

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

HART INTERCIVIC, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 1:09-cv-678
	:	
DIEBOLD, INCORPORATED and	:	<b>JURY TRIAL DEMANDED</b>
ELECTION SYSTEMS & SOFTWARE, INC.	:	
	:	
Defendants.	:	

**AMENDED COMPLAINT FOR PRELIMINARY AND  
PERMANENT INJUNCTION AND FOR DAMAGES**

Plaintiff, Hart InterCivic, Inc. (“Hart”), based on Rule 15(a), F.R.Civ.P. and not having been served with a responsive pleading or having previously amended its complaint without leave of court, submits the following Amended Complaint as a matter of course:

Hart brings this civil action against Diebold, Incorporated (“Diebold”) and Election Systems & Software, Inc. (“ES&S”), and alleges as follows:

**I. JURISDICTION AND VENUE**

1. This court has subject matter jurisdiction and jurisdiction over the parties pursuant to 28 U.S.C. §§ 1331 and 1337 and over the federal antitrust claims asserted herein under Section 16 of the Clayton Act, 15 U.S.C. § 26, Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 2 of the Sherman Act, 15 U.S.C. § 2.

2. Venue is proper in this district pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391, in that this case involves the acquisition of the outstanding shares of capital stock of Premier Election Solutions, Inc., a Delaware domestic corporation by

an acquiring party, ES&S, that is also a Delaware domestic corporation. Both defendants are found and transact business in the District of Delaware and throughout the United States.

3. Defendants are engaged in “commerce,” as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12(a). Defendant’s conduct has and will have a substantial, direct, and reasonably foreseeable effect on interstate commerce.

## **II. THE PLAINTIFF**

4. Plaintiff, Hart, is a for-profit corporation existing and doing business under the laws of the State of Texas organized on June 13, 1986 having its principal offices at 15500 Wells Port Drive, Austin, Texas 78728. The founders of Hart have been printing election ballots and serving the voting machine and election systems market since 1912. Hart presently serves approximately 9% of the approximately 180,000 voting precincts in the United States.

## **III. THE ULTIMATE PARENT ENTITIES**

5. The defendants, Diebold and ES&S, Hart’s two largest competitors, are the ultimate parent entities involved in the stock and/or asset transaction that is the subject of this case.

### **A. Defendant Diebold**

6. Diebold is a corporation existing and doing business under the laws of the State of Ohio organized on August 11, 1876 having its principal place of business at 5995 Mayfair Road, North Canton, Ohio 44720. Diebold is a diversified manufacturing company specializing in ATM’s and other banking equipment.

7. Diebold is the ultimate parent entity of Diebold Election Systems Holding Company, Inc., a Delaware general corporation organized on June 24, 2002.

8. Diebold is the ultimate parent entity of Global Election Systems, Inc. (“GES”), a Delaware general corporation organized on December 6, 1991 having its principal place of business at

1253 Allen Station Parkway, Allen, Texas 75002. On March 18, 2002 GES changed its name to Diebold Election Systems, Inc. (“DES”). On September 12, 2007 DES changed its name to Premier Election Solutions, Inc. (“PES”). Diebold is the ultimate parent entity of PES by virtue of its acquisition of GES in 2002. PES presently serves approximately 23% of the voting precincts in the United States.

9. Diebold is the ultimate parent entity of Data Information Management Systems, Inc., (“DIMS”), a California corporation organized on February 9, 1981, by virtue of having acquired the capital stock and/or assets of DIMS on or about January 23, 2003. DIMS provides information technology resources to PES and its customers.

10. Diebold is the ultimate parent entity of Premier Canada, a vendor of voting machines and election systems to Canadian jurisdictions.

**B. Defendant ES&S**

11. ES&S is a corporation existing and doing business under the laws of the State of Delaware organized on April 25, 1988 having its principal place of business at 11208 John Galt Blvd., Omaha, Nebraska 68137. ES&S is successor-in-interest to American Information Systems, Inc., which, in 1997, acquired the election systems division of Business Records Corporation. ES&S serves approximately 45% of the voting precincts in the United States.

12. ES&S is its own ultimate parent entity.

**IV. THE OTHER VENDORS**

13. Sequoia Voting Systems (“Sequoia”) is a vendor of voting machines and election systems that serves approximately 18% of the voting precincts in the United States.

14. Dominion Voting Systems, Inc. (“Dominion”) is a Toronto, Canada-based vendor of voting machines and election systems that serves approximately 5% of the voting precincts in the United States.

## **V. THE SEPTEMBER 2 ACQUISITION**

15. On September 2, 2009 Diebold and ES&S agreed and consummated a transaction in which ES&S would acquire from Diebold all the outstanding capital stock of PES and DIMS and the assets of Premier Canada.

16. On September 3, 2009 Diebold filed Form 8-K with the United States Securities and Exchange Commission disclosing that it had sold the capital stock of PES and DIMS and the assets of Premier Canada to ES&S (Exhibit “A,” attached).

17. The September 3, 2009 Form 8-K discloses that

[Diebold’s] sale of the election systems business (the ‘Divestiture’) was consummated simultaneously with the entry into the Purchase Agreement on September 2, 2009.

18. The Form 8-K further discloses that

[Diebold] has also entered into a non-competition agreement with ES&S pursuant to which [Diebold] has agreed not to provide election products and services within the United States, its territories or Canada.

19. The Form 8-K further discloses that

[a]s a condition to the transaction, [Diebold] entered into a transition services agreement with ES&S pursuant to which the [Diebold] will facilitate an orderly transfer of the business to ES&S and provide certain transition services.

20. On September 3, 2009 ES&S issued a press release announcing its acquisition of PES (Exhibit “B,” attached).

## **VI. NATURE OF THIS ACTION**

21. Plaintiff brings Count I of this action against defendants, Diebold and ES&S, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, for a preliminary and permanent injunction and other equitable relief on the grounds that defendants’ violation of Section 7 of the

Clayton Act, 15 U.S.C. § 18, poses a significant and imminent threat of irreparable antitrust injury to plaintiffs. The transaction also poses a significant and imminent threat of irreparable harm to the other vendors like Hart serving less than 20% of voting precincts, harm to the political subdivisions that constitute the jurisdictions that must purchase voting machines and election systems, and, ultimately, harm to the voters of the United States, in the form of loss of confidence in the integrity and security of the means by which elections are performed.

22. Plaintiff brings Counts II and III of this action against defendant, ES&S, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for damages for injury to plaintiff's business and property resulting from anticompetitive and exclusionary conduct by ES&S in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

23. Plaintiff brings Count IV of this action against defendants, Diebold and ES&S, pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for conspiracy to monopolize the market for voting machines and election systems in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

## **VII. TRADE AND COMMERCE**

### **A. The Nature of the Market for Voting Machines and Election Systems**

24. To conduct elections, states, counties and municipalities ("jurisdictions" or "customers") procure voting machines and election systems. Procurement across the United States occurs through a series of competitive bidding contests initiated by jurisdictions. Typically, a jurisdiction will publish a Request for Proposal ("RFP") to which vendors respond with specifications and bids. Bids are customarily submitted to provide a turn-key election system. An RFP may call for procurement of equipment, software, installation, training, ballot printing and programming, pre-election testing, maintenance, repairs, election-day assistance,

results tabulation, trouble shooting, investigation, and recount management.

25. Election systems are ordinarily designed to provide a useful service life over several 2- and 4-year election cycles. Accordingly, the term length of the contracts awarded by jurisdictions are frequently 1 - 10 years. The services to maintain and manage the election system must nearly always be provided throughout the multi-year life of the contract by the system vendor because in most cases it is impractical or impossible to obtain aftermarket services for an election system from a vendor other than the vendor that originally designed, fabricated, and delivered the system. As a result, jurisdictions are frequently “locked-in” to a vendor once a contract is awarded. Unscrupulous vendors can exploit the effect of lock-in to engage in price gouging. Some vendors also strategically strengthen customer lock-in by restricting customer access to the software source code and other intellectual property that controls the system.

26. Voting machines and election systems are subject to testing and certification requirements as overseen by the United States Election Assistance Commission (“EAC”) and by the individual states. Testing and certification is difficult, costly and time consuming, involving several years of product development before the products may be submitted to a lengthy certification process.

27. Not all vendors bid in all contests. Some vendors will not be qualified, depending on the requirements of the RFP. Requirements that call for a particular product feature or type of service, or for specific state or federal system certification, will often eliminate potential bidders.

28. Diebold and ES&S desire to, and do, influence the content of RFPs and the outcome of the competitive bidding contests, through both legitimate and illegitimate acts and conduct.

## **B. The Relevant Market**

29. The relevant antitrust product market is the market for voting machines and election systems which is a line of commerce within the meaning of Section 7 of the Clayton Act.

30. The relevant antitrust geographic market is the United States and Canada within the meaning of Section 7 of the Clayton Act.

31. Competition in the relevant market is strengthened the more vendors submit bids on contests conducted by jurisdictions. Competition is harmed where fewer vendors bid.

## **C. Market Concentration**

32. The U.S. market for voting machines and service is highly concentrated. The following table, based on publicly available data, uses the Herfindahl-Hirschman Index (“HHI”) as a measure of market concentration:

<u>HHI Before September 2 Acquisition</u>			
Company	# Precincts	%	HHI
ES&S	83098	45.41	2061.82
Diebold	41704	22.79	519.31
Sequoia	32405	17.71	313.54
Hart	16713	9.13	83.40
Dominion	9086	4.96	24.65
Total	183006	100	3002.72

<u>HHI After September 2 Acquisition</u>			
Company	# Precincts	%	HHI
ES&S	124802	68.20	4650.64
Sequoia	32405	17.71	313.54
Hart	16713	9.13	83.40
Dominion	9086	4.96	24.65
Total	183006	100	5072.23

Difference:			<u>2069.51</u>
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33. As a result of the September 2 acquisition, ES&S will serve more than 68% of all U.S. election precincts and the number of possible independent competitors qualified to bid on

any future contract let by a jurisdiction will be reduced from five to four. The proposed transaction will increase the HHI in voting machines and election systems from 3,003 points to a post-acquisition level of 5,072 points, or an increase of 2,069 points. Under the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines (rev. 1997, § 1.51), markets with an HHI above 1,800 are considered highly concentrated, and “[w]here the post-merger HHI exceeds 1,800, it will be presumed [by the agencies] that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise.” Starting from a pre-acquisition position of 3,002 (nearly twice the level indicative to the DOJ and FTC of an already highly concentrated market), the September 2 acquisition by ES&S will result in an increase of more than 20 times the magnitude that raises a presumption that competition substantially will be lessened.

**D. Anticompetitive Practices by Diebold and ES&S Prior to the September 2 Acquisition**

34. As a consequence of the unique feature of the voting machines and elections systems market, for almost one hundred years, it has been the policy of Hart to treat the integrity and security of its election products and services as its most valuable asset. Hart’s customers experience high satisfaction rates and are overwhelmingly loyal.

35. By contrast, Diebold and ES&S both experience low customer satisfaction and are overwhelmingly criticized by election officials responsible for procuring systems. This is due, in part, to the pattern of anticompetitive and monopolistic conduct in which Diebold and ES&S have engaged for many years. The September 2 acquisition all but confirmed the monopolistic animus in the hearts of Diebold and ES&S executives as evidenced by their past record of anticompetitive conduct.



36. Diebold and ES&S systematically
- a. win bids by bidding low and then gouging locked-in customers for aftermarket service and equipment;
  - b. misrepresent by exaggerating the features, capabilities, or certification status of their systems, or by falsely disparaging the features, capabilities, or certification status of rival systems;
  - c. engage in strategies that raise their rivals' costs;
  - d. impose unreasonable restrictions on access to software and other intellectual property;
  - e. exert improper and undue influence on government officials to achieve favorable competitive bidding outcomes; and
  - f. initiate litigation upon losing competitive bidding contests to establish a litigious reputation among customers, adding a risk premium to the cost of choosing a rival system.

37. In February 2008 VoterAction.Org posted "Examples of State and Local Government Actions Against Deceptive and Other Unlawful Practice by Voting Machine Companies" (Exhibit "C," attached) citing specific examples of customer dissatisfaction and contractual and other legal disputes between various jurisdictions and Diebold and ES&S.

38. On July 19, 2007 Leonard C. Piazza III, Director of Elections for the County of Luzerne, Pennsylvania, wrote to the Pennsylvania Department of State regarding the difficulty faced by the county in meeting a demand by ES&S for \$300,000 for an extended warranty (Exhibit "D," attached). The letter states:

The fact is, ES&S refuses to lower the pricing structure, is unwilling to restructure the coverage plan to meet the needs of the

counties and ES&S has not answered our repeated requests for the exact terms and condition of the extended warranty plan. As it turns out, ES&S misleads its customers in the Commonwealth, and judging from conversations with other election directors at a recent election officials' conference in Portland, Oregon—other jurisdictions as well.

39. The letter also refers to the inferior bargaining power of the jurisdiction and the market power and informational asymmetry of the jurisdiction and ES&S *inter se*:

In addition to not being able to meet the financial burden that ES&S is asking us to meet, we cannot individually deal with such a large, multi-national corporation and the mix of deception this company promulgates and respectfully ask the Commonwealth, specifically, the Department of State, for its leadership in insuring that the voting-system vendors doing business here do not have the opportunity to threaten a democratic process with such unsavory business practices that vendor, such as ES&S, seemingly have a deep commitment to employing.

40. On or about March 5, 2006 VotersUnite.Org posted a story attributed to The Columbus Dispatch on that date (Exhibit “E,” attached) quoting Ray Feikert, a Holmes County, Ohio County Commissioner, on the subject of unexpectedly large aftermarket expenses connected with a Diebold contract: “This completely blind-sided the county. It’s kind of a back-door expense that no one saw coming.”

41. On March 11, 2004 Indiana Election Commissioner Brian Burdick was quoted at VerifiedVotingFoundation.Org speaking to ES&S personnel: “I just think I was absolutely lied to by your CEO and I’m more than on the slow burn about it. I sat in this room and you all lied to me.”

42. On December 16, 2003 TheRegister.co.uk published internal Diebold e-mails (Exhibit “F,” attached) boasting about the company’s ability to gouge customers that “already bought the system” permitting them to “charge out the yin.” The Diebold CEO is reported to have written in early 2003, “I am committed to helping Ohio deliver its electoral votes to the

president next year.”

43. Some of ES&S’ anticompetitive conduct has been directed specifically at Hart and has injured Hart in its business or property by causing Hart to lose revenue and/or incur unnecessary expense. On one occasion in late 2007, ES&S asserted significant influence to pressure the Cuyahoga County, Ohio Director of Elections and County Commission to award a contract to ES&S despite its significantly higher cost to the County. On another occasion, after an Orange County, California County Commission task force recommended Hart’s election system, ES&S circulated a flyer to the Commission consisting of ten false statements about the Hart system (falsely claiming, for example, that Hart machines could not be operated in foreign languages or were not compliant with the Americans with Disabilities Act). Litigation by ES&S over the award of a 10-year contract to Hart by the State of Hawaii resulted in a truncation of the contract to a single year.

**E. Likely Anticompetitive Effects of the September 2 Acquisition**

44. The likely effect of the September 2 acquisition will be to substantially lessen competition and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act. Unless restrained and unwound, the transaction likely will have the following effects on competition:

- a. actual competition between ES&S and Premier/DIMS will be eliminated;
- b. competition generally in the manufacture and service of voting machines will be substantially lessened;
- c. prices for voting machines and services will increase;
- d. the quality and choice of products and services available for installation in the various precincts will decrease; and,

e. innovation in new products and services will suffer.

45. Unless restrained and unwound, the September 2 acquisition will vest ES&S with excessive market power and undue influence over competitive bidding contests by:

a. significantly reducing the number of qualifying bidders for future election systems contracts;

b. imparting ES&S with excessive influence over the scope and content of jurisdictions' RFPs;

c. giving control of an unduly large proportion of the industry-wide budget for research and development in products, software, and services related to election systems, and, thus, control over the path and pace of industry innovation, to a single firm with a reputation for a lack of innovation;

d. rendering it easier for ES&S to pursue lowball bidding with back-loading and strategies that raise rivals' costs.

46. New entry is not likely to thwart these anticompetitive effects. New entrants are not likely to perceive that this market offers any reasonable business opportunities where an enormous sunk investment in time and resources is the price of admission to compete in a market dominated by an incumbent firm with a nearly 70% share of the market.

47. Plaintiff has been required to retain the undersigned counsel to prosecute this cause.

## **VII. COUNT I**

### **(Injunctive Relief Against Diebold and ES&S, 15 U.S.C. § 18)**

48. If the September 2 acquisition is permitted to stand, the prices of voting machine equipment and services are likely to increase, the choice and quality of products and services

available to election officials in the United States is likely to decrease, innovation in voting systems and the introduction of new products is likely to suffer, and rival manufacturers are likely to exit the voting machine market. As a result, competition in the market for voting machines and election systems, jurisdictions that purchase voting machines and election systems, and the taxpayers that support them, and smaller rivals to ES&S, including plaintiff, are threatened with irreparable harm.

49. The September 2 acquisition threatens imminent and irreparable harm that injures plaintiff because the acquisition will undermine plaintiff's ability to retain its present customers and foreclose it from opportunities to obtain additional customers. Unless restrained and unwound, the Hart will face higher costs to capture market share from the merged entity or to retain market share that it already serves, ES&S will more easily achieve regulatory capture in connection with competitive bidding contests by jurisdictions and will exert greater undue influence over the specification of RFPs. As Hart and the other smaller rivals become unable to provide effective competitive bids the ultimately will be driven out of business.

50. The September 2 acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, which violation significantly threatens Hart and the other vendors with injury of the type the antitrust laws were intended to prevent and that flows from that which makes the September 2 acquisition unlawful.

51. Plaintiff, Hart, seeks an order declaring the transaction unlawful and requiring ES&S to divest its interests in PES, Premier Canada and DIMS and for other equitable relief because the transaction significantly increases ES&S's share of the highly concentrated market for voting machines and election systems, substantially lessening competition and tending to create a monopoly in that market.

52. As a large vendor of election systems, Diebold has shown a tendency to favor one side or another in elections, giving them an interest in the outcome. Accordingly, the lessening of customer choice of vendors of election systems that will result from the September 2 acquisition directly impairs the integrity of the voting process in the United States.

53. Permanent and temporary injunctive relief is necessary to prevent imminent threat of antitrust injury to plaintiff. Temporary relief to maintain the status quo during the pendency of this litigation is required to prevent irreparable harm to plaintiff and so as not to deprive this Court of a full range of remedies, including alternative arrangements for the disposition of the capital stock and/or assets of PES, Premier Canada and DIMS, that do not violate the law. Accordingly, the integration process in which Diebold has contracted with ES&S to provide transition services should be immediately suspended. In the absence of temporary relief, Diebold's present customers are subject to being locked-in to ES&S, alternative arrangements for the disposition of PES, Premier Canada and DIMS will be more difficult, and plaintiff will be foreclosed from competing for a large segment of customers.

54. The likelihood and severity of irreparable harm to the plaintiffs if the requested injunctive relief is denied would greatly outweigh the likelihood of harm to defendants if the requested injunctive relief is granted.

55. Plaintiffs are likely to succeed on the merits of its claim.56. The public interest would be better served if the requested injunctive relief is granted.

## **VIII. COUNT II**

### **(Monopolization by ES&S, 15 U.S.C. § 2)**

57. As a result of its pattern of past anticompetitive conduct ES&S has monopolized the market for voting machines and election systems by means other than superior product, foresight and industry, and possesses monopoly power in the market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

58. Plaintiff has been directly and proximately injured by ES&S' anticompetitive conduct by having been damaged in its business or property, which injury is of the type the antitrust laws were intended to prevent and that flows from that which makes ES&S' conduct unlawful.

## **IX. COUNT III**

### **(Attempted Monopolization by ES&S, 15 U.S.C. § 2)**

59. As a result of its past pattern of anticompetitive conduct, ES&S possesses a dangerous probability of monopolizing the market for voting machines and election systems by means other than superior product, foresight and industry, and a dangerous probability of obtaining monopoly power in the market, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.

60. Plaintiff has been directly and proximately injured by ES&S' anticompetitive conduct by having been damaged in its business or property, which injury is of the type the antitrust laws were intended to prevent and that flows from that which makes ES&S' conduct unlawful.

## **X. COUNT IV**

### **(Conspiracy to Monopolize against Diebold and ES&S, 15 U.S.C. § 2**

61. Diebold and ES&S conspired to monopolize the market for voting machines and election systems by entering into and consummating the September 2 acquisition.

62. Plaintiff has been directly and proximately injured by Diebold and ES&S' conspiracy to monopolize by having been damaged in its business or property, which injury is of the type the antitrust laws were intended to prevent and that flows from that which makes such a conspiracy unlawful.

## **XI. REQUESTED RELIEF**

WHEREFORE, plaintiffs seek the following relief:

A. A declaration that the September 2 acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18;

B. An temporary order enjoining defendants from proceeding to integrate the acquired companies into the operations of ES&S and requiring defendants to hold the assets acquired in the transaction separate during the pendency of this litigation;

C. A permanent order requiring ES&S to divest its interests in PES, Premier Canada and DIMS and for a novation of the September 2 acquisition;

D. An order awarding plaintiff three-fold damages directly and proximately caused by ES&S' anticompetitive conduct, monopolization, and attempted monopolization of the relevant market and the defendants' conspiracy to monopolize, and trial by jury of all issues so triable as of right;

E. An order awarding a reasonable attorneys' fee and the costs of this suit; and,

F. Such other further temporary and permanent equitable relief as may be reasonably



likely to cure the threatened harm to plaintiff and to competition in the relevant market caused by the unlawful acquisition.

PROCTOR HEYMAN LLP

/s/ Kurt M. Heyman

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Dated: September 14, 2009

# Exhibit A

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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549**

**FORM 8-K**

**CURRENT REPORT**

**Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934**

**Date of Report (Date of Earliest Event Reported): September 2, 2009**

**Diebold, Incorporated**

(Exact name of registrant as specified in its charter)

Ohio	1-4879	34-0183970
(State or other jurisdiction of incorporation)	(Commission File Number)	(I.R.S. Employer Identification No.)
5995 Mayfair Road, P.O. Box 3077, North Canton, Ohio		44720-8077
(Address of principal executive offices)		(Zip Code)

Registrant's telephone number, including area code: (330) 490-4000

Not Applicable

Former name or former address, if changed since last report

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
  - ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
  - ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
  - ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
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**Item 8.01 Other Events.**

On September 2, 2009, Diebold, Incorporated (the “Company”) and its subsidiaries, Premier Election Solutions Canada ULC (“Premier Canada”) and Premier Election Solutions (“Premier Election”), entered into a purchase agreement (the “Purchase Agreement”) with Elections Systems & Software, Inc. and its subsidiary (collectively, “ES&S”) pursuant to which ES&S agreed to purchase all of the outstanding capital stock of Premier Election and Data Information Management Systems, Inc. (“Data Information”) and substantially all of the assets of Premier Canada. The Company conducted its election systems business in the United States and Canada through Premier Election, Premier Canada and Data Information.

The Company’s sale of the election systems business (the “Divestiture”) was consummated simultaneously with the entry into the Purchase Agreement on September 2, 2009. The purchase price payable by ES&S in connection with the Divestiture was \$5.0 million in cash plus the payment to Diebold of 70% of the cash payments collected through the fifth anniversary of the closing with respect to any accounts receivable in existence as of, and including, August 31, 2009. Additionally, the Company has agreed to retain certain existing liabilities, including, without limitation, the previously disclosed lawsuit involving the Cuyahoga County Board of Elections, and share other liabilities with ES&S in connection with the election systems business.

As a result of this transaction, Diebold expects to recognize a pre-tax loss during the third quarter 2009 in the range of \$45 million to \$55 million. The pre-tax loss includes the assets and liabilities of the election systems business, certain retained legal liabilities, and other transaction costs. The amount of pre-tax loss is only an estimate and is subject to change based on final balance sheet information as of August 31, 2009, and changes in estimates related to valuation of the interest in accounts receivable.

In connection with the Divestiture, the Company has also entered into a non-competition agreement with ES&S pursuant to which the Company has agreed not to provide election products and services within the United States, its territories or Canada. However, the non-competition agreement does not restrict the Company’s Brazilian election systems business from operating in Latin America. The Company also reserved the right under the non-competition agreement to take necessary actions to perform its obligations and duties under the Purchase Agreement without being deemed in breach of the non-competition agreement.

As a condition to the transaction, the Company entered into a transition services agreement with ES&S pursuant to which the Company will facilitate an orderly transfer of the business to ES&S and provide certain transition services.

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### SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

Diebold, Incorporated

*September 3, 2009*

By: /s/ Chad F. Hesse

*Name: Chad F. Hesse*

*Title: Corporate Secretary*

# **Exhibit B**



FOR IMMEDIATE RELEASE

CONTACT

Ken Fields

(314) 982-0556

ken.fields@fleishman.com

## **ES&S Acquires Premier Election Solutions**

*Combined Company Will Provide Better Services to Customers and Voters*

Omaha, NE — September 3, 2009 — Election Systems & Software, Inc. (ES&S), a provider of voting solutions, announced today that it has acquired Premier Election Solutions, Inc. (PES). The acquisition combines the strengths of both organizations and will result in better products and services for all customers and voters alike.

“For more than 40 years, ES&S has recognized the incredible responsibility it has to voters and election administrators,” said Aldo Tesi, president and CEO of ES&S. “This acquisition is an opportunity to continue fulfilling our company’s core mission of maintaining voter confidence, and enhancing the voting experience. We are committed to meeting current and future needs for voting system solutions and services and providing better solutions to our customers.”

As the two experienced companies go forward, the combination will allow them to serve jurisdictions more effectively. By continuing to innovate and create new voting systems, software and services, the companies will be able to meet the evolving needs of our customers.

The acquisition will also create a more efficient and effective operating model that will also provide a sustainable delivery platform for the election industry in the future.

“Premier has a proud heritage of providing voting solutions,” said Tesi, President and CEO of ES&S. “The combination of our two companies will enhance our performance and allow us to meet our customers’ needs even more effectively.”

“While combining these two companies will mean many positive changes, one thing won’t change,” said Tesi. “In everything we do, we will continue our focus on delivering high quality services and products for all of our customers. Moving forward, all of our customers will get the same great level of service they have come to expect.”

### **About Election Systems & Software (ES&S)**

*Election Systems & Software, Inc. (ES&S) is a leading provider of total election management solutions. For nearly 40 years, ES&S has solely focused on elections and has had a track record of producing quality results.*

###

# Exhibit C



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[www.voteraction.org](http://www.voteraction.org)

## **Examples of State and Local Government Actions Against Deceptive and Other Unlawful Practices by Voting Machine Companies**

**Hancock County, Illinois, 2008.** In January 2008, Hancock County Clerk Kerry Asbridge requested the U.S. Department of Justice to investigate ES&S for deceptive business practices regarding the AutoMark voting machine. ES&S increased costs nearly four-fold in six years, changed requirements three times retroactively, and charged the exact amount of the federal grant for these voting machines.<sup>1</sup>

**California and City and County of San Francisco, CA, 2007.** On January 22, 2008, the City of San Francisco announced \$3.5 million settlement with ES&S.<sup>2</sup> On November 17, 2007, the City and County of San Francisco sued ES&S for breach of contract, fraud, negligent misrepresentation, and violations of California Elections Code Sections 18564.5, 12650, and 17200 for selling and servicing voting systems to the city and county that were not certified by California. Two days later the Secretary of State of California separately filed suit against ES&S for violations of California Elections Code Sections 18564.5(a)(5) and (a)(6), and 19214.5 in connection with unauthorized changes to electronic voting systems and failure to notify the Secretary of State of such changes. Both complaints allege that ES&S sold almost 1,000 voting machines that were of a model different from the one submitted to the state for certification.<sup>3</sup>

**Cuyahoga County, Ohio, 2006-07.** Election commissioners in the Ohio county that includes Cleveland proposed suing Diebold over the Accu-Vote TSx DRE voting system, which Cleveland purchased post-HAVA and which failed miserably in the 2006 federal election and otherwise had problems. Commission Jones said “[h]anging chads were much less of a problem,” and Commission Dimora argued against any touch-screen voting machine.<sup>4</sup> Cuyahoga is in the process of replacing Diebold DREs with optical scan voting machines.<sup>5</sup>

**Luzerne County, PA, 2007.** Luzerne bought 750 touch-screen voting machines from ES&S using \$2.4 million in federal taxpayer dollars in a rush to avoid losing federal HAVA money and a year later ES&S demands more than \$300,000 for a three-year warranty. In a July 19, 2007, letter to the Deputy Secretary of the Commonwealth of Pennsylvania, the director of elections for Luzerne County asked the state to make sure “that voting-system vendors doing business here do not have the opportunity to threaten the democratic process with such unsavory business practices that vendors, such as ES&S, seemingly have a deep commitment to employing.”<sup>6</sup> The Luzerne County Board of Elections negotiated a warranty resolution with ES&S at a cost of \$60,550 for four years.<sup>7</sup>

**Kentucky, 2007.** Attorney General investigation revealed that Diebold installed uncertified software in Kentucky’s most populous city Louisville, which uncertified software was used in at least three separate elections.<sup>8</sup>

**Northampton County, PA, 2007.** Northampton County sued AVS for breach of contract and warranties regarding touchscreen voting machines and failure to provide promised services and claimed damages arising from having to use other machines in elections.<sup>9</sup>

**Mercer County, PA, 2007.** Election officials troubled by ES&S pricing for voting machine warranty for maintenance and repair.<sup>10</sup>

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**Georgia, 2007.** State Board of Elections referred to the State Attorney General for investigation a complaint that Diebold installed uncertified software in voting machines in Georgia.<sup>11</sup>

**Indiana, 2007.** Secretary of State recovered \$363,000 in civil penalties and costs, and \$170,000 in legal fees, in an administrative ruling against Microvote for knowingly selling faulty machines.<sup>12</sup>

**West Virginia, 2006.** The County Commissioners Association and State file suit against ES&S for breach of contract and the Secretary of State complained to the federal Election Assistance Commission.<sup>13</sup>

**Oregon, 2006.** The Secretary of State sued ES&S for breach of contract regarding AutoMark touch-screen voting machines.<sup>14</sup>

**Arkansas, 2006.** The Secretary of State opened an investigation for breach of contract against ES&S. Four counties in Arkansas were unable to use touch-screen voting machines provided by ES&S and ES&S failed to deliver programmed computer chips for optical scanners.<sup>15</sup>

**City of Chicago and Cook County, Illinois, 2006.** After massive problems with Sequoia DREs, governments consider changing vendors and/or securing financial relief from Sequoia.<sup>16</sup>

**California, 2005.** The California Attorney General recovered \$2.6 million for the state and others and secured injunctive relief in the resolution of claims against Diebold for violations of the state's False Claims Act and Unfair Competition Laws. The State complained that Diebold falsely represented the security, and state and federal certification, of its touchscreen machines and vote tabulation systems to induce counties to spend taxpayer money on its voting systems.<sup>17</sup> Diebold stockholders have filed securities fraud class actions arising from Diebold conduct with respect to its voting machine business;<sup>18</sup> the SEC is investigating and in 2008 it was reported that the U.S. Department of Justice has opened a possibly broader investigation of Diebold voting machines business conduct.<sup>19</sup>

**Marion County, Indiana, 2005,** ES&S paid the county 1.2 million to settle a lawsuit claiming that ES&S installed uncertified software in the county's optical scan voting systems.<sup>20</sup>

**Four Counties in Indiana, 2004,** the State election commission required ES&S to put up \$10 million bond because the certified version of the firmware for the iVotronic DREs did not work. The discovery of ES&S secretly installed uncertified firmware in the iVotronics led to the discovery that the certified firmware did not work.<sup>21</sup>

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## Reference:

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# Exhibit D

ROSE S. TUCKER, CHAIRWOMAN  
JOSEPH M. COSGROVE, ESQ.  
DAVID A. FISHER  
LUZERNE COUNTY BOARD OF ELECTIONS

LEONARD C. PIAZZA III  
DIRECTOR OF ELECTIONS  
LEONARD.PIAZZA@LUZERNECOUNTY.ORG

NEIL T. O'DONNELL, ESQ.  
SOLICITOR TO THE BOARD OF ELECTIONS



**LUZERNE COUNTY  
BUREAU OF ELECTIONS**

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STEPHEN A. URBAN  
LUZERNE COUNTY COMMISSIONERS

SAMUEL T. GUESTO, JR.  
COUNTY MANAGER - CHIEF CLERK

July 19, 2007

**Thomas J. Weaver**  
Deputy Secretary of the Commonwealth  
Department of State  
210 North Office Building  
Harrisburg, PA 17120

**Harry A. VanSickle**  
Commissioner  
Bureau of Commissions, Elections and Legislation  
Department of State  
210 North Office Building  
Harrisburg, PA 17120

***VIA EMAIL AND FEDERAL EXPRESS COURIER***

Dear Mr. Secretary and Commissioner VanSickle,

I write to you today to make a formal request for financial relief with regard to the implementation of the Help America Vote Act (HAVA). More specifically, the County of Luzerne respectfully requests financial aid for the total cost of a proposal from Election Systems & Software (ES&S) for a three-year, extended warranty plan that is in excess of \$300,000.

As you know, Luzerne County, like all Pennsylvania counties, has done its very best to work through the many hardships of implementing HAVA, and we thank the Department of State for the great deal of assistance and guidance on the many, many issues that have arisen since 2004. We hope we've made the Commonwealth proud by way of our accomplishments. Yet in spite of all we've been able to accomplish together, you may be aware that county relationships with ES&S are already strained ones. We will, however, continue to work hard on behalf of the Commonwealth and with ES&S to ensure that excellence in Pennsylvania elections is met time and again.

As the former commissioners of the Counties of Adams and Union, respectively, I'm sure you know all too well that these are trying times for counties of our size. Despite these trying times, our commissioners in Luzerne County believe that longer-term investments in improving our community are to be the cornerstone of a better future for our county and its residents. The county is already committed to ambitious projects such as the construction of a new, \$150 million, state-of-the-art prison; a multi-million dollar commitment to developing the Susquehanna Riverfront and Downtown Wilkes-Barre; restoration of the historic Luzerne County Courthouse in time for its centennial celebration (scheduled, 2009); and of course, Commission Chairman Greg Skrepenak's untiring commitment to ensuring seniors, children and all of our citizens are protected from the scourge that drugs brings to our doorsteps each day.

Our county's five-year plan for economic stability and continued growth unfortunately holds no room for the kind of expense that ES&S is all but demanding we pay. Further, the encumbrance of \$300,000 is not one that the county had any opportunity to consider at the time

of the mandated switch to electronic voting. That is not to say, however, we did not try. We asked for these statistics and, aside from price, the details of an extended warranty as early as the State of Ohio in March of 2006. We were told by the vendors at that time, especially ES&S, that there would be sufficient time to talk about warranty arrangements after the system was in place. We were at the zero-hour when the system was finally delivered and were again told that the warranty coverage could be negotiated by the county when time permitted. Today, however, that is not the case. The fact is, ES&S refuses to lower the pricing structure, is unwilling to restructure the coverage plan to meet the needs of the counties and ES&S has not answered our repeated requests for the exact terms and conditions of the extended warranty plan. As it turns out, ES&S misleads its customers in the Commonwealth, and judging from conversations with other election directors at a recent election officials' conference in Portland, Oregon—other jurisdictions as well.

In addition to not being able to meet the financial burden that ES&S is asking us to meet, we cannot individually deal with such a large, multi-national corporation and the mix of deception this company promulgates and respectfully ask the Commonwealth, specifically, the Department of State, for its leadership in insuring that the voting-system vendors doing business here do not have the opportunity to threaten a democratic process with such unsavory business practices that vendors, such as ES&S, seemingly have a deep commitment to employing.

The Commonwealth and the rest of the nation are at a critical moment in the election process and the decisions we all make today will have a great deal of consequence affecting all levels of government. We should not be without coverage on an election system; we should have the right to a higher standard of business practice in the voting-systems marketplace; and, we all should be continually reviewing election practices at all levels for excellence and integrity. We should all carefully weigh the outcome of potential failures in the democratic process and the long, lasting effect it would have on the confidence of the electorate. As I've come to learn from other jurisdictions, once the confidence is lost, it is virtually un-retrievable—and that would suggest that the democratic process itself has been broken.

Thank you for your time and kind consideration. I look forward to meeting you, Mr. Secretary, and seeing you again soon Commissioner.

Sincerely,

A handwritten signature in black ink, reading "Leonard C. Piazza III". The signature is fluid and cursive, with a stylized "L" and "P".

Leonard C. Piazza III  
Director of Elections  
County of Luzerne

**CC VIA EMAIL:**

Gregory A. Skrepenak, Chairman, Luzerne County Board of Commissioners  
Rose S. Tucker, Luzerne County Board of Commissioners  
Stephen A. Urban, Luzerne County Board of Commissioners  
Joseph M. Cosgrove, Esq., Luzerne County Board of Elections  
David A. Fisher, Luzerne County Board of Elections  
Samuel T. Guesto, Jr., Chief Clerk ~ Luzerne County Manager  
William G. Brace, Deputy Chief Clerk  
Salvatore Diaz, Chief of Budget and Finance  
James P. Blaum, Esq., Chief County Solicitor  
Neil T. O'Donnell, Esq., Solicitor to the Luzerne County Board of Elections

# **Exhibit E**





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Voting machine support costly

Elections boards and counties stunned by expense; state aid for training ends after primary

Sunday, March 05, 2006

Mary Beth Lane

THE COLUMBUS DISPATCH

The cost of service contracts for new touchscreen voting machines has left county elections officials across Ohio in sticker shock.

Many say they need the extra ? and expensive ? technical support to program and run the machines properly and ensure the integrity of elections.

But a spokesman said Secretary of State J. Kenneth Blackwell thinks counties can run the systems themselves after the May 2 primary election, when state-paid training and technical support ends.

Counties are not required to have extra technical support after that. It?s their choice.

The full coverage plan offered by Diebold Election Systems to service its touch-screen voting machines in Fairfield County, for example, would cost \$90,000 a year. Partial-coverage options are available at \$60,000 and \$21,000 a year.

"It just about blew our minds away," said Alice Nicolía, director of the county Board of Elections.

In poorer Perry County, a Diebold service contract is out of the question.

"We just do not have the money," said Janie DePinto, elections board director. Her board is considering hiring a cheaper consultant to provide technical support at election times.

DePinto plans to ask county commissioners for more money.

The Fairfield County elections board already has asked county commissioners for more money for a service contract and other expenses, and got an angry response.

The elections board is scheduled to meet Monday to discuss its budget. The \$714,000 that county commissioners gave the board this year is inadequate and they need roughly double, Nicolía has said.

Part of the money sought is to service the county?s 492 touch-screen voting machines and to buy more to meet a new state law requiring one machine per 175 voters. The county has 93,000 registered voters and is growing.

Fairfield is among 47 counties that picked Diebold touch-screens. Costs for service contracts with Diebold were higher than anticipated.

The state has a five-year warranty contract with Diebold and Election Systems & Software, another company that sold voting machines to Ohio counties, for the equipment itself. Under the contract, the state is paying the companies to train and provide technical support to county elections boards through the May primary.

After that, counties are on their own.

Fairfield was among 44 of Ohio's 88 counties that used new voting machines for the first time in November.

Elsewhere in central Ohio, Franklin, Delaware, Pickaway, Union, Ross and Knox counties will use their Election Systems & Software touch-screens for the first time in the May 2 primary.

Until then, it's difficult to gauge whether extra technical support will be needed, said Janet Brenneman, director of the Delaware County Board of Elections.

A company spokeswoman declined to discuss the terms of service contracts that Election Systems & Software might offer its customers.

When Diebold began distributing proposals to county elections officials at their conference in January, some were shocked.

So were county commissioners.

"This completely blind-sided the county," said Ray Feikert, a Holmes County commissioner in northeastern Ohio. "It's kind of a back-door expense that no one saw coming."

Diebold's service contracts are priced depending on county size, level of support desired and number of elections annually.

For Holmes and Perry counties, the proposals are \$16,000, \$35,000 or \$50,000 annually. Like Perry County, Holmes County might search for a cheaper option, Feikert said.

County elections workers should be able to run the new voting equipment as ably as they did punch-card systems. Blackwell and county officials agree on that much.

They differ on how long it could take to learn.

Until counties go through a few full election cycles, including primary, general and special, it makes sense to have technical support, said Steven Harsman, president of the Ohio Association of Election Officials and director of the Montgomery County Board of Elections.

"I don't disagree with (Blackwell's) concept," Harsman said. "But I think it's too early to let a county be on their own without support. I look on it as an insurance policy."

Diebold's full coverage would cost \$110,000 annually in Montgomery County. Harsman's board is considering buying partial coverage and using a county information-technology worker for extra technical support.

The Fairfield County elections board has hired its own information-technology worker and plans to buy partial coverage from Diebold.

"The irony is that the small counties will have a bigger need for these contracts, but they won't have the money to pay for them," Harsman said. "Elections boards are going to county commissioners, and commissioners are kicking and screaming. It's not a pretty situation at all. But when the dust settles, a high percentage of counties are going to need this, and county commissioners are going to have to find the funding."

Blackwell disagrees. He thinks counties won't need technical support after May, said spokesman James Lee.

"Certainly there is a learning curve," he said. "We're confident, though, that the boards of elections, with all the training and assistance we have provided through the May primary, will be well-prepared for the November election."

Ultimately, it's up to the counties, though.

"They have to assess their needs and decide for themselves, working with their county commissioners," Lee said.



State law allows county boards of elections to seek a court order for funding. Fairfield County board members have told commissioners it might come to that.

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# **Exhibit F**



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## 'Gouging' memo leaves Diebold red-faced

### Paper trail? Sure, that'll be \$1200 for a printer

By [Andrew Orlowski in San Francisco](#) ([andrew.orkowski@theregister.co.uk](mailto:andrew.orkowski@theregister.co.uk))

Posted in [Security](#), 16th December 2003 01:33 GMT

The archive of internal correspondence from the politically-connected ATM giant Diebold - which is bidding for many electronic voting contracts across the US - is a gift that keeps on giving. Diebold has its own answer to critics who want a verifiable paper trail. Incredibly, the e-voting terminals don't leave behind such information.

It plans to make the modifications so expensive that city and state officials balk at the cost.



Steven Dennis at the Maryland *Gazette* last week [unearthed correspondence](#) (<http://www.gazette.net/200350/montgomerycty/state/191617-1.html>) from a Diebold engineer who advised that "any after-sale changes should be prohibitively expensive."

Diebold had told the *Gazette* that printers - required for the paper trail - would cost between \$1,000 and \$1,200 per machine. Given that printers can be found at Best Buy for as little as \$50, voters are justified in questioning what makes a Diebold-approved printer quite so expensive.

Explains support technician 'Ken':

"There is an important point that seems to be missed by all these articles: *they already bought the system*," he wrote: "At this point they are just closing the barn door. Let's just hope that as a company we are smart enough to charge out the yin if they try to change the rules now and legislate voter receipts."

Ken later [explains](http://chroot.net/s/lists/support.w3archive/200301/msg00015.html) (http://chroot.net/s/lists/support.w3archive/200301/msg00015.html) what 'yin' means.

The State of California recently [mandated](http://www.theregister.co.uk/content/4/34142.html) (http://www.theregister.co.uk/content/4/34142.html) that its electronic voting machines produce an auditable paper trail, although not before 2006.

Although paranoia is rife, comments by Diebold CEO Wally O'Dell have done little to allay public confidence. O'Dell is a top tier fundraiser for the GOP, and eleven of the top Diebold executives have also made Republican donations. Earlier this year, O'Dell wrote: "I am committed to helping Ohio deliver its electoral votes to the president next year."

Diebold recently used the DMCA in attempt to oblige ISPs to take down the archive of internal correspondence, which surfaced this year after it was left on a public ftp server. ®

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