

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

**PREMIER ELECTION SOLUTIONS, INC.,
ET AL.**

Plaintiffs,

v.

**BOARD OF ELECTIONS OF CUYAHOGA
COUNTY, ET AL.,**

Defendants.

CASE NO. 08-CV-05-7841

JUDGE CHARLES A. SCHNEIDER

JURY DEMAND ENDORSED HEREON

**SECRETARY OF STATE JENNIFER
BRUNNER**

COUNTERCLAIM PLAINTIFF

v.

**PREMIER ELECTION SOLUTIONS, INC.
1611 WILMETH ROAD
McKINNEY, TEXAS 75069**

AND

**DIEBOLD, INCORPORATED
5995 MAYFAIR ROAD
NORTH CANTON, OHIO 44720**

AND

**DATA INFORMATION MANAGEMENT
SYSTEMS, INC.
3001 DOUGLAS BLVD., SUITE 306
ROSEVILLE, CA 95661**

AND

**BELMONT COUNTY BOARD OF
ELECTIONS
C/O WILLIAM F. SHUBAT, DIRECTOR
103 PLAZA DRIVE, SUITE B
ST. CLAIRSVILLE, OH 43950**

AND

**BUTLER COUNTY BOARD OF
ELECTIONS
C/O BETTY L. McGARY, DIRECTOR
315 HIGH STREET, SUITE 1050
GOVERNMENT SVC. BUILDING
HAMILTON, OHIO 45011-6016**

AND

**CUYAHOGA COUNTY BOARD OF
ELECTIONS
C/O JANE PLATTEN, DIRECTOR
2925 EUCLID AVENUE
CLEVELAND, OHIO 44115-2497**

AND

**GREENE COUNTY BOARD OF
ELECTIONS
C/O TRACY K. SMITH, DIRECTOR
651 DAYTON-XENIA ROAD
XENIA, OHIO 45385**

AND

**GUERNSEY COUNTY BOARD OF
ELECTIONS
C/O SANDRA K. MILLER, DIRECTOR
627 WHEELING AVENUE, SUITE 101
CAMBRIDGE, OHIO 43725**

AND

**HENRY COUNTY BOARD OF
ELECTIONS
C/O GRACE E. SPEISER, DIRECTOR
1813 OAKWOOD AVENUE
NAPOLEAN, OHIO 43545**

AND

**JEFFERSON COUNTY BOARD OF
ELECTIONS
C/O DIANE M. SHIMP, DIRECTOR
117 NORTH THIRD STREET
STEUBENVILLE, OHIO 43952-4499**

AND

**LUCAS COUNTY BOARD OF
ELECTIONS
C/O DANIEL PILROSE, JR., DIRECTOR
ONE GOVERNMENT CENTER,
SUITE 300
TOLEDO, OHIO 43604**

AND

**MIAMI COUNTY BOARD OF
ELECTIONS
C/O L. STEVEN QUILLEN, DIRECTOR
215 WEST MAIN STREET,
COURTHOUSE
TROY, OHIO 45373**

AND

**MONTGOMERY COUNTY BOARD OF
ELECTIONS
C/O STEEVEN P. HARSMAN, DIRECTOR
451 WEST THIRD STREET
DAYTON, OHIO 45481-8705**

AND

**STARK COUNTY BOARD OF
ELECTIONS
C/O JEANETTE MULLANE, DIRECTOR
201 THIRD STREET NE
CANTON, OHIO 44702-1296**

AND

**OHIO ASSOCIATION OF ELECTION
OFFICIALS
C/O JODY BEALL O'BRIEN
1421 HURD AVENUE
FINDLAY, OHIO 45840**

**COUNTERCLAIM DEFENDANTS
AND CROSS CLAIM DEFENDANTS**

**CROSS CLAIM AND FIRST AMENDED COUNTERCLAIM OF
OHIO SECRETARY OF STATE JENNIFER BRUNNER**

1. Counterclaimant and Counterclaim Plaintiff Jennifer Brunner is Ohio's Secretary of State and, pursuant to Ohio Revised Code Title 35 and other titles of the Ohio Revised Code, is vested with the statutory powers and duties of that office including, but not limited to, the elections duties specifically set forth in R.C. 3501.05.
2. Secretary of State Brunner brings this cause of action for breach of contract, breach of warranty, fraud in the inducement, and declaratory judgment to establish the nonconformity to the Ohio Revised Code, including, but not limited to, the provisions of Title 35, of the products and services sold to the State of Ohio and the various counties of the State of Ohio by one or more or all of the Plaintiffs herein, pursuant to R.C. Chapter 2721.01, *et seq.*
3. Secretary of State Brunner further brings this cause of action for breach of contract and breach of warranty pursuant to common law and the Ohio Revised Code, including, but not limited to, the provisions of Title 35.

4. Counterclaim Defendant Premier Election Solutions, Inc. (“Premier”) is a Delaware Corporation with its principal place of business located in the State of Texas.
5. Counterclaim Defendant Diebold, Incorporated is an Ohio corporation with its principal place of business located in the State of Ohio. Premier is a subsidiary corporation of Diebold, Incorporated. Premier Election Solutions, Inc., its predecessor Diebold Elections Systems, Inc. (“DESI”), and Diebold, Incorporated shall be collectively referred to as “Diebold” or “DESI” in this counterclaim.
6. Counterclaim Defendant Data Information Management Systems, Inc. (“DIMS”) is a California corporation with its principal place of business located in California.
7. Cross-claim and Counterclaim Defendant Belmont County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Belmont County Board of Elections is a necessary party to this request for declaratory judgment because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Belmont County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).
8. Cross-claim and Counterclaim Defendant Butler County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Butler County Board of Elections is a necessary party to this request for declaratory judgment because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws.

Butler County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).

9. Cross-claim Defendant Cuyahoga County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Cuyahoga County Board of Elections is a necessary party to this request for declaratory judgment because the equipment it received from the Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Cuyahoga County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).
10. Cross-claim and Counterclaim Defendant Greene County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Greene County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Greene County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).
11. Cross-claim and Counterclaim Defendant Guernsey County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Guernsey County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Guernsey County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).

12. Cross-claim and Counterclaim Defendant Henry County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Henry County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Henry County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).
13. Cross-claim and Counterclaim Defendant Jefferson County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Jefferson County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Jefferson County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).
14. Cross-claim and Counterclaim Defendant Lucas County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Lucas County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Lucas County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).
15. Cross-claim and Counterclaim Defendant Miami County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06.

Miami County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws.

Miami County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).

16. Cross-claim and Counterclaim Defendant Montgomery County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Montgomery County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Montgomery County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).

17. Cross-claim and Counterclaim Defendant Stark County Board of Elections is an Ohio county board of elections organized and authorized pursuant to R.C. 3501.06. Stark County Board of Elections is a necessary party to this request for declaratory relief because the equipment it received from Counterclaim Defendant Diebold has failed to perform in accordance with both contractual terms and applicable laws. Stark County Board of Elections is added to this litigation under Ohio R. Civ. P. 13(H).

18. Cross-claim and Counterclaim Defendant Ohio Association of Election Officials (“OAEO”) is an Ohio nonprofit corporation with its principal place of business in Findlay, Hancock County, Ohio, according to its most recent Statement of

Continued Existence filed in the office of the Secretary of State. OAEO is added to this litigation under Ohio R. Civ. P. 13(H).

19. The OAEO's stated purposes include "to establish and maintain uniformity and certainty in the customs of the various Boards of Election [sic] and the interpretation of the laws of Ohio relating to elections . . ." and in its articles of incorporation specifically names "Members, Directors and Deputy Directors" of boards of elections as the participants in, and some of the beneficiaries of, the nonprofit corporation's activities.
20. The OAEO, through its members and/or representatives and agents, participates in legislative advocacy and lobbying before the Ohio General Assembly, and/or its individual members, on topics regarding the conduct of Ohio elections. The OAEO has filed with the Joint Legislative Ethics Committee one or more statements indicating it has employed one or more agents on its behalf to lobby the Ohio General Assembly on its behalf. In addition, individual members who are directors, deputy directors or members of boards of elections testify before the Ohio General Assembly on behalf of the OAEO.
21. The OAEO, through its members and/or representatives, has advocated and lobbied for and against the adoption of laws before the General Assembly, and/or its individual members, on topics including, but not limited to, voting systems for use in Ohio elections.
22. The OAEO participated in legislative advocacy before the General Assembly, and/or its individual members, regarding the implementation of voting systems that comply with HAVA. Specifically, the OAEO worked with the General Assembly

regarding the adoption of procedures for the certification and implementation of Direct Recording Electronic (“DRE”) voting machines and other voting equipment in Ohio.

23. Counterclaim Defendant OAEO is a necessary party to this request for declaratory judgment because R.C. 2721.12 requires that “all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding.” The requirements of Ohio law relating to the performance and operation of voting systems in the State of Ohio have been affected by the lobbying activities of the OAEO, and such activity is expected to continue, since its members are responsible for operating and maintaining voting systems on behalf of Ohio’s voters. Further, at least half of the state’s counties utilize systems received from Diebold, which equipment has failed to perform in accordance with both contractual terms and applicable laws, and the OAEO’s members will necessarily be affected by the court’s declaratory judgment interpreting all relevant contracts regarding the state’s voting systems received from Diebold.
24. This Court has jurisdiction over this counterclaim pursuant to R.C. Chapters 2721, 3505, and 3506, as well as pursuant to the Ohio Rules of Civil Procedure.
25. Venue for this counterclaim is proper in the Franklin County Common Pleas Court under Civil Rules 3 and 4.3 of the Ohio Rules of Civil Procedure.
26. An actual case or controversy exists between Counterclaim Plaintiff Secretary of State Brunner and the counterclaim defendants, which is justiciable in character, and a legal determination of this controversy is necessary in order to preserve the legal rights of all parties.

27. A declaratory judgment will resolve the dispute between the original parties to this action as well as determine the rights of the Secretary of State and named boards of elections and other boards represented by the OAEO under all relevant contracts regarding the state's voting systems received from Diebold and under the facts and laws in question; a finding of breach of contract or failure to comply with applicable laws by Diebold and/or DIMS, with its resultant damages, will serve to protect the rights of the Ohio Secretary of State and boards of elections who have utilized Diebold and/or DIMS systems, all on behalf of the State of Ohio and its citizens and will aid in ensuring the integrity of elections in the State of Ohio.
28. To the extent that any exist, Secretary of State Brunner has performed all conditions precedent to be performed by her and as required by the contracts as are hereafter described and are collectively referred to as "the Contracts."

FACTS

29. During the 2004 presidential general election, approximately 75% of the voters in the State of Ohio voted on punch card voting systems.
30. The State of Ohio agreed to accept federal funds, pursuant to the Help America Vote Act, 42 U.S.C. 15301, et seq. ("HAVA"), in part to modernize its voting machine technology.
31. After the passage of HAVA, the State of Ohio adopted legislation to bring the State into compliance with the federal statutory requirements as set forth in HAVA and other relevant federal law.
32. In order to participate in this federal program, the State of Ohio also agreed to fund a portion of the cost of new voting machines.

33. In order to comply with the requirements of purchasing new voting machines to replace punch cards in the State of Ohio, Secretary of State Brunner's predecessor issued a request for proposal ("RFP") to various manufacturers of voting machines.
34. Premier's predecessor, DESI, responded to the State's request for proposal.
35. DESI was one of three manufacturers who had successfully submitted a bid under the RFP to be eligible to sell new voting machines to Ohio under HAVA.
36. In July 2004, DESI and the Secretary entered into an Agreement for Acquisition of Voting Systems and Related Services (the Master Contract") which would allow the various county boards of elections in the State of Ohio to select DESI as their vendor. A copy of the Master Contract is attached to the Plaintiffs' complaint as Exhibit A.
37. On information and belief, Counterclaim Defendant Diebold engaged in activities to encourage the previous administration in the secretary of state's office to certify and county boards of elections to select Diebold voting systems, including making false representations and promises concerning the capabilities and performance of Diebold voting equipment.
38. On information and belief, Counterclaim Defendant Diebold represented to the previous administration in the secretary of state's office and county boards of elections that Diebold computerized voting equipment was based on sound and reliable computer engineering and programming, including sound source code, and was therefore capable of accurately recording and tabulating votes without computer stoppages, delays, internal conflicts, or other computer-based defects. These representations were made to induce the previous administration in the secretary of

state's office to certify, and county boards of elections to select, Diebold voting systems as HAVA-funded replacements for prior voting systems.

39. Counterclaim Defendant Diebold knew at the time these representations were made that Diebold computerized voting systems were built on outdated and inadequate computer code and engineering standards and were likely to produce computer stoppages, delays, internal conflicts, or other computer-based defects.

40. On information and belief, Counterclaim Defendant Diebold represented to the previous administration in the secretary of state's office and county boards of elections that Diebold computerized voting equipment was secure and not easily subject to computer attacks by outside entities or individuals desiring to interfere with the efficient and accurate administration of elections.

41. Counterclaim Defendant Diebold knew at the time these representations were made that Diebold computerized voting systems were vulnerable to hacking, tampering, and other attacks by outside entities or individuals desiring to interfere with the efficient and accurate administration of elections.

42. On information and belief, Counterclaim Defendant Diebold represented to the previous administration in the secretary of state's office and county boards of elections that board staff would easily be trained to program Diebold voting systems for elections and to otherwise administer Election Day activities, including tabulation.

43. Counterclaim Defendant Diebold knew at the time these representations were made that many counties in Ohio would require the assistance of retained computer consultants to assist them in programming Diebold voting systems for elections and to otherwise administer Election Day activities, including tabulation. Counterclaim

Defendant Diebold further knew that these professional consultants would create an ongoing expense to counties in administering elections so long as the Diebold voting systems were used.

44. Defendant Diebold provides, at separate cost to counties, professional consulting services to assist in the programming of Diebold voting systems to administer Election Day activities.
45. On information and belief Counterclaim Defendant Diebold engaged in activities to encourage the previous administration in the secretary of state's office to certify and county boards of elections to select Diebold voting systems, including providing individuals associated with county boards of elections things of value during the period of time those same individuals were considering and choosing the voting system to be purchased using HAVA funds supplied by the office of Secretary of State.
46. Under the terms of the Master Contract, the various counties that selected DESI as their vendors were declared to be third-party beneficiaries.
47. DIMS and county boards of elections entered into various limited licensing agreements. A representative sample of those agreements is attached to the Plaintiffs' complaint as Exhibits B, C, D, and J.
48. In June 2005, DESI and Secretary of State Brunner's predecessor entered into an amendment to the Master Contract. A copy of that amendment is attached to the Plaintiffs' complaint as Exhibit E.
49. In November 2005, Secretary of State Brunner's predecessor and 48 county boards of elections submitted purchase orders to DESI under the Master Contract for

the purchase of Direct Recording Electronic (“DRE”) voting machines and other equipment. These contracts were funded by money made available by the federal government under HAVA, by the State’s funding in order to participate in HAVA, and by funds supplied by the various county signors to these purchase orders. A sample of one of these purchase orders is attached to the Plaintiffs’ complaint as Exhibit F. The other purchase orders are already in the possession of the Plaintiffs.

50. The following Ohio counties submitted purchase orders for Diebold DRE equipment for their county boards of elections to conduct elections in their counties: Adams, Ashland, Belmont, Butler, Carroll, Coshocton, Crawford, Cuyahoga, Darke, Defiance, Fairfield, Fulton, Gallia, Greene, Guernsey, Hancock, Hardin, Harrison, Henry, Highland, Hocking, Holmes, Huron, Jackson, Jefferson, Licking, Lorain, Lucas, Marion, Medina, Mercer, Miami, Montgomery, Morgan, Morrow, Muskingum, Paulding, Perry, Pike, Portage, Richland, Scioto, Stark, Trumbull, Tuscarawas, Van Wert, Wayne, Wood.

51. The previous administration in the secretary of state’s office certified, and county boards of elections chose Diebold voting systems as their primary voting system to be purchased using HAVA funds, in reliance on the false representations made by Counterclaim Defendant Diebold.

52. The secretary of state and the boards of elections have suffered financial damages in that elections using Diebold systems have proven vastly more expensive, and required significant and excess expenditures for technical operations and support to maintain the statewide voter registration database, prepare elections ballots and administer election day activities, including tabulation of votes cast.

53. Diebold and various boards of elections entered into a sole source agreement in order for Diebold to supply specific equipment to the counties. A copy of this agreement is attached to the Plaintiffs' complaint as Exhibits G, I, K, L, M, N, and S.
54. In March 2006, Diebold and its insurance companies executed a performance bond to serve as security for Diebold's performance under its contracts. A copy of a representative sample of that bond is attached to the Plaintiffs' complaint as Exhibit H.
55. Diebold and the various counties entered into an agreement for the allocation of additional equipment and related services. These contracts expressly incorporated the terms of the Master Contract. A representative sample of these contracts is attached to the Plaintiffs' complaint as Exhibit O.
56. Diebold and various county boards of elections entered into agreements for election technicians professional training programs. A representative sample of these contracts is attached to the Plaintiffs' complaint as Exhibit P and Q.
57. Diebold and the various county boards of elections entered into contracts for amended poll worker technical training programs. A representative sample of that contract is attached to the Plaintiffs' complaint as Exhibit R.
58. Diebold and boards of elections entered into contracts for additional election media processors. A representative sample of that contract is attached to the Plaintiffs' complaint as Exhibit T.
59. Diebold and various county boards of elections entered into evaluation agreements for various goods and services. Representative samples of those contracts are attached to the Plaintiffs' complaint as Exhibits U, V, and W.

60. Diebold and various boards of elections entered into a voting system rental license and service agreement in order to allow county boards of elections to rent various equipment. Representative samples of those contracts are attached to the Plaintiffs' complaint as Exhibits X, Y, Z, and AA.
61. Premier and its insurance companies executed a performance bond as security for Premier's compliance with its contractual obligations. A representative sample of that bond is attached to the Plaintiffs' complaint as Exhibit H.
62. All of these various agreements are collectively referred to as the "Contracts."
63. As a part of the contracts, various county boards of elections purchased computer servers (commonly referred to as "the GEMS Servers") from Diebold that were manufactured by Dell. These servers are covered under the terms of the contracts with Diebold.
64. Under the terms of the contracts, the computer servers were to be under warranty by Diebold for five years.
65. Despite the requirement that these servers be warranted by Diebold for five years, Diebold is now claiming that the warranty was only effective for three years and has expired.
66. The Contracts included provisions requiring Counterclaim Defendant Diebold to provide training to boards of elections to allow boards of elections to independently run elections, yet many boards of elections using Diebold voting systems remain heavily dependent on Diebold for professional services at great expense to the counties and at great financial benefit to Diebold.

67. The voting machine equipment, including hardware and software, and other goods and services supplied by Diebold, DESI, and/or DIMS is deficient and has failed to perform as required by the Contracts or applicable law.
68. These deficiencies include, but are not limited to, the failure of the voting machine systems to function properly. For example, Diebold, DESI, and/or DIMS had previously advised counties that it would be possible to upload results from up to 50 AccuVote-TSX voting machines to the GEMS Server at the same time using Secure Sockets Layer (“SSL”) connections. The Diebold defendants have, in response to problems encountered by jurisdictions following that recommendation, reduced that number on multiple occasions and now recommend uploading results from only 20 AccuVote-TSX voting machines at the same time using SSL connections. Attached to this Complaint as Exhibit A.
69. During the 2007 general election, Cuyahoga County connected approximately 40 TSX’s together to use them to upload results from individual memory cards storing votes from the precincts into the server. Despite the fact that Cuyahoga County had complied with the technical specifications as supplied by Counterclaim Defendants Diebold, DESI, and/or DIMS, the GEMS server software crashed twice, the first time after about 30 minutes, during vote tabulation of the unofficial results for the November 2007 general election, with an approximate county voter turnout of 15%.
70. The Counterclaim Defendants Diebold, DESI, and/or DIMS had placed a technical representative at the Cuyahoga County Board of Elections on election night of 2007.

71. Counterclaim Defendants' technical representative was unable to give a proper diagnosis as to why the system crashed or to cause it to function properly.
72. After the system was rebooted and began working again, it crashed a second time.
73. Again the Counter Defendants' representative was unable to properly diagnose the problem with the system, which again had to be rebooted and verified to account for all uploaded votes and which finally tabulated votes for the low turnout election after midnight.
74. The Master Contract contains a warranty that the goods and services shall meet specific hardware and software requirements, including those set forth in Schedule A to the Master Contract and the requirements of Ohio Revised Code Section 3506.10.
75. The Master Contract contains a warranty, set forth in Schedule C, that the Counter Defendants shall provide software upgrades to repair defects in the system at no charge to the using entities or the State of Ohio.
76. Upon information and belief, the goods and services, including hardware and software, and other goods and services supplied to the State of Ohio and various counties through the Contracts have failed to perform adequately, as warranted, or in compliance with Ohio law.
77. Counterclaim Plaintiff Secretary of State Brunner has learned that Diebold equipment supplied to Belmont, Butler, Cuyahoga, Greene, Guernsey, Henry, Jefferson, Lucas, Miami, Montgomery, and Stark counties pursuant to the Master Contract have failed to properly register and tabulate votes.

78. Upon information and belief, similar deficiencies in equipment, hardware, and software manufactured and/or provided by Diebold, DESI, and/or DIMS have also occurred in states other than Ohio.
79. R.C. Chapter 3506 mandates that any voting system used in the State of Ohio must properly and accurately record all votes cast on the voting machine in order for that machine to be legally used in the State of Ohio.
80. The requirement that a voting system properly and accurately record all votes and successfully tabulate a legally cast vote is a requirement of Ohio law as well as a basic expectation of any Ohio voter; it is essential to maintain voter confidence and thus participation in our United States form of democracy.
81. By the operation of Ohio law, it is a condition and central requirement of the Contracts that voting systems properly and accurately record and tabulate all votes, and meet other statutory criteria, even if not explicitly set forth in that contract.
82. In addition to the deficiencies set forth above, the goods and services, including, but not limited to, those described in Schedules A and C to the Master Contract, supplied by the Counterclaim Defendants Diebold, DESI, and/or DIMS under the terms of the Contracts do not meet the terms of the Contracts. For example, the voting systems are not properly secure and resistant to tampering.
83. For example, the Secretaries of State in Ohio, California and Colorado, have issued reports in which they have found security problems with the machines manufactured by the Counterclaim Defendants Diebold, DESI, and/or DIMS.
84. The State of California even decertified the DRE equipment manufactured by the Defendants from use in the State's elections.

85. When the State of Ohio and its various county boards of elections purchased DELL computer servers from the Counterclaim Defendant Diebold, those servers were warranted for five years.
86. Counterclaim Defendant Diebold now claims that the DELL computer servers were not separately warranted under the terms of the master contracts. As a result, a real controversy exists between all parties about whether the DELL computer servers are still under warranty from Diebold.
87. The State of Ohio was required to provide a state match of funds appropriated to the Secretary of State for the HAVA funds grant that was used at least in part by the state to perform acceptance testing of the Diebold systems and by the state to provide funds to counties to purchase Diebold systems, causing the State of Ohio to suffer financial damages.

COUNTERCLAIM COUNT ONE - BREACH OF WARRANTY

(Diebold Defendants Only)

88. Counterclaim Plaintiff Secretary of State Brunner incorporates each and every allegation as set forth in Paragraphs 1-87 of the Counterclaim by reference as if fully restated herein.
89. The defects and failures of the goods and services provided by Counterclaim Defendants Diebold and/or DESI constitute a breach of one or more the express warranties contained in the Contracts.
90. Counterclaim Defendants' breach(es) of their warranties has directly and proximately resulted in damages to Counterclaim Plaintiff.

COUNTERCLAIM COUNT TWO - BREACH OF CONTRACT

(Diebold Defendants Only)

91. Counterclaim Plaintiff Secretary of State Brunner incorporates each and every allegation as set forth in Paragraphs 1-90 of the Counterclaim by reference as if restated herein.
92. Counterclaim Plaintiff Secretary of State Brunner seeks a declaration concerning her rights, status, and other legal relationships under the Contracts on behalf of the voters of the State of Ohio.
93. The goods and services provided by the Counterclaim Defendants Diebold and/or DESI including hardware, software, and services under the Contracts, failed to conform to the requirements of the Contracts.
94. The Counterclaim Defendants Diebold and/or DESI have materially breached the terms of the Contracts.
95. Due to the breach caused by the Counterclaim Defendants Diebold and/or DESI the Secretary of State has no further obligations under the Contracts.
96. Premier and DESI have violated their obligations under the Contracts.
97. Diebold has violated its obligations under the Contracts.
98. Counterclaim Defendants' breach(es) of the Contracts has directly and proximately resulted in damages to Counterclaim Plaintiff.

COUNT THREE –
BREACH OF CONTRACT BY FAILING TO CONFORM TO OHIO LAW

(Diebold Defendants Only)

99. Counterclaim Plaintiff Secretary of State Jennifer Brunner incorporates by reference each and every allegation as set forth in Paragraphs 1-98 of the Counterclaim by reference as if fully restated herein.
100. The goods and services, including hardware, software, and related services supplied by Diebold under the terms of the Contracts violated the requirements of and remain noncompliant with Ohio law.
101. The goods and services, including hardware, software, and related services supplied by Diebold under the terms of the Contracts, violated the requirements of Ohio law.
102. The goods and services, including hardware, software, and related services supplied by Diebold and/or DESI under the terms of the Contracts violated the requirements of Ohio law.
103. The failures of the goods and services to conform to Ohio law constitute material breaches of the Contracts.
104. Counterclaim Defendants Diebold and/or DESI are financially liable to the State of Ohio and its counties for any and all monies expended under the terms of these contracts and an order rescinding these contracts.

COUNT FOUR – FRAUD IN THE INDUCEMENT

(Diebold Defendants Only)

105. Counterclaim Plaintiff Secretary of State Jennifer Brunner incorporates by reference each and every allegation as set forth in Paragraphs 1-104 of the Counterclaim by reference as if fully restated herein.
106. Counterclaim Defendant Diebold made actual or implied false representations concerning the capabilities and performance of Diebold voting equipment.
107. Counterclaim Defendant Diebold had a duty to disclose, but failed to disclose, or concealed, facts concerning the capabilities and performance of Diebold voting equipment that were material to the decisionmaking of the secretary of state in the prior administration in certifying, and to the county boards of elections in purchasing, Diebold voting systems.
108. Counterclaim Defendant Diebold had knowledge of the falsity of their representations concerning the capabilities and performance of Diebold voting equipment, or acted with recklessness or utter disregard for the truthfulness of their representations.
109. Counterclaim Defendant Diebold intended that the secretary of state in the prior administration and the county boards of elections would rely on Diebold's false representations to induce them to certify and purchase Diebold voting systems.
110. The secretary of state in the prior administration and the county boards of elections justifiably relied on the false representations made by Diebold.

111. The secretary of state in the prior administration and the county boards of elections suffered injury as a proximate result of their reliance on the false representations made by Diebold.

COUNT FIVE – DECLARATORY JUDGMENT

(All Defendants)

112. Counterclaim Plaintiff Secretary of State Jennifer Brunner incorporates by reference each and every allegation as set forth in Paragraphs 1-111 of the Counterclaim by reference as if fully restated herein.

113. Based upon the Counterclaim Defendants Diebold and DIMS' failure to supply goods and services, including hardware, software, and related services, Counterclaim Plaintiff Secretary of State Brunner is entitled to a declaration pursuant to R.C. Chapter 2721 that Counterclaim Defendants Diebold and DIMS breached the Contracts, and with specific declarations as follows:

- a. A declaration that the voting systems and equipment provided by Diebold and DIMS under the terms of the Contracts fail to conform to the requirements of those contracts;
- b. A declaration that the services provided by Diebold and DIMS under the terms of the Contracts fail to conform to the requirements of those Contracts;
- c. A declaration that Diebold and DIMS have breached their legal obligations under the terms of those Contracts;
- d. A declaration that the voting systems and related equipment, including both hardware and software, supplied by Diebold and DIMS, violate Ohio law and therefore violate the Contracts;

- e. A declaration that the voting systems and related equipment, including both hardware and software supplied by Diebold and DIMS, violate Ohio law even if Diebold and DIMS supplied a voting system that meets the terms of the contract.
- f. A declaration that Counterclaim Plaintiff is entitled to legal and equitable relief on behalf of the voters of the State of Ohio as a result of the Court's declarations;
- g. A declaration that Counterclaim Plaintiff is entitled to attorneys fees and costs in this matter;
- h. A declaration that Counterclaim Plaintiff is entitled to pre- and post-judgment interest in the statutory amount; and
- i. A declaration that Counterclaim Plaintiff is entitled to any other relief that the Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Counterclaim Plaintiff Jennifer Brunner prays for judgment in her favor and against all Counterclaim Defendants for the declarations set forth in Count Four, and specifically in paragraph 113, and

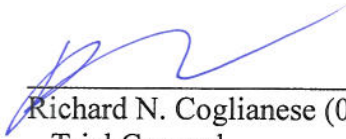
WHEREFORE, Counterclaim Plaintiff Jennifer Brunner further prays for judgment in her favor as against Counterclaim Defendants Diebold, Premier and DIMS as follows:

- a. For monetary damages in excess of \$25,000;

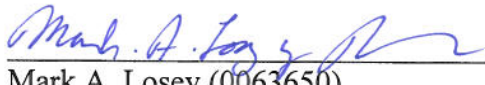
- b. For equitable relief, including specific performance, rescission of the Contracts, other preliminary or permanent injunctive relief, and/or such damages for which there is no adequate remedy at law;
- c. For attorneys fees and costs in defending this action and the bringing of this counterclaim;
- d. For pre and post-judgment interest in the statutory amount;
- e. For punitive damages in excess of \$25,000; and
- f. For any other relief the Court deems just and proper.

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio



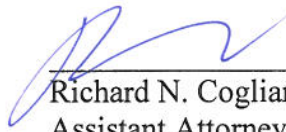
Richard N. Coglianese (0066830)
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Mark A. Losey (0063650)
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Business Counsel Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

JURY DEMAND

Counter Defendant Jennifer Brunner demands that all claims and issues be tried to a jury of 8 persons as provided for in Ohio R. Civ. P. 38.



Richard N. Coglianese
Assistant Attorney General

CERTIFICATE OF SERVICE

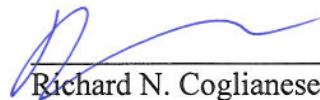
This is to certify a copy of this First Amended Counterclaim of Ohio Secretary of State Jennifer Brunner was served upon the following by US Mail, postage prepaid, on this 6th day of August, 2008:

Matthew A. Kairis
Michael R. Gladman
Daniel N. Jabe
Grant W. Garber
JONES DAY
PO Box 165017
Columbus, Ohio 43215-2673

Board of Elections of Cuyahoga County
c/o Cuyahoga County Prosecutor Bill Mason
Justice Center Building, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

Cuyahoga County
c/o Cuyahoga County Prosecutor Bill Mason
Justice Center Building, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

Board of County Commissioners of
Cuyahoga County
c/o Cuyahoga County Prosecutor Bill Mason
Justice Center Building, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113



Richard N. Coglianese

Product Advisory Notice

Product Type/Version:
GEMS version 1.18.25 and prior

Advisory #: PAN2008-003
Revision: 1.0
Date: 02-12-2008

Distribution:

- √ Premier Election Solutions Associates
- √ All customers

NOTE: The information contained in this document is for reference only. It is recommended that each jurisdiction consult with their state election authority in respect to applicable laws, regulations, procedures and other guidelines, which may impact how this information is used.

Summary: GEMS Intermittently Terminates During Results Uploads

Description:

There are 2 scenarios that have been found to cause the GEMS system to intermittently exit without warning. These scenarios are as follows:

1. Too many AccuVote®-TS, AccuVote-TSX, or EMP machines are uploading to the GEMS system simultaneously using SSL (Secure Sockets Layer) connections.
2. The AVServer console window in the GEMS system is closed at exactly the same time that an AccuVote-TS, AccuVote-TSX or EMP machine is starting to upload.

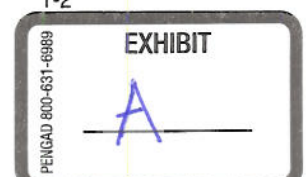
In either case, the AccuVote-TS, AccuVote-TSX, or EMP machines that were uploading at the time will receive an error message that the upload failed and will need to be re-uploaded.

NOTE: Results that were already uploaded are not lost. Results that were in the middle of being uploaded when this event occurred, may or may not have been successfully uploaded. It is recommended that these results be uploaded again once the GEMS system has been re-started. The GEMS software has control mechanisms in place such that the results from each memory card are only saved once. Therefore, it will not cause a problem to attempt to upload a memory card more than once.

Recommended Resolution(s):

Do not close the AVServer console window while machines are uploading results.

Reducing the number of machines which are simultaneously uploading to the GEMS system to less than either 20 AccuVote-TS's, or 20 AccuVote-TSX's, or 3 EMP's, helps mitigate this issue. This can greatly reduce the number of occurrences of the event, but



Product Advisory Notice

as with any networked communication system, additional system activity and the process flow used by the customer can affect this occurrence.

If the GEMS system exits unexpectedly, re-start GEMS and continue processing uploads. Restarting GEMS normally takes approximately one (1) minute and should only have minimal, if any impact on the overall election night processing time.

Technical Background:

The cause for the GEMS system to intermittently exit when too many devices are uploading simultaneously using SSL has been identified. The process of SSL authentication requires the use of shared resources on the GEMS system. When multiple connections are accessing these shared resources at the same time, this sometimes causes the GEMS system to exit. Newer versions of GEMS software have been changed to address this situation.

The cause for the GEMS system to intermittently exit when the AVServer console window is closed is still being investigated.