STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 15474

DIEBOLD ELECTION SYSTEMS, INC.,

Plaintiff,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS and THE NORTH CAROLINA OFFICE OF INFORMATION TECHNOLOGY SERVICES,

Defendants

and

JOYCE MCCLOY,[1]

Defendant-Intervenor.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO MODIFY OR VACATE TEMPORARY RESTRAINING ORDER

[1] Joyce McCloy's Motion to Modify or Vacate Temporary Restraining Order was filed concurrently with her Motion to Intervene.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. BACKGROUND

> [D]espite capable, dedicated election officials, the election system has malfunctioned just often enough and recently enough to create doubt in the public mind that the system is healthy. Those malfunctions, together with questions raised by critics of electronic voting about what problems are possible, threaten to leave the State with an election system that does not have the public's confidence.[2]

Having recognized the risks to security, election integrity, and voter confidence presented by electronic voting, North Carolina recently enacted one of the most robust statutory regimes in the country. Passed in August of 2005, the state's legislative package includes a wide range of reforms that, among other things, promise to make election equipment and accompanying procedures more transparent, more secure, and ultimately more reliable in the eyes of the public. While further progress can be made, North Carolina has set a high, although certainly reachable, standard for voting equipment vendors who wish to sell their products for use in elections in this state.

On October 11, 2005, the State Board of Elections issued a Request for Proposal ("RFP") to certify voting equipment to be used within the state.[3] The RFP set forth in extremely clear terms the features demanded by the Board for each bid, in accordance with the legislative requirements. The RFP contained a provision based on N.C.G.S. § 163-165.9A(a) [Session Law 2005-323], which requires the following:

> (a) Duties of Vendor. – Every vendor that has a contract to provide a voting system in North Carolina shall do all of the following:
>
> (1) The vendor shall place in escrow with an independent escrow agent approved by the State Board of Elections all software that is relevant to functionality, setup, configuration, and operation of the voting system, including, but not limited to, a complete copy of the source and executable code, build scripts, object libraries, application program interfaces, and complete

[2] North Carolina Select Committee on Electronic Voting Systems, "Interim Report to the 2005 General Assembly of North Carolina," February 9, 2005, at p.1. *See* http://www.ncleg.net/committees/jointselectcomm_/2005interimrepo/default.htm. Also attached as Exhibit A.

[3] Request for Production No. ITS-002724, the RFP at issue, is included as Exhibit B.

documentation of all aspects of the system including, but not limited to, compiling instructions, design documentation, technical documentation, user documentation, hardware and software specifications, drawings, records, and data. The State Board of Elections may require in its request for proposal that additional items be escrowed, and if any vendor that agrees in a contract to escrow additional items, those items shall be subject to the provisions of this section. The documentation shall include a list of programmers responsible for creating the software and a sworn affidavit that the source code includes all relevant program statements in low-level and high-level languages.

(2) The vendor shall notify the State Board of Elections of any change in any item required to be escrowed by subdivision (1) of this subsection.

(3) The chief executive officer of the vendor shall sign a sworn affidavit that the source code and other material in escrow is the same being used in its voting systems in this State. The chief executive officer shall ensure that the statement is true on a continuing basis.

(4) The vendor shall promptly notify the State Board of Elections and the county board of elections of any county using its voting system of any decertification of the same system in any state, of any defect in the same system known to have occurred anywhere, and of any relevant defect known to have occurred in similar systems.

(5) The vendor shall maintain an office in North Carolina with staff to service the contract.

On November 4 – the day the RFP bids were due – Diebold filed a Complaint for Declaratory Relief and Motion for Temporary Restraining Order and Preliminary Injunction, objecting to requirements to place "all software that is relevant to functionality, setup, configuration, and operation of the voting system" in escrow and to reveal the name of all programmers responsible for creating that software. Later that day, the Court granted that Motion in part, permitting Diebold to file its bid for voting equipment certification on November 7, 2005, three days after the submission deadline set by the state Board of Elections had expired, and for *all* voting equipment certification bids submitted, "afforded protection from criminal and civil penalties found in N.C.G.S.

§ 163-165.9A(b) … to the extent any submission shall be in conflict with N.C.G.S. § 163-165.9A(a) and N.C.G.S. § 163-165.7 (a)(6)."

II. ARGUMENT

A. Diebold Failed to Meet the Standards For the Issuance of Preliminary Injunctive Relief.

1. Legal Standard for Preliminary Injunction

A preliminary injunction is an "extraordinary measure taken by a court to preserve the status quo of the parties during litigation" and will only be issued (1) if the plaintiff is able to show a likelihood of success on the merits of the case, and (2) the plaintiff is likely to sustain irreparable harm, or in the opinion of the Court, the injunction is necessary to protect the plaintiff's rights during the course of the litigation. *See A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401 (N.C. 1983); *Stout v. City of Durham*, 121 N.C.App. 716, 717 (N.C. App. 1996). "Thus, the initial question must be whether plaintiff[is] able to show a likelihood of success on the merits." *Stout*, 121 N.C. App. at 717-18.

Diebold offered two reasons why it is likely to succeed on the underlying merits of the case; first that N.C.G.S. § 163-165.9A is "overbroad," and second that it received "conflicting guidance" from the State Board of Elections as to Diebold's compliance requirements. Neither argument has merit.

2. N.C.G.S. § 163-165.9A Clearly Requires Prospective Equipment Vendors to Place *All* Relevant Software In Escrow and Identify *All* Programmers of Such Software.

N.C.G.S. § 163-165.9A, cited in Requirement #6 of the RFP, places clear obligations on prospective voting equipment vendors: place in escrow "all software that is relevant to functionality, setup, configuration, and operation of the voting system" and list every programmer responsible for creating that software.

As an initial matter, Diebold has made absolutely no showing that any of its code is in fact "unavailable." Instead, Diebold asserts that some of the code in its voting

machines is the "property of third parties" and therefore "not available." Similarly, discussing the obligation to identify programmers responsible for the code in its equipment, Diebold alleges that it "do[es] not have access to all of this information for third party code." That software is owned by a third party does not preclude Diebold from asking for permission to place it in escrow as part of its North Carolina bid, nor does it prevent Diebold from asking software owners for programming records, yet Diebold hasn't shown that it has made any such attempts, much less that the third parties have denied them.

The real threshold question, however, is whether Diebold is likely to ultimately persuade this Court that the revised election code does *not* require Diebold to place in escrow its "operating system, various software drivers for ancillary components such as displays and card readers and other computer programs" (emphasis added).[4] The plain language of the statute shows that this is nonsense. The software cited by Diebold falls squarely into the extremely broad categories of software that "is relevant to functionality, setup, configuration, and operation of the voting system." Diebold in fact makes no effort whatsoever to persuade the Court otherwise – not even attempting to explain what its unidentified "other computer programs" are or do or attempting to explain how an operating system is not software "relevant to the operation of the voting system" – merely pointing out (rightly so) that its use of third party software likely disqualifies it for state certification.

In fact, far from mere technicalities, the broad escrow and programmer disclosure requirements represent deliberate policy choices made by the North Carolina General Assembly. This is made abundantly clear by the legislative history of N.C.G.S. § 163-165.9A, especially the findings and recommendations of the Joint Select Committee on Electronic Voting Systems. In order to eliminate voting systems that are "outdated,"

[4] Complaint for Declaratory Relief and Motion for Temporary Restraining Order and Preliminary Injunction ("Diebold Complaint") at ¶17.

"unreliable," and "lacking in needed support for operation," the General Assembly saw fit to create a uniform election system that limited counties' equipment choices to pre-approved systems whose programming would be reviewable by state officials and representatives from recognized political parties.[5]

> The Committee heard presentations from county election officials describing the problems that occurred in the 2004 election. The election board chair of Carteret County, where 4,438 votes were lost on an electronic voting system, said the nearest computer support person for his system was 3,000 miles away. **The Committee also heard testimony from computer specialists who asserted that computer-based voting systems are subject to errors and manipulation on a magnitude beyond anything possible with paper ballots.** (The Committee was reminded that paper ballots have their own long history of manipulation.) **The Committee was told that since computer source code is proprietary, no one but the vendor can know how the system operates.** The State Election Director, Gary Bartlett, recommended that the acquisition and support of voting systems move toward greater centralization.[6] [emphasis added]

In addition to seeking increased voter confidence due to better transparency, lawmakers recognized that access to the inner workings of voting machines would increase the chance that technology-related errors and malfunctions could be uncovered and corrected; indeed, included in the new law is a requirement of machine vendors to post a bond to cover machine-related damages.

> The Committee recommends that the State Board of Elections, with the assistance of the Office of Information Technology, be given authority to negotiate with vendors. The State Board, rather than the counties, would write the "request for proposal" for all voting systems of a certain type. The counties would still do the purchasing, but their choices would be limited to certain types of contracts negotiated by the State Board. The State Board would assure uniformity of cost and features within the type. All vendors doing business in North Carolina would be required to escrow their source code and submit it for review by the State Board and representatives of all the State's legally recognized political parties. Every vendor would be required to post a bond to cover damages from defects in the voting system. Every vendor would be required to have an operating office in North Carolina, to notify the State Board of updates in its system,

[5] Exhibit A at p.1-2.
[6] Id. at pg.1.

> and to report defects it is aware of that have occurred in its system anywhere. Felony penalties would apply to willful and fraudulent violations of the duties, and civil penalties would apply to any violation.[7]

Not only did the General Assembly eventually follow the Joint Select Committee's recommendations to dramatically strengthen the state's voting equipment regulations, the General Assembly ultimately *strengthened* the proposals originally submitted by the Committee, *including the very provisions at issue in this case*. The version of N.C.G.S. § 163-165.9A first recommended to the General Assembly required a very narrow code escrow requirement – applying only to "all source code relevant to the recording or counting of votes" – and no "programmer identification" requirement at all."[8]

The requirements for full software escrow and programmer identification are not accidental or unintended. They were specifically passed by the General Assembly to respond to concerns about election integrity. Diebold's claimed inability to meet the requirements of § 163-165.9A in no way makes the section overbroad. Indeed, it makes no showing that these requirements do not advance the legislature's goal of secure elections. As such, Diebold is not likely to succeed in its argument that it is not obligated to meet the requirements of this section.

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[7] Id. at p.2.

[8] *See* Exhibit A at p.18:

(1) The vendor shall place in escrow with an independent escrow agent approved by the State Board of Elections a copy of **all source code relevant to the recording or counting of votes**, and related documentation, together with updates as they become known or available. The documentation shall include a system configuration and a sworn affidavit that the source code includes all relevant program statements in low-level and high-level languages. As used in this section, 'source code' does not include variable codes created for specific elections.

(3) The vendor shall make accessible for review **all source code relevant to the recording or counting of votes** by the State Board of Elections; the Office of Information Technology Services; the state chairs, or one designee of each chair, of each political party recognized under G.S. 163-96; and the purchasing county board of elections. [emphasis added]

3. The State Board of Elections Has Not Provided Conflicting Guidance To Diebold.

Diebold also asserts that the State Board of Elections has given it conflicting guidance regarding its RFP bid such that it is impossible for Diebold to reasonably discern its obligations. This charge is baseless.

Confronted with an inability to meet the plain language of § 163-165.9A, Diebold sought relief from the Board of Elections; specifically, Diebold asked the Board how it should address the issue of third party software. The Board answered the only way that it could: vendors are obligated to meet both the escrow and programmer documentation requirements of the statute, and if a vendor cannot, the vendor should indicate in its RFP bid why it has not done so.[9]

The Board of Election also included in its RFP a standard disclaimer aimed at streamlining the RFP bid process and preventing vendors from inserting additional terms and conditions:

> NOTICE TO VENDORS: The State objects to and will not be required to evaluate or consider any additional terms and conditions submitted with a vendor response. This applies to any language appearing in or attached to the document as part of the vendor's response. By execution and delivery of this Request for Proposal and response(s), the vendor agrees that any additional terms and conditions, whether submitted purposely or inadvertently, shall have no force.[10]

Diebold argues that this disclaimer renders the Board's answers to its software questions contradictory. This is nonsense. Diebold's explanation as to why it has not submitted source code and programmer identification would be a statement of fact, not a term or condition. Second, such an explanation was requested by the Board of Elections and cannot be interpreted as being outside of or "in addition to" the vendor response. Third, and most importantly, the Board made no assertion that Diebold's explanation would satisfy the requirement of the statute or that it would serve to complete Diebold's

[9] *See* Deibold Complaint at ¶¶18, 25.
[10] *See* Exhibit B at p.4.

application. Once again, the mere fact that Diebold claims that it is finding it difficult to complete its RFP bid is due entirely to its apparent inability to meet the substantive requirements of the statute and not to conflicting instructions from the Board of Elections.

B. The Court's Order Is Overbroad.

The Court's Order of November 4, 2005, is overbroad in several respects. First, it afforded protection from criminal or civil liability incurred as a result of violations of *any* provision of N.C.G.S. § 163-165.9A(a). This far-reaching Order was unnecessary as Diebold did not ask for such broad protection and, more importantly, the statute contains many requirements – such as a requirement to notify the state upon the change of any escrowed software (*see* N.C.G.S. § 163-165.9A(a)(2)) – not contested by Diebold or any other bidder. The Court's Order provides blanket protection against a violation of *any* of these requirements.

Second, the temporal scope of the Order is unclear; no time limit was specified in the Order. Even if a time limit had been included, its meaning would still be unclear. A liability waiver issued on a temporary or preliminary basis is inherently problematic in these circumstances, as the waiver cannot easily be lifted after the Court makes a final determination and after (as now) bidders have relied on that waiver to make their final bids. Without an indication that the protection against criminal and civil liability extends *only* until the Court makes a final ruling on Diebold's declaratory relief claim and does *not* extend to liability incurred once bids are awarded, Diebold could achieve the long-term protection that it desires in the form of a TRO that is "temporary" in name only.

The confusion surrounding the Order of November 4 has already affected other potential participants in the RFP process. Hart Intercivic, a competitor of Diebold, reportedly decided to forego the North Carolina RFP process because of the software escrow process. Because of the Court's liability waiver, Hart has indicated that it may attempt to have the Board of Elections reopen the RFP process: "We feel [that due to the

TRO] the terms and conditions have been changed, so we wanted the opportunity to see if they would consider opening up the bid process."[11]

III. CONCLUSION

In its Complaint, Diebold makes the following remarkable statement:

> [I]n light of the broad requirements mandated by the North Carolina legislature in N.C.G.S. § 163.165.9A(a) [Session Law 2005-323], and the criminal and civil penalties associated with noncompliance, plaintiff DESI cannot submit a proposal in response to the Voting Machine RFP without necessarily being in violation of state law.[12]

This is precisely the point: Diebold is apparently unable to meet the clear substantive requirements of the law. Having failed to manufacture a system that is compliant with rigorous statutory standards, Diebold cannot now seek cover from this Court to help it make up for these shortcomings.

Intervenor respectfully requests that the Court vacate or modify its Order of November 4. If the Court chooses to vacate its Order, it should permit Diebold to withdraw (but not refile) its bid if Diebold so wishes. Alternatively, if the Court chooses to modify its Order, Intervenor requests that it make the following clarifications: (1) that the liability waiver granted in the November 4 Order only protects bidders until such time that the Court issues a final ruling on Diebold's declaratory relief cause of action and in no event extends past the date when the state awards bids, and (2) that the liability waiver only extends to aspects of N.C.G.S. § 163-165.9A challenged by Diebold; namely, the application of the software escrow and programmer identification provisions to third party software.

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[11] Statement by Michelle Shafer, Hart's Director of Corporate Communications. Joe Miller, "Voting Booths In Flux," The Daily News (Jacksonville, North Carolina), November 12, 2005, *at* <http://www.jdnews.com/SiteProcessor.cfm?Template=/GlobalTemplates/Details.cfm&StoryID=36534&Section=News>.

[12] Diebold Complaint at ¶43.

This 16th day of November, 2005.

Respectfully submitted,

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