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12

13 **ADDITIONAL PLAINTIFFS' COUNSEL LISTED**  
**ON NEXT PAGE**  
14

15 SUPERIOR COURT OF CALIFORNIA  
16 COUNTY OF ALAMEDA  
17

18 THE PEOPLE OF THE STATE OF  
19 CALIFORNIA, acting by and through  
California Attorney General Bill Lockyer  
20 and Alameda County District Attorney  
Thomas J. Orloff, and the COUNTY OF  
21 ALAMEDA,

22 Plaintiffs,

23 vs.

24 DIEBOLD ELECTION SYSTEMS, INC., a  
Delaware corporation; DIEBOLD,  
25 INCORPORATED, an Ohio corporation;  
and DOES 1 through 1000, inclusive,

26 Defendants.  
27  
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CASE NO. RG 03128466

**FIRST AMENDED COMPLAINT**

**JURY TRIAL DEMANDED (AS TO  
FIRST AND SECOND CAUSES OF  
ACTION)**

Date action filed:  
November 21, 2003 (*qui tam* complaint)

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13 **Attorneys for Plaintiff,**  
14 **COUNTY OF ALAMEDA**

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1 Plaintiffs, the People of the State of California (“State” or “California”) and the County of  
2 Alameda (“Alameda” or “County”) are informed and believe and allege as follows:

3 **PARTIES**

4 1. The People of the State of California, by California Attorney General Bill Lockyer and  
5 Alameda County District Attorney Thomas J. Orloff, is a plaintiff and a real party in interest in  
6 this action.

7 2. The County of Alameda is a plaintiff and a real party in interest in this action.

8 3. James March and Bev Harris are the *qui tam* plaintiffs. James March is a resident of  
9 California. Bev Harris is a resident of the State of Washington.

10 4. Defendant Diebold Election Systems, Inc. (“DESI”) is a corporation organized under  
11 the laws of Delaware. DESI maintains its principal office in McKinney, Texas. Prior to 2002,  
12 DESI was known as “Global Election Systems, Inc.”

13 5. Defendant Diebold, Incorporated (“Diebold Inc.”) is a corporation organized under the  
14 laws of Ohio. Diebold Inc. maintains its principal office in North Canton, Ohio. Diebold Inc.  
15 finalized acquisition of Global Election Systems, Inc. as a subsidiary in January, 2002, and  
16 renamed the subsidiary DESI.

17 6. DESI is a wholly owned subsidiary of Diebold Inc. DESI and Diebold Inc. may be  
18 collectively referred to as “Diebold.”

19 7. Defendants at all relevant times have transacted business in the County of Alameda  
20 and elsewhere in the State of California. The violations of law alleged herein have been and are  
21 being carried out within the County of Alameda and elsewhere in California. Diebold and DESI  
22 do business in Alameda County, California.

23 8. All of the acts and omissions described in this First Amended Complaint by any  
24 defendant were duly performed by, and attributable to, all defendants, each acting as agent, as  
25 employee, alter ego and/or under the direction and control of the others, and such acts and  
26 omissions were within the scope of such agency, employment, alter ego, direction, and/or  
27 control. Any reference in this complaint to any acts of defendants shall be deemed to be the acts  
28 of each defendant acting individually, jointly, or severally.



1 in the Alameda County Contract and RFP and Response, Diebold represented or warranted,  
2 among other things, that the system: (1) shall be free from defects; (2) shall be fit for the  
3 purpose of conducting elections; (3) does not contain any harmful code; (4) is capable of  
4 correctly tabulating votes; and (5) possessed security features to prevent vote-tampering.

5 **FUNDING UNDER THE VOTING MODERNIZATION**

6 **BOND ACT OF 2002**

7 14. In 2002 and 2003 the Counties of Alameda, Kern, Lassen, Plumas, Santa Barbara and  
8 Siskiyou applied for funds under the Voting Modernization Bond Act of 2002 (Elections Code  
9 section 19230 et seq.) (“VMBA”). Elections Code section 19234 subdivision (e) provides that  
10 VMBA funds shall only be used to purchase voting systems that are certified by the Secretary of  
11 State.

12 15. In 2003, VMBA funds were paid to the following counties, in the following amounts:

13 Alameda - \$8,779,360.86

14 Kern - \$1,123,581.47

15 Lassen - \$105,635.48

16 Plumas - \$176,139.87

17 Santa Barbara - \$1,000,226.57

18 Siskiyou - \$258,943.11

19 **INSTALLATION OF UNCERTIFIED SOFTWARE**

20 16. Elections Code section 19201 prohibits use of voting systems in the State of  
21 California, unless approved by the Secretary of State.

22 17. Elections Code section 19213 provides that when a voting system has been approved  
23 by the Secretary of State, the voting system shall not be changed or modified until the Secretary  
24 of State has been notified in writing and determined that the change or modification does not  
25 impair its accuracy and efficiency sufficient to require a reexamination and reapproval.

26 18. In October 2003, the Secretary of State learned that Diebold installed versions of the  
27 GEMS vote-tabulation software that had not been certified by the Secretary of State.

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1 27. During January and February 2004, Diebold proposed using versions of TSx hardware  
2 and vote-tabulation software that had not yet been approved by federal testing authorities.

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5 28. During January and February 2004, Diebold submitted a TSx version for federal  
6 testing that differed from the version that Diebold had submitted to the Secretary of State for  
7 state certification.

8 29. Diebold failed to submit a satisfactory back-up plan to the Secretary of State for use of  
9 Diebold voting systems, in the event federal qualification had not been obtained in time for the  
10 2004 Primary.

11 30. Due to Diebold's delays in submitting changes to the Secretary of State for approval  
12 and addressing problems noted by federal testing authorities, the TSx still had not received  
13 federal approval or state certification by mid-February 2004.

14 31. On February 11, 2004, the Secretary of State authorized use of the TSx system for the  
15 2004 Primary, conditioned on certain procedures and security measures being in place.

16 32. On February 16, 2004, the Voting Systems Board of the National Association of State  
17 Election Directors (NASSED) made a conditional recommendation for approval of the TSx  
18 system *only* in light of the urgent deadlines of the upcoming 2004 Primary.

19 **PRECINCT CONTROL MODULE (PCM 500)**

20 33. In January 2004, Diebold applied for certification with the Secretary of State for  
21 approval of two computerized vote card encoder models or Precinct Control Modules (known as  
22 the "PCM 100" and "PCM 500") that were needed to run elections in counties using Diebold  
23 touchscreen voting systems in the 2004 Primary.

24 34. Diebold submitted the PCM 100 and PCM 500 for certification by the Secretary of  
25 State when they had not yet been federally qualified.

26 35. On February 20, 2004, approximately two weeks before the 2004 Primary, the  
27 Secretary of State received a report from a federal testing lab, indicating that testing was  
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1 successful on the PCM 100 and PCM 500. However, because of Diebold's late submission,  
2 testing was limited to verifying that the units functioned as described in operator manuals.

3 36. On February 20, 2004, the Secretary of State conditionally approved the PCM 100 and  
4 PCM 500 for use in the 2004 Primary only.

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6 37. Diebold's failure to properly configure the PCM 500 resulted in battery failures.  
7 Diebold failed to advise counties and/or provide training to poll workers with respect to battery  
8 failures.

9 38. As a result of battery failures, PCM 500 units used in Alameda County and San Diego  
10 County failed the morning of the 2004 Primary. San Diego County was initially unable to open  
11 over one-third of its polling places due to battery failures in the PCM 500, thus delaying the  
12 election and causing voters to be turned away at the polls. Alameda County was able to open  
13 polls, despite battery failures, because it offered back-up paper ballots to voters, who would have  
14 otherwise been turned away at the polls.

15 **QUI TAM COMPLAINT**

16 39. In addition to the allegations contained in this First Amended Complaint, the *qui tam*  
17 complaint, filed under seal on November 21, 2003 in Alameda County Superior Court, Case  
18 No. RG 03128466, alleges violations of the California False Claims Act and California Unfair  
19 Competition Law<sup>1/</sup> arising out of the following: Diebold's ballot tally software program  
20 maintained three independent databases; Diebold's FTP site was not secure; Diebold modified  
21 Windows CE without notifying the federal testing laboratories; Diebold failed to escrow ballot  
22 tally software program codes; and Diebold made misrepresentations in sales contracts and  
23 promotional materials.

24 **FIRST CAUSE OF ACTION**

25 **Violations of the California False Claims Act (Government Code Section 12650 et seq.)**  
26 **Brought by COUNTY against all Defendants**

27 \_\_\_\_\_  
28 1. The California Unfair Competition Law cause of action was voluntarily dismissed by  
*qui tam* plaintiffs on February 19, 2004.

1 40. County incorporates by reference and re-alleges paragraphs 1 through 22.

2 41. This is a claim for treble damages and penalties under the California False Claims Act,  
3 Government Code sections 12650 et seq.

4 42. County is informed and believes that defendants had actual knowledge of the falsity of  
5 their statements, reports and submissions or acted in deliberate ignorance or with reckless  
6 disregard of the truth. To the extent that defendants claim that they did not know the statements  
7 were false at the time they were made, they failed to notify the County once they learned of the  
8 false claims.

9 43. As a result of the defendants' false claims, the County paid out monies under the  
10 Alameda County Contract, and/or for the cost of additional security measures necessary for the  
11 2004 Primary and the November 2, 2004 General Election.

12 44. The Alameda County Contract, RFP and Response and demand for payment constitute  
13 "claims" within the meaning of Government Code sections 12650 et seq.

14 45. By the conduct and acts described in paragraphs 1 through 22 above, defendants  
15 violated the California False Claims Act within the meaning of Government Code section 12650,  
16 as follows:

17 a. Defendants knowingly presented or caused to be presented to officers and  
18 employees of the County a false claim for payment or approval, by submitting the RFP and  
19 Response, Alameda County Contract and demand for payment, in which defendants made false  
20 statements about the security of the electronic voting system, compliance with federal and state  
21 certification requirements, and compliance with all laws and regulations, in violation of  
22 Government Code section 12651, subdivision (a)(1) and (2).

23 b. To the extent that any defendant did not knowingly participate in the making of  
24 any of the false claims within the meaning of Government Code section 12651,  
25 subdivision (a)(2) at the time such claims were made, such defendant is a beneficiary of an  
26 inadvertent submission of a false claim to the County, who subsequently discovered the falsity of  
27 the claims and failed to disclose them to the County within a reasonable time after such  
28 discovery, in violation of Government Code section 12651, subdivision (a)(8). Each defendant

1 benefitted from the submissions of the false claims to the County. Each defendant discovered  
2 the falsity of the records, statements, and claims but failed to disclose that falsity to the County  
3 within a reasonable time after discovery.

4 46. As a result of the defendants' acts, the County suffered damages.

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7 **SECOND CAUSE OF ACTION**

8 **Violations of the California False Claims Act (Government Code Section 12650 et seq.)**  
9 **Brought by CALIFORNIA against all Defendants**

10 47. California incorporates by reference and re-alleges paragraphs 1 through 22.

11 48. This is a claim for treble damages and penalties under the California False Claims Act,  
12 Government Code sections 12650 et seq.

13 49. California is informed and believes that defendants had actual knowledge of the falsity  
14 of their statements, reports and submissions or acted in deliberate ignorance or with reckless  
15 disregard of the truth. To the extent that defendants claim that they did not know the statements  
16 were false at the time they were made, they failed to notify California once they learned of the  
17 false claims.

18 50. As a result of the defendants' false claims, California paid out monies under the  
19 VMBA to the Counties of Alameda, Kern, Lassen, Plumas, Santa Barbara and Siskiyou to assist  
20 in the purchase of electronic voting systems.

21 51. By the conduct and acts described in paragraphs 1 through 22 above, defendants  
22 violated the California False Claims Act within the meaning of Government Code section 12650,  
23 as follows:

24 a. Defendants knowingly presented or caused to be presented to officers and  
25 employees of the County and the Counties of Kern, Lassen, Plumas, Santa Barbara and Siskiyou  
26 a false claim for payment or approval, by submitting claims or statements to the County and the  
27 Counties of Kern, Lassen, Plumas, Santa Barbara and Siskiyou stating that electronic voting  
28 systems sold to those counties were secure and certified as required by state law.



1 d. Defendants deployed versions of the TSx system for use by California counties in  
2 the 2004 Primary when those versions had not yet received necessary testing, approval and  
3 certification, without allowing adequate time in which to obtain necessary testing, approval and  
4 certification, and without providing suitable alternatives to be used in the event that necessary  
5 testing, approval and certification could not be completed prior to the 2004 Primary.

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7 e. Defendants deployed PCM 500 units for use by California counties in the 2004  
8 Primary when those units had not yet received necessary testing, approval and certification,  
9 without allowing adequate time in which to obtain necessary testing, approval and certification,  
10 and without providing any alternative to be used in the event that necessary testing, approval and  
11 certification could not be completed prior to the 2004 Primary.

12 **PRAYER FOR RELIEF**

13 California and the County pray for judgment against each defendant as follows:

14 **Under the First Cause of Action (Violation of the California False Claims Act):**

- 15 1. For three times the damages sustained by the County as a result of the defendants'  
16 false claims in an amount to be proven at trial.
- 17 2. Civil penalties in the amount of \$10,000 for each false claim.
- 18 3. Costs of suit.
- 19 4. For such further and additional relief as the court deems proper.

20 **Under the Second Cause of Action (Violation of the California False Claims Act):**

- 21 1. For three times the damages sustained by California as a result of the defendants' false  
22 claims in an amount to be proven at trial.
- 23 2. Civil penalties in the amount of \$10,000 for each false claim.
- 24 3. Costs of suit.
- 25 4. For such further and additional relief as the court deems proper.

26 **Under the Third Cause of Action (Unfair Business Practices):**

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**THE STATE OF CALIFORNIA**

RICHARD E. WINNIE  
County Counsel of the County of Alameda  
NANCY FENTON  
Deputy County Counsel

By: \_\_\_\_\_  
NANCY FENTON

**Attorneys for Plaintiff, COUNTY OF  
ALAMEDA**