

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
05 CVS 15474

DIEBOLD ELECTION SYSTEMS, INC.

Plaintiff,

v.

THE NORTH CAROLINA STATE  
BOARD OF ELECTIONS and THE  
NORTH CAROLINA OFFICE OF  
INFORMATION TECHNOLOGY  
SERVICES,

Defendants.

PLAINTIFF'S BRIEF IN  
OPPOSITION TO MOTION  
TO INTERVENE  
(N.C. Gen. Stat. § 1A-1, Rule 24)

### INTRODUCTION

On November 10, 2005 a motion to intervene in the above-captioned declaratory judgment action was brought. The name on the motion to intervene was that of Joyce McCloy, a North Carolina activist and coordinator of the North Carolina Coalition for Verified Voting. Behind the attempted intervention, however, is a San Francisco-based activist group, the Electronic Frontier Foundation ("EFF"). Indeed, while EFF appears nowhere in the motion and supporting memorandum of points and authorities, on its website, in an article subtitled "EFF Goes to Court to Force E-voting Company to Comply With Strict New North Carolina Law," EFF states it "is going to court in North Carolina to prevent Diebold Election Systems, Inc., from evading North Carolina law[,] and provides a link to its by now moot Memorandum Of Points And Authorities In Support Of Motion To Modify Or Vacate Temporary Restraining Order.<sup>1</sup>

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<sup>1</sup> EFFector, Vol. 18, No. 40, Nov. 18, 2005, available at <http://www.eff.org/effector/18/40.php>; see also [http://www.eff.org/Activism/E-voting/20051117\\_Diebold\\_v\\_NC\\_Motion.pdf](http://www.eff.org/Activism/E-voting/20051117_Diebold_v_NC_Motion.pdf). Because the temporary restraining order issued by Judge Manning is now expired by operation of law, EFF's attempt, via Joyce McCloy, to modify or vacate that temporary restraining order is moot. See, e.g., *Taylor v. Centura Bank*, 124 N.C. App. 661, 478 S.E.2d 226 (1996) (holding temporary restraining order expires after ten days by operation of law and action taken

Neither Ms. McCloy, nor EFF through Ms. McCloy, may intervene in Diebold Election Systems, Inc.'s ("DESI") action for declaratory judgment seeking clarification of escrow requirements for voting system vendors. "[T]he interest of a third party seeking to intervene as a matter of right must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment." *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 682-83 (1999) (quotations and citations omitted) Ms. McCloy, and certainly EFF, has no direct and immediate interest relating to DESI's action for clarification of escrow requirements for voting system vendors. Only election system vendors and the state agencies administering elections and election equipment procurement have a direct and immediate interest. In turn, denying EFF and Ms. McCloy's motion to intervene would not result in an impairment of the protection of a (here nonexistent) direct and immediate interest, and the North Carolina State Board of Elections will more than adequately represent the indirect interest of North Carolina voters, including Ms. McCloy. *Id.* Moreover, neither EFF nor Ms. McCloy should be granted permissive intervention because they lack a claim or defense with questions of fact or law common to DESI's action for declaratory judgment as to escrow requirements for voting system vendors, and their presence in this action will only delay adjudication of this action and prejudice the parties to the action. *Id.*

For these and other reasons detailed below, the motion to intervene should be denied.

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thereafter is without authority). Moreover, even if the temporary restraining order were still in effect, one judge of this Court is not allowed to overrule or modify the ruling of another. "'The power of one judge of the superior court is equal to and coordinate with that of another.' *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). Accordingly, it is well established in our jurisprudence that . . . ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003).

## STATEMENT OF FACTS

On August 26, 2005, the General Assembly of North Carolina enacted Session Law 2005-323, attached to DESI's complaint as Exhibit A, commonly called the Public Confidence in Elections Act (the "Act" N.C. Gen. Stat. §163-165.9A(a)( under the Act states that voting system vendors shall place in escrow the following information:

[A]ll software that is relevant to functionality, setup, configuration, and operation of the voting system, including, but not limited to, a complete copy of the source and executable code, build scripts, object libraries, application program interfaces, and complete documentation of all aspects of the system including, but not limited to, compiling instructions, design documentation, technical documentation, user documentation, hardware and software specifications, drawings, records, and data. . . . The documentation shall include a list of programmers responsible for creating the software and a sworn affidavit that the source code includes all relevant program statements in low-level and high-level languages.

N.C. Gen. Stat. §163-165.9A(b) states that a willful violation of these requirements is a Class G felony

On September 26, 2005, the Executive Director of the State Board of Elections issued a memorandum, attached to DESI's complaint as Exhibit B, stating it was "developing a Request for Proposal (RFP) for the certification of voting equipment that will be purchased by the counties," and inviting "all interested parties to submit written comments and/or suggestions for any additional requirements or features not already covered by the aforementioned, to be considered by the State Board." Cmplt. Ex. B

In response to State Board of Elections' September 26, 2005 memorandum, DESI submitted written questions to the State Board of Elections regarding the RFP and the requirements mandated by the Act The State Board of Elections responded to questions submitted by plaintiff DESI and other interested vendors by issuing Addendum Number 2 dated

October 25, 2005, a copy of which is attached to DESI's complaint as Exhibit D. Question 19 in Addendum Number 2 was submitted by DESI and states as follows

The RFP (and North Carolina law) require "all software that is relevant to functionality, setup, configuration and operation of the voting system" to be placed in escrow in source and object code format. In the Diebold Election System, Inc. ("DESI") voting system, the operating system, various software drivers for ancillary components such as displays and card readers and other computer programs are the property of third parties and not available to vendors. Nonetheless, failure to supply the software for those components is a felony and the SBE may impose a penalty of \$100,000 for a failure to comply. How should a vendor address software for ancillary components developed by third parties?

Cmplt. Ex. D p. 5. The State Board of Elections responded to Question 19 as follows:

Vendors must agree to place in escrow in source and object code format, all available "software that is relevant to functionality, setup, configuration and operation of the voting system" and indicate in the RFP response all that is not available and why it is not available.

*Id.*

The response by the State Board of Elections to Question 19 is inconsistent with RFP Requirement #6 and N.C.G.S. §163-165.9A, and yet noncompliance with the RFP and N.C.G.S. §163-165.9A carry the risk of not only substantial civil, but also criminal, liability. N.C.G.S. §163-165.9A; Cmplt. Ex. D p. 5 On November 4, 2005, DESI filed this action seeking declaratory judgment as to the escrowing obligations of potential vendors under the Act and the RFP, as well as a temporary restraining order and preliminary injunction. *See generally* Cmplt. The Honorable Howard E. Manning, Jr. issued a temporary restraining order on November 4, 2005 and extended that temporary restraining order on November 17, 2005, attached hereto as Exhibits 3 and 4. On November 10, EFF, through North Carolina voter and activist Joyce McCloy, filed a motion and supporting memorandum of points and authorities seeking to intervene in this declaratory judgment action. EFF and McCloy also filed a by now moot Motion

To Modify Or Vacate Temporary Restraining Order and a Memorandum Of Points And  
Authorities In Support Of Motion To Modify Or Vacate Temporary Restraining Order

**ARGUMENT**

***A. Neither Ms. McCloy, Nor EFF Through Ms. McCloy, May Intervene As A  
Matter Of Right Pursuant to N.C. R. Civ. P. 24(a)(2).<sup>3</sup>***

North Carolina Civil Procedure Rule 24(a)(2) allows a party to intervene as a matter of  
right as follows

When the applicant claims an interest relating to the property or  
transaction which is the subject of the action and he is so situated that  
the disposition of the action may as a practical matter impair or impede  
his ability to protect that interest, unless the applicant's interest is  
adequately represented by existing parties.

N.C. Gen. Stat A- Rule 24(a)(2)

Our Supreme Court has made clear that

[W]here no other statute confers an unconditional right to intervene,  
the interest of a third party seeking to intervene as a matter of right  
under N.C.G.S. § 1A-1, Rule 24(a) “must be of such direct and  
immediate character that he will either gain or lose by the direct  
operation and effect of the judgment . . . . One whose interest in the  
matter in litigation is not a direct or substantial interest, but is an  
indirect, inconsequential, or a contingent one cannot claim the right to  
defend.” *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313,  
316 (1968) (quoting *Mullen v. Town of Louisburg*, 225 N.C. 53, 56, 33  
S.E.2d 484, 486 (1945)) (emphasis added) (applying former N.C.G.S.  
§ 1-73), quoted in *River Birch Assocs. v. City of Raleigh*, 326 N.C.  
100, 128, 388 S.E.2d 538, 554 (1990) (applying Rule 24(a)(2)). The  
prospective intervenor seeking such intervention as a matter of right  
under Rule 24(a)(2) must show that (1) it has a direct and immediate  
interest relating to the property or transaction, (2) denying intervention  
would result in a practical impairment of the protection of that interest,  
and (3) there is inadequate representation of that interest by existing  
parties. *Alford v. Davis*, 131 N.C. App. 214, 218, 505 S.E.2d 917, 920  
(1998); *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978).

*Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83

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<sup>2</sup> See *supra*, note 1.

<sup>3</sup> Ms. McCloy and EF do not contend that any statute provides a conditional or unconditional right to intervene.

(i). Neither Ms. McCloy nor EFF through Ms. McCloy has a direct and immediate interest relating to the issue presented by this action, namely escrow requirements for voting system vendors.

“[W]here no other statute confers an unconditional right to intervene, the interest of a third party seeking to intervene as a matter of right under N.C.G.S. § 1A-1, Rule 24(a) must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment .” *Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83 (quotations and citations omitted). “[I]ndirect” or “contingent” interests “common to all persons” do not entitle a party to intervene as a matter of right. *Id.* at 459, 515 S.E.2d at 683

Neither McCloy, nor EFF through Ms. McCloy, has any direct, immediate interest in DESI’s declaratory judgment action. This action seeks clarification of escrow requirements for voting system vendors under a statute titled “Voting systems: requirements for voting systems vendors; penalties,” N.C. Gen. Stat. § 163-165.9A, and under the RFP for voting machines. Presently, it is unclear whether voting system vendors must escrow third-party source code and executables relevant to the functionality, set-up, configuration and operation of DESI election systems, and identify third-party programmers who worked on such software, or whether vendors must escrow all available such source code, executables and programmer identifications and make explicit and explain any unavailable information. This ambiguity directly and immediately affects and interests only: (a) voting system vendors, which are subject to the escrow requirements and penalties for noncompliance, (b) the State Board of Elections, which bears the duty and the right to administer North Carolina’s elections, and (c) the Office of Information Technology Services, which bears responsibility for procurement of information technology products, including election machines.

Ms. McCloy and EFF as activists and, Ms. McCloy as a voter, are not directly and immediately affected by or interested in this action. Ms. McCloy may be indirectly affected as a North Carolina voter who would, in future elections, make use of voting systems made by vendors subject to the escrow requirements at issue here. However, her indirect interest in this action is no more direct or immediate than the interest of, for example, a North Carolina bank account holder's interest in a declaratory judgment action about the interpretation of North Carolina laws regulating financial institutions, or, as in *Virmani*, a newspaper's interest in seeing matters related to civil actions made public. Because Ms. McCloy and EFF have no direct or immediate interest in DESI's declaratory judgment action, they are not entitled to intervene as a matter of right pursuant to Civil Procedure Rule 24(a)(2).

(ii). Because neither Ms. McCloy nor, through her, EFF has a direct and immediate interest relating to the issue presented by this action, denying intervention cannot result in the impairment of a direct or immediate interest.

A person "seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest . [and] (2) denying intervention would result in a practical impairment of the protection of that interest *Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83 (quotations and citations omitted). Logically, where there is no direct and immediate interest, there can be no impairment of a (nonexistent) direct and immediate interest. *See, e.g., Virmani, id.* (holding that where one lacks a direct interest and has only an "indirect or contingent interest -- an interest common to all persons," that person is "not entitled to intervene as a matter of right pursuant to N.C.G.S. § 1A-1, Rule 24(a).").

Here, because neither Ms. McCloy nor EFF has a direct and immediate interest relating to the issue presented by this action, namely escrow requirements for voting system vendors,

denying their attempted intervention cannot result in the impairment of a (nonexistent) direct or immediate interest.

(iii). North Carolina's State Board of Elections will more than adequately represent the indirect interests of Ms. McCloy and all North Carolina Voters.

As previously stated, one seeking "intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties. *Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83 (citations omitted) (emphasis added). Logically, where there is no direct and immediate interest, there can be no inadequate representation of that (nonexistent) interest by existing parties. *See, e.g., Virmani, id.* (holding that where one lacks a direct interest and has only an "indirect or contingent interest -- an interest common to all persons," that person is "not entitled to intervene as a matter of right pursuant to N.C.G.S. § 1A-1, Rule 24(a).").

Nevertheless, it should be noted that the State Board of Elections will more than adequately represent the indirect interest of North Carolina voters, including Ms. McCloy, in this action. The North Carolina State Board of Elections is "an independent regulatory and quasi-judicial agency," N.C. Gen. Stat. § 163-28, charged with the overall responsibility for administration of the elections process and campaign finance disclosure in North Carolina. *See* <http://www.sboe.state.nc.us/>. The State Board of Elections is comprised of five registered voters appointed by the Governor, not more than three of whom may be from the same political party, and all of whom are nominated via lists submitted by the chairmen of the two political parties with the highest number of registered affiliates. N.C. Gen. Stat. § 163-19. The current members



of the State Board of Elections are: Larry Leake, Lorraine G. Shinn, Charles Winfree, Genevieve C. Sims, and Robert Cordle. See <http://www.sboe.state.nc.us/>.

The State Board of Elections members, upon being appointed, took an oath of office in which they solemnly swore to “support the Constitution of the United States[,]” “be faithful and bear true allegiance to the State of North Carolina,” “support, maintain and defend the Constitution” of North Carolina, and “well and truly execute the duties” of their office to the best of their knowledge and ability. *Id.* As the agency responsible for administering our elections, the State Board has the right and the duty to interpret and enforce election laws and regulations, and to do so well, truly, and to the best of its members’ knowledge and ability. Nothing supports EFF’s and Ms. McCloy’s bald assertion that North Carolina’s State Board of Elections would “select,” which is in any event left to the counties, election systems based on criteria other than what is best for this State and its voters and in conformity with the State Board of Elections oath and duties. See Memorandum Of Points And Authorities In Support Of Joyce McCloy’s Motion To Intervene at p. 5

In sum, neither Ms. McCloy, nor through her EFF, has a direct and immediate interest relating to DESI’s action for clarification of escrow requirements for voting system vendors. Denying intervention would thus not result in an impairment of the protection of a (here nonexistent) direct and immediate interest. Moreover, the North Carolina State Board of Elections will more than adequately represent the indirect interest of North Carolina voters, including Ms. McCloy, in this action seeking clarification of escrow requirements for voting system vendors. The motion to intervene as a matter of right must, therefore, fail.

***B. Ms. McCloy, And Through Her EFF, Should Be Denied Permissive Intervention Pursuant to N.C. R. Civ. P. 24(b)(2).***

North Carolina Civil Procedure Rule 24(b)(2) confers discretion upon the court to allow permissive intervention when an applicant's claim or defense and the main action have a question of law or fact in common. Further, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and the grant or denial of permissive intervention "rests within the sound discretion of the trial court.

*Virmani*, 350 N.C. at 460, 515 S.E.2d at 683 (citing *State ex rel. Comm'r. of Ins. v. N.C. Bureau*, 300 N.C. 460, 468, 269 S.E.2d 538, 543 (1980); *Alford*, 131 N.C. App. at 219, S.E.2d at 921; *State ex rel. Long v. Interstate Cas. Ins. Co.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992)). Moreover, while it has been stated that "[a]n intervenor by permission need not show a direct personal or pecuniary interest in the subject of the litigation[.]" *In re Baby Boy Scarce*, 81 N.C. App. 531, 541, 345 S.E.2d 404, 410 (1986) (citation omitted), it is nevertheless noteworthy that, in reviewing the trial court's denial of permissive intervention in *Virmani*, our Supreme Court noted the newspaper's "only indirect or contingent" interest, as well as intervention's likely "undu[e] delay [of] the adjudication of the rights of the original parties." *Virmani*, 350 N.C. at 460, 515 S.E.2d at 683.

As discussed above, neither McCloy, nor through her EFF, has any direct, immediate interest in DESI's declaratory judgment action. This action seeks clarification of escrow requirements for voting system vendors under a statute titled "Voting systems: requirements for voting systems vendors; penalties," N.C. Gen. Stat. § 163-165.9A, and under the RFP for voting machines. Presently, it is unclear whether voting system vendors must escrow third-party source code and executables relevant to the functionality, set-up, configuration and operation of DESI election systems, and identify third-party programmers who worked on such software, or whether vendors must escrow all available such source code, executables and programmer identifications

and make explicit and explain any unavailable information. This ambiguity directly and immediately affects and interests only: (a) voting system vendors, which are subject to the escrow requirements and penalties for noncompliance, (b) the State Board of Elections, bears the duty and the right to administer North Carolina's elections, and (c) the Office of Information Technology Services, which bears responsibility for procurement of information technology products, including election machines. Moreover, because Ms. McCloy and EFF are activists and, in the case of Ms. McCloy, a North Carolina voter and not (1) a voting system vendor or (2) a state agency administering elections processes or election equipment procurement, neither has any claims or defenses common in law or fact to any claims or defenses of DESI or the State Board of Elections and the Office of Information Technology Services.

Further, allowing McCloy, and through her EFF, to intervene will likely delay adjudication of this action and prejudice the action's original parties. A section of Ms. McCloy's website, advertised on her home page below topics such as "Bribery in NC," is called "Diebold sales pitch." There, Ms. McCloy portends to inform readers about "What Diebold Election Systems doesn't want you to know[.]" See <http://www.ncvoter.net/diebold.html>. Ms. McCloy's and, through her EFF's, attempt to intervene in this action has also already been widely publicized in an unbalanced and prejudicial manner. For example, on the website of activist and filmmaker Michael Moore, EFF staff attorney Matt Zimmerman is quoted as stating about this litigation: "Diebold went to court complaining that it simply couldn't comply with the law. Diebold should spend its efforts developing a system that voters can trust, not asking a court to let it bypass legal requirements aimed at ensuring voting integrity."

<http://www.michaelmoore.com/words/index.php?id=4931> That quote comes from an Electronic Frontier Foundation Media Release "For Immediate Release" found on activist websites all over

the internet. As the above demonstrates, neither Ms. McCloy nor EFF seeks, as do the parties to this action, a speedy clarification of the escrow requirements for voting system vendors. Rather, Ms. McCloy, and through her EFF, seek to further their own agendas, a tactic that would likely delay adjudication of this action, as well as prejudice DESI through purposefully damaging statements such as those already made by EFF and Ms. McCloy, invasive and harassing discovery, and other such tactics. Ms. McCloy, and through her EFF, can contribute their viewpoints regarding the issues presented by this action through an amicus curiae brief to this Court. They should, however, not be allowed to delay adjudication and prejudice the parties to an action in which they have no direct or immediate interest and no common defense or claim but rather an agenda to further.

### CONCLUSION

As has been demonstrated above, neither Ms. McCloy nor EFF has a direct and immediate interest relating to DESI's action for clarification of escrow requirements for voting system vendors. In turn, denying intervention would not result in an impairment of the protection of a (here nonexistent) direct and immediate interest, and the North Carolina State Board of Elections will more than adequately represent the indirect interest of North Carolina voters, including Ms. McCloy. Further, Ms. McCloy and EFF lack a claim or defense with questions of fact or law common to DESI's action for declaratory judgment as to escrow requirements for voting system vendors, and their presence in this action will delay adjudication of this action and prejudice the parties. The Court should, therefore, summarily deny the motion to intervene.

This the 28<sup>th</sup> day of November, 2005.

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