

**ENDORSED
FILED**
San Francisco County Superior Court

NOV 19 2007

GORDON PARK-LI, Clerk
BY: DEBORAH STEPPE
Deputy Clerk

CASE MANAGEMENT CONFERENCE SET

APR 18 2008 -9⁰⁰AM

DEPARTMENT 212

COPY

VIA FAX

1 EDMUND G. BROWN JR.
Attorney General of the State of California
2 CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General
3 CONSTANCE L. LELOUIS
Supervising Deputy Attorney General
4 MARGARET CAREW TOLEDO
State Bar No. 181227
5 Deputy Attorney General
1300 I Street, Suite 125
6 P.O. Box 944255
Sacramento, CA 94244-2550
7 Telephone: (916) 322-6114
Fax: (916) 324-8835
8 E-mail: Margaret.Toledo@doj.ca.gov
Attorneys for Debra Bowen,
9 California Secretary of State

10
11 SUPERIOR COURT OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

CGC-07-469347

14 **DEBRA BOWEN, as California Secretary of State,**

15 Plaintiff,

16 v.

18 **ELECTION SYSTEMS & SOFTWARE, INC., a**
19 Delaware corporation, and Does 1-25,

20 Defendants.

**COMPLAINT FOR CIVIL
PENALTY, DAMAGES AND
RESTITUTION**

(Elections Code sections 18564.5
and 19214.5)

**NO FILING FEE REQUIRED
PURSUANT TO
GOVERNMENT CODE
SECTION 6103**

21
22 Plaintiff, Debra Bowen, the California Secretary of State, hereby alleges:

23 **I. INTRODUCTION**

24 1. This case involves a voting system vendor's unauthorized changes to the hardware
25 and firmware of an electronic ballot-marking device and its failure to notify the Secretary of State
26 of such changes. "When a voting system or part of a voting system has been approved by the
27 Secretary of State, it shall not be changed or modified until the Secretary of State has been
28 notified in writing and determined that the change or modification does not impair its accuracy

1 and efficiency sufficient to require a reexamination and reapproval . . .” (Elec. Code, § 19213.)
2 Defendant Election Systems & Software disregarded its obligations under California law to
3 notify the Secretary of State of changes that it made to its voting device called the AutoMARK
4 A100. Five California counties purchased a total of 972 of these AutoMARKs, which contained
5 unauthorized changes. Some, if not all, of these five counties believed that they were purchasing
6 the certified AutoMARK A100s when in fact they had purchased unlawfully changed
7 AutoMARK A200s. Some, if not all, of the five counties used these AutoMARK A200s in
8 elections. These AutoMARK A200s have never received the approval of the Secretary of State
9 and thus, should never have been used in elections in California. The Secretary of State, as the
10 chief elections officer of the State, brings this action to enforce the law and to protect the
11 integrity of California’s voting systems, which is of paramount concern to all Californians.

12 II. PARTIES

13 2. Plaintiff Debra Bowen is the California Secretary of State. The Secretary of State
14 is the chief elections officer of the state. (Elec. Code, § 10; Gov. Code, § 12172.5.) The
15 Secretary of State is responsible for the general supervision of elections and administration of
16 election laws. Her duties include setting standards for and certifying various voting machines
17 and systems.

18 3. Defendant Election Systems & Software, Inc. (“Defendant”), a Delaware
19 corporation, is one of the major voting system vendors used by more than a dozen California
20 counties.

21 4. Defendants Doe 1 through Doe 25, inclusive, are sued in this complaint under
22 fictitious names. The true names and capacities of defendants Doe 1 through Doe 25 are
23 unknown to the Secretary of State. When they are ascertained, the Secretary of State will amend
24 the complaint to state their names and capacities.

25 III. JURISDICTION AND VENUE

26 5. This Court has jurisdiction pursuant to California Constitution Article VI, section
27 10, because this case is a cause not given by statute to other trial courts.

28 ///

1 12. Elections Code section 18564.5, subdivision (a)(5) provides that the Secretary of
2 State may bring a civil action against a business that “[k]nowingly, and without authorization,
3 inserts or causes the insertion of uncertified hardware, software, or firmware, for whatever
4 purpose, into any voting machine, voting device, voting system, vote tabulating device, or ballot
5 tally software.” (Elec. Code, § 18564.5, subd. (a)(5).)

6 13. Elections Code section 18564.5, subdivision (a)(6) provides that the Secretary of
7 State may bring a civil action against a business that “[f]ails to notify the Secretary of State prior
8 to any change in hardware, software, or firmware to a voting machine, voting device, voting
9 system, or vote tabulating device, certified or conditionally certified for use in this state.” (Elec.
10 Code, § 18564.5, subd. (a)(6).)

11 14. In any civil action brought pursuant to Elections Code section 18564.5, the
12 Secretary of State may recover a civil penalty not to exceed \$50,000 for each act. (Elec. Code,
13 § 18564.5, subd. (b).)

14 15. In addition to the remedies set forth in Elections Code section 18564.5, the
15 Secretary of State may seek all of the following relief for an unauthorized change in hardware,
16 software, or firmware to any voting system certified or conditionally certified in California:

- 17 • Monetary damages, not to exceed \$10,000 per violation.
- 18 • Immediate commencement of decertification proceedings for the voting
19 system in question.
- 20 • Prohibiting the manufacturer or vendor of a voting system from doing any
21 elections-related business in the state for one, two, or three years.
- 22 • Refund of all moneys paid by a locality for a compromised voting system,
23 whether or not the voting system has been used in an election.
- 24 • Any other remedial actions authorized by law to prevent unjust enrichment of the
25 offending party.

26 (Elec. Code, § 19214.5, subd. (a)(1)-(5).)

27 ///

28 ///

1 24. Fourteen California counties now use the AutoMARK to comply with the
2 requirement of the Help America Vote Act (“HAVA”), 42 U.S.C. § 15301 *et seq.*, to provide at
3 least one machine in each polling place so voters with disabilities can cast ballots independently.

4 25. In March 2007, the Secretary of State announced an unprecedented top-to-bottom
5 review of voting systems certified for use in California. In May, the Secretary contracted with
6 the University of California to assess the security, accuracy, reliability and accessibility of the
7 certified systems during an intensive two-month review. Defendant chose not to submit its
8 Optical Scan Voting System to the top-to-bottom review. Defendant stated that instead of
9 submitting its currently certified system to the top-to-bottom review, it would submit a new
10 version of its Optical Scan Voting System to the Secretary of State for certification in 2007.

11 26. Defendant’s new Optical Scan Voting System is called Unity 3.0.1.1, and one of
12 its components is a new AutoMARK ballot-marking device, called the AutoMARK A200, with
13 firmware version 1.1.2258. “A200 ” signifies the hardware model, which indicates a change
14 from the AutoMARK A100 model. On information and belief, “Version 1.1.2258 ” signifies the
15 version of firmware on the device, and indicates a change from the AutoMARK A100, which
16 was certified by a prior Secretary of State with version 1.0 firmware. To date, Defendant’s new
17 Optical Scan Voting System has never been certified by the Secretary of State because testing did
18 not begin until November 2007 and has not been completed.

19 27. In addition, in 2006, Defendant did not notify the Secretary of State that it
20 intended to make hardware changes and, on information and belief, firmware changes to the
21 AutoMARK A100 prior to making those changes and selling and delivering the changed device,
22 now called the AutoMARK A200, to California counties.

23 28. On information and belief, Defendant and/or its subcontractor began
24 manufacturing the changed AutoMARK A200, with firmware version 1.1.2258, on or before
25 March 2006. At that time the AutoMARK A200 had not been approved by the Secretary of State
26 and did not have federal certification. It was not until August 31, 2006, that the AutoMARK
27 A200 received federal certification. (NASED # N-2-02-22-22-006.) To date, the AutoMARK
28 A200 has not been approved for use in California by the Secretary of State.

1 29. On information and belief, Defendant began selling AutoMARKs with
2 unauthorized changes to California counties in early 2006. Defendant sold a total of 972 units of
3 the AutoMARK A200 to five California counties in 2006. The five counties that unknowingly
4 bought 972 AutoMARK A200 machines are Colusa, Marin, Merced, San Francisco, and Solano
5 counties. On information and belief, the five counties believed that they were purchasing the
6 AutoMARK A100.

7 30. Defendant delivered 972 AutoMARK A200 machines to the five counties as
8 follows: (a) 20 units to Colusa County; (b) 130 units to Marin County; (c) 104 units to Merced
9 County; (d) 558 units to San Francisco City and County; and (e) 160 units to Solano County.

10 31. The AutoMARK A200 machines did not have federal certification when
11 Defendant delivered them to California elections officials for use in elections in 2006. However,
12 on information and belief, the AutoMARK A200 machines sold by Defendant bore stickers that
13 indicated that the machine had been certified by federal inspectors.

14 32. On information and belief, some of these five counties began using the
15 AutoMARK A200s in their elections in June 2006.

16 33. The AutoMARK A200 did not receive federal certification until August 31, 2006.

17 34. In July 2007, Defendant disclosed to the Secretary of State's office that it had sold
18 972 units of the AutoMARK A200 to five California counties in 2006.

19 35. In August 2007, the Secretary of State announced her intention to hold a public
20 hearing to gather facts, hear comments from the public, and decide whether to initiate an
21 enforcement action against Defendant for violations of Elections Code sections 18564.5 and
22 19213.

23 36. The Secretary of State held a public hearing on October 15, 2007.

24 37. At the public hearing, Defendant asserted that the Secretary of State had been
25 notified of the changes to the AutoMARK; however, Defendant provided no evidence before,
26 during, or after the hearing that it had notified the Secretary of State, in writing or otherwise, or
27 that it had obtained authorization from the Secretary of State, before it sold and delivered 972
28 AutoMARK A200 units in California.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays that this Court:

3 1. Pursuant to the First Cause of Action, grant civil penalties according to Elections
4 Code section 18564.5;

5 2. Pursuant to the Second Cause of Action, grant civil penalties according to
6 Elections Code section 18564.5;

7 3. Pursuant to the Third Cause of Action, award damages according to Elections
8 Code section 19214.5;

9 4. Pursuant to the Fourth Cause of Action, enter such orders as may be necessary to
10 refund all moneys paid by a locality for the unapproved AutoMARK A200;

11 5. Award plaintiff her costs of suit;

12 6. Grant such other and further relief as the court deems just and proper.

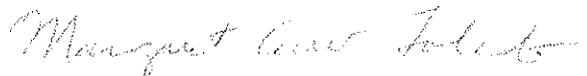
13 Dated: November 19, 2007

14 Respectfully submitted,

15 EDMUND G. BROWN JR.
Attorney General of the State of California

16 CHRISTOPHER E. KRUEGER
Senior Assistant Attorney General

17 CONSTANCE L. LELOUIS
Supervising Deputy Attorney General

18
19 

20 MARGARET CAREW TOLEDO
21 Deputy Attorney General
22 Attorneys for Office of Secretary of State

23 10399297.wpd
24 SA2007102405

EXHIBIT A

State of California

SECRETARY OF STATE

STATEMENT OF FINDINGS AND DECISION
OF THE SECRETARY OF STATE
TO SEEK RELIEF AGAINST
ELECTION SYSTEMS & SOFTWARE, INC. (ES&S)
REGARDING THE AUTOMARK A200

Legal Authority

California law prohibits the use of any "voting system, in whole or in part... unless it has received the approval of the Secretary of State prior to any election at which it is to be first used." (Elec. Code § 19201(a).)

Prior to considering any new voting system for approval, or any change to a currently certified voting system, the Secretary of State conducts a thorough examination and review of the proposed system that typically includes:

- (a) A review of the application and documentation of the system;
- (b) End-to-end functional examination and testing of the system;
- (c) Volume testing under election-like circumstances of the system and/or all voting devices with which the voter directly interacts;
- (d) Demonstration for and review by targeted stakeholders, including county elections officials, and representative advocates for voters with accessibility needs; and
- (e) A public hearing and public comment period.

When a voting system or part of a voting system has been approved by the Secretary of State, it shall not be changed until the Secretary of State has been notified in writing and has determined that the change does not impair its accuracy and efficiency sufficient to require a reexamination and reapproval. (Elec. Code § 19213.)

Under California law, the Secretary of State has the power to seek, among other things, monetary damages, refunds, civil penalties, and injunctive relief for failure to notify the Secretary of State and receive Secretary of State authorization before changing a certified voting system, or part of a voting system.

Under California law, the Secretary of State has the power to bring a civil action to recover civil penalties of \$50,000 per act against a business for "knowingly, and without authorization, inserting or causing the insertion of uncertified hardware, software, or firmware into a voting

machine, voting device, voting system, vote tabulating device, or ballot tally software.” (Elec. Code § 18564.5(a)(5).)

Under California law, the Secretary of State has the power to bring a civil action to recover civil penalties of \$50,000 per act against a business that “fails to notify the Secretary of State prior to any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state.” (Elec. Code § 18564.5(a)(6).)

In addition to the remedies set forth in Elections Code § 18564.5, the Secretary of State may seek all of the following relief for an unauthorized change in hardware, software, or firmware to any voting system certified or conditionally certified in California:

- Monetary damages from the offending party or parties, not to exceed ten thousand dollars (\$10,000) per violation. Each voting machine found to contain the unauthorized hardware, software, or firmware shall be considered a separate violation.
- Immediate commencement of decertification proceedings for the voting system in question.
- Prohibiting the manufacturer or vendor of a voting system from doing any elections-related business in the state for one, two, or three years.
- Refund of all moneys paid by a locality for a compromised voting system, whether or not the voting system has been used in an election.
- Any other remedial actions authorized by law to prevent unjust enrichment of the offending party. (Elec. Code § 19214.5(a)(1)-(5).)

The Secretary of State may also seek injunctive relief requiring any vendor or manufacturer of a voting machine, voting system, or vote tabulating device to comply with the requirements of the Elections Code. (Elec. Code § 19215; Elec. Code § 18564.5.)

The Secretary of State has the power to investigate any alleged violations of the Elections Code. (Elec. Code § 19102.)

Before seeking relief under Elections Code §19214.5, the Secretary of State must hold a public hearing. (Elec. Code §19214.5(b).)

The decision of the Secretary of State to seek relief under Elections Code §19214.5 must be in writing and state the findings of the Secretary. (Elec. Code §19214.5(c).)

Factual Findings

The following facts are based on information gathered independently by the Secretary of State, drawn from the Secretary of State's public hearing held on October 15, 2007, and provided to the Secretary of State by Election Systems & Software, Inc. (ES&S).

1. On June 1, 2005, voting system vendor Election Systems & Software, Inc. (ES&S) received federal certification (NASED #N-1-16-22-12-001) for its Optical Scan voting system, including a ballot-marking device component, called the AutoMARK A100, Version 1.0.
2. On August 3, 2005, the ES&S AutoMARK A100, Version 1.0, was certified for use in California as part of the ES&S Optical Scan voting system.
3. The California certification document contained the express condition that: "No substitution or modification of the voting systems shall be made with respect to any component of the voting systems, including the Procedures, until the Secretary of State has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval." (*Conditional Approval of Use of Election System and Software, Inc. Optical Scan Voting System*, Secretary of State, August 3, 2005.)
4. From March through August, 2006, ES&S delivered 972 AutoMARK A200 machines to five California counties: Colusa, Marin, Merced, San Francisco City & County, and Solano. County elections officials believed they had bought and received certified AutoMARK A100 machines.
5. As early as June 2006, some or all of the five counties began using the AutoMARK A200 machines in their elections, *before* the machines had ever been approved by the state or federal government.
6. On August 31, 2006, ES&S received federal certification for the Unity 3.0.1.1 voting system. This certification included approval for both AutoMARK A100 and A200 units with Version 1.1.2258 firmware (NASED # N-2-02-22-22-006).
7. In late August and early September 2006, the Secretary of State's office conducted a volume test of 100 AutoMARK ballot-marking devices containing Version 1.1.2258 firmware as part of an ES&S application for California certification of its new Unity 3.0.1.1 voting system. The test revealed numerous serious errors, and ES&S subsequently withdrew its application for certification of the new system. The Unity 3.0.1.1 voting system was never certified for use in California.
8. On July 11, 2007, nearly one year later, the Secretary of State discovered for the first time the existence of two AutoMARK hardware models: A100 and A200. The discovery was made during a conference call with ES&S about its new application for state certification of the Unity 3.0.1.1 voting system, which as noted above, had failed testing

in 2006. The following is a summary of factual admissions made by ES&S during the July 11, 2007, conference call:

- o ES&S stated its new application for certification of the Unity 3.0.1.1 voting system included a component called the AutoMARK A200, with firmware Version 1.1.2258.
 - o ES&S stated ES&S had already submitted for California testing both AutoMARK A100 and A200 units with Version 1.1.2258 firmware in August-September 2006.
 - o ES&S stated that at the time it submitted both the AutoMARK A100 and A200 (referring to them as "Phase I and Phase II") for testing in the fall of 2006, ES&S had already deployed both models in California.
9. On July 17, 2007, following the conference call, ES&S sent the Secretary of State one photograph of the A100 model with its cover open and one photograph of the A200 model with its cover open, showing visible differences between the two models.
10. On July 23, 2007, ES&S sent the Secretary of State an e-mail containing a spreadsheet confirming in detail the verbal statement ES&S made on July 11, 2007, that in mid-2006 it had deployed AutoMARK A200 units in California. The spreadsheet showed ES&S delivered 972 AutoMARK A200 units to five California counties as follows:
- | | |
|-----------------------------|---------------------|
| Colusa County | 20 machines |
| Marin County | 130 machines |
| Merced County | 104 machines |
| San Francisco City & County | 558 machines |
| <u>Solano County</u> | <u>160 machines</u> |
| Total | 972 machines |
11. From July through October 2007, the Secretary of State undertook an independent investigation to confirm the statements and documentation provided by ES&S regarding its deployment of AutoMARK A200 units in California.
12. ES&S did not provide notice to the Secretary of State that it changed the AutoMARK, nor did ES&S obtain authorization for the changes from the Secretary of State, before it sold and delivered 972 units of the AutoMARK A200 in California in 2006, as required by Elections Code §19213 and §18564.5.
13. On October 15, 2007, the Secretary of State held a public hearing on the ES&S AutoMARK issue, as required by Elections Code §19214.5(b).
14. At the public hearing, ES&S asserted that the Secretary of State had been notified of the changes to the AutoMARK; however, ES&S provided no evidence before, during, or after the hearing that it had notified the Secretary of State, in writing or otherwise, or that it had obtained authorization from the Secretary of State, before it sold and delivered 972 AutoMARK A200 units in California.

15. At the public hearing ES&S asserted that prior Secretaries of State had interpreted Elections Code §19213 and §18564.5 to require notice to the Secretary of State only of some, but not all, changes to a voting system; however, ES&S provided no evidence before, during, or after the hearing to substantiate that assertion.
16. At the public hearing ES&S conceded that it had made hardware changes to the AutoMARK ballot marking device, but asserted that the changes were “de minimus.” However, under Elections Code § 19213, it is not the vendor’s role to characterize the extent of changes to a voting system and determine whether the changes to the voting system “impair its accuracy and efficiency” and whether “reexamination and reapproval” of the system is required. Rather, it is the Secretary of State who must make that determination after written notice has been provided by the vendor. (Elec. Code § 19213.)

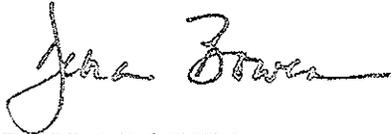
Therefore, I, Debra Bowen, Secretary of State for the State of California, find and determine, based on the legal authority and factual findings set forth above, the following:

- ES&S violated Elections Code §19213 and §18564.5 multiple times during the period March 2006 through August 2006, when it failed to notify or obtain approval from the Secretary of State, as required by Elections Code §19213 and §18564.5, before (1) making changes to the AutoMARK ballot marking device component of its certified Optical Scan voting system; and (2) selling and delivering to five California counties 972 AutoMARK units containing unauthorized changes.
- ES&S failed to comply with an express condition of the Secretary of State’s August 3, 2005, Conditional Approval of Use of Election System and Software, Inc. Optical Scan Voting System, which specifies that: “No substitution or modification of the voting systems shall be made with respect to any component of the voting systems, including the Procedures, until the Secretary of State has been notified in writing and has determined that the proposed change or modification does not impair the accuracy and efficiency of the voting systems sufficient to require a re-examination and approval.”
- As Secretary of State, I will seek the following relief, at a minimum and as provided by statute, through a civil action against ES&S:
 - Pursuant to Elections Code §18564.5(a)(5), civil penalties of \$50,000 per act for knowingly, and without authorization, inserting or causing the insertion of uncertified hardware, software, or firmware into a voting machine, voting device, voting system, vote tabulating device, or ballot tally software.
 - Pursuant to Elections Code §18564.5(a)(6), civil penalties of \$50,000 per act for failing to notify the Secretary of State prior to any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state.

○ Pursuant to Elections Code §19214.5(a):

- (1) Monetary damages from the offending party or parties, not to exceed ten thousand dollars (\$10,000) per violation. For purposes of this subdivision, each voting machine found to contain the unauthorized hardware, software, or firmware shall be considered a separate violation.
- (2) Refund of all moneys paid by a locality for a compromised voting system, whether or not the voting system has been used in an election.
- (3) Any other remedial actions authorized by law to prevent unjust enrichment of the offending party.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Great Seal of the State of California, this 19th day of November, 2007.



DEBRA BOWEN
Secretary of State