

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

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

*Plaintiff,*

v.

Case No.: 2006 CA 2973

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

*Defendants.*

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**RESPONSE OF ELECTIONS CANVASSING COMMISSION,  
SECRETARY OF STATE SUE M. COBB, AND DAWN K. ROBERTS  
TO PLAINTIFF'S MOTION TO COMPEL EXPEDITED DISCOVERY**

Defendants Elections Canvassing Commission of the State of Florida (the "Commission"), Sue M. Cobb in her official capacity as Secretary of State of the State of Florida (the "Secretary"), and Dawn K. Roberts, in her official capacity as Director of the Division of Elections of the State of Florida, respond to Plaintiff's Motion to Compel Expedited Discovery, filed November 20, 2006 (the "Motion"). These three defendants will be collectively referred to as the "State Defendants."<sup>1</sup> In opposition to the Motion, the State Defendants respectfully show this Court the following.

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<sup>1</sup> Under the election contest statute, the Commission and Buchanan are the only indispensable parties. § 102.168(4), Fla. Stat. (2006). The Secretary and Roberts reserve their right to seek dismissal of claims against them as improper parties.

I. **THERE ARE NO CIRCUMSTANCES JUSTIFYING THE UNREASONABLE RESPONSE TIMES REQUESTED BY THE PLAINTIFF.**

The Plaintiff initiated this action by filing her complaint approximately two hours after the Commission certified Buchanan as the winner in this congressional race. Plaintiff then filed her Motion, and she sought an immediate hearing. This Court scheduled a hearing for 10:30 a.m. on November 21, 2006—less than twenty-four hours after the Plaintiff filed her Complaint. All this, despite the complete absence of any circumstances justifying emergency discovery undertakings of any kind.

Through her Motion, the Plaintiff asks this Court to grant the Defendants *one day* to respond to extraordinary and comprehensive discovery requests—requests that will take some time to evaluate, coordinate, and respond to. Rather than outline the specific deadlines and circumstances justifying such a dramatic request (there are none), Plaintiff states that the exceptionally short response time is appropriate “in view of the enormous public interests at stake, the pressing need for a prompt resolution of this matter, and the limited nature of the discovery requested.” Motion at 2.

The State Defendants do not dispute that there are public interests at stake and that there is a need for a prompt resolution to this election contest.<sup>2</sup> But these interests do not justify a discovery deadline one day after this Court’s hearing. The Secretary and her staff have worked diligently to assemble information relating to this disputed election, and they have observed the recounts. They are preparing to comply with any discovery

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<sup>2</sup> The State Defendants certainly do, however, dispute the Plaintiff’s characterization of her discovery requests as “limited.” Indeed, they are comprehensive. They were compiled by experts, involve data-gathering reaching over 1,500 individual voting machines, and will require substantial efforts to satisfy. At any rate, Plaintiff cites no authority suggesting that the limited nature of a discovery request, without more, justifies an expedited response—much less a one-day response.

order entered by the Court, but they should be permitted a reasonable amount of time to respond—an amount of time that would allow them to coordinate with other defendants, craft an appropriate plan of discovery compliance, and collect and review the requested data. One day is not sufficient time to do this.

As legal authority for her request for the expedited response, Plaintiff relies on the contested election statute itself. Motion at 5. She notes that Section 102.168(6) expedites the normal deadline for filing an answer in an election contest. *Id.* Under that statute, an unsuccessful candidate for office has ten days following the election certification to initiate a contest. § 102.168(2), Fla. Stat. (2006). Defendants then have ten days to respond. § 102.168(6), Fla. Stat. (2006). So although the election contest statute provides for “a simple and speedy means of contesting elections,” *Farmer v. Carson*, 148 So. 557, 559 (Fla. 1933), it does not provide for fire drill discovery. Indeed, it merely reduces by half the answer time—the Florida Rules of Civil Procedure would ordinarily allow twenty days instead of ten. Fla. R. Civ. P. 1.140(a). The Rules also ordinarily allow thirty days for a party to respond to discovery requests. *See* Fla. R. Civ. P. 1.350(b). By reducing that time by half, the Defendants would have fifteen days to respond, instead of one.<sup>3</sup>

More importantly, there is no looming deadline that would require the expedited discovery the Plaintiff seeks. There is no requirement that the election contest be

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<sup>3</sup> Plaintiff also cites an unpublished order in *Jacobs v. Seminole County Canvassing Board*, 2000 WL 1720698 (Fla. Cir. Ct. 2000) for the proposition that expedited discovery is appropriate in election contests. Motion at 2. The cited order includes no explanation of the circumstances of that case, but the case involved the disputed 2000 Presidential contest, which involved an outside deadline under federal law, *Gore v. Harris*, 772 So. 2d 1243, 1261 (Fla. 2000), *rev'd on other grounds*, *Bush v. Gore*, 531 U.S. 98 (2000), a deadline that is not present in this case. At any rate, the cited order allowed seven days—the Plaintiffs in this case seek a one-day turnaround.

resolved in a matter of days or even weeks. The United States House of Representatives will ultimately decide whether to seat either candidate. Article I, Section 5, of the United States Constitution provides that “[e]ach House shall be the judge of the elections, returns and qualifications of its own members.” Congress also enacted a statute governing the procedures for an election contest before the House. *See* 2 U.S.C. § 381, *et seq.* (Federal Contested Election Act). The procedures in that Act allow for up to 200 days of pleadings, discovery, and briefing, before a contest can be resolved.

**II. PLAINTIFF IS NOT ENTITLED TO TAKE POSSESSION OF THE VOTING MACHINES.**

Plaintiff’s Motion includes a request for a physical possession of the voting machines. Motion at 7. As the Wallach Declaration states, the Plaintiff’s planned examination would require physically opening the electronic voting machines and the extraction of memory modules. Wallach Dec. ¶ 35. It is apparent from the Motion and the Wallach Declaration that the Plaintiff envisions taking custody of the electronic voting machines, testing them, opening them, removing permanent components, and otherwise manipulating the machines. These activities drift far beyond the Court’s authority to permit “permission to enter upon land or other property for inspection and other purposes.” Motion at 7-8 (quoting Fla. R. Civ. P. 1.280(a)).

Florida Rule of Civil Procedure 1.350 allows parties to request “entry upon designated land or other property in the possession or control of the party upon whom the request is served *for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property* or any designated object or operation on it within the scope of rule 1.280(b).” *Id.* (emphasis added). Plaintiff seeks to do more than inspect and test the electronic voting equipment; she seeks to *alter it*. The very nature of the

activities the Plaintiff wishes to conduct will alter the machines and leave the voting equipment in a different state than it is now. *See* Affidavit of David Drury, ¶ 5, attached to this Response as Exhibit A.

The Plaintiff cites no authority supporting her broad plans to rearrange, disassemble, and conduct mock elections on the voting equipment. The one case she cites for the proposition that access to computer equipment is generally permissible recognizes that discovery orders granting access to computer systems must be limited.

[T]he order must define parameters of time and scope, and must place sufficient access restrictions to prevent compromising patient confidentiality and to prevent harm to defendant's computer and data bases. One alternative might be for defendant's representative to physically access the computer system in the presence of plaintiff's representative under an agreed-upon set of procedures to test plaintiff's theory that it is possible to retrieve this purged data.

*Strasser v. Yalamanchi*, 669 So. 2d 1142, 1145 (Fla. 4th DCA 1996). Any order in this case should be likewise limited. It should not permit the Plaintiff to take possession of the machines, and any testing allowed should be under a set of ordered procedures, including perhaps the appointment of a special master. That will ensure the machines are preserved in the current condition in the possession of the accountable elected official, Supervisor Kathy Dent. There also must be in place a technical mechanism to ensure that any data provided to the Plaintiff be provided in a way that ensures a common data baseline.

The machines still contain the voting data from the election. In other words, they are the electronic equivalent of paper ballots. And just as a plaintiff would not be granted unsupervised access to a box of official paper ballots, for example absentee ballots, this Plaintiff should not be granted unsupervised access to a large number of electronic ballots now residing on the voting equipment.

**III. THE REQUESTED SOURCE CODE IS NOT SUBJECT TO PRODUCTION.**

Finally, the Plaintiff is not entitled to the source code requested. The Plaintiff recognizes that the software belongs to a third party, and she volunteers to enter into a nondisclosure agreement before accessing it. Motion at 8. But she did not include as a defendant the owner of the source code. Nor did she give that owner notice of these proceedings. Until the owner can be heard, the Secretary's disclosure of the proprietary source code would be improper. "A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice." Fla. Stat. § 90.506 (2006).

Because the State Defendants have had little time to review and analyze the discovery requests, they specifically reserve any and all other objections they may have to the discovery request.

WHEREFORE, the State Defendants respectfully request that this Court deny the Motion, disallow inspection of the voting machines, disallow production of the source code, set a reasonable discovery schedule, and grant the State Defendants such other relief as this Court deems proper.

Respectfully submitted this 21st day of November, 2006.



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Peter Antonacci  
Florida Bar No. 280690  
Allen C. Winsor  
Florida Bar No. 016295  
GrayRobinson, P.A.  
301 South Bronough Street  
Suite 600 (32301)  
Post Office Box 11189  
Tallahassee, Florida 32302  
Telephone (850) 577-9090  
Facsimile (850) 577-3311  
E-Mail pva@gray-robinson.com  
awinsonr@gray-robinson.com  
*Attorneys for State Defendants*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Facsimile or Electronic Transmission this 21st day of November, 2006, to the following:

Mark Herron  
Messer, Caparello & Self, P.A.  
2618 Centennial Place  
Tallahassee, Florida 32308  
Telephone (850) 222-0720  
Facsimile (850) 558-0659  
E-Mail: mherron@lawfla.com  
*Attorney for Plaintiff*

Kendall Coffey  
Coffey & Wright, LLP  
2665 South Bayshore Drive  
PH-2, Grand Bay Plaza  
Miami, Florida 33133  
Telephone (305) 857-9797  
Facsimile (305) 859-9919  
E-Mail: kcoffey@coffeywright.com  
*Attorney for Plaintiff*

Ronald A. Labasky  
Young Van Assenderp, P.A.  
225 South Adams Street  
Tallahassee, Florida 32302  
Telephone (850) 222-7206  
Facsimile (850) 561-6834  
E-Mail: rlabasky@yvlaw.net  
*Attorney for Supervisor Dent*

Hayden R. Dempsey  
Greenberg Traurig, P.A.  
101 East College Avenue  
Tallahassee, Florida 32301  
Telephone (850) 222-6891  
Facsimile (850) 681-0207  
E-Mail: Dempsey @gtlaw.com  
*Attorney for Vern Buchanan*



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Peter Antonacci  
Florida Bar No. 280690  
Allen C. Winsor  
Florida Bar No. 016295  
GrayRobinson, P.A.  
301 South Bronough Street  
Suite 600 (32301)  
Post Office Box 11189  
Tallahassee, Florida 32302  
Telephone (850) 577-9090  
Facsimile (850) 577-3311  
E-Mail: pva@gray-robinson.com  
awinsonr@gray-robinson.com  
*Attorneys for State Defendants*