

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
-Plaintiff,
-against-

AFFIDAVIT

NEW YORK STATE BOARD OF ELECTIONS,
PETER S. KOSINSKI and STANLEY L. ZALEN,
Co-Executive Directors of the New York State
Board of Elections in their official capacities;
and STATE of NEW YORK,
-Defendants

06 CIV 0263 (GLS/RFT)

I, STANLEY L. ZALEN, swear under penalty of perjury that the following is true and correct:

INTRODUCTION:

1. I, STANLEY L. ZALEN, am a Co-Executive Director for the New York State Board of Elections (“the State Board”). I have been employed by the State Board in various capacities since 1974.
2. On February 20, 2007 I was appointed, pursuant to Section 10 of the National Voter Registration Act (42 U.S.C. 1973gg-8), as Chief Election Official of New York State by Governor Eliot Spitzer (See February 20, 2007 Letter of Appointment annexed as Exhibit “A”).
3. In response to the 2000 Presidential Election debacle in Florida, Congress passed the Help America Vote Act of 2002 (“HAVA”), Public Law 107-252, codified at 42 USC 15301ff.

4. The Help America Vote Act of 2002 (“HAVA”), enacted as Public Law 107-252, effective October 29, 2002, was designed to improve the administration of federal elections. HAVA sets standards for voting systems to be used by states in federal elections. These requirements concern, among other things, verification of votes cast, audit capacity, error rates, and accessibility to voters with disabilities and to non-English speaking voters. While HAVA sets the minimum requirements for voting systems, states are free to establish higher standards. HAVA left the specific methods for compliance with its voting systems requirements to the states’ discretion. These requirements go to the heart of Congress’s intent to ensure that every vote cast is counted and that voters with disabilities are able to cast their votes at the polling place. HAVA also authorized financial assistance to states to use in implementing the statute’s mandated improvements to the voting process, including the standards for voting systems.
5. HAVA called for a sizeable oversight committee, as well as a technical panel to determine standards for new voting machinery. Both, however, were constituted almost a year after the deadline set by HAVA and they were so under funded that they had no meaningful way to carry out their mandate. United States Election Assistance Commission, Fiscal Year 2004 Annual Report *Preparing America to Vote*, p. 3. http://eac.gov/news_121305.asp. (A copy of which is annexed hereto as Exhibit “B”).
6. The Congressional mandate to the United States Election Assistance Commission (“EAC”) to “provide for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories” is set forth in Section 231 (a)(2) of HAVA, codified at 42 USC 15371(a)(2). Under HAVA, states were given the option of providing for the “testing, certification, decertification, and recertification of

its voting system hardware and software by *laboratories accredited by the Commission*”

(Section 231(a)(2) of HAVA , codified at 42 USC 15371 (a)(2), emphasis added).

7. HAVA requires, at Section 303 of HAVA , codified at 42 USC 15483, that every state develop a Statewide Voter Registration Database that satisfies specific criteria set forth in the statute. The Voter Registration Database goes to the very heart of HAVA’s intent to safeguard the right of every voter to vote. It is an essential tool to ensure that voters are not turned away from polling places because of errors or irregularities in Voter Registration Lists. The State Board has achieved a fully HAVA-compliant Statewide Voter Registration Database.

THE EAC’S RESPONSE TO ITS CONGRESSIONAL MANDATE:

8. The Election Assistance Commission was to have issued new Voting Systems Standards by January 1, 2004, when in fact it did not release even a draft for public comment until June 24, 2005. United States Election Assistance Commission, Fiscal Year 2004 Annual Report *Preparing America to Vote*, p. 23. http://eac.gov/news_121305.asp. (Exhibit “B”, *supra*). The EAC said at that time that “EAC proposes that the Guidelines become effective 24 months after final adoption, which is anticipated to take place in October 2005.” Final adoption did not actually occur until December 13, 2005, with publication not posted until January 12, 2006.
9. The Congressional mandate to the EAC to “provide for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories” is set forth in Section 231 (a)(2) of HAVA, codified at 42 USC 15371(a)(2). Under HAVA, states were given the option of providing for the “testing, certification, decertification, and recertification of its voting system hardware and software by

laboratories accredited by the Commission” (Section 231(a)(2) of HAVA , codified at 42 USC 15371 (a)(2), emphasis added).

10. Rather than immediately establish a program to implement this task the EAC simply carried forward the certification program for Independent Testing Authorities (ITA) of the National Association of State Election Directors (NASED) to test voting systems to determine compliance with the Voluntary Voting Systems Guidelines. The function of NASED in this regard was only taken over by the EAC in January of 2007 when it published its first Testing and Certification Program Manual (a copy of which is annexed hereto as Exhibit “C”). Prior to that time a program of interim certification was designed to accredit ITAs formerly authorized under the NASED accreditation program to continue voting system testing under an EAC accreditation until such time as the National Voluntary Laboratory Accreditation Program/EAC joint accreditation qualified one or more testing laboratories as a Voting System Test Laboratory (VSTL).
11. The EAC did not accredit any independent testing labs to test to the 2005 Voting Systems Standards until March of 2007. Nationwide only four labs are currently accredited to do the testing.

NEW YORK’S RESPONSE TO ITS OBLIGATIONS UNDER HAVA:

12. New York is fully committed to implementing HAVA and also ensuring that every voter can vote and that every vote is counted. That commitment is set forth in the Election Reform and Modernization Act of 2005 (Chapter 181 of the Laws of 2005, codified in Election Law 7-200 through 7-209). The Election Reform and Modernization Act of 2005 initially required the complete replacement of all lever voting machines in New York in time for the 2007 Primary Election (Chapter 181 of the Laws of 2005, Section

11). Although the State Board has made considerable progress toward achieving HAVA compliance the New York State Legislature realized that a September 1, 2007 date for full HAVA compliance in the state was impossible and in Chapter 506 of the Laws of 2007, it removed the September 1, 2007 deadline for full compliance. It is important to note that the State Legislature had met all of the functional requirements for a HAVA compliant voting system in its Election Reform and Modernization Act of 2005, and even gone beyond those requirements in terms of access for the disabled. The legislative scheme for carrying out this mandate was for the State Board to certify voting systems as compliant with the federal and state statutory requirements (Election Law 7-201). That statutory provision provided that the State Board would engage an outside testing laboratory to produce a report on any vendor's voting system, which report would indicate whether the system complied with or failed to comply with the state and federal requirements for voting systems.

13. Charged with this statutory duty and empowered to engage a testing laboratory to ensure that voting systems selected were state and federal compliant, the State Board set about its task in an orderly fashion. The first task would be to engage an independent testing authority. The State Board, working with its statutorily mandated partner, the Office of General Services ("OGS") put out a Request for Proposals for such an entity and ultimately awarded a contract to CIBER Testing, Inc. which had been previously identified by NASED as one of three operating ITAs able to test voting systems to determine compliance with the Voluntary Voting Systems Guidelines, a certification which EAC continued on an interim basis pending the development of its own certification procedures.

THE CIBER PROBLEM:

14. The State Board chose CIBER as its ITA in part because it enjoyed an interim certification from the EAC (as did all ITAs which had previously been certified by the NASED under its procedures) and went to contract with CIBER in January of 2006 (See Contract No. C002473 annexed hereto as Exhibit "D").
15. The Congressional mandate to the EAC to "provide for the testing, certification, decertification, and recertification of voting system hardware and software by accredited laboratories" is set forth in Section 231 (a)(2) of HAVA, codified at 42 U.S.C. 15371(a)(2). Under HAVA, states were given the option of providing for the "testing, certification, decertification, and recertification of its voting system hardware and software by *laboratories accredited by the Commission*" (Section 231(a)(2) of HAVA , codified at 42 U.S.C. 15371 (a)(2), emphasis added).
16. However, the EAC learned of various shortcomings of CIBER. For some reason, the EAC waited months to make those public, putting New York at a serious time loss as it continued to move forward with CIBER as its ITA, even when the EAC knew, or should have known, of its unreliability, an unreliability which ultimately resulted in the revocation of its authority to certify election systems.
17. The EAC was aware of the shortcomings in CIBER's performance as an ITA as early as July of 2006, when it conducted an assessment of CIBER which concluded that CIBER was deficient in its performance and needed additional quality control management. The findings were such that another assessment by EAC was scheduled for 120 days later (See EAC Assessment Report of CIBER & Wyle, dated July 17-22, 2006, annexed hereto as "E").

18. It was not until September 15, 2006 that the results of the July Assessment were conveyed to CIBER by letter from Thomas R. Wilkey, the Executive Director of the EAC. That letter directed CIBER to implement certain quality control practices and then apply for a new Assessment of its qualifications to continue in the interim certification program.
19. For reasons known only to the EAC, this information was not shared with the State Board which continued to engage CIBER as its ITA, without any word from the EAC that there were serious issues with its performance.
20. Meanwhile, the State Board held weekly status meetings with CIBER and continually followed up with each voting machine vendor to request the necessary equipment, software, documentation, and funding for testing. Nevertheless, by the end of September 2006, not one voting machine vendor had submitted a complete system for testing and certification.
21. The State Board also hired the New York State Technical Enterprise Corporation ("NYSTEC") to conduct an independent review of CIBER's testing plan. CIBER was required to complete a draft security master test plan by 9/14/06, which was to include all required security regulations and tests. However, CIBER's draft plan was so deficient that NYSTEC recommended substantial additional security requirements.
22. CIBER's next draft was submitted on October 9, 2006, but was so deficient that at meetings between NYSTEC and CIBER in Albany on October 18 and 19, 2006, NYSTEC documented and discussed more than 200 security requirements that still needed to be added. Those revisions were not complete until January, 2007.
23. On December 6-8, 2006, the EAC conducted another Assessment of CIBER, which resulted in a Report dated January 18, 2007 (a copy of the January 18, 2007 EAC

Assessment of CIBER is annexed as Exhibit "F"). Again, the findings of that Report were not shared with the State Board, which continued to engage CIBER as its ITA, in reliance on the interim EAC certification. It was not until January 26, 2007 that the CIBER infirmity became public and then only because CIBER had released it to a third party (See January 26, 2007 letter of Thomas R. Wilkey annexed as Exhibit "G"). In fact, the State Board first learned of the possibility that CIBER might lose its interim certification when the EAC voted to revoke that certification on the June 11, 2007.

NEW YORK REACTS TO THE CIBER EAC CERTIFICATION PROBLEM:

24. The rationale which the EAC provided for its rejection of CIBER's application for interim certification is telling for another reason germane to the issue before the Court. That rationale is set forth in a June 13, 2007 letter to CIBER from the Chair of the EAC, Donetta Davidson:

Finally, as you know, the EAC Commissioners voted to close the interim accreditation program under which you are seeking accreditation on February 8, 2007. This interim program served only to temporarily accredit test laboratories to conduct testing to the 2002 VSS. Ultimately, the EAC will cease certifying full voting systems to the 2002 VSS in December of this year, a mere six months from now. Continuing to utilize EAC's limited resources to accredit CIBER solely to a soon to be obsolete

standard under a defunct interim accreditation program adds little value to EAC's certification program. This conclusion is made even more poignant when you consider that the EAC now has an established permanent accreditation program to accredit laboratories using NIST/National Voluntary Accreditation Program (NVLAP) as required by the Help America Vote Act.

(See Exhibit "H" annexed hereto).

25. Thus, in June of this year the State Board was left with a previously certified ITA which had lost its certification and with the knowledge that the 2002 VVS was a "soon to be obsolete standard". The new standard was the 2005 VVSG, which the EAC adopted on December 13, 2005 to be effective in December, 2007 (see December 13, 2005 Press Release of the EAC, annexed as Exhibit "I"). The 2005 Guidelines significantly increased security requirements for voting systems and expanded access, including opportunities to vote privately and independently for individuals with disabilities, as is pointed out in the EAC Press Release.

26. The chronology of all of the above can not be overstated. The EAC did not adopt a testing methodology in a timely fashion, instead relying upon the previous certification procedures of NASED until it had developed its own

certification procedures in 2007, after the 2006 federal elections. However, it was not until June of 2007 that the interim certification of CIBER came to an end, leaving New York with no ITA and facing a new EAC standard, the 2005 VVSG.

27. Any voting system adopted by New York must comply with the 2005 VVSG, which is the current standard. The difficulty, however, is that to date, the EAC has not certified any manufacturer's system as compliant with the 2005 VVSG. (The EAC's Web Site lists the only two (2) systems which have applied for certification under the 2005 VVSG but does not list any systems as having met that standard:

http://www.eac.gov/voting%20systems/docs/certification-docs-applicationsvotingssystemtesting2007.pdf/attachment_download/file (See Exhibit "F" annexed hereto).

28. Upon information and belief, the source of such information being discussions with the staff of the EAC, no state in the union has certified any voting system as compliant with the 2005 VVSG, which is now the operative standard for voting systems in this nation.
29. New York has been a leader in the certification of voting systems throughout the United States. Its commitment to holding secure and accurate elections is demonstrated by the fact that New York State was one of the first states to require a verifiable paper audit trail for direct recording electronic voting

machines under newly adopted Election Law section 7-202(1)(j). In addition, Election Law section 7-202(1)(p)(2) established requirements for making voting systems accessible to disabled voters, including tactile controls, audio voting and pneumatic voting controls (the “sip and puff” switch). New York is determined to avoid the problems that have plagued other states that have moved more quickly toward HAVA compliance.

30. The State Board is investing enormous resources toward achieving HAVA compliance and has made great strides towards meeting that goal. It is in full compliance with HAVA’s requirements for a Statewide Voter Registration Database. And it is taking every measure possible to ensure that the State will be in full compliance with HAVA’s voting systems requirements, as well as with the greater protections mandated by New York’s Election Reform and Modernization Act. The steps that the State Board of Elections and the County Boards of Elections - essential partners in this process - have taken to date and will be taking in the months to come to achieve full HAVA compliance will be detailed in the course of this litigation. The State Board’s work requires coordination with the 57 separate County Boards of Elections and the City of New York Board of Elections, and it will be making every effort to ensure HAVA compliance, but it is not possible to complete all the steps necessary in the time that the Department of Justice would demand.
31. The Court must examine the demand of the Department of Justice, which is full HAVA compliance for the February 5th Presidential Primary, a date a mere ninety-two (92) days after the Department of Justice’s Notice of Motion,

against the realities of the situation. While the Department of Justice is demanding, "At the least, the State should provide for the use of so-called Plan B devices on a much greater scale than was the case for the fall 2006 elections". However this demand ignores the fact that the State Board and OGS are currently engaged in an orderly process for the acquisition and certification of both Plan A and Plan B (Lot 1 & Lot 2) machines at this time, a process which is well on its way but a process which simply can not infuse massive numbers of Plan B/Lot 2 machines throughout the state in the less than two (2) months left before the Presidential Primary, to say nothing of training Poll Watchers in their use.

32. The Plan of Compliance submitted by affiant on behalf of Commissioners Aquila and Kellner proposes to have widespread use of accessible voting machines throughout the state in time for the September Primary, to wit: one in every polling place, a time frame in keeping with reality when one considers the statutory schemes for the certification of voting systems and voting in this state.
33. New York has recently completed another RFP process for the engagement of an ITA in the face of CIBER's loss of certification. The EAC, in February of 2007, accredited three laboratories as capable of certifying election systems to the 2002 VSS and the 2005 VVSG: iBeta Quality Assurance, Systest Labs and InfoGuard Labs. In October of 2007 Wyle Laboratories was similarly accredited by the EAC.

34. The new ITA for New York is Systest Labs. Its contract has been negotiated, executed and approved by the Office of State Comptroller and the Attorney General as required by state law, with the last approval having been obtained on December 11th so that New York may now begin certifying voting systems .
35. On a parallel track, New York is currently engaged in a continuous recruitment for voting systems. To date three (3) vendors have submitted proposals, which have been opened and are being reviewed. Formal contract negotiations for the counties' purchase of such systems have commenced and are scheduled to be concluded this month.
36. While the purchase contracts are being negotiated, the kick off of the ITA's work for certification is scheduled for December 18th. However, the delays in getting to this kick-off meeting, all of which were shared with the Department of Justice as they occurred, have impacted the time line that was provided to the court and the Department of Justice as an exhibit filed with the affiant's previous submission. The delays will require a reassessment of that time line, and will force certain dates to be moved past affiant's original estimates. The initial meeting scheduled for December 18 will also be an opportunity for the testing facility staff to provide the State Board with a more precise estimate of the time required for Systest Labs to review existing test documents, conduct testing, and prepare certification reports for delivery to the State Board .

The New York Certification Process

37. The certification of voting machines in New York State consists of three main parts:

- i. Security. The machines, and the software that runs the machines, must be tested to ensure that the software and the operating systems are secure from external hacking and that the source code does not contain any malicious programming that could be triggered at a later time.
 - ii. Physical Functioning of the Machine: Will it Work in the Intended Environment. Here, the machines are tested for resistance to moisture, dust and movement that occurs in the normal use and transportation of the machines.
 - iii. Functionality. The machines are tested to ascertain if they will record and count votes accurately. This involves repeatedly placing votes on the machine in a prescribed pattern to ensure that it functions correctly.

38. New York's goal has been to have new voting machines in place in time for the September, 2008 primary elections, in accordance with the Federal Court order and New York State Law. The State Board had retained outside vendors, hired through a competitive procurement process, to assist in the voting machine certification process.

39. All new voting equipment, whether part of an interim solution (Plan B/Lot 2) or final implementation plan (Plan A/Lot 1), will be fully tested at the direction of the State Board of Elections to both the federal Election Assistance Commission's 2005 Voluntary Voting System Guidelines, and to requirements of New York law. All testing will be conducted in a transparent process. The State Board has consulted with numerous groups throughout this process, including

activists, community groups, disability groups, legislators, and County Boards of Elections in developing its plan to introduce new voting systems in New York.

The State Board will continue this process as it moves forward.

40. Affiant represents to the Court that the time table set forth in the Plan affiant submitted on behalf of Commissioners Aquila and Kellner contains a time line which does not provide for purchase and implementation of new voting machines or systems in time for the February 5th Presidential Primary because that is not humanly possible given the contractual, certification and purchasing issues in play.

The State Board's Authority and Role with Respect to the Certification Process

41. The State Board, as established pursuant to New York State Election Law section 3-100, is composed of four Commissioners. The commissioners are appointed by the governor as follows: two commissioners, one each recommended by the chairman of the state committee of each of the major political parties; and one each by the legislative leaders in each house of the legislature. Pursuant to New York State Election Law section 7-202, the State Board is charged with the responsibility of certifying that all voting machines that are used in the state meet the requirements set out in statute and regulation.

There are Challenges to Implementing HAVA

42. Implementation of HAVA in New York also presents significant challenges because of the State's size and demographic diversity. The significant technical

problems that other states have encountered in developing HAVA compliant voting systems are magnified in New York State. Electronic voting systems deployed in Florida, North Carolina, Indiana, Ohio, Maryland and California, to name a few, have been plagued with certification questions, security concerns and questions about the reliability and accuracy of their paperless ballots.

electionline.org, *Election Reform, What's Changed, What Hasn't and Why 2000-2006*. p. 9.; Executive Intelligence Review, *How Computers Can Steal Your Vote*. This book excerpt appears in the February 20, 2004 issue. (Annexed hereto as Exhibit "G").

43. Nearly half of the states missed one or more of HAVA's deadlines largely because questions remain about voting system reliability, security and accuracy. electionline.org, *Election Reform, What's Changed, What Hasn't and Why 2000-2006*. p. 5., Exhibit "G", *supra*. These are the kinds of devastating problems that New York is taking great care to avoid.
44. New York's sixty-two counties, which bear the lion's share of work in implementing HAVA's voting systems requirements, include densely populated urban areas, like New York City, and largely rural regions in upstate New York. Selecting appropriate technologies that adequately accommodate disabled voters and meet multi-lingual needs for such diverse geographical areas and populations requires great care. Training poll workers and educating voters around the State requires developing entirely new curricula for new voting systems, training trainers, and ensuring that 60,000 part-time poll workers truly understand how the new voting systems work and know what to do when they do not. There is

also the basic task of selecting, contracting for, awaiting the manufacture and delivery of, certifying, and installing thousands of new voting systems throughout the state.

45. That fact that no voting system has been certified to the current standards, the 2005 VVSG, by either the EAC or any state in the nation makes the undertaking particularly troublesome for New York. Should it be forced to ignore the new standards and rush to purchase systems certified to an outdated and seriously flawed standard so as to experience the chaos which other states have experienced? The voters of New York deserve a voting system which is secure, free from electronic and/or mechanical functional flaws and accessible to all voters. The fact that New York now has reselected an ITA, has received bids for new voting systems in conformity with the current 2005 VVSG and is in the process of certifying those systems to that standard must not be overlooked for the sake of expediency. To force draconian measures upon the state, such as overriding state purchasing and certifications statutes and regulations, is literally to throw the baby out with the bath water. The goal is an accessible, reliable and accurate voting system, not one fashioned in haste that replicates the disastrous experience of California, Florida and other states. As to the negative Florida experience with its new voting machines, the Court is respectfully reminded that the entire HAVA statutory scheme was enacted as a direct Congressional response to the Florida debacle of 2000. It would be the height of irony if, in the name of HAVA, a new Presidential Election debacle were forced upon New York State in 2008.

The Department of Justice's Suggestion That Paper Ballots Might Be Used

46. The suggestion of the Department of Justice, in a footnote at page 21 of its Memorandum of Law, that New York "would be free to utilize a paper ballot system" is nothing other than an invitation to revisit the Florida 2000 experience.
47. The hand counting of paper ballots in a state the size and population of New York would be a an insurmountable task, a task that is fraught with potential for fraud and corruption.
48. It was the constant fraud and argument over the counting of paper ballots that led to the enlightened use of voting machines decades ago, a use now imbedded in State Law at Election Law 7-200.
49. The Court should note that New York's election system is traditionally overburdened in a Presidential Election year when many more voters than "usual" exercise their franchise. A system which functions well in non-Presidential years is strained to the hilt every fourth year. The concept of paper ballots and hand counting would mean that election inspectors, who by law have started their day a 6:00 (12 noon upstate on Primary Day) would now be asked to begin hand counting paper ballots fifteen (15) hours later at 9:00, a work day which is an invitation to exhaustion driven errors and a sure way to undermine public confidence in the electoral system.
50. The massive lines in New York City during a Presidential General Election will only increase if voters are forced to use, as a punitive measure, a previously rejected voting system, paper ballots.

51. Thousands of dollars will be wasted upon training for election personnel and voters in this interim, one year, system which abandons the traditional and highly reliable voting machine systems currently in place throughout the state.

52. The lever machines in use in New York have a proven history of reliability, a history which should not be abandoned because New York refused to follow the path of California and Florida and precipitously purchase unreliable, but HAVA compliant voting systems.

Purchasing Voting Machines by the Counties in New York

53. OGS is in the process of establishing purchase contracts with voting machine manufacturers against which the counties can issue purchase orders for machines. As discussed above, the State Board is also in the process of testing voting machines to certify that the voting machines meet all Federal and State regulations.

54. Each County, though its Board of Elections, will then decide which machine(s) they wish to purchase and provide a request to purchase along with a check representing their prorated share of the five percent match to the State. These checks will then be deposited into an interest bearing special revenue fund established by the New York State Office of the State Comptroller.

55. If, for some reason, a County Board of Elections does not select a type of voting machine, State Election Law 7-203(3), authorizes the State Board to make the choice for the recalcitrant County Board. However it is the County Boards themselves which must set up the voting machines and staff the polling places

with inspectors knowledgeable in their operation. If for no other reason, they should be parties to this action so that complete relief may be afforded.

The Counties are not parties to this action:

56. Although the various county Boards of Elections within New York will be on the front line of HAVA implementation as the owners of the voting systems, the trainers and employers of the elections inspectors who will be charged with running the elections on Presidential Primary Day, as well as the September Primary Election and the General Election, they are not parties to this action and therefore not subject to the mandate of this Court.
57. The State Board and the Defendant Kosinski join affiant in moving by Order to Show Cause for an Order pursuant to Rule 19 joining all 57 county Boards of Elections and the City of New York Board of Elections as party defendants in this action.

New York is Working with the Justice Department

58. In order to meet HAVA's requirement that there be a disabled accessible voting system in every polling place, in agreement with the United States Department of Justice and ordered by the Court, the State Board put in place a strategy to comply with both HAVA and New York State Law by providing a voting system which is accessible to all voters with disabilities. As part of the agreement with the Justice Department, the State implemented a phased plan to comply with HAVA. The first phase was to provide disabled accessible ballot marking devices that were approved by the State Board and used by all counties in the

State in the September, 2006 Primary Election, the November, 2006 general election, the September, 2007 Primary Election and the November, 2007 General Election. The next phase of HAVA implementation is to have one handicapped accessible machine in each polling place for the September, 2008 Primary Election, as affiant's previously filed Plan on behalf of Commissioners Aquilla and Kellner sets forth. The final phase is to complete the replacement of the lever voting machines in time for use as soon as practicable after a replacement system is certified by the State Board. Affiant verily believes that this full HAVA compliance can not be achieved before the fall of 2009, but that it is achievable for the 2009 election cycle.

59. In response to a Request for Proposals for new voting systems, OGS has received, to date, three responses, from Avante, ES&S and Premier/Diebold. Those responses will be evaluated and tested for compliance with the RFP by New York's new ITA, Systest Labs. If they pass the state certification process, contracts for their purchase by the various counties in the state will be negotiated by OGS.
60. In addition, on December 11th OGS received a letter of intent to bid from Image Based Systems Corporation of Georgia expressing an intent to bid on both Lot I and Lot II Voting Systems.
61. By reason of the foregoing, the assertion of the Department of Justice, at page 17 of its Memorandum of Law that "there are currently no voting systems that have been submitted to the State, or for that matter *no* voting systems that now exist that can be submitted to the State, that will meet the state's certification

standards” is factually incorrect, for three (3) vendors have submitted systems which they feel meet New York’s certification standards and an additional vendor has indicated an intent to submit proposals.

Election Management in New York

62. Affiant respectfully points out to the Court that neither he, as the Chief Election Officer of the State nor the State Board control the election process in New York. That task falls to the County Boards of Elections who must actually conduct the elections, using personnel the County Boards train and employ and elections systems the County Boards themselves have selected and own.
63. The highest turnout of voters in New York occurs in Presidential Election years and it is the County Boards which must deal with that four (4) year spike in voter participation.
64. If the Court were to order the replacement of all level machines throughout New York for the September Primary and November elections in this year, the burden of compliance on an operational level would fall to the County Boards, which are not parties to this action.
65. The County Boards would have to train all election inspectors in the new voting system technology so that they could be of assistance to voters on Primary and Election Days. The enormity of that task can not be overstated as the vast, vast majority of election inspectors have no computer training and many, many are advanced in years.

66. Not only must the inspectors be trained but the voters must be educated in the operation of any new voting system.

Procedural History

67. On March 1, 2006, the United States Department of Justice commenced this lawsuit in the United States District Court for the Northern District of New York to compel the State Board to implement the voting system and statewide voter registration database requirements of HAVA. On March 23, 2006, the District Court granted an application by the Justice Department to require the State Board to submit a plan for complying with HAVA in time for the September, 2006 elections. The Plan was filed with the Court on April 10, 2006, with a supplement filed on April 20, 2006. On April 28, 2006, the Justice Department responded to the Plan. After gathering responses to the proposed plan from the County Boards of Elections, and after having discussions with the State Board, the Justice Department recognized that full compliance with HAVA with regard to the voting machines was not practicable for 2006. The Justice Department asked the District Court to order that the State achieve compliance, to the greatest extent possible, by providing voting machines accessible to voters with disabilities. On June 2, 2006, this Court issued a preliminary injunction setting forth deadlines for an interim plan for the State to achieve compliance with HAVA, requiring the placement of at least one disability-accessible voting machine in each County for the 2006 elections, and ordering the State to achieve full compliance with HAVA by September, 2007.

68. By Notice of Motion and supporting papers dated November 5, 2007 the

Department of Justice has moved the Court for an Order:

1) Finding the defendants in violation of the June 2, 2006 Remedial Order entered in this action and in continuing violation of Section 301 of HAVA, 42 U.S.C. 15301;

2) Enjoining defendants to take immediate and specific steps to carry out their extant obligations under that Order and HAVA;

3) Granting such additional and further relief as to this Court seems proper and just.

69. The motion of the Department of Justice does not propose any specific manner in which the Defendants are to achieve full HAVA compliance other than a vague reference to the fact that "there are currently in use in every other state in this country such voting systems and the State has ample federal funds to purchase or lease such systems in time for use in the upcoming fall 2008 election cycle".

(Department of Justice' Memorandum of Law, p. 22)

70. This cavalier treatment of the problem fails to recognize the fact that as of this date neither the EAC nor any state in the union has certified a voting system to the operative standard, the 2005 VVSG. It is in recognition of that fact that the Plan submitted by affiant references a full HAVA compliance date of 2009 rather than 2008.

71. There is another reason that affiant urges forbearance until the 2009 election cycle. The experience of other states, even under the less stringent 2002 VSS had not been favorable.

72. One need only reference the experience of California to see what havoc an untested system can wreak on the electoral process. The California Secretary of State has recently withdrawn previously granted certifications issued to Diebold, Sequoia and ES&S Voting Systems by reason of technical issues with those systems (See Exhibits "H", "I" and "J" annexed hereto).
73. The integrity of the voting system itself is not the only concern which the Court should consider. It should also consider the impact upon public confidence of a hastily configured procurement scheme. The lessons learned in New Jersey are valuable but dearly learned.
74. In New Jersey's haste to achieve full HAVA compliance despite the fact that the state's Attorney General declined to certify voting systems to the old 2002 VSS in view of the pending promulgation of the 2005 VVSG, many counties went ahead and purchased, with HAVA funds, new voting systems.
75. The New Jersey State Commission on Investigation found that those systems were purchased without competitive bids but more importantly, the certification process was through "independent" testing laboratories, *paid directly by the voting system vendor* (Report of New Jersey Commission of Investigations, December 5, 2005, p. 4; <http://www.state.nj.us/sci/pdf/VotingMachineReport.pdf>, a copy of which is annexed hereto as Exhibit "K").
76. The New Jersey State Commission on Investigation praised the New York system of certification wherein the state, rather than the vendor, contracted with the testing laboratory and the fact that New York had incorporated the 2005

VVSG into its state certification process, concepts which have admittedly slowed New York's efforts to reach full HAVA compliance but which are worthy of emulation if the New Jersey State Commission of Investigations is to be accorded any deference after its fact finding report.

CONCLUSION

77. The implementation of the Statewide Voting System Purchase and Replacement Project is a very complicated project. Testing to the standards set by the federal government has proven to be a very challenging enterprise. From testing and certification, through purchase and ultimately deployment there are many steps that must be done. The State Board must test and certify voting systems to the federal standards and the additional New York State statutory and regulatory standards. County Boards select a voting system from the list certified by the State Board. Those systems are purchased by the county utilizing a statewide contract. The state statute requires that the State's main purchasing agent, the Office of General Services, attempt to aggregate the choices that the counties make in order to get the best price for the voting system. Ultimately, the systems are delivered. The statute requires that State Board to test the voting systems when the County Boards accept delivery to make sure that they function properly upon delivery. The election workers must be trained to operate the equipment and the voting public must be educated on the use of the machines.
78. Given the delay in establishing standards and testing and certifying new voting systems, New York State has continued to use a voting system that has been

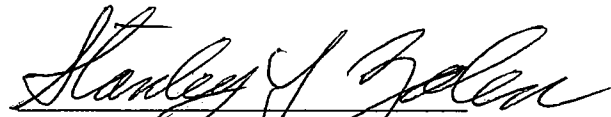
working for a long time. The State Board recognizes the need to augment that system with a system that is accessible to the disabled community.

79. Proceeding in haste to achieve full HAVA compliance, given that neither the EAC nor any state has certified any voting system to the current VVS, would compromise New York's ability to evaluate and test thousands of new voting systems, to train tens of thousands of poll workers, and to educate millions of New York State voters in the use of these new technologies. It would sap resources from the State and local boards of elections throughout the State that are critical to government's ability to perform its fundamental responsibility to ensure smooth and orderly elections this Fall.
80. The suggestion of the Department of Justice that New York adopt a voting system that is certified to the 2002 VVS flies in the face of the EAC's recognition that those standards were insufficient to adequately protect the integrity of the vote and its requirement that any voting system put in place after December 1, 2007.
81. Therefore, in light of all of the diligent steps that the State Board has taken and is taking to be in compliance with HAVA, affiant respectfully requests that the Court reject the Department of Justice's attempt to impose judicial supervision over New York's implementation of HAVA absent some showing in the future that New York is failing to adhere to the workable and reasonable HAVA compliance strategy it developed with the Department of Justice. It is affiant's belief that the State Board of Elections should continue to work diligently with the local Boards of Elections, the Department of Justice, the EAC and other

interested parties in meeting that strategy so that HAVA is not implemented in a rushed or haphazard way that would ultimately undermine public confidence in our electoral system.

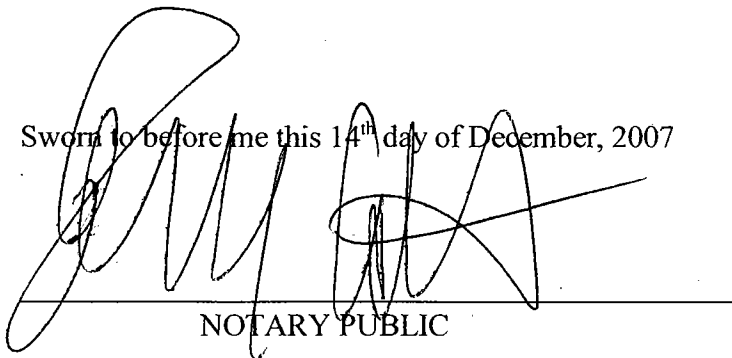
82. Affiant avers however, that if the Court does feel intervention is needed, that the Compliance Plan previously submitted by affiant be the benchmark of that intervention and not a simple direction to comply by the Presidential Primary or the 2008 fall elections for the reason set forth hereinabove.
83. Finally affiant represents to the Court that no judicial direction as to the implementation of New York's HAVA obligations should be issued without the presence before the Court of the various County Boards of Elections and the New York City Board of Elections, to which fall the burden of administering elections in this state. The County Boards of Elections do not work for the State Board, their employees are not hired, fired or otherwise in the control of the State Board and they are not agents of the State Board for any legal purpose. Rather, they enjoy their own separate and distinct legal status.

Dated: December 14, 2007



STANLEY L. ZALEN
Co-Executive Director
New York State Board of Elections

Sworn to before me this 14th day of December, 2007



NOTARY PUBLIC

PAUL M. COLLINS
NOTARY PUBLIC, STATE OF NEW YORK
RESIDING IN ALBANY COUNTY
COMMISSION EXPIRES 12/31/10