machine with a digital pen reader which required a voter to unplug headphones from the main voting machine and plug them into the digital pen reader. The voter was then required to scan a specific area of the paper receipt with the pen reader by passing the pen over designated lines. It is clear that this form of verification was intended to be utilized by persons with limited or no eyesight. The record indicates that this proved difficult to perform even for people without any disability. However, on January 22, 2008 petitioner provided an alternate independent verification device which would automatically scan the paper receipt. Commissioner Kellner did not consider such device in his review of petitioner’s machine.

The bid requirements provided for an open recruitment with no fixed time for submission of bids. They did require that a bidder submit a sample voting machine or system to the Board of Elections before 11:00 am. of the tenth business day after its bid was submitted. Petitioner’s bid was

submitted on January 7, 2008. The date for final submission of the equipment, as verified by email from the Office of General Services, was January 22, 2008. While petitioner has submitted a receipt for delivery of the new independent verification device on January 22, 2008, the receipt does not indicate the time of delivery. Respondents have submitted an affidavit indicating that the device was received at approximately 3:30 pm., 4 ½ hours after the 11:00 am. deadline. Petitioner has not offered any proof to the contrary.

As noted above, respondents are limited to the grounds they raised in support of their determination. Commissioner Kellner stated that the deadline for submission of petitioner's device was January 10, 2008 and that it was not fair to delay the determination by a late submission. The record establishes that Commissioner Kellner was in error with respect to the deadline. Clearly the factors to be considered in excusing a delay of a few hours are significantly different from those applicable to a delay of almost two weeks. Moreover, the record reflects that the Commissioners voted to approve two voting machines subject to subsequent modification to meet certain requirements. Allowing two of the bidders to modify their machines after the final submission date, while refusing to consider petitioner's modification which was already submitted, appears substantially similar to allowing a deviation from a bid specification. Such deviations are only allowed when they do not place any of the bidders at a competitive disadvantage (*see Matter of Cataract Disposal v Town Bd. of Town of Newfane*, 53 NY2d 266, 272 [1981]; *Matter of Hungerford & Terry, Inc. v Suffolk County Water Auth.*, 12 AD3d 675 [2d Dept 2004]; *Eldor Contr. Corp. v Suffolk County Water Auth.*, 270 AD2d 262 [2d Dept 2000]). The Court finds that allowing two of the bidders to make subsequent modifications while refusing to consider petitioner's modification submitted only a few hours late placed petitioner at a competitive disadvantage.

It further appears that the other two Commissioners did consider the petitioner's new independent verification device and found it sufficient to meet the statutory specifications. There was no vote to reject petitioner's submission and no determination by three Commissioners to that effect. It is therefore determined that Commissioner Kellner's determination that petitioner's machine did not have a compliant independent verification device based upon a refusal to consider the modification, which refusal was based upon an error of fact and improper disparate treatment of bidders, was arbitrary and capricious.

Accordingly the Court finds that the determination to deny approval to petitioner's machine was arbitrary and capricious and contrary to law, requiring that it be vacated and set aside. The matter shall be remitted to the Board of Elections with a direction that they issue an initial approval of petitioner's voting machine on or before February 8, 2008 (see CPLR § 7506; *Matter of McCambridge v McGuire*, 62 NY2d 563, 568-569 [1984]; *Matter of Hauser v Town of Webb*, 34 AD3d 1353, 1354 [4th Dept 2006]). Under the circumstances herein, in which the State of New York is under a very strict timetable imposed by the United States District Court and the initial approval is still subject to further testing to ensure that the voting machines and systems actually perform properly, the Board of Elections respondents shall be preliminarily enjoined immediately to treat petitioner's voting machine as if it has received their approval pending their formal approval, including being examined and included in the vendor selection process and distributing the information with respect to petitioner's machines to all County Boards of Election.

It further appears that all of the relief requested with respect to the Office of General Services is moot, as such agency has already submitted petitioner's bid documents to the Office of the State Comptroller. As such, the motion to dismiss shall be granted.

Accordingly it is,

ORDERED, that the petition is hereby granted to the extent that the determination to disapprove the petitioner's voting machine is vacated and annulled, and it is further

ORDERED, that the Board of Elections is directed to approve petitioner's voting machine on or before February 8, 2008, and it is further

ORDERED, that pending such approval, the Board of Elections is directed immediately to examine petitioner's machines, to include them in the vendor selection process and to distribute the information with respect to petitioner's machines to all County Boards of Election, and it is further

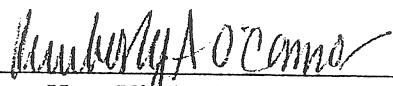
ORDERED, that the motion to dismiss by respondent Office of General Services is hereby granted.

This shall constitute both the decision and judgment of the Court. All papers, including this decision and judgment, are being returned to the attorneys for petitioner. The signing of this decision and judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ADJUDGED.

ENTER.

Dated: February 4, 2008
Albany, New York



Hon. Kimberly O'Connor
Acting Justice of the Supreme Court

Albany County Clerk
Document Number 10124222
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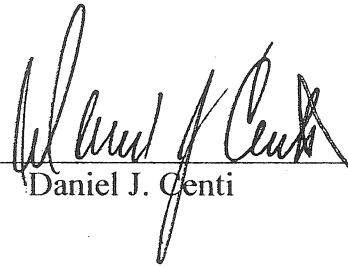
Papers Considered:

1. Order to Show Cause dated January 28, 2008; Petition verified January 28, 2008;
2. Notice of Motion dated January 31, 2008;
3. Affidavit of Michele M. Reale, Esq. sworn to January 30, 2008 with Exhibits A and B annexed;

4. Answer of respondents Commissioners Kelleher and Donohue verified January 31, 2008;
5. Affirmation of Allison M. Carr, Esq. dated January 31, 2008;
6. Answer of respondents Commissioners Kellner and Aquila verified January 31, 2008 with Exhibit A annexed;
7. Affidavit of Douglas A. Kellner sworn to January 31, 2008 with Exhibits A-C annexed;
8. Affidavit of Robert E. Warren sworn to February 1, 2008.

Daniel J. Centi, an attorney at law duly admitted to practice in the State of New York, hereby affirms under penalties of perjury that I have compared the annexed copy of Decision and Judgment to the original filed on February 6, 2008 with the Clerk of the Court, and state such is a true copy of such original.

Dated: February 6, 2008



Daniel J. Centi

AFFIDAVIT OF SERVICE

State of New York

County of Albany

Supreme Court

Index Number: 789-08

Date Filed: 2/6/2008

Petitioner:

In the Matter of the Application of Liberty Election Systems, LLC

vs.

Respondent:

New York State Board of Elections, et al.

State of New York, County of Albany)ss.:

Received by SERVINATOR LEGAL SUPPORT SERVICES, INC. to be served on Paul M. Collins, Esq. Deputy Special Counsel, New York State Board Of Elections, 40 Steuben St., Albany, NY 12207.

I, J.R. O'Rourke, being duly sworn, depose and say that on the 6th day of February, 2008 at 12:05 pm, I:

served an AUTHORIZED entity by delivering a true copy of the Decision and Judgment with the date and hour of service endorsed thereon by me, to: Lisa Shaw as Principal Clerk at the address of: New York State Board Of Elections, 40 Steuben St., Albany, NY 12207, who stated they are authorized to accept service for Paul M. Collins, Esq.,

Description of Person Served: Age: 48, Sex: F, Race/Skin Color: White, Height: 5'6", Weight: 130, Hair: Brown, Glasses: N

I certify that I am over the age of 18, have no interest in the above action, and am a Process Server in good standing in the jurisdiction in which the process was served.

Subscribed and Sworn to before me on the 6th day of February, 2008 by the affiant who is personally known to me.

NOTARY PUBLIC

PATRICIA A. BUNKE
Notary Public, State of New York
No. 0100072
Qualified in Albany County
Commission Expires Feb. 28, 2010

J.R. O'Rourke
Process Server

SERVINATOR LEGAL SUPPORT SERVICES, INC.
100 State Street
Suite 360
Albany, NY 12207
(518) 432-7378
Our Job Serial Number: 2008000461

AFFIDAVIT OF SERVICE

State of New York

County of Albany

Supreme Court

Index Number: 789-08

Date Filed: 2/6/2008

Petitioner:

In the Matter of the Application of Liberty Election Systems, LLC

vs.

Respondent:

New York State Board of Elections, et al.

State of New York, County of Albany)ss.:

Received by SERVINATOR LEGAL SUPPORT SERVICES, INC. to be served on Allison M. Carr, Esq. Deputy Special Counsel, New York State Board Of Elections, 40 Steuben St., Albany, NY 12207.

I, J.R. O'Rourke, being duly sworn, depose and say that on the 6th day of February, 2008 at 12:05 pm, I:

served an **AUTHORIZED** entity by delivering a true copy of the **Decision and Judgment** with the date and hour of service endorsed thereon by me, to: **Lisa Shaw as Principal Clerk** at the address of: **New York State Board Of Elections, 40 Steuben St., Albany, NY 12207**, who stated they are authorized to accept service for **Allison M. Carr, Esq.**,

Military Status: Deponent further states upon information and belief that said person so served is not in the military service of the State of New York or of the United States as the term is defined in either the state or federal statutes

Description of Person Served: Age: 48. Sex: F, Race/Skin Color: White, Height: 5'6", Weight: 130, Hair: Brown, Glasses: N

I certify that I am over the age of 18, have no interest in the above action, and am a Process Server in good standing in the jurisdiction in which the process was served.

Subscribed and Sworn to before me on the 6th day of February, 2008 by the affiant who is personally known to me.

NOTARY PUBLIC

PATRICIA A. BURKE
Notary Public, State of New York
No. 1227372
Qualified in Albany County
Commission Expires Feb. 28, 2010


J.R. O'Rourke
Process Server

SERVINATOR LEGAL SUPPORT SERVICES, INC.
100 State Street
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Our Job Serial Number: 2008000463