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 NELSON CHU PAVLOSKY and LUKE  
 11 THOMAS SMITH

12 UNITED STATES DISTRICT COURT  
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 ONLINE POLICY GROUP, NELSON CHU )  
 PAVLOSKY, and LUKE THOMAS SMITH )

No. C-03-4913 JF

15 Plaintiffs, )

SUPPLEMENTAL DECLARATION OF  
 LUKE THOMAS SMITH IN SUPPORT  
 APPLICATION FOR PRELIMINARY  
 INJUNCTION

16 v.  
 17

18 DIEBOLD, INCORPORATED, and DIEBOLD  
 ELECTION SYSTEMS, INCORPORATED,

19 Defendants.  
 20

21 \_\_\_\_\_ )  
 22 I, Luke Thomas Smith, declare:

23  
 24 1. I am Luke Thomas Smith, a plaintiff in the above-captioned case. This Declaration  
 25 is intended to supplement my previous Declaration, which I incorporate in full by this reference.

26 2. As I mentioned previously, on October 22, 2003, after receiving a cease and desist  
 27 notice from Diebold, Swarthmore decided to disable access to the Diebold e-mail archives from the  
 28 SCDC website. We were told that publishing the archives was against Swarthmore's policy. On

2 October 23, 2003, after I had posted a link to the archives hosted elsewhere, I was informed that  
 3 the link was also in violation of Swarthmore's policy. As a result, my colleague Nelson Pavlosky  
 4 removed the link.

5 3 At the time of both of those actions, neither Nelson nor I were sure that Swarthmore  
 6 would allow us to republish the information or a link to it if we filed a counter notice under the  
 7 copyright law. To the contrary, we were informed that the publication and the link violated  
 8 Swarthmore's policy and we were not certain whether Swarthmore's position was that it was acting  
 9 as our college, or as a service provider that might comply with the counter-notice provisions of 17  
 10 U.S.C. Section 512.

11 4 On October 31, 2003, Swarthmore made a public statement in which it stated that it  
 12 had "advised students on the process for filing under the copyright law a 'counter-notification'  
 13 against Diebold's take-down demand." Based upon that public statement, and after consultation  
 14 with attorneys, Nelson and I presented Swarthmore with a counter-notification on November 6,  
 15 2003. A true and correct copy of the counter notice is attached hereto as Exhibit A.

16 5 We understand that under 17 U.S.C. Sections 512(c) and (g), Swarthmore must not  
 17 replace the removed material less than 10 business days following receipt of the counter notice, or  
 18 approximately November 19, 2003

19 6 Thus, even if we are allowed to republish the material at the end of the 10 days,  
 20 Diebold's cease and desist letter will have resulted in the forced removal of the e-mail archive from  
 21 our website for nearly a month, including removal during the critical time period just prior to an  
 22 election where the Diebold machines were used in many locations. We believe that the  
 23 information revealed in the e-mail archive about problems with the Diebold machines could have  
 24 contributed to the important debate and public attention focused on electronic voting machines  
 25 around election day, had it not been for Diebold's actions.

26 I declare under penalty of perjury under the laws of the State of Pennsylvania that the  
 27 foregoing is true and correct and that this declaration was executed in SWARTHMORE,  
 28 Pennsylvania.

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Date: 6 Nov 2003

  
LUKE THOMAS SMITH

# **EXHIBIT A**

November 6, 2003

Judy Downing  
Director of Information Technology Services  
Swarthmore College  
Beardsley Hall  
500 College Avenue  
Swarthmore, PA 19081

Received ITS 11/6/03 9:23  
Judy Downing Director

Dear Ms. Downing:

Please find attached to this letter a list of materials, collectively known as the Diebold email archive, which were posted on the Swarthmore Coalition for the Digital Commons website and which were removed by the school following a complaint from Diebold company on October 22<sup>nd</sup>, 2003.

This letter is our counternotice to that complaint. We are filing this counternotice now, following Swarthmore's recent notification on October 31, 2003 that it would accept counternotice from us. Until that announcement, we were not sure whether Swarthmore was acting as our college, or as a service provider under 17 U.S.C. Section 512.

We have a good faith belief that the Diebold email archive was disabled in error as a result of mistake or misidentification of the material, including that our posting of this material constituted fair use under copyright law. We declare that this is true and accurate under penalty of perjury under the laws of the United States of America.

For the purposes of this matter, we consent to the jurisdiction of the Federal District Court for the judicial district in which we reside. We also consent to notice of service by the person providing notification under Section 512 (c)(1)(C) or that person's agent. However, by this letter, we do not waive any other rights, including the right to pursue an action for the removal or disabling of access to this material, if wrongful.

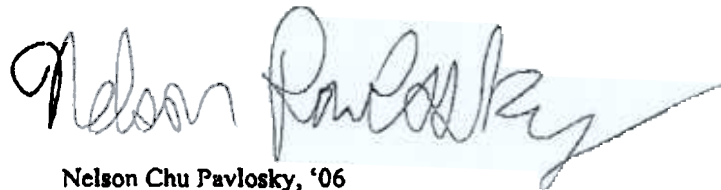
Having complied with the counternotice requirements of Section 512(g)(3), we expect that Swarthmore must now replace the blocked or removed materials set forth in the attachment and cease disabling access in ten to fourteen days of your receipt of this notice. Please notify us when this has been done.

We appreciate your prompt attention to this matter. If you have any questions about this notice, please do not hesitate to contact us.

Sincerely yours,



Luke Thomas Smith, '06  
500 College Avenue  
Swarthmore, PA 19081  
610-690-5546  
lsmith1@swarthmore.edu



Nelson Chu Pavlosky, '06  
500 College Avenue  
Swarthmore, PA 19081  
610-690-3892  
npavlos1@swarthmore.edu

LIST OF MATERIALS:

"Diebold e-mail archive"

<http://www.sccs.swarthmore.edu/org/scdc/s>

"Diebold e-mail archive, compressed"

<http://www.sccs.swarthmore.edu/org/scdc/memos/lists.tgz>