IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIVIL DIVISION

CHRISTINE JENNINGS, nominee of the Democratic Party for Representative in Congress from the State of Florida's Thirteenth Congressional District,

Plaintiff,

v. Case No. 2006 CA 002973

ELECTIONS CANVASSING COMMISSION OF THE STATE OF FLORIDA, et al.,

Defendants.
_____

ELLEN FEDDER, et al,

Plaintiffs,

v. Case No. 2006 CA 002996
(Consolidated)

TOM GALLAGHER, et al,

Defendants.
_____/

VOTER PLAINTIFFS' POST-HEARING BRIEF

I. Introduction.

In its Motion for additional time of December 6, 2006 ("ESS Motion of Dec. 6"), Defendant Election Systems & Software ("ESS")[1] represented to this Court that "given the highly technical nature of the Secret Code and Proprietary Equipment, which can only be adequately explained through expert testimony," additional time and an evidentiary

[1] Plaintiff Christine Jennings added ESS as a Defendant in her Amended Complaint, filed on November 30, 2006. Voter Plaintiffs have not added ESS as a Defendant, but this Court consolidated both cases on November 30, 2006.

hearing would be required in order to determine whether or not Plaintiffs would be permitted to undertake the bulk of its requested discovery. ESS Motion of Dec. 6 at p.7. Indeed, ESS represented that "[h]aving the benefit of ESS' experts, not just plaintiff's experts, is critical to the court in a case such as this where the subject matter of the trade secret is highly technical and one in which the court is unlikely to be familiar." *Id.* at pp.4-5.

After more than nine hours of testimony proffered during the resulting evidentiary hearing, ESS and the other Defendants have offered into evidence not a single fact, opinion, or indeed *witness* regarding the "highly technical nature" of ESS's purported trade secrets. Indeed, the one witness ESS offered to the court was a professor of government, without any competence to testify as to the nature – "highly technical" or otherwise – of ESS's trade secrets. Instead, Defendants engaged the Court in precisely the exercise that Plaintiffs vigorously argued was inappropriate when it was first suggested; namely, a premature mini-trial on the merits of the parties' respective theories. ESS and the other Defendants ultimately had just one point to make: that they have an alternative theory to explain the 15% undervote rate that ESS's iVotronic voting machines recorded for the 13th Congressional District race in Sarasota County. In the course of making this point, ESS demonstrated that their alternative theory (based on a statistical analysis that is not "highly technical" in any way) is (1) novel and never-before tested, (2) consistent with Plaintiffs' theory of machine malfunctions, and (3) based on incomplete evidence.

ESS and the other Defendants may further pursue this theory, submit their expert to the discovery process, and ultimately present their theory at trial. What they may not

do, however, is use their theory to deny Plaintiffs the ability to conduct their own legitimate discovery. In fact, ESS has simply underscored the importance of careful examination of the voting machines in order to present to the Court evidence that helps explain why the Sarasota iVotronic machines – as ESS's own expert now concedes – recorded anomalous results likely contrary to the intent of thousands of voters.

Plaintiffs respectfully urge the Court that it is time to allow this case to move forward.

II. Plaintiffs Have Demonstrated a Reasonable Necessity for Discovery.

As voters, the Plaintiffs here are the real parties in interest in this election contest. *See Boardman v. Esteva*, 323 So.2d 259, 263 (Fla. 1975) ("[T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration."). If the Plaintiffs were consumer victims who had lost thousands of dollars due to alleged computer error that lost or misattributed their funds, they would certainly be able to examine the computers to find out what went wrong. It is even more appropriate to allow discovery here when the Voter Plaintiffs seek not to protect their financial interests or to gain political power, but are protecting one of their most fundamental rights – the right to cast a vote and have it count.

It is axiomatic that Florida's trade-secret privilege – here, the right of litigants to shield even legitimate trade secrets from disclosure during the discovery process – is not absolute. 8 Wigmore, Evidence § 2212(3) (McNaughton rev.1961); Law Revision Council Note to § 90.506 (1976). Rather, the "purpose of the [trade secret] privilege is to prohibit a party from using the duty of a witness to testify as a method of obtaining a

valuable trade secret *when the lack of disclosure will not jeopardize more important interests."* Law Revision Council Note to § 90.506 (1976) (emphasis added). The privilege is statutorily limited and permits invocation only "if the allowance of the privilege will not conceal fraud or otherwise work injustice." Fla. Sta. § 90.506 (2006). Critically, the "necessity of disclosure to the presentation of the opponent's case" (among other factors) weighs against suspending the generally applicable discovery obligations. Law Revision Council Note to § 90.506 (1976).

With no party to the immediate consolidated case contesting trade secrecy status,[2] Plaintiffs need only demonstrate a "reasonable necessity" for such materials in order to trigger ESS's disclosure obligations. *See, e.g., Goodyear Tire & Rubber Co. v. Cooey,* 359 So.2d 1200, 1202 (Fla. 1st DCA 1978). If the Court finds that Plaintiffs have demonstrated a reasonable necessity, the Court should require ESS to produce the materials in question to the Plaintiffs under an appropriate protective order. *See, e.g., Seta Corporation of Boca, Inc. v. Attorney General,* 756 So.2d 1093, 1094 (Fla. App. 4 2000) ("[C]ourts can order disclosure of trade secrets so long as protections are taken to see that they are not disclosed to competitors").

Plaintiffs have clearly shown that the requested material is "reasonably necessary to resolve the issues in dispute." *Virginia Elecs. and Lighting Corp. v. Koester,* 714 S.2d 1164, 1165 (Fla. 1st DCA 1998). As Professor Dan Wallach explained in his testimony, the information sought by Plaintiffs is crucial to the resolution of a central disputed issue

[2] For purposes of facilitating discovery, Voter Plaintiffs have conceded that ESS's assertion that the materials that they have designated as trade secrets qualify as such and have further agreed to abide by any appropriate protective order the Court may find necessary to impose. Voter Plaintiffs reserve the right to challenge any such designation once discovery has commenced.

in this case: whether the malfunction of voting technology contributed to the Sarasota undervotes. Defendants could not offer a shred of evidence suggesting this information was not necessary – indeed, their own expert's testimony acknowledging the anomalous results produced by the machines points to the importance of an independent examination of their operation. Simply put, details regarding the operation and accuracy of the voting technology approved by the state of Florida and selected by Sarasota County are the very essence of this case.

III. All Expert Testimony Supports Plaintiffs' Need for Discovery.

The testimony of all three expert witnesses demonstrated Plaintiffs' need for the information and materials for which ESS claims trade secret protection.

Professor Charles Stewart, whose expert qualifications regarding voting technology, residual votes, and statistical analysis are not challenged by the Defendants, testified that the "excess undervote rate" in the Sarasota Congressional race – the percentage of ballots without a candidate selection above and beyond what is considered normal – was 12%, amounting to approximately 14,000 votes. Prof. Stewart also found that it was likely that voting machine problems led to this excess undervote. Moreover, he testified that it is likely that this unexplained excess undervote led to a different outcome that that chosen by the voters. Prof. Stewart's conclusions were based on, among other things, an analysis of precinct-level election returns from Sarasota County and other Florida counties as well as ballot images and event logs from Sarasota County iVotronic machines. Eliminating other theories such as voter error and intentional undervoting as likely causes of the undervote, Prof. Stewart concluded that the available data pointed to specific problems with iVotronic machines as the most likely explanation.

Professor Dan Wallach, a computer scientist whose expert qualifications regarding voting systems Defendants similarly do not challenge, testified that he would likely be able to prove or disprove a voting system malfunction theory within a reasonable degree of professional certainty only if he had access to the information and materials that ESS has designated as constituting or containing trade secrets. He testified that simply testing the voting machines – as opposed to testing the machines in conjunction with the source code and other related materials – could never disprove the existence of a software bug. He further testified that he would be unable to know precisely how his evaluation of the code would proceed until he was able to analyze it for likely sources of problems, although it was likely that he would be able to reach his conclusion within a matter of weeks. Prof. Wallach further described specific machine and non-machine theories that could explain the excess undervote rate witnessed with iVotronic machines in Sarasota County and how his investigation of these materials would likely allow him to prove or disprove those theories. Defendants introduced no evidence that contradicted Professor Wallach's testimony.

ESS's sole expert, Professor Michael Herron, a professor of government, was recognized by the Court as an expert in elections and voting patterns. He is not, as he conceded, an expert in computer science or voting systems. Professor Herron articulated an alternative theory focusing on ballot layout problems and voter confusion to explain the excess Sarasota undervotes. This theory, he testified, had never been used to evaluate the results of any previous election. Professor Herron also testified that he has only tested his theory using ballots cast on ESS voting machines; while he has requested ballot images created by machines from other manufacturers than ESS, he has of yet been

unable to acquire those ballot images for analysis. Based on the data and materials he *has* analyzed, Professor Herron testified that the outcome of the election would have been different had voters voted on machines with non-confusing ballot layouts such as the one used in Charlotte County. In addition, Professor Herron testified that while he believed that the "extraordinarily high undervote rates" in Sarasota County were caused by voter confusion resulting from a ballot format problem, no statistical analysis of observed voting data could distinguish between ballot format effects and engineering flaws that mimic those effects.

IV. Conclusion.

Defendants have conceded through expert testimony that the outcome of the election would have been different had Sarasota voters cast ballots on iVotronic machines with a different ballot style, that voting machine malfunctions could account for undervote rates that on the surface appear to be based on voter confusion, and that the evidentiary basis for their own alternative theory is incomplete. Nevertheless, Defendants continue to block Plaintiffs' access to clearly relevant material. At the same time, Defendants offer theories that actually are compatible with those of the Plaintiffs and continue to follow a pattern of leveling inflammatory accusations – for which they provide no factual support – that do nothing more than slow these proceedings.[3]

[3] *See, e.g.*, ESS's Pre-Hearing Memorandum of Law of December 18, 2006 (charging Plaintiffs, counsel, and experts of having "well-defined political agendas" for which they are abusing the judicial process and in support of which they will disclose proprietary information to third parties); State Defendants' First Set of Interrogatories to Each Fedder Plaintiff, Interrogatories #15 and #16, issued December 15, 2006 (insinuating that drug or alcohol use may have caused the extraordinarily high undervote rate in the Sarasota Congressional race and thus allegedly meriting intrusive discovery into the private lives of the Voter Plaintiffs); Transcript of December 8 Hearing at p. 40 (accusing Jennings expert Prof. Wallach of "mak[ing] a living on the lecture circuit trashing electronic voting

What was apparent before is even more so now: Plaintiffs have demonstrated a reasonable necessity for the materials sought in discovery, while ESS and other Defendants seek to hide behind a trade secret veil. Voter Plaintiffs and their experts are entitled to their requested discovery, discovery that can be protected by an appropriate protective order as the Court sees fit. Voter Plaintiffs respectfully request that their Motion to Compel be granted and that this case be permitted to proceed.

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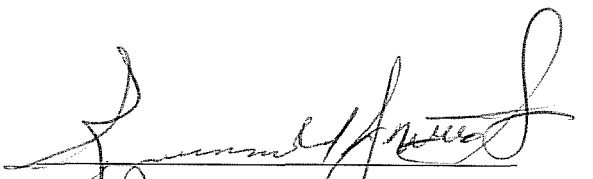
systems" and therefore having a pecuniary interest in "finding out what is in ES&S's source code" when in fact Wallach testified (and Defendants introduced no evidence to contradict) that he makes "[i]f I'm lucky, a couple hundred bucks on honorariums."

DATED this 22nd day of December, 2006.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Voter Plaintiff's Post Hearing Brief was furnished on the 22nd day of December, 2006, by facsimile to the following counsel of record:

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