

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MARK BANFIELD, *et al.*, :
 :
 : **Petitioners,** :
 :
 : **v.** :
 :
 : **PEDRO CORTÉS,** : **Docket No. 442 M.D. 2006**
 :
 :
 : **Respondent.** :

**CONFIDENTIALITY AGREEMENT AND
STIPULATED MACHINE/CODE PROTECTIVE ORDER**

Petitioners, the Secretary of the Commonwealth (the “Secretary”) and Subpoenaed Vendors of Electronic Voting Systems (the “Vendors”), by and through their respective counsel, hereby enter into, agree, stipulate and submit for the Court’s approval and entry this Confidentiality Agreement and Stipulated Machine/Code Protective Order (“Machine/Code Protective Order”) for the protection of confidential information relating to exemplar voting machines and their software and source code produced during discovery in this matter.¹

The materials and items that the Vendors are to turn over to the Petitioners pertaining to the Specified Voting Systems (as identified in Petitioners’ Complaint) are detailed in the supplemental requests contained in the June 1, 2009 letter sent by Petitioners to the Vendors (the “Supplemental Requests”).

¹ It is hereby stipulated that this agreement does *not* cover the production of all other documents which Petitioners requested in their subpoena and supplemental document requests. The Parties to the Order agree that those documents will be covered under a separate Document Protective Order.

The Petitioners have engaged or will engage consultants or experts to examine, inspect, analyze, operate, test, and use one or more of the instruments and the discovery information which the Vendors have agreed to provide to the Petitioners.

Upon negotiation of Petitioners, the Secretary and the Vendors (hereinafter “the Parties to the Order”),

IT IS AGREED THAT:

1. The Vendors shall make available to the Petitioners the following items demanded in the Supplemental Requests dated June 1, 2009:

- a) Source code relating to software or firmware installed in any version of your company’s electronic voting system which has been certified for use in Pennsylvania elections, as well as the applications that run on that source code.
- b) 90-day access to any version of your company’s electronic voting system which has been certified for use in Pennsylvania elections, including all hardware, software and firmware necessary to run the system.

The items produced pursuant to this paragraph shall be referred to herein as the “inspected material.”

2. The portions of the “inspected material” which Vendors assert are to be confidential trade secrets or confidential proprietary information shall be marked “CONFIDENTIAL” when provided. Such inspected material shall be referred to hereinafter as “Protected Discovery Items.”

3. The Protected Discovery Items or information derived solely therefrom, may only be disclosed or made available during discovery by the party receiving such information to “Qualified Persons,” who, in the case of documents designated as “CONFIDENTIAL” are defined to consist solely of:

- (a) The Court (in the manner provided by paragraph 14 hereof);

- (b) Counsel for the parties and the paralegals, clerical, and secretarial staff employed by such counsel;
- (c) Court reporters and other outside litigation-support services;
- (d) Experts or consultants retained in connection with this litigation, whether or not retained to testify at trial. Experts and consultants to whom documents designated as “CONFIDENTIAL” may be disclosed under this Machine/Code Protective Order shall *not* include (i) any person who is currently either (a) serving as a consultant or expert for, or (b) who is giving advice regarding the competitive decision-making, business operations, or financial matters to, any company that produces, develops, or sells electronic voting machine products or services (including but not limited to Sequoia Voting Systems, Inc., Premier Election Solutions, Diebold Election Systems, Inc., Election Systems & Software, Inc., Hart InterCivic, Inc., Danaher Industrial Controls, Advanced Voting Solutions, and any of those entities predecessors, successors, parents, subsidiaries, and affiliates, collectively, “Vendors”).
- (e) Any witness who counsel believes in good faith should be shown the document in order properly to prepare for his or her deposition or trial testimony. Before being shown any “CONFIDENTIAL” documents, said witness shall first agree to be bound by the terms of this Order and to submit to the jurisdiction of this Court regarding enforcement of this Order.
- (f) Any other person as to whom the producing party agrees in writing prior to disclosure.

4. No individual defined in ¶ 3 shall provide Protected Discovery Items to persons or entities that they know or reasonably should know are present employees, consultants, agents or representatives of competitors of any of the Vendors. In particular, Protected Discovery Items produced by one Vendor may not be shown to present employees, consultants, agents or representatives of competitors of any other Vendor. A nonexclusive list of competitors is attached hereto as Appendix A.

5. Before any consultant or expert engaged by any party is given access to the Protected Discovery Items, each such consultant or expert shall be provided a copy of this Machine/Code Protective Order and sign an undertaking in the form attached hereto as Appendix B, the signed original of which will be retained in the file of counsel retaining the consultant or

expert.

6. The Protected Discovery Items may be described, quoted or paraphrased in documents or communications transmitted between the parties to this litigation and in notes prepared for any hearing or conference before the Court. All such filings and notes, including retained drafts, shall also be considered Protected Discovery Items. Protected Discovery Items contained or reproduced in electronic media shall be password-coded or, in the case of diskettes, tapes, or other removable media, marked with an appropriate legend and kept in a secure location.

7. Documents that quote, paraphrase, or otherwise disclose Protected Discovery Items shall be labeled, “Contains Information Subject To Machine/Code Protective Order: Do Not Disclose To Unauthorized Persons,” or with substantially similar language, on each page. All such filings shall be Protected Discovery Items and shall be made under seal.

8. Any and all Protected Discovery Items provided to the Petitioners under the terms of this Machine/Code Protective Order are for the limited and exclusive use by the Petitioners, Petitioners’ counsel, or authorized representatives of Petitioners or Petitioners’ counsel, in the course of this litigation, except as provided in ¶ 17.

9. Within one month of entry of this Machine/Code Protective Order, the Protected Discovery Items shall be delivered by the Vendors to the offices of Professor Douglas W. Jones (“Dr. Jones”) of the University of Iowa Department of Computer Science at 201H MacLean Hall, University of Iowa, Iowa City, IA 52242-1419 and/or Professor Daniel P. Lopresti (“Dr. Lopresti”) of the Lehigh University Computer Science and Engineering Department at 19 Memorial Drive West, Lehigh University, Bethlehem, PA 18015-3084, or a location mutually agreed-upon by the parties to this Order subsequent to its entry. At the request of the Secretary,

Protected Discovery Items shall also be delivered by the Vendors to the Secretary's experts. The Petitioners and the Secretary will inform the Vendors of the precise destinations for each DRE its related software and source code within two weeks of entry of the Machine/Code Protective Order. This paragraph is subject to the restrictions in paragraph 4.

10. Dr. Jones and Dr. Lopresti and their respective teams of computer security experts will examine the Protected Discovery Items under the confidential conditions listed in paragraph 11 below. These conditions are subject to change at the mutual agreement of the parties to this Order.

11. Conditions under which the Protected Discovery Items will be examined:

- a) All Protected Discovery Items will be examined in a locked room. The lock will be changed before the Protected Discovery Items are delivered.
- b) Keys to the locked room will be given only to those who have signed this Machine/Code Protective Order. Keys will not be given to anyone who does not sign the Machine/Code Protective Order, including but not limited to Chairs of the Lehigh and University of Iowa computer science departments or the custodial staff of those respective institutions. One key each will be given to the Lehigh and University of Iowa Security Departments, for use only in the event of an emergency.
- c) The locked room will contain a safe. In the safe will be placed computer hard drives with DRE software, in encrypted form, when the software is not being tested. This means that when software is not being tested, it will be removed from the computers and placed in the safe, which will then be locked.

- d) Only individuals who have signed the Machine/Code Protective Order will have the combination/keys to the safe.
- e) The Protected Discovery Items will be tested using computers that are not hooked up to the internet.
- f) Tests may be performed on the Protected Discovery Items using computers that are connected to each other, as long as none of those computers is connected to the internet. As such, the Computer workstations within the University of Iowa and Lehigh testing labs may be networked together as long as there is no connection (an “airgap”) to any other internal or external network.
- g) The teams of computer scientists testing the Protected Discovery Items will determine which tests to perform. Those tests may include reverse engineering of software, and other tests they deem appropriate, as long as those tests comply with all portions of the Machine/Code Protective Order.
- h) Laptops with wireless internet access will be permitted in the rooms so that the examiners can conduct research and access documents and other information relevant to their testing. The laptops with wireless internet access will not be hooked up to the Protected Discovery Items being tested. As such, the Computer workstations within the testing labs may be networked together as long as there is no connection (an “airgap”) to any other internal or external network.
- i) The computer experts examining the Protected Discovery Items shall not reproduce, perform, or distribute any confidential information except for the Purpose of this Agreement.

j) Cell phones will be permitted in the room, but will not be hooked up to any of the Protected Discovery Items being tested.

12. Dr. Jones and Dr. Lopresti will have 90 days from the date of delivery of each set of Protected Discovery Items from each respective vendor to examine such items for security and accuracy, and 120 days from the date of delivery of each set of Protected Discovery Items from each respective vendor to produce a report discussing those topics. The Secretary's experts may be afforded the same opportunity at the Secretary's request. These timelines are subject to change at the mutual agreement of the parties to this Order.

13. At the end of the examination period, all examining experts must return the Protected Discovery Items to the respective Vendors. However, the Vendors must make available the same Protected Discovery Items to all parties and their experts thirty (30) days in advance of trial for use at trial, subject to the security measures set forth in ¶ 11. The parties will confer regarding the destination for delivery of the Protected Discovery Items.

14. Any reproductions of Protected Discovery Items made during the course of the examination period are themselves Protected Discovery Items, and they must be destroyed at the conclusion of this litigation.

15. Unless otherwise expressly provided in this Machine/Code Protective Order, any violation or breach of the Terms and Conditions set forth in this Machine/Code Protective Order will be grounds for court contempt action, after a hearing where the accused will be afforded due process.

16. The Petitioners, Petitioners' counsel and any authorized representative of the Petitioners or Petitioners' counsel shall not disseminate or communicate any part of Protected Discovery Items to any other person, persons, parties or entities who are not participants in this

litigation except for: the preparation of reports, as required by Court Rules; the giving of deposition and trial testimony in this case; filings submitted to the court in accordance with ¶ 20; and the limited circulation of transcripts of said testimony to the Court and to counsel for the parties to this litigation and their consultants, experts, agents and representatives. This paragraph is subject to the limitations of ¶ 17.

17. The Parties to the Order acknowledge that Petitioners' experts and their employees and agents have previously researched and published on voting technology topics, possibly including the Specified Voting Systems; so long as they do not disclose any Protected Discovery Items, they are not constrained from publishing the conclusions of their examination of the Protected Discovery Items or conducting and publishing additional research on voting systems, including the Specified Voting Systems.

18. The following information shall not be considered Protected Discovery Items for the purposes of this Agreement: information or items that were already known to or possessed by the Petitioners and their experts, other than under an obligation of confidentiality, at the time of disclosure; information or items that became known to or possessed by the Petitioners or their experts from a third party imposing no obligation of confidentiality and who did not acquire such information subject to an obligation of confidentiality, or information or items that is now or hereafter becomes publicly known or available by other than a breach of the nondisclosure agreements associated with this litigation. These restrictions shall not be construed to prevent Petitioners or their experts or individuals who have acknowledged this Agreement by their signatures from conducting future research on voting systems, possibly including the ones examined in this review, after the completion of this project, so long as that research does not improperly use Protected Discovery Items gained through this review.

19. Objections made to any designation of “CONFIDENTIAL” under this Machine/Code Protective Order shall be made in good faith. Any party objecting to a designation of “CONFIDENTIAL” shall notify the producing party in writing, specifically identifying each item that the objecting party in good faith believes should not be designated as “CONFIDENTIAL” and providing a brief statement of the grounds for such belief. The objecting and producing parties thereafter shall confer in an attempt to resolve the disputed issue(s) of confidentiality. To the extent the Parties are unable to reach an agreement as to the designation, the Party asserting the disputed confidentiality designation may make an appropriate application to this Court – with confidential portions being filed under seal pursuant to Paragraph 20– requesting that specifically identified items be included within the provisions of this Stipulation and Machine/Code Protective Order. All items that are the subject of such an application shall be treated in accordance with their initial “CONFIDENTIAL” designation and this Order unless and until the Court rules otherwise. If a Vendor does not move for a judicial affirmation of a disputed confidentiality designation within two (2) weeks of the conference referred to in this paragraph, the designation is removed from the document(s) in question.

20. In the event any Protected Discovery Items, or partial or entire copies derived therefrom, are contained in any pleadings and/or other papers filed with the Court, such filing shall be marked as “CONFIDENTIAL” and placed in a sealed envelope marked with the caption of the case and held by the Court under seal. The parties shall attach to the outside of the envelope a copy of the notice of motion, or other appropriate papers, and this Machine/Code Protective Order. Where there are disputed issues of confidentiality related to the information contained in such filings, the parties shall follow the procedure outlined in paragraph 19 for resolving such disputes.

21. At the Pre-Trial Conference, the Court will enter a separate order relating to the treatment of Protected Discovery Items at trial. Such an order may not be inconsistent with this order.

22. Complying with the terms of this Machine/Code Protective Order by the non-producing party shall not: (a) operate as an admission by any party that any particular document contains or reflects currently valuable proprietary or commercial information; or (b) prejudice in any way the right of a party at any time: (i) to seek a determination by the Court of whether any particular document should be subject to the terms of this Machine/Code Protective Order; or (ii) to seek relief on appropriate notice from any provision(s) of this Machine/Code Protective Order, either generally or as to any particular document. However, designating an item as “CONFIDENTIAL” shall operate as a representation by the producing party that the document contains or reflects currently valuable proprietary or commercial information

23. The terms and restrictions of the Machine/Code Protective Order shall survive until such time as the Protected Discovery Items fall into the public domain, or upon agreement of the Parties and Court approval pursuant to ¶ 16, whichever occurs first.

24. This Machine/Code Protective Order shall not be modified or terminated except by an Order entered by this Court or another Court of competent jurisdiction. Any agreements or understandings of any or all of the parties designated herein as to the terms of the Machine/Code Protective Order have been included herein and to the extent that they have not been so integrated, they are not a part of this Machine/Code Protective Order.

25. The illegality, invalidity or unenforceability of any particular provision of this Machine/Code Protective Order shall not affect the other provisions hereof, and this Machine/Code Protective Order shall be construed in all respects as if such illegal, invalid, or

unenforceable provision was omitted.

26. Any party becoming aware of any unauthorized disclosure or unauthorized use of the Protected Discovery Items or any part thereof shall immediately report the same in writing to this Court and to the affected Vendor.

27. Neither the Protected Discovery Items or any information, materials or knowledge derived therefrom (or any other information provided by the Vendors) shall be used for, or be permitted to be used for, (i) purposes of “patent mining” or (ii) preparation or development of any derivative or competing products or technologies or (iii) review or analysis of the Protected Discovery Items for any reason other than in connection with this litigation, other than as enumerated in Paragraph 17. For purposes of this Agreement, patent mining shall mean (x) the determination of whether any features, functions or processes are protected by any existing patent or patent application; or (y) use, with or without such intent, to modify, alter, or continue, in part or whole, any existing patent or patent application.

SO ORDERED:

Dated _____, 2009

Honorable Dan Pellegrini, Judge

APPENDIX A

COMPETITORS OF VENDORS

1. Sequoia Voting Systems, Inc.
2. Election Systems and Software
3. Avante International
4. Diebold Elections Systems
5. Premier Election Solutions (successor company name for Diebold)
6. Global Election Systems (prior company name for Diebold)
7. UniLect Voting Systems
8. Dominion Voting Systems
9. Hart InterCivic
10. MicroVote General Corp.
11. Advanced Voting Systems
12. Precise Voting
13. Shoup Voting Systems
14. TruVote International
15. Unisyn Voting Solutions

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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	:	
Petitioners,	:	
	:	
v.	:	
	:	
PEDRO CORTÉS,	:	Docket No. 442 M.D. 2006
	:	
Respondent.	:	

CONFIDENTIALITY AGREEMENT

I, _____, state under penalty of perjury that I have read and reviewed in its entirety the annexed Confidentiality Agreement and Stipulated Machine/Code Protective Order (“Machine/Code Protective Order”) that has been signed and entered by the Court in the above-captioned matter.

I hereby agree to be bound by and comply with the terms of the Machine/Code Protective Order, not to disseminate or disclose any information subject to the Machine/Code Protective Order that I either receive, review or about which I am told, to any person, entity, party, or agency for any reason, except in accordance with the terms of the Machine/Code Protective Order.

I agree to submit to the jurisdiction of this Court in the event of an asserted breach of this Agreement or the representations and warranties herein or violation of the Machine/Code Protective Order.

DATED: _____

(Signature)

(Typed or Printed Name)