1 | **RISNER & GRAHAM** #00089200
Attorneys at Law
2 | 100 North Stone Avenue, Suite 901
Tucson, Arizona 85701-1620
3 | (520) 622-7494

4 | **WILLIAM J. RISNER, ESQ.**
State Bar Number: 002257
5 | Pima County Bar Number: 48228

6 | **KENNETH K. GRAHAM, ESQ.**
State Bar Number: 007069
7 | Pima County Bar Number: 21588

8 | *Attorney for Plaintiff*

9 | IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

10 | IN AND FOR THE COUNTY OF PIMA

11 |

12 | DEMOCRATIC PARTY OF PIMA COUNTY,

NO. C2007-2073

13 |

Plaintiff,

14 | **MOTION TO AMEND FINDINGS OF FACT OR LAW OR FOR A NEW TRIAL**

-vs-

15 |

16 | PIMA COUNTY BOARD OF SUPERVISORS, a body politic,

Assigned to:
Hon. Michael Miller

17 |

Defendant.

18 |

19 | Pursuant to Rule 52(b), A.R.C.P. and Rule 59(a)(8), A.R.C.P., the plaintiff moves the

20 | court for certain amendments to its findings of fact or law or for a new trial. In particular, the

21 | plaintiff objects to the following findings which will referenced herein by the corresponding

22 | numbers in the court's, under advisement, ruling.

23 | 2. The court has erroneously concluded that Charles Huckelberry "has final authority

24 | to make individual decisions on specific record requests." It is instead, the Board itself that

25 | has such final authority. The plaintiff filed its Notice of Claim with the Pima County Board

26 | of Supervisors and they are the party defendants, not Mr. Huckelberry. The Board has final

authority and is by law the County's Chief Executive Officer. The Arizona Supreme Court in *Falcon ex. rel. Sandoval v. Maricopa County*, 213 Ariz. 525, 527, 144 P.3d 1254, 1256 (2006), concluded that: "Based upon the statutory powers and duties for a board of supervisors, we conclude that a county's board of supervisors is its chief executive officer." The court continued by noting that the Board's powers include supervising county officers, A.R.S. § 11-251(1)," etc. "Most importantly for purposes of this case the Board has the power to [d]irect and control prosecution and defense of all actions to which the county is a party, and compromise them." *Id.* § 11-251(14) (at p. 527).

3. The Pima County Board of Supervisors is charged with conducting elections by multiple statutes. Only rarely in Title 16 of the Arizona Revised Statutes is a "county election officer" mentioned. The Board in Pima County has chosen to create a Division of Elections to carry out its statutory duties.

5. The court erroneously stated that "the parties agree that the GEMS program is not subject to disclosure." The plaintiff pointedly does not agree that the GEMS program is not subject to disclosure. The plaintiff has not sought the GEMS program. Whether or not it may be disclosed is not an issue before this court and is irrelevant to the court's decision.

19 and 20. The plaintiff is unsure of the meaning of the court's term "final mdb files." It is the plaintiff's position that all the mdb files are public records and not prohibited from disclosure. As the court found, A.R.S. § 16-444(A)(4) definition of a computer program does not include data files. A.R.S. § 16-445 does not require data files to be sent to the Secretary of State and does not prohibit the County from disclosing any and all data files.

The initial ballot layout is valuable as it can be compared with counted ballots to determine if the ballot count has been "flipped." In other words, for an election such as the RTA election the server could be programmed to count "no" votes as "yes" votes. A comparison of the initial ballot order with the counted ballot order is a simple check on a

2

simple method of cheating. In this case the evidence revealed that the returned tape from the Secretary of State for only the RTA election was "lost" by Pima County. All other returned tapes are said to be in Pima County's possession.

By using the term "final mdb file" the court may be committing a grievous error if it is saying that political parties are prohibited from confirming that candidate codes and ballot orders have remained the same during the entire election process.

From the beginning to end of any given election, most of the databases are supposed to remain "frozen." Once the "logic and accuracy" tests have been completed only certain tables change. The audit log grows with use and the vote totals increment. The rest of the files contain what is supposed to be identical through the election. Releasing the complete series poses no danger whatsoever and is required for oversight.

The easiest way to "hack an election" is to tamper with portions of the database that are supposed to be frozen. The candidate ID numbers are the softest target but there are many more. For instance, both the "frozen elements" and the vote totals that are supposed to increment are vulnerable to hand editing.

29. The court erroneously claims that "the plaintiff concedes that the release of mdb files immediately after the polls close is neither practical or appropriate. Release of the mbd file days or even weeks after the election significantly reduces the concern that valid election results could be challenged with an altered mdb file." The plaintiff has made no such concession. Indeed, the whole thrust of its Declaratory Judgment claim is to obtain the needed data in a timely manner in the future.

It is important to remember that no election result could be successfully challenged with an altered mdb file under any possible circumstance. It is possible that ballots could be re-counted electronically or even manually under some unusual circumstances but never could an altered copy of an mdb file be admitted as evidence.

1   A.R.S. § 16-672 requires that election contests be filed within five days after the

2 completion of the canvass. Furthermore, the complaint must set forth the "particular grounds

3 of the contest" and be "verified." It is, therefore, an election contest itself that would be

4 "impractical" under the court's view that "days or even weeks" could elapse before data files

5 were available. The effect of the court's suggestion is to always keep proof of election

6 manipulations out of the hands of political parties and candidates until it is too late to

7 challenge any election.

8   The plaintiff agreed that the files need not be provided at 8 p.m. on election day but it

9 sees no reason why a copy could not be provided to all political parties that evening.

10   Due to the time it would take to analyze the data it should be made available at a

11 reasonable time well before the canvass is officially approved by the governing body in order

12 that the governing body can be made aware of potential errors. If available only at the time

13 of the final canvass the five day limit on specific challenges would be difficult to meet. The

14 suggestion that days and weeks later would suffice is an open invitation to fraud.

15   31. The court erroneously refers to an "unknown threat" as "plausible" in the context

16 of the release of mdb files. However, every single witness agreed on two critical points.

17 Firstly, there has never been a known attempt by outsiders to hack into an election computer

18 in the history of the United States. That history includes all manufacturers and all

19 jurisdictions that number nationally in the thousands. Secondly, because the Pima County

20 election server is in a protected room with layers of security protection all witnesses agreed

21 that no possible mechanism existed to accomplish such an intrusion from the outside.

22   Therefore, to refer to the provision of mdb files in this case as presenting a

23 "plausible" risk is to ignore all testimony from every expert that none knew how it could be

24 done. Because some scenario might be "possible" in the abstract does not render such a

25 scenario "plausible" when not one person could imagine how it could be done.

26

4

32, "33" and "second 33." The court notes in 32 that audit logs have previously been disclosed but ignores the definitive testimony that the audit logs are of limited value as they can be edited after the fact utilizing Microsoft Access™. That fact argues in favor of the necessity of a full examination of the data file because the audit log is inherently unreliable.

The court is correct that this lawsuit is not predicated on a showing of fraud. Such evidence suggesting fraud does exist, however, but the evidence is relevant to the defendant's request for a stay as opposed to the ruling on the merits.

The court's conclusion that the release of multiple copies of the mdb files would "pose a known risk that hackers could use the files to contaminate valid mdb files" is contrary to the evidence in this case. As previously noted the mere existence of such "hackers" is imaginary. Merle King testified that unknown persons and groups existed in his investigation but could not identify any such groups or persons nor could he cite a single attempt by outsiders to hack into an election computer anywhere in the country. The court's statement that hacking from the outside is a "known risk" ignores the evidence that protections are in place that adequately counters that risk.

Any "hacking" must be accomplished by those with access to the Pima County computers. Those "insiders" include election employees and vendors. The California study (Exhibit 17) examined all known risks and ranked them by order of least to greatest risk. They listed vendors as the greatest risk followed by election employees. Nowhere on their list, even at the bottom, can outside "hackers" be found. "Hackers" must have inside help and if such help is available the additional risk of multiple mdb files in possession of anyone is insignificant.

Importantly, the testimony established that multiple copies of databases does not contribute to risk. In response to the court's questions of Merle King about the risk of disclosure of the mdb "architecture" Professor King listed as examples of the contents of that

5

architecture the "table names," the "index of tables," and the "SQL queries." Those tables and other elements exist in all GEMS mdb files. There is simply no additional "risk" from multiple files. The table names and index are the same in all GEMS databases. They are the same in the database the court examined as is in all other databases. Indeed, Professor King testified that the architecture would be identical in each database. He testified that the architecture would be the same not only in each Pima County database but that "the mdb files are fairly uniform from version of GEMS to version of GEMS" throughout all jurisdictions. In other words, GEMS 1.18.24 would create databases with the same table names, the same index and the same queries every time everywhere.

Professor King's testimony relating to the risk of database architecture was in the context of information that could be used to "sow chaos," "create mayhem" or "spoof elections." Professor King's answers to the question of multiple databases in that context was that "patterns of usernames" might be revealed as well as the "size of fields" and the "order of values in databases." The pattern of usernames is a trivial matter that is irrelevant in Pima County since it does not utilize different usernames. The "size of fields" and "orders of values" does not explain any additional risk in multiple databases.

On the issue of "spoofing and chaos" Professor King offered as a singular example that a man in Pennsylvania took a hammer to a voting machine on one occasion. No other evidence was offered by the defendant from any witness.

The court's conclusion in the second number 33 conclusion is wholly without support in any testimony. Not only is there no known history of outside hacker attempts nor any means available to outsiders to hack into a protected computer but there is no additional value in the repeated disclosure of the identical "architecture" of mdb files.

In preparing these objections Plaintiff listened to the entire testimony of Professor

Merle King and Dr. John Moffatt.[1] Moffatt's testimony is of importance since Charles

Huckelberry testified that the Board of Supervisors had no role in his decision and that he

relied on Dr. Moffatt for his decision to not allow the Democratic Party to see the election

database.

Dr. Moffat listed three concerns during his testimony. As an initial legal matter it is

important to note that he testified that each of his concerns was merely a "possibility" while

the applicable legal standard requires the defendant to prove that "specific" harm is

"probable." The defendant's proof was wholly deficient in establishing any specific probable

harm. See *Mitchell v. Superior Court*, 142 Ariz. 332, 335, 690 P.2d 51, 54 (1984); *Cox of*

Arizona Publications, Inc. V. Collins, 175 Ariz. 11, 14 852 P.2d 1194, 1197 (1993).

Moffatt's number one concern was that the Democratic Party could generate different

numbers in a "votes cast report" within hours after election. His "concern" is logically

absurd because it would result in no advantage to the Party and the certain loss of credibility

as the County would retain the original database, other political parties would have copies of

the original and the ballots themselves would be in the County's possession. The absurdity

of this "number one concern" is helpful, however, in exposing the absolute and total absence

of any realistic risk through the provision of the databases to the Democratic Party.

For the purpose of these objections to the court's erroneous finding, the relevance of

Moffatt's asserted objection is that multiple databases would not increase his imagined risks.

The number two "major" risk testified to by Dr. Moffatt was the potential printing of

ballots by the Democratic Party. That risk was also described as merely "possible" and for

good reason as some 1,600 different ballot forms were described for each election. All of

those different ballots are provided to each political party months in advance of an election.

---

[1] Their testimony is available on Google Video.

7

1   The actual ballots themselves are mailed to voters who request ballots at least a month before

2   elections. There is no credible testimony as to how the disclosure of additional mdb files

3   from past elections could increase any risk of the falsification of ballots by the Democratic

4   Party or, in fact, anyone in the future as those same persons would receive their very own

5   ballots in advance of the next election. They would then face the virtually impossible task of

6   using and inserting fake ballots into the system. It is for good reason that Moffatt referred to

7   this scenario as only "possible." While perhaps "possible" in a technical sense it is absurd

8   and ridiculous in the real world, which might explain its absence in the historical record.

9   Although Moffatt described the "reporting and ballots as the two major things" he

10   testified about a third "possibility," namely that the Democratic Party could write memory

11   cards. He testified that could be accomplished with knowledge of how races are coded and

12   the possession of software and a crop scanner. Since Pima County has itself previously

13   publicly published how races are coded the disclosure of multiple past election databases

14   discloses nothing not already disclosed. The only known crop scanner in Arizona is the one

15   purchased by Pima County.

16   The plaintiff strongly asserts that there is no testimony to support this court's

17   conclusion on multiple databases posing increased risks. Nonetheless, if the court sticks with

18   its erroneous conclusion and limits the plaintiff to two databases as an initial disclosure then

19   the plaintiff requests that the May 16, 2006 RTA election and the 2006 Primary election

20   databases be disclosed. Following our analysis of those two databases the plaintiff would

21

22

23   / / /

24   / / /

25   / / /

26

1   then re-urge that all the databases should be disclosed.

2   RESPECTFULLY SUBMITTED this 2nd day of January, 2008.

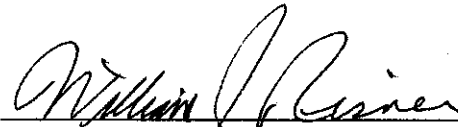3

4   **RISNER & GRAHAM**

5

6

7   BY: _____

8   William J. Risner, Esq.
                        Attorney for Plaintiff

9

10   **COPY** of the foregoing via facsimile
    this _2nd_ day of January, 2008, to:

11   Christopher Straub
    OFFICE OF THE

12   **PIMA COUNTY ATTORNEY**
    32 North Stone Avenue #2100

13   Tucson, Arizona 85701-1412
    Attorney for Defendants

14

15   _____
    Mot_to_Amend_Findings_of_Fact_or_Law

16

17

18

19

20

21

22

23

24

25

26