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To: File

Re: San Luis Obispo Investigation/Notes From Initial Background Interview

On September 10, 2003, a conference call was conducted at 8:00 a.m., to gather additional background for the legal analysis concerning the apparent transfer to a Diebold FTP site of certain election data from San Luis Obispo (SLO) County. The participants on the call were Karen Gantt, Dan McMillan, Frank Kaplan, Robert Chen, and Deborah. Robert is Diebold's project manager for California. Frank is Diebold's head of sales in California. I am not certain of Deborah's last name or her position; however, she works for Diebold in California. These notes are meant as a general summary of the discussion on the conference call. Much of the information reflected in these notes (particularly as to the events in question) constitutes speculation and cannot be viewed as "facts."

Background

In January 2003, the Diebold FTP site was hacked. The information obtained when the site was hacked includes thousands of files. One of the files obtained by the hackers appears to be actual election results from the March 5, 2002 primary election in SLO. One of the accusations made by Black Box Voting is that the data reflects results from 57 precincts. Based on this fact, Black Box Voting concludes that there must have been some sort of coordinated communication between the voting machines in each of those 57 precincts. As indicated below the investigation to date establishes that this is a false assumption.

Mail In Ballots From 57 Precincts

The file at issue contains data related solely to mail-in ballots. According to Deborah, SLO has many mail-only precincts. Under California law, any precinct with less than 250 residents can be designated a vote by mail precinct. There are 57 vote by mail precincts within SLO County. There are a total of approximately 300 walk-in precincts. However, on election day many of the precincts are consolidated and multiple precincts may vote at one location. As a result there are a total of about 100 precincts for walk-in voters. The 57 mail-in precincts do not have walk-up voting. Instead, the ballots are mailed to the clerk and the counting is done centrally at the clerk's office. The ballots from the 57 mail precincts, therefor arrive at one central location. In addition to being mailed, a mail-in ballot may be dropped off (at any precinct?) on the day of election. **(Confirm with Deborah whether the election day mail-in ballots that are dropped off must be dropped off at a central location or whether they may be dropped off at any of the precincts. Also are the drop off ballots processed at the precinct where they were delivered or at a central location.)**

The mail-in ballots are processed in much the same way as absentee ballots. According to Deborah, absentee ballots may be processed on the day of the election or prior thereto. Under California law, absentee ballots may be processed (including being machine read but not counted) up to 7 days prior to the closing of the polls. The processing involves opening the envelope, inspecting the ballot, and having the ballot machine read. The actual processing of these ballots and the machine reading of the ballots may continue into early on the day of the election. At some point on election day (e.g., noon) the processing of the absentee ballots maybe interrupted because election workers or officials need to go out to the precincts where the voting

is taking place. The absentee ballot processing and machine reading will continue sometime after the polls close.

At the point when the processing of the absentee ballots is suspended it is not unusual to generate a backup disk for the absentee ballots that have been processed. In addition, a "card cast report" will ordinarily be run. The card cast report simply reconciles the number of physical ballots to the number of ballots that the machine (software) indicates to have been read to ensure that there is a correspondence and an explanation for any deviation. This process is similar to reconciling hardcopy ballots to the voter registration book at the precinct. The card cast report does not constitute a vote count and does not show the number of votes that have been processed in terms of whether those votes have been cast for one candidate or another. Section 15101(b) of the California Election Code clearly provides that the processing of absentee ballots may include machine reading of the ballots. Thus, the machine reading of the ballots prior to the closing of the polls is not improper.

This same procedure described for absentee ballots seems to apply to mail-in ballots as well. **(It would appear that absentee ballots and mail-in ballots would be delivered to the same place. It also appears that they would be processed at the same time. We should confirm this with Deborah. Also, we should confirm with Deborah whether the data on the file at issue reflects both absentee ballots and mail-in ballots. If absentee ballots and ballots from mail in precincts are processed together, more than 57 precincts would be reflected on the database at issue because an absentee ballot could come from any precinct. We need to review the election code sections pertaining to mail-in ballots and confirm that the same rules apply in terms of early processing of mail-in ballots as applies to the processing of**

absentee ballots. Note: We have confirmed this; all votes that are other than walk-in votes are subject to the same rules on processing.)

This understanding debunks the Black Box Voting accusation that there was some sort of coordinated effort either electronically or manually to bring together information from 57 different precincts. The reason the file at issue contains information from 57 different precincts that are that those are 57 mail precincts. All of the data for these 57 precincts was processed at one location. There is no need for computers from 57 precincts to share information since all of the mail-in ballots were read by the same machine at the same location.

The accusation concerning the sharing of information between 57 computers for the 57 precincts is now recognized to be a faulty accusation. The Secretary of State understands this. According to Frank, Black Box Voting now understands this and has issued some sort of retraction or modification that reflects this understanding. **(I have not seen this retraction or modification.)**

Note: There appears to be a discrepancy between the number of mail precincts as indicated by Deborah (i.e., 57) and the information obtained concerning the number of precincts in SLO County. According to our information, there were 237 precincts, 105 mail ballot precincts, and 132 polling locations. If our information is correct, it is possible that only mail ballots for 57 precincts had been processed. In all events, we need to sort this out.)

Nature of the File and the Transfer

The file at issue appears to constitute a backup to the machine reading of mail ballots as of 3:31 p.m. on March 5, 2002. The file was zipped, a password assigned, and it was then posted to the FTP (File Transfer Protocol) site. The file appears to be limited to the mail-in ballots

processed up until that point in time. The file is quite large. According to Frank, it has approximately 56 MB of information. This election involved use of both optical voting machines and touch screen voting machines with audio capabilities. This was the first election for San Luis Obispo involving both of these technologies being used at the same time. At the time of this election, the Diebold system was using ".wav" files which take up substantial memory. They are now using ".mp3" files which do not take up as much memory. Because the file is so large, the transfer to the FTP site was not completed until 5:30 p.m. According to Frank, the information made it to the FTP site at 5:30 p.m. He believes that the Black Box Voting folks do not understand that the transfer occurred and the file was posted to Diebold's FTP site on the actual day of the election. Based on a further review of the discussion on the Black Box Voting website, it appears that they are aware of the fact that it was sent to the Diebold FTP site on election day.

Frank indicates that it is not unusual for a county to backup the database. Many times counties backup the database to ensure that a backup exists in the event of a problem. Thus, there is no problem with the fact that a backup was prepared in and of itself. Instead, the issue becomes the propriety of transferring that backup to a source outside the county or outside the voting system. Frank believes there have been many instances when a County Clerk or the Register of Voters has on his or her own backed-up the database or had our technical people assist with preparing the backup. In addition, he believes it is possible (but is not sure) that there may have been instances where a County was nervous as election data was being processed and may have believed there was an anomaly in the functioning of the software. He believes Counties may have asked that a backup be sent to our programmers to confirm that things were running properly. He did not recall specific instances and was speculating as to this scenario. It

is unclear whether, in the circumstances described, this would have occurred before or after the polls closed or during the course of processing absentee ballots before the polls closed.

We do not know and have been unable to determine who requested or who prepared the backup of the particular file in question. In the category of speculation, a number of possibilities were discussed. Apparently, the County itself could not have transferred the file directly to the FTP site. According to Frank, there are two computers that process the voting results for SLO County. Neither of those computers have modem capabilities or the ability to communicate outside the system or to the County network. One possibility is that a backup disk was made and loaded onto a personal computer, which was then used to transfer the information in the file via modem to the FTP website.

The password used for this file was Sophia ("Sophia"). Sophia Lee is a Diebold employee and worked in California. It is possible that the disk was loaded onto Sophia's laptop, which was then used to transfer the file to the Diebold FTP site. Sophia has no recollection of the backup or the transfer, according to Frank. Apparently, nobody at SLO County recalls the backup or the transfer. There was some suggestion that it might have been possible for Sophia to give her password to someone at the County to access this file from the FTP site (again, speculation). **(Is it possible to determine from Sophia's laptop whether this data was ever on her laptop and whether this file was ever transferred from her laptop? Also, is it possible that the file could have been loaded on to a County employee's laptop and transferred to the Diebold FTP site from the County employee's laptop?)**

The database contained within the file at issue does not itself constitute a count of the vote or a tally of the vote. In addition, the file appears to confirm that the only report generated was a card cast report and that the file was merely backed-up. There is no indication that a vote

tally report or a vote total was generated. According to the participants on the call, both Jim March and Beth Harris have acknowledged that no vote count report had been generated based on the data in the file. **(I have not seen this acknowledgement.)** This is a good fact for Diebold.

However, we discussed whether or not votes cast by candidate could be determined from the database. The information in the database likely would not be intelligible in the event it was simply printed out. The information may be in a binary form or other type of coded form. Thus, in order to understand how many votes each candidate had, the Gems program or some other software would need to be run on the database. It was suggested that an off-the-shelf software however could be run on the database and the information could be put in an intelligible form that would indicate the number of votes cast and also contain the information about which candidate received the votes. From this information, a person could determine the number of votes each candidate had received. Thus, a technical argument might be made that the transfer of this database to the FTP site constitutes a release of voting information in violation of voting secrecy requirements or prohibitions against release of vote tallies.

According to Deborah, the understanding and practice is that no vote tallies are to be done or vote counts performed prior to the closing of the polls. The database at issue does not constitute a vote count or vote tally. In fact no vote count report was generated.

There was some speculation as to whether or not other backup files during elections were ever transferred to the Diebold FTP site. Frank seemed to think (speculate) that there have been other occasions where actual election data may have been transferred to the Diebold FTP site. Diebold has a record or knowledge of all of the files that Black Box Voting obtained when the FTP site was hacked. A check needs to be conducted to determine whether any of the other files

that have been obtained by the hackers reflects transfer of election results before the vote was completed or the polls closed. This could be done by cross checking the date of elections against the date of the files that were hacked.

There was discussion about whether or not there is any record showing whether anybody looked at the file once it was transferred to the FTP site. There was some debate on this point. It was thought that the FTP site would not show who accessed the file after it was posted to the site. However, it was suggested that a screen print of the directory listing might show when the file was accessed and by whom the file was accessed. Ken and Pat (?) are programmers who have looked into this issue; however, Ken may not have been asked the precise question of whether anybody had accessed the file after it was transferred to the FTP site. We need to confirm whether or not this information can be determined.

According to Deborah, election ballots are maintained for state and local elections in California for 6 months and for federal elections for a period of 22 months. Hardcopy ballots would exist for the election conducted in San Luis Obispo for the precincts using optical machines.

The Clerk in San Luis Obispo is Julie. Her position is an elected position. The County Board of Supervisors sets her budget.

A question exists as to when the Diebold FTP site was first password protected. There was some thought that password protection did not exist for the Diebold FTP site at the time of the March 2002 election. Some thought that the password protection feature was not installed until after the March 2002 election. At the time that the FTP site was hacked in January 2003, the site was password protected. Josh in Vancouver should be able to advise us as to when the password protection was first installed.

Diebold has a record of everything that Black Box Voting downloaded when the FTP site was hacked. Josh has a copy of all the files that were downloaded. Bob, Ian and Jeff Hallmark are coordinating an effort to identify the materials that are available to Black Box Voting. Again, a check of election days should be a top priority to determine whether there are any other election results on any of the files available to Black Box Voting. More generally, regardless of whether the date corresponds to an election date, a review of those files need to be conducted to identify actual election results, if any, that were transferred to the FTP site. There was some discussion as to why it has taken Black Box Voting so long to surface this issue after the hacking of the FTP site. Some think that they may just be pacing themselves so that they can trickle out information and stay in the news. Others thought that there is simply such a large volume of files that they are only getting to some of the information and realizing what it is they have.

There was discussion of an incident involving Alameda County. There was a reference to the possibility that some election data may have been posted to the FTP site before the polls closed. This was a rather cryptic discussion and it wasn't clear whether this was actual election results or not. More information is needed on this point.

In summary, creating a backup file appears to be proper and the processing of mail ballots appears to be proper. The issue concerns the mere transfer of the backup file to the Diebold FTP site. There is nothing to suggest that this was done for an improper motive. Indeed, if anything, it would have been done to ensure that there was an available backup of files.

SLO's Posture

SLO County is a good client. They are requesting a written explanation of what occurred. They are concerned but not overreacting. They have viewed Diebold as a partner and

have worked very closely with Diebold. The Board of Supervisors seems satisfied. The County seems to understand that the backup file involved only mail in ballots, that no vote count was conducted, and that it is likely that people were simply trying to create a secure backup file. The County's personnel do not have any recollection of the details of the backup or the record of its making. This lack of detailed recollection would suggest that Diebold personnel are not hiding things and similarly lack a specific recollection of these events because there was nothing intentionally improper being done.

Arizona Issues

Frank mentioned very briefly and without substantive content an issue that has arisen in Arizona. A Dan Healy or Dan Heady from Midwest Media has been calling the Secretary of State of Arizona. Frank had received a voicemail from this person from Midwest Media and does not know the precise spelling of his last name. Diebold has advised that it thinks whatever the issue that is being addressed is bogus.

Follow-up Items

The following items require some follow up for further consideration:

- (1) We need to confirm with Josh whether any other election data or any other actual election data appears in any of the files that were obtained by Black Box Voting.
- (2) We need to determine from Josh (and/or others as necessary) whether anyone actually looked at the file for the SLO election that was transferred to the FTP site.
- (3) Diebold needs to reinforce with all California personnel that election day voting information, including backup files, should not be transferred to Diebold sites whether protected or not.

- (4) We need to determine whether any actual election data from Alameda County was ever transferred.
- (5) Sophia should be interviewed by counsel outside the presence of Frank and others directly involved with California.
- (6) We should determine whether Sophia's laptop has any record of loading and/or transferring the backup files.
- (7) We need to reconcile Deborah's statement that there are 57 mail precincts with the Secretary of State's information indicating that there are 105 mail precincts.

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