

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF NEW YORK

3 -----
4 UNITED STATES OF AMERICA

5 Plaintiff,
6 -versus- 06-CV-263

7 NEW YORK STATE BOARD OF ELECTIONS, et al.,
8 Defendants.
9 -----

10 TRANSCRIPT OF **IN CHAMBERS CONFERENCE** held in and for
11 the United States District Court, Northern District of
12 New York, at the James T. Foley United States Courthouse,
13 445 Broadway, Albany, New York 12207, on **FRIDAY,**
14 **MARCH 27, 2009,** before the **HON. GARY L. SHARPE,**
15 United States District Court Judge.

16 **APPEARANCES:**

17 **FOR THE PLAINTIFF:**

18 U.S. DEPT OF JUSTICE
19 BY: BRIAN F. HEFFERNAN, DOJ ATTY.

20 **FOR THE DEFENDANT BOARD OF ELECTIONS:**

21 NYS BOARD OF ELECTIONS
22 BY: KIMBERLY A. GALVIN, ESQ. and PAUL M. COLLINS, ESQ.

23 **FOR THE DEFENDANT STATE OF NEW YORK:**

24 OFFICE OF THE NYS ATTORNEY GENERAL
25 BY: JEFFREY M. DVORIN, AAG and BRUCE J. BOIVIN, AAG

BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY

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1 (Court commenced in chambers at 9:00 AM.)

2 THE COURT: Good morning. Why don't we do
3 this -- Brian, I've got Bonnie here and we're on the record --
4 so let me have everybody state their appearances so she can
5 control the record. Go ahead, start with you, Brian.

6 MR. HEFFERNAN: Okay. Brian Heffernan with the
7 Civil Rights Division of the U.S. Department of Justice in
8 Washington, for the plaintiff.

9 MR. DVORIN: Jeffrey Dvorin, New York State
10 Attorney General's Office, on behalf of the State of New York.

11 MS. GALVIN: Kimberly Galvin, New York State
12 Board of Elections.

13 MR. COLLINS: Paul Collins, State Board of
14 Elections.

15 THE COURT: All right. Let me ask you a
16 question first, Brian, before I turn to listening to the
17 State's sad tale of woes. I see the change in the HAVA
18 legislation, and I'm not certain that I understand the change.
19 I can't tell you that I've gone back and looked at the
20 congressional intent or anything else, but why the lever
21 change in the HAVA legislation? Are you familiar with that?

22 MR. HEFFERNAN: Yes, I am. I am -- it was
23 probably the one issue I was going to deal with today, so I, I
24 think our basic position is that there's nothing pending
25 before the Court. I do want to comment on that. I find

1 putting this in a letter to the Court to be disingenuous, at
2 best. This change, which is six lines contained in a 500 page
3 appropriations bill in between something that amends the
4 Christopher Columbus Fellowship Act and something that deals
5 with the FTC and the mortgage loan deals with one thing and
6 one thing only; it deals with Title One of HAVA, which
7 provides for the funds to the State to replace lever or punch
8 cord machines.

9 All this does -- a little background. When
10 HAVA was first enacted, it provided for this funding for
11 states that wanted it and said that the lever machines had to
12 be in order to keep the funding that the states got; the lever
13 machines had to be in place by a certain period of time.
14 Initially, that was by January 1st of 2006. It was changed
15 about two years ago, about a year and a half ago, actually
16 around the time of when we had our December 2007 hearing,
17 quite frankly, at the behest of New York State legislators to
18 make sure that they did not lose the \$50 million they have
19 sitting in their state treasury to replace lever machines.

20 Most recently, apparently, at the same behest,
21 this was hidden in the congressional appropriations bill, and
22 all it says is that New York does not lose the \$50 million in
23 the Treasury that it has to replace leverage machines as long
24 as they're replaced, I think, by the time of the first
25 election after November 1, 2010. It in no way, shape or form

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1 does anything to Title Three of HAVA which contains the
2 substantive voting system requirements on which we based our
3 lawsuit, which contains both the requirements and the
4 deadlines for replacement of machines, and in no way affects
5 the Court's orders in this case. And I assume the State is
6 not making any statement that they're no longer bound by the
7 Court orders here.

8 THE COURT: All right. So I wondered when I
9 saw that, it is true then that legislation is really specific
10 to New York so they don't lose money? It's got nothing to do
11 with whether or not other states have lever machines in place?

12 MR. HEFFERNAN: No, your Honor. I mean at this
13 point, as we've been through before, you know, New York is
14 really the only state that's in this situation.

15 THE COURT: That's the question I had, in light
16 of the statement in the papers; there's nothing that alters
17 the fact that still out of 50 states, New York's the only one
18 that hasn't complied?

19 MR. HEFFERNAN: Correct, your Honor. And
20 there's absolutely nothing in this that alters the
21 requirements of Title Three of HAVA, which is the basis of
22 this lawsuit and the basis for the outstanding Court orders we
23 have at this point.

24 THE COURT: Let me ask you one more question,
25 and then I'll let you fill in as you hear one thing or another

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1 from the State, but it appears to me that the federal -- the
2 Department of Justice is reluctant to recommend to me any
3 penalty I ought to impose as a result of the violation of the
4 consent decrees. Have you altered your position in that
5 regard?

6 (Bruce Boivin, AAG, enters...)

7 MR. HEFFERNAN: Well, your Honor, I guess our
8 position at this point is that we don't have a position,
9 majorly because there's nothing at this point that is before
10 the Court. I mean we -- to put this in perspective, we have
11 had our weekly meetings, conference calls, and the State has
12 been very up front about what has been happening here. We are
13 well aware of the issues that arose with regard to the test
14 lab, but we really only found out about this recent change, a
15 specific change to the timeline last week basically. It
16 was -- I think it was on the 18th or something when we were
17 provided by the State with a copy of the recent timeline that
18 the testing lab gave to the State Board following its -- the
19 reinstatement of its accreditation by the Election Assistance
20 Commission. It was only at that point that we knew that the
21 lab was projecting that the testing and the certification
22 would not be complete until after the elections. And to --
23 elections in this year. And one thing actually that the
24 letter does not mention, and I assume it's inadvertent, is the
25 date. They project some dates put in there by the State, but

1 they -- at this point the timeline that we've seen, the lab
2 has projected completion by November 30th of this year. And
3 the State has -- the State Board did not put that in a letter
4 because, I assume, they forgot or perhaps there's a different
5 date they have in mind. We don't know what they have in mind
6 at this point.

7 But, in any event, we discussed this timeline
8 last Friday in our conference call. The State indicated later
9 on that day that it was going to be asking the Court for a
10 conference. But until Wednesday, we did not know that the
11 State was going to formally move to extend. So we were now
12 having internal discussions with regard to what, apparently,
13 is going to be the State's request and, you know, are prepared
14 to make our position known once that request is made either of
15 the Court or -- quite frankly, your Honor, you know, we have
16 never been adverse to the State discussing anything with us
17 and, you know, we've had a very cooperative relationship with
18 at least the people who are sitting before you.

19 THE COURT: You're all on a first name basis
20 then. (Laughter.) Go ahead.

21 MR. HEFFERNAN: So, you know, certainly, to the
22 extent the State Board wanted to present something to us,
23 prior to presenting it to the Court, then we're not going to
24 reject anything out of hand. But to answer your question, in
25 as long-winded a fashion as I possibly can, which I've done

1 already, it's -- you know, we have not yet had a chance to
2 formulate a position on something we only found out a couple
3 of days ago, and we -- which technically is not even pending
4 before the Court at this point.

5 THE COURT: All right. Thank you. What I
6 really was interested in were those two issues; number one,
7 the lever machine issue, and I cocked an eye when I saw that,
8 and whatever position the Government intended to take really,
9 lest whether I ought to grant it or whether I not, we're going
10 to get down to the issues of penalties here sooner or later.
11 I don't know where else to go.

12 Let me summarize what I hear from the State and
13 then let me hear from the State so at least you can correct my
14 viewpoint on it. And, again, I'm trying to stay above the
15 trees, as I have all along in this case, but it's not easy.

16 It appears to me is that the fundamental
17 problem here is, is that the testing protocol broke down. So
18 there were delays due to decertification of those who were
19 testing. And as a result of those delays, you're now being
20 told by the testers that they can't have the testing protocol
21 done in time to put the lever machines in place by this fall's
22 elections. That's the gist of it.

23 Staying above the trees for a moment, am I
24 correct that the State is the one who selected the testing
25 protocol? And the State is going to tell me, we're required

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1 by our rules and regulations to make sure these machines
2 comply with A, B, C, D, under our rules and regulations and,
3 therefore, those are the standards we insisted on the testers
4 that they comply with? They weren't doing it through their
5 certification process, therefore, we had to de-certify them,
6 and that's what caused the delay? Is that what I'm going to
7 hear, in general?

8 MR. COLLINS: Respectfully, your Honor, the
9 State did not de-certify the SysTest. The EAC is the federal
10 agency in charge of promulgating the testing standards.

11 MR. HEFFERNAN: Excuse me, Paul. If you can
12 please speak louder, I'm having a hard time hearing you.

13 MR. COLLINS: Sure.

14 THE COURT: Wait a minute. We can turn that
15 up.

16 (Pause.)

17 MR. COLLINS: The State -- I apologize for
18 raising my -- can you hear me, Brian?

19 MR. HEFFERNAN: Yeah, as well as the rustling
20 of paper.

21 MR. COLLINS: The State did not de-certify
22 SysTest. The EAC did. And they restored their certification.

23 Your Honor, the State further -- the protocol
24 that the State is insisting upon is the conformance with the
25 EAC's voluntary voting system standard guidelines. We're not

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1 speaking at this juncture about anomalies of New York State
2 ballot configurations or any of that. And I think that's an
3 important distinction.

4 THE COURT: Let me put what you just said in my
5 words, and then you tell me if I'm right. This is an effort
6 to make sure I understand what you're saying.

7 Unlike what I relayed a moment ago, what you're
8 indicating to me is the decertification of the testers was
9 done by the federal government, not by the State?

10 MR. COLLINS: That is correct, your Honor.

11 THE COURT: Therefore, you had a process in
12 place where they were testing the machines, and those who were
13 testing were no longer permitted to do that by the federal
14 government; is that what you're indicating to me?

15 MR. COLLINS: I'm indicating, your Honor, that
16 they lost their accreditation for a period of time, and during
17 that down time, when we would not allow them as an uncertified
18 lab to test, they were working on -- and we agreed, they were
19 working on the creation of the so-called test cases, which, as
20 I understand it, is essentially the testing protocols. And as
21 we speak today, and Miss Galvin can help me out with this, I'm
22 not sure that they have all of those protocols completed.

23 MS. GALVIN: Judge, if I may just add, under
24 our contractual arrangements, we said that the testing lab
25 must be certified by the Government lab. SysTest labs was.

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1 As we progressed down, they lost their accreditation by the
2 federal government, so contractually we were unable to
3 continue to pay them for testing services under the contract.
4 We did continue a parallel track with them to try to do
5 non-testing development of these test cases, as Mr. Collins
6 speaks of. And most recently when they had their
7 accreditation restored by the federal government, we
8 reinstated our testing protocols and they produced this
9 timeline based upon our urging to see where we were in the
10 whole schedule of events.

11 Now, that being said, I think it's -- with all
12 due respect to the Court, it's not as simple as just blaming
13 the lab. Clearly, the State is at fault for some of our
14 management things. We have individual consultants that have
15 taken longer. It's turned out to be a much greater task than
16 originally envisioned. And the testing, you know, clearly was
17 a much greater undertaking than any of us had first seen in
18 trying to reach these federal standards or our own standards
19 which come next.

20 So, that being said, the testing lab did push
21 us back. I wouldn't say that all of the blame of this
22 blown-out timeline should rest with them, but, but much of it
23 does. They clearly weren't in a position to -- I mean we were
24 talking about whether or not they should have been accredited
25 in the first place when we found out how difficult it was when

1 we were involved in the day-to-day workings of the testing.
2 They didn't seem to be producing at the level that they were
3 suggesting they could. The machines weren't at the level that
4 the vendors said they were. It became a -- you know, and I'm
5 relatively new to this process, only a few months. It became
6 a very mushrooming type situation, and then when they lost
7 their accreditation, everybody took a hard look and sharpened
8 up the pencils to see where they stood. It isn't a pretty
9 picture at this point, but Brian is well aware of that.

10 THE COURT: Mm-hmm. Here's the difficulty I've
11 had all along. I mean, fundamentally, the problem is -- and,
12 you know, it is what it is, so I mean we aren't going to
13 re-invent the wheel in the context of this litigation. It's
14 obvious that New York is arcane in its system of Government
15 from top to bottom. (laughter) I mean -- and I'm a lifelong
16 New York resident so I mean I'm exercising my First Amendment
17 right to say that. I'm not -- I don't know that I'm speaking
18 as a Judge. But the problem, from an overall perspective, has
19 been that New York is obligated to comply with federal law.
20 Nobody has ever disagreed with that fundamental precept. New
21 York is obligated to comply with federal law. And what's
22 happened is one component or another of that arcane system is
23 getting stuck with retrenchment from all other components of
24 that system, as they're saying, well, under our law or under
25 our rules or under our regulations, we can't do X, Y, Z, so

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1 that we can comply with federal law. Well, all those reasons
2 may be true from one component to another, but it's not true
3 from the overall perspective of the lawsuit. The lawsuit is
4 you're obligated to comply with federal law. And it's crystal
5 clear you haven't. And, again, from a common sense
6 perspective, there are 50 states in this nation that have had
7 to comply with this law; 49 have long since done it, and the
8 only one that hasn't is New York. And I don't throw stones at
9 the people around this table. I know you leave here and have
10 to go back and deal with other components and agencies and
11 people and all of that, but the bottom line is, sooner or
12 later I'm going to do something about it. And I'm done
13 threatening. It's either going to get done or it's not.

14 What's New York want me to do? They want me to
15 extend the consent decree and extend the deadlines in the
16 consent decree? Isn't that the way I read your letter? We
17 can't have it done by this fall, but we'll have it done in the
18 next federal election in 2010.

19 MR. COLLINS: Respectfully, your Honor, I wrote
20 the letter, okay, and I'll take the hit for having written the
21 letter. (laughter)

22 THE COURT: You're compadres around the table
23 appreciate that.

24 MR. COLLINS: Notice how they're moving away.

25 MS. GALVIN: I was in court in Poughkeepsie.

1 (laughter)

2 MR. COLLINS: I wrote the letter because it
3 became apparent that we were not going to be able to comply
4 with your deadline. And while we have been telling Brian
5 Heffernan on a weekly basis and sharing with him, I felt it
6 important that we tell your Honor flat out and also to come
7 down and seek some guidance as to, you know, we probably are
8 going to make -- as I look at life under the federal rules, I
9 think I've got to make an application to be relieved of
10 non-compliance with your order. And I also know that most of
11 the Northern District judges just don't want to see a motion
12 come out of the blue; they want to talk about how we're going
13 to schedule it, etcetera. And we're not here today to argue
14 the merits of our position.

15 THE COURT: Mm-hmm.

16 MR. COLLINS: And the letter -- as your Honor
17 knows, ultimately, you have equitable authority, and we're
18 pointing out some of the equities, because you asked -- John
19 Law said what are we going to have a conference about? And
20 that's -- these are the items that, you know, we're going to
21 talk about.

22 THE COURT: I've sicked him on everybody like a
23 pit bull.

24 MR. COLLINS: He's a very effective pit bull.
25 I mean, obviously, to come in here cold with you not knowing

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1 what we wanted to talk about would have been inane, and it
2 makes sense for you to ask what is it you guys want to talk
3 about.

4 THE COURT: Right.

5 MR. COLLINS: That's it. And we are going to
6 seek permission and a schedule to make an application to
7 enlarge the time within which to comply with your order. This
8 is not that application, obviously.

9 THE COURT: Right.

10 MR. COLLINS: There's no papers.

11 THE COURT: Right.

12 MR. COLLINS: And we just wanted to point out,
13 we're not in the business of sandbagging either the Court or
14 the Department of Justice.

15 THE COURT: I don't believe that -- I don't
16 believe anything to the contrary.

17 MR. COLLINS: Okay.

18 THE COURT: I've tried to communicate as often
19 as I can that never have I believed I've had true issues with
20 the people who are appearing before me. I've had issues with
21 the people I'm not seeing. That's the problem I've had all
22 along.

23 MR. COLLINS: Respectfully, your Honor, in
24 fairness to those people whom we represent, they are part and
25 parcel of this application and they're not looking to sandbag

1 you either.

2 THE COURT: I understand that.

3 MR. COLLINS: You know...

4 THE COURT: I understand that. But it is one
5 aspect or another, given my initial observation about the
6 arcane system that's in place in New York, where some of the
7 clients find themselves paralyzed by what they believe New
8 York law rules and regulations require of them as they try to
9 work their way through this system. And I respect that point
10 of view by them. The problem I have is they don't understand
11 the federal society. They don't understand that the federal
12 government is pre-eminent in this realm. Not the State of New
13 York. So when push comes to shove, and the two are at odds
14 with one another, the federal government is going to win this
15 argument. It's that simple. So it's not a question of
16 whether New York wants to, can, or not. They will. Or, I
17 suppose, one of the things I could do is order the Governor to
18 write a \$50 million check and return the money. I mean I
19 suppose that could be one penalty to impose. I mean, I tried
20 to be comical about that one day, and the State Board of
21 Elections didn't see the comedy. I mean I was talking about
22 calling out the National Guard to install the machines on one
23 hand, and locking them up on the other, and all they heard was
24 locking them up.

25 MS. GALVIN: They still heard locking them up.

1 They're clear.

2 MR. COLLINS: Well, respectfully, your Honor,
3 your tone of voice on that day was significantly different
4 than this morning.

5 THE COURT: Well, you got to know me. You just
6 got to know me. I'm a pussy cat.

7 MS. GALVIN: I still use the toothbrush
8 jokingly.

9 THE COURT: Brian, I think what they're
10 indicating is precisely what you're indicating. What you
11 would prefer is to see an application so that you've got some
12 time to digest the position with your superiors and respond
13 accordingly.

14 MR. HEFFERNAN: Either that, your Honor, or, as
15 I said, you know, if they want to send something to us to look
16 at prior to approaching the Court, then we certainly have no
17 problem with that. But, you know, again, all we have is an
18 indication that they want an extension. We do not know the
19 specifics in terms of the time, in terms of what else there
20 might be there. And so, you know, if we have something
21 concrete to react to, we can do that, but at this point we do
22 not.

23 THE COURT: Doesn't he make sense? Why don't
24 you send him whatever proposal it is you're making, because
25 it's what you're going to present to me in a motion.

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1 MR. COLLINS: Yes.

2 THE COURT: You know, we're big people around
3 the table. Like I said, it gets disseminated differently as
4 it goes out, but it's no surprise to the State that Brian
5 doesn't want to be here... And I don't want to be here.

6 MR. COLLINS: If it's any consolation, we
7 don't --

8 MS. GALVIN: We don't want to be here either.

9 MR. DVORIN: I definitely don't want to be
10 here. (laughter)

11 THE COURT: None of us, none of us want to take
12 action in connection with this, but we're all obligated to
13 make sure HAVA is complied with and implemented. But what
14 Brian is saying makes sense to me.

15 Why don't you put a proposal -- let me put some
16 in anticipation. I think your point is well taken. Let's set
17 some timelines when we can get that done. I'll be frank with
18 you, you're not going to see me after today for the next 30
19 days. So I'm unavailable until May anyway.

20 What makes sense, Brian? They ought to send
21 you something by when? Or do you want, you want them to make
22 the initial salvo and you get to holler about it?

23 MR. HEFFERNAN: Yeah, you know, I mean at this
24 point there's nothing, obviously, preventing us from walking
25 in on any day and saying this is it.

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1 THE COURT: No, I know that.

2 MR. HEFFERNAN: If the State has taken it upon
3 themselves to advise the Court that it is going to move to do
4 something, then, you know, there's no reason why the State
5 can't move quickly to make a proposal to us, if that's what it
6 wants to do. At some point, if we don't hear from the State,
7 then, you know --

8 THE COURT: How much time --

9 MR. HEFFERNAN: -- we'll have to decide what we
10 need to do.

11 THE COURT: How much time does the State want?

12 MR. COLLINS: Your Honor, I would like to be
13 clear on that.

14 THE COURT: Yes.

15 MR. COLLINS: What we're talking about is a
16 time frame to send to the Department of Justice a specific
17 proposal.

18 THE COURT: Right.

19 MR. COLLINS: If the Department of Justice
20 either accepts that proposal, and we tweak it, nobody makes a
21 motion, or we don't make our application.

22 THE COURT: Or you simply then send a consent,
23 a proposed consent order to amend the consent decree. I think
24 that's what you would do.

25 MR. COLLINS: Right.

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1 MR. HEFFERNAN: That, you know, without,
2 without prejudging how any of this is going to go, I would
3 expect that, you know, if we got something from the State, and
4 after consultation here, we decided something that we could
5 live with, and that ideally would be what would happen,
6 obviously, if that was -- if we were unable to do that, then I
7 would expect that motion practice would go on after that.

8 THE COURT: Yeah, I think we're all on the same
9 sheet of music, Brian. That's what I anticipated. I would
10 prefer to see the two of you talk and to see whether the Civil
11 Rights Division thinks it's time to pull the trigger.
12 Metaphorically.

13 MR. COLLINS: Thank you for that caveat.

14 MS. GALVIN: I wrote it down. I got it. He
15 was nice, but he was firm. Pulling the trigger and
16 toothbrushes were brought up. I have it. (laughter)

17 THE COURT: What's the State -- they're looking
18 for a concrete proposal.

19 MS. GALVIN: I know. And it's really -- I know
20 nothing in life is simple. We're going to have to have a lot
21 of internal discussions because many people at the board, to
22 be honest, well, we're going to live with this timeline.
23 There's another faction of people perhaps that think we ought
24 to move it up. I mean we -- everything -- you know, Noah's
25 Ark didn't work either. Because every time we get into a

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1 situation -- so, so when I say we should be able to have it in
2 a week, we probably wouldn't -- Brian knows, we probably
3 wouldn't be able to have it in a week. We have a board
4 meeting April 7th.

5 MR. COLLINS: I believe so. Yes.

6 MS. GALVIN: Would that Friday work after that
7 board meeting, Brian, you think?

8 MR. HEFFERNAN: Is that two weeks from today?
9 Is that next week?

10 MR. COLLINS: No. It's two weeks from today,
11 by my watch.

12 MR. HEFFERNAN: Well, I --

13 MS. GALVIN: As we continue with the testing
14 and do everything that we possibly -- I mean we haven't
15 stopped anything so ...

16 MR. HEFFERNAN: Yeah, I suppose so, especially
17 since his Honor has indicated that he is basically unavailable
18 for the next 30 days, in any event.

19 THE COURT: Doesn't mean you can't reach me.

20 MR. HEFFERNAN: Oh, I understand that, your
21 Honor.

22 MR. COLLINS: We would just as soon leave you
23 alone.

24 THE COURT: If it was up to me, I wouldn't be
25 going anywhere, but after 42 years of marriage, I have little

1 say in the process. (laughter)

2 MS. GALVIN: Internally, that will give us time
3 to put something before the board, hopefully, on the 7th, and
4 then make any changes that we need to, so that it's a unified
5 proposal as we move forward, that we don't have any division
6 there...

7 MR. COLLINS: That would be April 10th, your
8 Honor, by my math. Right?

9 THE COURT: April 10th you're going to supply
10 Brian with a proposal?

11 MS. GALVIN: Right.

12 THE COURT: How much time do you want to digest
13 that proposal and respond to the State, Brian?

14 MR. HEFFERNAN: Two weeks.

15 MR. COLLINS: The 24th?

16 THE COURT: Right. And, therefore, couldn't we
17 set -- you all tell me, couldn't we set an anticipatory date
18 that if those exchanges don't bear fruition, then the State is
19 going to move to do something with the consent decree; and
20 they ought to file that motion by when? A week later? Two
21 weeks later?

22 MR. COLLINS: How about 5/15, your Honor?

23 THE COURT: How about 5/15, Brian?

24 MR. HEFFERNAN: An additional three weeks?

25 MR. COLLINS: Yup.

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1 MR. HEFFERNAN: I mean I hate to start these
2 discussions with reasons to accommodate continuing a delay on
3 behalf of the board. I mean if -- I assume by filing this
4 letter with the Court, the board was basically prepared to
5 move forward pretty quickly with a motion to extend, and so
6 I'm -- I guess I don't know if, if we will get something back
7 to -- you know, if we will hopefully have something back, and
8 I think it would be long before April 24th, what we're going
9 to do if they're going to take an additional three weeks to
10 extend --

11 THE COURT: I agree. Two weeks is enough.

12 MR. COLLINS: That would be 5/8?

13 THE COURT: Yes. To which you'll respond by
14 what, 5/15, so you accelerate it? Or do you want two weeks?

15 MR. HEFFERNAN: No, we can certainly do it in a
16 week.

17 THE COURT: We all know where this is going. I
18 made it eminently clear. So I mean sooner or later,
19 metaphorically, I'm going to pull the trigger.

20 MR. COLLINS: May we then have a week to
21 respond to DOJ?

22 THE COURT: If permission is granted. I'm not
23 going to give it to you now.

24 MS. GALVIN: Just to be clear, I don't know,
25 maybe I talk too much, but when we get into May, and Brian is

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1 well aware of this, as Paul is and Jeff is, we're now running
2 into issues with the counties, and whatever is ordered,
3 whether or not they can actually physically comply with a roll
4 out depending upon the --

5 THE COURT: They're already under an order to
6 comply with a roll out.

7 MS. GALVIN: But the --

8 THE COURT: To the extent that they don't
9 comply with the order --

10 MS. GALVIN: The machines are not made, sir.
11 That's just what I'm saying.

12 THE COURT: I understand all the underlying
13 problems.

14 MS. GALVIN: I understand.

15 THE COURT: It doesn't change the fact that
16 they're under an order to comply, and if they don't meet that
17 date, nothing changes; they're in violation of that order, and
18 I'm at the point where I'm ready to take action.

19 MS. GALVIN: I understand.

20 THE COURT: I want the federal government's
21 recommendation, if that's the case, as to what action they
22 feel I ought to take. I want the State's view in terms of
23 what action they think I ought to take. And then I'm going to
24 take action. Enough is enough. Non-compliance is not an
25 option. I say that at every proceeding, so I've now got it on

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1 the record at this one too.

2 MR. COLLINS: That message has been heard loud
3 and clear.

4 THE COURT: I know it has. I know it has. I
5 know the people here believe me.

6 MR. HEFFERNAN: In light of that, your Honor, I
7 mean, if the Court is granting and the Court is granting -- I
8 mean we're going to go by way of motion and then by way of
9 response and then by way of reply...

10 THE COURT: No, no, no. Here's what I said.
11 They're going to file their motion, and you're going to file
12 your response. If they wish to reply, they can seek
13 permission to reply.

14 MR. HEFFERNAN: Okay. Okay.

15 THE COURT: That's what I said.

16 MR. HEFFERNAN: Okay.

17 MR. BOIVIN: That's only if we can't work
18 things out.

19 THE COURT: Precisely. I'm of the hope that
20 spring is eternal, that the motion schedule will never be
21 employed.

22 MR. COLLINS: Okay.

23 THE COURT: That's what I'm hopeful of.

24 What else can I do for you?

25 MR. COLLINS: I think that's what we sought to

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1 accomplish this morning, and we're appreciative of the Court's
2 time.

3 THE COURT: Thank you. Brian, do you need
4 anything further?

5 MR. HEFFERNAN: No, your Honor. This is fine
6 with me. And I just want -- you know, one thing, you know, I
7 can put on the record is, again, you know, they know how to
8 get in touch with me, and we're here and open to discussion to
9 the extent that problems can be obviated and, you know, then
10 they know how to get me.

11 THE COURT: Yes.

12 MR. COLLINS: Brian, I assume that this
13 constitutes our weekly status conference. (laughter)

14 MR. HEFFERNAN: Yes. With special guest,
15 that's correct. (laughter)

16 THE COURT: Thank you, Brian.

17 MR. HEFFERNAN: Thank you very much.

18 MR. COLLINS: Thank you, your Honor.

19 THE COURT: Thank you, folks.

20 (Court adjourned at 9:30 AM.)

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C E R T I F I C A T I O N

I, BONNIE J. BUCKLEY, RPR, Official Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings held in this matter and caused the same to be transcribed; that the foregoing is a true and correct transcript of the same and whole thereof.

BONNIE J. BUCKLEY, RPR
USDC Court Reporter - NDNY

DATED: MARCH 30, 2009

**BONNIE J. BUCKLEY, RPR
UNITED STATES COURT REPORTER - NDNY**