COMMONWEALTH OF VIRGINIA		IN THE RICHMOND CIRCUIT COURT
COUNTY OF VIRGINIA	)	
	)	
	)	
IN RE ELECTION RECOUNT	)	
	)	
	)	
GEORGE ALLEN,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
TIMOTHY KAINE,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION IN SUPPORT OF THE ENTRY OF THE RECOUNT PROCEDURAL ORDER

Respondent, Timothy Kaine, by counsel, respectfully submits this Memorandum in Support of entry by the Court of the Recount Procedural Order submitted to the Court. The Preliminary Order directed the parties to meet and confer regarding the substance of a Procedural Order to direct the conduct of the recount to be held on December 18 and 19, 2012. The parties conferred, exchanged several drafts of the Procedural Order, and ultimately agreed on all provisions of the Procedural Order except one: whether election officials must inspect software, memory cards, and source code of a certain direct recording electronic voting machine (DRE). Petitioner supports access to these materials. Respondent disputes it. This Memorandum explains Respondent's position on the Procedural Order before the Court.

Statement of Facts

For the purposes of resolving this contested access issue in the Procedural Order only, and reserving the right to dispute factual questions in any future proceedings, the parties have stipulated to the following facts:

Following the November 6, 2012 election, the State Board of Elections (SBE) completed its statewide canvass pursuant to VA. CODE § 24.2-802. On November 26, 2012, SBE certified Respondent Tim Kaine as the winner. Respondent led Petitioner Allen by 203 votes statewide. Allen then petitioned for a recount under VA. CODE § 24.2-800. The Presidential and U.S. Congressional races produced clear winners in the Commonwealth.

In the George Wythe precinct of King William County,[1] election officials discovered that one DRE machine (Machine 1) appears to have produced a significant undervote. Although voters cast 420 and 413 votes in the Presidential and U.S. Congressional races respectively, Machine 1 registered zero (0) votes in the U.S. Senate race. Machine 1 recorded two undervotes for the Presidential Race, nine undervotes for the U.S. Congressional race, and 422 undervotes for the U.S. Senate Race, indicating a clear discrepancy. *See* Appendix 1. Race totals from the two other DRE machines operating in the George Wythe district (Machines 2 and 3) produced vote totals for the U.S. Senate that closely tracked the U.S. House race proportions. Appendix 1. All three machines were in use for the full day, with voters casting ballots on each machine in roughly equal numbers. Poll workers registered a total of 1,244 voters voting in the George Wythe precinct on Election Day. The ballot displays on Machines 1-3 were identical. Machines 1-3 appeared to be working properly on Election Day—voters reported no unusual problems to poll workers in George Wythe. The machine audit prior to Election Day proceeded smoothly and without incident.

In the event of a recount, VA. CODE § 24.2-802 provides that DRE ballots be "redetermined." VA. CODE § 24.2-802 describes the redetermination process as follows:

> *For direct recording electronic machines (DREs), the recount officials shall open the envelopes with the printouts and read the results from the printouts. If the printout is not*

[1] Counties and precincts are fictional and invented for the purposes of this scenario.

> *clear,* ***or on the request of the court****, the recount officials shall rerun the printout from the machine or* ***examine the counters as appropriate.***

(emphasis added). Following this procedure, recount officials attempted to "redetermine" the DRE ballots in accordance with VA. CODE § 24.2-802. The effort failed to produce a change in the tally from the malfunctioning DRE. The DRE's tally for the U.S. Senate Race remained at zero. After the state-wide hand recount concluded, Allen narrowed Kaine's lead to only 33 votes.

Petitioner timely filed a Recount Petition in the Circuit Court of the City of Richmond. VA. CODE § 24.2-801. The Chief Justice of the Virginia Supreme Court appointed two judges to sit on the election court panel along with the chief judge of the Richmond circuit court to preside over the recount and the parties negotiated a Recount Procedural Order. VA. CODE § 24.2-801.

Argument

I. In the case of a recount, Virginia law provides limited access to examination of DREs.

In the case of a recount, Virginia law is clear. Va. Code § 24.2-802(D)(2) provides that during a recount, officials must redetermine votes on direct recording electronic machines (DREs); this requires that recount officials open envelopes with printouts of results, and read the results of the printouts to confirm vote totals. VA. CODE § 24.2-802(D)(2) ("For direct recording electronic machines (DREs), the recount officials shall open the envelopes with the printouts and read the results from the printouts."). This process ensures that official arithmetic is accurate and that vote count totals are compatible with the counts that the machines provide. *Virginia Recounts and Contests: The Basics*, VIRGINIA STATE BOARD OF ELECTIONS (November 2011) ("A recount is a simple redetermination of all of the votes cast on Election Day. Recount officials are only counting the ballots that were previously cast."). If the vote total recorded by the machine is not easily ascertainable, Virginia law provides that,

> *If the printout is not clear, or on the request of the court, the recount officials shall rerun the printout from the machine or examine the counters as appropriate.* VA. CODE § 24.2-802(D)(2).

The statute therefore allows courts narrow discretion to grant access to a machine's "counter." *Id*. In keeping with the clear mandate of the statute, "counter" must be narrowly construed. Virginia statute does not define "counter;" it is not the role of the courts to define this term. The Virginia Constitution prescribes that it is the role of the General Assembly, not the courts, to "regulate the time, place, manner, conduct, and administration of … elections." VA. CONST. § 4 cl. 3.

Statutes in other jurisdictions, and materials from the local Virginia Boards of Elections (SBE) do make reference to DRE counters. It is generally accepted that with respect to DRE machines, the word "counter" refers to the "public counter" and the "protective counter." Both the public counter and protective counter provide the same function: to tally the total number of votes cast on any given machine. The Arlington County, VA Election Day Guide's Glossary defines the "public counter" as follows:

> Public Counter: Prior to each election, the public counter number is reset to zero on each machine. Each time a ballot is cast, the number advances. The end-of-day total is the number of people who voted on that machine for that election. This number should be equal to the difference between the ending and opening protective counter numbers.
>
> Protective Counter: Each voting machine is equipped with a continuous counter that indicates the number of votes that have ever been cast on that particular machine. This number is never reset, and continues from election to election. When the Electoral Board certifies the machines for the election, they mark the protective counter number for each machine on the precinct's Statement of Results (SOR). When the machines are opened at the polls on Election Day, election officers must verify the actual protective counter number on the machine is what has been written on the SOR. At the end of the day, election officers note the new protective counter number on the SOR; the difference between the ending and opening numbers should be equal to the public counter number.

Arlington County Election Day Guide available at http://www.arlingtonva.us/departments/VoterRegistration/eo/images/EdayGuide.pdf.

Some state statutes specifically define DRE counters, referring to what is known as "public" and "protective" counters. For example, Ohio's statute requires that DREs contain a "public counter" that is visible from the outside of the machine to confirm the number of people who have voted. It further requires DREs to have an internal "protective counter" that records the cumulative total number of movements of the internal counters. OHIO REV. CODE ANN. § 3506.01 (2006).

To grant Petitioner's request for access to software, memory cards, and source code not specified in the statute would far exceed the boundaries that the legislature has established in Va. Code § 24.2-802(D)(2), constituting a fishing expedition not contemplated by the statute and potentially fraught with unintended consequence.

Petitioner argues that the provision prescribed by Va. Code § 24.2-802(D)(2) that allows for access to inspection of "counters" constitutes a misunderstanding of DRE voting technology. The General Assembly, however, amended the provision in 2007 to reflect the 2006 decertification of mechanical lever machines. In this amendment, the General Assembly retained the language allowing courts to grant access for officials to examine "counters as appropriate" and did not correct or update this language. 2007 Va. Laws Ch. 939 (H.B. 2707). Before 2006, when the Commonwealth used mechanical lever machines, mechanical "counters" would record the number of votes mechanically so that there was no need to examine each ballot. ERIC A. FISHER, CONGR. RESEARCH SERV., ELECTION REFORM AND ELECTRONIC VOTING SYSTEMS (DREs): ANALYSIS OF SECURITY ISSUES, Nov. 4, 2003. Although the "counter" language most likely originally referred to lever technology, the General Assembly chose to retain the word

"counter" in Va. Code § 24.2-802(D)(2), presumably so that election officials can ascertain and compare vote tallies easily and efficiently to determine whether there have been irregularities in the case of recount.

The General Assembly adopted DRE technology and has allowed for its continued use. VA. CODE § 24.2-626 (2011). The General Assembly was undoubtedly aware of the scope of the information available to election officials in a recount involving DREs. With this in mind, the legislature, even when it updated the statute in 2007, did not change this language to provide for the type of broad post-election discovery process the Petitioner requests. 2007 Va. Laws Ch. 939 (H.B. 2707).

It is within the purview of the General Assembly—not this Court—to prescribe recount procedure. VA. CONST. § 4, cl. 3; *Moore v. Pullem*, 142 S.E. 415, 420 (1928) ("[T]he General Assembly unquestionably has the power to determine the manner of conducting and making returns of elections."). Important state interests such as ascertaining an accurate vote count are concurrent with interests in deciding an election contest as efficiently and expeditiously as possible. *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (States "have important interests in … in ensuring that their election processes are efficient."); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("States have important interests in protecting the integrity of their political processes [and] in ensuring that their election processes are efficient . . . ."); *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985). Efficient and orderly conduct of state elections requires that this Court deny Petitioner's efforts to bring about a boundless fishing expedition.

II. Petitioner's request is redundant and speculative.

Even if this Court accepts Petitioner's invitation to interpret its authority under Va. Code § 24.2-802(D)(2) broadly, such an investigation would be time consuming and costly, with results redundant to currently available information. The Commonwealth of Virginia maintains an important interest in efficiently and expeditiously determining the results of this election such that the people of Virginia will have adequate representation in the United States Senate. Although Virginia courts have not addressed the issue, the Minnesota Supreme Court has found that expeditious determination of election results is a legitimate state goal in recount law. *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. Sup. Ct. 1975) ("[A[chievement of a reasonably prompt determination of the result of the election have been the vital considerations in the development of absentee voting legislation.").

The Petitioner argues that access to this information could reveal lost votes. This point is mere speculation. Inspection of DRE may well not produce an accurate vote tally but instead only confuse matters further. *Public Comment on the 2005 Voluntary Voting System Guidelines*, A CENTER FOR CORRECT, USABLE, RELIABLE, AUDITABLE AND TRANSPARENT ELECTIONS, Sept. 30, 2005 ("In today's purely electronic systems, there is no 'fixed record' for voters to review, or for officials to review as a check against the system or in the case of a recount. If votes were incorrectly recorded by the system there is no possibility of a meaningful recount."); Doug Jones, *The Evaluation of Voting Technology*, in SECURE ELECTRONIC VOTING (2003) ("all direct-recording electronic machines have been required to contain redundant storage, but this redundant storage is not an independent record of the votes, because it is created by the same software that created the original record. As a result, recounts are of limited use with these machines."). To allow access to memory cards, software, and source code without reasonable

certainty that they will produce new information is not "appropriate" within the meaning of the statute. VA. CODE § 24.2-802(D)(2).

III. Providing access to this information would compromise the protection of trade secrets and proprietary information.

Petitioner has failed to demonstrate reasonable necessity for the disclosure of software, memory cards, and source code—proprietary materials that are trade secrets of WinVote, the manufacturer of the voting machines used in King William County.

Under Virginia law, a trade secret is information that "[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." VA. CODE § 59.1-336. Source codes and software of voting machines are such proprietary information. ERIC A. FISHER, CONGR. RESEARCH SERV., ELECTION REFORM AND ELECTRONIC VOTING SYSTEMS (DREs): ANALYSIS OF SECURITY ISSUES, Nov. 4, 2003.

Petitioner has not demonstrated that there is a sufficient interest to grant disclosure. Trade secrets are a property right, and thus, they require special protections. *Level 3 Communications, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 582 (E.D. Va. 2009). *Lacoste Alligator, S.A. v. Doe*, 81 Va. Cir. 412 (2010) (finding that the plaintiff must show "good cause" in order to get access to trade secrets for discovery). This court must weigh whether revealing such secrets is warranted in the present circumstance. A Florida state court was presented with a similar problem in 2006 when Christine Jennings requested access to voting machine software and source code, information that both parties stipulated was protected as trade secrets. *Jennings v. Elections Canvassing Com'n of the State of Florida*, 2006 WL 5508548 (Fl.

Cir. Ct. 2006). In that case, the court denied access on the grounds that Jennings failed to adequately demonstrate a "reasonable necessity to gain access to a trade secret." *Id.* The court found that the machines had been tested as law required and that Jennings' claim that access to the source codes could reveal the source of the error was mere conjecture. *Id.* The case at hand is nearly identical; the request for access to software of the allegedly defective machine is based on speculation. Granting such access would gut the protections and property interests that trade secrets laws provide and protect.

IV. Petitioner has not presented sufficient evidence that the recount process has deprived him or the voters of King William County of their due process rights.

Petitioner has failed to show a violation of substantive due process rights of either the candidate in question or Virginia voters. A due process claim cannot be based on minor errors and inconsistencies on the part of election officials or inherent to the election process. As the First Circuit ruled, "[g]arden variety election irregularities" do not rise to the level of constitutional violation in the absence of the intent to deprive voters of due process rights. *Griffin v. Burns*, 570 F.2d 1065, 1067 (1st Cir. 1978). Isolated errors in election administration do not constitute due process violations. *See Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970) ("[T]he due process clause … offers[s] no guarantee against errors in election administration."); *Hutchinson v. Miller*, 797 F.2d 1279, 1287 (4th Cir. 1986) (finding federal courts unavailable in the case of the "irregularities"); *White-Battle v. Democratic Party of Virginia*, 323 F. Supp. 2d 696, 706 (E.D. Va. 2004). Errors in election administration do not rise to the level of constitutional violations. In the past, federal courts have specifically recognized that irregularities in voting machines do not give rise to constitutional claim. *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003); *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975) ("Voting

device malfunction [and] the failure of election officials to take statutorily prescribed steps to diminish what was at most a theoretical possibility that the devices might be tampered with ... fall far short of constitutional infractions ....").

Griffin provided that a court may find a due process violation when the voting system of the state is shown to exhibit "patent and fundamental unfairness." *Griffin*, 570 F.2d at 1967. The Petitioner has failed to meet the burden of demonstrating such unfairness. The errors here are not of the systemic nature that might constitute a constitutional violation; they are random errors that constitute "garden variety … irregularities." Innocent malfunction is an unfortunate, but inherent, part of election administration. *Hutchinson*, 797 F.2d at 1287 ("[I]rregularities … are inevitable in elections staffed largely by volunteers."). Virginia law does not, however, leave voters without remedies. The recount system provides for review of machines to ensure the maintenance of each voter's due process rights. VA. CODE § 24.2-802(D)(2). To prove a due process violation, the Petitioners have a high burden to demonstrate that Virginia's election system is fundamentally unfair; they have failed to meet that burden.

In 2006, the 11th Circuit upheld disparate recount systems for paper and DRE ballots; the court found that any burden that the disparities in processes places on voters is justified by state administrative interests. *Wexler v. Anderson*, 452 F.3d 1226 (11th Cir. 2006). The state has chosen to employ different voting systems; it is squarely within the purview of states to choose how best to administer elections. U.S. CONST. ART. I, § 4. Different recount systems are inherent to this system. The Petitioner has failed to show how this administrative choice is a constitutional violation.

V. Petitioner has not presented sufficient evidence to demonstrate that the recount process has compromised voters' right to suffrage under the Virginia Constitution Art I, § 6.

Petitioner has not presented sufficient evidence to show a violation of the Virginia constitution. Election officers in the Commonwealth of Virginia, in the course of this recount, have followed the letter of the law pursuant to VA. CODE § 24.2-802. King William County voters were given the right to cast ballots on machines for "receiving recording and counting votes cast." VA. CONST. ART. II, § 3, cl. 1. Inconsistencies and innocent error in execution of this mission does not change this fact. *Powell v. Power*, 436 F.2d 84, 88 (2d Cir. 1970); *Griffin v. Burns*, 570 F.2d 1065, 1067 (1st Cir. 1978); *Hennings v. Grafton*, 523 F.2d 861, 864 (7th Cir. 1975). Courts have continually declined to find federal Constitutional claims when there are mere "garden variety election irregularities." *Griffin v. Burns*, 570 F.2d 1065, 1067. Routine irregularities do not rise to the level of deprivation of suffrage. This doctrine should be applied to state constitutional claims as well. Voting irregularities, including machine malfunction, have occurred in Virginia in the past. *Deeds v. McDonnell*, December 9, 2005, Markow, J. (denying recount petitioners request to have all paper-based ballots cast rerun for tabulation). There is no record, however, of a court ever finding that such an irregularity deprived Virginia voters of their rights to suffrage under the Virginia constitution, or that an unintentional equipment malfunction constituted a violation of the constitutional right to vote on a machine for "receiving recording and counting votes cast." VA. CONST. ART. II, § 3, cl. 1.

CONCLUSION

For the foregoing reasons, the Court should deny Petitioner's request for access to the Machine 1's software, memory cards, and source code. To the extent the Court grants Petitioner's request for recount officials to "examine the counters as appropriate," it should limit such examination to an observation of the vote totals recorded on the public and protective counters.

Respectfully submitted,

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Counsel for Respondent Timothy Kaine