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ON NEXT PAGE**

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF
CALIFORNIA, acting by and through
California Attorney General Bill Lockyer
and Alameda County District Attorney
Thomas J. Orloff, and the COUNTY OF
ALAMEDA,

Plaintiffs,

vs.

DIEBOLD ELECTION SYSTEMS, INC., a
Delaware corporation; DIEBOLD,
INCORPORATED, an Ohio corporation;
and DOES 1 through 1000, inclusive,

Defendants.

CASE NO. RG 03128466

FIRST AMENDED COMPLAINT

**JURY TRIAL DEMANDED (AS TO
FIRST AND SECOND CAUSES OF
ACTION)**

Date action filed:
November 21, 2003 (*qui tam* complaint)

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14 **COUNTY OF ALAMEDA**

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1 Plaintiffs, the People of the State of California (“State” or “California”) and the County of
2 Alameda (“Alameda” or “County”) are informed and believe and allege as follows:

3 **PARTIES**

4 1. The People of the State of California, by California Attorney General Bill Lockyer and
5 Alameda County District Attorney Thomas J. Orloff, is a plaintiff and a real party in interest in
6 this action.

7 2. The County of Alameda is a plaintiff and a real party in interest in this action.

8 3. James March and Bev Harris are the *qui tam* plaintiffs. James March is a resident of
9 California. Bev Harris is a resident of the State of Washington.

10 4. Defendant Diebold Election Systems, Inc. (“DESI”) is a corporation organized under
11 the laws of Delaware. DESI maintains its principal office in McKinney, Texas. Prior to 2002,
12 DESI was known as “Global Election Systems, Inc.”

13 5. Defendant Diebold, Incorporated (“Diebold Inc.”) is a corporation organized under the
14 laws of Ohio. Diebold Inc. maintains its principal office in North Canton, Ohio. Diebold Inc.
15 finalized acquisition of Global Election Systems, Inc. as a subsidiary in January, 2002, and
16 renamed the subsidiary DESI.

17 6. DESI is a wholly owned subsidiary of Diebold Inc. DESI and Diebold Inc. may be
18 collectively referred to as “Diebold.”

19 7. Defendants at all relevant times have transacted business in the County of Alameda
20 and elsewhere in the State of California. The violations of law alleged herein have been and are
21 being carried out within the County of Alameda and elsewhere in California. Diebold and DESI
22 do business in Alameda County, California.

23 8. All of the acts and omissions described in this First Amended Complaint by any
24 defendant were duly performed by, and attributable to, all defendants, each acting as agent, as
25 employee, alter ego and/or under the direction and control of the others, and such acts and
26 omissions were within the scope of such agency, employment, alter ego, direction, and/or
27 control. Any reference in this complaint to any acts of defendants shall be deemed to be the acts
28 of each defendant acting individually, jointly, or severally.

1 9. The true names and capacities, whether corporate, associate, individual, partnership or
2 otherwise of defendants Does 1 through 1000, inclusive, are unknown to the State and the
3 County, which therefore sue said defendants by such fictitious names. The State and the County
4 will seek leave of court to amend this First Amended Complaint to allege their true names and
5 capacities when the same are ascertained.

6 10. At all relevant times each of the defendants, including Doe defendants, was and is the
7 agent, employee, employer, joint venturer, representative, alter ego, subsidiary, and/or partner of
8 one or more of the other defendants, and was, in performing the acts complained of herein,
9 acting within the scope of such agency, employment, joint venture, or partnership authority,
10 and/or is in some other way responsible for the acts of one or more of the other defendants.

11 **FACTUAL ALLEGATIONS**

12 **ALAMEDA COUNTY CONTRACT**

13 11. On or about May 23, 2002, the County entered into a contract with Diebold, in which
14 Diebold was to provide, deliver, install, support, service and maintain an electronic voting
15 system for use in all public elections in the County (“Alameda County Contract”). The Alameda
16 County Contract called for a purchase price of \$11,777,422.75. Under the Alameda County
17 Contract, Diebold agreed to provide a voting system with 4,000 of Diebold’s electronic
18 touchscreen units, known as the “AccuVote TS,” eight optical scan units, known as the
19 “AccuVote OS”, and a central computer running the Diebold proprietary software, known as
20 “GEMS.”

21 12. The Alameda County Contract attaches and incorporates by reference the County’s
22 Request for Proposal (RFP No. 003-1-7459), Addendum 1 and Diebold’s Response (collectively
23 referred to as the “RFP and Response.”)

24 13. In the Alameda County Contract and the RFP and Response, Diebold agreed to:
25 (1) comply with all applicable laws, ordinances, codes and regulations of governmental agencies,
26 including federal, state, municipal and local governing bodies having jurisdiction over the scope
27 of services; (2) provide a voting system that has been certified by the Secretary of State; and
28 (3) provide upgrades to the system that have been certified by the Secretary of State. In addition,

1 in the Alameda County Contract and RFP and Response, Diebold represented or warranted,
2 among other things, that the system: (1) shall be free from defects; (2) shall be fit for the
3 purpose of conducting elections; (3) does not contain any harmful code; (4) is capable of
4 correctly tabulating votes; and (5) possessed security features to prevent vote-tampering.

5 **FUNDING UNDER THE VOTING MODERNIZATION**

6 **BOND ACT OF 2002**

7 14. In 2002 and 2003 the Counties of Alameda, Kern, Lassen, Plumas, Santa Barbara and
8 Siskiyou applied for funds under the Voting Modernization Bond Act of 2002 (Elections Code
9 section 19230 et seq.) ("VMBA"). Elections Code section 19234 subdivision (e) provides that
10 VMBA funds shall only be used to purchase voting systems that are certified by the Secretary of
11 State.

12 15. In 2003, VMBA funds were paid to the following counties, in the following amounts:

13 Alameda - \$8,779,360.86

14 Kern - \$1,123,581.47

15 Lassen - \$105,635.48

16 Plumas - \$176,139.87

17 Santa Barbara - \$1,000,226.57

18 Siskiyou - \$258,943.11

19 **INSTALLATION OF UNCERTIFIED SOFTWARE**

20 16. Elections Code section 19201 prohibits use of voting systems in the State of
21 California, unless approved by the Secretary of State.

22 17. Elections Code section 19213 provides that when a voting system has been approved
23 by the Secretary of State, the voting system shall not be changed or modified until the Secretary
24 of State has been notified in writing and determined that the change or modification does not
25 impair its accuracy and efficiency sufficient to require a reexamination and reapproval.

26 18. In October 2003, the Secretary of State learned that Diebold installed versions of the
27 GEMS vote-tabulation software that had not been certified by the Secretary of State.

1 19. On December 16, 2003, the results of an audit conducted by the Secretary of State
2 were released to the public. The audit revealed that uncertified software and firmware had been
3 installed in all 17 counties in the State of California using Diebold voting systems, and that
4 uncertified software and firmware had been used in the October 2003 Recall election and in
5 November 2003 elections. In addition, the audit revealed that software installed in three of the
6 17 counties was not federally qualified.

7 **SECURITY DEFECTS**

8 20. In July, 2003, computer scientists from the faculties of Johns Hopkins University and
9 Rice University published an analysis of Diebold's electronic voting system ("Johns Hopkins
10 Study"), which analyzed source code that had been made publicly available.

11 21. From September 2003 through January 2004, other states conducted analyses of the
12 electronic voting systems of Diebold and other vendors, and published all or a part of their
13 studies.

14 22. The Johns Hopkins Study and other states' analyses revealed significant security issues
15 in certain then-existing versions of Diebold's voting systems.

16 **TSx CERTIFICATION**

17 23. In August, 2003, Diebold requested certification from the Secretary of State for the
18 AccuVote TSx voting system ("TSx system").

19 24. In October, 2003, Diebold informed the Secretary of State that the TSx system had
20 been selected by the Counties of Kern, San Joaquin, San Diego and Solano for use in the
21 March 2, 2004 Primary Election ("2004 Primary").

22 25. Based on representations from Diebold that federal qualification was imminent and
23 that Diebold would comply with certain conditions, the Secretary of State conditionally certified
24 the TSx system on November 10, 2003.

25 26. From December 2003 to February 2004, Diebold filed ten applications for or urging
26 certification of components of the Diebold voting systems sought to be used in the 2004 Primary.
27 A number of these applications related either directly or indirectly to the TSx system.

1 27. During January and February 2004, Diebold proposed using versions of TSx hardware
2 and vote-tabulation software that had not yet been approved by federal testing authorities.

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5 28. During January and February 2004, Diebold submitted a TSx version for federal
6 testing that differed from the version that Diebold had submitted to the Secretary of State for
7 state certification.

8 29. Diebold failed to submit a satisfactory back-up plan to the Secretary of State for use of
9 Diebold voting systems, in the event federal qualification had not been obtained in time for the
10 2004 Primary.

11 30. Due to Diebold's delays in submitting changes to the Secretary of State for approval
12 and addressing problems noted by federal testing authorities, the TSx still had not received
13 federal approval or state certification by mid-February 2004.

14 31. On February 11, 2004, the Secretary of State authorized use of the TSx system for the
15 2004 Primary, conditioned on certain procedures and security measures being in place.

16 32. On February 16, 2004, the Voting Systems Board of the National Association of State
17 Election Directors (NASSED) made a conditional recommendation for approval of the TSx
18 system *only* in light of the urgent deadlines of the upcoming 2004 Primary.

19 **PRECINCT CONTROL MODULE (PCM 500)**

20 33. In January 2004, Diebold applied for certification with the Secretary of State for
21 approval of two computerized vote card encoder models or Precinct Control Modules (known as
22 the "PCM 100" and "PCM 500") that were needed to run elections in counties using Diebold
23 touchscreen voting systems in the 2004 Primary.

24 34. Diebold submitted the PCM 100 and PCM 500 for certification by the Secretary of
25 State when they had not yet been federally qualified.

26 35. On February 20, 2004, approximately two weeks before the 2004 Primary, the
27 Secretary of State received a report from a federal testing lab, indicating that testing was
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1 successful on the PCM 100 and PCM 500. However, because of Diebold's late submission,
2 testing was limited to verifying that the units functioned as described in operator manuals.

3 36. On February 20, 2004, the Secretary of State conditionally approved the PCM 100 and
4 PCM 500 for use in the 2004 Primary only.

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6 37. Diebold's failure to properly configure the PCM 500 resulted in battery failures.
7 Diebold failed to advise counties and/or provide training to poll workers with respect to battery
8 failures.

9 38. As a result of battery failures, PCM 500 units used in Alameda County and San Diego
10 County failed the morning of the 2004 Primary. San Diego County was initially unable to open
11 over one-third of its polling places due to battery failures in the PCM 500, thus delaying the
12 election and causing voters to be turned away at the polls. Alameda County was able to open
13 polls, despite battery failures, because it offered back-up paper ballots to voters, who would have
14 otherwise been turned away at the polls.

15 **QUI TAM COMPLAINT**

16 39. In addition to the allegations contained in this First Amended Complaint, the *qui tam*
17 complaint, filed under seal on November 21, 2003 in Alameda County Superior Court, Case
18 No. RG 03128466, alleges violations of the California False Claims Act and California Unfair
19 Competition Law^{1/} arising out of the following: Diebold's ballot tally software program
20 maintained three independent databases; Diebold's FTP site was not secure; Diebold modified
21 Windows CE without notifying the federal testing laboratories; Diebold failed to escrow ballot
22 tally software program codes; and Diebold made misrepresentations in sales contracts and
23 promotional materials.

24 **FIRST CAUSE OF ACTION**

25 **Violations of the California False Claims Act (Government Code Section 12650 et seq.)** 26 **Brought by COUNTY against all Defendants**

27 _____
28 1. The California Unfair Competition Law cause of action was voluntarily dismissed by
qui tam plaintiffs on February 19, 2004.

1 40. County incorporates by reference and re-alleges paragraphs 1 through 22.

2 41. This is a claim for treble damages and penalties under the California False Claims Act,
3 Government Code sections 12650 et seq.

4 42. County is informed and believes that defendants had actual knowledge of the falsity of
5 their statements, reports and submissions or acted in deliberate ignorance or with reckless
6 disregard of the truth. To the extent that defendants claim that they did not know the statements
7 were false at the time they were made, they failed to notify the County once they learned of the
8 false claims.

9 43. As a result of the defendants' false claims, the County paid out monies under the
10 Alameda County Contract, and/or for the cost of additional security measures necessary for the
11 2004 Primary and the November 2, 2004 General Election.

12 44. The Alameda County Contract, RFP and Response and demand for payment constitute
13 "claims" within the meaning of Government Code sections 12650 et seq.

14 45. By the conduct and acts described in paragraphs 1 through 22 above, defendants
15 violated the California False Claims Act within the meaning of Government Code section 12650,
16 as follows:

17 a. Defendants knowingly presented or caused to be presented to officers and
18 employees of the County a false claim for payment or approval, by submitting the RFP and
19 Response, Alameda County Contract and demand for payment, in which defendants made false
20 statements about the security of the electronic voting system, compliance with federal and state
21 certification requirements, and compliance with all laws and regulations, in violation of
22 Government Code section 12651, subdivision (a)(1) and (2).

23 b. To the extent that any defendant did not knowingly participate in the making of
24 any of the false claims within the meaning of Government Code section 12651,
25 subdivision (a)(2) at the time such claims were made, such defendant is a beneficiary of an
26 inadvertent submission of a false claim to the County, who subsequently discovered the falsity of
27 the claims and failed to disclose them to the County within a reasonable time after such
28 discovery, in violation of Government Code section 12651, subdivision (a)(8). Each defendant

1 benefitted from the submissions of the false claims to the County. Each defendant discovered
2 the falsity of the records, statements, and claims but failed to disclose that falsity to the County
3 within a reasonable time after discovery.

4 46. As a result of the defendants' acts, the County suffered damages.

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7 **SECOND CAUSE OF ACTION**

8 **Violations of the California False Claims Act (Government Code Section 12650 et seq.)**
9 **Brought by CALIFORNIA against all Defendants**

10 47. California incorporates by reference and re-alleges paragraphs 1 through 22.

11 48. This is a claim for treble damages and penalties under the California False Claims Act,
12 Government Code sections 12650 et seq.

13 49. California is informed and believes that defendants had actual knowledge of the falsity
14 of their statements, reports and submissions or acted in deliberate ignorance or with reckless
15 disregard of the truth. To the extent that defendants claim that they did not know the statements
16 were false at the time they were made, they failed to notify California once they learned of the
17 false claims.

18 50. As a result of the defendants' false claims, California paid out monies under the
19 VMBA to the Counties of Alameda, Kern, Lassen, Plumas, Santa Barbara and Siskiyou to assist
20 in the purchase of electronic voting systems.

21 51. By the conduct and acts described in paragraphs 1 through 22 above, defendants
22 violated the California False Claims Act within the meaning of Government Code section 12650,
23 as follows:

24 a. Defendants knowingly presented or caused to be presented to officers and
25 employees of the County and the Counties of Kern, Lassen, Plumas, Santa Barbara and Siskiyou
26 a false claim for payment or approval, by submitting claims or statements to the County and the
27 Counties of Kern, Lassen, Plumas, Santa Barbara and Siskiyou stating that electronic voting
28 systems sold to those counties were secure and certified as required by state law.

b. To the extent that any defendant did not knowingly participate in the making of any of the false claims within the meaning of Government Code section 12651, subdivision (a)(2) at the time such claims were made, such defendant is a beneficiary of an inadvertent submission of a false claim to California, who subsequently discovered the falsity of the claims and failed to disclose them to California within a reasonable time after such discovery, in violation of Government Code section 12651, subdivision (a)(8). Each defendant benefitted from the submissions of the false claims to California. Each defendant discovered the falsity of the records, statements, and claims but failed to disclose that falsity to California within a reasonable time after discovery.

52. As a result of the defendants' acts, California suffered damages.

THIRD CAUSE OF ACTION

**Unfair Business Practices (Business and Professions Code Section 17200 et seq.)
Brought by the People of the State of California, acting by and through the
California Attorney General Bill Lockyer and the Alameda County District Attorney
Thomas J. Orloff, against all Defendants**

53. California incorporates by reference and re-alleges paragraphs 1 through 52.

54. Beginning at an exact date that is unknown to plaintiffs, but within four years prior to the filing of this First Amended Complaint, defendants engaged in unfair competition as defined by Business and Professions Code section 17200, by engaging in the following unlawful, unfair or fraudulent acts or practices:

a. Defendants violated the California False Claims Act, Government Code sections 12650 et seq., by the acts and practices set forth in paragraphs 1 through 52 of this First Amended Complaint;

b. Defendants installed or caused to be installed uncertified software and firmware in ALAMEDA COUNTY and 16 other California counties that used Diebold voting systems, causing uncertified software and firmware to be used in the October 2003 Recall election and in November 2003 elections.

c. In three counties in California, defendants installed or caused to be installed software that was not federally qualified.

1 d. Defendants deployed versions of the TSx system for use by California counties in
2 the 2004 Primary when those versions had not yet received necessary testing, approval and
3 certification, without allowing adequate time in which to obtain necessary testing, approval and
4 certification, and without providing suitable alternatives to be used in the event that necessary
5 testing, approval and certification could not be completed prior to the 2004 Primary.

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7 e. Defendants deployed PCM 500 units for use by California counties in the 2004
8 Primary when those units had not yet received necessary testing, approval and certification,
9 without allowing adequate time in which to obtain necessary testing, approval and certification,
10 and without providing any alternative to be used in the event that necessary testing, approval and
11 certification could not be completed prior to the 2004 Primary.

12 **PRAYER FOR RELIEF**

13 California and the County pray for judgment against each defendant as follows:

14 **Under the First Cause of Action (Violation of the California False Claims Act):**

15 1. For three times the damages sustained by the County as a result of the defendants'
16 false claims in an amount to be proven at trial.

17 2. Civil penalties in the amount of \$10,000 for each false claim.

18 3. Costs of suit.

19 4. For such further and additional relief as the court deems proper.

20 **Under the Second Cause of Action (Violation of the California False Claims Act):**

21 1. For three times the damages sustained by California as a result of the defendants' false
22 claims in an amount to be proven at trial.

23 2. Civil penalties in the amount of \$10,000 for each false claim.

24 3. Costs of suit.

25 4. For such further and additional relief as the court deems proper.

26 **Under the Third Cause of Action (Unfair Business Practices):**

1 1. Pursuant to Business and Professions Code section 17206, each defendant be assessed
2 a civil penalty of \$2,500 for each violation of Business and Professions Code section 17200, in
3 an amount of not less than \$1,000,000.00.

4 2. That pursuant to Business and Professions Code section 17203, defendants, their
5 successors, agents, representatives, employees, and all other persons who act under, by, through,
6 or on behalf of any of them, or any of them, be permanently restrained and enjoined from
7 performing or proposing to perform any of the acts of unfair competition in the State of
8 California.

9 3. That defendants be ordered to make full restitution for acts of unfair competition as
10 determined by the court.

11 4. For costs of suit.

12 5. For such further and additional relief as the court deems proper.

13 DATED: November 10, 2004

Respectfully submitted,

14 BILL LOCKYER

Attorney General of the State of California

15 CHRISTOPHER AMES

Senior Assistant Attorney General

16 LARRY G. RASKIN

Supervising Deputy Attorney General

17 MELINDA VAUGHN

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24 **OF THE STATE OF CALIFORNIA**

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25 ANTHONY P. DOUGLAS

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THE STATE OF CALIFORNIA

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**Attorneys for Plaintiff, COUNTY OF
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