At a term, in Chambers, of the
Appellate Division, Third Judicial
Department, held in the County
Courthouse in Albany, New York
on the 7th day of February, 2008

PRESENT: HON. ANTHONY V. CARDONA, PJ

STATE OF NEW YORK
SUPREME COURT APPELLATE DIVISION
THIRD JUDICIAL DEPARTEMENT

LIBERTY ELECTION SYSTEMS, LLC

PETITIONER - RESPONDENT,

-against-

NEW YORK STATE BOARD OF ELECTIONS,
Respondents

DOUGLAS A. KELLNER, EVELYN J. AQUILA
RESPONDENTS-APPELLANTS,

NEIL W. KELLEHER and HELENA MOSES DONOHUE, SAID COMMISSIONERS TOGETHER CONSTITUTING THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

Order to Show Cause

Upon reading and filing the Affirmation of Paul M. Collins, and all of the proceedings heretofore had herein, the Appellants- Respondents Aquila and Kellner having moved this Court pursuant to CPLR 5704 and/or Rule 800.2 for an Order vacating the Mandatory Injunction of the Supreme Court, (O'Connor, J.) Albany County issued Ex-Parte on the 6th day of February, 2008, and upon reading the Affidavit in Opposition to such relief of Michael Mackey, Esq. made the 7th day of February, 2008, and upon due consideration, it is hereby

EXHIBIT C

ORDERED Petitioner-Appellant show cause before this Court at a motion Term thereof to be held on the 11th day of February, 2008 at 1:30 o'clock in the forenoon at the Justice Building, Empire State Plaza, Albany New York why an Order should not enter pursuant to CPLR 5704 and/or Rule 800.2 of the Rules of this Court vacating that portion of the Oder of the Supreme Court, Albany County, (O'Connor, J.) date February 6, 2008 as Ordered:

> Respondents notify the County Boards of Elections no later than 5:00 p.m. on February 6, 2008 that the Petitioner's Ballot Marking Device, is to be included in the list of Ballot marking Device systems that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services.

Sufficient reason appearing therefore, pending a determination of this application by the Court it is hereby

ORDERED, that portion of the Oder of the Supreme Court, Albany County, (O'Connor, J.) date February 6, 2008 as Ordered:

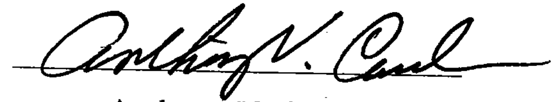
> Respondents notify the County Boards of Elections no later than 5:00 p.m. on February 6, 2008 that the Petitioner's Ballot Marking Device, is to be included in the list of Ballot marking Device systems that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services.

Be and same hereby is Vacated pursuant to CPLR 5704 by reason of the filing and service of a Notice of Appeal by Appellant-Respondents on the 6th day of January, 2008;

It is further Ordered that responding papers shall be served and filed with the Clerk of the Court not later than 1:30 p.m. on February 8, 2008;

It is further Ordered that service of a copy of this Order and the papers upon which it is granted by delivery to the attorneys for Petitioner by 5:00p.m. on February 7, 2008 be deemed good and sufficient services.

February 7, 2008



Anthony V. Cardona, PJ

STATE OF NEW YORK **APPELLATE DIVISION**
SUPREME COURT **THIRD DEPARTMENT**

LIBERTY ELECTION SYSTEMS, LLC
Petitioner-Respondent

-against-

ORDER TO SHOW CAUSE
Index #789-08

DOUGLAS A. KELLNER and EVELYN J. AQUILA,
Respondents-Appellants
and
NEW YORK STATE BOARD OF ELECTIONS,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

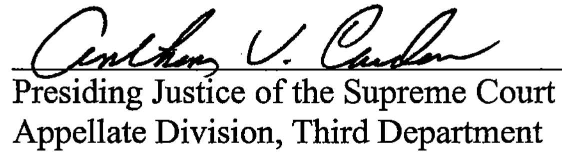
Upon reading and filing the Affidavits of L. Michael Mackey, Robert Witko, and Matthew J. Clyne, all sworn to the 7th day of February 2008, together with the exhibits appended thereto, and upon all pleadings and proceedings heretofore had herein, it is hereby

ORDERED that Respondents-Appellants show cause before this Court at a motion term thereof to be held at 3:00 pm on the 7th day of February, 2008 at the Justice Building, Empire State Plaza, Albany, New York 12223 to be heard why an Order should not be made and entered herein pursuant to CPLR 5519(c) vacating any stay that may automatically result from Appellants' having a filed a Notice of Appeal herein and granting Petitioner-Respondent such other and further relief as to the Court may seem just and proper; and it is further

Ordered that personal service of this order to show Cause and the papers upon which it is granted upon the attorneys for respondents-appellants by 12:30 PM on 2/7/08 shall be deemed good and sufficient notice thereof

ORDERED that pending hearing and determination of this motion any stay which may have been effected by Appellants' having filed a Notice of Appeal be, and hereby is, vacated.

Signed this 7th day of February, 2008 at Albany, New York.



Presiding Justice of the Supreme Court
Appellate Division, Third Department

Exhibit A

STATE OF NEW YORK
SUPREME COURT

APPELLATE DIVISION
THIRD DEPARTMENT

LIBERTY ELECTION SYSTEMS, LLC
Petitioner-Respondent

-against-

ORDER TO SHOW CAUSE
Index #789-08

DOUGLAS A. KELLNER and EVELYN J. AQUILA,
Respondents-Appellants
and
NEW YORK STATE BOARD OF ELECTIONS,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

Upon reading and filing the Affidavits of L. Michael Mackey, Robert Witko, and Matthew J. Clyne, all sworn to the 7th day of February 2008, together with the exhibits appended thereto, and upon all pleadings and proceedings heretofore had herein, it is hereby

ORDERED that Respondents-Appellants show cause before this Court at a motion term thereof to be held on the ____ day of February, 2008 at the Justice Building, Empire State Plaza, Albany, New York 12223 to be heard why an Order should not be made and entered herein pursuant to CPLR 5519(c) vacating any stay that may automatically result from Appellants' having a filed a Notice of Appeal herein and granting Petitioner-Respondent such other and further relief as to the Court may seem just and proper; and it is further

ORDERED that pending hearing and determination of this motion any stay which may have been effected by Appellants' having filed a Notice of Appeal be, and hereby is, vacated.

Signed this ______ day of February, 2008 at Albany, New York.

____
Presiding Justice of the Supreme Court
Appellate Division, Third Department

STATE OF NEW YORK **APPELLATE DIVISION**
SUPREME COURT **THIRD DEPARTMENT**

LIBERTY ELECTION SYSTEMS, LLC
Petitioner-Respondent

-against-

AFFIDAVIT
Index #789-08

DOUGLAS A. KELLNER and EVELYN J. AQUILA,
Respondents-Appellants
and
NEW YORK STATE BOARD OF ELECTIONS,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

State of New York)
County of Albany)SS.:

L. Michael Mackey being duly sworn deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York and am a partner in the firm of Feeney, Centi and Mackey, attorneys for Petitioner-Respondent. I make this Affidavit in opposition to Appellants' motion for an Order vacating the February 6, 2008 Order of the Honorable Kimberly O'Connor and in support of Petitioner-Respondent's motion for an Order pursuant to CPLR 5519(c) vacating any stay that might result from filing of Notice of Appeal by Appellants Kellner and Aquila.

BRIEF SUMMARY OF THE CASE.

2. The New York State Board of Elections ("Board") has notified all County Boards of Elections that by February 8, 2008 they must submit to the Board orders for

Ballot Marking Devices ("BMD's") which must be available in all polling places by fall of 2008. The counties are required to submit their orders from a list of approved BMD's.

3. The list of approved BMD's arises from its specifications published by the Office of General Services on October 17, 2007. The bid specifications did not envision an award to any one company. Rather, they were designed to encourage the approval of several different companies' machines, providing the County Boards of Elections with choices as required by Election Law 7-202(4).

4. Petitioner submitted a bid, which OGS certified as responsive to the bid specification. The next step in the process, pursuant to the bid specifications, was to have Petitioner's BMD, known as LibertyMark, examined by Systest Laboratories ("Systest"), for performance testing.

5. On January 24, 2008, however, the Board met to discuss the bids before any examination by Systest Laboratories. Two commissioners (Kelleher and Donohue) voted in favor of having the LibertyMark included in the examination and vendor selection process and one, (Kellner) voted against. One commissioner (Aquila) was absent. Because three affirmative votes are required for any action of the Board (Election Law 3-100), Mr. Kellner's negative vote effectively blocked the LibertyMark from being examined by Systest Laboratories against the bid specifications and also prevented it from being included in the vendor selection process.

6. On January 31, 2008 Petitioner commenced an Article 78 proceeding, which resulted in a favorable decision appended as Exhibit A.

7. The Board has not appealed from the decision in question. However, commissioners Kellner and Aquila have filed a Notice of Appeal and claim that it results in an automatic stay pursuant to CPLR 5519(a) (1). Petitioner-Respondent respectfully submits that, since the Board is not appealing, any stay that might arise from the Kellner-Aquila Notice of Appeal does not apply to the Board. For the reasons set forth below, we further submit that the appeal of Appellants Kellner and Aquila results in no automatic stay whatsoever. Finally, and for the reasons set forth in detail below, we move for an Order pursuant to CPLR 5519(c) vacating any stay that may arise as a result of the Kellner and Aquila appeal.

APPELLANTS' NOTICE OF APPEAL DOES NOT RESULT IN AN AUTOMATIC STAY.

8. Election Law 3-100(4) provides that the "affirmative vote of three commissioners shall be required for any official action of the state board of elections" (emphasis supplied). Since there were not three votes to appeal in this case, the actions taken by Commissioners Kellner and Aquila are not official actions of the Board. Rather, they are merely their own individual actions. As such, they do not result in an automatic stay. As the Court held in Roman v. Levitt, 73 Misc. 2d 35 (affd 42 ADnd 10 [3rd Dept. 1973], appeal denied 33NY2d 514):

> "The Chairman and Senior Executive Officer of the New York City Transit Authority, in whose individual names this proceeding is brought are not officers of the State within the meaning of [CPLR 5519(a)(1)]... this section applies only to actions taken by or against the authority itself."

Herein, there is not appeal by the Board. The individual actins of Kellner and Aquila in attempting to appeal do not result in a stay. Moreover, upon information and belief, the Board did not even convene a meeting with a lawful quorum to discuss whether to appeal. Absent such a meeting, the actions taken by Kellner and Aquila are invalid (see Rose v. Smith, 220 AD2d 922, 924, FNI [3rd Dept. 1995]).

PETITIONER-RESPONDENT IS ENTITLED TO VACATURE OF ANY AUTOMATIC STAY THAT MAY EXIST.

9. In the event that any automatic stay does arise from the Kellner and Aquila Notice of Appeal, Petitioner-Respondent moves for an Order vacating the same pursuant to CPLR 5519(c).

10. In the event Judge O'Connor's Decision and Judgment is stayed pending appeal, Petitioner will suffer severe and irreparable financial injury. On the other hand, vacature of any stay will not result in any prejudice to appellants.

11. The Board has notified all county boards that they must submit orders for ballot marking devices (BMD's) by February 8, 2008. A total of five companies have submitted BMD's pursuant to the bid specification referred to above. Upon information and belief, the counties have been advised that they should "rank" their preferred machines in order of preference and that their selection is contingent upon their preferred machines passing performance testing to be done by Systest Laboratories.

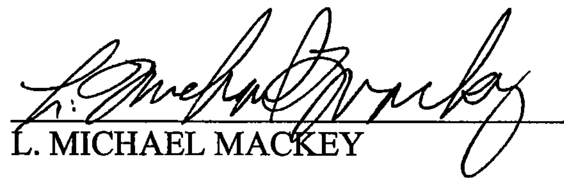
12. Of the five BMDs that were submitted for approval, at the January 24, 2008 meeting only the machine of a company named Sequoia was approved. As stated above, on January 31, 2008 Petitioner-Respondent commenced an Article 78 proceeding,

resulting in a favorable decision. Subsequently, the other three companies whose BMDs were not approved have also filed suit and those proceedings are pending. On February 6, 2008 Judge O'Connor granted those three companies temporary relief, pending hearing and determination of their respective proceedings. Copies of the Orders containing such temporary relief are appended as Exhibit B. Pursuant to those Orders, on February 6, 2008 the Board sent to all County Boards of Elections an e-mail (Exhibit C) indicating that pending the outcome of the litigation in those matters, the respective companies' BMDs must "be included in the list of ballot marking devices that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services."

13. Accordingly, County Boards have at this point four choices- Sequoia (which was approved originally by the Board) and the three companies that have litigation pending. Ironically, the only BMD that the Board has not advised the County Boards they may consider is Petitioner's LibertyMark. In other words, the three companies that waited until the last possible minute to bring Article 78's and whose proceedings are still pending have their BMDs on the list; Petitioner, which promptly sought judicial relief and has prevailed, is the only company whose BMD is not available. Unless the Board immediately notifies the County Boards that Petitioner's BMD is now available, it can not and will not be selected by any of the Counties. It seems absurd and is certainly unjust that Petitioner's BMD not be available to the Counties while those of three competitors whose cases are still pending are available. It is particularly unjust when the Board is not even appealing the Decision and Judgment. The Notice of Appeal

has been filed only by two dissenting commissioners who are apparently unhappy that they lack sufficient votes to bring about an appeal by the Board.

Wherefore, Petitioner-Respondent respectfully prays for an Order denying the relief sought by Appellants and in the alternative, vacating any stay which may result from Appellants' Notice of Appeal and granting Petitioner-Respondent such other and further relief as to the Court may seem just and proper.



L. MICHAEL MACKEY

Sworn to before me this 7th

day of February, 2008.

Notary Public

NANCI CARVILL
Notary Public, State of New York
No. 01CA6092588
Qualified in Albany County
Commission Expires 05/27/2007

STATE OF NEW YORK **APPELLATE DIVISION**
SUPREME COURT **THIRD DEPARTMENT**

LIBERTY ELECTION SYSTEMS, LLC
Petitioner-Respondent

-against-

AFFIDAVIT
Index #789-08

DOUGLAS A. KELLNER and EVELYN J. AQUILA,
Respondents-Appellants
and
NEW YORK STATE BOARD OF ELECTIONS,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

State of New York)
County of Albany)SS.:

Robert Witko being duly sworn deposes and says:

1. I am the President of Liberty Election Systems LLC, the Petitioner-Respondent herein.

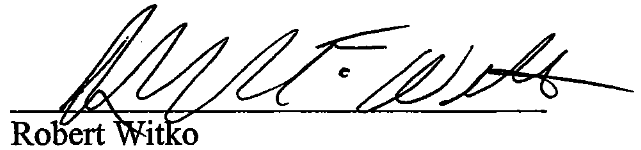
2. For the past several years Petitioner has developed voting systems to be marketed to New York State County Boards of Elections for them to come into compliance with the Help America Vote Act and New York State laws and regulations implementing the same. Toward that end, we have expended in excess of Five Million Dollars ($5,000,000.00) developing our product. Upon information and belief, my company is the only New York State based company involved in the bidding process referred to in Mr. Mackey's affidavit.

3. Pursuant to the October 17, 2007 bid specifications provided by OGS, we designed a machine known as LibertyMark. At the January 24, 2008 meeting of the State Board of Elections, two of the three commissioners present voted in favor of LibertyMark. Commissioner Kellner voted against. Because three affirmative votes are required, the effect was to disapprove our machine.

4. I will not go into the details of the decision below. Suffice it to say, Judge O'Connor found that Mr. Kellner's two objections to LibertyMark were unfounded and that LibertyMark complied with the requirements of the election law.

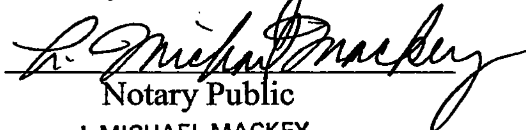
5. Despite receiving the favorable decision from Judge O'Connor, I have essentially run into a road block trying to market LibertyMark. Prior to January 24, 2008 at least 20 counties indicated to me that LibertyMark was their preferred machine. Because of Commissioner Kellner's vote, however, most of those counties are now questioning whether they can, in fact, order LibertyMark by the February 8th deadline. The situation has been worsened by the fact that the County Boards of Elections have now been informed by the State Board by e-mail (Exhibit C) that machines of three other companies who have litigation pending may be ordered by the Counties. Thus, LibertyMark is the only machine that the Counties are under the impression they may not order. This is despite the fact that we have been successful in our litigation and the other three companies have cases pending, which may or may not be successful. Unless LibertyMark is included immediately on the list of ballot marking devices which may be ordered by County Boards, it will be too late. As explained above, the State Board has indicated the ordering deadline is February 8th. Unless the requirements set forth in

Judge O'Connor's Decision and Judgment are adhered to and an e-mail similar to Exhibit C is provided to the County Boards with respect to LibertyMark, the Petitioner will suffer tremendous and irrevocable financial injury.



Robert Witko

Sworn to before me this 7th
day of February, 2008.



Notary Public

L MICHAEL MACKEY
Notary Public, State of New York
No 4773650
Qualified in Albany County
Commission Expires: 7/31/08

STATE OF NEW YORK **APPELLATE DIVISION**
SUPREME COURT **THIRD DEPARTMENT**

LIBERTY ELECTION SYSTEMS, LLC
Petitioner-Respondent

-against-

AFFIDAVIT
Index #789-08

DOUGLAS A. KELLNER and EVELYN J. AQUILA,
Respondents-Appellants
and
NEW YORK STATE BOARD OF ELECTIONS,
NEIL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

State of New York)
County of Albany)SS.:

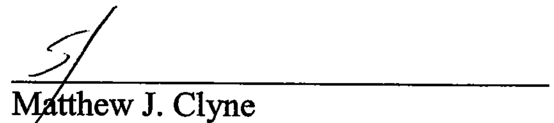
Matthew J. Clyne being duly sworn deposes and says:

1. I am the Democratic Commissioner of the Albany County Board of Elections and, along with Republican Commissioner John A. Graziano, am responsible for ordering ballot marking devices to be in place by the fall of 2008.

2. Commissioner Graziano and I have been advised by the New York State Board of Elections that the deadline for us to place orders for ballot marking devices is February 8, 2008. We have been informed that we should rank in order of preference those ballot marking devices that the State Board of Elections has indicated are available.

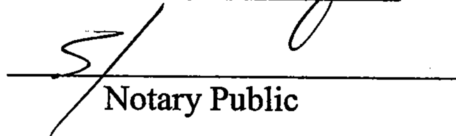
3. Mr. Graziano and I are familiar with the LibertyMark, manufactured by Liberty Election Systems, LLC. The LibertyMark has many excellent qualities and, if

available, is a ballot marking device that I would strongly consider ordering. Mr. Graziano has expressed to me similar feelings. However, the State Board of Elections has not made it clear whether the LibertyMark is an available machine. We have been advised by the State Board of Elections that the Sequoia ballot marking device is available. Also, late yesterday we received an e-mail from the Democratic and Republican Co-executive Directors of the State Board of Elections advising that the ballot marking devices of ES&S, Premiere, and Avante are all included on the list of ballot marking devices that the County Boards may rank in their selections due February 8th. We have received no similar instructions regarding the LibertyMark. Absent the same, it is unclear to us whether we may, in fact, rank that machine in the selection process.



Matthew J. Clyne

Sworn to before me this 7th
day of February, 2008.



Notary Public

L MICHAEL MACKEY
Notary Public, State of New York
No 4773650
Qualified in Albany County
Commission Expires: 7/31/10

STATE OF NEW YORK
SUPREME COURT   COUNTY OF ALBANY

In the Matter of the Application of
LIBERTY ELECTION SYSTEMS, LLC,

Petitioner,

DECISION AND JUDGMENT

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Index No. 789-08
RJI # 01-08-092009

-against-

NEW YORK STATE BOARD OF ELECTIONS, and
DOUGLAS A. KELLNER, EVELYN J. AQUILA.
NEILL W. KELLEHER and HELENA MOSES DONOHUE,
SAID COMMISSIONERS TOGETHER CONSTITUTING
THE NEW YORK STATE BOARD OF ELECTIONS, and
THE NEW YORK STATE OFFICE OF GENERAL SERVICES,
Respondents.

(Supreme Court, Albany County, Special Term)

APPEARANCES:

FEENEY, CENTI AND MACKEY
Attorneys for Petitioner
(L. Michael Mackey and John L. Cordo, Esqs. of Counsel)
116 Great Oaks Blvd.
Albany, New York 12203

PAUL M. COLLINS, ESQ.
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40 Steuben Street
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ALLISON M. CARR, ESQ.
Special Counsel
Attorney for Respondents Kelleher and Donohue
New York State Board of Elections
40 Steuben Street
Albany, New York 12207

HON. ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Respondent Office of General Services
(Bruce J. Boivin, Esq., of counsel)
The Capitol
Albany, New York 12224-0341

O'Connor, J.:

Petitioner commenced the instant article 78 proceeding seeking review of a determination of the New York State Board of Elections, which by a vote of two to one in favor of approval, failed to approve the ballot marking device voting system which petitioner seeks to sell to the various counties within the State of New York. Respondent New York State Office of General Services has moved to dismiss the proceeding as to it on the ground that it has already performed all of the acts sought in the petition and that therefore the application is moot as to it.

While the apparent anomaly of denial of approval based upon a majority vote in favor of approval has been characterized as unique by some of the litigants, it is not without precedent. Indeed, a unanimous affirmative vote by less than the required number of members has been held insufficient to constitute an effective action (*see e.g. Matter of Squicciarini v Planning Bd. of Town of Chester*, 38 NY2d 958 [1976]). Election Law § 7-201 requires the Board of Elections to determine whether a voting machine complies with the requirements of Election Law § 7-202 and can be safely and properly used by voters and local boards of election. Pursuant to Election Law §§ 3-100 (4) and 7-201(1), approval of a voting machine must be made by affirmative vote of at least three of the four Commissioners. Even though at the time of the vote the Board had a quorum of three Commissioners, the affirmative vote of two of the three present Commissioners was insufficient to constitute an action by the Board approving petitioner's machine for use in New York.

Such lack of action is indistinguishable from the failure to act caused by the tie vote in *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, (97 NY2d 86, 91-93 [2001]). In such proceeding, the Court made it clear that such inaction could not preclude or interfere with judicial review. Thus, even where there are no factual findings or a statement of reasons for denial, the Court may consider the entire record, including transcripts of the meetings at which votes were taken as well as affidavits submitted in the article 78 proceeding (id. at 93). In the instant proceeding, the approval was effectively denied by the negative vote of Commissioner Kellner. The transcripts of the meetings contain specific statements of the grounds for his negative vote. Under the circumstances, the Court finds that such statements will be considered as the reasoning for denial of approval. Moreover, review of the determination shall be limited to those grounds raised by Commissioner Kellner at the time of the denial (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs* ., 77 NY2d 753, 758 [1991]; *Matter of Police Benevolent Assn of N. Y. State Troopers v Vacco* , 253 AD2d 920, 921 [3d Dept 1998]).

The primary ground for denial of approval asserted by Commissioner Kellner was that the petitioner's ballot marking device did not produce or create a ballot in compliance with the requirements of the Election Law. In general, an interpretation of a statute by an administrative agency charged with its administration is entitled to great deference. However, "[w]here 'the question is one of pure legal interpretation of statutory terms, deference to the [agency] is not required' (*Matter of Toys "R" Us v Silva*, 89 NY2d 411, 419)." (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 102 [1997]; *see also Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451 [1980]). Moreover, in the instant proceeding, two of the three Commissioners present construed the Election Law differently. As such, Commissioner Kellner's interpretation of the statute is not entitled to any

deference. It is also noted that the record contains responses to inquiries from vendors as to whether the ballot marking device was required to produce a "paper ballot" or whether the machine interface could be considered as the "ballot." The response was consistently that the "ballot" must comply with the Election Law with no further detail given. Petitioner has paid at least $170,000 to respondents for testing to ensure that its machine complies with the statute. Clearly no testing is required to determine whether petitioner's machine's "ballot" complies with the Election Law.

Petitioner's machine is a modified voting machine rather than a dedicated paper ballot marking device. The machine itself has a large "ballot" displayed with provision for the voter to choose candidates and vote on proposals. The machine then prints a paper receipt indicating the choices that were made. The paper receipt does not include, inter alia, the names of all the candidates and their parties, nor does it include the text of any proposals. It clearly does not constitute a paper ballot within the meaning of Election Law § 7-106.

However, a "ballot marking device" is not defined in the Election Law. The only time the phrase is used in a New York statute is in the Election Reform and Modernization Act of 2005, (L. 2005, c. 181, § 11). Such statute provides:

> "Up to and until the replacement of existing voting machines by voting machines or voting systems which meet the requirements of section 7-202 of the election law, each county shall provide at least one location with one or more ballot marking devices which are equipped for individuals with disabilities and provide individuals with disabilities with the same opportunity for access and participation as other voters and which are authorized by the state board of elections pursuant to subdivision 4 of section 7-201 of the election law."

Clearly, a voting machine or voting system which meets the requirements of Election Law § 7-202 will constitute an appropriate "ballot marking device." Moreover, nothing in the Election Reform and Modernization Act of 2005 can be construed as requiring a "paper ballot marking device."

Certainly, if the Legislature had intended such a requirement, it could have included it in the statute.

Election Law § 1-104 is entitled "Definitions." Subdivision 8 thereof provides: "The term 'official ballot' refers to the paper ballot on which the voter casts his vote, or the face of a voting machine as prepared for the voter to cast his vote at any election held in accordance with the provisions of this chapter." Subdivision 18 thereof provides:

> "The word "ballot" when referring to voting machines or systems means that portion of the cardboard or paper or other material or electronic display within the ballot frame containing the name of the candidate and the emblem of the party organization by which he was nominated, of the form of submission of a proposed constitutional amendment, proposition referendum or question as provided in this chapter, with the word "yes" for voting for any question or the word "no" for voting against any question except that where the question or proposition is submitted only to the voters of a territory wholly within a county or city, such form shall be determined by the county board of elections. Such statement and the title shall be printed and/or displayed in the largest type or display which it is practicable to use in the space provided."

Election Law § 7-104 contains numerous requirements for the form of a ballot in a voting machine. An entirely separate section, Election Law § 7-106, provides the requirements for a paper ballot. It appears uncontroverted that the instant proceeding involves a challenge to a determination made pursuant to Election Law § 7-201, which is entitled "Voting machines and systems; examination of." The Commissioners were voting on whether the ballot marking devices met the requirements of Election Law § 7-202, entitled "Voting machine or system; requirements of." Election Law § 7-202 (1) (j) requires that a voting machine or system shall:

> "retain all paper ballots cast or produce and retain a voter verified permanent paper record which shall be presented to the voter from behind a window or other device before the ballot is cast, in a manner intended and designed to protect the privacy of the voter; such ballots or record shall allow a manual audit and shall be preserved in accordance with the provisions of section 3-222 of this chapter."

The Court therefore finds that this proceeding involves the approval of a voting machine or system, and not approval of a paper ballot. The statute expressly and clearly contemplates that the

"ballot" be printed or displayed on the machine or system, not that it be a "paper ballot." Moreover, the statute specifically authorizes a machine which produces a permanent paper record of the vote rather than a "paper ballot." Commissioner Kellner has argued that the phrase "ballot marking device" contemplates marking a paper ballot. However, nothing in the phrase or anywhere else in the statute indicates an intent to exclude the virtual marking of a machine ballot. It is therefore determined that the Election Law does not require a ballot marking device to produce a paper ballot as such is defined in the Election Law. Accordingly, Commissioner Kellner's primary ground for voting against approval is based upon an erroneous construction of the applicable statutes and therefore that portion of the determination is contrary to law.

Commissioner Kellner's other ground for disapproval was that the petitioner's machine did not adequately provide for a disabled person's independent verification of the vote before it was cast. Petitioner initially supplied a machine with a digital pen reader which required a voter to unplug headphones from the main voting machine and plug them into the digital pen reader. The voter was then required to scan a specific area of the paper receipt with the pen reader by passing the pen over designated lines. It is clear that this form of verification was intended to be utilized by persons with limited or no eyesight. The record indicates that this proved difficult to perform even for people without any disability. However, on January 22, 2008 petitioner provided an alternate independent verification device which would automatically scan the paper receipt. Commissioner Kellner did not consider such device in his review of petitioner's machine.

The bid requirements provided for an open recruitment with no fixed time for submission of bids. They did require that a bidder submit a sample voting machine or system to the Board of Elections before 11:00 am. of the tenth business day after its bid was submitted. Petitioner's bid was

submitted on January 7, 2008. The date for final submission of the equipment, as verified by email from the Office of General Services, was January 22, 2008. While petitioner has submitted a receipt for delivery of the new independent verification device on January 22, 2008, the receipt does not indicate the time of delivery. Respondents have submitted an affidavit indicating that the device was received at approximately 3:30 pm., 4 ½ hours after the 11:00 am. deadline. Petitioner has not offered any proof to the contrary.

As noted above, respondents are limited to the grounds they raised in support of their determination. Commissioner Kellner stated that the deadline for submission of petitioner's device was January 10, 2008 and that it was not fair to delay the determination by a late submission. The record establishes that Commissioner Kellner was in error with respect to the deadline. Clearly the factors to be considered in excusing a delay of a few hours are significantly different from those applicable to a delay of almost two weeks. Moreover, the record reflects that the Commissioners voted to approve two voting machines subject to subsequent modification to meet certain requirements. Allowing two of the bidders to modify their machines after the final submission date, while refusing to consider petitioner's modification which was already submitted, appears substantially similar to allowing a deviation from a bid specification. Such deviations are only allowed when they do not place any of the bidders at a competitive disadvantage (*see Matter of Cataract Disposal v Town Bd. of Town of Newfane*, 53 NY2d 266, 272 [1981]; *Matter of Hungerford & Terry, Inc. v Suffolk County Water Auth.*, 12 AD3d 675 [2d Dept 2004]; *Eldor Contr. Corp. v Suffolk County Water Auth.*, 270 AD2d 262 [2d Dept 2000]). The Court finds that allowing two of the bidders to make subsequent modifications while refusing to consider petitioner's modification submitted only a few hours late placed petitioner at a competitive disadvantage.

It further appears that the other two Commissioners did consider the petitioner's new independent verification device and found it sufficient to meet the statutory specifications. There was no vote to reject petitioner's submission and no determination by three Commissioners to that effect. It is therefore determined that Commissioner Kellner's determination that petitioner's machine did not have a compliant independent verification device based upon a refusal to consider the modification, which refusal was based upon an error of fact and improper disparate treatment of bidders, was arbitrary and capricious.

Accordingly the Court finds that the determination to deny approval to petitioner's machine was arbitrary and capricious and contrary to law, requiring that it be vacated and set aside. The matter shall be remitted to the Board of Elections with a direction that they issue an initial approval of petitioner's voting machine on or before February 8, 2008 (see CPLR § 7506; *Matter of McCambridge v McGuire*, 62 NY2d 563, 568-569 [1984]; *Matter of Hauser v Town of Webb*, 34 AD3d 1353, 1354 [4th Dept 2006]). Under the circumstances herein, in which the State of New York is under a very strict timetable imposed by the United States District Court and the initial approval is still subject to further testing to ensure that the voting machines and systems actually perform properly, the Board of Elections respondents shall be preliminarily enjoined immediately to treat petitioner's voting machine as if it has received their approval pending their formal approval, including being examined and included in the vendor selection process and distributing the information with respect to petitioner's machines to all County Boards of Election.

It further appears that all of the relief requested with respect to the Office of General Services is moot, as such agency has already submitted petitioner's bid documents to the Office of the State Comptroller. As such, the motion to dismiss shall be granted.

Accordingly it is,

ORDERED, that the petition is hereby granted to the extent that the determination to disapprove the petitioner's voting machine is vacated and annulled, and it is further

ORDERED, that the Board of Elections is directed to approve petitioner's voting machine on or before February 8, 2008, and it is further

ORDERED, that pending such approval, the Board of Elections is directed immediately to examine petitioner's machines, to include them in the vendor selection process and to distribute the information with respect to petitioner's machines to all County Boards of Election, and it is further

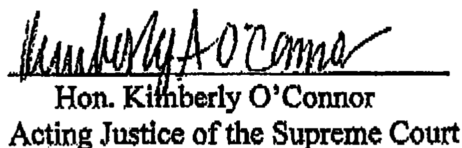
ORDERED, that the motion to dismiss by respondent Office of General Services is hereby granted.

This shall constitute both the decision and judgment of the Court. All papers, including this decision and judgment, are being returned to the attorneys for petitioner. The signing of this decision and judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

SO ADJUDGED.

ENTER.

Dated: February 4, 2008
Albany, New York



Hon. Kimberly O'Connor
Acting Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause dated January 28, 2008; Petition verified January 28, 2008;
2. Notice of Motion dated January 31, 2008;
3. Affidavit of Michele M. Reale, Esq. sworn to January 30, 2008 with Exhibits A and B annexed;

4. Answer of respondents Commissioners Kelleher and Donohue verified January 31, 2008;
5. Affirmation of Allison M. Carr, Esq. dated January 31, 2008;
6. Answer of respondents Commissioners Kellner and Aquila verified January 31, 2008 with Exhibit A annexed;
7. Affidavit of Douglas A. Kellner sworn to January 31, 2008 with Exhibits A-C annexed;
8. Affidavit of Robert E. Warren sworn to February 1, 2008.

Exhibit B

-2-

NEW YORK SUPREME COURT – ALBANY COUNTY

Art. 78 Part __

Present: HONORABLE KIMBERLY A. O'CONNOR
JUSTICE

---x

~~ELECTION SYSTEMS & SOFTWARE, INC.,~~
PREMIER ELECTION SOLUTIONS, INC

Petitioner, **Index No.** 923-08

For a Judgment Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules **ORDER**

- against -

Albany County Clerk
Document Number 10124522
Rcvd 02/06/2008 3:13:32 PM

NEW YORK STATE BOARD OF ELECTIONS, and NEIL W. KELLEHER, DOUGLAS A. KELLNER, HELENA MOSES DONAHUE, EVELYN J. AQUILA, as Commissioners of the New York State Board of Elections,

Respondents.

---x

ORDERED, that pursuant to Section 7805 of the New York Civil Practice Law and Rules pending the hearing of the petition filed in above-entitled proceeding:

(A) Respondents, their employees, and all persons acting in concert with them or on their behalf, are stayed from enforcing the decision appealed from in this proceeding as set forth in the January 29, 2008 letter, from the New York State Board of Elections Co-Executive Directors to the County Boards of Elections finding Petitioner's AutoMARK ballot marking device non-compliant with the New York Election Law ballot display provisions and the Sequoia Image Cast the sole choice for purchase by county boards of elections, and pending the outcome of the litigation in this matter, the Petitioner's AutoMARK ballot marking device, as modified, is to be included in the list of Ballot Marking Device Systems that the County Boards of Elections may rank their selections for the February 8, 2008 submissions to the NYS Office of General

00370473

(B) New York State's county boards of election, and each of them, including the New York City Board of Elections, their officials, employees, and all persons acting in concert with them or on their behalf, are stayed from choosing a ballot marking device vendor until further order of this Court, and it is further

ORDERED, that Respondents shall forthwith furnish New York State's county boards of elections with a copy of this Order, and it is further

ORDERED, that Respondents shall take all actions necessary to extend the deadline for the county boards of elections to choose a ballot marking device vendor, which presently is set for February 8, 2008, until this Court shall decide the merits of the Verified Petition filed herein and direct the entry of Judgment upon said petition, and it is further

ORDERED, that respondents' answering papers, if any, shall be served upon petitioner by delivery to its attorneys, James E. Long & Associates, at their offices located at 668 Central Avenue, Albany, New York, 12206, and Davidoff Malito & Hutcher LLP, at their offices located at 605 Third Avenue, New York, New York 10158, on or before the ___ day of February, 2008.

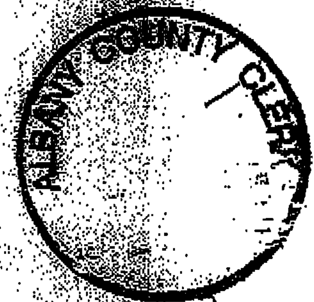
ENTER:

Justice of the Supreme Court

At a term of the Supreme Court held in and for the County of Albany at the Albany County Courthouse, Eagle Street, Albany, New York on the 6th day of February, 2008.

PRESENT:

HON. KIMBERLY O'CONNOR,
Acting Justice.



AVANTE INTERNATIONAL TECHNOLOGY, INC.,

Petitioner,

-against-

NEW YORK STATE BOARD OF ELECTIONS and DOUGLAS A. KELLNER, EVELYN J. AQUILA, NEIL W. KELLEHER and HELENA MOSES DONOHUE, SAID COMMISSIONERS TOGETHER CONSTITUTING THE NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

ORDER TO SHOW CAUSE

Index No. 1655-08

Upon reading and filing the verified petition of Avante International Technology, Inc. ("Avante"), and all the proceedings heretofore had herein, it is hereby

ORDERED, that respondents show cause before this Court at the Albany County Courthouse, in the City and County of Albany, New York on the 11th day of February, 2008 at 1:30 p.m. of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein:

1. Directing that respondents take any and all actions necessary to approve and otherwise permit petitioner Avante's three machines (EVC 308 SPR-BMD; EVC 308 FF42; EVC 308-FF-BMD) to be among those ballot marking devices that were approved by respondents on January 24, 2008 to be examined and included for the vendor selection process for 2008 elections including primaries in the State of New York, and/or

2. Restraining the respondents until further order of this Court from taking any action, including but not limited to issuing list(s) of ballot marking devices approved by respondents to be examined and included in the final vendor selection process for the 2008 elections, including primaries in the State of New York, and

3. Directing the respondents to immediately distribute all petitioner's bid information, including but not limited to petitioner's offered systems and price information, to all County boards of elections, relevant to support the selection of their preferred Ballot Marking Device for use in the 2008 elections, and

4. Directing the Office of General Services to forward to the Office of the State Comptroller a contract for petitioner Avante's machine in accordance with proper procedures, and

5. Granting such other and further relief as to the Court may seem just and proper, and it is further

ORDERED, that respondents are to produce upon the return date of this proceeding any and all original determinations, certifications, resolutions, minutes, audio and video recordings, reports and records of any kind of or relating to respondents' meetings and determinations concerning the subject matter of this proceeding, and it is further

ORDERED, that leave is hereby granted to petitioner upon the return date of this proceeding or any adjourned date thereof to submit such additional proof by way of affidavits, exhibits or other evidence in support of the petition, and it is further

ORDERED, that until further Order of this Court respondents shall include petitioner Avante's ~~three~~ machines ~~(EVC 308 SPR BMD, EVC 308 FF42, EVC 308-FF-BMD)~~ on the approved list of ballot marking devices to be tested for use in the 2008 elections including primaries in New York State and the County Boards of Elections shall be notified of this by email immediately.

~~**ORDERED,** that respondents shall suspend for one week, until February 15, 2008, the Board's certification of the list of machines available for purchase by the counties.~~

Sufficient cause appearing therefor, it is further

ORDERED, that service of this Order to Show Cause and the Petition upon which it was granted upon respondents New York State Board of Elections and Commissioners Douglas A. Kellner, Evelyn J. Aquila, Neil W. Kelleher and Helena Moses Donohue, be made by delivering a copy thereof to the New York State Board of Elections, 40 Steuben Street, Albany, New York, and giving such papers to a person authorized to accept such papers on behalf of said New York State Board of Elections on or before February 7, 2008, and upon respondent New York State Office of General Services by delivering a copy thereof to the New York State Attorney General's Office in Albany, New York on or before February 7, 2008; and that such service shall constitute good and sufficient service of the within proceeding.

Signed this 11th day of February 2008 at Albany, New York.

[signature]

Hon. Kimberly O'Connor
Acting Justice of the Supreme Court

NEW YORK SUPREME COURT – ALBANY COUNTY

Art. 78 Part __

Present: HONORABLE KIMBERLY A. O'CONNOR
JUSTICE

---x

ELECTION SYSTEMS & SOFTWARE, INC.,

Petitioner, **Index No. 954/08**

For a Judgment Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules **ORDER**

- against -

NEW YORK STATE BOARD OF ELECTIONS, and NEIL W. KELLEHER, DOUGLAS A. KELLNER, HELENA MOSES DONAHUE, EVELYN J. AQUILA, as Commissioners of the New York State Board of Elections,

Respondents.

---x

ORDERED, that pursuant to Section 7805 of the New York Civil Practice Law and Rules pending the hearing of the petition filed in above-entitled proceeding:

(A) Respondents, their employees, and all persons acting in concert with them or on their behalf, are stayed from enforcing the decision appealed from in this proceeding as set forth in the January 29, 2008 letter, from the New York State Board of Elections Co-Executive Directors to the County Boards of Elections finding Petitioner's AutoMARK ballot marking device non-compliant with the New York Election Law ballot display provisions and the Sequoia Image Cast the sole choice for purchase by county boards of elections, and pending the outcome of the litigation in this matter, the Petitioner's AutoMARK ballot marking device, as modified, is to be included in the list of Ballot marking device systems that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of

(B) New York State's county boards of election, and each of them, including the New York City Board of Elections, their officials, employees, and all persons acting in concert with them or on their behalf, are stayed from choosing a ballot marking device vendor until further order of this Court, and it is further

ORDERED, that Respondents shall forthwith furnish New York State's county boards of elections with a copy of this Order, and it is further

ORDERED, that Respondents shall take all actions necessary to extend the deadline for the county boards of elections to choose a ballot marking device vendor, which presently is set for February 8, 2008, until this Court shall decide the merits of the Verified Petition filed herein and direct the entry of Judgment upon said petition, and it is further

ORDERED, that respondents' answering papers, if any, shall be served upon petitioner by delivery to its attorneys, James E. Long & Associates, at their offices located at 668 Central Avenue, Albany, New York, 12206, and Davidoff Malito & Hutcher LLP, at their offices located at 605 Third Avenue, New York, New York 10158, on or before the ___ day of February, 2008.

ENTER:

[signature] 2/6/08

Justice of the Supreme Court

00370473

Exhibit C

Mike Mackey

From: Robert F. Witko [rwitko@libertyelectionsystems.com]
Sent: Wednesday, February 06, 2008 5:55 PM
To: Mike Mackey; Dan Centi; 'John Cordo'
Subject: FW: List of ballot marking devices

Looks like NYSBOE/Judge punted

--Original Message-----
From: Lew Sanders [mailto:lsander3@nycap.rr.com]
Sent: Wednesday, February 06, 2008 5:50 PM
To: Rfwitko@aol.com
Subject: FW: List of ballot marking devices

-----Original Message-----
From: TODD VALENTINE [mailto:TVALENTINE@elections.state.ny.us]
Sent: Wednesday, February 06, 2008 5:30 PM
Cc: ALLISON CARR; ANNA SVIZZERO; Douglas Kellner; ELIZABETH HOGAN; LEE DAGHLIAN; PAUL COLLINS; ROBERT BREHM; STAN ZALEN
Subject: List of ballot marking devices

Dear County Boards,

ES&S

ES&S has brought litigation against the New York State Board of Elections and its Commissioners. Pursuant to a Court Order issued today, please be advised that pending the outcome of the litigation in this matter, the Petitioners AutoMark ballot marking device, as modified, is to be included in the list of ballot marking devices that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services.

PREMIER

Premier has brought litigation against the New York State Board of Elections and its Commissioners. Pursuant to a Court Order issued today, please be advised that pending the outcome of the litigation in this matter, the Petitioners AutoMark ballot marking device, as modified, is to be included in the list of ballot marking devices that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services.

AVANTE

Avante has brought litigation against the New York State Board of Elections and its Commissioners. Pursuant to a Court Order issued today, please be advised that pending the outcome of the litigation in this matter, the Petitioners Avante EVC 308-FF-BMD (the 42" touchscreen DRE) ballot marking device is to be included in the list of ballot marking devices that the County Boards of Elections may rank their selections for February 8, 2008 submissions to the NYS Office of General Services.

Sincerely,

Stanley Zalen,
Co-Executive Director

Todd Valentine,
Co-Executive Director