Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OHIO**
**WESTERN DIVISION**

| | | |
|---|---|---|
| League of Women Voters of Ohio, et. al.,<br><br>Plaintiffs,<br>and<br><br>Jeanne White,<br><br>Intervenor-Plaintiff,<br><br>v.<br><br>J. Kenneth Blackwell, Secretary of State of Ohio, et. al.,<br><br>Defendants. | ) | Case No. 3:05CV7309<br><br>Hon. James G. Carr<br><br>Richard M. Kerger (0015864)<br>Kimberly A. Donovan (0074726)<br>KERGER & ASSOCIATES<br>33 S. Michigan St., Suite 100<br>Toledo, Ohio 43602<br>Telephone: (419) 255-5990<br>Fax: (419) 255-5997<br><br>Cindy A. Cohn, Esq.<br>Matthew S. Zimmerman, Esq.<br>ELECTRONIC FRONTIER FOUNDATION<br>454 Shotwell Street<br>San Francisco, California 94114<br><br>*Counsel for Intervenor-Plaintiff* |

**INTERVENOR-PLAINTIFF WHITE'S MEMORANDUM IN SUPPORT OF HER MOTION TO LIFT THE DISCOVERY STAY AND FOR A PRESERVATION ORDER**

This case raises issues of crucial public importance to the exercise of democracy. Plaintiffs and Intervenor-Plaintiff Jeanne White seek prospective injunctive relief from Defendants' continuing violation of their constitutional right to vote. By this motion, the Intervenor-Plaintiff White asks the Court to order Defendants to preserve evidence from the 2004 Presidential election – namely voting machines, their contents, manuals, and other election-related information. The requested preservation order is identical to a preservation order requested in another case regarding the exact same evidence and which Defendant Blackwell did not oppose. If this evidence is not in fact preserved, Ms. White will be forever denied access to

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

critical evidence to prove that Defendants' maladministration of elections, with respect to electronic voting machines, violates her constitutional right to vote.

Ms. White also asks the Court to lift the stay of discovery entered on December 8, 2005, generally, and in particular, to permit discovery regarding voting machines before Defendants reuse the machines in the 2006 federal elections, the Ohio primary for which is scheduled for May 2006.

By way of background, Ms. White observes that subsequent to the Court's case management order of September 26, 2005, a significant amount of discovery took place involving initial disclosures, written interrogatories, document production requests, third party subpoenas, document production and depositions, all in anticipation of a June 2006 trial date.[1] (R.30, *Case Management Order*.) Ms. White, however, has not had the opportunity to participate in discovery subsequent to her November 2005 intervention as the Court, upon Defendants' request, stayed all discovery on December 8, 2005. (R.202, *Order*; R.215, *Order*.)

Defendants sought the stay on discovery following their unsuccessful attempt to dismiss Plaintiffs' Complaint and prevent Ms. White's intervention and upon filing a second round of motions to dismiss raising Eleventh Amendment immunity claims for the first time. The reasons the immunity defense will fail are clearly set forth in Plaintiffs' and in Ms. White's memoranda in opposition. (See R.226, R.227.) For the reasons set forth herein, and upon consideration of the entire case, the Court should enter a preservation order and resume discovery in this case.

---

[1] See R. 88, *Deposition of Charlene Dyson*; R.190, *Deposition of Mildred Casas*; R. 191, *Deposition of Dorothy Cooley*; R. 192, *Deposition of Sadie Rubin*; R. 26, N*otice of Service of Plaintiffs' Request for Production of Documents*; R.27, *Notice of Service of Initial Disclosures*; R. 29, *Notice of Service of First Set of Interrogatories; R.66*, *Notice of Service of Plaintiffs' Responses To Defendants First Set of Interrogatories and Request for Production of Documents*; R. 70, *Notice of Service of Discovery Responses To Defendants*, R. 73, *Notice of Service of Original Signature Page of Sadie Rubin's Responses to Defendants First Set of Interrogatories and Request for Production of Documents*; *R. 203, Notice of Service of Responses to Defendants' Third Set of Interrogatories and Requests for Production of Documents*.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

## I. A Preservation Order Should Issue.

The Federal Rules of Civil Procedure contemplate that evidence will be preserved and available for trial. Fed. R. Civ. P. 26; *Danis v. USN Communications, Inc.*, 53 Fed.R.Serv.3d 828 (N.D. Ill. 2000) (federal discovery rules imply a duty "to preserve documents and other information that may be relevant in a case.") In considering an order to preserve evidence, "[t]he reviewing court, as well as the parties, should be focused upon maintaining the integrity of the evidence in a form as close to, if not identical to, the original condition of the evidence." *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp*., 220 F.R.D. 429, 435 (2004). The court has broad discretion in determining whether to enter a preservation order and should do so upon a showing that equitable relief is warranted. *Madden v. Wyeth*, No. 3-03-CV-0167-R, LEXIS 6427, WL 21443404 (N.D Texas, April 16, 2003). [Attachment I.] This standard for a preservation order is easily met here inasmuch as Ms. White faces the destruction of evidence and irreparable harm if evidence is destroyed or otherwise tampered with before discovery. Furthermore, there is no demonstrable burden to a party.

It is important to note that Defendant Blackwell did not oppose the entry of a preservation order, identical to the one requested here, in another election matter before this Court, which involves the 2004 Presidential election and in which plaintiffs seek equitable relief. (*See Delaware County Prosecuting Attorney et al v. National Voting Rights Institute et al,* 3:05-cv-07286, Docket No. 33-34.)[2] In that case, evidentiary support for the requested preservation order, all of which Intervenor-Plaintiff hereby incorporates by reference, includes the destruction of evidence, the irreparable harm faced if evidence from the election and recount were destroyed

[2] Ms. White is a plaintiff in the companion and lead case, *Rios et al v. Blackwell*, 3:04-cv-07724, originally filed in the Southern District of Ohio (Columbus), 2:04CV1139.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

or otherwise tampered with before discovery and the absence of any burden to a party. Thus, the only thing yet to be done is the formal entry of the preservation order.[3]

## II. Discovery Should Go Forward Pending Consideration of Defendants' Immunity Defense

District courts have discretion and power to permit, limit or stay discovery while motions to dismiss are pending. *Hahn v. Star Bank,* 190 F.3d 708, 719 (6th Cir.1999). While valid, timely claims of qualified immunity may serve as a basis for staying discovery, "if the court finds that a defendant has failed to exercise due diligence or has asserted the defense for dilatory purposes," it may find that the defense has been waived. *English v. Dyke,* 23 F.3d 1086, 1090 (6th Cir. 1994). Specifically with regard to discovery, a defendant who fails to timely assert the defense prior to discovery may waive the right to avoid discovery," *Id.*

Here, Defendants raised their Eleventh Amendment defenses more than four months into this case and *after* they were able to take the depositions of four Plaintiffs and *after* receiving numerous documents and responses to interrogatories from the Plaintiffs. (See R.198; R. 213.) Defendants, who have made initial disclosures, but who have yet to respond to interrogatories or produce documents[4], should not be allowed to avoid discovery by raising eleventh hour, frivolous defenses.

---

[3] To show the Court the magnitude of the security, reliability, accuracy and other problems with electronic voting machines, Ms. White provides the Court with five bi-partisan or non-partisan blue ribbon reports on the subject: "Building Confidence in U.S. Elections" (known as the "Carter-Baker Report"), Report of the Commission on Federal Election Reform, http://www.american.edu/ia/cfer/report/full_report.pdf (2005); "Federal Efforts to Improve Security and Reliability of Electronic Voting Systems Are Underway but Key Actions Need To Be Completed," United States Government Accountability Office, Report to Congressional Requesters, GAO 05-956, http://www.gao.gov/new.items/d05956.pdf (2005); Congressional Research Service, "The Direct Recording Electronic Voting Machine (DRE) Controversy: FAQ's and Misperceptions, http://www.opencrs.com/rpts/RL33190_20051214.pdf (2005); ACCURATE, Public Comment on the 2005 Voluntary Voting Systems Guidelines, http://www.verifiedvotingfoundation.org/downloads/2005_vvsg_comment.pdf (2005); and Analysis of an Electronic Voting System, IEEE Symposium on Security and Privacy, http://avirubin.com/vote.pdf (2004).

[4] See R. 26, N*otice of Service of Plaintiffs' Request for Production of Documents*; R.27, *Notice of Service of First Set of Interrogatories; R.66*. In addition, the Plaintiffs served subpoenas on all 88 county boards of election

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

Moreover, Ms. White has a distinct and compelling additional reason that discovery should be allowed now – to avoid causing her irreparable injury. As declared by the Court of Appeals for the First Circuit, with respect to staying discovery on claim of immunity, "[t]here are powerful policy reasons why discovery should not be halted. Regardless of what happens to the damage claims in this case, the equitable requests stand on a different footing." *Cancel-Lugo v. Alvarado*, 114 F.3d 1169 (Table), 1997 WL 235489 (1st Cir. (Puerto Rico)), unpublished, *7, citing *Debasing v. Arnold*, 742 F.2d 401, 404 (8th Cir. 1984). [Attachment II.] "Even if we overlook considerations of efficient calendar management by the trial court, considerations which obviously are not to be slighted, this discovery should be carried out sooner rather than later, particularly where, as here, there are claims of irreparable injury." *Id.*

Ms. White is at substantial risk of irreparable injury in at least two ways. First and foremost, she has a constitutional right to vote, which she alleges Defendants are infringing, and each election that goes by means another election in which her voting rights will likely be violated irreparably. Thus, it is imperative that discovery not be stayed.

To make her case that Defendants are continuing to violate her right to vote by their maladministration of voting on electronic voting machines, Ms. White in particular requires access to the voting machines used in the 2004 Presidential election (including the machine that caused her vote to jump away from the candidate of her choice) before they are recalibrated and reused in future elections. As previously observed, the next federal election is only months away. A substantial risk exists that the recalibration and reuse of the voting machines will result

---

requesting documents related to the 2004 Presidential election and local procedures. See R. 73-74; R. 76-162. In response, 23 counties filed motions to quash, objections or motions for extension of time. See R.56-57, R. 52, R. 54-64, R.68-69, R. 72, R. 163, R. 169, R. 173, R.175, R. 177, R. 179, R. 181. See also R. 232, *Plaintiff's Discovery Status Report* filed on February 2, 2006.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

in evidence that would be helpful to Ms. White's case being lost. (*See Affidavit of Douglas W. Jones*, ¶19-20.) [Attachment III.]

Ms. White needs access to the electronic voting machines used in Mahoning County and elsewhere in Ohio in 2004 in a condition that is as close to the condition they were in on the Election Day as possible. In particular, Ms. White needs to determine why the "jumping screen" she experienced occurred and whether it was from poor screen calibration in the monitors, errors in the ballot mapping done prior to the election, bugs in the computer program or possible malicious activity.

At least following items will be needed for a review:

a. Any voting machines or tally machines used by Ms. White and others who reported the "jumping screen" problem in 2004. The purpose is to perform a number of tests, including: (1) a screen calibration test, and (2) a review of redundant memory, log files and registers inside voting machines to ensure that each memory bank is consistent with each other and with the totals reflected on the cartridges removed from the machine at the end of the election and that the log files and registers do not reflect any malicious or unexpected changes to the direct recording electronic (DRE) machines.

b. A complete voting machine set up as it was on election day, 2004, including hard drive, monitor, memory cards and smart cards used to activate the machines for voting and to store votes, as well as a complete vote tally system set up, to track the votes from the voter to the final tally report.[5]

c. Source code for the system and tally system so that its operation can be viewed and understood from "inside the machine" to watch for programming errors and malfunctions as well as signs of hacking or other manipulation.

d. Review of internal audit logs and machine registers, including both electronic voting machines and tally systems, from the date on which the ballot was finalized and sent to the publisher for the creation of absentee ballots in 2004

[5] Litigation arising from electronic voting machines across the country has been met with claims that trade secret or other law somehow prohibits any access to the internal systems of the voting machines. These claims have often delayed, or in some instances denied, access to voting machines. Plaintiffs hope that such claims will not be raised by the Defendants or any voting machine vendor here, but if so, they could result in even further delay of access to the voting machine information Ms. White requires in order to prove her case. Such issues should be raised, and if necessary, litigated now, so that discovery can proceed with reasonable speed.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

(usually 45 days prior to the election) to the date the election was certified. Especially important is review of network access logs.

e. The public counters and protective counters and the "end of the day" paper print out from each electronic voting machine in each precinct at the close of the polls, as well as the audit logs from each precinct.

In addition to access to the machines themselves, Ms. White's claims raise serious questions about the processes used to support the use of electronic voting machines in Ohio. (R. 46, *White Amended Complaint*, ¶ 23A.) She alleges that election workers are not given sufficient training on the use of the electronic voting machines, including processes and procedures for dealing with the machines that malfunction. She requires access to all of the procedures that applied in 2004, the training materials used by election officials, any reports from voters about problems in 2004 and 2005 elections, much of which could be destroyed or lost should discovery not resume now.

In sum, the next few months provide an important window in which to conduct the discovery into Ohio's voting machines before they are reset and deployed for the 2006 election. Delaying voting machine discovery will seriously jeopardize Ms. White's ability to prove her case. It will also ensure that Ohio voters obtain no relief prior to the November 2006 general election, and will likely delay relief until 2007 or beyond.

## III. DISCOVERY SHOULD GO FORTH EVEN IN THE EVENT THE DEFENDANTS' MOTION FOR AN INTERLOCUTORY APPEAL IS GRANTED.

The standards for granting any type of stay pending an appeal are the same as those for awarding injunctive relief. *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP,* 423 F.3d 539 (6th Cir. 2005). These factors include; (1) the appellants' likelihood of success on the merits; (2) whether the appellant could suffer irreparable harm if the stay is not granted; (3) whether granting the stay will cause substantial harm to others; and (4) the impact of the stay on

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

the public interest. *Golden v. Kelsey-Hayes Co*., 73 F.3d 648, 653 (6th Cir.1996). These factors must be balanced, as none of them standing alone is by itself a prerequisite to relief. *Id*. Here, the balance of the equities is absolutely against a stay, as none of these factors favor a stay. Accordingly, a request by Defendants for an interlocutory stay should be futile.

1. Defendants' Interlocutory Appeal Has No Likelihood Of Success.

In its Opinion and Order of December 2, 2005, this court ruled that Plaintiff's complaint stated valid equal protection and due process violations related to the Defendant's maintenance of statewide voting procedures. (See Order, R. 202.) In support of their request for an interlocutory appeal, the Defendants claim there is a substantial likelihood that the court's ruling will be reversed on appeal because "the attendant legal theories have not been tested in the Sixth Circuit." (R.229, *Response To Motion for Leave to File an Interlocutory Appeal,* p. 3.)

Not surprisingly, the Defendants do not identify which "attendant legal theories" have not been tested. Clearly, a citizen's right to vote is protected by both the Equal Protection and Due Process Clauses of the United States Constitution. Neither issue is untested in the Sixth Circuit nor presents a case of first impression. The District Court, in denying the Defendants' motion to dismiss, cited to a myriad of case law supporting the claims raised by the Plaintiffs. Ms. White submits that the Court will likewise reject Defendants' belated Eleventh Amendment defenses as wholly without merit. There is consequently no likelihood of Defendants prevailing on appeal.

2. Defendants Will Suffer No Harm if Discovery Proceeds.

As previously set forth, Defendants have already engaged in limited discovery. They have already taken depositions, provided initial disclosures, and fielded document requests. *See supra* at page 2. There is no harm in continuing this process, especially since there is little

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

chance the Defendants will prevail on appeal. Moreover, going forward with discovery now rather than later is in the best interests of Ohio's 88 Boards of Election that Defendants direct and supervise. If delayed, the discovery process could create disruption of the work of the Boards of Election in the critical weeks prior to a major election. Obviously such an outcome could and should be avoided by allowing discovery now.

3. A Discovery Stay Will Cause Great Prejudice to Plaintiffs and Intervenor-Plaintiff White.

As previously set forth, the upcoming elections make it imperative that the Plaintiffs and, in particular, Ms. White be permitted to proceed with discovery.

4. Public Interest Weighs in Favor of Continuing Discovery

The American public has a great interest in having its votes properly counted. Delay in initiating discovery until after the 2006 election will ensure that the ultimate relief in this case is delayed past that election into 2007, and possibly even beyond the 2008 Presidential election. Every election that passes without proper procedural protection for voters compounds the harm suffered by Ms. White, plaintiffs and all eligible voters in Ohio, due to poorly functioning technologies and inadequate supporting processes. The majority of Ohio voters are scheduled to vote on electronic voting machines in 2006.[6] Providing voters with constitutional voting processes in time for the next election is critical and that can only be accomplished if discovery goes ahead.

## III. Conclusion

[6] 54 of the 88 Ohio Boards of Election are currently reporting use of DREs: Adams, Ashland, Belmont, Butler, Carroll, Crawford, Cuyahoga, Darke, Defiance, Delaware, Fairfield, Franklin, Fulton, Gallia, Greene, Hancock, Hardin, Harrison, Henry, Highland, Hocking, Holmes, Huron, Jackson, Jefferson, Knox, Lake, Licking, Lorain, Lucas, Mahoning, Marion, Medina, Mercer, Miami, Montgomery, Morgan, Morrow, Muskingum, Paulding, Perry, Pickaway, Pike, Portage, Putnam, Richland, Ross, Stark, Trumbull, Tuscawaras, Union, Van Wert, Wayne, Wood. See http://www.yourvotecountsohio.org/default.asp?pageLoc=/general/map.html

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=9f51e6d7-fe1e-4236-ba37-3897220abb44

For the reasons stated, Ms. White respectfully requests that the stay placed upon discovery be lifted and a preservation order entered.

Respectfully submitted,

/s/ Richard M. Kerger
Richard M. Kerger (0015864)
Kimberly A. Donovan (0074726)
KERGER & ASSOCIATES
33 South Michigan Street, Suite 100
Toledo, Ohio 43602
Telephone: (419) 255-5990
Fax: (419) 255-5997

Cindy A. Cohn, Esq.
Matthew S. Zimmerman, Esq.
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, California 94114

*Counsel for Plaintiff-Intervenor*

Dated: February 3, 2006

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was electronically filed this 3rd day of February 2006. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Richard M. Kerger