



ALAMEDA COUNTY

APR 12 2007

CLERK OF THE SUPERIOR COURT

BY [Signature] DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

AMERICANS FOR SAFE ACCESS,
JAMES BLAIR, MICHAEL L.
GOODBAR, and DONALD O. TOLBERT,

Petitioners,

vs.

COUNTY OF ALAMEDA, BRADLEY
CLARK, Registrar of Voters for the
County of Alameda, and the
CITY OF BERKELEY,

Respondents.

RG04192053

ORDER GRANTING PETITIONERS'
MOTION FOR SUMMARY
ADJUDICATION, DENYING
RESPONDENTS' MOTION FOR
SUMMARY JUDGMENT AND
CONTINUING PETITIONERS'
MOTION FOR SANCTIONS

The motions of: (1) Respondents County of Alameda and Dave MacDonald ("the County") for Summary Judgment; (2) Petitioners Americans for Safe Access, James Blair, Michael L. Goodbar, and Donald O. Tolbert ("Petitioners") for Summary Adjudication, and (3) Petitioners for Sanctions all came on regularly for hearing on March 2, 2007, in Department 31 of this Court, the Honorable Winifred Y. Smith presiding. Petitioners appeared by counsel Gregory Luke of

APR 16 2007

Strumwasser & Woocher, LLP. The County appeared by counsel Jimmie Johnson and Charles H. Bell, Jr. of Bell, McAndrews & Hiltachk and Nancy E. Fenton, Alameda County Counsel. Respondent City of Berkeley did not appear.

The Court having considered the pleadings, admissible evidence¹ and arguments submitted in support of and in opposition to the motions, and good cause appearing, it is hereby ORDERED that:

1. The County's Motion for Summary Judgment is DENIED.
2. Petitioners' Motion for Summary Adjudication is GRANTED.
3. Petitioners' Motion for Sanctions is CONTINUED as set forth below.

The reasons follow.

SUMMARY OF FACTS

On November 2, 2004, there was an election that included a vote on Measure R, a City of Berkeley ballot measure. (Petitioners' Undisputed Material Facts ("PUMF") No. 1 and evidence cited therein.) The election was conducted, at least in part, using Diebold Accuvote-TS direct-recorded electronic ("DRE") voting machines. (PUMF No. 2.) The results of the election were certified by the

¹ The Court sets forth its rulings on the parties' objections in Appendix A hereto.

The Court, by separate order, has DENIED the County's requests for in camera review and for sealing of certain documents. The Clerk has been directed to return the documents to the County without filing them. The Court has not considered the documents therein in connection with this motion. Given the nature of the documents apparently contained in the sealed envelopes submitted, the Court has no reason to believe that their contents would at all have affected its ruling on the instant motions.

Alameda County Registrar of Voters on November 30, 2004, including the result that Measure R failed. (Respondents' Statement of Material Facts ("RSMF") No. 3.)

On December 3, 2004, Petitioners requested from the Registrar a recount of the vote on Measure R. (PUMF No. 3, RSMF No. 4.) Petitioners specifically requested examination of four categories of election materials in connection with the recount, under the authority of Elections Code §15630: 1. redundant vote data on DRE machines; 2. chain of custody documentation and system access logs for the DRE system; 3. audit logs; 4. logic and accuracy test results. (PUMF No. 3; RSMF No. 5.) The Registrar denied the request for these materials on the grounds that he deemed them not relevant to a recount of the election. (PUMF No. 3; RSMF No. 6.) A hand recount was made of the paper ballots cast as provisional or absentee ballots. (RSMF No. 8.) Petitioners declined to have a recount done from the "images" of the ballots cast on the DRE machines, as saved on the PCMCIA cards. (RSMF No. 9.) The recount of the paper ballots concluded January 7, 2005. (RSMF No. 11.) There was no change in the outcome. (RSMF No. 12.)

Petitioners filed the instant petition on December 30, 2004. Respondents demurred to the petition, and this Court sustained the demurrer without leave to amend on August 23, 2005, and entered a judgment of dismissal thereafter. Petitioners appealed, and the Court of Appeal reversed the dismissal and remanded the action for the trial court to "determine, on evidentiary facts, whether the

requested materials are in fact relevant.” (Opinion of the Court of Appeal, First Appellate District, dated April 28, 2006, filed May 1, 2006 herein.) Remittitur issued on June 30, 2006, and these motions followed.

DISCUSSION

I. THE COUNTY’S MOTION FOR SUMMARY JUDGMENT

The Petition alleges that the County’s refusal to provide the information requested in connection with Petitioners’ demand for a recount violated Elections Code §15630, and therefore violated Petitioners’ rights to equal protection, due process and the Constitutional right to have one’s vote counted. Section 15630² provides that “All ballots, whether voted or not, and *any other relevant material*, may be examined as part of any recount if the voter filing the declaration requesting the recount so requests.” (Section 15630 [emphasis added].)

Respondents move for summary judgment of the entire Petition on the grounds that none of the materials requested by Petitioners are relevant under Section 15630. Respondents purport to provide, as part of their motion, copies of documents that are responsive to the requests at issue and that were available to Respondents at the time of the recount. It is clear from the evidence submitted in opposition, and Respondents’ own subsequent filings, that the documents provided are not all that were available at the time of the recount. (*See, e.g.*, Petitioner’s Memo. in Opposition to Motion for Summary Judgment at pg. n.3; Respondents’ Reply Memo. at pg. 9:4-15 and n.1; Declaration of Nancy Fenton filed March 1,

² All references are to the Elections Code unless otherwise specified.

2007 and exhibits A and B thereto, Respondents' Third Application for In Camera Review of Records in Support of Motion for Summary Judgment, filed February 22, 2007, and documents referenced therein.) Thus, the evidence offered in support of the motion is incomplete. Essentially, Respondents' theory of this motion was that it would put "everything" before the Court, and then the Court could determine that none of it is relevant. However, Respondents plainly failed to put "everything" before the Court.

Respondents' suggestion that the Court could grant "partial summary judgment" based upon as much of the evidence as the County presented at the time it made this motion, and then could later adjudicate the relevance of any other materials not yet presented, is simply not permitted under Code of Civil Procedure section 437c. (*See* Cal. Code Civ. Proc. §437c(c), (f)(1).) First, summary adjudication was not requested in the notice of motion, nor was a separate statement identifying evidence issue-by-issue filed. (Cal. Rules of Court 3.1350(d).) Moreover, summary adjudication must completely dispose of a cause of action, affirmative defense, claim for punitive damages or issue of duty. (Cal. Code Civ. Proc. §437c(f)(1).) The sort of "partial summary judgment" suggested by the County would not be permitted under the statute.

Therefore, summary judgment in favor of the County is DENIED.

II. PETITIONERS' MOTION FOR SUMMARY ADJUDICATION

Petitioners' central argument is that the information they sought and were denied by Respondents – redundant vote data on individual electronic voting

machines; chain of custody documentation and system access logs for the voting system; audit logs; and logic and accuracy test results for the machines used in the system – constitutes “any other relevant material [that] may be examined as part of any recount” under Section 15630. Petitioners’ claims all turn on the question of whether a recount includes examination of the accuracy of vote recording and preservation, in addition to the accuracy of the actual tabulation of votes.

The Court finds that, under the plain meaning of the statute, as considered in the context of Chapter 9 of Division 15 of the Elections Code, a “recount” includes an examination of errors or failures in the safekeeping, handling, tallying, counting, recording, or certification of the ballots or votes cast, sufficient to make it likely that the result of the election was affected. First, the common meaning, as well as the legal usage, of the word “relevant” generally denotes a broad conception such as “likely to have an effect upon,” or “tending to inform a determination.” For instance, the Evidence Code defines relevant evidence as evidence having “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code §210.) The concept is broader still with respect to discovery in civil cases, a process more analogous to a request for information in connection with a recount. “For discovery purposes, information is relevant if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement” or might

reasonably lead to admissible evidence. (*Cruz v. Sup. Ct.* (2004) 121 Cal.App.4th 646, 653 quoting *Gonzales v. Sup. Ct.* (1995) 33 Cal.App.4th 1539, 1546.)³

Respondents themselves concede that, if the data requested by Petitioners showed discrepancies between what was recorded as the vote and what was actually tallied as the vote, such information would be “of concern” to the accuracy of the vote. (PUMF No. 13-15, 17 and admissible evidence cited therein; *see, e.g.*, Declaration of Aimee Dudovitz, Exh. 8 [Deposition of David MacDonald] at pp. 53-57, 146-47, 190-94, 196-98, 209-11.)

Moreover, other provisions of the Elections Code declare that a Court may, at the behest of a board of supervisors, or a grand jury, order a recount based upon probable cause to believe there were errors or failures in the safekeeping, handling, tallying, counting, recording, or certification of the ballots or votes cast, sufficient to make it likely that the result of the election was affected. Nothing in Section 15640, or Sections 15620 or 15630, precludes a voter from seeking a recount on those same grounds.

Respondents have not filed an opposition separate statement, and therefore concede that the material facts offered by Petitioners are not disputed. The audit logs requested contained information about the functioning of the DRE units

³ The Court in *Cruz* continues: “Admissibility is not the test and information, unless privileged, is discoverable if it might reasonably lead to admissible evidence. These rules are applied liberally in favor of discovery, and (contrary to popular belief), fishing expeditions are permissible in some cases.” (*Cruz, supra*, 121 Cal.App.4th at 653, quoting *Gonzales v. Sup. Ct.* 33 Cal.App.4th 1539, 1546.)

before, during and after the November 2, 2004 election, including information about system malfunction or error and human access to the units and central tally server. (PUMF No. 5 and admissible evidence cited therein.) The redundant data requested contained copies of votes and information about votes cast in the election that could be compared to vote tallies to confirm the accuracy of recorded votes. (PUMF No. 6 and admissible evidence cited therein.) The chain-of-custody records sought contained information about human access to the DRE units and the regulation of such access, before, during and after the election. (PUMF No. 7 and admissible evidence cited therein.) The logic and accuracy test reports contain information about the proper functioning and preparation of the units used in the election. (PUMF No. 8 and admissible evidence cited therein.)

The information in the redundant data could indicate a discrepancy between the votes on the individual units and the vote tallies generated by the central server. (PUMF No. 14 and admissible evidence cited therein.) Information in the chain-of-custody and audit logs could show unauthorized access and possible manipulation of the vote data. (PUMF No. 8, 9, 15 and admissible evidence cited therein.) All the data and documents requested by Petitioners contain information that would aid in confirming, or would casting doubt upon, the accuracy of the vote recording generated by the DRE units. (PUMF No. 10 and admissible evidence cited therein.)

Petitioners' declarations in support of their motion, as well as the admissions in deposition by representatives of Respondents, demonstrate that the

documents requested are relevant to a recount that includes examination of the accuracy of vote data from electronic voting machines. Therefore Respondents were under a ministerial duty to permit Petitioners to examine such information in connection with their recount request per Elections Code §15630.

Based upon the foregoing, summary adjudication is GRANTED as to Petitioner's First Cause of Action for Writ of Mandate, Second Cause of Action for Declaratory Relief, and Third Cause of Action for Violation of the Elections Code.

Summary Adjudication is likewise appropriate as to Petitioners' Fourth, Fifth and Sixth Causes of Action, as Respondents' conduct constitutes a violation of equal protection, due process, and individuals' right to have their votes counted under Article II, section 2.5 of the California Constitution. The recount mechanisms implemented do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right to vote. (*Bush v. Gore* (2005) 531 US 98 at 105.) Essentially, votes on paper ballots were treated differently, and that differential treatment violated voters' right to equal protection. (*Id.* at 105, 110). Denial of Petitioners' rights to review the requested materials also denied them procedural and substantive due process rights, because the refusal to produce the materials relevant to a recount interfered with the fundamental right to vote, and flouted the protections of that right in the Elections Code. (*See Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1035; *Ryan v. Calif. Interscholastic Federation – San Diego* (2001) 94 Cal.App.4th 1048, 1069.)

Further, because the right to vote includes the right to have one's vote counted properly, the County's conduct also constitutes a violation of Article II, section 2.5 of the California Constitution. (*See* Cal. Elections Code §15702 [right to have vote counted, for purposes of Art. II, §2.5, includes having vote counted properly and included in totals of votes cast].)

Respondents' failure to comply with that duty, and refusal to conduct a recount taking that information into consideration, warrants declaratory relief, as well as injunctive relief requiring Respondents to produce the information requested in connection with this and future elections. The Court does not agree that the passage of changes requiring electronic voting machines to print a paper confirmation necessarily moots the need for prospective relief of this kind.

III. MOTION FOR SANCTIONS

Petitioners move for sanctions under CCP §§2023.010, 2023.030 and 128(a)(2) and (4) based upon their contention that Respondents failed to preserve the information on the individual DRE voting machines, and instead returned the machines to the Diebold company without taking any steps to preserve the information on them. Respondents' opposition to the motion is two-fold: (1) the County contends that the information on the machines was preserved on the PCMCIA cards; and (2) the County indicates that it is in the process of trying to obtain the information on the individual machines from Diebold.

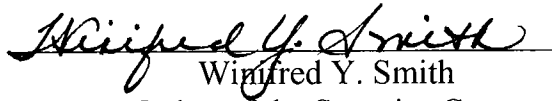
Therefore, the Court CONTINUES the motion for sanctions to May 4, 2007, at 9:00 a.m. in Department 31. Respondents shall file and serve a status

report of no more than five pages indicating whether they have produced the information sought. Such status report shall be filed and served no less than 10 court days prior to the continued hearing. Petitioners shall file and serve a response to the status report of no more than five pages, no less than 5 court days prior to the continued hearing.

The Court notes that while it reserves ruling on the issue, it is not inclined to agree with the contention that the PCMCIA cards “preserved” all the information contained on the individual DRE machines.

IT IS SO ORDERED.

DATED: 04/12/07


Winifred Y. Smith
Judge of the Superior Court

APPENDIX A

Both parties' objections are procedurally defective. First, the objections served by the County are not in the proper form and did not include a proposed order on the objections, as required per Calif. Rules of Court 3.1354(b) and (c). Further, Petitioner's objections, while in the proper form for the most part, did not include the required separate proposed order. (CRC 3.1354(c).)

The Court could decline to reach the objections at all due to these procedural errors. However, in the interests of justice, the Court rules as follows on the objections:

I. County's Objections to Evidence

A. Objections to Declaration of Douglas W. Jones – Objections on the grounds of relevance are OVERRULED.

Objections on the grounds of improper testimony on a legal conclusion are OVERRULED. Under Evidence Code §805, the Court has discretion to consider evidence that is otherwise admissible even if it embraces an ultimate fact. (Evidence §805; *see Paez v. Alcoholic Beverage Control Appeals Bd.* (1990) 222 Cal.App.3d 1025.)

The objection to paragraph 35 on the grounds of hearsay is SUSTAINED.

B. Objections to the Declaration of Frederic D. Woocher

Objections on the grounds of relevance are OVERRULED.

Objections on the grounds of improper testimony on a legal conclusion are OVERRULED.

Objection to paragraph 30 on the grounds of speculation is SUSTAINED.

Objection to paragraph 35 on the grounds of hearsay is SUSTAINED.

C. Objections to the Declaration of Kenneth A. Pettit

Objections on the grounds of improper testimony on a legal conclusion are SUSTAINED IN PART as to:

1. paragraph 3, the text regarding the meaning of the statute;
2. paragraph 5, the phrase reading "all clearly relevant under the meaning of the terms of that statute;"
3. paragraph 7, the sentence reading "a recount is properly. . . a recount;"

4. paragraph 8 in its entirety.

The objections on these grounds are otherwise OVERRULED.

Objections to paragraph 6 on the grounds of hearsay and speculation are SUSTAINED.

D. Objections to Declaration of Aimee Dudovitz

The objections on the grounds of relevance to Exhibits 9 and 10 are OVERRULED.

E. Objections to Amicus Letter of Secretary of State Debra Bowen

The *amicus* letter addresses, *inter alia*, the legislative history of recent changes to the Elections Code to require a paper trail be created for each voter's choices made on an electronic voting machine. To the extent this letter brief is offered to provide legislative history it is useful, and could be considered, in the Court's discretion.

However, the letter brief is not supported by admissible evidence to prove the facts therein. The Court sees no way to consider this brief in the absence of evidence to support the assertions made. The letter is not a matter of which the Court may take judicial notice under Evidence Code §452. Neither is it an affidavit, signed under oath by the Secretary of State. Therefore, the Court has not considered it in connection with these motions.

Any and all references to the letter as "evidence" in support of Petitioners' motion are STRICKEN. (See Petitioners' Separate Statement of Undisputed Facts Nos. 5-10, 13-17.)

F. Objections to Plaintiff's Request for Judicial Notice.

Objection to Exhibit A, an administrative decision regarding the State of Florida's election laws, as irrelevant is SUSTAINED. All other relevance objections are OVERRULED.

However, the request for judicial notice is DENIED as to Exhibits C, D, F, I, J, K, and L as none of these documents are of the type that the Court may take judicial notice. (See Evid. Code §452(a), (b), (c), and (h).)

II. Petitioners' Objections to Evidence:

A. Objections to Declaration of Bradley Clark filed October 13, 2006

1. [¶8] – OVERRULED.

2. [¶9B, 9C, 9D] – OVERRULED.
3. [¶9A at “In response. . . .”] – SUSTAINED on grounds of lack of foundation and outside the expertise proffered
4. [¶9C at “In response. . . .”] -- SUSTAINED on grounds of lack of foundation and outside the expertise proffered.

B. Objections to Declaration of David McDonald filed October 13, 2006

1. [¶2] – OVERRULED.
2. [¶3] – SUSTAINED on grounds of lack of foundation.

C. Objections to Factual Assertions in Respondents’ Pleading

Respondents’ pleadings are not evidence and have not been considered as such in connection with these motions.

D. Objections to Declarations filed March 7, 2005, in connection with Respondents’ prior opposition to petition for writ of mandate herein.

Respondents have not referenced the declarations filed March 7, 2005 in connection with the instant motions, nor has the Court considered them as evidence in connection with the motions. Therefore, the objections are moot.

E. Petitioner’s Second Set of Objections, filed February 28, 2007
General objection is OVERRULED as not in a proper form.

Specific Objections:

[February 16, 2007 Declaration of Nancy Fenton]

1. [¶2] SUSTAINED on grounds of improper legal conclusion and hearsay
2. [¶3] SUSTAINED on grounds of improper legal conclusion and hearsay
3. OVERRULED
4. [¶6] SUSTAINED on grounds of best evidence
5. [¶7] SUSTAINED on grounds of lack of foundation and not a qualified expert opinion
6. [¶8] SUSTAINED on grounds of lack of foundation, hearsay and best evidence
7. [¶8] SUSTAINED on grounds of lack of foundation, hearsay and best evidence
8. [¶9] SUSTAINED on grounds of hearsay
9. [¶10] SUSTAINED on grounds of lack of foundation and hearsay

[February 16, 2007 Declaration of Dave MacDonald]

10. [¶2] OVERRULED
11. [¶3] OVERRULED
12. [¶4] OVERRULED
13. [¶4] SUSTAINED on grounds that declarant is not a qualified expert

14. [¶5] SUSTAINED on grounds that declarant is not a qualified expert

[Objections to Factual Assertions in briefs]

Respondents' pleadings are not evidence and have not been considered as such in connection with these motions.

F. Petitioner's Third Set of Objections, filed February 28, 2007
General objection is OVERRULED as not in a proper form.

Specific Objections:

[February 22, 2007 Declaration of Dave MacDonald ISO Reply]

1. [¶2] OVERRULED
2. [¶4] SUSTAINED on grounds of legal conclusion
3. [¶5] SUSTAINED on grounds of lack of foundation for expert opinion
4. [¶6] SUSTAINED on grounds of lack of foundation for expert opinion
5. [¶6] SUSTAINED on grounds of lack of foundation for expert opinion
6. [¶7] SUSTAINED on grounds of lack of foundation for expert opinion
7. [¶5] SUSTAINED on grounds of lack of foundation for expert opinion
8. [¶12] SUSTAINED on grounds of legal conclusion

[February 22, 2007 Declaration of Dave MacDonald ISO in camera review]

9. [¶2] OVERRULED
10. [¶3] OVERRULED
11. [¶4] SUSTAINED on grounds of lack of foundation for expert opinion
12. [¶5] SUSTAINED on grounds of lack of foundation for expert opinion

[February 22, 2007 Declaration of Elaine Ginnold]

13. [¶3, 7] OVERRULED
14. [¶4] OVERRULED
15. [¶5] OVERRULED
16. [¶6] SUSTAINED on grounds of lack of foundation
17. [¶7] OVERRULED
18. [¶8] OVERRULED
19. [¶9] SUSTAINED on grounds of best evidence
20. [¶10] OVERRULED

[Objections to Factual Assertions in briefs]

Respondents' pleadings are not evidence and have not been considered as such in connection with these motions.

**CLERK'S CERTIFICATE OF MAILING
(CCP 1013a)**

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is 201 13TH Street, Oakland, California. I served this ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY ADJUDICATION, DENYING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, AND CONTINUING PETITIONERS' MOTION FOR SANCTIONS by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Oakland, California, following standard court practices.

FREDRIC D. WOOCHRR
MICHAEL J. STRUMWASSER
GREGORY G. LUKE
ATMEL DUDOVITZ
STRUMWASSER & WOOCHEER LLP
100 Wilshire Boulevard, Suite 1900
Santa Monica, CA 90401

Charles H. Bell
Jimmie E. Johnson
BELL, McANDREWS & HILTACHK
455 Capitol Mall, Suite 801
Sacramento, CA 95814

RICHARD E. WINNIE
County Counsel of The County of Alameda
Nancy Fenton, Deputy County Counsel
1221 Oak Street, Room 450
Oakland, CA 94612

Date: 04/¹²~~29~~/2007

Executive Officer/Clerk of the Superior Court

By 
Kimlachew Manderso, Deputy Clerk