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NOTE FOR SPECIAL SETTING

Please note that this matter has been set before the Honorable John E. Bridges on the 2nd day of May, 2005 at 8:30 a.m.

Nature of hearing: **Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting**

DATED: April 13, 2005.

PERKINS COIE LLP

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I. INTRODUCTION

In this election contest, Petitioners claim that certain votes counted by election officials were illegal votes because the individual casting the ballot was disqualified from voting. In order to prove this claim, Petitioners must prove not only that the identified individual was disqualified from voting; they must also prove that the individual actually received a ballot, marked the ballot to indicate a vote in the Governor's race, turned in the ballot to election officials, and that election officials thereafter counted the vote marked in the Governor's race. Petitioners' discovery responses show that the sole evidence they intend to offer to prove all these elements is that the individual "illegal voters" were eventually credited with voting in the county voter registration files. Discovery from the counties and Secretary of State has demonstrated that voter registration files are inherently unreliable to prove that a ballot was given to an individual, marked by the individual, cast by the individual, and counted by election officials. To prove that an individual who was disqualified from voting received a ballot, marked it, and cast it, Petitioners must produce the best evidence available – a signed receipt from the alleged voter (i.e., a poll book page that the voter signed to request a ballot, a provisional ballot envelope submitted for counting, or an absentee oath signed by the individual) or testimony from the voter him or herself. All of these documents are public records and readily obtainable by Petitioners – if the individual actually received and cast a ballot.

II. FACTUAL BACKGROUND

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Petitioners allege that county election officials counted illegal votes in the Governor's election, such as "votes by felons and others ineligible to vote and votes cast in the name of deceased persons." Pet. at 3. In response to interrogatories asking Petitioners to "identify every document that supports, is inconsistent with, or otherwise relates to [the

1 allegations of illegal votes],” Petitioners identified the voter registration files for various
2
3 counties:

4
5 Electronic Voter File Records for all counties except Asotin,
6 Columbia, Cowlitz, Douglas, Ferry, Grant, Kittitas, Klickitat, Lincoln,
7 Mason, Pacific, Pend Oreille, San Juan and Skamania (Access
8 Databases, numbered RC 10009- 0034).
9

10 Declaration of William C. Rava in Support of WSDCC's Motion In Limine to Exclude
11
12 Evidence of "Voter Crediting" ("Rava Decl.") ¶ 2, Ex. A (Respondent Secretary of State's
13
14 Interrogatories and Requests for Production of Documents to Petitioners and Responses &
15
16 Objections Thereto ("Petitioners' Responses")).
17

18 **A. Evidence of Voter Crediting: Voter Crediting Files.**
19

20 Each county maintains an electronic voter registration database. *Id.*, Ex. C
21
22 (Petitioners' First Interrogatories and Requests for Production to Washington Secretary of
23
24 State and Responses Thereto ("Secretary's Responses")). These databases generally include
25
26 the recent voting record of voters registered in that county ("Voter Crediting Files"). *Id.*
27
28 The crediting of voters is a post-election administrative exercise that has various
29
30 opportunities for error. *Id.*, Ex. B (Jan. 5, 2005 email from Nick Handy, Director of
31
32 Elections, Office of Secretary of State, with attached "Crediting Voters Issues: Talking
33
34 Points" ("Secretary's Talking Points")). Lewis County has succinctly described the process
35
36 and its pitfalls:
37

38 The crediting process is done on-the-fly as daily mail ballots are
39 returned and after the poll books are returned from polling places.
40 The crediting is done by whatever staff member or temporary hire is
41 available. The crediting of a voter is a mechanical process that is
42 accomplished by passing a wand over a unique voter registration
43 number on the return label of a mail voter or that same number in a
44 poll book. Some clerks use a key pad to enter this six digit number
45 because they believe that is faster. In the meantime, the phone is
46 ringing, customers need help at the counter, or nature calls.
47

1 *Id.*, Ex. G (Petitioners' First Interrogatories and Requests for Production to Lewis County
2 and Its Auditor ("Lewis County's Responses")). The Voter Crediting Files are not designed
3 to prevent fraud; they simply allow the counties, the Secretary of State, and third parties to
4 track voter participation:
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9 Crediting voters for voting is not designed to determine if voter fraud
10 occurred, but rather a process to ensure voter registration lists are
11 updated and current, to assist in administering and managing elections
12 (i.e.; merging voter registration update information, updating absentee
13 ballot requests, etc.) and to be available for use by political
14 organizations for tracking voter participation.
15

16 *Id.*, Ex. D (King County 2004 Elections Report ("King County Report")).
17

18 The voter crediting process occurs after certification of the election results. *Id.*,
19 Ex. G (Lewis County's Responses) ("[C]rediting voters becomes a post-election exercise in
20 order to maintain this record and keep a voter 'alive' in the registration system."). The
21 procedure is completely separate from the verification of ballots and votes, which occurs
22 prior to certification. *Id.* Because the crediting process takes place after certification, the
23 procedural safeguards in place are not the same as those in place pre-certification:
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30 The safeguards and scrutiny in place for the post-certification process
31 of crediting voters are less than the pre-certification reconciliation
32 process undertaken by all counties because the process does not bear
33 upon the validity of the election. The highest level of scrutiny and
34 oversight is placed on the front end processes before certification.
35
36

37 *Id.*, Ex. B (Secretary's Talking Points). Indeed, the pre-certification procedural requirements
38 "are typically characterized by bipartisan election workers, strong supervision oversight, and
39 presence of observers." *Id.* By contrast, post-certification processes, such as voter crediting,
40 "are typically carried out by election workers with less supervision and oversight." *Id.*
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45 Errors in the Voter Crediting Files are common and expected. *Id.*, Ex. B (Secretary's
46 Talking Points) (identifying numerous reasons for errors in the crediting process); Ex. G
47

1 (Lewis County's Responses) ("In a nutshell, a number is easily transposed or omitted in
2 error."); Ex. I (Petitioners' First Interrogatories and Requests for Production to Spokane
3 County and Its Auditor ("Spokane County's Responses")) (Discrepancy between voters
4 credited and ballots case was "not researched on an individual level to determine the reason
5 or reasons for the difference."). "[C]ounties are not required to reconcile 'ballots cast'
6 against 'voters credited with voting.'" *Id.*, Ex. B (Secretary's Talking Points).
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12 In fact, voters often receive "credit" just for submitting a ballot – even if their vote is
13 later determined to be invalid. Rava Decl., Ex. F (Petitioners' Revised First Interrogatories
14 and Requests for Production and Answers from Island County ("Island County's
15 Reponses")) ("[O]ne absentee envelope was returned with two ballot cards. One voter was
16 credited, but neither ballot counted."); Ex. I (Spokane County's Responses) ("voters credited
17 but not counted"). For example, Grays Harbor County noted in its interrogatory responses
18 that credit for voting "is given to voters attempting to vote that may not successfully
19 complete the voting process for reasons including sending a ballot in too late." *Id.*, Ex. E
20 (Grays Harbor County's Responses to Petitioner's First Interrogatories and Requests for
21 Production ("Grays Harbor County's Responses")). San Juan County stated that it "expect[s]
22 that one or more voters may have received credit for voting, and then had their ballot
23 reviewed and rejected by the Canvass Board because the ballot was post-marked late, a
24 signature could not be verified, or other infirmity." *Id.*, Ex. H (Petitioners' First
25 Interrogatories and Requests for Production and Answers thereto by San Juan County
26 Auditor Si A. Stephens ("San Juan County's Responses")).
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1 **B. The Original Sources of Voter Credit: Poll Books, Absentee Ballot**
2 **Envelopes, and Provisional Ballot Envelopes.**
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4 The evidence that a voter received a ballot is the voter's signed receipt for the ballot
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6 in the poll book, or the voter's signed oath accompanying the submission of a ballot to
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8 election officials. Counties have suggested that the only way to determine with accuracy
9
10 whether a particular individual cast a ballot is to examine the poll book pages, absentee
11
12 ballot envelopes, and provisional ballot envelopes, the original sources of voter credit. Rava
13
14 Decl., Ex. I (Spokane County's Responses) ("To [reconcile the number of voters credited
15
16 with the number of votes cast] would require that each voter registration record in our
17
18 database (over 225,000) be compared back to the *original source of voter credit.*")
19
20 (emphasis added).
21

22 The manual process of voter crediting often creates errors in the Voter Crediting
23
24 Files. A hurried clerk may mistake any writing in a poll book as a signature and credit
25
26 someone who did not appear at the polls as a result. Rava Decl., Ex. F (Island County's
27
28 Responses) ("Sometimes other voters mark the poll book if they know someone has moved
29
30 or is deceased. This mark could look like a signature when giving voters credit from the
31
32 poll books, and mistakenly give the voter credit."). An example of such an error in
33
34 connection with Petitioners' claims is:
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- 36 • Petitioners allege that Sarah Sakimae, from King County, voted twice. Rava
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38 Decl., Ex. A (Exhibit B to Petitioners' Responses). Ms. Sakimae is registered
39
40 twice, and was credited with voting twice at the polls. *Id.* ¶ 12, Ex. K.
41
42 However, there is only one signature for Ms. Sakimae on the poll book page
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44 (which lists her name twice). *Id.* The second signature line for Ms. Sakimae
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46 contains the handwritten note, "Is this the same as above"? *Id.* Thus, the poll
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1 book page reveals that Ms. Sakimae was only issued one ballot, but that the
2 poll worker noted that her name appeared twice in the poll book. *Id.*

3
4 Similarly, the clerks that credit voters do not compare the signatures in the poll
5 books with the corresponding names and unique voter registration numbers. Thus, if
6 someone signed the wrong line in a poll book (such as the line immediately before or after
7 that voter's name), the clerk could credit the wrong voter. An example of such an error in
8 connection with Petitioners' claims is:
9

- 10 • Petitioners allege that Artrese Hartman voted in Washington and out of state.
11 Rava Decl., Ex. A (Exhibit B to Petitioners' Responses). She is credited with
12 voting at the polls in King County's voter registration file. *Id.* ¶ 13, Ex. L.
13 However, the poll book page shows that another voter, Glenn Harvey, signed
14 on her signature line in the poll book. *Id.* Glenn Harvey is listed in the poll
15 book on the line immediately following Artrese Hartman. *Id.* There is no
16 signature in the poll book that appears to be that of Ms. Hartman. *Id.*
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28 Further, the voter registration database itself often contains two entries for the same
29 person due to a slight variance in address, middle initial or other detail. When this occurs,
30 both entries often show "credit" for voting, and thus it appears that the individual voted
31 twice. Island County has identified one instance where a voter was registered twice, once
32 with a middle initial and once without. Rava Decl., Ex. F (Island County's Responses).
33 Both registrations were inadvertently given credit for voting, although the voter was only
34 issued one ballot. *Id.* Another example of this kind of error in connection with Petitioners'
35 claims is:
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- 43 • Petitioners allege that Frederick B. Ungrich II voted twice. *Id.*, Ex. A
44 (Exhibit B to Petitioners' Responses). His name appears in the King County
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1 voter registration database twice, with slightly different addresses. *Id.* ¶ 14,
2
3 Ex. M. Both registrations received credit for voting, once by absentee ballot
4
5 and once at the polls. *Id.* However, on the poll book list, there is no
6
7 signature or other indication that Mr. Ungrich – or anyone else under his
8
9 name – voted at the polls. *Id.*

10 WSDCC and other parties obtained in discovery many of the original source
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12 documents relevant to determining whether each allegedly illegal voter actually voted. Rava
13
14 Decl. ¶ 15. WSDCC does not expect that the parties would burden the Court with an
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16 individual by individual examination of the source documents if their contents are
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18 undisputed. Although the parties have not reached any formal stipulation, WSDCC expects
19
20 that each party will evaluate the original source documents and that the parties will stipulate
21
22 to much of the evidence contained in those documents and present it to the Court in
23
24 summary fashion.
25

26 **III. ARGUMENT AND AUTHORITY**

27 **A. Standard for Motions in Limine.**

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29 Motions in limine are used to exclude incompetent or prejudicial evidence.
30

31
32 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 9 (1989). They "are designed to
33
34 simplify trials." *Fenimore v. Drake Constr. Co.*, 87 Wn.2d 85, 89 (1976). In *Fenimore*, the
35
36 Supreme Court stated:
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38 [T]he trial court should grant such a motion if it describes the
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40 evidence which is sought to be excluded with sufficient specificity to
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42 enable the trial court to determine that it is clearly inadmissible under
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44 the issues drawn or which may develop during trial, and if the
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46 evidence is so prejudicial in its nature that the moving party should be
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offered during the trial.

1 *Id.* at 91.

2
3 Under ER 401, "relevant evidence" is any evidence "having any tendency to make
4 the existence of any fact that is of consequence to the determination of the action more
5 probable or less probable than it would be without the evidence." Evidence that is not
6 relevant is not admissible. ER 402. Moreover, ER 403 calls for the exclusion of evidence
7 when its "probative value is substantially outweighed by the danger of unfair prejudice,
8 confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of
9 time, or needless presentation of cumulative evidence." The decision whether to admit
10 evidence under ER 403 is within the trial court's sound discretion. *Indus. Indem. Co. v.*
11 *Kallevig*, 114 Wn.2d 907, 926 (1990) ("A trial court has broad discretion in performing the
12 balancing test contemplated in ER 403 and will be reversed only on a showing of abuse of
13 discretion.").

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25 **B. This Court Should Exclude Evidence of "Voter Crediting" as Proof of an**
26 **Illegal Vote.**

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28 The probative value of the Voter Crediting Files as evidence of illegal votes is
29 outweighed by the prejudice and potential confusion that these post-hoc records will create.
30 For each illegal vote that Petitioners allege was cast in the 2004 General Election,
31
32 Petitioners must prove that: (1) the individual was disqualified from voting; (2) the
33 individual cast a ballot in the 2004 General Election; (3) the individual marked that ballot to
34 indicate a vote for a gubernatorial candidate; and (4) that vote was counted by election
35 officials. RCW 29A.68.020; RCW 29A.68.110. However, the Voter Crediting Files have
36 little probative value towards proving these elements. The counties themselves have
37 reported that they give "credit" to every individual who is registered to vote and attempted to
38 vote – regardless of whether that vote was counted in the election. Rava Decl., Ex. H (San
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1 Juan County's Responses) ("We expect that one or more voters may have received credit for
2 voting, and then had their ballot reviewed and rejected by the Canvass Board because the
3 ballot was post-marked late, a signature could not be verified, or other infirmity."); Ex. F
4 (Island County's Responses) ("[O]ne absentee envelope was returned with two ballot cards.
5 One voter was credited, but neither ballot counted."); Ex. E (Grays Harbor County's
6 Responses) ("Credit for Voting – is given to voters attempting to vote that may not
7 successfully complete the voting process for reasons including sending a ballot in too late.");
8 Ex. I (Spokane County's Responses) ("voters credited but not counted").

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Thus, an individual may receive credit if he submitted an absentee ballot but that
ballot was postmarked after November 2, 2004, and therefore invalid. An individual may
receive credit if he submitted a ballot, but his signature was later rejected by the canvassing
board. Indeed, the purpose of the database is not to track votes that were counted, but rather
to track voter participation. Rava Decl., Ex. B (Secretary's Talking Points); Ex. D (King
County Report); Ex. G (Lewis County's Responses). Thus, the Voter Crediting Files only
indicate who *attempted* to vote, if in fact the credit is correctly entered, not whether the
votes were cast and counted. Ballots that were cast but not counted cannot have affected the
election, and therefore are not "illegal votes" for the purposes of Petitioners' election contest.
See RCW 29A.68.110.

Moreover, the Voter Crediting Files will create prejudice and confusion at trial given
the numerous inaccuracies they contain. The Voter Crediting Files are inherently unreliable.
The counties – who maintain these files – have acknowledged that this post-hoc voter
crediting process creates numerous errors in the Voter Crediting Files. Rava Decl. Ex. D
(King County Report); Ex. G (Lewis County's Responses); Ex. I (Spokane County's
Responses). There are instances where an individual was credited with voting but the

1 original source of voter crediting – the poll books, absentee ballots, and provisional ballots –
2 showed that those individuals did not cast a ballot. *See, e.g., id.* ¶ 13. Moreover, there are
3 instances where individuals were credited with voting twice, but they only cast one ballot.
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7 *See, e.g., id.* ¶¶ 12, 14. The Voter Crediting Files cannot establish that an individual actually
8 voted in the 2004 General Election with any sufficient certainty.
9

10 Because of the numerous errors and inaccuracies in the Voter Crediting Files, the
11 probative value of the "credit for voting" is outweighed by the potential prejudice and
12 confusion caused by the evidence. Where, as here, actual evidence of whether the alleged
13 voter received and cast a ballot is readily available, the Court should not allow a lesser
14 quantum of evidence. The Court should exclude the Voter Crediting Files as proof of illegal
15 votes.
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23 **C. This Court Should Require Petitioners to Rely on the Best Evidence of**
24 **Voting.**
25

26 "It is a general demand of the law that the best possible evidence be produced."
27
28 *Larson v. A.W. Larson Const. Co.*, 36 Wn.2d 271, 279 (1950); *see also Eagle Group, Inc. v.*
29 *Pullen*, 114 Wn. App. 409 (2002) (must use "best available" evidence to show lost profits);
30 *Minor v. United States*, 375 F.2d 170, 181 (8th Cir. 1967) ("It is the established rule that the
31 best evidence extant and obtainable must be used in a trial, and that secondary evidence of a
32 fact may not be offered so long as primary evidence is extant and obtainable.").
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38 Here, the Voter Crediting Files are, at best, secondary evidence that any individual
39 cast a ballot. Every county uses the poll book pages, absentee ballot envelopes, and
40 provisional ballot envelopes to update the Voter Crediting Files. Rava Decl. Ex. B
41 (Secretary's Talking Points); Ex. I (Spokane County's Responses). These original sources
42 for the Voter Crediting Files are readily available to Petitioners. Indeed, counties have
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already produced these documents regarding many of the individuals that Petitioners claim voted illegally. *Id.* ¶ 15.

Given the numerous inaccuracies, the Voter Crediting Files do not fairly represent the information contained in the poll book pages, absentee ballot envelopes, and provisional ballot envelopes. Petitioners cannot rely on this faulty secondary evidence. *See Pneumo Abex Corp. v. Bessemer & Lake Erie R. Co., Inc.*, 936 F. Supp. 1250, 1258-59 (E.D. Va. 1996) (rejecting a compilation of records because it did not fairly represent the underlying records). Because the primary evidence of voting is available and the Voter Crediting Files are unreliable to show that any individual cast a ballot, the Court should require Petitioners to produce the poll book pages, absentee ballot envelopes, and provisional ballot envelopes for each allegedly illegal vote.

IV. CONCLUSION

For the reasons set forth above, the Court should grant WSDCC's Motion in Limine Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting.

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DATED: April 13, 2005.

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I, William C. Rava, state and declare as follows:

1. I am one of the attorneys for Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC"), am competent to make this declaration, and do so upon personal knowledge as indicated.

2. A true and correct copy of excerpts of Respondent Secretary of State's Interrogatories and Requests for Production of Documents to Petitioners and Responses & Objections Thereto is attached hereto as Exhibit A.

3. A true and correct copy of an email to county auditors from Nick Handy, Director of Elections, Office of the Secretary of State, dated January 5, 2005, with the attached document entitled "Crediting Voters Issues: Talking Points" (bates numbered KC 03687-87) is attached hereto as Exhibit B.

4. A true and correct copy of excerpts of Petitioners' First Interrogatories and Requests for Production to Washington Secretary of State and Responses Thereto is attached hereto as Exhibit C.

5. A true and correct copy of excerpts of King County's 2004 Elections Report to King County Executive Ron Sims is attached hereto as Exhibit D.

6. A true and correct copy of excerpts of Grays Harbor County's Responses to Petitioner's First Interrogatories and Requests for Production is attached hereto as Exhibit E.

7. A true and correct copy of Petitioners' Revised First Interrogatories and Requests for Production and Answers from Island County is attached hereto as Exhibit F.

8. A true and correct copy of excerpts of Petitioners' First Interrogatories and Requests for Production to Lewis County and Its Auditor, and responses thereto, is attached hereto as Exhibit G.

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9. A true and correct copy of excerpts of Petitioners' First Interrogatories and Requests for Production and Answers Thereto by San Juan County Auditor Si A. Stephens is attached hereto as Exhibit H.

10. A true and correct copy of excerpts of Petitioners' First Interrogatories and Requests for Production to Spokane County and Its Auditor, and responses thereto, is attached hereto as Exhibit I.

11. King County produced its voter registration database to the parties. A search of King County's voter registration database results in a record entitled "King County Voter Search." On April 11, 2005, Perkins Coie received, via email, an explanation regarding some of the notations in King County's voter registration database. A true and correct copy of the email from Janine Joly, King County Prosecuting Attorney's Office, to Rebecca Engrav, Perkins Coie, dated April 11, 2005, is attached hereto as Exhibit J.

12. True and correct copies of Sarah Sakimae's poll book page from King County and the "King County Voter Search" records for both registrations are attached hereto as Exhibit K. Addresses and other personal information have been redacted from these documents.

13. True and correct copies of Artrese Hartman's poll book page from King County and the "King County Voter Search" records for her registration are attached hereto as Exhibit L. Addresses and other personal information have been redacted from these documents.

14. True and correct copies of Frederick B. Ungrich II's poll book page and the "King County Voter Search" records for both registrations are attached hereto as Exhibit M. Addresses and other personal information have been redacted from these documents.

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15. Various counties have produced the poll book pages, absentee ballot envelopes, and provisional ballot envelopes for many of the individuals that Petitioners claim voted illegally.

I declare subject to penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED and DATED at Seattle, Washington, this 13th day of April, 2005 by
WILLIAM C. RAVA.

s/ William C. Rava

William C. Rava

EXHIBIT A

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SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

Timothy Borders, Thomas Canterbury, Tom Huff, Margie Ferris, Paul Elvig, Edward Monaghan, and Christopher Vance, Washington residents and electors, and the Rossi For Governor Campaign, a candidate committee,

Petitioners,

v.

Chelan County; Klickitat County; Klickitat County Auditor Diana Housden; Lewis County Auditor Gary Zandell; Snohomish County; Sam Reed, in his official capacity as Secretary of State for the State of Washington; Frank Chopp, Speaker of the Washington State House of Representatives; and Lieutenant Governor Brad Owen, President of the Washington State Senate,

Respondents,

Washington State Democratic Central Committee,

Intervenor Respondents,

v.

Libertarian Party of Washington State,

Intervenor Respondents.

Honorable John E. Bridges

No. 05-2-00027-3

RESPONDENT SECRETARY OF STATE'S

INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

TO PETITIONERS

AND RESPONSES & OBJECTIONS THERETO

["Secretary of State's Discovery Requests To Petitioners"]

TO: Petitioners Timothy Borders, Thomas Canterbury, Tom Huff, Margie Ferris, Paul Elvig, Edward Monaghan, Christopher Vance, and the Rossi For Governor Campaign,

AND TO: Davis Wright Tremaine LLP, Harry Korrell, and Robert Maguire, their attorneys.

RESPONSES TO SECRETARY OF STATE'S DISCOVERY REQUESTS TO PETITIONERS - 1

SEA 1631360v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square - 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 628-7699

1 Petitioners have not gathered and are not producing the large number of media reports,
2 blogs, or other publicly available reports of errors, neglect, or misconduct that gave rise to
3 the discrepancies and inaccuracies in the returns.

4
5 **Illegal Votes Apparently Given To Gregoire And Rossi**

6 *Your Election Contest Petition states that "it appears that a sufficient number of*
7 *illegitimate, invalid and/or illegal votes has been given to Ms. Gregoire that, if taken from*
8 *her, would reduce the number of her legal votes below the number of votes given to*
9 *Mr. Rossi, after deducting there from the illegal votes that may be shown to have been*
10 *given to him. RCW 29A.68.110" (Sec. VI.B.10).*

11 *In your February 22 answers to the intervenor Democrats' discovery requests, you*
12 *further maintain that you base your contentions as to the candidate for whom those illegal*
13 *votes were cast on facts such as direct evidence (e.g., "the specific ballots cast illegally"*
14 *and "testimony from the illegal voters") and circumstantial evidence (e.g., "a proportional*
15 *analysis", "proportional allocation " by precinct, or "media reports"). See Petitioner*
16 *Rossi Campaign's February 22 answers to the Democrats' Interrogatory Nos. 3, 5, 7, 9,*
17 *14, & 16.*

18 *The following Interrogatories ask you to fully disclose your facts concerning every*
19 *illegal vote alleged in this election contest.*

20 **INTERROGATORY NO. 13:** With respect to the 2004 Governor's election,
21 please:

- 22 (a) state the total number of illegitimate, invalid, or illegal votes you claim
23 were apparently given to Ms. Gregoire; and
24 (b) state the total number of illegitimate, invalid, or illegal votes you claim
25 were apparently given to Mr. Rossi;

26 **ANSWER:** Petitioners cannot yet state the total number of illegitimate, invalid, or
27 illegal votes apparently given to Ms. Gregoire or Mr. Rossi until discovery is complete.

Petitioners will supplement their answer to this interrogatory to the extent required by the
Civil Rules.

INTERROGATORY NO. 14: Please:

- (a) identify the voters in whose name you claim illegitimate, invalid, or illegal
votes were cast in the 2004 election – including each such voter's full name
and, to the extent available to you, that voter's residence address, telephone
number, voter ID or registration number, county voting precinct, and date of
birth;
(b) for each voter you identify, briefly state the reason you claim their vote was
illegitimate, invalid, or illegal (e.g., felon, deceased, voted twice, cast by
person other than the registered voter, etc.);

RESPONSES TO SECRETARY OF STATE'S DISCOVERY
REQUESTS TO PETITIONERS - 16

SEA 1631360v1 55441-4

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- 1 (c) for each voter you identify, state the candidate for whom you claim that
2 voter's vote was apparently cast in the 2004 Governor's election;
- 3 (d) for each voter you identify, state every type of direct or circumstantial
4 evidence you rely upon for your claim concerning the gubernatorial
candidate for whom that voter's vote was apparently cast (e.g., proportional
analysis, voter testimony, etc.).

5 To facilitate the prompt and orderly evaluation of the illegal votes you claim were cast in
6 the 2004 Governor's election, please provide your answers in the matrix format illustrated
7 below.

8 ANSWER: See General Objections No. 5 and 6. Petitioners also object to this
9 Interrogatory as confusing, because certain illegitimate, illegal, and invalid votes are
10 incapable of being described in the manner that the subparts hereof require (e.g.,
11 identifying voter information as to Provisional Ballots unlawfully fed into precinct vote
12 counters without first being verified that they were being cast by lawfully registered voters
13 who had not already voted). Without waiving these objections and with this
14 understanding, see the **Illegitimate, Invalid, & Illegal Vote Matrix attached hereto as**
15 **Exhibit B**. Petitioners caution that contents of Exhibit B are subject to those certain
16 Protective Orders described in the Answer to Interrogatory No. 37.

17 INTERROGATORY NO. 15: Please identify every person with any knowledge
18 concerning your answer to the Interrogatory Nos. 13-14 above, along with a brief
19 description of the subject matter of that person's knowledge.

20 ANSWER: Objection. This Interrogatory is vague and its reference to "every
21 person with any knowledge" is overbroad and could be interpreted as improperly seeking
22 attorney work product. The list of persons with "any knowledge" could potentially include
23 every individual listed on Exhibit B, as well as all members of the legislature, virtually all
24 individuals including counsel who have been involved in this election contest litigation,
25 and any person reading the numerous media accounts of illegal votes in the election.
26 Petitioners interpret "every person with any knowledge" to mean every person with
27

RESPONSES TO SECRETARY OF STATE'S DISCOVERY
REQUESTS TO PETITIONERS - 17

SEA 1631360v1 55441-4

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1 Individuals who cast illegal votes (including felons, persons voting in the name of
2 deceased individuals, persons voting more than once, and non-citizens casting ballots), as
3 set forth by Petitioners in Exhibit B, have knowledge of the casting of their respective
4 illegal votes.

5 **INTERROGATORY NO. 16:** Please identify every document that supports, is
6 inconsistent with, or otherwise relates to your answer to Interrogatory Nos. 13-14 above.

7 **ANSWER:** Objection. This Interrogatory is overbroad in that it does not appear to
8 be reasonably calculated to lead to the discovery of admissible evidence, and it seeks
9 attorney work product. Discovery is ongoing, particularly with respect to documents
10 outstanding from King County, and Petitioners will supplement this Answer and each
11 subpart hereof to the extent required by the Civil Rules. Without waiving these objections
12 and with this understanding, Petitioners identify the documents set forth in the attached
13 Exhibit A

14 **Errors, Etc. Causing Fewer Lawful Votes To Be Counted For Rossi Than Gregoire**

15 *Your Election Contest Petition states that "As a result of Respondents' errors,*
16 *omissions, misconduct, neglect, and other wrongful acts, Respondents failed to count more*
17 *lawful votes for Candidate Rossi than the number of votes separating the candidates"*
18 *(Sec. VI.C), that "The number of individuals who state that they voted for Mr. Rossi but*
19 *their ballots were wrongfully rejected by Respondents exceeds the number of votes*
20 *certified by the Secretary of State as separating the two candidates by more than double"*
21 *(Sec. VI C), and that "the votes of lawfully registered voters were not counted, and the*
22 *failure of the Respondents to count them, when presented with evidence of Respondents'*
23 *errors, was arbitrary, capricious, wrongful, and a violation of their obligations under*
24 *Washington's election laws" (5th para., Sec. VI).*

25 *In addition to the statements you refer to by individuals whose votes for Mr. Rossi*
26 *were rejected, your February 22 answers to the intervenor Democrats' discovery requests*
27 *indicate that you base your contentions in this case concerning the candidate for whom*
votes were cast on facts such as direct evidence (e.g., "the specific ballots cast illegally"
and "testimony from the illegal voters") and circumstantial evidence (e.g., "a proportional
analysis", "proportional allocation" by precinct, or "media reports"). See the Petitioner
Rossi Campaign's February 22 answers to the Democrats' Interrogatory Nos. 3, 5, 7, 9,
14, & 16.

The following Interrogatories ask you to fully disclose your facts concerning the
errors, omissions, misconduct, neglect, and other wrongful acts of elections officials
alleged in this election contest.

RESPONSES TO SECRETARY OF STATE'S DISCOVERY
REQUESTS TO PETITIONERS - 21

SEA 1631360v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES

2600 Century Square - 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 628-7699

1 STATE OF WASHINGTON)
2 COUNTY OF Kiwa) ss.

3 Petitioner Paul Elvig, being first duly sworn on oath, deposes and says:

4 I have read the foregoing Answers and Responses to RESPONDENT
5 SECRETARY OF STATE'S INTERROGATORIES AND REQUESTS FOR
6 PRODUCTION OF DOCUMENTS TO PETITIONERS, know the contents thereof, and
7 believe the same to be true.

8 Signatures: [Signature]
9 Paul Elvig

10 SUBSCRIBED AND SWORN to before me this 7th day of March, 2005

11 [Signature]
12 (Signature of Notary)

13 Martha A. Lutz
14 (Legibly Print or Stamp Name of Notary)



15 Notary public in and for the state of
16 Washington, residing at Snohomish, WA

17 My appointment expires 11/8/07

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RESPONSES TO SECRETARY OF STATE'S DISCOVERY
REQUESTS TO PETITIONERS - 90

SEA 1631360v1 55441-4

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EXHIBIT A

Felon Records of Convictions, Judgments & Sentences, and Orders Terminating Probation & *Not* Restoring Rights from various counties including King, Benton, Clark, Kitsap, Lewis, Mason, Pacific, Pierce, Skagit, Snohomish, Spokane, Thurston, Whatcom, Yakima Counties (Bates numbered RC 1-9660; 14148-14352)

Washington State Patrol database of felony convictions (RC 9998-9999)

County Felony databases produced (RC 10000)

List of Felony Charges in King County from State Office of the Administrator of the Courts (RC 10001)

Poll book signature page, absentee ballot envelope or provisional ballot envelope for alleged felon voters supplied to REALS by the Seattle Times (B/KING 002200-2273)

Poll book signature pages for alleged illegal voters from list attached to 3/8 letter to Cheryl Broom (B/KING 002274-2624)

Electronic Voter File Records for all counties except Asotin, Columbia, Cowlitz, Douglas, Ferry, Grant, Kittitas, Klickitat, Lincoln, Mason, Pacific, Pend Oreille, San Juan and Skamania (Access Databases, numbered RC 10009-10034) including all records for each county in the 2004 General Election including:

- Felon Voters
- Votes in the name of deceased persons
- Voter records showing double votes in WA
- Voter records of persons who voted once in Washington and one or more times outside Washington

Voter records from other states showing one or more out-of-state votes by persons who also voted in Washington (RC 9751-9774)

Voter records showing non-citizen voters who were disqualified from voting (RC 14757-14758)

Documents regarding restoration of convicted felons' civil rights (RC 14758-14809)

List from State Office of the Administrator of the Courts of felons whose civil rights were restored in King County (RC 10002)

Death Certificates (RC 9661-9750; 14132-14147)

State Department of Health Databases (RC 20003-20005)

Clark County Department of Health Database (RC 20006)

Snohomish County Department of Health Database (RC 20007)

King County Burial Transit Data (RC 2/22/2005)

Certified Election Returns from Each County (produced by Secretary of State to WSDCC, numbered 1-3742)

Election Returns from Each County following its Mandatory Recount (Machine)
Produced by Secretary of State to WSDCC, numbered 3743-5097)

Election Returns from Each County following its Requested Recount (Hand) (produced
by Secretary of State to WSDCC, numbered 5098-5749)

Provisional Ballot Spreadsheets from King County (KC 2567-71)

Documentation from King County responding to WSDCC Public Disclosure Request
Item 3, "Prematurely Counted Provisional Ballots" (B/KING 000687-2199)

E-mail from Bill Huennekens to Peter Schalestock regarding provisional ballots (B/KING
004369)

Ballot Accountability Sheets for Precincts in King County in the City of Seattle (KC 1-
1003)

Ballot Accountability Sheets for Precincts in King County outside the City of Seattle (KC
1022-2565)

Polling Place Canvass Reports for King County (KC 2572-2782)

King County Elections Policy IV-10 (B/KING 003310-3316)

Excerpt of 2004 State of Washington Election Administrator Certification Course
training manual (produced by Secretary of State to Petitioners 2/24/2005, numbered 1957-1986)

King County Polling Place Reconciliation Summary – 2004 General Election (B/KING
004284-4368)

King County Absentee Ballot Reconciliation Summary – 2004 General Election
(Petitioners have not yet received this from King County in discovery)

Pierce County Reconciliation Data (Petitioners have not yet received this from Pierce
County in discovery)

Press releases from King County regarding ballot reconciliation (RC 14670-14754)

Pierce County Media Advisory regarding election information to address allegations
raised regarding the November 2, 2004 general election (RC 9780-9784)

Certificate of Election dated (incorrectly) January 10, 2005 attached as Exhibit B to WSDCC's Motion to Dismiss for Lack of Subject Matter Jurisdiction filed 1/20/2005

Certificate of Election dated January 18, 2005 attached as Exhibit C to Declaration of Robert J. Maguire in Opposition to WSDCC's Motion to Dismiss for Lack of Subject Matter Jurisdiction filed 1/26/2005

Press release issued by Secretary of State's Office on January 7, 2005 (RC 014755)

Seattle Times article dated December 31, 2004 quoting Sam Reed (RC 9775-9778)

The Chronicle article dated December 17, 2004 regarding Lewis County absentee ballots (Petitioner Monaghan) (RC 14667-14669)

As discovery progresses, Petitioners might learn of more documents that Petitioners may identify to support their claims.

ILLEGITIMATE, INVALID & ILLEGAL VOTE MATRIX

	Voter's Full Name	Address	Voter ID Registration Number	County & Precinct	Reason You Claim Vote Illegal
1.	Carlos C. Craff	190802 S Plymouth Rd Plymouth, WA 99346	621669	Benton, Expansion	Felon
2.	Jeremy Benjamin Johnson	120 W McGraw St Seattle, WA 98119	950266244	King, 1761	Felon
3.	Russell Martin	30405 S Gerards Rd Kennewick, WA 99337	587686	Benton, Hedges	Felon
4.	Cynthia McInturf	1011 Winslow Ave Richland, WA 99352	98315	Benton, 230	Felon
5.	Brian Meldrum	504 Newcomer St Richland, WA 99352	628011	Benton, 165	Felon
6.	Kristine Rasmussen	1715 Merlot Ct Richland, WA 99352	611446	Benton, 286	Felon
7.	Hank Robinson	9 Royalty Ln West Richland, WA 99353	611628	Benton, WR 1	Felon
8.	Dion Rowell	5880 Gray St No. 3 West Richland, WA 99353	631197	Benton, WR 2	Felon
9.	Scott G. Sarria	1110 W 37th Pl Kennewick, WA 99337	122106	Benton, W3-P556	Felon
10.	James L. Vann	4226 W 10th Ave Kennewick, WA 99336	610068	Benton, W2-P620	Felon
11.	Jose Villa	165401 W Johnson Rd Prosser, WA 99350	597548	Benton, Walnut Grove	Felon
12.	James W. Walters-Goulet	202003 E Bowles Rd Kennewick, WA 99337	621549	Benton, Randy	Felon
13.	David W. Webb	203810 E 14th Pl Kennewick, WA 99337	594627	Benton, Kennewick Valley	Felon
14.	Jay B. Wolf	70207 N 132 P R NE Benton City, WA 99320	628754	Benton, Kiona	Felon
15.	Daniel B. Zilch	509 Endress St Richland, WA 99352	617185	Benton, 250	Felon
16.	Shaun L. Appelman	9601 Steilacoom Blvd SW S-8 Lakewood, WA 98498	750181	Pierce, 28432	Felon
17.	Justin H. Ashby	314 E 12th St D Vancouver, WA 98660	4304891	Clark, 120	Felon
18.	Richard M. Byers	2117 Kauffman Ave Vancouver, WA 98660	4376610	Clark, 110	Felon
19.	David Christman	1718 NE Ione St Camas, WA 98607	4713142	Clark, 985	Felon
20.	Gregory W. Clark	888 12th St Washougal, WA 98671	4173251	Clark, 900	Felon
21.	Marie Clark	4311 NW Olive St Vancouver, WA 98660	4036201	Clark, 60	Felon
22.	Caren Coffield	2811 E 19th St Vancouver, WA 98661	4200546	Clark, 220	Felon
23.	Brandi J. Collum	3617 M St Vancouver, WA 98663	4720131	Clark, 150	Felon

917	Charles H. Kinnune	330 2nd Ave NE Issaquah, WA 98027	710716803	King, 546	Deceased
918	Gertrude B. Lane	585 Mountainside Dr SW Issaquah, WA 98027	159921	King, 2461	Deceased
919	Clayton R. Laplant	9344 Fauntleroy Way SW Seattle, WA 98136	760677136	King, 2501	Deceased
920	Earl D. McFarland	19708 330th Ave NE Duvall, WA 98019	760385549	King, 3334	Deceased
921	Caroline G. Richardson	2211 5th Ave N Seattle, WA 98109	820158741	King, 1740	Deceased
922	Eric B. Swanson	9611 Hilltop Rd Bellevue, WA 98004	801359329	King, 201	Deceased
923	Anne M. Witte	2303 246th Ave SE Sammamish, WA 98075	710754357	King, 3215	Deceased
924	Maxine M. Zemko	8718 31st Ave NW Seattle, WA 98117	725426011	King, 2512	Deceased
925	Donald R. Waters	10034 Riviera Pl NE Seattle, WA 98125	723088101	King, 2304	Deceased
926	Agnes E. Stone	1900 Elm St SE Auburn, WA 98092	712309547	King, 83	Deceased
927	Gary G. Peterson	5225 S 234th Pl Kent, WA 98032	950244186	King, 3378	Deceased
928	Lawrence E. Martin	39219 200th Ave SE Auburn, WA 98092	921786093	King, 2832	Deceased
929	Joan D. Macdonald	12704 72nd Ave NE Kirkland, WA 98034	740356950	King, 2767	Deceased
930	John W. Convey	7322 55th Ave NE Seattle, WA 98115	820312368	King, 2377	Deceased
931	Irwin J. Brenner	17812 147th Ave SE Renton, WA 98058	721477151	King, 293	Deceased
932	Jazzy Blue	14381 30th Ave NE 13 Seattle, WA 98125	921601735	King, 2352	Deceased
933	Artrese Hartman	3900 Southcenter Blvd C12 Tukwila, WA 98188	940560390	King, 3393	Multi State Duplicate
934	Brian E. Brooks	327 NE 95th St Seattle, WA 98115	30331940	King, 2358	Multi State Duplicate
935	John William, Heidmiller	3051 Aki Ave SW B Seattle, WA 98116	990483921	King, 1438	Multi State Duplicate
936	Judith A. Shaffer	2810 Alpine St SE Auburn, WA 98002	910389394	King, 58	Multi State Duplicate
937	Karen C. Glaser	1636 Arvon Ave Bremerton, WA 98312-3033	5937	Kitsap, 100013	Multi State Duplicate
938	Darlene Diaz	16825 119th Pl NE Bothell, WA 98011	157279	King, 3321	In State Duplicate
939	Darlene Diaz	16825 119th Pl NE Bothell, WA 98011	990135789	King, 3321	In State Duplicate
940	Frederick B. Ungrich II	1726 Summit Ave 307 Seattle, WA 98122	40099921	King, 1844	In State Duplicate
941	Frederick B. Ungrich II	1712 Summit Ave 3 Seattle, WA 98122	720569	King, 1844	In State Duplicate
942	George R. Fuller	3008 13th Ave S Seattle, WA 98144	40006249	King, 1942	In State Duplicate
943	George R. Fuller Sr	3008 13th Ave S Seattle, WA 98144	40051368	King, 1942	In State Duplicate
944	Jennifer C. Mendicla	6901 S 123rd St 164 Seattle, WA 98178	30055136	King, 233	In State Duplicate
945	Jennifer C. Mendicla	6901 S 123rd St 164 Seattle, WA 98178	40325204	King, 233	In State Duplicate
946	Michael R. Prince	2702 Queen Anne Ave N Seattle, WA 98109	30267648	King, 1759	In State Duplicate
947	Michael R. Prince	2702 Queen Anne	20040467	King, 1759	In State Duplicate

		Ave N Seattle, WA 98109			
948	Patricia A. Brown	10108 NE 16th Pl Bellevue, WA 98004	710327149	King, 194	In State Duplicate
949	Patricia A. Brown	12709 NE 28th St Bellevue, WA 98005	710448825	King, 224	In State Duplicate
950	Paul F. Hessburg Jr	1421 First St Wenatchee, WA 98801	55233	Chelan, 59	In State Duplicate
951	Paul F. Hessburg Sr	1421 First St Wenatchee, WA 98801	17134	Chelan, 59	In State Duplicate
952	Sarah M. Sakimae	1039 NE 90th St Seattle, WA 98115	30003861	King, 2282	In State Duplicate
953	Sarah M. Sakimae	1039 NE 90th St Seattle, WA 98115	30064071	King, 2282	In State Duplicate
954	Tara B. Nelson	14310 37th Ave NE Seattle, WA 98125	245941	King, 2371	In State Duplicate
955	Tara Brooke Nelson	14310 37th Ave NE Seattle, WA 98125	10197813	King, 2371	In State Duplicate
956	Thomas J. Harleman	24210 SE 203rd St Maple Valley, WA 98038	880400568	King, 37	In State Duplicate
957	Thomas J. Harleman	24038 SE 203rd St Maple Valley, WA 98038	712220627	King, 37	In State Duplicate
958	Shari D. Bligh	10909 Avondale Rd NE T 178 Redmond, WA 98052	20273721	King, 3281	In State Duplicate
959	Shari D. Bligh	10909 Avondale Rd NE T 178 Redmond, WA 98052	990650307	King, 3281	In State Duplicate
960	Chun C. Chen	4233 7TH Ave NE 110 Seattle, WA 98105	990598675	King, 2052	Non-U.S. Citizen
961	Ming Y. Anderson	306 6TH Ave S 510 Seattle, WA 98104	30437420	King, 2686	Non-U.S. Citizen

In addition to the above, for which Petitioners have individual names, the following are identified as illegitimate, invalid and/or illegal votes, though Petitioners do not yet have names for the persons casting the ballots (either because the counties have not provided the names or because it is impossible to determine who cast the ballot):

Provisional Ballots that were improperly cast directly into precinct vote counters and counted, instead of being sealed in envelopes to be processed and verified with other Provisional Ballots as required by law.

Ballots counted in excess of the number of lawfully registered voters who cast ballots in the election

Absentee ballots that were cast by persons other than the registered voters to whom they were sent

Absentee ballots that were not counted even though they had been previously determined to be valid and approved for counting (the inclusion of this category is based on the recent disclosures by King and Pierce Counties. Petitioners know little about the circumstances surrounding these newly discovered ballots and list them here without knowing yet the proper disposition of these ballots in this election contest.)

EXHIBIT B

Dan Gillespie

From: Handy, Nick [nhandy@secstate.wa.gov]
Sent: Wednesday, January 05, 2005 4:00 PM
To: Zona Lenhart; Al Brotche (auditor@auditor.co.mason.wa.us); Bill Varney; Bob Terwilliger; Bobbie Gagner (bobbie_gagner@co.benton.wa.us); Cathleen McKeown (cmckeown@co.clallam.wa.us); Clydene Bolinger (auditor@co.ferry.wa.us); David B. Bowen (davidb@co.kittitas.wa.us); Diana Housden (dianah@co.klickitat.wa.us); Diane Tischer (tischerd@co.wahkiakum.wa.us); Donna Eldridge (deidridge@co.jefferson.wa.us); Eunice Coker; Evelyn Arnold (evelyn.arnold@co.chelan.wa.us); Gary Zandell (Gzandell@co.lewis.wa.us); Greg Kimsey (greg.kimsey@co.clark.wa.us); J. Michael Garvison; Karen Flynn (kflynn@co.kitsap.wa.us); Kim Wyman (wymank@co.thurston.wa.us); Kristina Swanson (swansonk@co.cowlitz.wa.us); Nancy McBroom (nancym@co.adams.wa.us); Norma Brummet (normab@co.skagit.wa.us); Pat Gardner (pgardner@co.pacific.wa.us); Pat McCarthy; Peggy Robbins; Sharon Richter; Shelly Johnston (sjohnston@co.lincoln.wa.us); Shirley Forslof (sforslof@co.whatcom.wa.us); Si Stephens; Suzanne Sinclair (Suzannes@co.island.wa.us); Thad Duvall (tduvall@co.douglas.wa.us); Tim Gray (tgray@co.stevens.wa.us); Vern Spatz (vspatz@co.grays-harbor.wa.us); Vicky Dalton (vdalton@spokanecounty.org); Karen Martin (kmmartin@co.walla-walla.wa.us); Carla Heckford; Corky Mattingly (E-mail); Dean Logan; Donna Deal; Elaine Johnston; Tim Likness (tlikness@co.clark.wa.us); Amy Lee; Brittany Connolly; Carolyn Diepenbrock (carolyn.diepenbrock@co.snohomish.wa.us); Dan Gillespie; David O'Brien (davido@co.skamania.wa.us); Dawn Weaver (dawnw@co.klickitat.wa.us); Debbie Adelstein (DAdelste@co.whatcom.wa.us); debrah@co.whitman.wa.us; Delores Gilmore (dgilmore@co.kitsap.wa.us); Diana Killian (dkillian@usa.com); Diana Soules (Diana.soules@co.yakima.wa.us); Dianna Galvan (elections@co.ferry.wa.us); Freeman Moore (skip.moore@co.chelan.wa.us); Heidi Hunt (heidih@co.adams.wa.us); Karen Cartmel (karenc@co.jefferson.wa.us); Katrina Manning (kmanning@co.walla-walla.wa.us); Libby Nieland (nielandl@co.cowlitz.wa.us); LoAnn Gulick (loanng@co.island.wa.us); Lori Augino (laugino@co.pierce.wa.us); Mariann Zumbuhl (mlzumbuhl@co.lewis.wa.us); Mila Jury (jury6576@co.okanogan.wa.us); Pat Pennington (ppennington@co.douglas.wa.us); Pat Sykora (pas@co.mason.wa.us); Patty Rosand (prosand@co.clallam.wa.us); Peggy Laughery (plaughery@co.garfield.wa.us); Pete Griffin (pgriffin@co.whatcom.wa.us); Ron Pursley (rpursley@co.grays-harbor.wa.us); Steve Homan (homans@co.thurston.wa.us); Sue Higginbotham (sue@co.kittitas.wa.us); Susie Christopher (susie_christopher@co.benton.wa.us); Tina Beck; Barbara Sandahl; Beverly Lamm (blamm@co.stevens.wa.us); Bill Huennekens; Brandt, Paul; Erika Kubitschta; Faith Anderson; Keri Rooney; Michele Reagan
Cc: Elections - All; Hutchins, Trova; Nacke, Joanie
Subject: Crediting Voters Talking Points.doc

Election Partners,

Yesterday we coordinated a conference call of the Auditors who have been in the middle of issues relating to reconciliation of "ballots cast" and "voters credited with voting".

You have been reading about this in King County but the issue has expanded into five Western Washington counties.

Attached please find talking points that help explain these issues. Any of you being asked questions about these issues may want to refer to this document.

We are not releasing this but rather are using it as an internal document.

I hope this is helpful.

Nick Handy

Crediting Voters Issues Talking Points

We have no evidence of fraud in this election

- Valid ballots from registered voters returned in a timely manner were processed and counted.
- Military ballots were mailed prior to dates required by state law and in compliance with federal law. Valid military ballots timely returned were counted in accordance with state law.
- The three counts resulted in as accurate a canvass of this election as is possible under current election laws. Differences in the counts were almost exclusively due to voter intent being determined by human intervention in the vote-counting process, and both candidates benefited from this process.

The process of crediting voters is a post-election administrative exercise that does not bear upon the authenticity of the election results.

- The processing of voters is a post-election administrative exercise. The purpose of the exercise is to ensure that current voting records and to collect data for future elections.
- Crediting voters after certification does not bear upon the authenticity of the election.
- Due to the machine and manual recounts, the process of crediting voters is occurring later than usual, and is mostly being done after certification.
- The safeguards and scrutiny in place for the post-certification process of crediting voters are less than the pre-certification reconciliation process undertaken by all counties because the process does not bear upon the validity of the election. The highest level of scrutiny and oversight is placed on the front end processes before certification.
 - **Pre Certification Processes.** These processes are typically characterized by bipartisan election workers, strong supervision oversight, and presence of observers.
 - **Post Certification Processes.** These processes are typically carried out by election workers with less supervision and oversight.

- Prior to certification, counties are required to reconcile the number of ballots received against the number of ballots counted and rejected.
- After certification, counties are not required to reconcile “ballots cast” against “voters credited with voting.” Counties are required to credit voters with voting for reasons related to administration of future elections.

Reconciliation of “voters credited with voting” against “ballots cast” is a complex process. Good reasons exist for why these numbers may not reconcile.

- **Dynamic Process.** After certification, counties reopen voter registration lists and delete and add voters. As such, the list of registered voters may change daily during this time. Thus, comparing a registered voter list from November 15 will probably not match a list of credited voters dated December 15. And, neither may match the number of ballots cast in the election.
- **Clerical Errors.** The process of crediting voters involves an election worker passing a wand over bar codes appearing next to the names of voters in poll books who voted or in some other way entering this information. Mistakes occur in this process when clerical workers miss a name or skip a page or fail to capture information. This does not mean that a ballot was not counted.
- **Address Confidentiality Program.** State law allows for registered voters in the state's address confidentiality to not appear on voter registration lists.
- **Overseas and Service Voters.** Federal law allows certain military and overseas voters stationed in Washington to vote here even if they are Washington residents. These voter names may not appear on any voter registration file but their votes will be counted.
- **Inactive Voters.** Some voters who have not voted for a long time may not be on the active voter list. The act of voting automatically restores these voters to the active list.
- **Provisional Ballots.** Washington had nearly 90,000 provisional voters in the last election. Reconciling all of these provisional ballots has been difficult. In particular would be the situation where a provisional voter signed a poll book, cast a provisional ballot, but whose ballot was later not accepted.
- **Voter Errors.** County officials are continually challenged by voters who change their name, address, signature, military status, and

other circumstances without advising county officials. These voter lapses can cause difficulties in crediting voters after the election.

- **Absentee Ballots.** An absentee voter's signature may have been matched and the ballot processed but a clerical error may have been made not crediting that voter at the time. For King County to reconcile this number after certification would require re-checking signatures on over 600,000 absentee ballots.

Recent Comparisons of "credited voter lists" with "ballots cast" include many elements of an "apples to oranges" comparison.

- **Work in Progress.** In most instances when counties recently released "credited voter lists" the counties advised that the process of crediting voters is still ongoing and that the process is not complete. Thus, comparing these lists to "ballots cast" in that county is not a valid comparison.
- **Importance Beyond Its Value.** This issue has taken on an importance beyond its value. This information does not bear on the authenticity of the election result. The information relates to the administration of future elections.

EXHIBIT C

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, Thomas Canterbury, Tom) Huff, Margie Ferris, Paul Elvig, Edward) Monaghan, Dino Rossi, and Christopher Vance,) Washington residents and electors, and the Rossi) for Governor Campaign, a candidate committee,)

Petitioners,)

v.)

King County and Dean Logan, its Director of) Records, Elections and Licensing Services, et al.,)

Respondents.)

No. 05-2-00027-3

**PETITIONERS' FIRST
INTERROGATORIES AND
REQUESTS FOR
PRODUCTION TO
WASHINGTON SECRETARY
OF STATE
AND RESPONSES THERETO**

TO: SECRETARY OF STATE SAM REED

Pursuant to Civil Rules 26, 33 and 34 and the orders of the court, you are hereby requested to supply responses to these interrogatories and requests for production, within 10 days of the service of these requests upon you. Petitioners request that the responses to the interrogatories and the documents herein designated for production be produced at the offices of Davis Wright Tremaine, LLP, 1501 Fourth Avenue, 2600 Century Square, Seattle, Washington 98101-1688, and that petitioners, or someone acting on their behalf, be permitted to inspect and copy the designated documents.

PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION AND RESPONSES
THERETO- 1

SEA 1596547v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 628-7699

1
2 INTERROGATORY NO.1: Please describe in detail all measures taken to ensure
3 that ballots cast by voters voting more than once—whether by multiple ballots of one or
4 more type(s) (poll, provisional, absentee), by being registered to vote in more than one
5 jurisdiction or using more than one name, or otherwise—were not counted during the
6 November 2004 general election.

7
8 ANSWER: Please see the General Note before Request for Production No. 1.
9 Moreover, since most measures are conducted by persons other than the Respondent (e.g.
10 County Auditors), the following response has to be somewhat general in nature.

11 Protections against duplicate voting consist generally of maintenance of the voter
12 registration lists and procedures directed to identify multiple ballots cast by a single voter.
13 Most of these functions are performed by County Auditors, rather than by the Secretary of
14 State.

15 *List maintenance:* Counties maintain a voter registration database for their
16 jurisdiction with information on each registered voter. This same database often serves as
17 an election management system as well. An election management system places voters in
18 their precincts and voting jurisdictions, prints poll books, and designates a voter's method
19 of voting (poll site, absentee, provisional, etc.), among other administrative functions.

20 List maintenance is performed on these databases by the County Auditors. That list
21 maintenance, performed by the counties, typically includes the following:

- 22 • canceling records found on the Department of Health lists regarding deaths in their
23 jurisdiction;
- 24 • canceling records found in felony conviction notices from courts;
- 25 • processing cancellation notices from other counties and states;
- 26 • processing cancellation notices from voters;

27
PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION AND RESPONSES
THERE TO- 8

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- 1 • designating voters inactive when nonforwardable mail is returned as undeliverable;
- 2 • removing inactive voters when no response from voters after two federal elections
- 3 (four years);
- 4 • transferring voters who have moved within the county and notified the elections
- 5 office;
- 6 • transferring voters who have changed their address through Department of
- 7 Licensing;
- 8 • transferring voters when postal information is received;
- 9 • adding new voters from mail-in registration forms;
- 10 • adding new voters from Department of Licensing information;
- 11 • annually processing the statewide duplication lists from the Secretary of State's
- 12 office;
- 13 • each even year, conducting a county wide list maintenance by statutorily defined
- 14 processes.

15 These processes are to help facilitate the list being accurate and up to date, but are
16 daily processes. This database is closed to original registrations and transfers, 30 days
17 before an election. Late registration allows new registrations up to 15 days before an
18 election if done in person.

19 In addition to the County Auditor work, for the past six years the Secretary of
20 State's Office has conducted a statewide comparison of all 39 counties' voter registration
21 databases, with the goal of identifying possible duplicate registrations or duplicate voting.
22 This comparison was then delivered to the counties for processing and possible
23 prosecution where applicable. After January 1, 2006, a centralized statewide database of
24 registered voters should become available and should enable this process to occur more
25 efficiently and more timely.

26 *Prevention of duplicate voting:* When a voter requests an absentee ballot, either for

27 PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION AND RESPONSES
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1 one time use or for ongoing status, the County Auditor generally places a flag on the
2 voter's record. A voter may make multiple requests for absentee ballots, but a record is
3 kept of each. When the County Auditor prints poll books from this same database, the
4 names of voters so flagged as absentee voters have a notation printed in the poll book that
5 they have been sent an absentee ballot, and poll workers are supposed to have those voters
6 vote a provisional ballot if they attempt to vote a second ballot at the polls. If an absentee
7 ballot is requested after the poll books are printed, the Auditor generally issues it in a
8 different color, or with some other marking, than the regular absentee ballots so that it will
9 not be processed and counted until after the poll books are reviewed to be sure that the
10 voter did not vote at the poll site.

11 Provisional ballots are regular poll site ballots but are processed differently from
12 regular poll site ballots. A provisional ballot is voted and then placed in a security
13 envelope that contains no identifying marks. The security envelope, however, is placed
14 inside a larger envelope, the outside of which has a form for the voter's name, address,
15 signature, and reason for voting a provisional ballot. Provisional ballots are then reviewed
16 when they are returned to the elections office. If the voter is a registered voter in the
17 jurisdiction, is eligible to vote on all the races on the ballot, and the voter's ballot is valid
18 (e.g., the voter has not already voted by absentee), it is counted. If the voter is registered in
19 a different precinct, the ballot is typically duplicated so that only the proper races for the
20 voter's actual precinct are counted. If the voter is found to be registered in another county,
21 the ballot is sent to the other county.

22 As each absentee ballot is received and processed in the elections office, the
23 Auditor typically places another flag on the voter's record in the database that indicates a
24 returned ballot. This is sometimes referred to as one form of "crediting" and is done when
25 the signature on the absentee envelope matches the signature on the voter registration
26 record. Allowing only one flag for returning a ballot prevents a provisional ballot voted at

27 PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION AND RESPONSES
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1 the poll site from also being counted, as well as preventing more than one absentee ballot
2 being counted for any voter. (This reference to "crediting" is but one type of "crediting"
3 and is limited to absentee ballots. Crediting of poll site voters for voting is done in a
4 different manner.)

5
6 REQUEST FOR PRODUCTION NO. 6: Please produce any instructions,
7 guidelines, or training materials sent by your office to any county, and any documents
8 received from any county, regarding measures to ensure that ballots cast by voters voting
9 more than once—whether by multiple ballots of one or more type(s) (poll, provisional,
10 absentee), by being registered to vote in more than one jurisdiction or using more than one
11 name, or otherwise—are not counted.

12
13 RESPONSE: Please see the General Note before Request for Production No. 1 and
14 the response to Request for Production No. 3.

15 Responsive records are attached. The response to Request for Production No. 6
16 includes pages 1235 through 1247 of the responsive materials.

17
18 INTERROGATORY NO.2: Please identify all audits of any county's voting or
19 canvassing procedures conducted in the last five years, whether or not they were related to
20 a particular election.

21 ANSWER: Please see the General Note before Request for Production No. 1.
22 Please also note that Respondent construes the use of the term "audit" in this interrogatory
23 as a reference to election reviews, conducted under RCW 29A.04.560 through .580.

24 There are two types of reviews. "Regular" reviews are conducted during an
25 election. The Secretary's review staff examines various aspects of the election and
26 prepares a written report. "Special" reviews are conducted when a recount of a statewide

27 PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION AND RESPONSES
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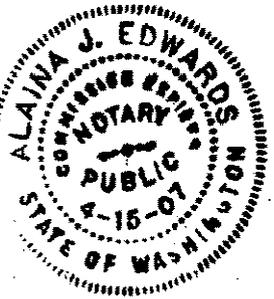
RESPONSES DATED this 18th day of February, 2005.

STATE OF WASHINGTON)
)ss.
COUNTY OF Thurston)

Pamela Floyd, being first duly sworn, upon oath, deposes and states: That he/she an officer of the Respondent Secretary of State in this lawsuit, that he has read the within and foregoing interrogatories and answers thereto, knows the contents thereof, and believes the same to be true and correct to the best of his knowledge.

Pamela Floyd
Its Assistant Director of Elections

SUBSCRIBED AND SWORN TO before me this 18 day of February 2005.



Alaina J. Edwards
NOTARY PUBLIC in and for the State of Washington, residing at Thurston Co.
My commission expires 4/15/2007

The undersigned attorney for Respondent Secretary of State Sam Reed has read the foregoing responses and objections and certifies that they are in compliance with CR 26(g).

Dated this 18th day of February, 2005.

ROB McKENNA
Attorney General
Maureen Hart, WSBA No. 7831
Solicitor General

Jeffrey T. Even
Jeffrey T. Even, WSBA No. 20367
Assistant Attorney General

PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION AND RESPONSES
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FOSTER PEPPER & SHEFELMAN PLLC
Special Assistant Attorneys General
Thomas F. Ahearne, WSBA No. 14844
Jeffrey D. Richard, WSBA No. 28219
Hugh D. Spitzer, WSBA No. 5827
Marco J. Magnano, WSBA No. 1293
Attorneys for Respondent Secretary
of State Sam Reed

**PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION AND RESPONSES
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EXHIBIT D

2004 King County Elections Report

“ It is the policy of the State of
Washington to encourage every
eligible person to register to vote and
to participate fully in all elections,
and to protect the integrity of the
electoral process by providing equal
access to the process while guarding
against discrimination and fraud. ”

.....
*Chapter 29A.04.205
Revised Code of Washington*

2004 King County **Elections** Report

.....
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Action Plan.....	18
Summary and Conclusion.....	21

.....

Washington is a voter intent state.

Ballot Duplication and Enhancement

King County followed both the letter and spirit of the law.

Because many ballots are received in a manner other than filling in the response position as instructed, it is sometimes necessary to duplicate or enhance the ballot to reflect the voter's intent and ensure the vote tabulation system can properly count the ballot. This process is governed by Washington Administrative Code and King County followed the guidelines as set forth in the statewide rules.

Examples of ballots requiring duplication or enhancement include those where the voter

circles the name of their choices, or those where the voter fills in the oval for their candidate choices, but also writes the names of the candidates on the line provided for write-in votes.

Canvassing Board review of ballots

Washington is a voter intent state. Our election laws give deference to voter intent where it can be determined over following instructions on how to mark a ballot.

The three person King County Canvassing Board, consisting of the director of Elections, an appointee from the Prosecuting Attorney's Office, and a member of the King County Council, is an entity established in law to

certify elections and oversee the canvassing of votes. The board was consistent and acted appropriately in reviewing ballots set aside and referred to them by Elections' staff. Staff were instructed to forward ballots to the canvassing board when voter intent was not clear.

The board followed the guidance of state law and administrative rule in carefully reviewing more than 1,600 ballots to discern whether the intent of the voter could be interpreted. The vast majority of those decisions were determined unanimously by all three members of the board.

Meetings of the Canvass Board were conducted publicly – some even aired on local access cable television – and a record of the proceedings is maintained.

Variance between ballots cast and voters credited with voting

The process of crediting voters for voting is not designed to determine if voter fraud occurred.

Statements and articles highlighting the difference between the numbers of votes cast and the number of voters credited with voting as evidence of fraud are misleading. This issue has been knowingly misrepresented to the public as if there were more ballots counted than there were voters in King County. This is not the case.

QUICKFACTS

- Ballot duplications and enhancements are conducted by at least two people in the presence of political party observers.
- A log is maintained of all duplications and enhancements to ensure full accountability of all ballot handling.
- Ballot enhancement only occurs when the original marks on the ballot can be maintained. If enhancement would permanently obscure a ballot, the ballot is duplicated rather than enhanced.
- In the 2004 General Election, 4,902 ballots were duplicated and 55,177 ballots were enhanced out of nearly 900,000 ballots cast.
- The King County Canvassing Board reviewed more than 1,600 ballots to determine voter intent. The vast majority of these decisions were unanimous.

The most common reasons people who voted may not appear on the list of registered voters is:

- they cast a federal write-in ballot in accordance with provisions of the Federal Voting Assistance Program (which includes non-registered service personnel and overseas voters);
- they are participants in the state's Address Confidentiality Program (victims of domestic violence and stalking whose information is secured from public record); or
- human error during the crediting process and when voters sign the poll books.

State election laws address ballot security and accountability on the front end of the elections process – at the polls, in ballot counting centers and throughout the verification process.

Elections oversight consists of direct involvement of representatives of the major political parties and final certification of a canvass board comprised of the county's chief elections officer, the county prosecuting attorney or his designee, and a member of the county's legislative body appointed by its chair.

Human error – in crediting or during various interaction points at

poll sites or in crediting absentees – is most likely what resulted in a variance that is within two-tenths of a percent.

Crediting voters for voting is not designed to determine if voter fraud occurred, but rather a process to ensure voter registration lists are updated and current, to assist in administering and managing elections (i.e.; merging voter registration update information, updating absentee ballot requests, etc.) and to be available for use by political organizations for tracking voter participation.

The controls established in the administration of an election and

inherent to our election laws, address voter registration and who should receive a ballot – be it an absentee ballot or a ballot marked at the polls. Those laws and rules require that administration and staffing of critical election processes are conducted in an open, public and secure manner.

“...there is every indication that the King County Records, Elections and Licensing Services Division acted professionally and intended to act in the public's best interest under immense pressure and under intense public scrutiny. Armies of lawyers and poll watchers examine King County's every move, threatening litigation and more. Under the circumstances, King County's prudence is understandable.”

Excerpt from King County Superior Court
Opinion in Washington State Republican
Party v. Washington State Democratic
Central Committee v. King County
Records, Elections and Licensing Services
Division (Case No. 04-2-36048-0 SEA,
Nov 16, 2004)

EXHIBIT E

Judge John E. Bridges
Department 3

SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

TIMOTHY BORDERS; et al.,)	
)	
Petitioners,)	NO. 05-2-00027-3
)	
vs.)	GRAYS HARBOR COUNTY'S
)	RESPONSES TO PETITIONER'S
KING COUNTY and DEAN LOGAN, its)	FIRST INTERROGATORIES AND
Director of Records, Elections and)	REQUESTS FOR PRODUCTION
Licensing Services; et al.,)	(revised per stipulation)
)	
Respondents)	
<hr/>		

COME NOW the Respondents, Grays Harbor County and its Auditor, Vern Spatz, and respond to Petitioner's First Interrogatories and Requests For Production (revised per stipulation), as follows:

INTERROGATORY No. 1

"ballots cast, number of voters credited, and reconciliation discrepancy"

Ballots cast for November 2, 2005 general election was 28,256;
Voters Credited (on file as of January 18, 2005) 26,960;
Difference of 1,296 from November 2 voting compared to January 18 report.
Ballots cast are based on the sum total of the absentee ballots received by mail added to regular ballots cast at the polls with any provisional ballots accepted during certification.

GRAYS HARBOR COUNTY'S RESPONSES
TO PETITIONER'S FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION
(revised per stipulation)

INTERROGATORY No. 2

"reasons for reconciliation discrepancy . . . attribute to each reason"

- (a) Reasons for differences between ballots cast on November 2 and voters credited are many.
- Dynamic Process – voter registration is an ongoing process. As soon as the election was certified the voter registration file was opened up for new registrations, removal, address changes, and deletions. Results change daily. No report was run as of certification that shows the number of voters credited for voting.
 - Potential Clerical Errors – crediting voters for voting involves passing a wand over a bar code next to each voters signature for voters registered in the poll books or on the envelope for absentee voters. It is possible to not only skip crediting a voter but to skip a whole page in the poll books as the clerks tire or get distracted.
 - Address Confidentiality – a few voters are in the address confidentiality program and do not appear on voter registration lists.
 - Inactive Voters – do not appear on "active" voter registration lists but are restored to active status upon voting.
 - Credit for Voting – is given to voters attempting to vote that may not successfully complete the voting process for reasons including sending a ballot in too late.
- (b) We cannot attribute to each reason a number of ballots cast because we do not track or keep information in this manner.

INTERROGATORY No. 3

"voters in address confidentiality program . . . (b) had inactive registrations"

Grays Harbor County has 8 voters in the address confidentiality program.

We had 114 inactive voters that voted on November 2. The number of inactive voters was determined by running a report on the voter registration file as of January 19, 2005.

EXHIBIT F

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**Exhibit A to Stipulation
Revised Discovery Requests**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, Thomas Canterbury, Tom
Huff, Margie Ferris, Paul Elvig, Edward
Monaghan, and Christopher Vance, Washington
residents and electors, and the Rossi for
Governor Campaign, a candidate committee,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents

No. 05-2-00027-3

**PETITIONERS' REVISED
FIRST INTERROGATORIES
AND REQUESTS FOR
PRODUCTION AND
ANSWERS FROM ISLAND
COUNTY**

[revised per stipulation]

TO: ISLAND COUNTY AND ITS AUDITOR

Pursuant to Civil Rules 26, 33 and 34 and the orders of the court, you are hereby requested to supply responses to these interrogatories and requests for production, within 10 days of the service of these requests upon you. Petitioners request that the responses to the interrogatories and the documents herein designated for production be produced at the offices of Davis Wright Tremaine, LLP, 1501 Fourth Avenue, 2600 Century Square, Seattle, Washington 98101-1688, and that petitioners, or someone acting on their behalf, be permitted to inspect and copy the designated documents.

**PETITIONERS' REVISED 1st INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 1**

SEA 1600878v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 628-7699

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DEFINITIONS

For purposes of these requests for production, the following terms shall have the meaning set forth below:

1. "You" means the respondent county to which these requests are addressed above, its auditor, and their agents, employees, attorneys and representatives.

2. "Relating to" means pertinent, relevant or material to, evidencing, having a bearing on, or concerning, affecting, discussing, dealing with, considering or otherwise relating in any manner whatsoever to the subject matter of the inquiry.

3. A "measure," as in "any measures taken," includes any policy, procedure, practice, effort, plan, or action whose purpose is or was the thing or result referred to.

4. The "November 2004 general election" refers to Washington's statewide general election on November 2, 2004 and all subsequent recounts.

5. "Ballots Cast" means the total number of ballots containing a valid vote for a candidate (whether printed on the ballot or written in) and those not counted because of overvotes and undervotes.

6. "Voters Credited" means the number of voters who received credit for voting in the county's voter registration database. Voters Credited includes voters in the address confidentiality program, voters who cast federal write-in ballots without being registered in the county for which they voted, and voters who had inactive registrations at the time they voted.

7. "Reconciliation Discrepancy" means the difference between Ballots Cast and Voters Credited.

8. When used with respect to provisional or absentee ballots, "verify," "verified," or "verification" refers to the process of matching the information provided with the provisional ballots (such as the voter's name, address, signature, and date of birth) with the voter registration database for the purpose of determining whether the voter is eligible and registered to vote and whether the voter has voted another ballot.

**PETITIONERS' REVISED 1st INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 2**

SEA 1600878v1 35441-4

Davis Wright Tremaine LLP
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INTERROGATORIES AND REQUESTS FOR PRODUCTION

INTERROGATORY NO. 1: Please state the number of Ballots Cast, the number of Voters Credited, and the Reconciliation Discrepancy in your county in the November 2004 general election and describe in detail how you calculated that number.

ANSWER:

Voters Credited	39,057
Less: Voter credited twice	(1)
Less: Voter credited, ballot not counted (2 ballots in 1 envelope)	(1)
Add: Known Provisional Ballots dropped in Ballot Box No credit given	3
Add: Unknown variance in poll votes (net)	12
Add: Address Confidential Voters	5
Add: Unknown absentee difference	1
Total Ballots Cast	39,076

Voter credited twice

During the reconciliation process, we discovered a voter who was registered twice, once with a middle initial and once without. The voter did not vote twice (the poll book indicates only one ballot issued and only one signature), but inadvertently was given credit on both registrations. The VR system count for credited voters did not adjust its total, despite the adjustment in credit.

Voter credited, no ballot counted (2 ballots in 1 envelope)

An absentee ballot was returned with one return envelope, which contained two ballots. Only one voter was credited, neither ballot was counted since the ballots were not voted the same.

Known provisional ballots dropped in ballot box, no credit given

The poll books or the provisional ballot envelopes indicate that these ballots were dropped in the ballot box instead of returned, according to the notes of the poll workers. These voters were not given credit, as they were not registered. The ballots themselves could not be identified and were counted with the others. This number was calculated by listing all the provisional signatures and envelopes with this notation.

Unknown variance in poll votes

This is the variance between the ballot count from the ballot box and the count of the voters who signed the poll book. The variance was calculated for each precinct by counting the signatures and ballot stub numbers in the poll book. This

1 total was compared to the number of ballots counted on election night plus any
2 ballots sent to the canvassing board. The difference in these two numbers less
3 any known variance was marked as unknown variance. Many hours were spent in
4 trying to reconcile the cause of the variance, but it simply cannot be identified for
5 certain.

6 Address confidential voters

7 There were ballots cast under the address confidentiality program. These voters
8 are not included in the voter registration database due to court ordered confidential
9 records. The voters are tracked manually.

10 Unknown absentee difference

11 Absentee ballots are counted by mail tray as received. An absentee tally sheet is
12 prepared with the count and the tray sent to check signatures and give voters
13 credit. Each tray is reconciled to the original count as it moves through the
14 process. These numbers balanced until the election week when the volume was
15 the heaviest and additional workers were brought in to verify signatures and there
16 developed a one-vote difference. The interruptions, and the need to enlist multiple
17 people processing ballots simultaneously, make reconciliation challenging to
18 maintain. We were unable to locate the single ballot error.

19 **INTERROGATORY NO. 2:** Please (a) list all the reasons for the Reconciliation
20 Discrepancy stated in your answer to the previous interrogatory, (b) state the portion of the
21 Reconciliation Discrepancy, in terms of the number of Ballots Cast in excess of the
22 number of Voters Credited, that you attribute to each reason, and (c) describe in detail how
23 you calculated these numbers. Responsive information will include information regarding
24 how many ballots of the discrepancy are due to provisional ballots' being counted without
25 being verified, information regarding what the other reasons are for the discrepancy and
26 how many ballots are explained by each reason, and information regarding how many of
27 the ballots of the discrepancy you can provide no explanation or reason for.

ANSWER:

Reasons for Discrepancy:

Voter Credited Twice

1 As explained in No. 1, there was only one voter and one vote, but credit was given
2 to each registration, so this represents one more voter credited than votes cast.

3 Voter credited, ballot not counted (2 ballots in 1 envelope)

4 As explained in No. 1, one absentee envelope was returned with two ballot cards.
5 One voter was credited, but neither ballot counted. At the point the inner envelope
6 was opened, the voter could not be identified. This represents one more voter
7 credited than votes cast.

8 Known provisional ballots dropped in ballot box, no credit given

9 There were 10 provisional ballots put in the ballot box without being verified
10 according to the poll workers' notations. The voter registration files were checked.
11 Seven provisional ballots were deposited by registered voters, and credit was
12 given to these voters. The remaining three ballots were voted by voters who could
13 not be verified as registered at the time of the election, and the ballots, which
14 could not be identified from others, were counted.

15 Unknown variance in poll votes

16 We analyzed the variance by precinct.

17 Following are some of the possible reasons for the discrepancies of more
18 voters credited than votes counted. Our records indicate there were 12 of
19 these.

- 20 1. Several precincts are located in the same polling place. In at least
21 two instances, a voter signed in the poll book, but received the wrong
22 precinct ballot. This would create an over in one precinct and an
23 under in another precinct. It is possible that this happened between:
 - 24 • Country Club, Point Allen and Driftwood, but it would still leave an
25 unknown of 3 more voters credited than votes counted.
 - 26 • Glendale and Maxwelton but it would still leave an unknown of 3
27 more voters credited than votes counted.
 - Countryside and Highland would clear up the unknown difference
2. A voter signed in, did not vote and did not put the ballot in the ballot
box. This actually happens at every election.
3. A voter signed in the poll book and for some reason was given a
provisional ballot. We could not confirm any instance of this, but it's
a possibility.
4. If the number of votes documented as having been sent to the
canvass board was wrong this might also account for the variance.

PETITIONERS' REVISED 1st INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 5

SEA 1600878v1 55441-4

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Seattle, Washington 98101-1698
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1 We believe the number was correct, but it's a possibility.

- 2 5. Sometimes other voters mark the poll book if they know someone
3 has moved or is deceased. This mark could look like a signature
4 when giving voters credit from the poll books, and mistakenly give
5 the voter credit. We have double-checked for this and were unable
6 to find any actual instances where these unauthorized notes were
7 counted as signatures.

8 Following are some of the possible reasons for the discrepancies of more voters
9 credited than votes counted. Our records indicate there were 24 of these.

- 10 1. The offset to one above for receiving the wrong precinct ballot could
11 be a reason that there were more votes counted than voters signed
12 in.
- 13 2. The voter could have placed a provisional ballot in the ballot box.
- 14 3. The voter may have checked in and been given a ballot, but forgot to
15 sign the poll book.
- 16 4. The person giving credit in the voter registration file may have
17 missed a voter in the book, or missed a page.

18 Address confidential voters

19 There were ballots cast under the address confidentiality program. These voters
20 are not included in the voter registration database due to court ordered confidential
21 records. The voters are tracked manually. Five of these voters voted in the
22 election.

23 Unknown absentee difference

24 Absentee ballots are counted by mail tray as received. An absentee tally sheet is
25 prepared with the count and the tray sent to check signatures and give voters
26 credit. Each tray is reconciled to the original count as it moves through the
27 process. These numbers balanced until the end of the process when the volume
was the heaviest and there developed a one-vote difference. The interruptions,
and the need to enlist multiple people processing ballots simultaneously, make
reconciliation challenging to maintain. We were unable to locate the single ballot
error. This is most likely a data entry error and a voter just failed to receive credit.

INTERROGATORY NO. 3: Of the Voters Credited in your county in the

November 2004 general election, please state the number of them, respectively, who (a)
are in an address-confidentiality program; (b) had inactive registrations at the time they

**PETITIONERS' REVISED 1ST INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 6**

SEA 1600878v1 55441-4

Davis Wright Tremaine LLP
LAW OFFICES

2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 628-7699

1
2 DATED this _____ day of February, 2005.

3
4 Davis Wright Tremaine LLP
Attorneys for Petitioners

5
6 By _____
7 Harry J.F. Korrell, WSBA #23173
8 Robert J. Maguire, WSBA #29909

9 RESPONSES DATED this 1st day of February, 2005.

10
11 By [Signature]
12 Attorneys for Respondent Island County Auditor
13 GREGORY M. BANKS, WSBA #22926

14 STATE OF WASHINGTON)
15)ss.
16 COUNTY OF ISLAND)

17 ANNE LACOUR, being first duly sworn, upon oath, deposes
18 and states: That he/she an officer of the Respondents in this lawsuit, that he has
19 read the within and foregoing interrogatories and answers thereto, knows the contents
20 thereof, and believes the same to be true and correct to the best of his knowledge.

21 Anne LaCour
Its Chief Deputy Auditor

22 SUBSCRIBED AND SWORN TO before me this 1st day of February, 2005.



28 Janice L. Ford
29 JANICE L. FORD
30 NOTARY PUBLIC in and for the State of
31 Washington, residing at Coupeville
32 My commission expires 5/19/07

33 PETITIONERS' REVISED 1st INTERROGATORIES
34 AND REQUESTS FOR PRODUCTION - 15

EXHIBIT G

E-Filed
January 31, 2005

Siri A Woods
Chelan County Clerk

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

9 Timothy Borders, Thomas Canterbury, Tom
10 Huff, Margie Ferris, Paul Elvig, Edward
11 Monaghan, and Christopher Vance, Washington
residents and electors, and the Rossi for
Governor Campaign, a candidate committee,

12 Petitioners,

13 v.

14 King County and Dean Logan, its Director of
15 Records, Elections and Licensing Services, et al.,

16 Respondents

No. 05-2-00027-3

**PETITIONERS' FIRST
INTERROGATORIES AND
REQUESTS FOR
PRODUCTION**
[revised per stipulation]

17
18 TO: LEWIS COUNTY AND ITS AUDITOR

19 Pursuant to Civil Rules 26, 33 and 34 and the orders of the court, you are hereby
20 requested to supply responses to these interrogatories and requests for production, within
21 10 days of the service of these requests upon you. Petitioners request that the responses to
22 the interrogatories and the documents herein designated for production be produced at the
23 offices of Davis Wright Tremaine, LLP, 1501 Fourth Avenue, 2600 Century Square,
24 Seattle, Washington 98101-1688, and that petitioners, or someone acting on their behalf,
25 be permitted to inspect and copy the designated documents.
26
27

PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 1

SEA 1597588v1 55441-3

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 622-7690

1 **DEFINITIONS**

2 For purposes of these requests for production, the following terms shall have the
3 meaning set forth below:

4 1. "You" means the respondent county to which these requests are addressed
5 above, its auditor, and their agents, employees, attorneys and representatives.

6 2. "Relating to" means pertinent, relevant or material to, evidencing, having a
7 bearing on, or concerning, affecting, discussing, dealing with, considering or otherwise
8 relating in any manner whatsoever to the subject matter of the inquiry.

9 3. A "measure," as in "any measures taken," includes any policy, procedure,
10 practice, effort, plan, or action whose purpose is or was the thing or result referred to.

11 4. The "November 2004 general election" refers to Washington's statewide
12 general election on November 2, 2004 and all subsequent recounts.

13 5. "Ballots Cast" means the total number of ballots containing a valid vote for
14 a candidate (whether printed on the ballot or written in) and those not counted because of
15 overvotes and undervotes.

16 6. "Voters Credited" means the number of voters who received credit for
17 voting in the county's voter registration database. Voters Credited includes voters in the
18 address confidentiality program, voters who cast federal write-in ballots without being
19 registered in the county for which they voted, and voters who had inactive registrations at
20 the time they voted.

21 7. "Reconciliation Discrepancy" means the difference between Ballots Cast
22 and Voters Credited.

23 8. When used with respect to provisional or absentee ballots, "verify,"
24 "verified," or "verification" refers to the process of matching the information provided
25 with the provisional ballots (such as the voter's name, address, signature, and date of birth)
26
27

1 with the voter registration database for the purpose of determining whether the voter is
2 eligible and registered to vote and whether the voter has voted another ballot.

3 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

4 INTERROGATORY NO. 1: Please state the number of Ballots Cast, the number
5 of Voters Credited, and the Reconciliation Discrepancy in your county in the November
6 2004 general election and describe in detail how you calculated that number.

7 ANSWER:

8 Lewis County November 2004 General election: 32,945 ballots counted and
9 32,916 voters credited. Discrepancy: 29. These totals arrived at by using figures available
10 upon first certification on November 17, 2004. Beyond that date, crediting figures are
11 obscured by additions and deletions from registered voter rolls. In subsequent recounts, no
12 ballots were added to count. Any minor variation on ballots processed attributed to "read
13 check" or "pick check" errors in ballot tabulation in punch card reader machine.

14
15 INTERROGATORY NO. 2: Please (a) list all the reasons for the Reconciliation
16 Discrepancy stated in your answer to the previous interrogatory, (b) state the portion of the
17 Reconciliation Discrepancy, in terms of the number of Ballots Cast in excess of the
18 number of Voters Credited, that you attribute to each reason, and (c) describe in detail how
19 you calculated these numbers. Responsive information will include information regarding
20 how many ballots of the discrepancy are due to provisional ballots' being counted without
21 being verified, information regarding what the other reasons are for the discrepancy and
22 how many ballots are explained by each reason, and information regarding how many of
23 the ballots of the discrepancy you can provide no explanation or reason for.

24 ANSWER:

25 State election protocols require all county offices to maintain the last five voting
26 dates for registered voters. Any voter missing two federal elections is inactivated
27

1 subsequent to being purged completely from the voter rolls. As such, crediting voters
2 becomes a post-election exercise in order to maintain this record and keep a voter "alive"
3 in the registration system. Counting and verifying valid votes and voters is done upfront by
4 matching ballots cast at a polling place with signatures in a poll book or matching the mail
5 ballot with a voter signature in the registration data base.

6 The crediting process is done on-the-fly as daily mail ballots are returned and after
7 the poll books are returned from polling places. The crediting is done by whatever staff
8 member or temporary hire is available. The crediting of a voter is a mechanical process
9 accomplished by passing a wand over a unique voter registration number on the return
10 label of a mail voter or that same number in a poll book. Some clerks use a key pad to
11 enter this six digit number because they believe that it is faster. In the meantime, the
12 phone is ringing, customers need help at the counter, or nature calls. In a nutshell, a
13 number is easily transposed or omitted in error.

14 Of the 29-vote reconciliation error, two votes are directly attributed to your
15 client/petitioner, Edward Monaghan and his spouse Janice. They allege that their ballots
16 were stolen from their Centralia Post Office box and forged. Both their original ballots
17 and replacement ballots were counted in the November 17 certified results.

18 Of the 29-vote reconciliation error, one vote is attributed to a single valid vote cast
19 and counted by a participant in the address confidentiality program.

20 Three provisional ballots were deposited directly into the ballot box at one polling
21 place without the execution of a provisional ballot envelope. A check of signatures in the
22 back of the poll book reveal that those three individuals were legally registered to vote and
23 their provisional ballots would have been accepted by the canvassing board.

24 The remaining 26 "un-reconciled votes" must be attributed to crediting error
25 explained above.
26
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PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 4

SEA 1597588v1 55441-3

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square • 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 • Fax: (206) 628-7699

1 INTERROGATORY NO. 12: Please state the number of ballots cast by persons
2 voting more than once—whether by multiple ballots of one or more type(s) (poll,
3 provisional, absentee), by being registered to vote in more than one jurisdiction or using
4 more than one name, or otherwise—in your county during the November 2004 general
5 election and describe in detail how you calculated that number and identify the names and
6 voter registration numbers of the persons voting more than once.

7 ANSWER:

8 One person voted twice in Lewis County in the 2004 November General election.
9 That person is: Luke A. Erwin, 369 Garrard Creek Rd, Rochester, WA 98579, VR#
10 207120, Independence Precinct. Erwin voted a mail ballot sent to his residence (above)
11 and cast a second provisional ballot from the polling place at WWU Viking Union Bldg
12 (Whatcom County) on election day. That provisional ballot envelope was sent to this
13 office and a determination was made that he had already voted in Lewis County. The
14 ballot was not counted. These details were provided to the Lewis County Prosecutor who,
15 in turn, sent the information to the Whatcom County Prosecutor where the violation
16 occurred. Disposition of this case is unknown.

17 REQUEST FOR PRODUCTION NO. 2: Please produce the complete countywide
18 Voter File for your county, including permanent and temporary absentee marks and all
19 available vote history through the General Election of November 2, 2004. Please produce
20 this in a machine readable format including a file layout and/or column headers. Such file
21 should include, but not be limited to, the following items:
22

- 23 a. Voter full name, including first name, middle name or initial, last name, suffix
24 and prefix if applicable
25 b. Voter full registration address, including street address and unit number if
26 applicable, city, state, and nine-digit zip code.
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- c. Voter full mailing address, even if identical to voter registration address, including street address and unit number if applicable, city, state, and nine-digit zip code.
- d. Voter Registration Number, which also may be called Affidavit Number or Voter ID Number.
- e. Registration Date
- f. Registration Status, such as Active or Inactive, and Registration Activity Date, which may also be called Last Voted Date.
- g. Birthdates
- h. District designations, including but not limited to Precinct, Legislative District, Congressional District and County Council District

RESPONSE:

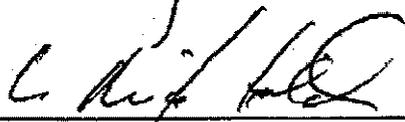
See enclosed data file on compact disc marked EXHIBIT I – Lewis County.

DATED this ____ day of January, 2005.

Davis Wright Tremaine LLP
Attorneys for Petitioners

By _____
Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

RESPONSES DATED this 18th day of January, 2005.

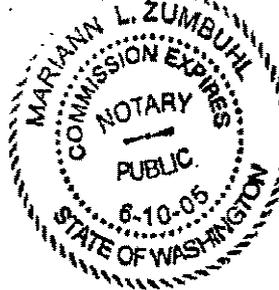
By 
L. Michael Golden, WSBA# 26128
Sr. Deputy Prosecuting Attorney
Attorneys for Respondents Lewis County and
Gary Zandel, Lewis County Auditor

1
2 STATE OF WASHINGTON)
3)ss.
4 COUNTY OF LEWIS)

5 Gary Zandell, being first duly sworn, upon oath, deposes and states: That he is the
6 respondent Lewis County Auditor in this lawsuit, that he has read the within and foregoing
7 interrogatories and answers thereto, knows the contents thereof, and believes the same to
8 be true and correct to the best of his knowledge.

9 Gary Zandell
10 Gary Zandell, Lewis County Auditor

11 SUBSCRIBED AND SWORN TO before me this 19th day of January, 2005.



28 Mariann L. Zumbuhl
29 NOTARY PUBLIC in and for the State of
30 Washington, residing at Levin
31 My commission expires 6-10-05

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EXHIBIT H

RECEIVED
FEB 02 2005
PERKINS COIE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, Thomas Canterbury, Tom
Huff, Margie Ferris, Paul Elvig, Edward
Monaghan, Dino Rossi, and Christopher Vance,
Washington residents and electors, and the Rossi
for Governor Campaign, a candidate committee,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents

No. 05-2-00027-3

**PETITIONERS' FIRST
INTERROGATORIES AND
REQUESTS FOR
PRODUCTION AND
ANSWERS THERETO BY SAN
JUAN COUNTY AUDITOR SI
A. STEPHENS**

TO: SAN JUAN COUNTY

Pursuant to Civil Rules 26, 33 and 34 and the orders of the court, you are hereby requested to supply responses to these interrogatories and requests for production, within 10 days of the service of these requests upon you. Petitioners request that the responses to the interrogatories and the documents herein designated for production be produced at the offices of Davis Wright Tremaine, LLP, 1501 Fourth Avenue, 2600 Century Square,

PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION (SAN JUAN) - 1
SEA 1595621v1 55441-3

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square - 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 422-3150 - Fax: (206) 628-7699

1 Seattle, Washington 98101-1688, and that petitioners, or someone acting on their behalf,
2 be permitted to inspect and copy the designated documents.

3 DEFINITIONS

4 For purposes of these requests for production, the following terms shall have the
5 meaning set forth below:

6 1. "You" means the respondent county to which these requests are addressed
7 above, its auditor, and their agents, employees, attorneys and representatives.

8 2. "Relating to" means pertinent, relevant or material to, evidencing, having a
9 bearing on, or concerning, affecting, discussing, dealing with, considering or otherwise
10 relating in any manner whatsoever to the subject matter of the inquiry.

11 3. A "measure," as in "any measures taken," includes any policy, procedure,
12 practice, effort, plan, or action whose purpose is or was the thing or result referred to.

13 4. The "November 2004 general election" refers to Washington's statewide
14 general election on November 2, 2004 and all subsequent recounts.

15 5. "Overvote" means a ballot containing marks in addition to a single,
16 completely filled-in oval for one candidate.

17 6. "Undervote" means a ballot containing a less than completely filled-in oval
18 for a candidate.

19 7. "Ballots Cast" means the total number of ballots containing a valid vote for
20 a candidate (whether printed on the ballot or written in) and those not counted because of
21 overvotes and undervotes.

22 8. "Voters Credited" means the number of voters who received credit for
23 voting in the county's voter registration database. Voters Credited includes voters in the
24 address confidentiality program, voters who cast federal write-in ballots without being
25 registered in the county for which they voted, and voters who had inactive registrations at
26 the time they voted.

1 9. “Reconciliation Discrepancy” means the difference between Ballots Cast
2 and Voters Credited.

3 10. When used with respect to provisional or absentee ballots, “verify,”
4 “verified,” or “verification” refers to the process of matching the information provided
5 with the provisional ballots (such as the voter’s name, address, signature, and date of
6 birth) with the voter registration database for the purpose of determining whether the voter
7 is eligible and registered to vote and whether the voter has voted another ballot.

8 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

9 REQUEST FOR PRODUCTION NO. 1: Please produce all documents describing,
10 recording, or referring to any attempt to reconcile the Ballots Cast with Voters Credited in
11 your county in the November 2004 general election.

12 RESPONSE:

13
14 There are no documents which refer to the difference between the number
15 of Ballots Cast and the number of Voters Credited in San Juan County. Please
16 see information on the number of Ballots Cast in the San Juan County Canvass
17 Report for the November 2, 2004 General Election (Canvass Report) and Official
18 Returns for the Recount(s), which are found as Exhibit A.

19 REQUEST FOR PRODUCTION NO. 2: Please produce all documents describing,
20 analyzing, or referring to any discrepancy between the number of Ballots Cast and the
21 number of Voters Credited in your county in the November 2004 general election.

22 RESPONSE:

23 See answer to RFP NO. 1.
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2 INTERROGATORY NO. 1: Please state the number of Ballots Cast, the number
3 of Voters Credited, and the Reconciliation Discrepancy in your county in the November
4 2004 general election and describe in detail how you calculated that number.

5 ANSWER:

6
7 Number of ballots cast: 10,145
8 Number of Voters credited: 10,154

9 The difference of 9 more voters who were credited than ballots cast is
10 calculated by subtraction. The discrepancy exists because no effort has been
11 made to reconcile the numbers and correct any mistakes. The discrepancy is
12 likely the result of human error in marking a voters record with a credit for voting in
13 the 2004 general election. We expect that one or more voters may have received
14 credit for voting, and then had their ballot reviewed and rejected by the Canvass
15 Board because the ballot was post-marked late, a signature could not be verified
16 or other infirmity.

17 INTERROGATORY NO. 2: Please list (a) all the reasons for the Reconciliation
18 Discrepancy stated in your answer to the previous interrogatory, (b) state the portion of the
19 Reconciliation Discrepancy, in terms of the number of Ballots Cast, in excess of the
20 number of Voters Credited that you attribute to each reason, and (c) describe in detail how
21 you calculated these numbers. Responsive information will include information regarding
22 how many ballots of the discrepancy are due to provisional ballots' being counted without
23 being verified, information regarding what the other reasons are for the discrepancy and
24 how many ballots are explained by each reason, and information regarding how many of
25 the ballots of the discrepancy you can provide no explanation or reason for.

26 ANSWER:

27 No analysis has been made of the potential reasons for the difference
between the number of votes cast and the number of voters credited.

1
2 DATED this _____ day of January, 2005.

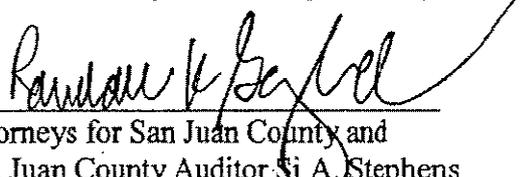
3
4 Davis Wright Tremaine LLP
Attorneys for Petitioners

5
6
7 By _____
8 Harry J.F. Korrell, WSBA #23173
Robert J. Maguire, WSBA #29909

9
10 OBJECTIONS TO RESPONSES DATED this 1st day of

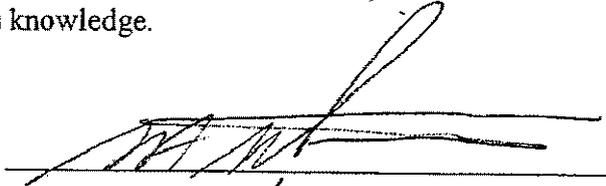
11 February, 2005

12 RANDALL K. GAYLORD
San Juan County Prosecuting Attorney

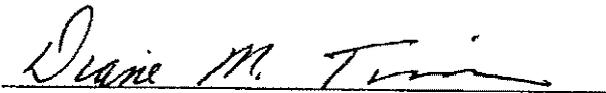
13
14 By 
15 Attorneys for San Juan County and
16 San Juan County Auditor Si A. Stephens

1 STATE OF WASHINGTON)
2 COUNTY OF SAN JUAN) ss.
3)

4 Si A. Stephens being first duly sworn, upon oath, deposes and states: That he is the
5 duly elected Auditor for San Juan County, Washington, that he has read the within and
6 foregoing interrogatories and answers thereto, knows the contents thereof, and believes the
7 same to be true and correct to the best of his knowledge.

8 

9 SUBSCRIBED AND SWORN TO before me this 1st day of Feb., 2005
10 BY Si A. Stephens.

11 



13 NOTARY PUBLIC in and for the State of
14 Washington, residing at Friday Harbor
15 My commission expires Aug 20, 2008

EXHIBIT I

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**Exhibit B to Stipulation
Revised Discovery Requests**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, Thomas Canterbury, Tom
Huff, Margie Ferris, Paul Elvig, Edward
Monaghan, and Christopher Vance, Washington
residents and electors, and the Rossi for
Governor Campaign, a candidate committee,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents

No. 05-2-00027-3

**PETITIONERS' FIRST
INTERROGATORIES AND
REQUESTS FOR
PRODUCTION**
[revised per stipulation]

TO: _____ COUNTY AND ITS AUDITOR

Pursuant to Civil Rules 26, 33 and 34 and the orders of the Court, you are hereby requested to supply responses to these interrogatories and requests for production, within 10 days of the service of these requests upon you. Petitioners request that the responses to the interrogatories and the documents herein designated for production be produced at the offices of Davis Wright Tremaine, LLP, 1501 Fourth Avenue, 2600 Century Square, Seattle, WA 98101-1688, and that Petitioners, or someone acting on their behalf, be permitted to inspect and copy the designated documents.

PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 1

BEL 282765v1 55441-3

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square · 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 · Fax: (206) 628-7699

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DEFINITIONS

For purposes of these requests for production, the following terms shall have the meaning set forth below:

1. "You" means the respondent county to which these requests are addressed above, its auditor, and their agents, employees, attorneys and representatives.

2. "Relating to" means pertinent, relevant or material to, evidencing, having a bearing on, or concerning, affecting, discussing, dealing with, considering or otherwise relating in any manner whatsoever to the subject matter of the inquiry.

3. A "measure," as in "any measures taken," includes any policy, procedure, practice, effort, plan, or action whose purpose is or was the thing or result referred to.

4. The "November 2004 general election" refers to Washington's statewide general election on November 2, 2004 and all subsequent recounts.

5. "Ballots Cast" means the total number of ballots containing a valid vote for a candidate (whether printed on the ballot or written in) and those not counted because of overvotes and undervotes.

6. "Voters Credited" means the number of voters who received credit for voting in the county's voter registration database. Voters Credited includes voters in the address confidentiality program, voters who cast federal write-in ballots without being registered in the county for which they voted, and voters who had inactive registrations at the time they voted.

7. "Reconciliation Discrepancy" means the difference between Ballots Cast and Voters Credited.

8. When used with respect to provisional or absentee ballots, "verify," "verified," or "verification" refers to the process of matching the information provided with the provisional ballots (such as the voter's name, address, signature, and date of birth)

1 with the voter registration database for the purpose of determining whether the voter is
2 eligible and registered to vote and whether the voter has voted another ballot.

3 **INTERROGATORIES AND REQUESTS FOR PRODUCTION**

4 INTERROGATORY NO. 1: Please state the number of Ballots Cast, the number
5 of Voters Credited, and the Reconciliation Discrepancy in your county in the November
6 2004 general election and describe in detail how you calculated that number.

7 ANSWER:

8	Number of Ballots Cast	203,886
9	Voters Credited	<u>204,861</u>
10	Reconciliation Discrepancy	<u>(975)</u>

11 In the first line above, the "number of ballots cast" is the number of ballots counted
12 and certified by the Spokane County Canvassing Board on December 17, 2004, for the
13 requested hand recount.

14 In the second line above, the number of "voters credited" is the number of voter
15 records that are credited with voting in the voter registration system.

16 In the third line above, the number of "reconciliation discrepancy" is the difference
17 between line one and line two. Please see the Answer to Interrogatory No. 2 for an
18 explanation of this number.

19 It is important to note that the numbers developed above are based on the
20 definitions provided to us in this interrogatory. This formula serves no legitimate purpose
21 in the reconciliation necessary to certify an election. My office uses a different
22 methodology to verify that the number of ballots counted has been reconciled to the
23 number of voters verified prior to final certification of the election. Our reconciliation
24 shows a net difference of one (1) between the number of voters verified as valid and the
25 number of ballots actually counted. Please see the reconciliation in the Answer to
26 Interrogatory No. 2

27
PETITIONERS' FIRST INTERROGATORIES
AND REQUESTS FOR PRODUCTION - 3

BEL 282765v1 55441-3

Davis Wright Tremaine LLP
LAW OFFICES
2600 Century Square · 1501 Fourth Avenue
Seattle, Washington 98101-1688
(206) 622-3150 · Fax: (206) 628-7699

1 INTERROGATORY NO. 2: Please (a) list all the reasons for the Reconciliation
2 Discrepancy stated in your answer to the previous interrogatory, (b) state the portion of the
3 Reconciliation Discrepancy, in terms of the number of Ballots Cast in excess of the
4 number of Voters Credited, that you attribute to each reason, and (c) describe in detail how
5 you calculated these numbers. Responsive information will include information regarding
6 how many ballots of the discrepancy are due to provisional ballots' being counted without
7 being verified, information regarding what the other reasons are for the discrepancy and
8 how many ballots are explained by each reason, and information regarding how many of
9 the ballots of the discrepancy you can provide no explanation or reason for.

10 ANSWER:

11 (a) Reconciling the number of ballots cast to the number of voters credited with
12 voting is not part of our certification process; we use a different methodology to ensure
13 that ballots counted are reconciled to voters verified as valid. Our reconciliation process
14 shows a difference of one (1).

15 Voter credit is not posted until after certification of the election is complete. For the
16 2004 General Election, we began posting voter credit on November 18, 2004, and
17 completed the process approximately January 5, 2005. When voter credit is posted, we do
18 a gross comparison to ensure that the process of crediting the voter is complete. During
19 that time it takes to post voter credit, an unknown number of voter registrations records
20 would have been changed. Some reasons for changes are cancellation, change of address
21 (and possibly precinct) and name changes

22 The reasons for the Reconciliation Discrepancy could include but not be limited to:
23 changes in voter registration records, voters credited whose ballots were not counted,
24 errors in marking/scanning poll books, file import errors, errors in indicating that ballots
25 were accepted or data entry errors.

26 (b) In total, 975 more voters were credited than ballots were counted. This is
27

1 composed of 1052 absentee voters whose ballots were rejected for various reasons (no
2 signature, returned late, etc). The remaining difference is 77 less voters credited than
3 ballots counted. Of these 77, 51 were from poll sites, 16 from provisional and 10 from
4 absentee. These were not researched on an individual level to determine the reason or
5 reasons for the difference. To do so would require that each voter registration record in
6 our database (over 225,000) be compared back to the original source of voter credit-poll
7 books, absentee envelopes and provisional envelopes. This would require weeks, if not
8 months, of effort by several staff members. The effort to research the individual reasons
9 would exceed the benefit since we rely a different methodology for reconciling ballots
10 counted to voters verified.

11 (c) A table is presented in Appendix "A" that shows the number of ballots that we
12 expected to count, the number of ballots counted and the number of voters credited with
13 voting for each group (Poll Site, Provisional and Absentee/Vote By Mail). This table
14 contrasts the numbers produced by the formula required in this interrogatory (975) to the
15 legitimate numbers produced for certification purposes (1).

16 INTERROGATORY NO. 3: Of the Voters Credited in your county in the
17 November 2004, general election, please state the number of them, respectively, who (a)
18 are in an address-confidentiality program; (b) had inactive registrations at the time they
19 voted; or (c) cast federal write-in ballots without being registered to vote in your county
20 and, for each category, describe in detail how you calculated the number.

21 ANSWER:

22 (a) Spokane County does not maintain participants in the address
23 confidentiality program in the Voter Registration system; therefore no voters in the address
24 confidentiality program were credited with voting in the Voter Registration Record
25 module. Spokane County had 8 people in the address confidentiality program vote in the
26 2004 General Election.

EXHIBIT J

Engrav, Rebecca S.

From: Joly, Janine [Janine.Joly@METROKC.GOV]
Sent: Monday, April 11, 2005 2:43 PM
To: Engrav, Rebecca S.
Cc: 'amykoziak@dwt.com'
Subject: FW: Codes in KC's voter database

Rebecca:

I think the email below from Carlos Webb answers your questions. If it does not, please let me know.

Thank you,
Janine

-----Original Message-----

From: Webb, Carlos
Sent: Monday, April 11, 2005 2:30 PM
To: Joly, Janine
Subject: RE: Codes in KC's voter database

Janine,

Please review the following response and confirm this is what Ms Engrav wants:

Blank or no notation; This indicates that the voter was not eligible for the election
"A" Indicates the voter was credited for returning an absentee ballot, the absence of the (NP) indicator probably means the record was credited by hand.

"A" (NP) Indicates the voter was credited for returning an absentee ballot.

"N" The voter did not vote in this election.

"N"(NP) The absentee voter did not vote.

"V" The voter voted at the polls.

"V"(NP) Provisional ballot credited.

Carlos Webb
Assistant Superintendent
Voter Services
King County Elections
206.205.7362

-----Original Message-----

4/12/2005

From: Engrav, Rebecca S. [mailto:REngrav@perkinscoie.com]

Sent: Monday, April 11, 2005 1:15 PM

To: @Joly, Janine

Cc: 'amykoziak@dwt.com'

Subject: Codes in KC's voter database

Hi Janine,

As mentioned in my phone call just now, we would like confirmation of what the following codes in King County's voter registration database stand for. To the extent necessary, please consider this a PDA request for this information. I am copying Ms. Koziak on this email as we have agreed to copy each other on PDA requests. I am indicating here what we think the codes mean, based on context. Please either confirm if what I've noted is correct or let me know if the codes mean something else. Thanks very much for your help.

Field "v1104" = did the individual vote in the November 2004 election

Answer "V" = voted at the polls, including by provisional ballot

Answer "A" = voted absentee

Answer "A (NP)" = voted absentee; our guess is that the NP designation shows up or doesn't show up randomly and doesn't mean anything since we did not have partisan ballots for the general election

Answer "N" or "NNP" or blank = the individual did not vote; it's random which one of those codes appears

Rebecca S. Engrav
Perkins Coie LLP
(206) 359-6168 direct
(206) 359-7168 fax

NOTICE: This communication may contain privileged or other confidential information. If you have received it in error, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

4/12/2005

EXHIBIT K

King Co Voter Search

name_last	SAKIMAE	PAV	N
name_first	SARAH	source	
name_middle	M	birth_place	
v1104	V	birth_date	00/00/0000
voter_id	30003861	care_of	
status	A	mail_street	
affidavit		mail_city	
last_voted		mail_state	
name_prefix		mail_zip	
name_suffix		mail_country	
house_number		ltd	7/12/2004 0:00:00
house_fraction		language	
pre_dir		drivers_license	
street		reg_date_original	1/6/2003 0:00:00
type		perm_category	
post_dir		confidential	N
building_number		IDRequired	
apartment_numbe		Citizen	
city		UnderAge	
state		reg_date	10/25/2002 0:00:00
zip		image_id	990666913
precinct	2282	phone_1	
portion	282	phone_2	
consolidation		military	N
alpha_split		gender	F
party	NP		

King Co Voter Search

name_last	SAKIMAE	PAV	N
name_first	SARAH	source	
name_middle	M	birth_place	
v1104	V	birth_date	00/00/0000
voter_id	30064071	care_of	
status	A	mail_street	
affidavit		mail_city	
last_voted		mail_state	
name_prefix		mail_zip	
name_suffix		mail_country	
house_number		ltd	7/15/2004 0:00:00
house_fraction		language	
pre_dir		drivers_license	
street		reg_date_original	1/21/2003 0:00:00
type		perm_category	
post_dir		confidential	N
building_number		IDRequired	
apartment_numbe		Citizen	
city		UnderAge	
state		reg_date	12/11/2002 0:00:00
zip		image_id	990681825
precinct	2282	phone_1	
portion	282	phone_2	
consolidation		military	N
alpha_split		gender	F
party	NP		

EXHIBIT L

Redacted

PRECINCT NAME: TUK 11-3393		3393		PAGE: 2920		DOB / Gender	
BALLOT NO. GIVEN VOTER	BALLOT CODE REGISTRATION NUMBER	NAME AND ADDRESS	REGISTRATION NO.	BALLOT CODE	REGISTRATION NO.	NAME AND ADDRESS	DOB / Gender
1	25 990664299	GUERRERO, GUILLERMO	25 990664299	1	25 990664299	GUERRERO, GUILLERMO	
2	25 990664299	GUZMAN, MATTHEW-CHARLES O	25 990664299	2	25 990664299	GUZMAN, MATTHEW-CHARLES O	
3	25 40305769	HAILE, TSEHAY	25 40305769	3	25 40305769	HAILE, TSEHAY	
4	25 890584005	HARRIS, LAUREN	25 890584005	4	25 890584005	HARRIS, LAUREN	
5	25 940560390	HARTMAN, ARTRESE	25 940560390	5	25 940560390	HARTMAN, ARTRESE	
6	25 81053479	HARVEY, EILEEN G	25 81053479	6	25 81053479	HARVEY, EILEEN G	
7	25 961234026	HASSELL, ALEXSANDRIA S	25 961234026	7	25 961234026	HASSELL, ALEXSANDRIA S	
8	25 970560620	HAYES, ADAVIETTE D	25 970560620	8	25 970560620	HAYES, ADAVIETTE D	
9	25 962414931	HAYES, BENJAMIN PAUL	25 962414931	9	25 962414931	HAYES, BENJAMIN PAUL	
10	25 962414931	HAYES, BENJAMIN PAUL	25 962414931	10	25 962414931	HAYES, BENJAMIN PAUL	

30

I HEREBY DECLARE UNDER PENALTIES OF PERJURY THAT I AM A REGISTERED VOTER OF THE STATE OF WASHINGTON QUALIFIED TO CAST A BALLOT AT THIS ELECTION AND THAT I HAVE VERIFIED MY ADDRESS AS IT APPEARS ON THIS PAGE.

SIG. TOTAL THIS PAGE:

KC 04112

King Co Voter Search

name_last	HARTMAN	PAV	N
name_first	ARTRESE	source	
name_middle		birth_place	
v1104	V	birth_date	00/00/0000
voter_id	940560390	care_of	
status	A	mail_street	
affidavit		mail_city	
last_voted		mail_state	
name_prefix		mail_zip	
name_suffix		mail_country	
house_number		ltd	11/8/2004 0:00:00
house_fraction		language	
pre_dir		drivers_license	
street		reg_date_original	9/21/1994 0:00:00
type		perm_category	
post_dir		confidential	N
building_number		IDRequired	
apartment_numbe		Citizen	
city		UnderAge	
state		reg_date	9/7/1994 0:00:00
zip		image_id	940560390
precinct	3393	phone_1	
portion	593	phone_2	
consolidation		military	N
alpha_split		gender	F
party	NP		

EXHIBIT M

Redacted

PRECINCT NAME: SEA 93-1044

1077

PAGE : 3849

DOB / Gender

NAME AND ADDRESS

BALLOT CODE
REGISTRATION NO.

BALLOT NO.
GIVEN VOTER

✓ FOR SPECIAL/
CHALLENGED
BALLOT

MARK SB
FOR SPOILED
BALLOT

MARK I
WHEN
ISSUED

Bar Code

1

SIGNATURE

Michael Treacy

TREACY, MICHAEL STARBUCK

BALLOT CODE
REGISTRATION NO.
960378628

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SIGNATURE

Must Update Voter Registration
TREACY, MICHAEL STARBUCK

TROMMER, MARY M

BALLOT CODE
REGISTRATION NO.
100595328

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SIGNATURE

Must Update Voter Registration
TROMMER, MARY M

THORNTON, ROBERT J

BALLOT CODE
REGISTRATION NO.

4

SIGNATURE

Must Update Voter Registration
THORNTON, ROBERT J

TRUJILLO, HERMAN

BALLOT CODE
REGISTRATION NO.
10219272

029

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SIGNATURE

Must Update Voter Registration
TRUJILLO, HERMAN

TURNQUIST, JOEL

BALLOT CODE
REGISTRATION NO.
910228797

7

SIGNATURE

Must Update Voter Registration
TURNQUIST, JOEL

TYLER, KATHERINE ELIZABETH

BALLOT CODE
REGISTRATION NO.
990077878

9

SIGNATURE

Absent Voter Ballot Issued
Vote Provisional Ballot
Must Update Voter Registration
TYLER, KATHERINE ELIZABETH

UNTERMYER, FREDERICK H

BALLOT CODE
REGISTRATION NO.
755565

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SIGNATURE

Must Update Voter Registration
UNTERMYER, FREDERICK H

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SIG. TOTAL THIS PAGE: 2

I HEREBY DECLARE UNDER PENALTIES OF PERJURY THAT I AM A REGISTERED VOTER OF THE STATE OF WASHINGTON QUALIFIED TO CAST A BALLOT AT THIS ELECTION AND THAT I HAVE VERIFIED MY ADDRESS AS IT APPEARS ON THIS PAGE.

Redacted

PRECINCT NAME: SEA 43-1844

1844

PAGE : 3850

SIGNATURE	Bar Code	MARK WHEN ISSUED	MARK SB FOR SPOILED BALLOT	✓ FOR SPECIAL/ CHALLENGED BALLOT	BALLOT NO. GIVEN VOTER	BALLOT CODE REGISTRATION NO. NUMBER	NAME AND ADDRESS	DOB / Gender
Absent Voter Ballot Issued Vote Provisional Ballot	1					BALLOT CODE 3 REGISTRATION NO. 40059921	UNGRICH, FREDERICK B II	
Absent Voter Ballot Issued Vote Provisional Ballot	2					BALLOT CODE 3 REGISTRATION NO. 90624314	[REDACTED]	
SIGNATURE	3					BALLOT CODE 3 REGISTRATION NO. 940341582	VEGA, J.A	
SIGNATURE	4					BALLOT CODE 3 REGISTRATION NO. 906421	VEGA, MATTHEW J	
SIGNATURE	5	I			041	BALLOT CODE 3 REGISTRATION NO. 790074025	Must Update Voter Registration VESTER, EUGENE E	
Absent Voter Ballot Issued Vote Provisional Ballot	6					BALLOT CODE 3 REGISTRATION NO. 940598079	VILINSKAS, ERIK	
SIGNATURE	7					BALLOT CODE 3 REGISTRATION NO. 870670847	VILINSKAS, LEON	
SIGNATURE	8				012	BALLOT CODE 3 REGISTRATION NO. 940598064	VISION, RICHARD A	
SIGNATURE	9					BALLOT CODE 3 REGISTRATION NO. 840598064	WADSWORTH, LARRY C	
SIGNATURE	10					BALLOT CODE 3 REGISTRATION NO. 840598064	WADSWORTH, LARRY C	

KC 04117

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SIG. TOTAL THIS PAGE: 2

REGISTERED VOTER OF THE STATE OF WASHINGTON QUALIFIED TO CAST A BALLOT AT THIS ELECTION AND THAT I HAVE VERIFIED MY ADDRESS AS IT APPEARS ON THIS PAGE.

King Co Voter Search

name_last	UNGRICH	PAV	N
name_first	FREDERICK	source	
name_middle	B	birth_place	
v1104	V	birth_date	00/00/0000
voter_id	720569	care_of	
status	A	mail_street	
affidavit		mail_city	
last_voted		mail_state	
name_prefix		mail_zip	
name_suffix	II	mail_country	
house_number		ltd	11/5/2004 0:00:00
house_fraction		language	
pre_dir		drivers_license	
street		reg_date_original	10/19/2000 0:00:00
type		perm_category	
post_dir		confidential	N
building_number		IDRequired	
apartment_numbe		Citizen	
city		UnderAge	
state		reg_date	8/30/2000 0:00:00
zip		image_id	720569
precinct	1844	phone_1	
portion	844	phone_2	
consolidation		military	N
alpha_split		gender	M
party	NP		

King Co Voter Search

name_last	UNGRICH	PAV	Y
name_first	FREDERICK	source	
name_middle	B	birth_place	
v1104	A(NP)	birth_date	00/00/0000
voter_id	40099921	care_of	
status	A	mail_street	
affidavit		mail_city	
last_voted		mail_state	
name_prefix		mail_zip	
name_suffix	II	mail_country	
house_number		ltd	8/10/2004 0:00:00
house_fraction		language	
pre_dir		drivers_license	
street		reg_date_original	3/4/2004 0:00:00
type		perm_category	P
post_dir		confidential	N
building_number		IDRequired	
apartment_numbe		Citizen	
city		UnderAge	
state		reg_date	6/21/2004 0:00:00
zip		image_id	990746192
precinct	1844	phone_1	
portion	844	phone_2	
consolidation		military	N
alpha_split		gender	M
party	NP		

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central
Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

[PROPOSED] ORDER GRANTING
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S MOTION
IN LIMINE TO EXCLUDE EVIDENCE
OF "VOTER CREDITING" AND TO
REQUIRE PETITIONERS TO
INTRODUCE THE BEST EVIDENCE
OF VOTING

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THIS MATTER comes before the Court on Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting (the "Motion"). The Court having reviewed the Motion and any other briefing filed in support of or opposition thereto, and any reply, and all declarations filed in support of or in opposition to the Motion, and being fully advised in the premises, now, therefore, it is hereby ORDERED that:

Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting is hereby GRANTED.

The Court hereby excludes any evidence of "voter crediting" to prove an illegal vote. Any party seeking to prove an illegal vote by written evidence must produce the original source of voter credit – the poll book page, absentee ballot envelope, or provisional ballot envelope.

ENTERED this ____ day of _____ 2005.

The Honorable John E. Bridges

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Presented by:

s/ Kevin J. Hamilton

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April 13, 2005

Via Electronic Delivery

The Honorable John E. Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

Re: *Borders v. King County, et al.*
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed with this letter are copies of out-of-state cases, referred to by Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting, filed today.

Yours truly,

William C. Rava

cc: All parties and counsel of record

WCR:ccs

Enclosures

[15934-0006/SL051020.274]

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · HONG KONG · LOS ANGELES
MENLO PARK · OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

H

United States Court of Appeals Eighth Circuit.
Asa Hurrial MINOR, Jr., Appellant,
v.
UNITED STATES of America, Appellee.
No. 18408.

March 13, 1967, Rehearing Denied April 21, 1967.

Defendant was convicted on verdict in the United States District Court for the Eastern District of Arkansas, Gordon E. Young, J., of interstate transportation of a stolen automobile, and he appealed. The Court of Appeals, Van Oosterhout, Circuit Judge, held that where none of errors asserted in Court of Appeals was raised in trial court nothing was before court for review absent plain error, and that no plain error was shown.

Affirmed.

Heaney, Circuit Judge, dissented.

West Headnotes

[1] Criminal Law  **1030(1)**

110k1030(1) Most Cited Cases

Where none of errors asserted in Court of Appeals was raised in trial court nothing was before court for review absent plain error.

[2] Criminal Law  **641.4(2)**

110k641.4(2) Most Cited Cases

Right to counsel may be waived as long as waiver is knowingly and intelligently made.

[3] Criminal Law  **641.10(1)**

110k641.10(1) Most Cited Cases

The Constitution does not force an unwanted attorney upon a defendant.

[4] Criminal Law  **641.4(1)**

110k641.4(1) Most Cited Cases

Accused may before trial elect to conduct his own defense.

[5] Criminal Law  **641.4(5)**

110k641.4(5) Most Cited Cases

Once accused has properly waived right to counsel effects flowing from decision must be accepted by him

together with benefits which he presumably sought to obtain therefrom; accused who elects to waive constitutionally guaranteed right of counsel does so at his own risk and must accept consequences of his action.

[6] Criminal Law  **1028**

110k1028 Most Cited Cases

Defendant who has knowingly and intelligently elected to waive counsel and has deliberately chosen to act as his own attorney is afforded all protection to which he is justly entitled in event trial results in clear miscarriage of justice by plain error rule. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

[7] Criminal Law  **1028**

110k1028 Most Cited Cases

Resort to plain error rule is appropriate only in exceptional cases where such course is necessary to prevent clear miscarriage of justice. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

[8] Automobiles  **355(12)**

48Ak355(12) Most Cited Cases

Evidence sustained conviction for interstate transportation of stolen automobile. 18 U.S.C.A. § 2312.

[9] Receiving Stolen Goods  **8(4)**

324k8(4) Most Cited Cases

Possession of property recently stolen, if not satisfactorily explained, is ordinarily circumstance from which jury may reasonably draw inference and find in light of surrounding circumstances shown by evidence in case that person in possession knew property had been stolen.

[10] Automobiles  **355(12)**

48Ak355(12) Most Cited Cases

Jury was not compelled to accept defendant's uncorroborated explanation of his possession of stolen automobile in prosecution for interstate transportation of stolen automobile. 18 U.S.C.A. § 2312.

[11] Criminal Law  **1035(2)**

110k1035(2) Most Cited Cases

Reception of evidence with respect to first count of two-count indictment for interstate transportation of stolen automobiles, which count was dismissed by

court on its own motion, was not plain error where no request for severance was made, transactions involved in each of the counts were closely related, and both vehicles were discovered at the same place and at the same time. Fed.Rules Crim.Proc. rules 8, 14, 18 U.S.C.A.; 18 U.S.C.A. § 2312.

[12] Criminal Law  **1036.5**

110k1036.5 Most Cited Cases

(Formerly 110k1036(5))

Admission of hearsay testimony in prosecution for interstate transportation of stolen automobiles was not plain error where testimony was merely cumulative. 18 U.S.C.A. § 2312.

[13] Jury  **33(1.1)**

230k33(1.1) Most Cited Cases

(Formerly 230k33(1))

Evidence did not support claim that jury panel was not selected in constitutional manner and that panel did not represent fair cross section of community.

*171 John W. Walker, Little Rock, Ark., for appellant and filed brief.

Lindsey J. Fairley, Asst. U.S. Atty., Little Rock, Ark., for appellee and filed brief with Robert D. Smith, Jr., U.S. Atty., Little Rock, Ark.

Before VAN OOSTERHOUT, GIBSON and HEANEY, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This is an appeal by the defendant Asa Hurrial Minor, Jr., from his conviction by a jury on Count II of an indictment charging him with the transportation of a specifically described Chevrolet automobile in interstate commerce from Indiana to Arkansas, knowing said motor vehicle *172 to have been stolen in violation of 18 U.S.C.A. § 2312. Defendant was sentenced to two years imprisonment. The court on its own motion dismissed Court I of the indictment which charged interstate transportation of another automobile upon the ground that proof that such automobile was stolen was insufficient.

Defendant represented himself in the trial court. His right to counsel, including right to court-appointed counsel without expense to him, was fully explained. Defendant persistently declined counsel and insisted upon representing himself. The court just prior to the opening of the trial again offered to provide counsel.

Defendant has not, either in the trial or here, raised the issue that he has been deprived of his constitutional right to be represented by counsel. He is represented on this appeal by competent counsel and raises no brief point that his waiver of counsel in the trial court was not knowingly and intelligently made, nor does he in any way intimate or suggest that he has been wrongly deprived of his constitutional right to counsel. Hence, the issue of denial to defendant of his right of counsel is not now before us.

Defendant urges he is entitled to a reversal for the following reasons: (1) Insufficiency of the evidence to support the guilty verdict. (2) Admission of prejudicial evidence and failure to give instruction limiting the consideration of such evidence. (3) The jury was unconstitutionally selected.

[1] None of the errors here asserted was raised in the trial court. No motion for acquittal was made; no objection was made to any evidence offered; no exception to or request for instructions was made and there was no challenge to the jury panel. Thus absent a plain error situation, there is nothing before us for review. 'A trial judge ordinarily should not be held to have erred in not deciding correctly a question that he was never asked to decide.' Page v. United States, 8 Cir., 282 F.2d 807, 810; Petschl v. United States, 8 Cir., 369 F.2d 769.

[2] Defendant attempts to excuse his failure to preserve errors here asserted by a contention that he is unskilled and unknowledgeable in the law. It is well settled that the right to counsel may be waived as long as the waiver is knowingly and intelligently made. Moore v. State of Michigan, 355 U.S. 155, 161, 78 S.Ct. 191, 2 L.Ed.2d 167; Carter v. People of State of Illinois, 329 U.S. 173, 177, 67 S.Ct. 216, 91 L.Ed.172; Johnson v. Zerbst, 304 U.S. 458, 463, 58 S.Ct. 1019, 82 L.Ed. 1461.

[3][4][5] The Constitution does not S.Ct. 216, 91 L.Ed. 172; Johnson v. Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268; United States v. Washington, 3 Cir., 341 F.2d 277, 285. The accused may before trial elect to conduct his own defense. Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356; United States ex rel. Maldonado v. Denno, 2 Cir., 348 F.2d 12, 15; Johnson v. United States, 8 Cir., 318 F.2d 855, 856; Butler v. United States, 8 Cir., 317 F.2d 249, 258. However, as aptly stated by the Court of Appeals for

the Fifth Circuit: 'Once it is found * * * that such an accused has properly waived his right to counsel, the effects flowing from that decision must be accepted by him, together with the benefits which he presumably sought to obtain therefrom.' Smith v. United States, 5 Cir., 216 F.2d 724, 727. Thus, when accused elects to waive his constitutionally guaranteed right of counsel, he does so at his own risk and must accept the consequences of his action. United States v. Redifield, D.C.Nev., 197 F.Supp. 559, 572, affirmed on the basis of the trial court's opinion, 9 Cir., 295 F.2d 249.

Sound policies of judicial administration as prescribed by the Rules of Criminal Procedure should apply to all trials whether conducted by counsel or by a defendant. Otherwise, defendant would in practical effect be given two trials, one in which he conducts his own defense and if unsuccessful, another trial with representation by counsel.

*173 [6] In the event the trial results in a clear miscarriage of justice, the 52(b) plain error rule affords a defendant representing himself all of the protection to which he is justly entitled when he has knowingly and intelligently elected to waive counsel and has deliberately chosen to act as his own attorney.

A careful examination of the record shows that no plain error has been committed and that defendant has had in all respects a fair trial. Defendant by representing himself secured many advantages that would not have been available to him had he been represented by counsel. Defendant was permitted to testify in narrative form and was permitted to say everything that he desired to without restriction. He made his own opening statement to the jury, his own closing argument, and he was allowed to supplement his argument after the court had instructed the jury. Defendant cross-examined the witnesses and was given much more freedom than would have been afforded counsel. As heretofore pointed out, the court on its own motion at the close of the Government's case dismissed Count I and advised the defendant that he would not have to meet such charge. On several occasions, the court restricted the Government's testimony on its own motion. The instructions given are simple, easily understood and fair.

[7] Resort to the plain error rule is appropriate only in exceptional cases where such course is necessary to prevent a clear miscarriage of justice. Petschl v. United States, supra; Page v. United States, supra;

Johnson v. United States, 8 Cir., 362 F.2d 43, 46; West v. United States, 8 Cir., 359 F.2d 50, 53; Gendron v. United States, 8 Cir., 295 F.2d 897, 902.

We find no plain error requiring a reversal has been committed and affirm the conviction.

[8] The evidence is clearly sufficient to support the guilty verdict. Title 18 U.S.C.A. 2312 reads: 'Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, Knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.'

There is direct proof from the owner that the precise car involved in this offense was stolen from the Placke Chevrolet Company in St. Louis, Missouri, on September 24, 1964, and was reported stolen to the police at 7:30 p.m. on that date. The invoice of the manufacturer to the Placke Chevrolet Company showing ownership of the car in such company was introduced. After the car was recovered by the authorities, it was returned to such owner. Such evidence is not contradicted. Defendant himself stated to the jury, 'I believe this vehicle was stolen on the 24th of September. I came into acquisition of it about one month later.'

Defendant specifically admitted that he transported the car from Indiana to Arkansas where it was recovered. Thus the only element of the offense with respect to which any dispute exists is whether defendant knew the automobile was stolen at the time he transported it to Arkansas.

[9] The court in an instruction to the jury, not excepted to and not asserted to be error upon this appeal, told the jury:

'Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew that the property had been stolen, * * *'

The foregoing instruction contains a proper statement of the applicable law. Lee v. United States, 8 Cir., 363 F.2d 469, 474; Cloud v. United States, 8 Cir., 361 F.2d 627, 629; Harding v. United States, 8 Cir., 337 F.2d 254, 257.

As we point out in *Harding*, supra, the instruction here given differs materially from the supplemental instruction in *Bollenbach v. United States*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, relied upon by the defendant.

*174 [10] Defendant's defense is based upon his testimony that he was holding the car as security for a loan to Ellsworth Turner. He said that he had a chattel mortgage on the car but produced no evidence to prove that he did. The jury was not compelled to accept defendant's uncorroborated explanation of his possession of the car.

[11] Defendant's contention that plain error was committed in receiving certain evidence, not objected to, is without merit. Defendant went to trial on a two-count indictment charging two transportation offenses involving separate stolen automobiles. Such counts were properly joined in the same indictment under Rule 8, Fed.R.Crim.P., and no Rule 14 request for severance was made. Trial upon all counts of indictments such as this is the usual procedure. While Count I was before the jury, some evidence was introduced with respect to the stealing of the car there involved and the registration and transportation thereof. The transactions involved in each of the counts were closely related. Both cars were discovered at the same place and at the same time. The evidence offered was competent to support Count I at the time it was offered. Count I was subsequently dismissed by the court on its own motion. The defendant has failed to demonstrate that any prejudicial error was committed in the reception of such evidence.

[12] There is some hearsay testimony as to reports received by officers that the cars were stolen and that the license number and registration certificate on the Chevrolet did not pertain to the car involved in Count II but was issued for a 1950 Chevrolet owned by the defendant. No plain error was demonstrated. Such evidence is merely cumulative. The theft is shown by the direct testimony of the owner and the registration is shown by the license bureau officer's testimony. Complaint is also made of receiving evidence as to registration from the registration official without the introduction of the exhibits. The exhibits were in court. If objection had been made, the exhibits could have been readily identified and introduced. defendant could also have introduced the exhibits.

The Government made out a prima facie case by showing defendant's admitted possession of recently stolen property. The registration evidence was not essential to the Government's case. In any event, such evidence was not prejudicial.

[13] Defendant's final contention that the jury was not selected in a constitutional manner, in that the panel does not represent a fair cross section of the community, is not supported by the record. No challenge was made nor was any evidence offered in support thereof in the trial court. All we have before us is an attachment to defendant's brief showing a list of jurors called to serve on October 17, 1966, and purporting to list the occupations of most of such jurors. This is not the jury that tried the defendant. He was tried on April 5, 1966.

We are satisfied that there is no record support for defendant's contention. Even if the list submitted on appeal is considered, it falls far short of meeting the burden resting upon the defendant to show that the jury which convicted him was improperly constituted.

We hold that none of the errors asserted upon this appeal were properly raised in the trial court and that none of the errors urged constitute plain error under Rule 52(b). The defendant has had in all respects a fair trial.

The judgment of conviction is affirmed.

HEANEY, Circuit Judge (dissenting).

Defendant Asa Minor, Jr., was charged by indictment February 14, 1966, in two counts. Count I charged that on or about October 1, 1964, he transported in interstate commerce a stolen 1964 Thunderbird automobile from Gary, Indiana, to Grady, Arkansas. Count II charged that on or about January 1, 1965, the defendant transported in interstate commerce a *175 stolen 1964 Chevrolet from Gary, Indiana, to Pine Bluff, Arkansas. Each count alleged the defendant knew that the automobiles were stolen.

The defendant, who represented himself, was tried by jury April 5, 1966, and was found guilty on the second count.

The trial judge permitted extensive hearsay testimony to be introduced which tended to establish that the

Thunderbird automobile had also been stolen, and that the defendant had come into possession of the automobile a short time after the theft. At the close of the Government's case, the trial judge dismissed this count on the ground that no competent evidence had been introduced to show that the Thunderbird, in fact, had been stolen.

The court imposed a two-year sentence on the defendant who appeals to this Court urging a reversal for the following reasons: (1) Insufficiency of the evidence to support the guilty verdict. (2) Admission of prejudicial evidence and failure to give instruction limiting the consideration of such evidence. (3) The jury was unconstitutionally selected. I concur with the majority opinion insofar as it relates to defendant's contentions that the jury was unconstitutionally selected. I respectfully dissent, however, on the grounds that the defendant did not voluntarily waive his constitutional rights to be represented by counsel, and that incompetent testimony, highly prejudicial to defendant, was received in evidence.

While no specific contention is made upon this appeal that the counsel was not knowingly and intelligently waived, [FN1] the defendant asserts that he ought to be excused for his failure to preserve errors in the trial court on the ground that he is unskilled and unknowledgeable in the law. While my colleagues hold that the issue of waiver is not now before us, thus preserving defendant's right in this regard, they point out that the defendant cannot be excused for failing to preserve errors as he was advised of and waived his right to counsel. Under these circumstances and in view of the fact that the defendant has the right to raise the issue in a subsequent habeas corpus petition or in a proceeding under *176 28 U.S.C.A. § 2255, [FN2] I feel that the issue should be resolved in this proceeding.

FN1. The Sixth Amendment of the Constitution provides that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the

Assistance of Counsel for his defence.' See also Rule 44, Federal Rules of Criminal Procedure; Johnson v. Zerbst, 304 U.S. 458, 462-463, 58 S.Ct. 1019, (1938), where the Court stated:

'* * * The Sixth Amendment guarantees that 'In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.' This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress convened under that Constitution as essential barriers against arbitrary or unjust deprivation of human rights. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer-- to the untrained laymen-- may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '* * * the humane policy of the modern criminal law * * *' which now provides that a defendant * * * if he be poor, * * * may have counsel furnished him by the state * * * not infrequently * * * more able than the attorney for the state.'

FN2. 'Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with his constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not

represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. A court's jurisdiction at the beginning of trial may be lost 'in the course of the proceedings' due to failure to complete the court-- as the Sixth Amendment requires-- by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. * * * Johnson v. Zerbst, supra, at 467, 58 S.Ct. at 1024.

The Court, in Johnson, specifically held that even though this issue was not raised at trial, it could be raised in a habeas corpus proceeding.

The following colloquy was recorded with reference to the defendant's right to counsel and his waiver thereof:

'The Court: Are you ready, Mr. Minor?'

'The Defendant: Yes, sir.'

'The Court: All right. Now, Mr. Minor, come around to that speaker please. (The defendant came close to the Bench.) No, you have no lawyer?'

'The Defendant: That's right. I have no lawyer.'

'The Court: You indicated that you did not wish to have a lawyer?'

'The Defendant: True.'

'The Court: And the Court offered to appoint you one, is that right?'

'The Defendant: Yes, sir.'

'The Court: Will you sign another waiver, please, Mr. Minor?'

'(The Defendant executed the document waiving his rights to have counsel.)'

'* * * Now, I previously, in chambers, discussed with Mr. Minor and the Clerk and the United States Attorney about-- I explained particularly to Mr. Minor-- about his right to challenge jurors, certain jurors. Ascertain from him, Mr. Cole, if he has any jurors he wishes to challenge.'

'(The Clerk conferred with Mr. Minor.)'

'The Clerk: Your Honor, he doesn't desire to strike.'

'(At this time, a jury was empaneled to try the case.)'

'The Court: Now, Members of the Jury, as in the last case, the defendant does not have a lawyer. He desires to represent himself. He has a right to do it. There are always some problems about that because the defendant is not learned in the law, but the Court, as well as the United States Attorney, will see to it that his rights are protected. We want him to have just as fair and complete a trial as if he had a lawyer. * * * [FN3]

FN3. Before the defendant took the stand, the court advised him of his right not to testify against himself.

The above record indicates that the trial court did little more than offer to appoint counsel and to accept a waiver. The Supreme Court, in Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948), held a similar procedure to be insufficient to establish a meaningful waiver. It then defined the responsibilities of the trial court:

'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused-- whose life or liberty is at stake-- is without counsel. This protecting duty imposes the *177 serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension

of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.' Id. at 723, 68 S.Ct. at 323.

See also Kercheval v. United States, 274 U.S. 220, 223, 47 S.Ct. 582, 71 L.Ed. 839 (1927); United States v. Washington, 341, F.2d 277 (3rd Cir. 1965); United States v. Cariola, 323 F.2d 180, 186 (3rd Cir. 1963); United States v. Lester, 247 F.2d 496, 499-500 (2nd Cir. 1957); Snell v. United States, 174 F.2d 580 (10th Cir. 1949); People v. Kemp, 55 Cal.2d 458, 11 Cal.Rptr. 361, 359 P.2d 913 (1961); Commonwealth ex rel. McCray v. Rundle, 415 Pa. 65, 202 A.2d 303 (1964); State ex rel. Burnett v. Burke, 22 Wis.2d 486, 126 N.W.2d 91 (1964); People v. Chesser, 29 Cal.2d 815, 823, 178 P.2d 761, 765 (1947).

The Supreme Court has repeatedly pointed out that it will indulge every reasonable presumption against waiver of fundamental constitutional rights; and while the accused may waive his right to counsel, the trial court should determine whether there is a proper waiver, and that determination should appear in the record. Carnley v. Cochran, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019 (1938). See Annot., 9 L.Ed.2d 1260 (1963); Annot., 2 L.Ed.2d 1644 (1958); Annot., 93 L.Ed. 137 (1950); 4 Barron, Federal Practice and Procedure, Rules Edition, § 2461 (1951); Note, 49 Minn.L.Rev. 1133 (1965).

Notwithstanding Von Moltke, the 7th Circuit Court of Appeals, in United States v. McGee, 242 F.2d 520 (7th Cir. 1957), found a voluntary waiver in a case similar to the instant one. There the trial court had advised the defendant, before a plea of guilty, of his right to counsel and had informed him that the court would appoint counsel in the event he could not obtain counsel. The court, subsequently, asked if he desired counsel, and he answered unequivocally, 'No, sir.'

The defendant was a thirty-three year old individual, of average age and intelligence, who obtained a high school diploma while in the Army. The defendant

contended, on appeal to the 7th Circuit, that his waiver of counsel was not made voluntarily and with full appreciation of the nature of the crime with which he was charged. In denying the defendant's request, the Circuit Court stated:

'Defendant's contention in this regard, stripped of its gloss, is simply that he did not know and was not advised of the 'independent contractor' defense.' Id. at 524.

The Court went on to state:

'But it is not the duty of the trial court judge to explain or enumerate for the accused the possible defenses he might raise to the charge against him. * * * This would mean a layman could not plead guilty unless he had the opinion of a lawyer on such questions of law as might arise if he did not admit his guilt.' Ibid.

The United States Supreme Court reversed per curiam, ordering a further *178 hearing on all issues. McGee v. United States, 355 U.S. 17, 78 S.Ct. 64, 2 L.Ed.2d 23 (1958).

The Supreme Court's decision in McGee was followed by the 6th Circuit in Vellky v. United States, 279 F.2d 697, 669 (6th Cir. 1960). Cf. United States v. Kniess, 264 F.2d 353 (7th Cir. 1959); United States v. Wantland, 199 F.2d 237 (7th Cir. 1952). In Vellky, the defendant, forty years of age, had a lengthy criminal record and had served one term in a penitentiary from 1941 to 1945 for a bad check and another term of three years in Atlanta for the same offense involving a government money order. The trial court, before accepting a guilty plea, asked the defendant:

'I see that you do not have a lawyer. Do you wish one assigned to represent you?' Id. 279 F.2d at 698.

The defendant answered, 'No, I do not,' and then entered a plea of guilty. Subsequently, the defendant filed a motion to vacate the judgment under § 2255, Title 28 U.S.C., alleging that he had never knowingly or intentionally waived his right to counsel. The District Court's decision, denying relief, was reversed by the 7th Circuit on the basis of the Von Moltke and McGee cases. The Court, in making its decision, stated:

* * * a defendant, even though he waives assistance

of counsel, is entitled to more explanation and discussion of the charge against him and the facts affecting a decision to enter a plea of guilty, than was given in the present case.' Id. at 699.

The 7th Circuit, in McGee, relied heavily on Michener v. United States, 181 F.2d 911 (8th Cir. 1950).

Michener is clearly distinguishable on its facts. There the defendant contended on appeal that he did not realize the results of his pleading guilty to any and all of the charges that were laid in the indictment. The trial court specifically found that the defendant knew what he was doing and, in fact, wanted the longest federal sentence he could get. This Court sustained the trial court's finding and said:

'Appellant also contends that Heisey informed him that 'he (appellant) would have to plead (guilty) to the indictment as whole', which information was gross misrepresentation and false legal advice by virtue of the case of Von Moltke v. Gillies, 332 U.S. 708, 68 S.Ct. 316, 325, 92 L.Ed. 309. The contention is inconsistent with what appellant said he wanted at the time of arraignment and sentence. * * * He told Heisey, in fact, that he was not concerned about how much time he got, providing he was sent to a federal penitentiary.' He was not concerned about the number of the counts to which he pleaded. * * * Appellant himself states that he desired a long federal sentence, hoping thereby to diminish the length of his Wisconsin sentence and his present contention that he was led by misrepresentation to plead guilty to both counts is obviously a mere afterthought. His hope of diminishing the Wisconsin imprisonment motivated his action and as shown by the record, his imprisonment in that state was cut down about twenty seven years. The Von Moltke case, cited by appellant, affords no support for appellant's position here.' Id. at 915.

This Court further distinguished Von Moltke saying:

'In the Von Moltke case there was a remand to the trial court to determine the question whether 'petitioner did not competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel.' And if she did not so waive, an order should be entered releasing her from custody. In the instant case, on that precise question of waiver of counsel, there was a finding by the trial

court that appellant 'intelligently, competently and intentionally waived his right of assistance of counsel' and that finding was affirmed, supra, (Michener v. Johnson, 9 Cir.) 146 F.2d 129, 130.' Id. at 917, n. 2.

*179 In the instant case, it was essential that the defendant understand the presumption which is applicable to possession of recently stolen automobiles. In my judgment, McGee is directly in point and the failure to advise the defendant of the existence of the presumption is a sufficient basis, standing alone, on which to find that the defendant did not knowingly and intelligently, and with a full understanding of the implications, waive his right to counsel. [FN4]

FN4. The jury was instructed with respect to it as follows:

'Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew that the property had been stolen, * * *'

In addition, however, there is no indication that the court explained the range of allowable punishment, or possible defenses to the charges.

Nor is there any testimony to indicate that the defendant, because of his experience, background or conduct, understood the operation of the presumption, the range of allowable punishment, or possible defenses to the charges without an explanation. [FN5] Nor is there any indication that he was consciously 'playing it smart,' or that he had a feeling he could represent himself more competently than an attorney.

FN5. Compare Adams v. United States ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236 (1942); United States v. Redfield, 197 F.Supp. 559, 572 (D.C.Nev.1961), aff'd. 295 F.2d 249; Burstein v. United States, 178 F.2d 665 (9th Cir. 1949).

He made no objections during the course of the trial, even though highly prejudicial and incompetent testimony was offered and received into evidence. He took the stand in his own behalf and testified freely when and how the automobile in question came into

his possession. [FN6] His cross-examination was inept and frequently did more to confuse than to clarify.

FN6. As if to cinch the case against himself, he asked and was given permission to make an additional statement to the jury after it was instructed. He then proceeded to clarify otherwise vague testimony as to when the car came into his possession by fixing the date as about October 24, 1964.

In my judgment, the defendant did not knowingly, intelligently and with a full understanding of the implications, waive his constitutional rights to counsel. The defendant is, therefore, entitled to a new trial. [FN7]

FN7. In a concurring opinion in Chapman v. State of California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, Justice Stewart wrote: 'When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680. That, indeed, was the whole point of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, overruling Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. Even before trial, when counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.' Hamilton v. State of Alabama, 368 U.S. 52, 55, 82 S.Ct. 157, 7 L.Ed.2d 114; White v. State of Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193.' Chapman v. State of California, 87 S.Ct. 824 (U.S. February 21, 1967).

PLAIN ERROR WAS COMMITTED IN RECEIVING CERTAIN HEARSAY EVIDENCE AND IN PERMITTING TESTIMONY AS TO THE CONTENT OF CERTAIN RECORDS.

There is competent testimony to establish that the Chevrolet was stolen September 24, 1964. The defendant freely admits that he came into possession

of the car about a month later, and that he transported it from Indiana to Arkansas in late December, 1964. To establish that the defendant was guilty of a violation of 18 U.S.C.A. § 2312, however, *180 it was also necessary to show that the defendant knew the car was stolen.

The defendant denied such knowledge and testified that he came into possession of the car when he made a loan to Ellsworth Turner and accepted the car as collateral. There is no direct testimony indicating that the defendant knew the car was stolen until it was taken from him by the police on March 6, 1965. The defendant did not attempt to conceal [FN8] or change the appearance of the car. Neither the motor serial number nor the body serial number was altered. [FN9] The defendant did not attempt to sell the car during the time it was in his possession.

FN8. Defendant's testimony that he used the car frequently during the two months it was in Indiana was undisputed, as was testimony that the car broke down while he was driving it from Gary, Indiana, to Grady, Arkansas, and that he asked the police of a small town near Chicago to leave the car with them. It is also undisputed that on being refused, he towed the car the remainder of the way, receiving a traffic ticket from the state police.

FN9. It is interesting to compare the defendant's conduct in the present case, and the condition of the car when found, with that of other defendants in similar cases. In McCloud v. United States, 75 F.2d 576 (6th Cir. 1935), the appellant told three versions of how he came into possession of the car. When the stolen car was found in his possession, the motor numbers had been changed. In United States v. Wheeler, 219 F.2d 773 (7th Cir. 1955), the serial numbers on the auto body had been filed off.

As the testimony showed that the defendant came into possession of the car within a month of when it was stolen, the trial court properly instructed the jury as follows:

'Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding

circumstances shown by the evidence in the case, that the person in possession knew that the property had been stolen. * * * [FN10]

[FN10]. The record does not disclose why the defendant was not indicted until February 14, 1966.

In view of this presumption and defendant's explanation, the defendant's guilt or innocence turned largely on whether he was believed by the jury. His credibility became the crucial issue, thus evidence casting doubt on that credibility was critical to the ultimate jury determination.

1. Harry Thomas, of the Arkansas State Police, and John Moore, a Special Agent of the Federal Bureau of Investigation, testified at length regarding information they received that the vehicle registrations were false and that the cars had been stolen. Thomas in part, testified:

'A. * * * I sent off for registration information on the '65 Indiana tag, which I got off of the Ford Thunderbird. I also sent off for information on the '64 Indiana tag bearing 45-R Roberts 1690, which was displayed on the '64 Chevrolet. I received information back by radio that these two tags were issued to cars other than the two that I had there.

'Q. Did you ask for any registration certificate for this Chevrolet?

'A. No, sir-- well, I asked for it. I asked what she had and she stated 'nothing'. [FN11] After getting the registration information back by radio from Indiana, I realized that I needed to go more thoroughly into the cars, and I probably needed some assistance and I asked Agent John Moore, of the F.B.I., who is stationed at Pine Bluff, to come into the area and assist me, and we examined the cars, and through information that he was able to obtain through his office and through out radio, we did determine that the cars--*181 one, the Chevrolet-- had been reported stolen in St. Louis, Missouri, on September 24, 1964, and the Thunderbird had been reported stolen on September 30, 1964, in Chicago, Illinois. I have a copy of the police report from those two cities.

[FN11]. Thomas here refers to a conversation he had with the defendant's sister. Elsewhere in the record, he was permitted to testify at

length as to the conversations which were not held in the defendant's presence. The conversations tended to cast doubt on the defendant's testimony and were thus prejudicial.

'Q. You learned this through your inquiry because of your official connection with Arkansas State Police?

'A. Yes, I did.'

And, Moore was permitted to testify as follows:

'A. The '64 Chevrolet, and I also examined the-- I examined the Chevrolet at the Grady City Hall, and I examined the Thunderbird at Mrs. Trotter's residence.

'Q. Upon examination of these cars, did you attempt to ascertain the ownership of them?

'A. Yes, I did.

'Q. What did you learn upon that attempt?

'A. On March 16th, we received information through our official offices in Indianapolis, Indiana, that the 1964 Chevrolet vehicle, identification number 41467S299311, which is the vehicle that was at the Grady City Hall, was stolen September 24, 1964, from this Chevrolet place in St. Louis, Missouri. This check, by the way came from the National Automobile Theft Bureau.

'A. * * * I also learned that the '64 Thunderbird vehicle, identification number 4Y87Z186012, which is the car I looked at in Mrs. Trotter's front yard, was stolen September 30, 1964, from the Yates Motor Company, in Chicago, Illinois. This vehicle had been left there for servicing and when the owner called for it, it couldn't be found.'

Much of the above testimony was hearsay. Queen v. Hepburn, 7 Cranch 290, 291, 3 L.Ed. 348 (1813); Peppard v. United States, 314 F.2d 623, 627 (8th Cir. 1963); In re Sawyer's Petition, 229 F.2d 805, 809 (7th Cir. 1956); Landstrom v. Thorpe, 189 F.2d 46, 53, 26 A.L.R.2d 1170 (8th Cir. 1951); Kercheval v. United States, 12 F.2d 904, 908 (8th Cir. 1926); 5 Wigmore, Evidence 1362 (3d ed. 1940); Model Code of Evidence rule 502 (1942). It did not fall within exceptions to the rule. See 28 U.S.C.A. § 1732.

While the hearsay testimony with respect to the Chevrolet was in part cumulative, it tended to discredit the defendant's statements that he was rightfully in possession of the car.

The hearsay testimony with respect to the Thunderbird was highly prejudicial as, without it, there would have been no testimony indicating that the defendant may have transported other stolen vehicles in interstate commerce to his sister's home in Arkansas.

To reiterate, the defendant's credibility was a crucial issue. Thus, hearsay evidence which had the effect of attacking that credibility was prejudicial and its admission was error.

2. The record is filled with numerous references to registration forms, license plates and official reports. Although it appears that the documents were available, and probably in the hands of a testifying witness, the only documentary evidence offered or received was a copy of an invoice on the stolen 1964 Chevrolet from the General Motors Corporation to the St. Louis, Missouri, garage.^[FN12]

^{FN12.} If an original document has been destroyed or is difficult to obtain, a copy, of course, is preferable to oral testimony which might well be admissible. See Riggs v. Tayloe, 9 Wheat. 483, 486, 6 L.Ed. 140, (1824) (Original contract destroyed, oral testimony permitted.)

It is the established rule that the best evidence extant and obtainable must be used in a trial, and that secondary evidence of a fact may not be offered so long as primary evidence is extant and obtainable. Renner v. Bank of Columbia, 9 Wheat. 581, 595, 6 L.Ed. 166 (1824); Williamson v. United States, 272 F.2d 495 (5th Cir. 1960); *182 United States v. Manton, 107 F.2d 834, 845 (2d Cir. 1938); McDonald v. United States, 89 F.2d 128, 137 (8th Cir. 1937), cert. denied, 301 U.S. 697, 57 S.Ct. 925, 81 L.Ed. 1352 (1937); Billington v. United States, 15 F.2d 359, 360 (6th Cir. 1926); see McCormick, Evidence § 197 (1954); 4 Wigmore, Evidence § 1185 (3d ed. 1940); 22A C.J.S.Criminal Law § § 692, 693 (1961). In this case, the rule was not followed and the defendant was prejudiced as a result of the failure to follow it.

For example, Patrolman Thomas testified that at the

outset of his investigation, the defendant's sister produced a document purporting to be an 'owner's copy' or the registration certificate on the 1964 Thunderbird. This certificate also purported to be issued by the Indiana Motor Vehicle Department. Without requiring production of the document, the court permitted Thomas to state that the serial numbers on the car and the registration certificate were the same, but that the license number appearing on the certificate and that on the automobile was different.^[FN13] As Thomas was testifying to the contents of the registration certificate, its production should have been required.

^{FN13.} Patrolman Thomas testified, at one point in the trial, that the 1964 Chevrolet bore license plate #45 R 3307. At another, he stated the license number was #45 R 1690. His testimony regarding checking of registration certificates given him by Mrs. Trotter is ambiguous as to the 1964 Chevrolet.

The best evidence rule was again violated during the direct examination of the Chief Clerk of the Indiana Motor Vehicle Department. He testified he had checked the license plate numbers provided him by the investigation officers with the automobile registration certificates on file in his office. He stated that license plate #45 R 1690 was issued to Rose Pritchett (defendant's common law wife) on a 1950 Chevrolet on April 3, 1964. He further stated that license plate #45 R 3307 was issued to defendant on the same 1950 Chevrolet on October 22, 1964.

The failure to require the production of the documents in question was more than a harmless error as it tended to establish (a) that a dual or false registration had been made on the 1950 Chevrolet, (2) that the date of defendant's admitted possession of the stolen automobile and the date the registration certificate on the 1950 Chevrolet coincided with one another, (3) that the license number and plate registered to the 1950 Chevrolet was found on the stolen automobile. These statements helped weave the web of circumstantial evidence necessary to convince the jury that the defendant knew the car was stolen and impaired his credibility.

In conclusion, it is to be noted that the trial court, in advising the defendant that it and the United States Attorney would fully protect his rights, expressed that

responsibility which is owed to any defendant, who, in a criminal case, decides to proceed pro se. The United States Attorney was under an obligation to avoid offering evidence he knew to be incompetent and the trial court under an equally heavy burden to avoid receiving such evidence. [FN14] Both were under an obligation to insure the defendant a fair trial.

FN14. In *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935), Justice Sutherland wrote: 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.' See generally Canon No. 5, Canons of Professional Ethics, American Bar Association.

I would reverse and remand for a new trial.

375 F.2d 170

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Motions, Pleadings and Filings

United States District Court,
 E.D. Virginia,

Norfolk Division.

PNEUMO ABEX CORPORATION, et al., Plaintiffs,
 v.
 BESSEMER AND LAKE ERIE RAILROAD
 COMPANY, INC., et al., Defendants.
Civil Action No. 2:94cv716.

Sept. 12, 1996.

Successor of railroad parts foundry operators and city brought Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action against sellers of scrap journal bearings to foundry and others, seeking to recover response costs. The District Court, Jackson, J., held that: (1) harm at site was indivisible; (2) rational basis existed for apportionment of liability; (3) oversight costs were recoverable; (4) city could recover indirect costs for site-related work performed by employees upon proper proof; (5) costs associated with medical monitoring were recoverable; and (6) plaintiffs and defendants would equally bear costs of cleanup.

So ordered.

West Headnotes

[1] Environmental Law **445(3)**
149Ek445(3) Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)

[1] Environmental Law **447**
149Ek447 Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)

[1] Environmental Law **464**
149Ek464 Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)
 Nonsettling defendants in CERCLA response cost

action bore burden of either establishing that harm at site was divisible or that there existed reasonable basis for apportionment, based upon contribution of each defendant, of liability for single harm. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[2] Environmental Law **445(3)**
149Ek445(3) Most Cited Cases
 (Formerly 199k25.5(5.5) Health and Environment)

Despite presentation of evidence indicating several sources of lead contamination at CERCLA site and that contaminated sand from railroad parts foundry remained in certain portions of site, defendants who sold scrap journal bearings to foundry failed to provide district court with way to separate harms or costs of cleanup; harm was indivisible. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[3] Evidence **555.9**
157k555.9 Most Cited Cases

Expert's methodology in calculating poundage of worn journal bearings that CERCLA defendants delivered to railroad parts foundry was reasonable approach for estimating defendants' contributions to lead contamination at site, despite claims that expert relied upon records from only few of years at issue and that estimates assumed consistent usage of foundry by defendants as opposed to use of competing operations or use of one of operator's other foundries in other parts of country. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[4] Environmental Law **464**
149Ek464 Most Cited Cases
 (Formerly 199k25.15(5.1) Health and Environment)

Plaintiffs in CERCLA response cost action bore burden of proving that their response costs were consistent with national contingency plan (NCP). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[5] Environmental Law **671**

149Ek671 Most Cited Cases

(Formerly 199k25.15(5) Health and Environment)

Statute of limitations did not begin to run in CERCLA response cost action brought by successor of railroad parts foundry operators and city until Environmental Protection Agency (EPA) issued record of decision (ROD). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, 113(g)(2)(A), as amended, 42 U.S.C.A. § 9607, 9613(g)(2)(A).

[6] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Costs of oversight of CERCLA cleanup activities by Environmental Protection Agency (EPA) and Virginia Department of Waste Management (VDWM) were necessary costs of response consistent with national contingency plan (NCP). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B); 40 C.F.R. § 300.700(c)(3).

[7] Environmental Law  **720(2)**

149Ek720(2) Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

District court could not reasonably conclude that law firm providing legal assistance to CERCLA response cost plaintiff performed work in connection with actual cleanup as opposed to protecting plaintiff's interest in its attempt to limit its liability or to avoid listing on national priorities list (NPL) based on voluminous billing invoices and testimony that one of firm's functions was "to protect the corporate interest" and that separation of firm services into those that protected corporate interest generally and those associated with cleanup was not distinction that made sense. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[8] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Upon proper proof of costs, city and city redevelopment and housing authority could recover from CERCLA response cost defendants for employees' time spent in responding to contamination

for which defendants were partially responsible, despite claim that lost time was form of economic loss not recoverable under CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[9] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Deficiencies in city and city redevelopment and housing authority's proof regarding amount of time employees spent in responding to contamination at site for which CERCLA response cost defendants were partially responsible precluded recovery for most claims for recovery of employees' salaries; to calculate costs for employee time, plaintiffs referred to calendars of personnel involved and estimated, based on entries in calendars, how many hours employees spent dealing with site, many entries were illegible, entries did not include when activities ended, estimates were not contemporaneous with occurrence of meeting or activity, plaintiffs did not present testimony from individuals who made time estimates, and plaintiffs made little or no showing that activities and associated costs were necessary response costs consistent with national contingency plan (NCP). Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[10] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

To extent that city and city redevelopment and housing authority sought to recover from CERCLA response cost defendants the cost of medical testing and screening conducted to assess effect of release or discharge on public health or to identify potential public health problems presented by release, they presented cognizable CERCLA claim. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[11] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

CERCLA response cost plaintiffs could recover from

defendants costs of technical services company's services where company reviewed work plan submitted to Environmental Protection Agency (EPA), company designed curbing, fencing, capping, and storm water runoff which was constructed at site, company hired contractors to do excavation, sampling, construction, and testing required, and company conducted treatability studies concerning other means of treating material rather than disposing of it. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[12] Environmental Law  **446**

149Ek446 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

District court would disallow much of CERCLA response cost plaintiff's claimed costs for engineering services rendered in area partially within Superfund site in absence of methodology for delineating which costs were associated within site versus those outside site. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(a)(4)(B), as amended, 42 U.S.C.A. § 9607(a)(4)(B).

[13] Environmental Law  **447**

149Ek447 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

In allocating CERCLA response costs, district court considers several equitable factors including degree of involvement by parties in generation, transportation, treatment, storage, or disposal of hazardous substances. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

[14] Environmental Law  **447**

149Ek447 Most Cited Cases

(Formerly 199k25.5(5.5) Health and Environment)

Plaintiffs in CERCLA response cost action, including successor of railroad parts foundry operators and city, and defendants, including sellers of scrap journal bearings to foundry, would be required to equally bear costs of cleanup of lead contamination at site, given that parties were fully involved in transport, disposal, or treatment of hazardous substances, that parties were only able to roughly distinguish contributions to site contamination, that some defendants indicated recalcitrance to cooperate with government officials,

that nonsettling defendants had not performed or financed performance of any response activities, that parties profited from foundry arrangement, and that nothing in record suggested that any of parties were unable to pay share of cleanup costs. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107, as amended, 42 U.S.C.A. § 9607.

*1253 James A. Gorry, III, Taylor & Walker, P.C., Norfolk, VA, Joseph G. Homsy, John W. Roberts, Lea D. Leadbeater, Albert J. Birkbeck, Zevnik Horton Guibord & McGovern, P.C., Chicago, IL, for Pneumo Abex Corporation, Whitman Corporation.

Nancy Bennett Cherry, George Manuel Willson, City Attorney's Office, Portsmouth, VA, for City of Portsmouth, Virginia.

Joseph Price Massey, Susan Taylor Hansen, Katherine Susan Cross, Cooper, Spong & Davis, Portsmouth, VA, for Portsmouth Redevelopment and Housing Authority.

Michael Henry Wojcik, Weinberg & Stein, Norfolk, VA, Louis A. Naugle, James Mizgala, Reed Smith Shaw & McClay, Pittsburgh, PA, Jennifer Sarah Blank, Reed Smith Shaw & McClay, Washington, DC, for Bessemer and Lake Erie Railroad Company, Inc., Union Railroad Co., Inc.

Thomas Scott McGraw, Faggert & Frieden, P.C., Chesapeake, VA, David Charles Bowen, Willcox & Savage, Norfolk, VA, Rodney B. Griffith, Consolidated Rail Corporation, Philadelphia, PA, for Consolidated Rail Corporation.

Robert H. Cox, Kevin A. Gaynor, George C. Hopkins, Vinson & Elkins, L.L.P., Washington, DC, for CSX Transportation, Inc., Fruit Growers Express Company, Inc.

Michael Dale Beverly, Joseph Marvin Spivey, III, Hunton & Williams, Richmond, VA, Frederick Blair Wimbish, Norfolk Southern Corporation, Law Department, Norfolk, VA, for Norfolk Southern Railway Co., Norfolk & Western Railway Co.

Mary Metil Grove, Christian, Barton, Epps, Brent and Chappell, Richmond, VA, Richard A. Porach, Pittsburgh, PA, for Pittsburgh & Lake Erie Railroad Company, Inc.

Channing Joseph Martin, William Rutherford Mauck, Jr., Heidi Abbott, Williams, Mullen, Christian & Dobbins, Richmond, VA, for Richmond,

Fredericksburg & Potomac Railroad Co., Inc.

MEMORANDUM OPINION AND ORDER

JACKSON, District Judge.

INTRODUCTION

Plaintiffs initiated this action in 1994 pursuant to sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9607, 9613 (1994), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA" or "the Act"), and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1994). Plaintiffs seek recovery of costs allegedly incurred in responding to releases or threatened releases of hazardous substances at or from the Pneumo Abex Superfund Site ("Site") in Portsmouth, Virginia. Plaintiffs also seek a declaratory judgment that Defendants are liable for the costs of implementing the permanent remedy at the Site. The Site, designated by the United States Environmental Protection Agency (the "EPA") as Operable Unit 1 ("OU1"), is the area within a radius of 700 feet of Pneumo Abex Corporation's ("Pneumo Abex") former foundry, and is divided into four quadrants.

By order filed March 25, 1996, the Court found the Railroad Defendants remaining in the litigation and Consolidated Rail Corporation liable as generators under § 107(a) of CERCLA. The Court also dismissed Plaintiffs' claims under § 113 of CERCLA as unnecessary because the Court had ruled that they could proceed under § 107 even though they are potentially responsible parties ("PRPs"). The Court held a six-day bench trial to determine the allocation of liability among the parties. The parties filed post-trial briefs, as directed, on June 12, 1996. This matter is now ripe for judicial determination.

I. FACTUAL BACKGROUND

Plaintiffs Pneumo Abex, the City of Portsmouth (the "City"), and the Portsmouth Redevelopment and Housing Authority (the "PRHA") own property within the Site. Plaintiff Whitman Corporation is the former parent company of Abex Corporation, the predecessor of Pneumo Abex. Whitman Corporation has been reimbursing Pneumo Abex for its environmental liability since *1254 Whitman Corporation sold Pneumo Abex in 1988. (R. at 230-31.) Most of the Defendants in this case were customers of Pneumo Abex's foundry in Portsmouth, Virginia ("Defendants I") and sent worn journal bearings to the foundry to be "converted" into new journal bearings. (See March 25,

1996 Memorandum Opinion and Order, 921 F.Supp. 336 for further explanation.) Plaintiffs also sued Defendants Holland Investment and Manufacturing Company, Inc., John C. Holland, Jr., and Runnymede Corporation (collectively known as "the Landowner Defendants") as landowners within the Site.

According to the EPA, response activity began at the Site in 1986 when the EPA identified high lead concentrations. (Record of Decision Amendment, prepared by the United States Environmental Protection Agency, August 1994 [hereinafter ROD Amend.] at 2.) Pursuant to the Consent Order of August, 1986, Pneumo Abex excavated and removed contaminated soil at the Site. (*Id.*) In October of 1989, Pneumo Abex entered into an administrative order on consent with the Virginia Department of Waste Management ("VDWM") to perform the Remedial Investigation/Feasibility Study ("RI/FS") under the VDWM's supervision. (Stip. ¶ 23.) Pneumo Abex completed the RI/FS and submitted the final report to the VDWM in February of 1992. (Stip. ¶ 24.) Pursuant to the EPA's unilateral administrative order of March, 1992, Pneumo Abex excavated and removed additional contaminated soil. (ROD Amend. at 2.) However, Pneumo Abex did not complete the excavation and removal of contaminated surface soil because some residents wished to remain in place for the long-term remediation. In September of 1992, the EPA and the Commonwealth of Virginia published a Record of Decision ("1992 ROD") with the final remedy. (*Id.*) On October 19, 1993, Pneumo Abex submitted proposed changes to the 1992 ROD based upon new information from the City on proposed plans for zoning and land-use, as well as new institutional controls on future excavation within the Site. (*Id.* at 2- 3.) The EPA subsequently amended the 1992 ROD and published in August of 1994 the Record of Decision Amendment ("Amended ROD"). In December of 1995, the EPA issued the Explanation of Significant Differences ("ESD") which again revised the permanent remedy. (Pls.' Br. at 10.)

In January, 1993 and December, 1994, during these removal activities, the EPA notified, *inter alia*, Defendants I and Plaintiffs that they were PRPs under § 107(a), (Stip. ¶ ¶ 29, 30), and invited them to negotiate a consent decree. [FN1] Plaintiffs were the only parties to negotiate a consent decree with the United States. In a separate action, the United States and Plaintiffs herein lodged the Consent Decree with the Court on March 4, 1996, and the Court entered it on April 25, 1996. *United States v. Pneumo Abex Corp.*, Civ.A. No. 2:96cv27 (E.D.Va.).

FN1. Defendants remaining in the litigation adduced testimony to suggest that the EPA never "invited" them to enter into a consent decree. (R. at 504-07.) As the Court explains below in its discussion of Plaintiffs' Share and Defendants' Share, the explanation proffered for Defendants' failure to enter into a consent decree is unpersuasive.

On May 6, 1996, the EPA issued a unilateral administrative order pursuant to § 106(a) of CERCLA to Defendants I. (Pls.' Ex. 446; R. at 508-09, 533-34.) The order requires Defendants I to contribute to the permanent remedy at the Site. Section 106(a) of CERCLA allows for the issuance of an order when "there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility." CERCLA § 106(a). The Court has jurisdiction to grant relief "as the public interest and the equities of the case may require." *Id.* Furthermore, § 106 provides that

any person who, without sufficient cause, willfully violates, or fails or refuses to comply with, any order ... under subsection (a) of this section may, in an action brought in the appropriate United States district court to enforce such order, be fined not more than \$25,000 for each day in which such violation occurs or such failure to comply continues.

*1255 CERCLA § 106(b)(1). To date, the EPA has not petitioned the Court to enforce the order.

Subsequent to the Court's ruling of March 25, 1996 concerning liability, Plaintiffs and a number of Defendants entered into settlement negotiations. Defendants remaining at the conclusion of the trial were CSX Transportation, Inc., Fruit Growers Express

Company, Inc., Norfolk Southern Railway Company, Norfolk and Western Railway Company, and High Point, Thomasville and Denton Railroad Company ("Remaining Defendants"). Norfolk Southern Railway Company is a subsidiary of Norfolk Southern Corporation. Norfolk and Western Railway Company is a subsidiary of Norfolk Southern Railway Company. Finally, High Point, Thomasville & Denton Railroad Company is an affiliate of Norfolk and Western Railway Company. The Court refers to these related entities simply as "Norfolk Southern," unless otherwise indicated. CSX Transportation, Inc. and Fruit Growers Express Company, Inc. are subsidiaries and/or affiliates of CSX Corporation. The Court refers to these entities separately, although witnesses may have referred to them simply as "CSX." All other Defendants settled with Plaintiffs ("Settling Defendants"), and the Court dismissed Settling Defendants in orders filed May 9, 1996 and September 12, 1996.

II. DISCUSSION

The parties stipulated that the 1992 ROD estimated the cost of the clean-up remedy at the Pneumo Abex site to be \$31,962,923.00. The Amended ROD estimated the cost of the remedy to be \$31,507,670.00. Finally, the ESD estimated the cost to be \$21,000,000.00. (Stip. ¶ 31.) The parties also stipulated that Pneumo Abex has incurred response costs at the Site and that Defendants have not. (Stip. ¶¶ 34, 35.) Thus, the questions remaining are 1) which of the costs Plaintiffs allegedly have incurred in connection with the Site are recoverable as response costs and 2) what portion of those costs Remaining Defendants must pay.

Plaintiffs presented proof of their alleged costs as follows:

1) Oversight by the EPA--	\$1,740,195.71
2) The City's costs--	112,034.00
3) The PRHA's costs--	93,405.85
4) Services related directly to excavation and removal at the Site--	5,334,509.00

TOTAL	\$7,280,144.56.

Of the total amount, Pneumo Abex allegedly has incurred and paid \$7,074,704.00.

A. Divisibility of the Harm

[1] The United States Court of Appeals for the Fourth

Circuit has held that "[w]hile CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm." United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir.1988), cert. denied, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989). In this case, Remaining Defendants bear the burden of either

establishing that the harm is divisible or that there exists a reasonable basis for apportionment, based upon the contribution of each Defendant, of liability for a single harm. *Id.* at 171-72. In their post-trial brief, Remaining Defendants argue that they have established that "the area of environmental harm at the Site attributable to Foundry manufacturing activities is clearly divisible from the area of environmental harm not related to the Foundry." (Defs.' Br. at 3.) Although faced with the possibility that the Court could find the harm indivisible, in their post-trial briefs Remaining Defendants do not present the alternative argument that there exists a rational basis for apportionment of liability.

1. Sources of Contamination

One of Plaintiffs' experts, John Rhodes, of GEO Engineering, who managed the Site from the beginning of the cleanup activities, testified that his firm tried to identify several sources of lead contamination. The firm considered air emissions and sand from the foundry, lead paint, automobile emissions, ash from an incinerator, and dredge fill material. (R. at 33.) However, the firm was unable to identify reliably sources other than foundry-related ones through the use of its chosen method: canonical analysis. (R. at 33-34.) Canonical analysis is a statistical procedure used to create a "fingerprint" of *1256 known contaminants. (R. at 37.) GEO Engineering gathered soil and dust samples throughout the Site to try to match those samples to the fingerprints, samples of previously identified contaminants. GEO Engineering analyzed the samples for lead content and other metals. (*Id.*; 1994 ROD at 17.) However, GEO Engineering was ultimately unable to fingerprint non-foundry-related sources of lead.

Remaining Defendants also presented the expert testimony of Dr. Swiatoslaw Vladimir Kaczmar [FN2] in an attempt to establish that there existed several sources of contamination in addition to the sand from the foundry. (R. at 629- 776.) Dr. Kaczmar drew most of his conclusions from his review of the work performed and reports generated by GEO Engineering (*see, e.g.*, R. at 686, 716); Dr. Kaczmar nor his firm collected any soil samples from the Site. (R. at 727.) In general, Remaining Defendants tried to establish that ash from the City's incinerator, dredge spoils, demolition waste, and miscellaneous fill contributed to the contamination of the Site. [FN3] For example, Dr. Kaczmar used several demonstrative exhibits to establish the pattern of development and demolition within the Site from 1889 to 1964. (R. at 647- 661.) He testified that demolition occurred in all four quadrants of the Site, (R. at 661), and that the demolition left residuals of lead. (R. at 635.) Similarly, on cross-examination, a witness from the PRHA testified that demolition had

occurred in quadrants II and IV. (R. at 893-97.) Dr. Kaczmar also testified that there existed *no* basis for linking air emissions to the residuals of lead detected at the Site outside of the foundry-area, (R. at 676), yet later testified that the releases from the foundry were only insignificant sources of contamination. (R. at 716.)

FN2. Dr. Kaczmar has a bachelor's degree in chemistry, biology, and water science from Northern Michigan University. (R. at 629.) He holds a master's degree from Northern Michigan University in chemical limnology, the study of the "fate and transport" of chemicals in aquatic systems. (*Id.*) He also has a doctorate degree from Michigan State University in environmental toxicology which includes analytical chemistry, human toxicology, and fate and transport. (R. at 630.) He has performed approximately ten (10) Remedial Investigations and Feasibility Studies as a project manager and supervised approximately 100.

FN3. Plaintiffs objected to much of the testimony or opinions offered by Dr. Kaczmar on two separate grounds. First Plaintiffs objected to the nature and scope of his proposed testimony because Dr. Kaczmar was not a geologist or an engineer, having held himself out previously as a toxicologist. (R. at 633-40.) The Court allowed Dr. Kaczmar to testify and indicated that it would give the testimony due weight, recognizing the witness's limitations. (R. at 640.) Second, Plaintiffs objected on the basis that Dr. Kaczmar did not disclose the offered opinions or bases thereof in his written report made pursuant to Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure. Upon reviewing Dr. Kaczmar's report, the Court sustained many of these objections. (*E.g.*, R. at 670-75, 699- 700, 701, 704-07, 708-09, 735-36.)

The focal point of Dr. Kaczmar's testimony was that the use of canonical analysis, as a method for identifying materials from the foundry outside of Pneumo Abex's lot, could not be supported by the information in the Remedial Investigation report. (R. at 663.) He emphasized the portion of the Remedial Investigation report which explained the "opportunity for false positives" and the problem of relying upon "single observations" of foundry-related lead contamination without a sufficient number of neighboring samples also being classified as foundry-related. (R. at 686.) Dr. Kaczmar testified that GEO Engineering did not have enough reference points or fingerprints of known contaminants, thus leaving great opportunities for misclassification of samples. (R. at 687.)

He testified that GEO Engineering would have needed "hundreds" of reference points to make canonical analysis an appropriate methodology at the Site. (R. at 690.) In response to questions from the Court, however, Dr. Kaczmar testified that for the last classification or canonical analysis he performed for polychlorinated biphenyls (PCBs), he used only six (6) reference points. (R. at 767.) He also testified that GEO Engineering used four to six reference points in this case. (R. at 768, 776.) Dr. Kaczmar also testified to examples within the RI/FS of misclassifications within the reference groups such as a known sample of auto emissions being classified as paint, miscellaneous fill, and sand from the foundry. (R. at 697.) He further testified that the misclassifications *1257 were "a very strong basis for just throwing the canonical analysis right out, at least the application here." (*Id.*)

2. Containment of Sand and Air Emissions from the Foundry

At trial, Plaintiffs presented the first evidence to suggest divisibility of harm. John Rhodes testified that he made the argument to the EPA that portions of Quadrant II did not indicate foundry-related contamination and that Quadrant III did not show any indication of foundry-related contamination. (R. at 42-43.) Thus he argued "that at least a portion of quadrants II and III could be carved out of the site as not related to the foundry." The EPA rejected this argument within the 700-foot circle, (R. at 44), and found that "it is reasonable to assume the foundry contributed, either through disposal of waste sand or through air deposition, to lead contamination found in these areas." (Pls.' Ex. 322, 1992 ROD at 101.)

Remaining Defendants also presented testimony from Mr. Elmer Oakes, [FN4] a former employee and plant manager of Pneumo Abex, that to the best of his recollection, he only saw sand removed from the back lot twice, "a couple of pick-up loads to use for fill." (R. at 942, 955.) However, he also testified that there was no fence around the back lot. (R. at 942.) Mr. Rhodes testified that one mechanism for moving the contaminated sand "that was of concern throughout the study [the RI/FS] and remains a concern is wind blowing of foundry sand." (R. at 221.) Pneumo Abex's lot is within the 700-foot circle designated as the Site, but the Site includes more than Pneumo Abex's lot. Remaining Defendants thus argue that they are not liable for costs associated with the cleanup of the entire Site, but merely the cleanup within the Pneumo Abex's lot.

[FN4] Mr. Oakes was employed at the Site from 1946 until its closing in 1978. (R. at 930-31.)

Dr. Kaczmar also concluded that there existed "no likelihood of foundry sand being outside the foundry

areas." (R. at 706.) He reached this conclusion based upon the following:

- 1) the information in the Remedial Investigation report that the foundry's used sand was exclusively disposed of, by wheelbarrow, within the north lot of the foundry, (R. at 706-07),
- 2) his analysis of aerial photographs which depicted two major thoroughfares on either side of the foundry that, in his opinion, would have precluded anyone from taking a wheelbarrow full of material to one of the residential areas, (R. at 707,) and
- 3) GEO Engineering's estimate that over the fifty years of the foundry's operation, the foundry would have generated 140,000 cubic feet of waste sand and that amount "could fit very easily" within the foundry's lot. (R. at 708.)

Dr. Kaczmar also testified about "grain size analysis," which involves taking soil samples and sifting the samples through a series of sieves with each sieve having progressively smaller openings so that the particles or grains separate by size. (R. at 702.) According to Dr. Kaczmar, one then weighs the amount of material that passes through each of the sieves to determine the size of the particles in any given sample. (*Id.*) He also testified that grain size analysis is a "visual" analysis: "You collect a sample and its got some big pieces, small pieces, and some really tiny pieces in it, you can differentiate one from the other." (R. at 703-04.) Based upon GEO Engineering's testing, Dr. Kaczmar concluded that the grain size of the soil samples for quadrants II and III did not match the grain size of the samples from the foundry's lot. (R. at 705.)

[2] Despite presentation of evidence indicating several sources of contamination and that the sand remained in certain portions of the Site, Remaining Defendants failed to provide the Court with a way to separate the harms or the costs of cleanup. *Cf. Northwestern Mutual Life Ins. Co. v. Atlantic Research Corp.*, 847 F.Supp. 389, 401 (E.D.Va.1994) ("Although it is reasonably clear that several sources, including the lime pit and the Hot Lab, contributed to the release of hazardous materials at the facility, there is no way to separate out these harms."). The EPA found that the contamination at the Site is foundry-related. While *1258 the EPA's determination is not dispositive, the Court finds it more persuasive than Remaining Defendants' proof which fails to provide the Court with a feasible alternative. Thus, the Court finds that the harm at the Site is indivisible.

B. Apportionment of Liability

Remaining Defendants bear the burden, in the case of indivisible harm, of providing the Court with a rational basis for apportionment of liability. In their post-trial brief,

however, Remaining Defendants argue that the burden somehow rests with Plaintiffs: "The spotty data produced by Abex makes extrapolation of generators' shares from the few documents highly speculative.... Abex, not the Railroad Defendants should bear the consequences of its unexplained failure to produce complete records of shipments to the Foundry for 46 of the Foundry's 51 years of operation." (Defs.' Br. at 20.) The Court recognizes that the parties produced few records to document the activity at the foundry. The foundry operated from 1927 until 1978; however, the parties produced "relatively complete" records for five non-consecutive years and some additional information for a few Defendants who produced their own records. (R. at 436.) The parties also had the benefit of information provided by Mr. Elmer Oakes, who was employed at the foundry for approximately twenty-two (22) years. Despite the paucity of documents, in order to avoid joint and several liability, Remaining Defendants had the burden of providing the Court a rationale for apportionment. Cf. Chesapeake & Potomac Tele. Co. v. Peck Iron & Metal Co., 814 F.Supp. 1269, 1279-80 (E.D.Va.1992) (finding that it could not "reasonably divvy up the environmental harm" for a site with six years of incomplete records for company which operated for fifteen years). As the Court explains below, Remaining Defendants failed to carry this burden; however, the Court has been able to fashion from all the evidence a reasonable basis for apportionment.

In this instance, Remaining Defendants are liable for contamination caused by disposal and/or treatment of worn journal bearings. Remaining Defendants attempted to establish the volume of waste, in the form of worn journal bearings, each party contributed to the Site. They offered the testimony and compilation [FN5] of data of Matthew Low, an engineer and attorney, whose firm developed a database of shipments of lead bearing materials into the foundry. Mr. Low testified that for the years for which he had data, Defendants I shipped approximately 90% of the non-virgin lead-bearing materials to the Site. (R. at 590.) He also testified that CSX Transportation, Inc. and its related entities, Fruit Growers Express Company, Inc., and Norfolk Southern Railway Company and its related entities shipped approximately 66.85% of the lead-bearing material into the Site. (See R. at 569, 614-15.) Remaining Defendants presented and the Court admitted most, if not all, of the records used by Mr. Low's firm to create the database. (R. at 624 (admitting Defendants' Exhibits 40-124, 153-55).) However, after cross-examination of Mr. Low, the Court sustained Plaintiffs' objection to the admission of Remaining Defendants' compilation as an exhibit. (R. at 618-20 (Defendants' Exhibit 39 refused).) Cross-examination of Mr. Low indicated numerous inaccuracies and discrepancies between the compilation and the underlying documents. (R. at 575-615.) For

example, on cross-examination, Mr. Low admitted that in at least four instances, his firm erred in interpreting the entries in the foundry's records for pounds of worn journal bearings shipped to the foundry. His firm attributed poundage to non-existent entities when the entries were actually for parties to this litigation. Plaintiffs' counsel also pointed out approximately six other discrepancies in Remaining Defendants' compilation. In rejecting the compilation, the Court ruled that although it could accept a summary chart pursuant to Rule 1006 of the Federal Rules of Evidence, Remaining Defendants' compilation did not fairly represent the evidence before the Court: the underlying records. *1259 United States v. Bakker, 925 F.2d 728 (4th Cir.1991); United States v. Strissel, 920 F.2d 1162 (4th Cir.1990); United States v. Porter, 821 F.2d 968 (4th Cir.1987).

FN5. Rule 1006 of the Federal Rules of Evidence provides that "[t]he contents of voluminous writings ... which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." Fed.R.Evid. 1006.

Plaintiffs retained Dr. Kenneth Wise [FN6] to estimate, *inter alia*, the poundage of worn journal bearings that each Defendant sent to the foundry. Dr. Wise used documents from the foundry that indicated the amount of metal received by the foundry, (Pls.' Exs. 1-27), bills of lading to railroads or from truck drivers, invoices for conversions of worn journal bearings into new journal bearings, and credit letters. (Pls.' Exs. 28-234.) Dr. Wise testified that he had relatively complete information for the years 1961, 1962, 1964, 1967, and 1968. (R. at 436.) Dr. Wise also relied upon the deposition of Elmer Oakes and several other employees of Pneumo Abex, as well as the affidavit of Mr. Oakes. Dr. Wise used Moody's Reports to develop estimates of the amount of material sent by conversion customers. (R. at 430, Pls.' Ex. 244.) Dr. Wise testified that in making his estimate, he considered the possible bias against companies that were not consistent users of the foundry over time. (R. at 437.) From Moody's Reports, he obtained information on the "ton miles[,] or the number of freight miles[,] or [the] number of gondola cars ... to extrapolate for certain companies into years where Elmer Oakes suggested they would have been customers of the foundry but which were not covered by the documents." (R. at 437.) Dr. Wise testified that according to his calculations, which exclude the contributions of Pittsburgh and Lake Erie Railroad Company, [FN7] Remaining Defendants "Fruit Growers Express along with CSX and Norfolk Southern" delivered 80.1% of the worn journal bearings to the foundry. (R. at 477.) Plaintiffs did not offer as an exhibit a summary of Dr. Wise's projections.

FN6. Dr. Wise holds a bachelor's degree in physics from Harvey White College and a doctorate in economics from Massachusetts Institute of Technology. (R. at 420.) He has experience in the lead industry and other metals markets. (R. at 420-22.)

FN7. Counsel for Defendant Pittsburgh and Lake Erie Railroad Company indicated that his client had filed for relief under Chapter 11 of the Bankruptcy Code. The Court released counsel from the trial pursuant to the automatic stay of Chapter 11. 11 U.S.C. § 362 (1994).

Remaining Defendants objected to Dr. Wise's projections because he relied upon records from only a few of the years at issue. Dr. Wise also testified that he did not include Third-Party Defendant, Illinois Central Railroad Company in the calculations. (R. at 472.) Furthermore, Remaining Defendants questioned many of the assumptions upon which Dr. Wise based his conclusions, such as suggesting that the estimates assumed consistent usage of the foundry by Defendants as opposed to use of competing operations, (R. at 469), or use of one of Pneumo Abex's foundries in other parts of the country. (R. at 470.) However, Dr. Wise testified that when he made the estimate, he took into account indications that a railroad was not using the foundry in Portsmouth at a particular time. (R. at 470.) He also testified that he made adjustments according to Mr. Oakes's testimony about how long a railroad was a customer of the foundry. (R. at 474.)

[3] The Court finds Dr. Wise's methodology to be a reasonable approach for estimating the contributions of Defendants and that it reflects more accurately the available records than does Remaining Defendants' compilation as presented by Mr. Low. Furthermore, having rejected Remaining Defendants' compilation as unrepresentative of the underlying records, use of Dr. Wise's calculations is the only way for the Court to avoid assigning Remaining Defendants with 100% of Defendants' Share of the liability (minus the amounts of settlements). Accordingly, the Court assigns Remaining Defendants 80.1% of Defendants' Share as discussed below in section III.D.

C. Recoverable Costs/Costs Consistent with the NCP

[4] Section 107(a)(4)(B) provides that Remaining Defendants are liable for "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Plaintiffs, however, bear the burden of proving that their response costs are consistent with the national contingency *1260 plan (the "NCP"). United States v. Northeastern Pharmaceutical & Chem.

Co., Inc., 810 F.2d 726, 747 (8th Cir.1986); United States v. J.M. Taylor, 909 F.Supp. 355, 362 n. 8 (M.D.N.C.1995). Remaining Defendants contend that Plaintiffs have not established that many of their costs are either necessary or consistent with the NCP. Remaining Defendants also argue that the applicable statute of limitations bars some of Plaintiffs' claims. More specifically, Remaining Defendants challenge Plaintiffs' claims for the costs of oversight by the EPA and the VDWM, attorneys' fees, the lost time of the employees of the City and the PRHA, and medical monitoring. Remaining Defendants also charge that Plaintiffs are attempting to win "multiple recovery" by presenting more than one bill for a single expense.

The Court begins its analysis with the recognition that CERCLA does not define the phrase "costs of response." CERCLA does, however, define "response." The statute defines "response" as "remove, removal, remedy, and remedial action; ... all such terms ... include enforcement activities related thereto." CERCLA § 101(25). CERCLA further defines remove and removal in § 101(23) and remedy and remedial action in § 101(24). Thus, it appears that the costs of removal and remedial actions are costs of response. Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1154 (9th Cir.1989).

The Court now turns to the requirement that the costs of response be consistent with the NCP. The purpose of the NCP "is to provide the organizational structure and procedures for preparing for and responding to ... releases of hazardous substances...." 40 C.F.R. § 300.1 (1995). "The NCP provides ... for [p]rocedures for undertaking response actions pursuant to CERCLA...." 40 C.F.R. § 300.3(b)(4) (1995). The regulations further provide as follows:

For the purpose of cost recovery under section 107(a)(4)(B) of CERCLA:

- (i) A private party response action will be considered "consistent with the NCP" if the action, when evaluated as a whole, is in *substantial compliance* with the applicable requirements in paragraphs (5) and (6) of this section, and results in a CERCLA-quality cleanup; and
- (ii) Any response action carried out in compliance with the terms of ... a consent decree entered into pursuant to section 122 of CERCLA will be considered "consistent with the NCP."

40 C.F.R. § 300.700(c)(3) (1995) (emphasis added). Most of Plaintiffs' claimed costs are for the services rendered by the vendors, contractors, and subcontractors who conducted the actual work at the Site; "the main thrust of the remedy is to excavate soil containing lead." (R. at 49.) Plaintiffs have conducted this work under the direction of the EPA and the VDWM, consistent with various administrative orders and consent decrees. (E.g., R. at 48-52; 250-55.) The Court thus finds that the majority

of the claimed costs are recoverable.

1. Statutes of Limitations

Section 113(g)(2)(A) of CERCLA provides in relevant part that actions for the recovery of costs referred to in § 107 for a removal action "must be commenced ... within 3 years after the completion of the removal action." Remaining Defendants argue that the action for recovery of the costs associated with the Consent Order of 1986 is time-barred. Remaining Defendants rely upon the EPA's statement in the administrative order of March, 1992, issued pursuant to § 106(a) of CERCLA, that the removal action under the 1986 Consent Order was completed "on or about February of 1988." (Pls.' Ex. 314, at 3.) Plaintiffs filed their complaint in July of 1994. Remaining Defendants do not cite any cases for the proposition that a statement from the EPA in a unilateral administrative order is dispositive of the issue of when the statute of limitations tolls. [FN8] Plaintiffs counter that for purposes of the statutes of limitations, all activity up to and including issuance of a record of decision constitutes the removal action.

FN8. Defendants do, however, cite *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 840 (6th Cir.1994) and *One Wheeler Rd. Assocs. v. Foxboro Co.*, 843 F.Supp. 792 (D.Mass.1994), which held that the removal actions were not complete until the last removal action concluded.

*1261 In *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 840 (6th Cir.1994), the United States Court of Appeals for the Sixth Circuit affirmed the district court's ruling that "surface removal activity and the RI/FS comprise a single removal action for statute of limitations purposes." In that case, the defendants argued that the surface removal activity was an emergency physical removal under § 104(a) of CERCLA and the RI/FS was conducted pursuant to § 104(b). Thus, they argued that because different subsections of the Act governed the activities, the activities were distinct, with two different dates of completions. In finding that both activities comprised one removal action, the Sixth Circuit found that the two subsections were interrelated and implied Congress's expectation that both types of activities would be taken in tandem. *Id.* at 840-41.

[5] Several district courts have held that the statute of limitations does not begin to run until the EPA issues the record of decision. *E.g.*, *United States v. Davis*, 882 F.Supp. 1217, 1225-27 (D.R.I.1995) (citing cases); *California v. Celtor Chem. Corp.*, 901 F.Supp. 1481, 1487-89 (N.D.Cal.1995). Citing *Kelley v. E.I. DuPont de Nemours & Co.*, the district court in *Celtor Chem. Corp.*

found that the first phase of the cleanup was the removal action which ended when the EPA signed the ROD and that "[a]ll of the cleanup activities which took place within this time period, including the Remedial Investigations and Feasibility Studies, constitute a single 'removal action' under CERCLA." 901 F.Supp. at 1488. The Court finds persuasive the reasoning of these cases. Plaintiffs have been engaged in this cleanup for some time; however, their efforts have been continuous and the EPA did not issue the ROD until 1992 and the Amended ROD until 1994. Thus, the Court finds the statute of limitations bars none of Plaintiffs' claims presented to the Court.

2. Costs of Oversight

Plaintiffs petition the Court for recovery of the costs they reimbursed the EPA for oversight of the cleanup activities. Pursuant to the Consent Decree, Plaintiffs have reimbursed the EPA \$1,170,131.37, and the Court received testimony that subsequent to the Consent Decree, Plaintiffs have paid the EPA an additional sum of \$570,064.34 for a total of \$1,740,195.71 (R. at 377-78, Pls.' Exs. 259, 363.) Plaintiffs argue that because the Consent Decree required them to reimburse the EPA for its costs of oversight, they should be able to recover Remaining Defendants' proportional share. As for the involvement of the VDWM, Plaintiffs conducted the RI/FS under the supervision of VDWM. Also, the EPA and the Commonwealth of Virginia jointly published the 1992 ROD and the Amended ROD. Remaining Defendants argue that only the EPA's costs associated with the Remedial Investigation/Feasibility Study ("RI/FS") conducted pursuant to the consent order of 1989 are recoverable. They further argue that the RI/FS terminated with the final document in February, 1992. Remaining Defendants make no mention of costs associated with the oversight of VDWM.

[6] The United States Court of Appeals for the Fourth Circuit has not addressed the recovery of costs for agencies' oversight. In support of their position, Remaining Defendants cite *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1278 (3d Cir.1993), which drew a distinction between the government's role in performing cleanups and the government's role in supervising cleanups by private parties. *Cf. United States v. Lowe*, 864 F.Supp. 628, 632 (S.D.Tex.1994) (holding that *Rohm & Haas* leads "to the incongruous result that the EPA could recover the costs of overseeing its own contractors but not the costs of overseeing those hired by the potentially responsible parties"). Discussing § 104(b) of CERCLA, the United States Court of Appeals for the Third Circuit held that an RI/FS is one type of investigation contemplated by § 104(b) and is thus a removal action. *Rohm & Haas*, 2 F.3d at 1277. However, the Third Circuit held that "if what the

government is monitoring is not the release or hazard itself, but rather the performance of a private party, the costs involved are non-recoverable oversight costs." *Id.* at 1279. Plaintiffs cite a number of cases which have not similarly restricted recovery of the costs of oversight. *E.g.*, *1262 United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir.1989); California v. Celter Chem. Corp., 901 F.Supp. 1481 (N.D.Cal.1995); United States v. Lowe, 864 F.Supp. 628 (S.D.Tex.1994). In *R.W. Meyer, Inc.*, the United States Court of Appeals for the Sixth Circuit held that § 107(a) authorized the recovery of indirect costs. 889 F.2d at 1504. In rejecting the defendant's arguments, the Sixth Circuit explained as follows:

[T]o the extent cleanup actions are necessary, we are persuaded that the statute contemplates that those responsible for hazardous waste at each site must bear the full cost of cleanup actions and that those costs necessarily include both direct costs and a proportionate share of indirect costs attributable to each site. In essence then, the allocation of indirect costs to specific cleanup sites effectively renders those costs direct costs attributable to a particular site.

Id. This Court is most persuaded by the reasoning of the Sixth Circuit. In this instance, the cleanup would not occur without the oversight of the EPA and the VDWM. Thus, the Court finds that these costs of oversight by the EPA and the VDWM are necessary costs of response consistent with the NCP. The Court notes that Plaintiffs have not submitted a claim for the costs of oversight by VDWM. The Court accordingly finds that Plaintiffs may recover the costs of oversight by the EPA that they have already incurred, and pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1994), Plaintiffs may recover any future costs of oversight by the EPA and the VDWM that are consistent with the NCP and this memorandum opinion and order.

3. Attorneys' Fees

In Key Tronic Corp. v. United States, 511 U.S. 809, ----, 114 S.Ct. 1960, 1967, 128 L.Ed.2d 797 (1994), the United States Supreme Court held that "some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B)" and is thus recoverable. In that instance, the Supreme Court considered whether the plaintiff-petitioner could recover the costs associated with pursuing an action for recovery of costs, the cost of the attorneys' efforts to identify potentially responsible parties ("PRPs"), and the costs of the negotiations between the plaintiff-petitioner and the EPA which culminated in a consent decree. The Supreme Court placed the costs at issue into two broad categories: 1) traditional expenses of litigation and those incurred to protect Key Tronic's interest as a defendant in proceedings that established the

extent of its liability and 2) expenses which increase the probability that cleanup will be effective and paid for and that serve a statutory purpose other than the reallocation of costs. *See id.* at ---- - ----, 114 S.Ct. at 1967- 68. The Supreme Court held that the plaintiff-petitioner could recover only the attorneys' costs for identifying PRPs. *Id.* at ----, 114 S.Ct. at 1967.

Corporate Counsel for Whitman Corporation testified that one law firm, Winston and Strawn, assisted Pneumo Abex in its dealings with the EPA in a number of ways. (R. at 239.) He further testified that the law firm 1) assisted in the discussions of the appropriate remedy, 2) participated in various activities involving cleanup, and 3) assisted in identifying PRPs. (*Id.*) Although this witness testified that he did not know if the invoices involved negotiating the consent decree in 1986, (R. at 245), the Court's review of the invoices indicate that they cover the period from 1991 to 1994. The witness also testified that the invoices covered a period too early in time to be associated with the latest consent decree which the Court entered in 1996. (*Id.*)

The Court's review, however, also uncovered some deficiencies in Plaintiffs' proof of its recoverable costs. For example, many of the invoices contain entries for conferences among attorneys within the firm. Although the entries indicate that the conferences were held to discuss the Site, the Court is unable to discern whether the conferences concerned Plaintiffs' liability, consent decrees or administrative orders, or the technicalities of the cleanup. For example, one of the invoices from Winston and Strawn lists one hour of billable time for "Status and strategy conference with J. Homsey." (Pls.' Ex. 258 Moore 1.) This conference could have involved *1263 the technicalities of the cleanup, the recovery of costs from other PRPs, or any number of matters for which Plaintiffs may or may not be entitled to recover; Plaintiffs simply did not illuminate the nature of such expenses. Another invoice contains an entry for eleven (11) hours for "Preparation for meeting with U.S. EPA." (Pls.' Ex. 258 Moore 1.) The Court does not know if the meeting involved negotiations for a consent decree for which costs would not be recoverable or if it involved some compliance issue for which costs may be recoverable. The invoices also contain numerous entries for "Photocopy Miscellaneous Environmental Documents." Plaintiffs did not offer testimony of how or if the firm segregated photocopying charges related to the cleanup from those that were not. Similarly, the Court could not discern whether the long distance telephone charges were related to the cleanup. Also, throughout the invoices, portions of the descriptions of the billed for activities have been blacked-out and the total number of hours associated with the activities have been adjusted, presumably downward,

by handwritten notations. Plaintiffs offered no testimony to establish how they or the law firm adjusted the hours. Furthermore, the manner in which the adjustments are indicated in the records suggests to the Court that these adjustments were made long after Plaintiffs incurred the costs, when memories may have been inaccurate or incomplete.

[7] Corporate Counsel for Pneumo Abex [FN9] testified that another law firm, Bingham, Dana & Gould provided legal assistance through legal research, identifying actions the EPA had taken at other sites contaminated with lead, addressing legal issues in formulating work plans, addressing issues of compliance and issues that arose during the response activities, and assisting with the contracts of vendors and contractors. (R. at 376-77.) These invoices covered the period from 1986 to 1990. This witness further testified that one of the law firm's functions was "to protect the corporate interest." (R. at 388.) When asked on cross-examination in a series of questions whether he could separate the services of the law firm into those that protected the corporate interest generally and those associated with the cleanup, (R. at 388- 91), the witness answered that such a separation was "not a distinction that makes sense" to him. (R. at 391.) One of the invoices from Bingham, Dana & Gould lists "Prep for, attend meeting at Abex re strategy on remedial issues and NPL listing" for \$1,182.50. (Pls.' Ex. 258 Kenfield 1.) Another example is "Telephone conference with Rhodes and Lee" for \$60.00. (*Id.*) Without further explanation, the Court cannot reasonably conclude that the firm performed this work in connection with the actual cleanup as opposed to protecting Pneumo Abex's interest in its attempt to limit its liability or avoid listing on the NPL.

FN9. For clarification, the Court understands that the witness was employed by Abex Corporation in 1986 and is currently employed by McAndrews & Forbes, a holding company. Pneumo Abex went through a series of changes in its corporate structure, and McAndrews and Forbes now manages this case for Pneumo Abex. However, the Court is primarily concerned with the witness's involvement as a past and present legal representative for Pneumo Abex. (R. at 365-67.)

Although Plaintiffs presented two witnesses to lay a foundation for the admission of the invoices from the two law firms, the Court, through its examination of the exhibits, is unable to discern whether many of the expenses incurred are "closely tied to the actual cleanup." [FN10] Unlike the plaintiff-petitioner in *Key Tronic*, Plaintiffs did not provide the Court with a categorization of its attorneys' fees. Rather, Plaintiffs provided the Court with two sets of invoices, totalling more than 500 pages, with the only

assistance to the Court being the total cost for each law firm. The Court thoroughly reviewed the exhibits and has found that a portion of Pneumo Abex and Whitman Corporation's claimed attorneys' fees are closely tied to the actual cleanup and are recoverable.

FN10. The Court notes that Plaintiffs merely "dumped" voluminous invoices in the record without sufficient explanation of the presumably relevant information within the exhibits. The Court questioned whether this practice could create any difficulties, and Remaining Defendants indicated that they would be challenging specific items. (*E.g.*, R. at 244- 46, 403, 407, 424.)

*1264 Regarding the City's claim for the services of its outside legal counsel, Hogan and Hartson, L.L.P., the Court examined the invoices and allowed only those portions that the Court could reasonably attribute directly to the cleanup. The Court similarly allows the costs for the services of the PRHA's outside legal counsel, Cooper Spong & Davis. Also, the Court notes that portions of several of the entries for Hogan and Hartson, L.L.P. were redacted, but the corresponding hours for those activities had not been adjusted. (Pls.' Ex. 279.) Furthermore, the City's and the PRHA's proof suffered from many of the same deficiencies that Pneumo Abex's and Whitman Corporation's proof did.

4. The Lost Time of the Employees of the City and the PRHA

Plaintiffs presented evidence of the time spent by employees of the City and the PRHA in dealing with the Site. They calculated the portion of each employee's salary that could be attributed to the time spent on the Site. Remaining Defendants argue that the lost time is a form of economic loss that is not recoverable under CERCLA. Plaintiffs respond that the use of the employees of the City and the PRHA rather than consultants does not render the costs of such work unrecoverable. Plaintiffs cite *T & E Indus., Inc. v. Safety Light Corp.*, 680 F.Supp. 696 (D.N.J.1988), in support of their position that the time spent by the employees of the City and PRHA are recoverable because the activities performed by these employees were required by the NCP. In *T & E Indus.*, the district court found that the plaintiff could recover for the time spent by its president if it could adduce sufficient facts to demonstrate that he was personally involved in monitoring, evaluating, and minimizing the contamination. 680 F.Supp. at 707. Cf. *Hatco Corp. v. W.R. Grace & Co.*, 849 F.Supp. 931, 971-72 (D.N.J.1994) (holding that salaries of management and personnel are recoverable as indirect costs associated with general operation of response

action). In so holding, the court rejected the defendants' argument that it should draw a distinction between costs recoverable by the government and those recoverable by private parties. *Id.* at 706. Remaining Defendants cite *Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.)*, 126 B.R. 656, 663 (D.Mass.1991), *aff'd in part, rev'd in part on other grounds*, 993 F.2d 915 (1st Cir.1993), in support of their position that the lost time is not recoverable.

In finding that the value of the time of the plaintiff's employees was not recoverable, the bankruptcy court explained as follows:

Nothing in the statutory language of CERCLA indicates that employee time should be considered a cost of response. Rather, employees must be paid whether or not they have to spend their time addressing waste cleanup efforts; these costs are not made necessary by the improper disposal of wastes. To interpret CERCLA to require reimbursement of employee time and effort would, in effect, compensate CERCLA plaintiffs for lost employee productivity. But CERCLA was never intended to provide for the recovery of business losses.

Id. The bankruptcy court relied upon *Artesian Water Co. v. Government of New Castle County*, 659 F.Supp. 1269, 1287 (D.Del.1987), *aff'd*, 851 F.2d 643 (3d Cir.1988), which held that losses resulting from idling property and equipment were not recoverable because they were economic losses. The Court finds Remaining Defendants' reliance upon this line of cases unpersuasive, particularly because the losses discussed in *Artesian Water Co.* were those associated with the business previously conducted upon the contaminated site, not with the losses and/or costs associated with the actions taken in response to the contamination.

[8] As a result of responding to the contamination for which Defendants' are partially responsible, the City and the PRHA presumably faced one or more of three scenarios because they did not hire outside consultants to handle the situation: 1) existing personnel diverting their time from other governmental affairs to attend to the Site and other matters remained unaddressed, 2) hiring of new personnel, temporary or permanent, to compensate for the increased work load, or 3) existing personnel working overtime. Regardless of which scenario occurred, the *1265 Court finds that CERCLA provides for all liable parties to share in the costs. The Court now turns to Plaintiffs' proof of these indirect costs.

To calculate the costs for the time of the employees of the City and the PRHA, Plaintiffs referred to the calendars of the personnel involved and estimated, based upon entries in the calendars, how many hours the employees spent dealing with the Site. The City presented calendars for

several employees. The Court found this documentation to be problematic for several reasons. First, many of the entries in the calendars are illegible because of poor quality photocopies. (*E.g.*, Pls.' Ex. 266.) Second, although the activities described may be directly related to cleanup and the entries provide the times at which the activities presumably began, the entries do not include when the activities ended. (*E.g.*, Pls.' Ex. 269.) Also, these estimates of time are not contemporaneous with the occurrence of the meeting or activity but have been made after the fact for meetings dating back to as early as 1991. (*See, e.g.*, Pls.' Ex. 269.) For example, the Director of Operations for the PRHA testified as follows about how the PRHA calculated its employees' hours:

We had my secretary, who also serves as the secretary of the Executive Director and at the time served as secretary to the Director of Housing, she went through and compiled meeting dates from our calendars. She saves our calendars going back a number of years. Whenever we had a meeting scheduled with CSX or Abex, or related to Abex, she would know the meeting related to Abex and what topic. She went back and computed those over the pas[t] three or four years.

(R. at 883.) One example of such a computation is an entry in the PRHA's proof for work from 1992 to 1995 by six (6) employees for sixty-nine (69) hours. The Court is unable to verify such claims. The witness further testified that "[t]he secretary went through the calendar, and where we had a meeting noted--for example, if we had a 1:00 meeting noted for Abex and then we had a 2:00 meeting for something totally unrelated, she would put an hour down and assign it to the Abex category." (R. at 884.) Although a meeting may have appeared on an individual's calendar, the Court cannot be certain that the individual actually attended the meeting nor can the Court be certain that the individual remained at the meeting until the next appointment on his/her calendar. The witness was asked if he thought the calendared time or uncalendared time would be greater for the employees and he replied:

Well, certainly my experience has been that we do not keep time the way attorneys do. So if I had a meeting with two other people in the office to discuss something that came through on Abex or something from EPA or whatever, we might discuss it for an hour or two hours, but I don't run in and mark that on my calendar, so I would say that the time that my secretary was able to document for meetings would be the tip of the iceberg in terms of the amount of time that's spent dealing with Abex over the years....

(R. at 886.) Although the City and the PRHA may have spent much more time on the Site than they have claimed, the Court must still question the reliability or accuracy of the claims presented. This uncertainty is largely insurmountable, particularly because Plaintiffs did not present testimony from any of the individuals who actually

made the estimates of time.

Furthermore, Plaintiffs made little or no showing that these activities and associated costs were "necessary response costs consistent with the NCP." On several occasions, the Court cautioned Plaintiffs to provide specific testimony about the exhibits, but Plaintiffs continued to cursorily offer voluminous pages into evidence without attempting to clarify many issues on re-direct examination. (E.g., R. at 245-46, 407, 424.) Also, many of the witnesses through whom the exhibits were offered were for the most part custodians of the records and did not have direct knowledge of why the costs were incurred. (E.g., R. at 244, 412.) The lack of "direct knowledge" testimony is particularly problematic when the Court attempts to discern the meaning of entries such as "EPA" for one hour or "Fisher Funeral Home Issues" for four (4) hours. (Pls.' Ex. 265.)

*1266 [9] Although the Court finds that as a matter of law indirect costs for the work performed by employees of PRPs may be recoverable, the deficiencies of Plaintiffs' proof in this case prevent recovery for most of their claims for the salaries of the employees of the City and the PRHA.

5. Medical Monitoring/Department of Health's Costs

Remaining Defendants also contend that the City and the PRHA may not recover costs associated with "medical monitoring." They cite *Price v. United States Navy*, 39 F.3d 1011, 1017 (9th Cir.1994) and *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir.1992) in support of their position. However, Remaining Defendants provide no discussion of the facts or reasoning of these cases or how they apply to the case at hand. Plaintiffs seek recovery of costs for tests for the level of lead in the blood of the residents of the Site, clinic visits, and a survey. (Pls.' Ex. 273; R. at 404.) Having reviewed the cases Remaining Defendants cite, the Court does not find that these costs are of the type considered in those cases.

[10] The United States Court of Appeals for the Ninth Circuit in *Price* followed *Daigle* in holding that an individual homeowner could not recover "the cost of medical monitoring to detect the onset of any latent disease caused by exposure to hazardous waste." 39 F.3d at 1014, 1015-17. In *Daigle*, the United States Court of Appeals for the Tenth Circuit upheld a denial of the plaintiffs' claim for the establishment of a fund to finance long term medical monitoring or surveillance to detect the onset of latent disease. However, the Ninth Circuit has clarified its position in *Price* to explain that it held "that private party medical monitoring activities, initiated and coordinated independently of ongoing CERCLA cleanup efforts, were not § 9601 removal or remedial actions.... [However,]

[t]he reasoning in *Durfee v. E.I. DuPont De Nemours & Co.*, 59 F.3d 121 (9th Cir.1995)] and *Price* does not apply to health assessment and surveillance actions engaged in by a governmental agency pursuant to explicit CERCLA provisions. *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469 (9th Cir.1995) (emphasis added). In *Hanford Downwinders Coalition*, the Ninth Circuit considered costs incurred by the Agency for Toxic Substances and Disease Registry ("ATSDR"), established by CERCLA § 104(i) which is not at issue in the instant case. However, in this case, the VDWM, one of the lead agencies at the Site, asked the City's Health Department to conduct the screening to help VDWM determine the necessity of immediate soil removal. (Pls.' Ex. 274.) Each of these cases discusses recovery of costs for personal injuries or diseases as being inconsistent with the legislative history and distinguished such costs from the examples of removal actions provided in § 101(23) of CERCLA. This Court finds that in the instant case "[t]o the extent that plaintiffs seek to recover the cost of medical testing and screening conducted to assess the effect of the release or discharge on public health or to identify potential public health problems presented by the release, however, they present a cognizable claim under section 9607(a)." *Brewer v. Ravan*, 680 F.Supp. 1176, 1179 (M.D.Tenn.1988). The blood tests in this case do not appear to be the result of the residents' personal concerns but a result of the VDWM's attempt to assess the effects of the release or threatened release upon the residents of the Site and the rapidity with which Plaintiffs needed to respond to the release or threatened release. Accordingly, the Court finds that these medical costs are recoverable.

6. JSG Technical Services

[11] Remaining Defendants also argue that JSG Technical Services ("JSG") did not perform response activities and, thus, Plaintiffs may not recover the cost of JSG's services. JSG became involved with the Site after issuance of the consent decree in 1986. Remaining Defendants focus on some of the descriptions of work in JSG's invoices such as "professional services" "management services," and "environmental management services." (Pls.' Ex. 258 Bassano 10.) Although the Court recognizes that these are rather vague descriptions, Plaintiffs offered testimony *1267 to clarify the services provided. The president of JSG testified as follows:

[JSG] reviewed a work plan that was submitted to the EPA, designed curbing, fencing, capping and storm water runoff that was constructed at the site; hired contractors to do the excavation, sampling, construction, and testing required; and I reviewed invoices for those contractors to ensure that the work was done that was invoiced for, and the invoices were accurate, and I approved invoices for that work.

(R. at 338-39.) He also testified that he worked on "treatability studies ... working toward other means of treating the material rather than disposing of it...." (R. at 339-40.) The Court finds this testimony credible and sufficient evidence to establish that JSG assisted in the cleanup and removal of hazardous substances and took actions consistent with a permanent remedy. JSG provided services "to prevent, minimize, or mitigate damage to public health or welfare or to the environment ... [including] security fencing or other measures to limit access," CERCLA § 101(23), and performed or oversaw the performance of such tasks as collection of runoff and excavation. CERCLA § 101(24). Accordingly, the Court finds that Plaintiffs may recover the costs of these services as well as those of contractors and vendors listed in Plaintiffs' Exhibit 259.

7. Multiple Recovery

In their post-trial brief Remaining Defendants provide the Court one example of Plaintiffs allegedly seeking to recover twice for one invoice. The Court received testimony that Pneumo Abex sent many of the invoices for work at the Site to its counsel, Winston and Strawn. (R. at 288.) Winston and Strawn then paid the vendors and subcontractors and, according to Remaining Defendants, billed Pneumo Abex for "expert consulting fees." At trial Plaintiffs submitted the bills from Winston and Strawn as well as invoices from their vendors and subcontractors. Based upon this information and this one example, Defendants argue that "at the least all of Winston's entries labeled 'expert consultation fees' [should] be removed from the total response costs figure." (Defs.' Br. at 28.)

The Court makes several observations in addressing Remaining Defendants' concern. First, Remaining Defendants have provided the Court with one invoice number to be found in Plaintiffs' Exhibit Dunnell 1. More than 500 loose pages comprise Plaintiffs' Exhibit Dunnell 1. Remaining Defendants also direct the Court's attention to Plaintiffs' Exhibit 258 Moore 1, the invoices from the law firm of Winston and Strawn. In reviewing the law firm's invoices, the Court has not included in Plaintiffs' recoverable costs the entries for "expert consultation fees." Furthermore, testimony suggests that these entries were offered as proof that the invoices from vendors, contractors, and subcontractors listed separately in Plaintiffs' Exhibit 259 and provided in Plaintiffs' Exhibits Dunnell 1 and Dunnell 2 were paid on behalf of Pneumo Abex by its counsel. Remaining Defendants have simply failed to adduce sufficient proof for the Court to find that Plaintiffs are attempting to exact double recovery. Furthermore, the Court's independent review of the documentation does not

suggest such difficulties.

8. Total Recoverable Costs

[12] The Court conducted an extensive review of Plaintiffs' documentation of costs. With the exception of the documentation for technical services by vendors, contractors, and subcontractors, Plaintiffs' proof suffered from a lack of direct testimony by individuals with personal knowledge of how or why Plaintiffs incurred the costs. Plaintiffs also failed to separate from the total cost those costs closely tied to the cleanup. For example, many of the costs were associated with consent decrees, particularly attorneys' fees.

a. The City's Costs

The Court disallows much of the City's claimed costs for the services of SCS Engineers because the invoices are for services rendered in the area known as Southside or Portcentre Commerce Park ("Portcentre"). (Pls.' Ex. 275.) Although Portcentre overlaps the Site to a large degree, Plaintiffs offered the Court no method for delineating *1268 which costs were associated within the Site versus those outside of the 700-foot circle. (See R. at 415-16, 876-77.) The Court has no rationale for apportioning those costs. Also, the City submitted costs for long distance telephone bills, (Pls.' Ex. 270), and costs to send one of the resident families to a meeting with the EPA in Washington, D.C. (Pls.' Ex. 271.) Plaintiffs offered no evidence that these costs were necessary and consistent with the NCP. The Court previously has discussed the unreliability of the records upon which Plaintiffs base their claim for the lost time of employees of the City.

b. The PRHA's Costs

The documentation for PRHA's costs suffers from many deficiencies. For example, one entry for employee time for \$43.54 simply indicated "Gordon Wheatley meeting with Mrs. Bailey." (Pls.' Ex. 261.) The Court does not know the nature of the meeting and Plaintiffs offered no testimony to explain the entry in the record. Another example is "Meeting in PA (STH) Abex" for \$1,000.00. Nothing in the record suggests to the Court the nature of this meeting, other than the blanket statement that these are "amounts paid by PRHA relating to Abex Superfund Site." (R. at 882.)

As the Court has discussed above, Plaintiffs bore the burden of establishing that the costs were necessary and consistent with the NCP. Having reviewed Plaintiffs' claims, the Court finds that the following amounts were necessary response costs consistent with the NCP:

1) Oversight by the EPA--

\$1,740,195.71

2) The City's costs--	14,072.67
3) The PRHA's costs--	15,590.64
4) Attorneys' Fees--Whitman Corporation and Pneumo Abex	44,818.50
5) Services related directly to excavation and removal at the Site--Whitman Corporation and Pneumo Abex	5,014,888.74

TOTAL	\$6,829,566.26.

D. Plaintiffs' Share and Defendants' Share

[13] As the Court indicated in its order of March 25, 1996, the Court will determine Plaintiffs' Share and Defendants' Share. CERCLA specifically provides for the Court to use equitable factors in an action for contribution pursuant to § 113(f)(1). Although the instant action is not one for contribution, the Court will use these factors to ensure that the responsible parties bear their fair share of liability. In making this determination, the Court considers several equitable factors. One factor is "the degree of involvement by parties in the generation, transportation, treatment, storage, or disposal of hazardous substances." United States v. Monsanto Co., 858 F.2d 160, 168 n. 13 (4th Cir.1988). The district court in Weyerhaeuser Co. v. Koppers Co., 771 F.Supp. 1420, 1426 (D.Md.1991), listed the following as factors which courts have considered in allocating response costs:

- 1) the ability of the parties to distinguish their contribution to the discharge, release, or disposal of hazardous waste;
- 2) the amount of hazardous waste involved;
- 3) the degree of toxicity of the hazardous waste involved;
- 4) the degree of care exercised by the parties with respect to the hazardous waste concerned;
- 5) the degree of cooperation by the parties with government officials to prevent any harm to the public or the environment;
- 6) the benefits received by the parties from the contaminating activities; and
- 7) the knowledge and/or acquiescence of the parties in the contaminating activities.

Id. Other courts have also considered the financial resources of the parties involved. *E.g.*, Central Maine Power Co. v. F.J. O'Connor Co., 838 F.Supp. 641, 645 (D.Me.1993).

[14] In their post-trial brief, Remaining Defendants argue that as owners and operators of the Site, Plaintiffs should bear most of the costs of cleanup. They argue that the relevant equitable factors are control, culpability, and benefit. (Defs.' Br. at 13-16.) Remaining Defendants also try to rebut the inferences Plaintiffs attempted to raise at trial concerning Remaining Defendants' alleged recalcitrance and

ability to pay. (*Id.* at 17- 19.) Plaintiffs' post-trial brief similarly focused upon Remaining Defendants' refusal *1269 to contribute to the response action, the EPA's issuance of § 106 unilateral administrative orders, and Remaining Defendants' financial resources. (Pls.' Br. at 16-18.) The Court's consideration of many of these factors, as discussed below, suggests that Plaintiffs and Defendants should equally bear the costs of cleanup.

1. Degree of Involvement, Degree of Care, and Knowledge and/or Acquiescence

Pneumo Abex is the most obvious PRP at the Site. It owned and operated the foundry which used worn journal bearings and other materials to cast new journal bearings. As the Court explained in its memorandum opinion and order of March 25, 1996, Pneumo Abex placed the bearings in a furnace to melt them down for re-casting. Pneumo Abex added other metals to the molten scrap to comply with the Association of American Railroads' specifications. The furnaces used were vented to the outside and produced emissions of fine particulate material. Pneumo Abex poured the molten material into sand molds to form the backs of journal bearings. After the backs hardened and Pneumo Abex machined them, Pneumo Abex lined the backs with the scrap lining metal (babbitts) that it had separated from the scrap journal bearings initially. Pneumo Abex reused the sand until the sand lost its capacity to form molds. After washing the sand to reclaim bits of brass, Pneumo Abex placed the sand in a nearby creek from approximately 1946 to 1961. After 1961, it placed the sand on the back lot of its property. (R. at 940-41.) However, there is no evidence to suggest that Pneumo Abex knew that it would be subject to liability for its disposal of the sand. (*See* R. at 942.)

Defendants I, however, displayed greater involvement in the treatment and/or disposal of the hazardous substances than many other generators of hazardous substances. For example, Defendants I shipped worn journal bearings to the foundry in their own rail cars. (R. at 939.) They also had company representatives visit the foundry on a regular basis to inspect the new journal bearings and the operation in

general. (R. at 937-38.) Mr. Oakes testified that the contracts between the foundry and Defendants I required access to the foundry per the Association of American Railroads' specifications for lined journal bearings as follows:

The inspector representing the purchaser shall have free entry, at all times, while the work on the contract of the purchaser is being performed, to all parts of the manufacturer's works which concern the manufacture of the material ordered. The manufacturer shall afford the inspector, that the material is being furnished in accordance with these specifications. Tests and inspection shall be made at place of manufacture prior to shipment unless otherwise specified.

(Pls.' Ex. 362 at 3, R. at 937.)

Landowner Defendant Holland Investment and Manufacturing, Inc. purchased the foundry in 1984 and conducted vehicle maintenance and repairs on the lot. (Stip. ¶ 16.) Holland Investment and Manufacturing, Inc. moved its operation from the Site in late 1987 or 1988. (R. at 218.) Mr. Rhodes of GEO Engineering testified that as for the contamination of the property owned by Landowner Defendant Runnymede Corporation, "Clearly the very high levels of lead in that area are the result of the foundry operation." (R. at 214.)

The Court's consideration of these factors suggests that Plaintiffs should bear more of the costs of response than Defendants; however, the differences here are only slight. Defendants I were fully involved in the transport of the hazardous substances and were also involved in the treatment and/or disposal of the substances. Plaintiffs were fully involved in the disposal and/or treatment of the hazardous substances. Cf. *Central Maine Power Co.*, 838 F.Supp. at 646 (considering two parties' full involvement in generating and arranging for the disposal of waste and other party's full involvement in treatment and disposal of wastes).

2. The Ability of the Parties to Distinguish Their Contributions

As the discussion above concerning divisibility indicates, the parties are only able to roughly distinguish their contributions to the contamination of the Site. The parties have *1270 produced few records of shipment of worn journal bearings which indicate Defendant I's contributions. Pneumo Abex also contributed scrap metal purchased on the scrap metal market, to the Site. (R. at 787-88.) The Court has used some of Plaintiffs' volumetric analysis to

determine Plaintiffs' Share and Defendants' Share; however, the testimony of Plaintiffs' expert, Dr. Wise, did not include the contribution of lead-bearing materials by Pneumo Abex or Defendants I, individually. The Court has before it no complete volumetric analysis because it refused admission of Remaining Defendants' compilation and Plaintiffs' did not offer theirs. However, Remaining Defendants' expert, Matthew Low, testified that Pneumo Abex contributed approximately 0.9% of the lead-bearing materials at the Site. (See R. at 570-71.)

3. Degree of Cooperation with Government Officials

Response activity at the Site began in 1986. Pneumo Abex has entered into two Consent Decrees, one in 1986 and one in 1996, with the EPA and has been the respondent of one unilateral administrative order issued in 1992 pursuant to § 106(a) of CERCLA. The EPA notified Defendants I on several occasions of their status as PRPs. Finally, on May 6, 1996, approximately two weeks before the trial, the EPA issued to Defendants I a unilateral order pursuant to § 106(a) of CERCLA. Remaining Defendants offered testimony to rebut Plaintiffs' claim that Remaining Defendants had been recalcitrant. Corporate counsel for Norfolk Southern testified that although the EPA sent at least three notices (R. at 488, 490, 491), and a copy of a model consent decree, he viewed the EPA's notifications as "an indication of the agency's jurisdiction under Section 122(a) of CERCLA by which it was renotifying us of the previous special notice waiving the procedures involved in such notice, but inviting further discussion as to our responsibility as EPA has determined it under CERCLA." (R. at 504.) The Court finds that Defendants I's responses to the EPA demonstrate recalcitrance, particularly when considered within the context of the notifications. After identifying Plaintiffs and Defendants I as PRPs and notifying the parties several times of its position, the EPA wrote the following: "By this letter, EPA notifies you of your potential liability with regard to this matter and encourages you to perform or to finance voluntarily those response activities that EPA determines to be necessary at the Site." (Pls.' Ex. 360 at 3.) To date, Remaining Defendants have not performed or financed the performance of any response activities. The letter also included the following: "To further encourage settlement, the EPA is enclosing with this letter a site-specific draft of EPA's model consent decree." (Pls.' Ex. 360 at 4; R. at 504.) Referring to the preceding sentence from the EPA's letter, the corporate counsel testified that he viewed it "as an invitation to negotiate with EPA as to whether and to what extent it deemed or it felt my

company might be responsible for the site." (R. at 504- 05.) The EPA extended this "invitation" in December of 1994. Norfolk Southern met with the EPA in January of 1995 to discuss the special re-notification. However, the counsel testified that Norfolk Southern did not enter into a consent decree because the "EPA has never otherwise asked us to sign a consent decree." (R. at 507.) The next communication from the EPA to Norfolk Southern was the unilateral administrative order of May 6, 1996. (R. at 508.) Norfolk Southern and CSX Transportation, Inc. met with the EPA on May 17, 1996 to discuss the unilateral administrative order. (R. at 508.) When asked if the parties discussed the consent decree at the meeting of May 17, 1996, the counsel testified as follows: "we focused primarily on the need for additional time to respond to their request. We unequivocally indicated our willingness to comply with the order by Tuesday, May 21, one day after the trial was scheduled to begin, and I believe the subject of a consent decree may have come up, but we asked that those matters be deferred pending completion of the actual trial phase of this case." (R. at 509.) He further testified that he was shocked that the EPA issued the order because he had not heard from the EPA in over a year and he thought that if the EPA were going to issue such an order, it would have provided the parties with an opportunity to discuss their *1271 concerns as it had in the past. (R. at 509.) During this time, Remaining Defendants did nothing to try to resolve its difficulties with the EPA. (R. at 538.) The Court finds Remaining Defendants' rationale wanting. Remaining Defendants knew that the EPA considered them PRPs as early as January of 1993, (R. at 488), approximately three and one-half years ago. Plaintiffs served them with the complaint initiating this action in 1994, approximately two years ago. The Court ruled that Remaining Defendants were liable as generators approximately two months before the trial. Most of the parties found liable in that order have settled with Plaintiffs. Yet, Remaining Defendants persist in their refusal to assist in the cleanup of the Site.

4. Benefits Received From the Contaminating Activities

Dr. Wise, Plaintiffs' expert, testified that the railroads derived substantial economic benefits from their use of the foundry. (R. at 431.) He further testified that "for the few years in which I can make a direct comparison, the railroads derived a greater benefit from the operation of the foundry than did the foundry.... [I]t was a factor of almost three or four times the benefit to the foundry." (*Id.*) Dr. Wise

testified that the railroads benefited from using the foundry because they received a greater credit from their scrap journal bearings than they could have received as payment if they sold the bearings on the scrap market. (R. at 431-32.) He calculated that for the years 1961, 1962, 1964, and 1967 the benefit for the railroads ranged from two (2) cents a pound of scrap journal bearings to nine (9) cents a pound. (R. at 432.) He also calculated that the profit for the foundry was two (2) cents per pound in 1961 and two and one-quarter (2 1/4) cents per pound in 1962. (R. at 433.) In order to make these calculations, Dr. Wise used the credit price the foundry paid its customer per pound of scrap metal, the amount per pound the foundry paid on the scrap metal market, and information from the American Metal Market to derive a forecasting equation to estimate what the price on the scrap metal market would have been for months for which he did not have data. (R. at 432.) On cross-examination, Dr. Wise admitted that the foundry derived from its system of conversion the benefit of largely avoiding the scrap metal market. (R. at 460.) However, he testified that the benefit "nets out in their ultimate profits. That would be one reason they would be willing to pay more for this scrap than the scrap dealer...." (*Id.*)

Remaining Defendants presented testimony from Lewis Perl, an economic consultant, to rebut Dr. Wise's testimony about the benefits received by the parties. Mr. Perl testified that he did not think that Dr. Wise's approach made "economic sense." (R. at 840.) In essence, he testified that the profits did not change from year to year because a change in the credit price would always accompany a change in the price of a new journal bearing, with the difference between the two prices remaining constant. (R. at 841.) However, Mr. Perl did not testify to specific instances in the years for which Dr. Wise had data that the changes in the two prices always moved proportionally. He provided hypothetical examples but did not point out specifics in the record. (*See* R. at 842-46.) He also criticized Dr. Wise for comparing the scrap market metal price to the conversion price because the scrap metal market represents cash payments and the conversion represents a credit that is not realized until the new journal bearings are purchased. (R. at 847-48.) In effect, Mr. Perl argued, the railroads lent the foundry the value of the scrap bearings without receiving interest. He also testified that Pneumo Abex avoided the volatility of the scrap market which reduced their price of capital, (R. at 848); Dr. Wise similarly testified. (R. at 460.) The Court notes that the railroads would have also enjoyed the benefits of avoiding the volatile scrap market. Mr. Perl also

testified that "Dr. Wise makes no allowance for the differential quality of the product, which would all flow to the benefit of Abex and certainly not to the railroads." (R. at 848.) Some of Mr. Perl's testimony supported that of Dr. Wise. For example, Mr. Perl testified that

The reason the scrap price was as low as it was throughout this period is because *1272 Abex chose a high transfer price, which made the scrap market uninteresting. Therefore, the railroads didn't go to the scrap market; they went directly to Abex. Therefore, there was not or at least a lesser demand for the scrap metal. Abex doesn't need to go to them. They can go to the railroads directly.

(R. at 849.) Although the thrust of Mr. Perl's testimony was to give an opinion that the railroads did not receive as great a benefit as Dr. Wise had testified, Mr. Perl himself testified that Pneumo Abex presented the most economically attractive option for the railroads. In response to the Court's questions, Mr. Perl testified that the railroads were "neutral" or indifferent to whether they sold their scrap metal on the market or received a credit from the foundry. (R. at 864.) The Court, however, finds this position incredulous. The railroads maintained this relationship for a significant period of time and the Court finds it unlikely that they were "neutral." Mr. Perl further testified that profits from journal bearings accounted for two and one-half percent of the foundry's profits and that it accounted for six-tenths of a percent of the railroads' profits. (R. at 851.) He reached the figures for the railroads by computing the proportion of the railroads' assets that were represented by the value of the journal bearings. (*Id.*) He reached the figure for the foundry by dividing the profits of the foundry at Portsmouth, as calculated by Dr. Wise, by the total profits for Pneumo Abex. (*Id.*) Mr. Perl only calculated the profits for "five or six railroads." (*id.*), and he did not indicate in his testimony which railroads those were. (*See id.*)

Having reviewed the testimony of the parties' experts and the exhibits, the Court concludes that the benefits received do not sharply distinguish the liability of Plaintiffs versus Defendants. The Court's analysis of the information suggests that both parties profited from the arrangement. They both had an alternative--the scrap metal market--but chose to remain in this relationship for many years. Consequently, the Court finds that this equitable factor militates in favor of finding Plaintiffs and Defendants equally liable for the costs of cleanup.

5. Financial Resources of the Parties

Plaintiffs argue that Remaining Defendants are capable of contributing to the cleanup: "CSX and Norfolk Southern are enormous, billion-dollar companies. Indeed, by every financial measure they have far more resources than Whitman Corporation, not to mention the City and PRHA." (Pls.' Br. at 18.) Citing United States v. Atlas Minerals & Chems., Inc., 41 Env't Rep. Cas. (BNA) 1417, 1480, 1995 WL 510304 (E.D.Pa.1995), Remaining Defendants argue that the financial resources of the parties are relevant if a PRP is insolvent or unable to absorb a significant portion of the costs. Remaining Defendants also argue that unless a party introduces evidence from which the Court can assess the parties' financial positions, the Court should allocate the shares without regard for financial considerations.

The Court admitted form 10-Ks that Whitman Corporation, CSX Transportation, Inc., and Norfolk Southern Railway Company submitted to the Securities and Exchange Commission for the year ending December, 1995. (Pls.' Exs. 246-48.) Whitman Corporation reported assets of \$2,363.3 million. (Pls.' Ex. 246.) CSX Transportation reported assets of \$10,629 million. (Pls.' Ex. 247.) Norfolk Southern Railway Company reported assets of \$10,752.3 million. (Pls.' Ex. 248.) According to the Court's own research, Remaining Defendant Norfolk Southern is a Fortune 500 company and Remaining Defendants CSX Transportation, Inc. and Fruit Growers Express Company, Inc. are subsidiaries or affiliates of CSX Corporation, a Fortune 500 company. Plaintiff Whitman Corporation is also a Fortune 500 company. Plaintiff Pneumo Abex has experienced a number of changes in its corporate structure and affiliations during the last few years. (R. at 365-67.) Thus, the Court is unable to find a measure of its financial health. However, the Court notes that Plaintiffs do not argue that Remaining Defendants' resources are greater than Plaintiff Pneumo Abex's. The Court recognizes that the City and the PRHA have the financial resources characteristic of municipalities; however, Plaintiffs have not suggested that the City or the PRHA is unable to meet its obligations at the *1273 Site. Nothing in the record suggests that any of the parties are unable to pay a share of the costs of cleanup. Thus, this factor also counsels in favor of Plaintiffs and Defendants sharing the liability equally.

Considering these equitable factors, the Court concludes that Plaintiffs' Share of the response costs should be 50% and Defendants' Share should be 50%. As the Court indicated in a separate memorandum opinion and order, the principles of the Uniform Comparative Fault Act govern the effect of

settlements and bar of future claims for contribution. Having found that Remaining Defendants are responsible for 80.1% of Defendants' Share, Remaining Defendants are liable for 80.1% of half of the response costs incurred or to be incurred by Plaintiffs for the cleanup of OU1, or approximately 40.1% of the total response costs for OU1.

E. Prejudgment Interest

Plaintiffs also petition the Court for an award of prejudgment interest. Section 107(a) of CERCLA provides for the recovery of interest as follows:

The amount recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

CERCLA § 107(a). The Hazardous Substance Superfund ("Superfund") provides that the interest rate for repayment of advances to the Superfund shall be "equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding and shall be compounded annually." 26 U.S.C. § 9507(d)(3)(c) (1994). Furthermore, the Secretary of the Treasury must invest any portion of the Superfund not required to meet existing obligations and "[s]uch investments may be made only in interest-bearing obligations of the United States." 26 U.S.C. § 9602(b)(1) (1994). The district court in American Color & Chem. Corp. v. Tenneco Polymers, Inc., 918 F.Supp. 945, 960 (D.S.C.1995), calculated the interest rate "by averaging the auction average annual rate of six (6) month treasury bills and the average annual rate of composite long term government securities" for the years in question. Apparently using this method, Plaintiffs claim that the interest accrued through July 1, 1996 is in excess of \$700,000.00. (Pls.' Br. at 22, n. 12.) Plaintiffs, however, do not provide the Court with an affidavit of an accountant or similar expert outlining how they calculated this figure. Cf.

American Color & Chem. Corp., 918 F.Supp. at 960.

The Court finds that Plaintiffs are entitled to prejudgment interest and **DIRECTS** Plaintiffs to file the following information with the Court within fifteen (15) days of the date of this memorandum opinion and order:

- 1) the amount of prejudgment interest claimed based upon the amount of the Court's award in this memorandum opinion and order,
- 2) the date(s) from which they are calculating the interest,
- 3) the derivation of the interest rate(s) used, and
- 4) the per diem rate(s) of interest.

CONCLUSION

For the reasons stated above, the Court finds as follows:

- 1) the harm at the Site is indivisible,
- 2) there exists a rational basis for apportionment of the liability, assigning Remaining Defendants 80.1% of Defendants' Share of 50%, or approximately 40.1% of the total response costs, those incurred and to be incurred,
- *1274 3) recoverable response costs to date equal \$6,829,566.24, and
- 4) Plaintiffs are entitled to recover from Remaining Defendants prejudgment interest, in an amount to be determined, which continues to accrue until payment.

Plaintiffs are **DIRECTED** to file with the Court the requested information concerning prejudgment interest within fifteen (15) days of the date of this memorandum opinion and order.

The Clerk is **DIRECTED** to send a copy of this order to counsel for Plaintiffs and counsel for Defendants.

It is so **ORDERED**.

936 F.Supp. 1250, 27 Env'tl. L. Rep. 20,230

Motions, Pleadings and Filings (Back to top)

• 2:94CV00716 (Docket)
(Jul. 15, 1994)

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

 Petitioners,

 v.

King County et al.,

 Respondents,

and

Washington State Democratic Central
Committee,

 Intervenor-Respondent.

NO. 05-2-00027-3

CERTIFICATE OF SERVICE

The undersigned is a citizen of the United States and resident of the State of Washington, is over the age of eighteen and is not a party to the within action.

The following documents were caused to be served:

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- 1. Letter to Judge Bridges Regarding Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting;
- 2. Note for Motion;
- 3. Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting;
- 4. Declaration of William C. Rava in Support of Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting;
- 5. (Proposed) Order Granting Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting; and
- 3. Certificate of Service.

These documents were served in the manner described below.

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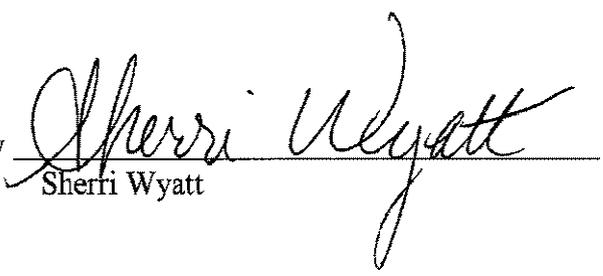
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I declare under penalty of perjury that the foregoing is true and correct, and that this
certificate was executed in Seattle, Washington on April 13, 2005.

By 
Sherri Wyatt