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19 THOMAS SMITH

20 UNITED STATES DISTRICT COURT

21 FOR THE NORTHERN DISTRICT OF CALIFORNIA

22 ONLINE POLICY GROUP, NELSON CHU  
23 PAVLOSKY, and LUKE THOMAS SMITH

24 Plaintiffs,

25 v.

26 DIEBOLD, INCORPORATED, and DIEBOLD  
27 ELECTION SYSTEMS, INCORPORATED,

28 Defendants.

No. C-03-4913 JF

DECLARATION OF NELSON CHU  
PAVLOSKY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT

Date: February 9, 2004  
Time: 9:00 a.m.  
Courtroom: 3

29 I, Nelson Chu Pavlosky, declare:

1 I am Nelson Chu Pavlosky, a plaintiff in the above-captioned case. I am one of the  
2 two Swarthmore students who founded the Swarthmore Coalition for Digital Commons (SCDC).

3 2. As described more fully in my previous declarations, which I hereby incorporate by  
4 this reference, SCDC's publication of and linking to the Diebold email archive was prevented by  
5 Swarthmore College, our ISP, after receipt of two cease and desist letters from Defendant Diebold.

6 3. Without a judicial decision the future of the SCDC as a free speech organization is  
7 in jeopardy. Though Diebold Corporation has officially withdrawn its DMCA notification to our  
8 organization for displaying the email archive, Diebold has made no representations regarding its  
9 future legal actions toward myself, Luke Thomas Smith, or SCDC for our publications of other  
10 materials in the future. We therefore feel as if we are operating under the constant threat of  
11 litigation for any actions we undertake with regard to Diebold.

12 4. Additionally, since we have no judicial decision to serve as a clear benchmark for  
13 our future actions, we are concerned about other companies or individuals with similar claims  
14 against SCDC and ourselves. Without a clear statement of the application of copyright law to our  
15 noncommercial publication of leaked internal company information about electronic voting  
16 machines, we would be forced to repeat the same cycle of notification, counternotification, two  
17 weeks of not publishing and threats of impending lawsuits the next time someone notifies  
18 Swarthmore College that he or she claims a copyright interest in such information.

19 5. For two undergraduate students, this is simply not feasible. My parents are rightly  
20 concerned that my involvement in responding to Diebold's legal claims is detracting from my  
21 studies and activities. Neither we nor the SCDC (which we founded) have the financial or  
22 emotional reserves to repeat this scenario. While we were fortunate to have the Stanford Clinic  
23 assist us this time, we cannot be sure that we will receive pro bono legal representation in the  
24 future. Any future parties – including Diebold – desiring for us capitulate to their demands would  
25 easily win by virtue of persevering financially in their pursuit.

26 6. A distinct danger exists to the mission of the SCDC, which among other goals seeks  
27 to improve voting accountability through examining electronic voting source code for flaws. As  
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long as SCDC has access to information suggesting voting software is not secure and reliable, it will wish to make that information public. However, without a judicial decision, SCDC cannot be certain that email archives like Diebold's may be legally published and our ISP, Swarthmore College, is likely to once again require us to remove any questioned material. Given SCDC's and our very limited personal resources, publishing information that must first be cleared through expensive copyright litigation is not a risk we can afford to take. The uncertainty associated with Diebold's vague letter and the lack of a judicial decision renders SCDC ineffective and unable to pursue its mission of promoting free speech and voting accountability.

7 SCDC's December conference on open-source voting was limited by the absence of a judicial resolution. SCDC originally planned to distribute CD-ROMs with Diebold's email archives to those attending the conference, so that the participants could read the archives in their entirety, perhaps immediately at the conference, without having to find the archives on the Internet. However, SCDC ultimately decided against pursuing this method of distribution because it wished to err on the side of safety from additional Diebold legal claims. Any future information about Diebold or other parties will inevitably have a similar effect on SCDC's efforts at publication, as long as there is no clear legal demarcation of acceptable and unacceptable uses for the information. It is therefore crucial for SCDC to have a judicial decision for reference in similar future situations.

I declare under penalty of perjury under the laws of the State of ~~Pennsylvania~~ <sup>New Jersey</sup> that the foregoing is true and correct and that this declaration was executed in Morris Plains, ~~Pennsylvania~~ <sup>New Jersey</sup>.

Date: Jan. 9, 2004

  
NELSON CHU PAVLOSKY