

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN, and THERESA M.)
PETRONE,)

Plaintiffs,)

vs.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
OSKAR OBEREDER, CHRISTOPH JOHANNES)
MUTTER, JAMES BAUMGARTNER and DOMAIN)
BANK, INC.,)

Defendants.)

00 CE 031

270 OCT 30 PM 5:25

PLAINTIFFS' EMERGENCY VERIFIED PETITION FOR RULE TO SHOW CAUSE

Plaintiffs BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO,
LANGDON D. NEAL, RICHARD A. COWEN and THERESA M. PETRONE, petition this
Court for an order and rule to show cause why Defendants HANS BERNHARD, LUZIUS A.
BERNHARD, OSKAR OBEREDER, CHRISTOPH JOHANNES MUTTER and JAMES
BAUMGARTNER should not be held in civil contempt of Court and in support of this petition
state as follows:

1. On October 18, 2000, this Court entered a Preliminary Injunction Order
(hereinafter referred to as the "Order") against Defendants HANS BERNHARD, LUZIUS A.
BERNHARD, OSKAR OBEREDER, CHRISTOPH JOHANNES MUTTER, JAMES
BAUMGARTNER and DOMAIN BANK, INC., and all those acting in concert with them,
enjoining them from:

A. Using or operating any Internet web site that encourages or allows residents of Illinois to sell their votes to be cast at the November 7, 2000 General Election.

B. Using, operating, facilitating or accessing domain name "voteauction.com" and to remove such web site from the Internet completely or, in the alternative, to modify the Internet web site known as "voteauction.com" so as to remove any illegal content.

C. Allowing or continuing registration of the Internet domain name "voteauction.com" or any other domain name offering substantially the same service as voteauction.com.

D. Using or operating in the State of Illinois any Internet web site by any name in any manner that would violate prohibitions in the laws of the State of Illinois and of the United States against the buying and selling of votes in elections.

E. Accepting from residents of the State of Illinois any registration or offer to sell votes or to buy votes at auction through voteauction.com and to modify their web site to indicate that all registrations or offers to sell votes and/or buy votes from Illinois residents will be denied.

2. The Order also compelled Defendants and all those acting in concert with them to immediately disclose to the proper election authorities the names and addresses of every individual in Illinois who has sold his or her vote or has offered to sell his or her vote through voteauction.com and the names and addresses of every individual and/or entity that has paid or has offered to pay for votes of Illinois residents through voteauction.com.

3. The Order further compelled Defendants to report to the Court within 10 days of the order on the measures they have taken to implement this order.

4. The Order stated that the Court was to retain jurisdiction over this matter.

5. The Order is still in full force, not having been modified or vacated.

6. A copy of the Order was served on the Defendants as more fully explained in the proof of service attached to this Petition as Exhibit A and as made a part hereof as though fully set forth herein.

7. In response to the Order, Defendant DOMAIN BANK, INC., took immediate steps to place a hold on the domain name "voteauction.com" as more fully explained in DOMAIN BANK, INC.'S, report to the Court attached to this Petition as Exhibit B and made a part hereof as though fully set forth herein. The effect of this effort was to make the domain name "voteauction.com" and the web site associated with that name inaccessible to most computers throughout the United States within two to three days after entry of the Order.

8. On October 18, 2000, the same day as the Order was entered by this Court, Defendant LUZIUS A. BERNHARD registered a new domain name – "vote-auction.com" – with and through an organization called CORE Internet Council of Registrars ("CORE") and one of its affiliate members, Joker.com, as evidenced by CORE's "Whois" file report, a copy of which is attached to this Petition as Exhibit C and made a part hereof as though fully set forth herein.

9. On October 20, 2000, a web-site known as "vote-auction.com" became accessible on the Internet. The web site consisted of two pages, a copy of which is attached to this Petition as Exhibit D and made a part hereof as though fully set forth herein. This web site's first page had a banner stating: "URGENT NOTICE TO ALL VOTE-AUCTIONEERS: Vote-auction.com services had been temporarily offline due to". An image of the first page of the Plaintiffs'

Emergency Motion for a Temporary Restraining Order or Preliminary Injunction, redacted to remove the names of certain of the Defendants, appeared below the banner. Below the first page of the Plaintiffs' motion was a notice stating, "you can now reach us at WWW.VOTE-AUCTION.CO for further statements or anything else, please contact pr@vote-auction.com."

10. It was determined that the domain name "vote-auction.com" was registered through CORE and a copy of the Order was emailed to the Secretariat of CORE and to each of the members of CORE's Executive Committee on October 20, 2000, as more fully set forth in the Affidavit of Daniel Doyle, attached to this Petition as Exhibit E, which is made a part hereof as though fully set forth herein.

11. On or about October 22 or 23, 2000, "vote-auction.com" was "on-line" and appearing on computers accessing the URL "vote-auction.com." A true and correct copy of the web site pages for "vote-auction.com" as they appeared on October 27, 2000, along with the affidavit of Daniel Doyle, is attached to this Petition as Exhibit F and made a part hereof as though fully set forth herein.

12. Include as a part of the "vote-auction.com" web site is a copy of a "press release" dated October 22, 2000 announcing that "vote-auction.com" regained access to the web via its new domain name and relating its version of the legal proceedings against the Defendants. See Exhibit F, 6-8.

13. The "vote-auction.com" site includes a page entitled "legal documents regarding 'chicago board of elections'" and that provides a hypertext link to the documents filed by the Plaintiffs in connection with this action – the complaint, memorandum of law, the emergency motion for a temporary restraining order and the preliminary injunction order – that are posted on the Chicago Board of Election Commissioners' web site. See Exhibit F, 17.

individuals in the State of Illinois to register on-line to sell their votes to the highest bidder, except now the vote selling is characterized as, "Sell: Register to ask for donations." Exhibit F, 23-25. The site also solicits and allows individuals or organizations to register to "bid" on and buy the votes that are placed for sale, except that the vote buying is now characterized as, "Bid: register to donate funds." Exhibit F, 26-29.

15. The "vote-auction.com" site still states that the "winning bidder for each state will be able to choose who the group will vote for en masse." Exhibit F, 14. As in the earlier version of "votauction.com," the starting bid for each state's block of votes is \$100, with a minimum bid increase of \$50. Id. "Vote-auction.com" again states that it will not receive money from the auction. Id. The site states, "The winning bidder will have to contact the [V]ote-auction.com voters in order to provide payment and for the voters to provide verification." Id.

16. By and through the domain name "vote-auction.com" Defendants HANS BERNHARD, LUZIUS A. BERNHARD, OSKAR OBEREDER and CHRISTOFF JOHANNES MUTTER are still in violation of the election laws of the State of Illinois and of the United States in that the operators of this site still solicit and allow voters to sell their votes and solicit and allow others to bid and buy such votes.

17. By and through the domain name "vote-auction.com" Defendants HANS BERNHARD, LUZIUS A. BERNHARD, OSKAR OBEREDER and CHRISTOFF JOHANNES MUTTER are knowingly and willfully violating the terms of this Court's Order and they have done nothing to comply with the terms of the Order. These Defendants have failed to report to the Court within 10 days on measures they have taken to implement the Order. The only communication is an October 30, 2000 fax from Defendant LUZIUS A. BERNHARD, aka, HANS BERNHARD, to the undersigned requesting a "suspension" of the case for a 30-day

period, a copy of which is attached to this Petition as Exhibit G and made a part hereof as though set forth fully herein.

18. Meanwhile, Defendant DOMAIN BANK, INC., which served only as the domain name registrar for "voteauction.com," took immediate steps to comply with the terms of the Order.

19. Defendant JAMES BAUMGARTNER executed an affidavit under oath on October 24, 2000, stating that the "voteauction.com" web site was designed and intended to be only a "political parody and satire" and that at no time did he intend to buy or sell votes or facilitate any third party buying or selling a vote. He also states in part that he no longer has any involvement with the web site. A copy of Defendant BAUMGARTNER'S affidavit is attached hereto as Exhibit H and made a part hereof as though fully set forth herein. However, it is still uncertain whether Defendant BAUMGARTNER has possession of, access to or control over any records pertaining to the names and addresses of Illinois residents who registered to sell their vote or who offered to bid upon and buy such votes so as to be within the terms of the Order compelling the immediate disclosure to the proper election authorities of such information. See, e.g., a copy of the undersigned's October 25, 2000 letter to Defendant BAUMGARTNER'S New York attorney seeking additional information and clarification of the affidavit, attached to this Petition as Exhibit I and made a part hereof as though fully set forth herein. Therefore, it is possible that Defendant BAUMGARTNER may be in continuing violation of that part of the Order compelling disclosure of information as to sellers and buyers.

WHEREFORE, Plaintiffs pray that an order and Rule to Show Cause be entered against Defendants HANS BERNHARD, LUZIUS A. BERNHARD, OSKAR OBEREDER, CHRISTOFF JOHANNES MUTTER and JAMES BAUMGARTNER to show cause, if any, why

they should not obey the Order of this Court of October 18, 2000. Plaintiffs also pray that further proceedings may be conducted as may be consistent with the provisions of the Rule to Show Cause.

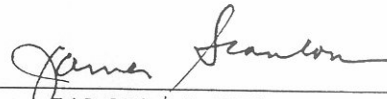
BOARD OF ELECTION COMMISSIONERS OF
THE CITY OF CHICAGO, LANGDON D. NEAL,
RICHARD A. COWEN and THERESA M.
PETRONE, Plaintiffs

By: James Scanlon
Their Attorney

Atty. No. 70383
James M. Scanlon
James M. Scanlon & Associates
70 West Madison Street, Suite 3600
Chicago, Illinois 60602
312-977-4881

CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



JAMES M. SCANLON

PROOF OF SERVICE

I, KRISTEN DAVIS, being duly sworn and upon oath, state as follows:

1. I am employed as a Paralegal to James M. Scanlon, Attorney, of James M. Scanlon & Associates, and my office is located at 70 West Madison Street, Suite 3600, Chicago, Illinois.

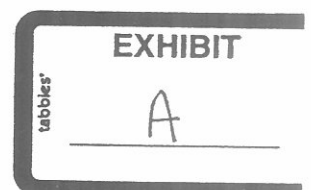
2. I have personal knowledge of the facts stated herein.

3. On October 18, 2000, between the time of 5:30 p.m. and 6:30 p.m. Central Daylight Saving Time, I did the following:

A. I prepared a Federal Express USA Airbill slip, FedEx tracking No. 814015314911, addressed to Mr. James Baumgartner, c/o Rensselaer Polytechnic Institute, 110 8th Street, DCC 135, Troy, NY 12180. I placed a copy of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, into a Federal Express Overnight Pack and affixed the prepared label for James Baumgartner onto the package.

B. I prepared a Federal Express USA Airbill slip, FedEx tracking No. 814015314900, addressed to Mr. James Baumgartner, 212 3rd Street, Troy, NY, 12180. I placed a copy of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, into a Federal Express Overnight Pack and affixed the prepared label for James Baumgartner onto the package.

C. I prepared a Federal Express USA Airbill slip, FedEx tracking slip No. 814015314896, addressed to Domain Bank, Inc., c/o Henry Lubsen, 23 West Fourth Street, Bethlehem, PA, 18018. I placed a copy of the Preliminary Injunction Order



entered by the Circuit Court of Cook County on October 18, 2000, into a Federal Express Overnight Pack and affixed the prepared label for Domain Bank, Inc., onto the package.

D. I prepared a Federal Express International Air Waybill slip, FedEx tracking slip No. 8167 2339 7127, addressed to Hans Bernhard, Kurrentgasse 10/22, Vienna, Austria, A-1010. I placed a copy the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, into a Federal Express Overnight Pack and affixed the prepared label for Hans Bernhard onto the package.

E. I prepared a Federal Express International Air Waybill slip, FedEx tracking slip No. 8167 2339 7116, addressed to Luzius Bernhard, Kurrentgasse 10/22, Vienna, Austria, A-1010. I placed a copy of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, into a Federal Express Overnight Pack and affixed the prepared label for Luzius Bernhard onto the package.

F. I prepared a Federal Express International Air Waybill slip, FedEx tracking slip No. 8167 2339 5190, addressed to Oskar Obereder, Lorenz Mandelgasse 31-33, Vienna, Austria 1160. I placed a copy of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, into a Federal Express Overnight Pack and affixed the prepared label for Oskar Obereder onto the package.

G. I prepared a Federal Express International Air Waybill slip, FedEx tracking slip No. 8167 2339 5180, addressed to Christoph Johannes Mutter, Lorenz Mandelgasse 31/1, Vienna, Austria 1160. I placed a copy of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, into a Federal Express Overnight Pack and affixed the prepared label for Christoph Johannes Mutter onto the package.

4. On October 18, 2000, at approximately 6:40 p.m. Central Daylight Saving Time I placed all six Federal Express packages in the Federal Express receiving station for pick-up on the 36th floor at 70 West Madison Street, Chicago, Illinois.

5. On October 18, 2000 between the time of 2:00 p.m. and 6:45 p.m. Central Daylight Saving Time, I attempted service of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, by facsimile transmission to Defendants Oskar Obereder and Christoph Johannes Mutter at fax number 011.43.1.149.332.5611. I attempted service of the five pages of the preliminary injunction order and a one-page cover memo by facsimile to that telephone number on six separate occasions. Each attempt resulted in a busy signal and I was unable to transmit the motion by facsimile transmission.

6. On October 18, 2000, I sent copies of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000 to all Defendants at the addresses listed on the Service List that was attached to the Notice of Motion by U.S. Postal Service, postage pre-paid.

7. On October 20, 2000, I sent a copy of the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, by U.S. Registered or Certified Mail, return receipt requested, postage pre-paid, to the following

A. Hans Bernhard, Kurrentgasse 10/22, Vienna, Austria, A-1010, by U.S. Registered Mail, No. R260788816;

B. Luzius Bernhard, Kurrentgasse 10/22, Vienna, Austria, A-1010, by U.S. Registered Mail, No. R260788815;

C. Oskar Obereder, Lorenz Mandelgasse 31-33, Vienna, Austria 1160, by U.S. Registered Mail, No. R260788817;

D. Christoph Johannes Mutter, Lorenz Mandelgasse 31/1, Vienna, Austria 1160, by U.S. Registered Mail, No. R260788818;

E. Domain Bank, Inck, c/o Henry Lubsen, 23 W. Fourth Street, Bethlehem, PA, 18018, by U.S. Certified Mail, No. 7000 0520 0012 3619 1522;

F. James Baumgarnter, 212 3rd Street, Troy, NY 12180, by U.S. Certified Mail, No. 7000 0520 0012 3619 1515, return receipt requested, postage pre-paid.

8. If sworn as a witness, I can testify competently and would testify as to the matters set forth herein.

KRISTEN DAVIS

Signed and sworn to (or affirmed) before me by Kristen Davis
this _____ day of October, 2000.

Notary Public

October 30, 2000

Hon. Michael J. Murphy
Circuit Court of Cook County
c/o James M. Scanlon, Esq.
James M. Scanlon & Associates, P.C.
70 West Madison Street
Suite 3600
Chicago, Illinois 60602

Re: **Board of Election Commissioners of the City of Chicago, et. al. vs. Hans
Bernard, et. al. – 00 CE 031**

Dear Judge Murphy:

In accord with the Preliminary Injunction Order you issued on October 18, 2000 with respect to the above referenced action, Domain Bank, Inc. has taken the following actions:

1. We have placed the domain name "voteauction.com" on hold, thereby deleting the name from the zone files maintained by the registry for the .com top level domain. Such action effectively renders the domain name inactive in that Internet browsers are no longer able to resolve the domain name to the IP address of any web site.
2. We have locked the domain name so that (i) no changes can be made to the record associated therewith, and (ii) the registrant will be precluded from transferring the name to any other person, or transferring the registration sponsorship to any other registrar.

As Mr. Scanlon has indicated to the Court, Domain Bank has played no role in the development or operation of the voteauction.com web site. We are simply the registrar of record for the domain name. We believe that the actions that we have taken, as set forth above, constitutes our full compliance with your Order.

Please feel free to contact me if you have any questions in this matter.

Very truly yours,



M. Scott Hemphill
Vice President & General Counsel

[About CORE](#)[Find a registrar](#)[Documents](#)[Join CORE](#)[Press release](#)[Glossary](#)[Contact](#)[Home](#)

CORE WHOIS

Example of input for domain-names: **domain.com**

Luzius A. Bernhard (template COCO-781664)
hans@ubermorgen.com
Kurrentgasse 10-22
Vienna, Austria 1010 AT

Domain Name: vote-auction.com
Status: production

Admin Contact, Technical Contact, Zone Contact:
Luzius A. Bernhard (COCO-781664) hans@ubermorgen.com
+43-676-9300061

CORE Registrar: [CORE-11]

Record last modified: 2000-10-20 03:15:03 MET by [CORE-11]
Record created: 2000-10-18 15:37:55 MET by [CORE-11]

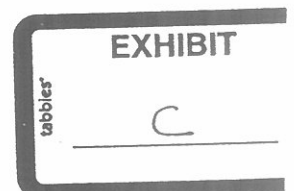
Domain servers in listed order:

ns1.sil.at 194.152.178.1
ns2.sil.at 194.152.178.10

Database last updated on 2000-10-24 16:51:32 MET

INTERNET COUNCIL OF REGISTRARS - WORLD TRADE CENTER II -- 29, ROUTE DE PRE-BOIS - CH-1215
GENEVA - SWITZERLAND - PHONE: +41.22.929 57 44 - FAX: +41.22.929 57 45

E-MAIL: secretariat@corenic.org





IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN and THERESA M. PETRONE,)

Plaintiffs,)

vs.)

HANS BERNHARD, [REDACTED],)
[REDACTED], [REDACTED])
[REDACTED], [REDACTED] and DOMAIN)
BANK, INC.,)

Defendants,)

00 CE 031

00 OCT 16 PM 1:05
COURT CLERK
COOK COUNTY

PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER
OR PRELIMINARY INJUNCTION

NOW COMES the BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, LANGDON D. NEAL, RICHARD A. COWEN and THERESA M. PETRONE, Plaintiffs in the above-entitled cause, by their attorney, James M. Scanlon & Associates, and moves this Court to enter a temporary restraining order, without bond, pursuant to Section 11-101 of the Code of Civil Procedure (735 ILCS 5/11-101) or a preliminary injunction pursuant to Section 11-102 of the Code of Civil Procedure, notice having been given to the defendants, restraining and enjoining Defendants HANS BERNHARD, [REDACTED], [REDACTED], [REDACTED] and DOMAIN BANK, INC., and each them and their agents, employees, and all others acting in concert with them from using or operating an Internet web site known as "Voteauction.com" or any web site by any other name in any manner as a forum for conducting an "auction" for the purpose of encouraging, soliciting and allowing residents of the State of Illinois to sell their votes to be cast

EXHIBIT

tabbles

D

WWW.VOTE-AUCTION.CO

for more information, or anything else, please email
pr@vote-auction.com

AFFIDAVIT OF DANIEL DOYLE

I, DANIEL DOYLE, being duly sworn and upon oath, state as follows:

1. I am employed as Director of Registration Records for the Chicago Board of Election Commissioners, which is located at 69 West Washington Street, Chicago, Illinois.

2. I have personal knowledge of the facts stated herein.

3. On October 20, 2000, at approximately the hour of 4:10 P.M. Central Daylight Savings Time, I searched on my computer and found an Internet web site known as "vote-action.com" at <http://www.vote-auction.com/>.

4. While I was on the Internet, I switched to an Internet registration site named www.Internic.net. This site has a feature call "Whois" whereby you can enter a domain name and receive select information. A portion of the information I received was:

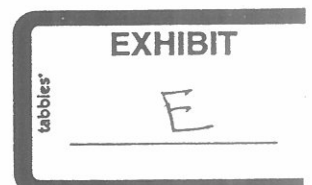
Domain Name: VOTE-AUCTION.COM
Registrar: CORE INTERNET COUNCIL OF REGISTRARS
Whois Server: whois.corenic.net
Referral URL: www.corenic.net
Name Server: No nameserver
Updated Date: 18-oct-2000

5. I then highlighted and copied into memory the text: CORE INTERNET COUNCIL OF REGISTRARS and went into the infoseek.com search engine Internet site.

6. I "pasted" the text that was in memory into the search box of Infoseek and clicked on the "Go" button. The search returned many choices, the first of which was:

1. CONTACT

&NB SP; .CONTACT CORE INTERNET COUNCIL OF REGISTRARS World Trade Center II 29, route de Pre-Bois CH



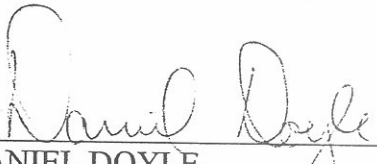
1215 Geneva-Switzerland Phone: +41.22.929.57 ...
<http://www.corenic.org/contact.htm>

7. I clicked on the word CONTACT and was taken to

<http://www.corenic.org/contact.htm>.

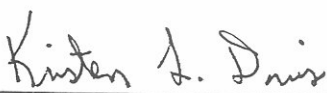
8. The page located at <http://www.corenic.org/contact.htm> contains email addresses for various individuals associated with this company. At the direction of James Scanlon, general counsel for the Board of Election Commissioners, I then sent emails containing preliminary injunction order entered by the Circuit Court of Cook County on October 18, 2000 to each of the Executive Committee whose email addresses are on the copy of the CORE web site page and to secretariat@corenic.org. A true and correct copy of the email that I sent to these individuals is attached hereto.

9. If sworn as a witness, I can testify competently and would testify as to the matters set forth herein.

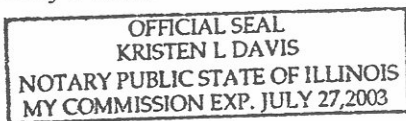


DANIEL DOYLE

Signed and sworn to (or affirmed) before me by Daniel Doyle
this 27th day of October, 2000.



Notary Public



Chicago Board of Elections

From: Chicago Board of Elections <cboe@chicagoelections.net>
To: <secretariat@corenic.org>
Sent: Friday, October 20, 2000 4:16 PM
Attach: injunction5.JPG; injunction2.JPG; injunction3.JPG; injunction4.JPG; injunction1.JPG
Subject: Injunction against Voteauction.com

individual in Illinois who has sold his or her vote or has offered to sell his or her vote through voteauction.com and the names and addresses of every individual and/or entity that has paid or has offered to pay for votes of Illinois residents through voteauction.com.

3. Defendants shall within 10 days report to the Court on the measures they have taken to implement this order.
4. The Court shall retain jurisdiction over this matter.

JUDGE MICHAEL J. MURPHY

OCT 18 2000

Circuit Court-209

Entered: _____

Atty. No. 70383
James M. Scanlon
James M. Scanlon & Associates
70 West Madison Street, Suite 3600
Chicago, Illinois 60602
312-977-4881

I HEREBY CERTIFY THE ABOVE TO BE CORRECT
DATE OCT 18 2000

Aurelia Pucinski

CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL
THIS ORDER IS THE COMMAND OF THE CIRCUIT
COURT AND VIOLATION THEREOF IS SUBJECT TO THE
PENALTY OF THE LAW.

-
2. This Court has personal jurisdiction over all of the parties in this action.
 3. Venue is proper in Cook County.
 4. Plaintiffs BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, LANGDON D. NEAL, RICHARD A. COWEN and THERESA M. PETRONE, having standing to bring this action.
 5. Plaintiffs have demonstrated a likelihood of success on the merits and the proofs, once submitted would likely show that:
 - A. Defendants James Baumgartner, Hans Bernhard, Luzius Barnhard, Oskar Obereder, and Christoff Johannes Mutter, and those acting in concert with them, have violated the election laws of the State of Illinois and of the United States by using and operating an Internet web site known as "voteauction.com" as an auction forum for the purpose of encouraging, soliciting and allowing residents of Illinois to sell their votes to be cast at the November 7, 2000 General Election and encouraging, soliciting and allowing individuals and corporations to "bid" on and buy such votes.
 - B. These Defendants' continued use and operation of the Internet web site known as Voteauction.com as an auction forum for purpose of encouraging, soliciting and allowing residents of Illinois to sell their votes to be cast at the Election and encouraging, soliciting and allowing individuals and corporations to "bid" on or buy such votes constitutes knowing and willful violations of the election laws of the State of Illinois and of the United States that will result in illegal and fraudulent voting at the Election if not prevented.
 - C. These Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such

votes, owe a duty to Plaintiffs and to all citizens of the State of Illinois not to violate the election laws of the State of Illinois and of the United States.

D. These Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, owe a duty to Plaintiffs and to all citizens of the State of Illinois not to deprive them or defraud them of their rights and privileges under the Constitutions and laws of the State of Illinois and of the United States to a free and equal election and to a fair and impartially conducted election process.

E. These Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have deprived and defrauded, and will continue to deprive and defraud if not enjoined, the Plaintiffs and all citizens of the State of Illinois of their rights and privileges under the Constitutions and laws of the State of Illinois and of the United States to a free and equal election and to a fair and impartially conducted election process.

F. That anyone selling or attempting to sell his or her vote, and anyone buying or attempting to buy the votes of another is in violation of the election laws of the State of Illinois and of the United States as enumerated herein.

6. Plaintiffs possess certain and clearly demonstrated rights which need protection.
7. Plaintiffs will suffer irreparable harm without protection of an injunction.
8. There is no adequate remedy at law to compensate for Plaintiffs' injuries.
9. In the absence of injunctive relief, the Plaintiffs would suffer greater harm without an injunction than Defendants will suffer if it is issued.

10. Defendants have been notice of the Plaintiffs' Emergency Motion for a

Temporary Restraining Order.

IT IS THEREFORE ORDERED that:

1. Defendants and all those acting in concert with them are enjoined from:
 - A. Using or operating any Internet web site that encourages or allows residents of Illinois to sell their votes to be cast at the November 7, 2000 General Election.
 - B. Using, operating, facilitating or accessing domain name "voteauction.com" and to remove such web site from the Internet completely or, in the alternative, to modify the Internet web site known as "voteauction.com" so as to remove any illegal content.
 - C. Allowing or continuing registration of the Internet domain name "voteauction.com" or any other domain name offering substantially the same service as voteauction.com.
 - D. Using or operating in the State of Illinois any Internet web site by any name in any manner that would violate prohibitions in the laws of the State of Illinois and of the United States against the buying and selling of votes in elections.
 - E. Accepting from residents of the State of Illinois any registration or offer to sell votes or to buy votes at auction through voteauction.com and to modify their web site to indicate that all registrations or offers to sell votes and/or buy votes from Illinois residents will be denied.
2. Defendants and all those acting in concert with them and order them shall immediately disclose to the proper election authorities the names and addresses of every

IN THE CIRCUIT COURT OF COOK COUNTY
 COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
 CITY OF CHICAGO, LANGDON D. NEAL,)
 RICHARD A. COWEN, and THERESA M.)
 PETRONE,)

Plaintiffs,)

vs.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
 OSKAR OBEREDER, CHRISTOPH JOHANNES)
 MUTTER, JAMES BAUMGARTNER and DOMAIN)
 BANK, INC.,)

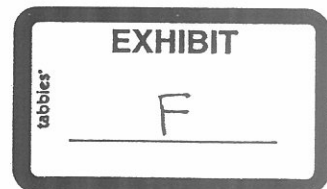
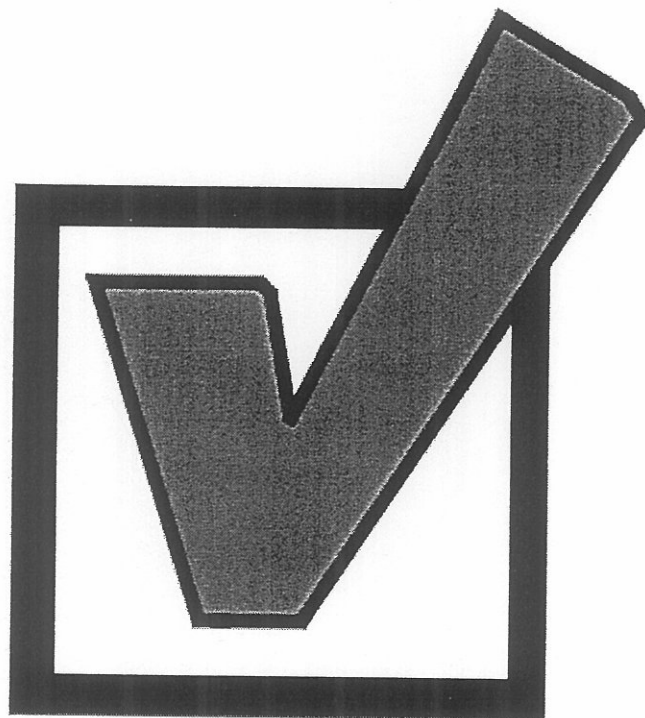
Defendants.)

00 CE 031

PRELIMINARY INJUNCTION ORDER

This matter coming before the Court upon Plaintiffs' Emergency Motion for a Temporary Restraining Order or Preliminary Injunction pursuant to Sections 2-701, 11-101 and 11-102 of the Code of Civil Procedure (735 ILCS 5/2-701, 5/11-101 and 5/11-102), seek declaratory judgment, injunctive and other relief against said Defendants either jointly, severally or in the alternative, and upon Plaintiffs' verified Complaint for Declaratory Judgment, Injunction and other relief filed against Defendants HANS BERNHARD, LUZIUS A. BERNHARD, OSKAR OBEREDER, CHRISTOPH JOHANNES MUTTER, JAMES BAUMGARTNER and DOMAIN BANK, INC., and the Court having reviewed and considered the allegations in the verified complaint and exhibits thereto, as well as evidence presented at the hearing on this Motion, and having heard and considered oral argument, the Court finds as follows:

1. This Court has subject matter jurisdiction over this action.



"Bringing Capitalism and Democracy Closer Together"

History

[v]ote-auction.com is owned by an Austrian holding company that has invested in many of America's new, emerging industries. Like the Prison industry....

Take a closer look [here](#).

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from [aboutpolitics.com](#)

2

[How it works](#)

[Election History](#)

[V.E.K.](#)

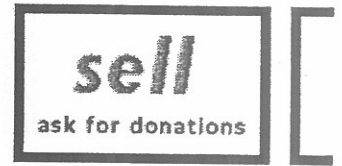
[Legal Issues](#)

[Message Board](#)

[News & Press](#)

[Contact](#)

[Links](#)



[history]

A short history of the U.S.A. Election Market

From the "Father of our Country," George Washington, to the mafia-connected political bosses of the prohibition era, to today's politicians funded by "soft money", big money has often had an important influence on United States elections.

Here are a few examples of vote-buying in America:

In 1757, George Washington ran for a seat in the Virginia House of Burgesses. For this election he purchased more than a quart and a half of alcoholic beverages for each of the 391 voters in his district.

A candidate in the 1838 New York mayoral election paid \$22 per uncommitted vote.

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LATEST PRESS RELEASE

FOR IMMEDIATE RELEASE - Berlin, October 22, 2000

Vote-auction.com back online

Below you find the latest press release by Vote-auction.com [formerly voteauction.com].

We have included any information on the latest developments of the site and the people and users behind it.

You can also find this press release at <http://www.vote-auction.com/pr.htm>

For any further information feel free to contact pr@vote-auction.com or in urgent cases call +49-175-2066954.

[V] Voteauction.com is dead, long live Vote-auction.com

The "Leader of the Election Industry", vote-auction.com has regained access to the web via its new domain <http://www.vote-auction.com> During the past week, diverse rumours and hear-say has been passed concerning the website which explores the high-risk consumer markets of the American election industry. The site's original domain had been ordered shut down by a local American court in the U.S. state of Illinois earlier this week. But whilst the American authorities took their time and tax payers' money to legally pursue almost everybody related to the existence of the website, the owners of the site worked on a re-design and strategy paper for version 2.0 of the project.

[V] Sue 'em 'til they drop...

The legal authorities of Chicago, Illinois, made every effort to get the site out of service during the last 2 weeks. Amongst the original creator of the project, James Baumgartner, and the owner of the domain, Hans Bernhard, they also found it in the public's interest to sue:

. domainbank.com: Domainbank inc., is the registry where the original domain "votetiauction.com" is registered. It is defendant in named Chicago legal case.

. silverserver.at: Both SILVER SERVER's president as well as of

one of the top technical staff are also named defendants in the Chicago legal case. SILVER SERVER is vote-auction.com's internet access provider.

[V] (II)legal Battle?

It remains open for discussion how it should be possible that a dns (domain name service) or an access provider could ever be responsible for contents accessible via domains they are providing routing services for.

Vote-auction.com sees this as illegal practice in total violation of standards set by ICANN.

We can only interpret domainbank's and SILVER SERVER's name on the list of defendants as a indirect means of repression to force vote-auction.com to go offline.

Concerning domainbank inc., this strategy seemed to work out for Chicago prosecutors:

Because of domain- bank being involved in the legal case, the provider "politely asked" vote-auction.com to provide them with a USD 100,000.00 bond for potential legal costs.

Vote-auction.com decided not to comply.

Instead, we asked them to transfer our "voteauction.com" domain to another provider. This order was not fulfilled by domainbank, as they had at that time already made a "deal" with Chicago authorities "not to move the domain anywhere", as we were told by one of domain- banks executives.

Concerning "defendant" SILVER SERVER, we can provide you with a clear statement from their president:

"SILVER SERVER clearly and fully supports vote-auction.com. SILVER SERVER president, o.o., is proud to be the billing contact

for vote-auction.com. actually we received very interesting offers

by investors to launch vote-auction.com in russia and japan."

[V] Users give full support - despite potential respression

Lots of users of Vote-auction.com have described their support in various emails. This is another reason why we decided not to wait to get back online until local U.S. legal authorities understand that Vote-auction.com works for and NOT against democracy.

We will keep on protecting any data which has been submitted to us by trusting users.

Chicago courts have a somewhat different approach to user rights. The court has ordered all data of users registered with the site to be disclosed to the authorities. This would then enable prosecutors in Chicago to sue users of vote-auction.com individually for "voter fraud".

[V] Where to go from here

Vote-auction.com is ready to deliver even more services to the vital elections markets. We will keep on focusing on the American elections until mid-November this year. In the meantime we will also finish our redesign and software upgrade in order to get ready for upcoming elections worldwide.

For the Vote-auction.com team:

lizvix (pr@vote-auction.com)

PLEASE NOTE: if you want to access Vote-auction.com via web or mail, please be sure to use the correct domain:

pr@vote-auction.com
<http://www.vote-auction.com>

We will not be able to receive messages sent to the old address. Thank you.

**press and media
contact:**

pr@vote-auction.com

User Statistics

Income Bracket		Occupation		Political_Affiliation	
Less than \$15,000	22%	Administrative/Clerical	14%	Communist	9%
\$15,000 - \$24,999	11%	Attorney	1%	Democrat	18%
\$25,000 - \$34,999	13%	Doctor	1%	Green	4%
\$35,000 - \$49,999	13%	Educator	3%	Independent	15%
\$50,000 - \$74,999	21%	Managerial/Executive	8%	Libertarian	4%
\$75,000 - \$99,999	9%	Professional/Technical	34%	Reform	1%
Over \$100,000	11%	Sales	7%	Republican	18%
		Service Labor	2%	Socialist	2%
		Skilled Labor/Construction	3%	None	29%
		Police/Armed Forces	1%		
		Other	26%		
 Education		 Gender		 Race	
Some High School	13%	Female	10%	Asian/Pacific Islander	10%
High School Graduate	11%	Male	85%	Black/African American	6%
Some College	39%	Unspecified	5%	Native American	3%
College Graduate	26%			Spanish/Hispanic/Latino	3%
Graduate School	11%			White/Caucasian	78%

remark: all numbers are based on users registered so far.

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- Why should you get active? Until recently, [V]ote-auction.com only has had the resources to concentrate on the United States Presidential election. We will keep on concentrating on this election until its final date at Nov. 7th, 2000.
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MESSAGE BOARD

[V]ote-auction.com provides this message board as a forum for the free exchange of ideas about [V]ote-auction.com, vote-selling, campaign investing, and campaign finance.

You will have to regulate yourself, otherwise we will not have the time nor morals to interfere.

Advertising is not allowed. Except if it is good edvertizing, or extremely bad advertizing. If it is not suitable for our target audience, you will make a fool out of yourself.

If you spam, don not get caught.

Enter the Message Board

message board hosted by:

www.wØØf.com

[how it works]

General

[V]ote-auction.com is devoted to combining the American principles of democracy and capitalism by bringing the big money of campaigns directly to the voting public. We provide a forum for campaign contributors and voters to come together for free-market exchange.

Classic Approach

Until recently, the Election Industry was controlled by an exclusive group of political consultants. These consultants spend the campaign contributors' money on advertising while taking a 10-15% cut for themselves. The political consultants are paid based on their ability to "deliver" voters to the candidates. This effectively treats the voters as a product to be sold to the candidates (and/or their campaign contributors.) This is similar to the way television (and other media outlets) operate. In television, the end product is the viewer whose attention is sold to television's customer, the advertiser.

The [V]ote-auction.com Approach

[V]ote-auction.com has created a new paradigm in the election industry. Now the voters can take control of their voting capital and campaign investors will see a greater return on their investment. Control your vote - control your democracy!

The worldwide Approach

[V]ote-auction.com is planning on going worldwide soon. We are already talking to diverse democratic countries in South America, Africa and Asia. Nevertheless, the E.U. [European Union] will be our next market of service. With our worldwide services voters will be able to control their vote worldwide, and thusly able to control democracies worldwide directly!

Target Markets

The Voters:

50% of the voting age population routinely stays home on election day. Are they fed up with the system? Are they disappointed by the two major parties? Are they desensitized by the thousands of political ads they see on Television? [V]ote-auction.com will allow these voters to profit from their democratic capital. By offering their voting capital at auction, these traditionally non-voting citizens will be participating in the democratic process and the expanding economy.

The campaigners:

Voteauction.com also provides a more efficient method for campaign investors to obtain their objectives. When a major communication company contributes over a million dollars to a political party, do they hope that this investment will result in increased profits? Of course they do! Although they may have a net worth of billions of dollars, most corporations do not spend 1 million dollars without some hope of a return on their investment. Unfortunately, 10-15% of this investment is taken off the top by the campaign consultants. [V]ote-auction.com allows campaign investors to get their dollar's worth by connecting them directly with the voters.

The way the Markets work

The winning bidder for each state will be able to choose who the group will vote for en masse. The free market will determine the value of the votes in each state. Votes in heavily populated states may be more valuable than votes in less populous states; however, if there is a large number of voteauction voters in a small state, the voteauction voters could help swing that state and thus the state's electoral votes. The value of a vote in a particular state could change on a daily basis. Votes have been purchased in the past (in fact the United States has a long history of vote buying going back to George Washington) but it has never taken this form.

The starting bid for each state is \$100, with a minimum bid increase of \$50. [V]ote-auction.com will not receive any money from the auction. The winning bidder will have to contact the [V]ote-auction.com voters in order to provide payment and for the voters to provide verification.

Individuals, corporations and organizations must first register in order to bid on one of the voting blocks. Spending money to influence voters is protected by the free speech clause of the First Amendment of the U.S. constitution. A recent U.S. Supreme Court decision (Buckley v. Valeo) has equated freedom of spending money with the freedom of speech. Freedom of spending and freedom of speech are central components of our capitalist democracy. It is however considered problematic by very local jurisdictions of a few small states of the U.S. if one pays money directly to voters [it is ok to pay campaigners directly]. We understand this twist of modern day society, and have therefore found new ways on how to solve this situation smoothly.

The new Way

We at [V]ote-auction.com offer you the following services:

- . you can register as a potential political candidate
- . you can register as a potential political lobbyist
- . we provide the forum for the two above-mentioned parties to meet.
- > You donate money to the campaigners of the future. Do here, do it now, do it directly. No Fuzz!

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legal documents regarding "chicago board of elections"

name of document

complaint against voteauction.com

[take this link](#)

memorandum of law

[take this link](#)

temporary restraining order

[take this link](#)

preliminary injunction order

[take this link](#)

[news & press]

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Voteauction.com in the American Press:

CNN.com: Web site offers to sell U.S. presidential votes, Web site offering to sell votes shut down, Vote-selling website to be revived. possibly offshore

Wirednews.com: Close Vote? You Can Bid On It, Voteauction Bids the Dust, Austrian Takes Bids on U.S. Votes, Thousands Sign Up to Sell Votes

NY1 News: Website to Make It Possible to Sell Your Vote Online

USA Today: Votes Up For Auction Draw Official Inquiries

ABC News: Personal (Campaign) Finance

Slate.com: Buy This Vote!

Washington Post: Buy This Vote! (same article as slate.com)

Minnesota Public Radio's Future Tense: Sell Your Vote (real audio file)

The Industry Standard: Wanna Buy My Vote? Fuhgeddaboutit

Auction watch: Straight Talk from Voteauction.com

Voting Integrity Project: VIP Reports - Going, Going Gone!

Fox 4 News, Kansas City: Voteauction.com founder, James Baumgartner, phone interview. 8/23/00 (not available online)

KPIX, San Francisco: not available online

Associated Press: Web Sites Offer Votes For Sale

Metroland, Albany, NY: How Much Is That Voter In The Window? (9/1/00 - not available online.)

Salt Lake Tribune: Auction Gives New Meaning to "Check Here"

California Secretary of State: Jones Issues Warning Against On-line Vote Buying Schemes

Federal Computer Week: Is a vote-selling Web site parody or threat?

Fortune Small Business: [American Cynicism. 101](#)

Chicago Sun-Times: [Web vote sale all about buzz](#)

Cnet: [Chicago tries to close vote Web site](#)

The Register: [Votes for sale online in the US](#)

Cluebot: [Americans sell their votes for \\$10 each](#)

Everett Herald (WA): [Bid to sell votes on Web rankles officials](#)

Sioux City Journal: [Vote buying becomes more blatant](#)

Thirsty: [UPDATE: Voteauction.com up and running again](#)

Voteauction.com in the International Press:

Transfert: [Voter, c'est facile et ça peut rapporter gros ! ; Votes aux enchères : suite et... fin](#)

Heise online: [Chicago will Stimmenkauf per Internet stoppen](#)

Telepolis/ixmagazin: [Schock-Marketing aus dem Netz-Underground](#)

Lenta.RU: <http://lenta.ru/internet/2000/08/17/vote/>

Denni zpravy z Internetu: [Vsechno je prece na prodej, tak proc by ne volicске hlasy?](#)

Spiegel Online: [Behörden stoppen Stimmenverkauf im Web](#)

NET-BC: [US-Wahlkampf: Demokratie jetzt online käuflich?](#)

Voteauction.com on discussion boards:

Picnet: [Selling Your Vote for Cash](#)

FreeRepublic: [Discussion of "Vote-Selling Website to be revived, possibly offshore"](#)

slashdot: [from the retail-goods-at-wholesale-prices department](#)

Cnet Canada: [eBay thwarts sale of presidential election votes](#)

October 3, 2000: Voteauction Action Team visits the first U.S. Presidential debates. Over 200 voter empowerment kits are distributed to the crowd gathered outside the JFK Library.

August 28, 2000: Voteauction.com re-launches with added features to better serve the user.

August 22, 2000: Voteauction.com is sold to an Austrian Holding company for an undisclosed sum.

Let us know if we missed any story or discussion board about voteauction.com
pr@vote-auction.com

[**contact**]

**press and media
contact:**

pr@vote-auction.com

Your enquiries will either be answered by [V]ote-auction.com's
hans bernhard, ubermorgen.com's lizvix or by one of our staff.

[links]

Site Name	url	comments
George W. Bush for president	www.georgewbush.com	official site for the campaign to elect Governor George W. Bush as president of the U.S.
Al Gore for president	www.algore2000.com	official site for the campaign to elect Vice President Al Gore as president of the U.S.
America 2000: The Democratic National Convention	www.dems2000.com	official site for the Democratic National Convention
2000 Republican National Convention	www.gopconvention.com	official site for the Republican National Convention
Common Cause	www.commoncause.org	site devoted to campaign finance reform
Open Secrets	www.opensecrets.org	facts and statistics about campaign financing and other issues
Billionaires For Bush (or Gore)	www.billionairesforbushorgore.com	lobbying organization committed to buying the candidates
The Voting Integrity Project	www.votingintegrity.org	"Defending Your Freedom by Protecting Your Vote"

Sell: Register to ask for donations

Whether you are a first-time voter, or you've been voting since World War II, you know that your presidential vote is very valuable in our democracy. Your vote is so valuable, that the candidates, their parties and the corporations that support them are spending millions of dollars this year in an attempt to influence your decision. Unfortunately this money is spent on advertising campaigns, pollsters and high-priced consultants. [V]ote-auction.com is cutting out the middleman and bringing the big money of presidential politics directly to you.

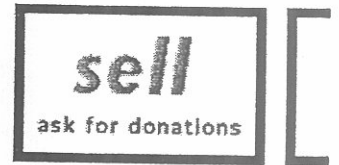
Fields marked with a * are required. This information will be used to create a demographic profile of the various voting blocks. Your personal information will be kept strictly confidential. It will not be sold, released, or retransmitted for any reason. When you register on this page, you will also be registered for the voters email list which will contain important updates for [V]ote-auction.com voters. You will not receive any advertising or unsolicited emails (spam) as a result of this list.

First (Given) Name	<input type="text"/>	*	Middle Initial	<input type="text"/>
Last (Family) Name	<input type="text"/>	*		
Address (Line 1)	<input type="text"/>	*		
Address (Line 2)	<input type="text"/>			
City	<input type="text"/>	*	State	<input type="text"/>
Zip Code	<input type="text"/>	*		
Email address	<input type="text"/>	*		
Age (on November 7, 2000)	<input type="text"/>	*	Sex	<input type="text"/>
I describe myself as:	<input type="text"/>	*	Employment Status	<input type="text"/>
Occupation	<input type="text"/>	*	Highest Education Level	<input type="text"/>
Household Income	<input type="text"/>	*	Political Affiliation	<input type="text"/>

d3

I am asking
for a
donation for
my political
engagements
because:

Save your values



25

Bid: register to donate funds

Is your corporation wasting its money on campaign contributions? The soft money that your corporation gives to national political committees will be spent on single-issue ads which are an ineffective method of persuading the voting populace. Voteauction.com offers a greater return on your campaign investment. When your corporation wins the auction on a particular voting block, you can be certain that the voteauction.com voters in that state will vote for your candidate. Thus, your corporation is guaranteed that its interests will be looked after.

Fields marked with a * are required. This information will be used to create a demographic profile of the bidding corporations. You and your corporation's identity will be kept strictly confidential. This information will not be sold, distributed, or released for any reason. You will be assigned a bidder number so you can follow the bids on the [check](#) page. Registering to bid on votes also registers you for the bidders email list which will contain updates on important voteauction.com information. You will not receive any advertising or unwanted emails (spam) from this list.

Register to donate funds.

Name of Organization/Corporation	<input type="text"/>	*		
Contact's Name	<input type="text"/>	*		
Address (Line 1)	<input type="text"/>	*		
Address (Line 2)	<input type="text"/>			
City	<input type="text"/>	*	State/Province	<input type="text"/>
Zip/Post Code	<input type="text"/>	*		
Country	<input type="text"/>	*		
Contact's email address	<input type="text"/>	*	Telephone	<input type="text"/>
Contact's Title	<input type="text"/>			
Type of business/organization	<input type="text" value="Administrative/Clerical"/>	*	Years incorporated	<input type="text" value="1 - 3"/>
Yearly sales	<input type="text" value="Less than 250,000"/>		Political Affiliation	<input type="text" value="Communist"/>

26

How much did your business/organization spend in campaign contributions (hard and/or soft money) in the 1996 election cycle?

 *

Is your organization a tax-exempt, non-profit? yes

Please indicate why your business/organization is interested in donating funds:

Submit

Bid: Registrater to donate funds

Are you wasting your money on campaign contributions? The soft money that you give to national political committees will be spent on single-issue ads which are an ineffective method of persuading the voting populace. [V]ote-auction.com offers a greater return on your campaign investment. When you win the auction on a particular voting block, you can be certain that the [V]ote-auction.com voters in that state will vote for your candidate. Thus, you are guaranteed that your interests will be looked after.

Fields marked with a * are required. This information will be used to create a demographic profile of the bidders. Your identity will be kept strictly confidential. This information will not be sold, distributed, or released for any reason. You will be assigned a bidder number so you can follow the bids on the [check](#) page. Registering to bid on votes also registers you for the bidders email list which will contain updates on important [V]ote-auction.com information. You will not receive any advertising or unwanted emails (spam) from this list.

Register to donate funds.

First (Given) Name	<input type="text"/>	*		
Last (Family) Name	<input type="text"/>	*	Middle Initial	<input type="text"/>
Address (Line 1)	<input type="text"/>	*		
Address (Line 2)	<input type="text"/>			
City	<input type="text"/>	*	State	AL <input type="text"/> *
Zip Code	<input type="text"/>	*		
Email address	<input type="text"/>	*	Telephone	<input type="text"/>
Age (on November 7, 2000)	18 <input type="text"/>	*	Sex	----- <input type="text"/> *
I describe myself as:	Asian/Pacific Islander <input type="text"/>	*	Employment Status	Full-Time <input type="text"/> *
Occupation	Administrative/Clerical <input type="text"/>	*	Highest Education Level	Some High School <input type="text"/> *
Household Income	Less than 15,000 <input type="text"/>	*	Political Affiliation	Communist <input type="text"/>

28

Amount I
spent in
campaign
contributions
(soft and/or
hard money)
in the 1996
election
cycle.

 *

I am
interested
in
donating
funds
because:

Submit

29

Current bids for the voting blocks:

Minimum bid is \$100. Minimum bid increase is \$50 for bids less than \$10000. For bids over \$10000, minimum bid increase is \$500.

State (# electoral votes)	Number of Voterauction.com voters	Current Total Price	Current Price per vote	Current Leading Bidder
Totals	21079	\$262550	(N/A)	(N/A)
Alabama (9)	214	\$2100	\$9.44	5601
Alaska (3)	6	0	0	none
Arizona (8)	207	\$2300	\$10.98	6301
Arkansas (6)	156	\$2500	\$16.07	8801
California (54)	2546	\$48000	\$19.61	none
Colorado (8)	162	\$2950	\$18.97	8301
Connecticut (8)	292	\$3100	\$15.12	8701
Delaware (3)	52	0	0	no
District of Columbia (3)	371	\$34	\$10.00	56
Florida (25)	540	\$95	\$11.00	63
Georgia (13)	231	\$18	\$10.00	62
Hawaii (4)	65	0	0	none
Idaho (4)	74	0	0	none
Illinois (22)	1632	\$28500	\$12.38	none
Indiana (12)	721	\$12000	\$9.79	6301
Iowa (7)	212	\$2400	\$10.42	8215
Kansas (6)	120	\$1000	\$9.62	8701
Kentucky (8)	245	\$1700	\$7.36	9501
Louisiana (9)	63	\$500	\$3.57	8101
Maine (4)	265	\$1400	\$6.57	9515
Maryland (10)	589	\$8000	\$14.34	5601
Massachusetts (12)	731	\$4000	\$6.08	8315
Michigan (18)	1429	\$28000	\$22.73	9301
Minnesota (10)	215	\$2800	\$13.64	9501
Mississippi (7)	178	\$1400	\$8.63	8301

Missouri (11)	562	\$6000	\$10.62	8701
Montana (3)	49	0	0	none
Nebraska (5)	89	\$900	\$10.98	9101
Nevada (4)	161	\$1400	\$8.75	8301
New Hampshire (4)	153	0	0	none
New Jersey (15)	1266	\$6000	\$6.96	9215
New Mexico (5)	182	\$800	\$5.00	7815
New York (33)	0	0	0	none
North Carolina (14)	422	\$4600	\$6.98	8015
North Dakota (3)	51	0	0	none
Ohio (21)	1344	\$19000	\$6.19	none
Oklahoma (8)	290	\$2000	\$5.15	5901
Oregon (7)	418	\$5100	\$11.60	8701
Pennsylvania (23)	1376	\$27000	\$18.24	9010
Rhode Island (4)	83	0	0	none
South Carolina (8)	248	\$3500	\$11.01	5201
South Dakota (3)	42	0	0	none
Tennessee (11)	367	\$3500	\$5.66	4515
Texas (32)	1164	\$2600	\$4.19	9515
Utah (5)	187	0	0	none
Vermont (3)	51	0	0	none
Virginia (13)	282	\$3200	\$11.97	8315
Washington (11)	371	\$5000	\$11.05	9215
West Virginia (5)	121	0	0	none
Wisconsin (11)	428	\$4600	\$10.14	9701
Wyoming (3)	56	0	0	none

last updated 16 October, 2000



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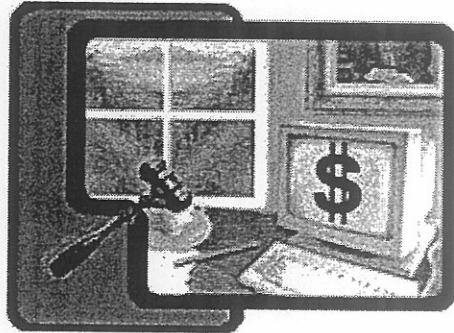
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Web site offers to sell U.S. presidential votes

August 18, 2000
Web posted at: 4:17 PM EDT (2017 GMT)

By *Richard Stenger*
CNN.com Writer

(CNN) -- A new Web site promises to "bring capitalism and democracy closer together" by auctioning votes in the 2000 presidential election.



But the political protest scheme could also bring forth criminal charges, officials said.

"The election industry is spending hundreds of millions of dollars in an attempt to influence the presidential election," reads [votauction.com](#), which launched in August. "This system is an inefficient waste of money for the candidates and their supporters. [Votauction.com](#) is committed to improving this system by bringing the campaign contributors' money directly to the voters."

The August startup purports to give voters the ability to place their ballots on the auction block, state by state. The highest bidder determines which White House candidate the [votauction.com](#) participants in each state will select en masse.

"I'm not being cynical," said founder James Baumgartner, a political science graduate student in New York. "I'm being realistic. Most people have an honest view of how the candidates are selling themselves. Voters should be included in the situation and get some of the windfall."

[MESSAGE BOARD](#)
[Democracy for sale](#)

At least one political observer praised the message delivered by the site.

"It's really a great way to bring home to voters how much others (big donors) are gaining from the system and how little voters are getting in comparison," said Sheila Krumholz, research director of the Center for Responsive Politics, a non-partisan organization that studies the influence of money in politics.

"You have to give this guy credit, bringing this to people's attention in a provocative way," she said.

But not everyone agrees.

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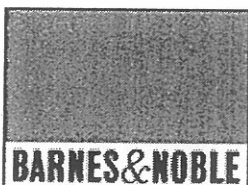
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"It needs to be shut down," said Deborah Phillips, president of the Voting Integrity Project, a non-profit public interest group that often deals with Internet issues. "It's cynicism raised to a new art form. It's destructive to the democratic process. If 50 state prosecutors don't jump on this guy's back and every voter that participates, they aren't doing their job."

Legal authorities have taken notice of similar escapades. The U.S. Justice Department contacted eBay this week after a handful of users offered their votes for sale on the Internet auction site.

When eBay learned of the questionable sale items, it removed them from the site immediately, spokesman Kevin Pursglove said.

"The reality is, even if people think it's a prank, we take it very seriously," said Pursglove. "This is an act that could bring along felony charges."

Vote sellers and buyers violate both state and federal laws and could face thousands of dollars in fines or years in prison, authorities say.

Baumgartner said he is not directly selling or buying votes, only providing a forum where others can do so, provided he takes a percentage of the transaction money.

He also argues that he is protected by recent Supreme Court decisions that equate money with free speech, including one in the 1970s that sanctioned the use of soft money in political campaigns.

But even his sympathizers are not so sure. Krumholz anticipates that the site could face serious legal challenges.

"I worry for the author of the site," she said.

Baumgartner, for his part, remains optimistic.

"I hope to get investors and advertisements soon," he said.

Phillips thinks he should look for something else.

"This is real vote fraud taking place on the Internet. I don't care how you couch it. I hope this guy has some good pro bono lawyers backing him up."

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Web site offering to sell votes shut down

From...

THE INDUSTRY STANDARD AN IDG.net SITE

August 23, 2000
Web posted at: 10:47 a.m. EDT (1447 GMT)

by Ronna Abramson

(IDG) -- If you were thinking of selling your vote in the presidential election, think again.

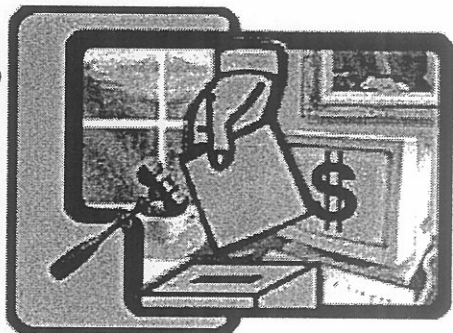
Voteauction.com, a Web site that offers a forum for citizens to sell their votes to the highest bidder, shut down Friday amid legal questions and technical glitches. EBay also has pulled the plug on at least seven people who have posted their votes for sale on its auction site since Wednesday.

The problem: Buying and selling votes violates federal and state statutes.

"You have to make your own decision how you want to vote," says Douglas Kellner, a New York City Board of Elections commissioner who helped persuade Voteauction to close. "People can spend money to influence your vote, but they can't buy it."

James Baumgartner, a graduate student working toward a master's in fine arts at Rensselaer Polytechnic Institute in Troy, N.Y., launched Voteauction earlier this month. He shut it down Friday and announced Monday that he was selling the content and domain name to an e-commerce developer in Austria. He did not disclose sales figures and did not know about the buyer's plans. No charges have been filed against Baumgartner.

Baumgartner's idea was to capitalize on undecided or disillusioned voters who intended to sit out during the November election -- a group that comprises more than half the amount of voters from four years ago. Baumgartner also hoped to divert some of the millions of dollars being spent on advertising and consultants to get voters. "I thought it'd be more direct and more democratic to have these voters make money from their vote," Baumgartner says. The site's



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from their vote," Baumgartner says. The site's motto: "Bringing Democracy and Capitalism Closer Together."

Voteauction planned to auction votes in blocks according to state. Bids would start at \$100 per state and go up by \$50. Whoever had the highest bid would get to decide how the entire group of votes from the particular state would vote. Voters would divide the final price equally among themselves.

Despite server crashes last week, about 200 voters signed up at Voteauction on Thursday after an online article featured the site.

"Selling my vote I think is a very obvious political statement," said one enrollee from upstate New York, who would only give her online pseudonym, "Jenny Ondioline." "It's saying that if the buying and selling of votes is going on even now between closed doors, through the lobbyists, let's make it a little more obvious."

The vehicle for that political statement is following the course of other troubled dot-coms, albeit for a different reason. Although many Web sites have ceased operations in recent months because of financial problems, Baumgartner decided it would be "prudent" to shut the site down Friday night after his thesis adviser, Albany attorney Paul Rapp, received a call from Commissioner Kellner.

"Under New York law, it is a felony merely to offer to sell your vote or to offer to buy a vote," Kellner says. People who buy or sell votes or gamble on the outcome of an election forfeit their right to vote, he added.

Buying and selling votes also is illegal under federal law, according to a U.S. Justice Department spokeswoman. The Justice Department has been talking to eBay's counsel about the votes for sale on the auction site, which were removed, said company spokesman Kevin Pursglove.

Rapp suggests that Voteauction might not have violated the law because it merely proposed to provide a forum for votes to be bought and sold, without engaging in the actual practice. Baumgartner suggests another defense: a landmark 1976 legal decision called Buckley vs. Valeo. In the "money equals speech" decision, the U.S. Supreme Court found that to limit campaign spending was to violate free speech.

While Rapp finds the argument "interesting," he can imagine judges rolling their eyes in a courtroom. After all, "the end result would be the sanctioning the sale of an election," he says. "No judge is going to endorse that."

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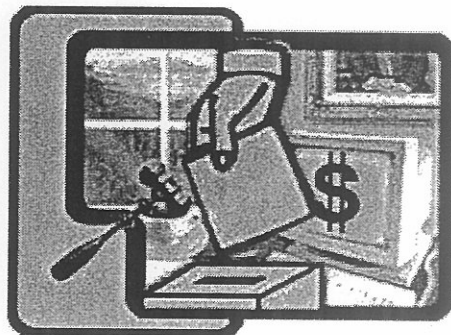
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Vote-selling Web site to be revived, possibly offshore

August 25, 2000
Web posted at: 3:05 p.m. EDT (1905 GMT)

By *Richard Stenger*
CNN.com Writer

(CNN) -- An Internet site designed to auction U.S. presidential votes could reopen days after New York authorities convinced its creator to shut it down, said a maverick Austrian businessman who bought the domain name.



Hans Bernhard said his holding company would operate [voteauction.com](#) outside the United States to circumvent federal and state laws that forbid purchasing and buying ballots.

"Our lawyers are evaluating the situation. The Web site should be up in the next 24 to 48 hours," Bernhard said Thursday. "We still have the option to go offshore if there are legal problems."

Bernhard did not give the name of the holding company. But the e-mail address listed with his domain registration belongs to a Vienna-based group that specializes in unorthodox e-commerce services and works with a variety of Internet companies.

Ubermorgen.com "is a network of flexible digital uber-brains," reads the company Web site, which offers headhunting and investments as well as "guerilla marketing, shock marketing and drama marketing."

MESSAGE BOARD
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Bernhard said he and his European associates might need time to become familiar with U.S. elections and laws, but Bernhard seems to have an idea about U.S. commerce.

"We bought the domain name and related business because we see this as a serious business venture in which we can make money."

Critics think he and others trying to auction ballots on the Internet are making a moral mess of the voting process.

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"The age of Internet voter fraud is here sooner and in more sinister form than even I imagined," said Deborah Phillips, president of the Voting Integrity Project, an activist group that specializes in Internet and democracy issues.

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"We don't have any moral attitude," Bernhard countered. "We are simply business-oriented. We see how the U.S. system works. There's lots of money related to elections. We just come from the other side. We don't go the top down, advertising approach. We take a direct approach with the voter."

James Baumgartner sold the site for an undisclosed price earlier this week. He launched voteauction.com in early August to allow undecided or disillusioned voters to sell their votes to the highest bidder in the November presidential election.

Whoever bid the highest for each state could decide how those participants would vote. The Troy, New York, graduate student had planned for voters to mail him absentee ballots to verify the selections.

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Close Vote? You Can Bid on It

by Mark K. Anderson

3:00 a.m. Aug. 17, 2000 PDT

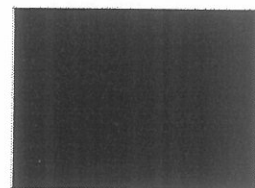
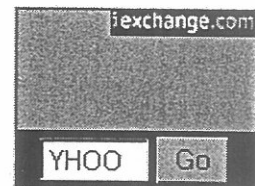
This week, as the country endures a second foregone convention, a website is gearing up to convert voter cynicism into voter income. If citizens do indeed find the choice between Gush and Bore meaningless, the proprietors of [Voteauction.com](#) say, why not at least make a little cash on the side?

That is, after all, the American way.

"The clearest language is, we're selling votes," said James Baumgartner, an MFA student at Troy, New York's [Rensselaer Polytechnic Institute](#) and founder of [Voteauction](#) -- the subject of his thesis.

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"The person who raises the most money is the person who almost invariably wins," Baumgartner said of the current political system. "And they're treating the voter as an end-product, like how the television industry treats the viewers.

"In the current election system, the voter is a product to be sold to the corporations. But they're being sold through this convoluted method of advertising, consultants, (and) traveling. [Voteauction](#) is making a more direct line -- the old cutting-out-the-middle-man approach."

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It's a ploy that certainly strikes the untrained ear as a violation of something -- whether it's election laws or just basic democratic values. It's also an eventuality some framers of the Constitution feared.

According to Sheila Krumholz, research director at campaign finance watchdog organization [Center for Responsive Politics](#), the concept is clever as well as incendiary. "I can't imagine that this wouldn't be rife with legal entanglements and cause legal appeals," she said.

Nevertheless, she added, "I think it's really a brilliant ploy on their part. Through sarcasm it shows how absurd the system is. It tells voters to prize their voting franchise, and yet it tells them it's just another commodity."

Jamin Raskin, a law professor at [American University](#), takes Krumholz's reactions further. He noted that, for starters: "For someone to facilitate an exchange of money for a vote would in most jurisdictions constitute criminal conspiracy."

However, he added, depending on the cleverness with which Voteauction is designed, the site could actually test the limits of the Supreme Court's 1976 "[money equals speech](#)" ruling.

"The proposition being tested here is whether the general theory that it's OK for money to buy elections extends to money buying individual votes," Raskin said. "The insight of the authors is that we have now evolved a system in which it's OK for money to buy elections, and yet we somehow cling to the fantasy that there's something deeply immoral about the purchase of an individual vote."

"It's as if we don't care about the big things -- that is, people purchasing public offices. But we obsess over the little things -- that is, people buying votes."

42

Sign up with Voteauction, and potential vote sellers are notified that the Voteauction legal agreement (still being hammered out) will be sent to them at the end of the month.

Baumgartner said he's currently considering a process in which the Voteauction participant fills out an absentee ballot and votes for whomever they want in every race but the presidency. Whether that choice will be Bush, Gore, Nader, Buchanan, or someone else entirely is determined by the outcome of the online auction.

"Then when the time comes, whoever wins the auction decides who this group is going to vote for," Baumgartner said. "So I tell those people you should vote for this person. Then they fill in the form, and then they send it to me. And I just verify that they're voting for the correct person."

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Voteauction Bids the Dust

by [Mark K. Anderson](#)

8:20 a.m. Aug. 22, 2000 PDT

Voteauction.com, which attempted to sell presidential votes to the highest bidder, is no more.

Quietly operating since the beginning of August, the site posed a simple question: If entire elections can be bought and sold to the individual or corporation with the most money, why can't individual votes?

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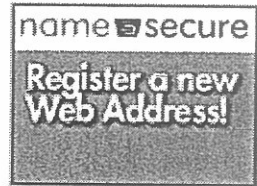
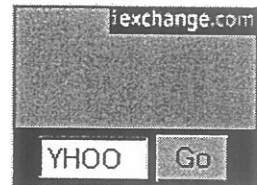
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Last week, Voteauction received a spate of publicity that began with a [Wired News story](#). Two days of intense press and Internet attention followed, which concluded in legal threats that compelled its operator to shut it down.

"I acted immediately when I found out about [Voteauction]," said Doug Kellner, one of two Manhattan representatives on the New York City Board of Elections.

Kellner said selling votes is not only illegal within New York state law, but the state constitution also bars it. The only other crime the constitution defines, he said, is treason.

Before last week, Voteauction had received emails from five voters



44

[Vouchers](#)

indicating their interest in selling their votes. When it shut down on Aug. 18, Baumgartner said, an estimated 200 had expressed their initial interest in participating. Although no contracts had been signed -- legal language was still being worked out when the site was shut down -- the interests of potential participants ranged from the pecuniary to the polemic.

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"Some were doing it as a joke, some were serious, some were cynical, some were sincere," Baumgartner said. "Somebody else said they were going to buy [voterauction.com](#)."

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When visited on Monday afternoon, [Voterauction.com](#) -- with the extra "r" - - appeared to be a mirror of the George W. Bush [campaign website](#). Although given the history of web-based [satire](#) inspired by the Texas governor's presidential bid, one can never be sure.

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Kellner stressed the seriousness of the criminal consequences for those who even indicate their interest in buying or selling a vote.

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"The message to get out to the public is that posting (intent to sell votes) to a website even in jest is a serious matter. It could subject you to prosecution, or in New York you could forfeit your vote," Kellner said, referring to a New York state law that imposes a one-year forfeiture on vote buyers and sellers.

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Baumgartner, who continues to stress that his site holds a mirror up to a larger corrupt electoral system, offered no comment in response to Kellner's charges.

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Austrian Takes Bids on U.S. Votes

by Mark K. Anderson

3:00 a.m. Sep. 6, 2000 PDT

When a website that offered to auction presidential votes to the highest bidder was

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However, in the meantime, Voteauction.com has changed owners as well as modus operandi. And this time, it appears, the prospect of squelching the wrongdoing is going to involve more than a threatening phone call.

"Our server is in Bulgaria at the moment," said Hans Bernhard, an Austrian investor and new owner of Voteauction. "It's a Twilight Zone out there. And we can even move it further on, if it's necessary. We can disconnect it from my person. We're very flexible with this. Because we're very interested in the core business, in the idea -- and in the future of this idea."

On Aug. 22, Bernhard bought the fledgling site from James Baumgartner, an art graduate student at Rensselaer Polytechnic Institute in Troy, New York, who had conceived of the site as a satire on the

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American campaign finance system. However, where Baumgartner -- who ran Voteauction himself from his studio in upstate New York -- viewed the site as a commentary on the vagaries of American plutocracy, Bernhard espouses no such higher motives.

For the Austrian businessman, American voters have a product that can be sold. Simple as that.

"They're proving the point that the market knows no bounds," said Jamin Raskin, a law professor at American University. "These people are just 50 years ahead of their time in seeing that the ultimate destination of the current [electoral] process is that everything will be for sale -- from the votes of citizens to the votes of legislators to perhaps even, heaven forbid, the votes of Supreme Court justices.

"So the society has got to get serious and figure out what are in fact the principled limitations on the logic of the marketplace. Because right now 'May the highest bidder win' is the logic for everything."

Presently, according to Bernhard, Voteauction has a core team of

seven employees: lawyers, communications experts, and marketing people. As of Tuesday morning, the site was trafficking in 376 votes with \$10,600 in bids already posted. Bids are submitted via email to the Austrian clearinghouse and are broken down state by state.

New York, whose electoral boards shut down Voteauction with one phone call when it was run stateside, has been excluded from the bidding. But in every other state in the union -- where, according to Raskin, vote buying and selling are also unambiguously illegal activities -- Voteauction blithely continues to facilitate vote fraud as if it were just another Beanie Baby auction on eBay.

The 68 California voters who have reportedly offered up their presidential votes to the highest bidder currently face a \$34.56 paycheck for marking their ballots as told -- as well as the possibility of criminal prosecution if they get caught. As of Tuesday morning, the price-per-vote in Illinois was up to \$64.70, while Kansas' two Voteauction participants are promised \$100 each.

According to Brad

Smith, a law professor at Capital University and current member of the Federal Election Commission, the only distinction between Voteauction and other electoral fraud systems is size.

"Conceptually, the enforcement problem is really no different from any other vote-fraud or vote-buying scheme," Smith said. "If I'm going to go out and buy votes with street money I'm going to try to keep it underground, and make sure people can't track it or get witnesses. What's different here is the potential magnitude of operation. Because what the Web does, as it does in all kinds of legitimate commerce, is provide this great worldwide auction market."

Smith, who also pointed out that prosecution of such illegal activities would most likely be up to individual states, questioned the ultimate feasibility of the Voteauction scheme -- since verification is a bottleneck that fortunately no one has been able to work around.

However, verification is only as much of a concern as buyers want it to be.

"Verification will now

be the responsibility of the winning bidder," a spokesman for Voteauction said in a recent email interview. "They can choose from a variety of methods for verification of the votes. They may have the voters send in their absentee ballots for verification, they may have the voters take a photograph inside the voting booth, or they may go on the honor system -- this is the system that many vote-purchasing endeavors have used in the past.

"We have chosen to have the winning bidders responsible for the verification because it would not be feasible to have people send their absentee ballots all the way to Austria and have us send them back to America within an appropriate time frame."

As for the obvious and undoubtedly immediate reaction Voteauction will inspire when state prosecutors and boards of election get wind of its activities, Bernhard sounded a sentiment all too familiar in an age where the difference between onshore and offshore commerce can be measured in mouse clicks.

"Why should we react on a state prosecution level?" Bernhard

asked. "Outside of the U.S., we don't care about state law. We only care about any kind of international law that might be affected. On the other hand, there might be a reaction on our side, if it might affect the users who sell their vote. That would be the only reason why we would react. But then we would be protecting our customers, and not our company."

Should Voteauction actually manage to weather the coming tempest of summons and prosecutions -- and also somehow insulate its buyers and sellers from detection and conviction -- Bernhard said he has plans to venture beyond what he calls "the American election industry."

"For us, it's a double strategy," said Bernhard, whose investments include the wily conglomerate of Internet mischief makers

Roger Pilon of the libertarian Cato Institute noted that Voteauction's illegal activities should indeed be curtailed. But he also understood the frustration of the American voters and vote-buyers who participate in the process:

"When Al Gore

promises prescription benefits for seniors, is he not buying votes? When George W. Bush says to college students, I'm going to give you free tuition if you vote for me, it's the same thing, isn't it?"

Still, according to Smith of the FEC, an important distinction remains between vote-influencing and outright vote-buying.

"There is much that is problematic about any system of financing elections, including the way we finance our elections now," Smith said. "But there is a fundamental difference between paying someone to vote in a certain way and trying to convince someone to vote in a certain way. Trying to convince any large group of people involves spending money to communicate, and that's what the Supreme Court said in Buckley v. Valeo.

"But the voter remains under no obligation to vote in any particular way. There's a reason why every state in the union makes it illegal to buy votes. But no state makes it illegal for individuals to contribute money to a candidate."

Raskin of American University reiterated that Voteauction has entered the American

54

marketplace when accusations of corruption and influence peddling have become so rampant that outright vote fraud loses some of its outrageous taint.

"Traditionally, we have thought that votes operate in a separate sphere from dollars," he said. "But the Supreme Court has not helped to build a wall of separation between public elections and the private economy. On the contrary, that wall is riddled with holes and crumbling all the time. So I think this business is appealing to a strong public sense that everybody's getting rich in politics but the voters."

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Thousands Sign Up to Sell Votes

by [Mark K. Anderson](#)

3:00 a.m. Sep. 22, 2000 PDT

According to detective novels and TV shows, criminals are those who perform illegal actions clandestinely. But some real-world scofflaws get more mileage out of the adage, "If you've got it, flaunt it."

Recently, the Austrian owner of Voteauction.com flaunted it.

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Boasting of the more than 6,000 Americans who have signed up to auction off their presidential votes to the highest bidder -- illegal activity under the laws of every state in the union -- Voteauction is now detailing its plans to begin an outreach campaign.

Using its "Voter Empowerment Kits" and "Action Teams," the company claims in a press release that it can reach more potential customers and facilitate voter fraud without the intervention of an online middleman.

Such activity leaves Deborah Phillips of the [Voting Integrity Project](#) flummoxed.

Phillips has been observing the [ups](#) and [downs](#) of the blatantly felonious site since August, when Wired News first

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reported on this curious conglomeration of satire, lawlessness and voracious capitalism.

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"Why isn't the Justice Department getting involved?" she said. "Why hasn't there been any comment from the White House? Why hasn't Congress held any hearings?"

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Federal Election Commission member Brad Smith noted that federal and state officials may be hesitating for three reasons.

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First, the site probably hasn't garnered enough media attention yet to mobilize all the forces who should be opposing Voteauction.

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Second, since the site traffics in a novel form of overseas-instigated vote fraud, it's also undoubtedly unclear just who those forces are -- whether they be the Department of Justice, Department of State, municipal or statewide boards of election, state attorneys general or other offices tasked specifically to monitor the Internet. (Voteauction, he guessed, would probably not be handled by the FEC.)

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Finally, he said, it's still unclear just how widespread a threat a site like Voteauction represents.

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"I suspect that if this began to appear to be a problem on a large enough scale, though, you'd see action, and it'd come quickly," Smith said.

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According to Hans Bernhard, the Austrian businessman who bought Voteauction from James Baumgartner, a New York graduate student who developed the site, American reaction against his investment has already begun.

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In addition to the hate emails he receives for running an offshore enterprise that facilitates American felonies, Bernhard reports that the site has also been the recipient of numerous hacks and electronic attacks.

"We do understand that there is a certain interest on the part of certain services of the U.S. government who most probably are interested in this data," Bernhard said of Voteauction's list of vote sellers and buyers. "Our job is to protect this data. We don't want this data to be public."

According to James Baumgartner, the MFA student who first conceived of the site as a commentary on wholesale corruption in American politics, a few facts can be divulged about the \$75,000 in bids so far and the 6,000 participants.

Vote-sellers on the whole tend to be in their twenties, male and with at least some college education -- including a lot of college students, he said. Vote buyers, on the other hand, tend to be in their forties, affluent and Republican.

Almost all of the bids for votes -- broken down by state -- have come from individuals seeking to increase the number of votes for their favorite candidates. Only three companies, in the "\$200 million sales range," Baumgartner said, have yet placed any bids for Voteauction votes.

The profile of both sides of the Internet auction does jibe with the history of vote-buying in America, said Larry J. Sabato, a University of Virginia political scientist and author of the 1996 book *Dirty Little Secrets: The Persistence of Corruption in American Politics*.

Especially telling is the fact that the payoff-per-vote, as tallied on the site, is settling into the \$10-\$20 range -- the amount of cash an individual vote tends to command in other, non-Internet-based schemes.

"It always seems to be about \$20," Sabato said. "That must be the going rate. And when you think about it, it makes sense. Because 10 bucks is not what it used to be. With 20 bucks you can get a pretty good meal, if you know where to go. And I think that's how

59

some people conceive of it. Their vote may be worth a meal. It's sad, but that may be true."

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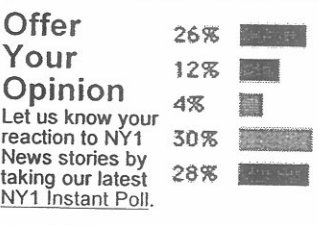
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08/23/00- Updated 10:21 AM ET

(none)

The news behind the Net

Votes up for auction draw official inquiries

By Janet Kornblum, USA TODAY

Pranks or not, legal officials and election watchdogs are taking seriously the recent attempts to buy and sell political votes on the Internet. Authorities, including the Department of Justice, are looking into several cases of Net vote commerce: In the past week a handful of people have put their votes up for sale on general auction sites, and a New York student launched a site designed to match vote buyers and sellers.



For past E-Briefing columns, [click here](#).

Both eBay and Yahoo! have removed the auctions and are cooperating with the Justice Department, says an agency spokeswoman. Officials in New York and

For more information:

▶ voting-integrity.org

Maryland also are investigating.

It's unclear if anyone will be prosecuted, but Deborah Phillips, chairwoman of the Voting Integrity Project, a watchdog group based in Arlington, Va., worries that the Net is creating a "fundamentally dangerous" venue for fraud.

Phillips is especially concerned because James Baumgartner, 26, a student at Rensselaer Polytechnic Institute in Troy, N.Y., is selling his site, VoteAuction.com, to an Austrian businessman. Baumgartner, who says he launched the site to make money, shut it Friday after New York City's Board of Elections raised concerns. He's selling it for an undisclosed price to Hans Bernhard, a Vienna businessman who says he intends to put it back up once he figures out how to run it legally (possibly moving it offshore) and how to profit from voters wanting to make a buck.

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"We'll evaluate it and have it running during the presidential election and see if this is a fruitful business," Bernhard says.

Whether the site is successful or intended to be a parody — and even though votes can't be legally sold — the cases raise troublesome issues to Phillips. "I love the Internet. But the more I've looked at this issue, the more concerned I've become, because there's a different mind-set that goes hand-in-hand with Internet entrepreneurs."

Brian Ward, 28, an Ellicott City, Md., database developer who says he was the first to offer his vote on eBay last week, has told Maryland officials that he meant it as satire. "Even if you were serious, you couldn't do this. This warrants some attention, but I think the Internet community is pretty vigilant."



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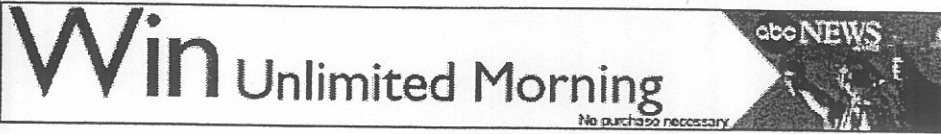
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Personal (Campaign) Finance

Internet Sites Try To Sell Votes

By Sascha Segan

abc NEWS.com

Aug. 20 — Your vote could be worth cash.

At least three people recently tried to auction off their votes in November's presidential election to the highest bidder on eBay. In upstate New York, a site called [voteauction.com](#) is trying to be even more audacious, selling blocks of votes to interest groups who want to influence the election.

There's only one problem: it's illegal. Buying and selling votes in North America has been illegal since the 1680s, electoral historian Bob Murch said.

"Buying votes has been a crime ever since people started having elections. It was a crime in the Roman republic," he said.

The owner of [voteauction.com](#), James Baumgartner, a graduate student at Rensselaer Polytechnic Institute in Troy, N.Y., insists that he's for real.

Court cases have proved, he argues, that in elections, "money is free speech. Corporations or individuals are ... influencing voters with their money. [Voteauction.com](#) is a more direct method of doing that," he said.

As a satire on the political system, the vote-sellers get their points across, said Susan Quatrone of political reform advocacy group Common Cause.

"The idea that the American voters' choices are basically auctioned off to the highest bidders through the soft money system is very true. I like direct, honest satire that cuts through the rhetoric which tries to pretend this system is clean," she said.

Wanna Buy a Vote?

The votes on eBay appeared for sale on Wednesday and Thursday, spokesman Kevin Pursglove said, and were taken down when a user noticed them and complained.

The auction site, which handles more than 50 million listings every three months, takes down illegal auctions when told about them — in the past people have tried to auction off things like "the dolphin which found Elian [Gonzalez] at sea" and a

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One of the votes got up to \$122 before getting knocked out.

Voteauction.com is a bit more complicated than the one-seller, one-buyer votes on eBay. Apathetic voters theoretically give their votes to the site, which then auctions them off in blocks, state by state, to corporations or individuals.

Voters would order absentee ballots, fill them out based on Voteauction's recommendation, and then send them to Baumgartner for verification before he sends them to polling places. The voters would get cash; Baumgartner gets revenues from banner ads placed on his site.

"The election industry is spending hundreds of millions of dollars in an attempt to influence the presidential election. This system is an inefficient waste of money for the candidates and their supporters. Voteauction.com is committed to improving this system by bringing the campaign contributors' money directly to the voters," the site says.

As of this afternoon, 200 people had signed up with voteauction.com, according to Baumgartner. Earlier this week, votes were going for up to \$50 apiece. Four "interested individuals" — not candidates — had applied to buy some of the votes, Baumgartner said. He plans to close his auction two weeks before the election.

That is, if he isn't arrested. Any attempt at buying or selling individual votes is criminal, according to the U.S. Justice Department.

"Anyone who's going to be in a position to buy probably has a lawyer who's going to hit the roof at the very thought of it," Murch said.

Voteauction.com tries to bolster its case by citing past precedents, like a 1757 Virginia election where George Washington bought all the voters liquor. That's different from buying individual votes, Murch said. Washington threw a party after the vote to which everyone was invited, whether or not they voted for him.

Overpriced Votes

The auctions are way above market rates, according to campaign finance data from Common Cause. During the 1995-1996 presidential election cycle, the Democrats spent \$141 million to convince 45.6 million people to vote for Bill Clinton, or \$3.09 per vote. The Democrats also spent an additional \$7.36 per vote in "soft money" — funds spent to influence the electoral process through issue-related advertisements and party support.

The Republicans spent \$7.61 per vote in direct campaign money for Bob Dole, and \$14.74 per ballot in soft money.

66

So far in 1999-2000, the Democrats have raised nearly double the amount of soft money that they had at this point in the 1995-1996 cycle, Common Cause data says. The Republicans have raised 82 percent more in 1999-2000 than at the equivalent time in 1995-1996.

Cynical World

The political process isn't exciting Americans — that's been shown by low voter turnout rates, Murch said. Selling votes through the Internet means people see their franchise as worthless, he said.

"People see no value in their vote; they don't see their vote as something that allows them to participate in self-government ... instead of simply not voting, they think, I'll give my vote to the highest bidder," he said.

Quatrone sees it as the ultimate statement of political futility.

"If [voteauction] is serious, it is a sick sign of the depth to which cynicism has sunk," she said.

Baumgartner agrees that his vote-sellers don't feel like their votes matter much.

"Most of them are people who see the candidates spending a lot of money and feel like they deserve part of that," he said. "A lot of them also say that the two candidates are pretty much the same on issues that matter to them. They feel like they aren't making a difference if they choose one of those two candidates, so they feel like they might as well make some money as part of the process," he said. ■

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TODAY IN SLATE

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Buy This Vote!

The Web puts democracy on sale.

By [Jeremy Derfner](#)

Posted Wednesday, Aug. 23, 2000, at 12:30 p.m. PT



Last Tuesday, an eBay user offered his vote to the highest bidder, and five copycat vote-sellers followed suit. Meanwhile, James Baumgartner, a graduate student at Rensselaer Polytechnic Institute, had launched Voteauction.com, an Internet marketplace for the wholesale purchase of votes. The model was simple: Recruit willing voters, auction them off in state blocs, double-check their absentee ballots for accuracy, and split the proceeds evenly. The schemes generated a lot of media attention and some sellers and buyers—the bidding on eBay reached \$10,100, and Voteauction found 200 takers in a single day.

But it was all over inside a week. Baumgartner shut down Voteauction after his academic adviser received a call from the state board of elections, and he sold the content and domain name to an Austrian company. eBay pulled all six auctions after a day.

The problem is that vote-buying and -selling is clearly illegal. Every state prohibits a market in votes, and buying or selling votes in a federal election is a federal crime punishable by a \$10,000 fine and five years in jail. (So far, no Internet vote-sellers have been charged.) Though Baumgartner isn't testing it, he has suggested that he could mount a defense on the grounds that money equals speech, a reference to the landmark Supreme Court decision in *Buckley vs. Valeo*, which struck down campaign spending limits and is anathema to campaign-finance reformers. In fact, a *Buckley* defense would fail. In 1982, the court ruled (in *Brown vs. Hartlage*) that buying, selling, or arranging to buy or sell votes is not constitutionally protected speech.

Baumgartner insists that votes have been for sale in America

68

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at least since 1757, when George Washington bought alcohol for every voter in his House of Burgesses district. But the reality of colonial corruption was rarely so simple. Voters were tied to each other through business and family connections, and a man was expected to vote for his patrons.

Flagrant vote-buying came into prominence with the expansion of the franchise and the rise of the political boss in the mid-1800s. Big-city machines routinely got out the vote by paying for it with cash on election morning. The practice was so common that cartoonist Thomas Nast started his career depicting it (click [here](#) for an example). On a deeper level, the machines unapologetically operated on the principle of giving favors for votes. Poor voters especially could count on food, coal, and patronage jobs as long as they voted with the boss.

By the late 1800s, reformers were sure the machines had corrupted democracy. They pushed for secret ballots and Australian ballots (as opposed to pre-marked party ballots) in part so that bosses could never be sure who voted for whom. Most political machines broke down by the 1920s, and yet a vote-buying scandal still crops up every few years. In 1996, for instance, 21 Georgians were indicted for selling their votes in a county election for \$50 apiece.

Some experts saw the abortive Internet vote auctions as old-style machine politics with a high-tech twist. The chairman of the [Voting Integrity Project](#), a conservative front group, called Voteauction an "obscenity" and warned of a "bloodless coup." But few would disagree that the problem with money in politics today is the hundreds of millions of dollars at the top, not a few dollars at the bottom. Which is why the short-lived vote sale should be seen less as a serious act of sabotage and more as guerrilla theater.

One eBay seller confirmed that the auction of his vote was a "political prank." His original posting included the following description: "Why should the American citizen be left out? Congressmen and senators regularly sell their vote to the highest bidder. Democracy for sale!"

Baumgartner's intentions are harder to figure because he never recanted or even cracked a smile, but his sense of irony is undeniable. According to Baumgartner, the biggest spenders invariably win elections today, but they do it messily, with big advertising budgets and paid consultants. Voteauction, he claimed, would bring market efficiency to the electoral process by "cutting out the middle man." Voteauction's slogan? "Bringing Democracy and Capitalism Closer Together."

Ralph Nader's now-famous MasterCard parody makes the same point (click [here](#) to see the ad), as did the protesters outside the conventions when they offered delegates money for their credentials. Many campaign-finance reformers,

69

including Sheila Krumholz of the Center for Responsive Politics and American University law professor Jamin Raskin, have said they appreciate the vote-selling sentiment, though they would deplore the practice.

John Bonifaz, the executive director of the National Voting Rights Institute, said the vote auctions are indeed bribery, but so is "a lot of what goes on in the halls of Congress and in the White House." What Baumgartner and the eBay seller did is "only one or two steps removed from the existing campaign-finance system," Bonifaz said.

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Reader Comment from The Fray:

Lucky Janet Reno doesn't run eBay. It would take four years to decide whether or not selling votes is illegal.

--Dennis

(To reply, [click here.](#))

The article raised in my mind the following question: Would it not be appropriate to establish a vote-buy-back program similar to the gun-buy-backs promoted by the gun control crowd? Suppose one were to offer, oh, \$25 to any registered voter (in a selected city or neighborhood, of course) who *did not* vote at all in a particular election? Obviously, anyone offering to sell their right to vote for such a modest sum has no particular business voting and the sponsors of the buy-back are not asking anyone to vote for or against a particular candidate so what would be the problem? In the one case, people are bribed not to exercise their right to arms, in the other they are bribed not to exercise their right to vote.

--Jack Dupont

(To reply, [click here.](#))

I wonder if it would pass legal muster if the voter offered to sell merely his attention to some free speech by the politician, rather than his vote itself. This is the theory by which campaign contributions are not held to be bribery of the politician involved, in that there is supposedly no *quid pro quo* that the politician will change his vote to favor the contributor, so that the contributor is given nothing but access and a hearing in exchange for the money. Why can't a voter make the same claim, ie that "Of course I didn't vote for Smith because his campaign credited my account for that \$50. That money simply got me to scroll through their informative web site, where I found arguments so compelling I could not but vote for Smith. That auction I held to get to the figure of \$50? Well, my time is limited, I can't waste it scrolling through everyone's web sites. My time is certainly worth more than the \$10 the Vegetarian Party offered me."

--Glen Tomkins

70

(To reply, click [here.](#))

[A number of readers made similar points--"Politicians try to buy my vote, so why can't I sell it" and "While I will not sell my vote to anyone, if someone wants to lobby me, I'm having a dinner party at \$10,000 per plate." One poster tried to answer them.]

What politicians provide in return for campaign donations is access to their time. A politician's schedule is discretionary, not an inalienable right. There is no sale of access, but rather a predisposition to hear out those who help fund election success. Be careful condemning this predisposition, for it applies to small donors as well as large, and to citizen groups as well as fat cats. If a politician assures he/she will vote a certain way in return for a specified amount money, then that is graft. The legal point with graft is not the transfer of an inalienable right but rather a dereliction of duty, a willful failure to represent the citizenry. The worst disservice to democracy created by our current campaign finance system is the time it requires from politicians and staff that is diverted from attending to public business. A representative democracy will fail if it is not both deliberative and participatory. As things stand, there is little time available for negotiated synergy, and little incentive to pursue issues that don't return a high dollar value to campaign coffers.

--[Aghast](#)

(To reply, click [here.](#))

(8/24)

Jeremy Derfner is a Slate editorial assistant.

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August 21, 2000, 3:53 PM PDT

Wanna Buy My Vote? Fuhgeddaboutit

Voteauction.com, a site that enables citizens to sell their votes, shut down Friday amid legal questions.

By Ronna Abramson

If you were thinking of selling your vote in the presidential election, think again.

Voteauction.com, a Web site that offers a forum for citizens to sell their votes to the highest bidder, shut down Friday amid legal questions and technical glitches. EBay also has pulled the plug on at least seven people who have posted their votes for sale on its auction site since Wednesday.

The problem: Buying and selling votes violates federal and state statutes.

"You have to make your own decision how you want to vote," says Douglas Kellner, a New York City Board of Elections commissioner who helped persuade Voteauction to close. "People can spend money to influence your vote, but they can't buy it."

James Baumgartner, a graduate student working toward a master's in fine arts at Rensselaer Polytechnical Institute in Troy, N.Y., launched Voteauction earlier this month. He shut it down Friday and announced Monday that he was selling the content and domain name to an e-commerce developer in Austria. He did not disclose sales figures and did not know about the buyer's plans. No charges have been filed against Baumgartner.

Baumgartner's idea was to capitalize on

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undecided or disillusioned voters who intended to sit out during the November election – a group that comprises more than half the amount of voters from four years ago. Baumgartner also hoped to divert some of the millions of dollars being spent on advertising and consultants to get voters. "I thought it'd be more direct and more democratic to have these voters make money from their vote," Baumgartner says. The site's motto: "Bringing Democracy and Capitalism Closer Together."

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Voteauction planned to auction votes in blocks according to state. Bids would start at \$100 per state and go up by \$50. Whoever had the highest bid would get to decide how the entire group of votes from the particular state would vote. Voters would divide the final price equally among themselves.

Despite server crashes last week, about 200 voters signed up at Voteauction on Thursday after an online article featured the site. "Selling my vote I think is a very obvious political statement," said one enrollee from upstate New York, who would only give her online pseudonym, "Jenny Ondioline." "It's saying that if the buying and selling of votes is going on even now between closed doors, through the lobbyists, let's make it a little more obvious."

The vehicle for that political statement is following the course of other troubled dot-coms, albeit for a different reason. Although many Web sites have ceased operations in recent months because of financial problems, Baumgartner decided it would be "prudent" to shut the site down Friday night after his thesis adviser, Albany attorney Paul Rapp, received a call from Commissioner Kellner.

"Under New York law, it is a felony merely to offer to sell your vote or to offer to buy a vote," Kellner says. People who buy or sell votes or gamble on the outcome of an election forfeit their right to vote, he added.

Buying and selling votes also is illegal under federal law, according to a U.S. Justice Department spokeswoman. The Justice Department has been talking to eBay (EBAY)'s counsel about the votes for sale on the auction site, which were removed, said company spokesman Kevin Pursglove.

Rapp suggests that Voteauction might not have violated the law because it merely proposed to provide a forum for votes to be bought and sold, without engaging in the actual practice. Baumgartner suggests another defense: a landmark 1976 legal decision called Buckley vs. Valeo. In the "money equals speech" decision, the U.S. Supreme Court found that to limit campaign spending was to violate free speech.

While Rapp finds the argument "interesting," he can imagine judges rolling their eyes in a courtroom. After all, "the end result would be the sanctioning the sale of an election," he says. "No judge is going

to endorse that."

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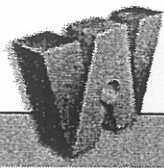
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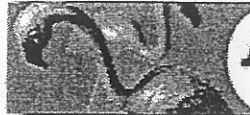
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Straight Talk from Voteauction.com

by [Chris Connor](#)
August 18, 2000, 3 p.m. PT

If the pandering and vaudeville antics of the Republican and Democratic conventions inspired you with nausea instead of idealism, you're not alone.

The politicians spend millions of tax dollars and corporate and special interest contributions to purchase your vote; sadly that green goes to consultants and ad geeks. You, the taxpayer who finances the monkey show, now has a chance to partake of the corruption that is politics.

[Voteauction.com](#) (click here for a [mirror site](#)) puts the power in your hands--and the cash in your wallet--allowing you to sell your vote directly to the entity that is ready to shell out.

As the site says: "The election industry is spending hundreds of millions of dollars in an attempt to influence the presidential election. This system is an inefficient waste of money for the candidates and their supporters. Voteauction.com is committed to improving this system by bringing the campaign contributors' money directly to the voters."

They also post a history of vote-purchasing starting in the days of old George Washington.

To sell their votes, users must first register at [Voteauction.com](#), giving their name and address. Whoever bids the most for [Voteauction.com](#)'s users, which are broken down by electoral district, will be able to choose the candidate the group will vote for en masse via absentee ballot. The winnings will be split equally among each state's [Voteauction.com](#) voters.

"The free market will determine the value of the votes in each state," [Voteauction.com](#) explains. "Votes in heavily populated states may be more valuable than votes in less populous states, however, if there is a large number of [voteauction](#) voters in a small state, the [voteauction](#) voters could help swing that state and thus the state's electoral votes."

The starting bid for [voteauction.com](#)'s votes is \$100, with a minimum bid increase of \$50. Individuals, corporations, and organizations must first register in order to bid.

In related news, those Honest Abes over at eBay have done it again, halting auctions by people trying to sell their votes in the upcoming U.S. presidential election. Apparently the Department of Justice and the Federal Elections Commission are investigating. Yahoo was also investigating a vote up for auction.

AW's guide to Online Auctions

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Voteauction.com did not respond to emails by press time, so it's unclear whether it is also facing flak from the feds for its Web site. But this afternoon it was experiencing very heavy traffic, with more than 200 people registering to sell their vote in one day.

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76



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GOING, GOING GONE!

There is a dangerous new wrinkle out there in the vote fraud world -- Thanks to the Internet, you can now put your vote up for auction -- or if you are on the other side of this fraudulent and felonious scheme -- you can buy blocks of votes in jurisdictions where your candidate or party may need them!

[Click here: Close Vote? You Can Bid on It](#)

I have not been successful in accessing the actual VOTEAUCTION website -- perhaps officials have already shut it down -- but to me it raises the level cynicism about elections to new and dangerous heights. Rather than performing some perverted public service by raising new legal issues about the vote -- the perpetrators of the website and all their cynical participants are engaging in illegal activity which could become tantamount to a bloodless coup. Imagine if there were widespread unfettered participation in this site -- then the presidential race truly would go to the highest bidder!

This website is an **INSULT** to every American who has ever fought to protect our freedom or for the right to vote in America!

I hope that prosecutors in all fifty states -- not to mention the U.S. Congress -- will act immediately not only to shut this obscenity down -- but to fully prosecute all of those involved.

Deborah M Phillips
Chairman and President
THE VOTING INTEGRITY PROJECT

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Associated Press

78



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SALT LAKE Tribune

NEWS  **RELEASE**
California Secretary of State Bill Jones

BJ00:81

FOR IMMEDIATE RELEASE
Tuesday, August 22, 2000

Contact: Shad Balch
Alfie Charles

Jones Issues Warning Against On-line Vote Buying Schemes

SACRAMENTO --- Secretary of State Bill Jones today issued the following statement regarding recent stories about on-line vote buying and selling on the E-Bay auction site and through a web site at voteauction.com:

"Any individual who attempts to buy or sell votes, whether through an Internet auction site or personal communication, is guilty of a felony and will be prosecuted to the fullest extent of the law.

"We have an absolute zero tolerance policy for voter fraud in California. My election fraud investigation unit is looking into the recent reports of Internet-based vote buying schemes, will be monitoring web sites for suspicious election activity and will forward any information they find to the appropriate prosecutors for immediate action.

"During the last nine months, voter fraud investigations conducted by my office resulted in six convictions for a total of 13 years in prison."

"Voters who have been approached regarding vote-buying or voter coercion should contact the Secretary of State's office at 1-800-345-VOTE."

-30-

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10 pols who get the Web

Of the roughly 700 congressional campaign sites out there, many are just electronic donations, but some have come up with innovative features

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Internet voting put to the test

On Election Day, voters in Arizona, California and at military bases may decide the fut voting

Chicago wants Voteauction gone

The Chicago Board of Election Commissioners said it has asked federal and state attor down a Web site that offers votes to the highest bidder

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82



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American Cynicism, 101

In the old days, you could rig an election by raising the dead and getting them to the polls. Student James Baumgartner wants to change the rules, by offering disinterested citizens a chance to auction their ballots online.

by Liz Borod
Web exclusive

Some people find it disturbing that only 49 percent of the 196 million eligible voters cast their ballots in the last presidential election. But James Baumgartner, a 26-year-old master of fine arts student at Rensselaer Polytechnic Institute in Troy, N.Y., finds inspiration in Americans' widespread political apathy.

Baumgartner is the founder of [Voteauction.com](#), a Website which purports to let voters auction their votes to the highest bidder, eBay-style. The site packages "unused" votes in blocks, by state.

Baumgartner, who launched his venture Aug. 1, says that because big corporations and special interest groups indirectly "buy" votes using soft money contributions to political campaigns, there's no reason to keep the average Joe from selling his vote on the open market. "I wanted to provide a free service to campaign contributors and voters," he says.

That argument may have worked at Tammany Hall, but not at the New York City Board of Elections, which didn't find

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83

the publicity stunt funny. Seventeen days after Baumgartner took his site live, Douglas Kellner, a commissioner at the New York City Board of Elections, phoned the student's attorney, Paul Rapp, and warned him that buying and selling votes was illegal in 50 states and could leave Baumgartner subject to criminal prosecution. "I got the impression that that he thought nobody was going to care about it," says Kellner.

"While the site is clearly illegal, I only regard it as a small nuisance," he adds. I don't think they can accomplish what they set out to do." Kellner believes the chances of attracting enough voters to affect the outcome of an election are extremely slim.

The week after Kellner's call, Baumgartner sold the site to Hans Bernhard, CEO of Ubermorgen, an Internet incubator in Vienna, Austria, for an undisclosed amount and agreed to stay on as the U.S. spokesman. Moving the company's server to Bulgaria to decrease the possibility of legal problems, Bernhard relaunched the site on Aug. 28 with a note saying that voters from New York could not participate. "We're not moral," Bernhard says. "We're interested in the consumer, because the consumer is our business."

Voteauction.com claims that 2,294 people have signed up to sell their votes so far, and that the highest bid -- \$7,300 -- has been for 413 votes in California. But it's unclear whether any money is changing hands; the site isn't set up for credit card transactions and simply instructs bidders to contact sellers to complete their deals. Voteauction.com has no way of actually verifying that someone who has sold his vote will actually cast his ballot as promised.

If anyone was actually trading in votes on the site, they probably wouldn't get in trouble, says Deborah Phillips, chairman of the Voting Integrity Project, a non-profit organization in Arlington, Va. "The Internet has a lot of loopholes when it comes to state and federal laws," she says.

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Bernhard says he hasn't yet determined how he will make money from the site. Right now, he's interested in using it as a research and development tool to let him see what kind of opportunities exist in the "election industry." If Voteauction.com generates enough traffic to make money from advertising, Bernhard says he will consider setting up similar sites for England and Germany, where elections are similar to ours. But he has no plans to create one for Austria. "The campaigns are state funded," Bernhard says. "It's too small a market, so it doesn't make sense."

Jay Stanley, an analyst at Forrester Research, doesn't believe that Bernhard plans to turn Voteauction.com into a lasting business, but thinks he'll attract plenty of attention while the site stays up. "It seems like more of a gimmick," Stanley says, "and scams do succeed in drawing large numbers of people to the site, so that could work as far as getting advertisers. They would have trouble getting legitimate advertisers, unless they could do it in a tongue-and-cheek way to not offend people's sensibilities."

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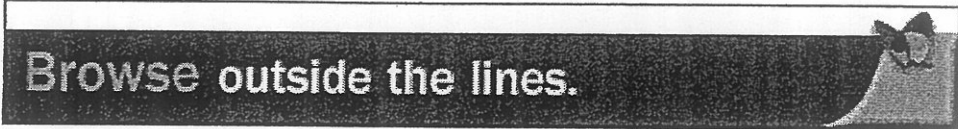
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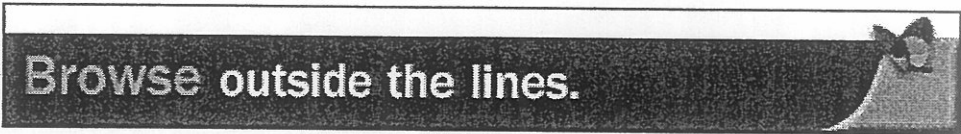
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Posted: 05/10/2000 at 11:48 GMT

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Chicago's gangster ridden past has come back to haunt city officials with the appearance of a new website - Voteauction.com, where people can register to sell their vote to the highest bidder

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Special Report

Perhaps unsurprisingly, city officials have failed to get the joke. The Board of Elections sent letters to federal and state prosecutors demanding that the site be shut down.

Register with Coverage:
RIP vs Dumpster

Board chairman and sourpuss Langdon Neal commented: "In Chicago we react strongly and quickly to this type of activity - whether it's tongue-in-cheek or not - because we need to guard our reputation here that this is a place where voting activity is legal and above board and beyond reproach."

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Reg kit - You know you love it

The value of a vote varies widely from state to state. In Illinois, where 168 votes have been registered for sale, the asking price is a mere \$15.79. Californian votes, by contrast, are going for more than \$5,000.

However, it may prove quite a trick to get the site shut down. As advertised on the front page of the site:

"Voteauction.com has recently changed ownership. It is now owned by an Austrian holding company that has invested in many of America's new, emerging industries. We feel that the American Election Industry provides unique new opportunities for the foreign investor. We purchased voteauction.com in order to investigate the profit-making potential of the American Election Industry"

The new owner is running the site from Austria, and might just be outside the jurisdiction of any American authorities. And according to Dai Davis, a consultant solicitor with UL legal firm Nebarro Nathanson, there may be no way to get the site closed down at all.



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89

"If it is a criminal offence in both the US and Austria, then it would be easy to shut down," he said. "But presumably if it was criminal then there would have been a complaint made against it. If it is lawful to sell your vote, then I can't see how they could do it in practise. It isn't so much a grey area as it is an impossibility to stop people doing things abroad." ®

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Americans Sell Their Votes for \$10 Each

posted by [cosmo](#) on Friday September 29, @12:11AM from the [my-vote-for-a-burger-please](#) dept.

If you needed further proof that Americans are disgusted with politics, just check out [Voteauction.com](#), which allows people to auction off their votes to the highest bidder. According to a [Wired News](#) article, more than 6,000 people have already signed on, eager to profit off of their democratic rights. And how much are our fellow countrymen's voices going for? Looks like it's in the \$10 to \$20 dollar range, folks. Sad? Perhaps, but not all that new. James Baumgartner, a grad student at Rensselaer Polytechnic Institute [argues](#) that votes have been on the market since 1757 when George Washington bought drinks for all the voters in his district. Officially, the practice of selling votes is illegal, and there's at least one group that's a little miffed the site's still running. *"This website is an INSULT to every American who has ever fought to protect our freedom or for the right to vote in America!"* [raged](#) Deborah Phillips, president of the [Voting Integrity Project](#). The site operators got around America's laws by, well, leaving America. Note to Congress: shape up, or Americans will ship out.



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I'd do it... (Score:0)

91

by Anonymous Coward on Friday September 29, @12:39AM EST (#1)

10 dollars for my vote is more than I've ever make by using it in an election. It's my vote, and I'll sell it if I want to!

It's amusing that those who crow the loudest about "liberty" are the most offended when they see it in action. If I cannot sell my vote, then, I do not truly HAVE it.

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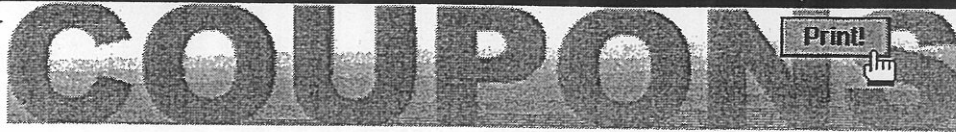
- [Re:I'd do it...](#) by hoyos (Score:1) Tuesday October 03, @09:04AM EST

He who slings mud generally loses ground. -- Adlai Stevenson

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92

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Published: Friday, August 18, 2000

HEADLI

Bid to sell votes on Web rankles officials

By *SUSANNA RAY*
Herald Writer

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Was someone really trying to sell the key to democracy -- the right to vote -- for 99 cents on the Internet or was it just a cynical political protest?

Snohomish County Auditor Bob Terwilliger doesn't care -- he doesn't think it's funny, and he's hoping to find and prosecute the would-be vote-sellers.

- Economy
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Terwilliger got a notice Thursday8 from the Secretary of State's office that two Washingtonians, including one from Marysville, had put their votes up for sale on eBay's popular auction Web site.

- Opinion
 - Editorials
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"During the upcoming election whoever wins this bid gets to specify what I will vote on election day," the Marysville resident wrote as the item description. "That's right democracy is in fact for sale!"

- Features
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The \$5 asking price was apparently too high, however -- no bids were received.

But someone did offer 99 cents to the other seller, who didn't list a city but said he or she is from the Seattle/Tacoma region.

Selling your vote is a gross misdemeanor and can get you thrown in jail for up to a year or fined up to \$5,000, or both.

- Your County
 - Communities
 - Events
 - Local guide
 - School districts
 - Web directory
 - Your legislators
 - Your Newspaper

"This is a very serious violation, for the sanctity of the vote," Terwilliger said.

The Secretary of State's office contacted eBay, and by Thursday afternoon both auctions had been removed. The company also promised to screen for such listings in the future.

- Marketplace
 - Main

Terwilliger said he plans to turn the case over to the county prosecutor's office to pursue, but because of eBay's privacy stipulations, it may be difficult to find the culprits.

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- Find a car
- Find a job
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The Marysville resident's listed e-mail address did not work, Terwilliger said, and officials have only been able to ascertain the other person's last name.

State officials were also concerned about another Web site, www.voteauction.com, which they discovered Thursday through an article in the on-line magazine Wired.com. The site offers votes for sale in every state.

"The election industry is spending hundreds of millions of dollars in an attempt to influence the presidential election," the site reads. "This system is an inefficient waste of money for the candidates and their supporters. Voteauction.com is comitted (sic) to improving this system by bringing the campaign contributors' money directly to the voters."

There were only a handful of participants listed on the site Thursday evening -- with no one from Washington -- but the price per vote in California was up to \$50.

"I think this is more of a political statement," state elections director Gary McIntosh said, "but there are other ways of making your political feelings known without breaking the law."

You can call Herald Writer Susanna Ray at 425-339-3439 or send e-mail to ray@heraldnet.com.

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94

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Vote buying becomes more blatant

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By Kate Thompson, Journal staff writer | [E-mail](#)

Capitol correspondent

It's been more than 200 years since George Washington bought alcohol for virtually every voter in his district to win an election. That was clearly a blatant effort to influence the election.

The more things change, the more they remain the same.

They - whoever they are - say you can buy darn near anything. It would appear to be true. Under old-style politics, people were expected to vote for those who could get things done. But that didn't mean votes were for sale in a straight cash transaction.

95

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OPINION

JOIN IN INTERACT

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Political parties and candidates often help voters get to the election booth, either with rides or by helping insure that voters get absentee ballots and get those ballots turned in on time. It can make a difference in a close election. But those individuals aren't buying or selling votes.

Secret ballots pretty much prevent the ward boss or anyone else from finding out who someone voted for so there's really nothing that prevents someone from taking a ride from the Democrats and casting a ballot for Republicans.

Now there's a new twist.

Given the times, and the now pervasiveness of the Internet, I guess it was bound to happen online.

About a week ago, someone offered his vote to the highest bidder on eBay and five more people copied his proposal.

The good news is that eBay pulled those auctions after a day, but not until after bidding had reached \$100.

And, earlier in August there was a new web site [voteauction.com](#), launched by James Baumgartner, a graduate student, which is recruiting voters and auctioning off their ballots in state blocks. In just two days, more than 200 people registered with [voteauction.com](#), willing to offer their votes to the highest bidder. [Voteauction.com](#) has a slogan up on its site which says, "Bringing capitalism and democracy closer together."

I don't know how much closer together you could get them.

With the California block at \$100,

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voteauction.com apparently has quit. A statement on the site indicates the site is going through corporate restructuring and that it was illegal in New York.

That's not the only place it's illegal. It's bribery.

Buying and selling votes has been prohibited in every state and at the federal level. Selling or buying votes can be a federal crime, carrying a penalty of a fine of up to \$10,000 and up to five years in prison. That's nothing to sneeze at.

In Iowa, the crime and penalty are less. It's classified as a serious misdemeanor, according to the code, and the penalty is a fine of at least \$250 but not more than \$1,500 and the person convicted may be sentenced to up to a year in prison.

Nobody's been charged, either through eBay or voteauction.com, so far at least. Perhaps it was all a "joke."

The more cynical among us, of course, would suggest that there's not all that much difference between selling your vote for some specific number of dollars and what some lawmakers already do when they are raising money for their elections. With the high cost of getting elected, both at the federal and, increasingly, at the state level, some people would argue that there are a lot of elected officials whose votes are for sale.

It's just not usually quite so blatant.

We're getting closer to election time when The Sioux City Journal will be interviewing candidates particularly in legislative races that are contested. If you have questions you'd like answered or if there are issues you'd like to have candidates addressed, please let me know. I can be reached at the phone number and address below or by writing

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to me at The Sioux City Journal, P.O. Box 118, Sioux City, Iowa 51102.

Kate Thompson is The Sioux City Journal's political reporter. She can be reached at KateThompson@siouxcityjournal.com or by calling 712-293-4203.

[Go to index](#) of 1999 Capitol Insights by Kate Thompson

TO TOP OF PAGE

BACK

- [Getting Started](#)
- [Salute to Trucking](#)

SEARCH

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CONTENTS

- [Quick access index](#)

ARCHIVES

- [Archive pages](#)

SITE MENU

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19

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I know something
called Thirsty

AFFIDAVIT OF DANIEL DOYLE

I, DANIEL DOYLE, being duly sworn and upon oath, state as follows:

1. I am employed as Director of Registration Records for the Chicago Board of Election Commissioners, which is located at 69 West Washington Street, Chicago, Illinois.

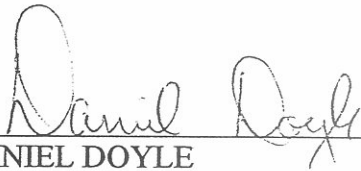
2. I have personal knowledge of the facts stated herein.

3. On October 27, 2000, at approximately the hour of 3:00 Central Daylight Savings Time, I searched on my computer and found an Internet web site known as "voteaction.com" at <http://www.vote-auction.com/>.

4. On that day and time I printed to the printer attached to my computer the pages of the voteauction.com web site as they appeared on my computer screen.

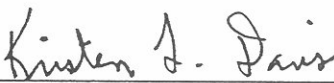
5. Attached to this affidavit is a true and correct copy of the pages that I printed as described above.

6. If sworn as a witness, I can testify competently and would testify as to the matters set forth herein.

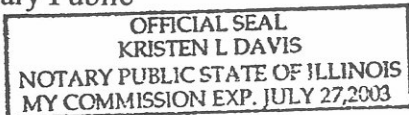


DANIEL DOYLE

Signed and sworn to (or affirmed) before me by Daniel Doyle
this 27th day of October, 2000.



Notary Public



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN, and THERESA M. PETRONE,)

Plaintiffs,)

v.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
OSKAR OBEREDER, CHRISTOPH JOHANNES)
MUTTER, JAMES BAUMGARTNER and DOMAIN)
BANK, INC.,)

Defendants.)

No. 00 CE 31
Judge Michael Murphy

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CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
DOROTHY BROWN CLERK

**MOTION FOR LEAVE TO FILE MEMORANDUM
IN EXCESS OF FIFTEEN PAGES**

Defendant James Baumgartner, by his attorneys, moves this Court to enter an order permitting him to file the attached Memorandum in Support of Combined Motions for, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment that is in excess of 15 pages. In support of this motion, defendant states as follows:

1. This case concerns the Internet web site Voteauction.com, which purportedly solicited and allowed individuals to "sell" and individuals and groups to "bid" on votes to be cast in the November, 2000 presidential election. Plaintiffs, the Board of Election Commissioners of the City of Chicago and three individual Commissioners, sought and obtained from the Court a preliminary injunction that prohibits defendants from operating Voteauction.com on the grounds that such operation violated numerous federal and state criminal and election laws.

Baumgartner now has filed his Combined Motions for, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment pursuant to Sections 2-615, 2-619, 2-1005, and 2-619.1 of the Code of Civil Procedure. In that motion, Baumgartner seeks dismissal of the Complaint,

judgment on the pleadings, or summary judgment in his favor, on the grounds that Voteauction.com was a lawfully operated work of political and social satire and parody, protected by the First Amendment to the Constitution of the United States. In another motion, separately filed and briefed, Baumgartner asks this Court to vacate the preliminary injunction.

2. Foremost, the Memorandum is in support of three different motions, argued in the alternative, for dismissal, judgment on the pleadings, and summary judgment. While these motions could have been advanced in three separate, 15-page memorandums, an economy of words has been achieved by integrating the motions into a single document.


3. Furthermore, Plaintiffs' Complaint is a lengthy document that charges Baumgartner, his co-defendants, and unnamed Illinois voters who purportedly acted in concert with them, with the violation of at least eleven different statutes and the Illinois Constitution. In addition, attached as an exhibit to and incorporated into the Complaint, and quoted at great length therein, is a 109 page print-out of Voteauction.com. The question of whether plaintiffs reasonably interpreted this exhibit lies at the heart of the case and this motion. To explain why he is entitled to dismissal or judgment as a matter of law, Baumgartner's memorandum seeks to show that the only reasonable interpretation of Voteauction.com was that it was a work of satire and parody. This, in turn, requires analysis of the vast contents of that site, in context, as well as a statement of the applicable First Amendment precedent governing political and artistic expression, in general, and satire and parody, in particular. The memorandum also addresses each statutory and constitutional violation alleged by plaintiffs.

4. While defendant has attempted to keep his memorandum as short as possible, he was not able to confine the above referenced arguments to 15 pages. Instead, the proposed

memorandum consists of 36 pages, in which counsel for Baumgartner have made every effort to be concise, yet thorough, given the nature of these potentially dispositive motions.

WHEREFORE, defendant Baumgartner, by his attorneys, moves this Court to enter an order granting him leave to file his Memorandum in Support of Combined Motions in excess of 15 pages.

Respectfully submitted,

By: 
Harvey Grossman - # 1071629
Roger Baldwin Foundation of ACLU, Inc.
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Chicago, Illinois 60601
(312) 201-9740

Richard J. O'Brien
David L. Ter Molen
SIDLEY & AUSTIN - #90761
Bank One Plaza
Chicago, Illinois 60603
(312) 853-7000

Attorneys for Defendant
James Baumgartner

Dated: March 30, 2001

CERTIFICATE OF SERVICE

David L. Ter Molen, an attorney, hereby certifies that he caused a true and correct copy of the foregoing document to be served upon all counsel of record by messenger delivery, as follows:

James M. Scanlon
James M. Scanlon & Associates
70 West Madison Street
Suite 3600
Chicago, Illinois 60602

Phillip J. Robertson
Assistant Attorney General
Nursing Home Bureau
State of Illinois
Office of the Attorney General
100 West Randolph Street
Chicago, IL 60601

on this 30th day of March 2001.



David L. Ter Molen

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN, and THERESA M. PETRONE,)

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v.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
OSKAR OBEREDER, CHRISTOPH JOHANNES)
MUTTER, JAMES BAUMGARTNER and DOMAIN)
BANK, INC.,)

Defendants.)

No. 00 CE 31

Judge Michael Murphy

DOUGOTHY BROWN
CLERK

CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
COUNTY DIVISION

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FILED

**MEMORANDUM IN SUPPORT OF DEFENDANT BAUMGARTNER'S
MOTION TO VACATE PRELIMINARY INJUNCTION**

Introduction

James Baumgartner, a graduate student at Rensselaer Polytechnic Institute ("RPI"), created the Internet web site Voteauction.com for his master's degree thesis in Electronic Art. See Defendant Baumgartner's Verified Answer and Counterclaim (hereafter "Counterclaim") at par.6: Baumgartner Affidavit (hereafter "Def. Aff.") at par. 3¹ In launching Voteauction.com, Baumgartner's chief intention was to comment critically and generate discussion on what he perceived to be a major problem in American government: the ability of corporate interests to buy political candidates. Counterclaim at pars. 6-8; Def. Aff. at pars. 3-6. He also meant to send a critical message about American consumerism by designing the web site as a parody of the on-line commercial market in which virtually anything can be put up for sale. Counterclaim at pars. 6,9; Def. Aff. at par. 8. No votes were actually bought or sold, or intended to be; rather, the "vote auction" construct was simply a creative vehicle for Baumgartner to communicate his

message and generate an ongoing, interactive conversation in cyberspace about these pressing concerns. Counterclaim at par. 6; Def. Aff. at par. 12. As such, Voteauction is political and artistic expression deserving of the highest First Amendment protection. *See* Memorandum in Support of Defendant Baumgartner's Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, Or Summary Judgment (hereafter "Def. Mem. D/SJ") at Sections IA-C.

Plaintiffs -- the Board of Election Commissioners of the City of Chicago, and three individual Commissioners of the Board -- apparently were uneasy with even the tongue-in-cheek suggestion that elections can be bought and sold. *See* Complaint, Exh. A at 81 (Sherrif, *Votes for sale online in the US*, The Register, October 5, 2000) (citing plaintiff Langdon Neal). *See also* Counterclaim, Exhibits C and D. They filed suit in the Circuit Court of Cook County on October 16, 2000, seeking a preliminary injunction to close down Voteauction.com on the grounds that its operation violated various federal and state election and criminal laws. The Court granted the requested Preliminary Injunction on October 18, upon which Voteauction.com immediately was removed from the Internet and Baumgartner ceased to have any access to or control over the site.

Baumgartner now requests that this Court vacate the preliminary injunction.

Baumgartner desires to reinstate Voteauction.com or a substantially similar web site to the Internet, to continue to broadcast his disdain for the election process and the commercialization of American democracy through such a vehicle, and to use the "vote auction" construct to continue to engage his site visitors in discussion and debate about these critically important issues, *see* Counterclaim at par. 28, Def. Aff. at par. 28, all of which the preliminary injunction prevents him from doing. This kind of censorship of political speech and assembly is flatly

¹ The Baumgartner Affidavit is attached as Exhibit 1 to the Memorandum in Support of Defendant Baumgartner's Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, Or Summary Judgment.

unconstitutional, and each day it continues compounds a grave injury for which there is no recompense. In another motion, filed and briefed separately, Baumgartner also asks this Court to dismiss the Complaint or award him judgment on the pleadings pursuant to Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615), or, in the alternative, dismiss the Complaint pursuant to Section 2-619 (735 ILCS 5/2-619), or, in the alternative, award him summary judgment pursuant to Section 2-1005 (735 ILCS 5/2-1005).

Because Voteauction.com is satire and parody protected by the First Amendment, the preliminary injunction operates as an unconstitutional prior restraint on Baumgartner's and his site visitors' political expression. Moreover, it is not narrowly tailored to serve a compelling state interest. Finally, under the circumstances here, plaintiffs have not met, and cannot meet, the showing required to obtain injunctive relief. Since Baumgartner's creation and operation of Voteauction.com violated no election or criminal law, *see* Def. Mem. D/SJ at sections IA-C, and since the injunction is based solely on the predicate of the likelihood that the proof at trial would demonstrate such violations, it must be dissolved.

I. The preliminary injunction is an unlawful prior restraint that “chills” protected speech.

Even plaintiffs here appear to have understood that Baumgartner was not really auctioning off votes. As plaintiff Neal stated to the press:

In Chicago we react strongly and quickly to this type of activity -- *whether it's tongue-in-cheek or not* – because we need to guard our reputation here that this is a place where voting activity is legal and above board and beyond reproach.

Sherrif, *Votes for sale online in the US*, The Register, October 5, 2000 (emphasis added).

(Complaint, Exh. A at 81.) Nonetheless, plaintiffs proceeded to obtain an *ex parte* preliminary injunction shutting down Voteauction.com.

Governmental action directed to suppressing speech because of its content before the speech is communicated, such as that which occurred here, constitutes a prior restraint. *U.S. v. Kaum*, 827 F.2d 1144, 1150 (7th Cir. 1987), citing *In re G. & A. Books, Inc.*, 770 F.2d 288, 296 (2d Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986). The preliminary injunction entered in this case clearly falls within this definition; “[t]emporary restraining orders and permanent injunctions – i.e., court orders that actually forbid speech activities – are classic examples of prior restraints.” *U.S. v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000), citing *Alexander v. U.S.*, 509 U.S. 544, 550 (1993). Since government suppression of protected speech is not tolerated, even temporarily, under the First Amendment, the Supreme Court has insisted upon even greater protection from prior restraints than from subsequent punishments, *see Alexander*, 509 U.S. at 554, citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975), with “heavy presumptions” against their constitutional validity. *Kaum*, 827 F.2d at 1150, citing *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

The presumption of invalidity is even stronger in the case of a pretrial injunction that was issued before full evidentiary proceedings and a final determination that the speech lacked constitutional protection. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989) (mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (allegedly obscene speech may not be enjoined pre-trial without a final judicial determination of obscenity). This presumption is grounded in the recognition that the suppression of protected speech, even temporarily, constitutes irreparable injury to First Amendment interests. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Finally, the presumption against invalidity of prior restraints should be strongest where, as here, the case involves Internet speech, “the most participatory form of mass speech yet

developed,” where free speech protections are at their highest. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 863 (1997), citing *ACLU v. Reno*, 929 U.S. 824, 883 (E.D. Pa. 1996) (Dalzell, J. concurring). See Def. Mem. D/SJ at section IB.

In this case, the Preliminary Injunction Order entered by the Circuit Court of Cook County on October 18, 2000, enjoins defendants, and “all those acting in concert with them,” from:

- A. Using or operating any Internet web site that encourages or allows residents of Illinois to sell their votes to be cast at the November 7, 2000 General Election.²
- B. Using, operating,, facilitating or accessing domain name “voteauction.com” and to remove such web site from the Internet completely or, in the alternative, to modify the Internet web site known as “voteauction.com” so as to remove any illegal content.
- C. Allowing or continuing registration of the Internet domain name “voteauction.com” or any other domain name offering substantially the same service as voteauction.com.
- D. Using or operating in the State of Illinois any Internet web site by any name in any manner that would violate prohibitions in the laws of the State of Illinois and of the United States against the buying and selling of votes in elections.
- E. Accepting from residents of the State of Illinois any registration or offer to sell votes or to buy votes at auction through voteauction.com and to modify

² As the November 7, 2000 election has now passed, this paragraph has become moot in terms of enjoining future conduct. Nonetheless, the fact that Baumgartner was enjoined between October 18 and November 7 from using or operating Voteauction.com as an Internet web site that “encourages” Illinois residents to “sell” their votes, see Preliminary Injunction Order at 4, albeit not seriously, and only satirically, is pertinent to his counterclaim for damages.

their web site to indicate that all registrations or offers to sell votes and/or buy votes from Illinois residents will be denied.

Preliminary Injunction Order at 4, pars. 1A-E.

As shown above, paragraph 1B of the Order prevents Baumgartner from using or operating Voteauction.com and orders the removal of the web site from the Internet. *Id.* While this paragraph purports, in the alternative, to allow the site to continue if modified “so as to remove any illegal content,” *id.*, in fact the option for modification is meaningless. For this

Court made ex parte findings, based entirely on the papers submitted by the plaintiffs and before defendants could mount any defense, that

the proofs, once submitted, would likely show that defendants ... and those acting in concert with them ... have violated the election laws of the State of Illinois and the United States by using and operating an Internet web site known as ‘voteauction.com’ as an auction forum for the purpose of encouraging, soliciting, and allowing residents of Illinois to sell their votes ... and corporations to ‘bid’ on and buy such votes.

Preliminary Injunction Order at 2, par. 5A. When these findings are read in conjunction with paragraph 1B, there could be virtually nothing left on the site – and certainly not its core, satirical message -- once the “illegal content,” as defined by the Court, was excised. Thus, under the Order, any content on the site that “encouraged” or “solicited” people to buy or sell votes is part of the “illegal content” that must be removed. Yet such content formed the very heart of Baumgartner’s satirical construct of a vote auction.

Paragraph 1B, in conjunction with paragraph 1C, further prevents Baumgartner from putting up a web site with the Internet domain name “voteauction.com” or any domain name “offering substantially the same service.” *Id.* at 4. Thus, under the Order, Baumgartner is not only prohibited from using or operating the Voteauction.com web site, but also is prohibited from putting up a substantially similar web site to voteauction.com under a different name.

Paragraph 1D, which prohibits the use of any Internet web site under any name in any manner that would violate federal and state election laws against buying and selling votes, also must be read in conjunction with the factual findings that form the predicate for the Preliminary Injunction Order. Because the Court found that the proof likely would show that the vote auction construct created by Baumgartner constitutes illegal vote bartering, Baumgartner understands the Order to prohibit him from creating and operating any future web site, under any name, that uses a similar construct.

Finally, paragraph 1E prohibits Baumgartner from accepting any registrations by Illinois voters through Voteauction.com and to expressly indicate that all such registrations will be denied. Although paragraph 1E applies only to registrations through Voteauction.com, and not through other sites, Baumgartner understands this paragraph, in conjunction with paragraph D, to prohibit him from accepting Illinois registrations on any substantially similar web site that he might create in the future. In any event, should Baumgartner revive the name "Voteauction.com," accepting registrations from Illinois clearly would be prohibited under this section. However, the registration process is necessary to effectuate the participatory, interactive component of Voteauction.com as the satirical performance piece that Baumgartner envisioned. *See* Counterclaim at pars. 6,8; Def. Aff. at par. 10. Moreover, prohibiting registrations violates the rights of free speech and assembly of Illinois site visitors, as well as Baumgartner. *See* Def. Mem. D/SJ at section IB.

In short, so long as the Preliminary Injunction Order remains in effect, Baumgartner cannot revive Voteauction.com or even create a new, substantially similar site without risk of contempt proceedings in this action, and the underlying threat of the application of criminal laws to his conduct as well. In light of the real nature of Voteauction.com, the preliminary injunction thoroughly chills his protected political expression and that of his site visitors. Under the First

Amendment, such chill is impermissible. Moreover, the injury to First Amendment interests is particularly grievous, because the injunction was issued *ex parte*, without any evidence of actual vote buying or vote selling, and prior to the receipt of any evidence from the defense about the real nature of the Web site, Baumgartner's intent, and the understanding and intent of those who registered or visited the site. Finally, the factual predicates supporting the injunction cannot be squared with the evidence -- whether one looks at the Complaint alone or in conjunction with the pleadings and materials Baumgartner has now filed -- demonstrating that Baumgartner's speech was protected parody and satire. *See* Def. Mem. D/SJ. Under these circumstances, the injunction cannot stand.

II. The injunction was not necessary to serve a compelling state interest, nor was it narrowly tailored.

The injunction prohibits the communication and receipt of Baumgartner's satiric political speech through the Internet, based on the content of that speech. Such limitations are reviewed under a standard of strict scrutiny; the government must demonstrate that the limitation serves a compelling state interest and that the injunction is narrowly drawn to further that interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Plaintiffs cannot satisfy either prong of this test here.

The interests claimed by plaintiffs -- preventing election fraud and preserving the integrity of the voting process -- are certainly worthy, but not truly at issue in this case. Plaintiffs must assert more than important interests in the abstract; they must show "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. FCC*, 522 U.S. 622, 664 (1994). Because Voteauction.com was never meant to be used, and in fact could not be used, to match up real buyers and sellers of votes, it never posed any threat to the asserted interests of the public in

a “fair and impartially conducted” or “free and equal” election. Moreover, because Baumgartner’s satiric message was reasonably apparent to site visitors, the site posed no real threat even to the *appearance* of a fraud-free election.

Even if Voteauction.com were found, somehow, to implicate the public’s interest in a fair election, the injunction is not narrowly tailored to protect that interest. *See Sable*, 492 U.S. at 126; *Raymond*, 228 F.3d at 816 (cautioning district courts to narrowly tailor their injunctions to prohibit only those activities that can be restrained consistent with the First Amendment). The injunction did not simply prohibit Baumgartner and his unnamed, alleged co-conspirators merely from buying or selling votes; it broadly prohibited him from “using, operating, facilitating, or accessing” the Internet site “voteauction.com” and ordered him to remove that web site from the Internet completely. Preliminary Injunction Order at 4, par. 1B. The injunction also prohibits him from creating and operating any substantially similar site, using the vote auction construct, in the future. *Id.* at pars. 1C-E. Thus, the injunction completely silenced his communications and chills future communications about serious flaws in our campaign financing system, by way of this creative, effective, and technologically advantageous medium. An overbroad injunction that suppresses more protected speech than is necessary to serve a compelling interest is abhorrent to the First Amendment. *See Reno*, 521 U.S. at 874-75.

III. Plaintiffs did not meet the standard to secure preliminary relief.

Finally, the procurement of a preliminary injunction requires a showing by plaintiffs that they are likely to prevail on the merits and that they will suffer irreparable harm if injunctive relief is not granted. *Limestone Development Corp. v. Village of Lemont*, 284 Ill. App. 3d 848, 853, 672 N.E.2d 763, 767 (1st Dist. 1996). *See also ACLU v. Reno*, 929 F. Supp. at 851. In addition, the court must consider whether the potential harm to the defendant outweighs possible harm to the plaintiffs if such relief is denied, *id.*, and whether the granting of injunctive relief is

in the public interest. *ACLU v. Reno*, 929 F. Supp. at 851. Plaintiffs here did not meet this standard at the time they requested the preliminary injunction and cannot meet it now.

First, plaintiffs are unlikely to succeed on the merits. As shown in the Memorandum in Support of Defendant Baumgartner's Combined Motions for, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment, defendants, including James Baumgartner, did not violate any election or criminal law, or cause anyone else to violate any such law, in connection with the operation of Voteauction.com. *See* Def. Mem. D/SJ at sections IA-C. Thus, the very basis of the Complaint is unsubstantiated. Indeed, plaintiffs are entitled to a dismissal of the Complaint or, in the alternative, judgment on the pleadings or summary judgment. *See* Def. Mem. D/SJ.

Second, plaintiffs were not facing irreparable harm at the time they sought the preliminary injunction and will not suffer irreparable harm now – indeed, any harm at all – had Voteauction.com remained on-line prior to the November 2000 election and if Baumgartner is permitted to put Voteauction.com or a substantially similar web site back on the Internet in the future. Because Baumgartner and the web site were not in fact engaging in any illegal vote buying or selling, the site poses no threat either to the authority of the laws of the state or federal government or to the legitimacy of any election.


The remaining factors heavily favor Baumgartner. Because the injunction deprives him and the site users of their First Amendment interests, he (and they) are suffering irreparable harm, as noted above. “[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976), citing *New York Times Co. v. United States*, 403 U.S. 713 (1971). Finally, “no long string of citations is necessary to find that the public interest weights heavily in favor of having access to a free flow of constitutionally protected speech.” *Id.*, citing *Turner Broadcasting System, Inc. v.*

FCC, 512 U.S. 622 (1994); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763-65 (1976).

Conclusion

Voteauction.com was satire and parody, not an illegal scheme for vote bartering. The preliminary injunction impermissibly censored Baumgartner's political and artistic expression and chills him from engaging in similar expressive activities in the future. The attempt to suppress such expression should have been evaluated only after all the evidence was in, and by the most stringent standards of review. Neither practice occurred here. This Court should vacate the preliminary injunction and permit Baumgartner to restore Voteauction.com, or a similar site using the vote auction construct, to the Internet.

Respectfully submitted,

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Attorneys for Defendant
James Baumgartner

Dated: March 30, 2001

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN, and THERESA M. PETRONE,)

Plaintiffs,)

v.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
OSKAR OBEREDER, CHRISTOPH JOHANNES)
MUTTER, JAMES BAUMGARTNER and DOMAIN)
BANK, INC.,)

Defendants.)

No. 00 CE 31
Judge Michael J. Murphy

01 APR -2 AM 9:00
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
COUNTY DIVISION
DOROTHY BROWN CLERK

FILED

**DEFENDANT JAMES BAUMGARTNER'S MOTION
TO VACATE PRELIMINARY INJUNCTION**

Defendant James Baumgartner, by his attorneys, pursuant to Section 11-108 of the Illinois Code of Civil Procedure (735 ILCS 5/11-108), moves this Court to vacate the preliminary injunction entered on October 18, 2000. In support of this motion, Baumgartner states as follows:

1. This case concerns the Internet web site Voteauction.com, which purportedly solicited and allowed individuals to "sell" and individuals and groups to "bid" on votes to be cast in the November 2000 presidential election. Plaintiffs, the Board of Election Commissioners of the City of Chicago and three individual Commissioners, sought and obtained from this Court a preliminary injunction that prohibits defendants from operating Voteauction.com on the grounds that such operation violated numerous federal and state criminal and election laws. On October 31, 2000 Baumgartner removed the action to the United States District Court for the Northern District of Illinois, but that court, upon plaintiffs' motion, remanded the case back to this Court on February 6, 2001. Baumgartner now asks this Court to vacate the preliminary injunction. In

other combined motions, filed and briefed separately from this motion, Baumgartner has asked this Court, alternatively, to dismiss the complaint, award him judgment on the pleadings, or award summary judgment in his favor on the grounds that Voteauction.com was a lawfully operated work of political and social satire and parody, protected by the First Amendment to the Constitution of the United States. *See* Defendant's Combined Motions for, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment, and memorandum in support thereof (hereafter "Def. Mem. D/SJ").

2. The Preliminary Injunction Order entered on October 18, 2000, enjoins defendants, and "all those acting in concert with them," from:

- A. Using or operating any Internet web site that encourages or allows residents of Illinois to sell their votes to be cast at the November 7, 2000 General Election.
- B. Using, operating,, facilitating or accessing domain name "voteauction.com" and to remove such web site from the Internet completely or, in the alternative, to modify the Internet web site known as "voteauction.com" so as to remove any illegal content.
- C. Allowing or continuing registration of the Internet domain name "voteauction.com" or any other domain name offering substantially the same service as voteauction.com.
- D. Using or operating in the State of Illinois any Internet web site by any name in any manner that would violate prohibitions in the laws of the State of Illinois and of the United States against the buying and selling of votes in elections.

- E. Accepting from residents of the State of Illinois any registration or offer to sell votes or to buy votes at auction through voteauction.com and to modify their web site to indicate that all registrations or offers to sell votes and/or buy votes from Illinois residents will be denied.

Preliminary Injunction Order at 4, pars. 1A-E.

3. Baumgartner, a graduate student at Rensselaer Polytechnic Institute, created Voteauction.com for his master's degree thesis in Electronic Art. Verified Answer and Counterclaim (hereafter "Counterclaim") at par. 6; Baumgartner Affidavit (hereafter "Def. Aff.") at par. 3.¹ In launching Voteauction.com, his chief intention was to comment critically and generate discussion on what he perceived to be a major problem in American government: the ability of corporate interests to buy political candidates. Counterclaim at pars. 6-8; Def. Aff. at pars. 3-6. In compliance with the Preliminary Injunction Order, Voteauction.com immediately was removed from the Internet and Baumgartner ceased to have any access to or control over the site. Counterclaim at par. 23; Def. Aff. at pars. 25-26.

4. Baumgartner desires to have the option to reinstate Voteauction.com or a substantially similar web site to the Internet, to continue to broadcast his disdain for the election process and the commercialization of American democracy through such a vehicle, and to use the "vote auction" construct on an Internet web site to continue to engage his site visitors in discussion and debate about these critically important issues. *See* Counterclaim at par. 28; Def. Aff. at par. 28. However, as long as the Preliminary Injunction remains in effect, Baumgartner cannot revive Voteauction.com or even create a new, substantially similar site without risk of contempt proceedings in this action.

¹ The Affidavit of James Baumgartner is attached as Exhibit 1 to his Memorandum in Support of Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment.

5. The preliminary injunction was wrongfully issued and should be dissolved, for the following reasons:

6. Because Voteauction.com is political and artistic satire and parody protected by the First Amendment, *see* Def. Mem. D/SJ, at sections IA-B, the preliminary injunction chills protected speech and operates as an unconstitutional prior restraint on Baumgartner's expression. *See U.S. v. Raymond*, 228 F.3d 804, 815 (7th Cir. 2000).

7. In addition, the injunction was not necessary to serve a compelling state interest, nor was it narrowly tailored. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Because Voteauction.com was never meant to be used and in fact could not be used to match up real buyers and sellers of votes, it never posed any threat to the interests asserted by plaintiffs, those of the public in a "fair and impartially conducted" or a "free and equal" election. Moreover, the injunction was not narrowly tailored to serve such interests. It did not simply prohibit Baumgartner from using Voteauction.com to enable the purchase and sale of votes; it broadly prohibited him from "using, operating, facilitating, or accessing" the Internet site "voteauction.com" and ordered him to remove that web site from the Internet completely. Preliminary Injunction Order at 4, par. 1B. The injunction also prohibits him from creating and operating any substantially similar web site, using the vote auction contract, in the future. *Id.* at pars. 1C-E. An injunction that suppresses more protected speech than is necessary to serve a compelling interest is abhorrent to the First Amendment. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75 (1997).


8. Finally, plaintiffs did not meet the standard to secure preliminary injunctive relief. Since Baumgartner's operation of Voteauction.com did not violate any criminal or election law, *see* Def. Mem. D/SJ at section IC, plaintiffs are not likely to succeed on the merits of the

Complaint. (Indeed, defendant is entitled to its dismissal. *See id.*). For the same reasons, plaintiffs will not suffer any harm, let alone irreparable harm, if Voteauction.com is returned to the Internet. In contrast, the issuance of the injunction caused irreparable harm to Baumgartner. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”), citing *New York Times Co. v. United States*, 403 U.S. 713 (1971). Finally, the public interest weighs heavily in favor of having access to a free flow of constitutionally protected speech. *See id.*

9. Contemporaneously with this motion, Baumgartner has filed a supporting memorandum, in which his arguments are set forth in further detail.

WHEREFORE, defendant James Baumgartner moves this Court to vacate the preliminary injunction of October 18, 2000.

Respectfully submitted,

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Attorneys for Defendant
James Baumgartner

Dated: March 30, 2001

CERTIFICATE OF SERVICE

David L. Ter Molen, an attorney, hereby certifies that he caused a true and correct copy of Defendant James Baumgartner's Motion To Vacate Preliminary Injunction, and Memorandum in Support thereof, to be served upon all counsel of record by messenger delivery, as follows:

James M. Scanlon
James M. Scanlon & Associates
70 West Madison Street
Suite 3600
Chicago, Illinois 60602

Phillip J. Robertson
Assistant Attorney General
Nursing Home Bureau
State of Illinois
Office of the Attorney General
100 West Randolph Street
Chicago, IL 60601

on this 30th day of March 2001.



David L. Ter Molen

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN, and THERESA M. PETRONE,)
)
Plaintiffs,)

v.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
OSKAR OBEREDER, CHRISTOPH JOHANNES)
MUTTER, JAMES BAUMGARTNER and DOMAIN)
BANK, INC.,)
)
Defendants.)

NOV 28 2000

RECEIVED
UNITED STATES DISTRICT COURT

No. 00 C 6813
Judge William J. Hibbler

Magistrate Judge
Sidney I. Schenkier

DEFENDANT BAUMGARTNER'S MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFFS' AMENDED SUPPLEMENTAL
MOTION TO REMAND TO STATE COURT

This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. §§ 1332 and 1441(a)¹ because the parties are diverse and the amount-in-controversy exceeds \$75,000. The jurisdictional amount is met because aggregation of damages is appropriate under Counts III and IV since Plaintiffs and the putative class ("all citizens of the State of Illinois") are seeking to redeem a right in which they have a common and undivided interest.² Also, every

¹ It is Baumgartner's position that, based on the unequivocal law of this Circuit, jurisdiction is also proper under 28 U.S.C. §§ 1331 and 1441(a) because Plaintiffs' complaint presents significant questions of federal law.

² Baumgartner's good-faith belief is that an individual's right to free and equal elections and damages suffered by that individual in a conspiracy to encourage illegal voting, exceed \$75,000. Thus, should this Court find that aggregation is not appropriate under the circumstances of this case, Plaintiffs should be prepared to state whether the claims of an individual class member in Counts III and IV exceed \$75,000.

practical consideration weighs against remand for not following Local Rule ("LR") 81.2, a non-mandatory rule that is simply a procedural device to ascertain the amount-in-controversy.

I. Aggregation of Claims in Counts III and IV is Appropriate Because the Class Seeks to Enforce a Common and Undivided Interest.

When "several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount." Loss v. Blankenship, 673 F.2d 942, 949 n.9 (7th Cir. 1982) (quoting Zahn v. Int'l Paper Co., 414 U.S. 291, 294 (1973)). The corollary is that "separate and distinct claims [can] not be aggregated to meet the required jurisdictional amount." Snyder v. Harris, 394 U.S. 332, 336 (1969). The doctrine of not aggregating separate and distinct claims is not derived from the Federal Rules of Civil Procedure, but from the Supreme Court's interpretation of the statutory phrase 'matter in controversy.'" Id. at 336.³ The Supreme Court's concern was that aggregating separate and distinct claims would "allow aggregation of practically any claims of any parties that for any reason happen to be brought together in a single action." Id. at 340.

Thus, determining whether a common and undivided interest is at stake can be approached by asking if the right being enforced is a collective right, or asking if the claims are

³ As a result, the determination of whether claims can be aggregated requires the application of current facts to outdated legal terminology. As Snyder, 394 U.S. at 335-36, observes, aggregation was not allowed when the class action was "spurious," as that term was defined prior to the 1966 amendment to the Rule 23 of the Federal Rules. Collins v. Bolton, 287 F.Supp. 393, 397 (N.D. Ill. 1968) (citations omitted) elaborates:

Under the old Rule 23, aggregation was permitted in "true" class actions where the asserted claim was "joint" or "common" and concerned the interests of the plaintiffs as a body, rather than the interests of the individual plaintiffs. But where the parties asserted "hybrid" or "spurious" class actions, where the claims were in reality only those relating separately to individual members of the "class", aggregation was disallowed. The language of the insurance contracts at bar makes clear that each policyholder's liability is several, rather than joint or common. Hence, under the pre-amendment Rule 23 these claims would have constituted a "spurious" class action, and aggregation would not have been permitted.

separate and distinct. Both perspectives demonstrate that aggregation in this case is appropriate. First, Counts III and IV involve collective rights. Loizon v. SMH Societe Suisse de Microelectronics, et Horologerie SA, 950 F.Supp. 250, 253 (N.D. Ill. 1996) (quotations and citation omitted) says that "[t]o establish a common and undivided interest, the moving party must show that the plaintiffs' claims derive from rights which they hold in group status." As Eagle v. American Tel. and Tel. Co., 769 F.2d 541, 546 (9th Cir. 1985) teaches:

The character of the interest asserted depends on the source of plaintiffs' claims. If the claims are derived from rights that they hold in group status, then the claims are common and undivided. If not, the claims are separate and distinct.

See also Cohen v. Office Depot, Inc., 204 F.3d 1069, 1075 (11th Cir. Feb. 24, 2000) (The phrase "'[c]ommon and undivided interest' is simply the standard used to decide which, if any, claims by multiple plaintiffs may be considered in the aggregate for jurisdictional purposes, and which must be divided among the class members"); 1 James W. Moore, *Moore's Federal Practice* ¶ 0.97[3], at 917 (2d ed. 1995) ("Basically, aggregation is allowed when the plaintiffs unite to assert a 'common,' 'joint,' 'integrated' or undivided right."). As Chief Judge Posner observed, in determining whether certain claims could be aggregated, the rule by some courts that "punitive damages is a right of the individual plaintiff, rather than a collective entitlement of the victims of the defendant's misconduct," might "have to be qualified... [because] the Supreme Court has [since] held that excessive awards of punitive damages violate the due process clause." In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 609 (7th Cir. 1997).

One need look no further than the complaint to determine that Counts III and IV seek to enforce asserted group rights. Those claims are class actions that seek to collect damages on behalf of all Illinois citizens for an alleged deprivation of their right to "free and equal

elections”⁴ and for an alleged conspiracy to encourage illegal voting. The class members--“all citizens of the State of Illinois”--are unified to enforce a right in which they have a common and undivided interest because both claims allege that Defendants “owe a duty” to the class, that the duty was breached, and the entire class was harmed and entitled to damages as a result. See Complaint, Count III ¶¶ 61, 65-68, 69A, Count IV ¶¶ 61, 63, 65, 66A. Because the rights as alleged by Plaintiffs create a duty owed to all Illinois citizens, the right must necessarily be a group right.⁵ Indeed, Plaintiffs are not alleging that there was any individualized harm, but that the group was harmed by the alleged conduct of Defendants. See, e.g., Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F.2d 245, 252 (7th Cir. 1945) (Allowing aggregation of claims because the “plaintiffs have an undivided interest, though separable as between themselves” since “[t]he relief demanded [by the plaintiffs] is identical. If any one plaintiff should in a single suit recover on the demand here made by it or him, that judgment would of itself immediately furnish all the relief which the other plaintiffs are here demanding for themselves....”). As Complaint, Count III ¶ 62 states; “When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed.”

The collective nature of those rights is also demonstrated by applying Rule 19(a) of the Federal Rules of Civil Procedure to determine if this is a case in which joinder for a just

⁴ Count III asserts a cause of action for the deprivation of “rights, privileges, or immunities secured by the Constitution or laws of the United States or the State of Illinois, relating to...the conduct of elections, voting, or the nomination or election of candidates for public...office.” Complaint, Count III ¶ 64 (quoting 10 ILCS 5/29-17). Two rights are cited, one under Article 3, Section 3 of the Constitution of the State of Illinois, which simply states that “All elections shall be free and equal,” the other under 42 U.S.C. § 1973gg-10, which secures the right of voters in a State to have fair and impartially conducted elections.” Complaint, Count III ¶ 63. Because Baumgartner views those rights (right of voters to “free and equal” elections and to “fair and impartially conducted elections”) as synonymous, this memorandum will simply use “free and equal” to refer to both rights collectively.

⁵ It is no surprise that the named plaintiffs are not random citizens, but are all on the Board of Election Commissioners of the City of Chicago. Plaintiffs are thus really proponents for all Illinois citizens in trying to enforce the collective rights at issue in Claims III and IV.

adjudication is necessary. See Snyder, 394 U.S. at 335 (Declaring "spurious" class actions to be merely a form of "permissive joinder"). Rule 19(a) provides that if joining a party is essential for complete relief and if the party has not been joined, "the court shall order that the person be made a party." Under Rule 19(a) each class member in Plaintiffs' complaint:

[Has] an interest relating to the subject of the action and [are] so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede [their] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Both parts of that test are met in this case, though only one is necessary.⁶ Application of this rule demonstrates that the putative class has a common and undivided interest because "the class as a whole is entitled to the relief requested." Poindexter v. National Mortgage Corp., 1991 WL 278454, *2 (N.D. Ill. Dec. 23, 1991). Hence, joinder under Rule 19(a) would be required and the rights involved are common and undivided among the class.

Another way of determining the appropriateness of aggregation is to ascertain whether the class action claims are several and distinct. If not, then aggregation is allowed. Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir. 1990) (citing 1 Freeman on Judgments, § 100, at 174 (1925)) observed that traditionally:

[W]here the rights of the parties in the relief to which they are entitled are different, the judgment may not be joint but should be several. If several plaintiffs properly join, but their causes of action are separate and distinct and their damages may be different,

⁶ As Plaintiffs' complaint states, all Illinois citizens have an interest in damages because the harm is to Illinois citizens as a group. Thus, if only the named plaintiffs were involved in this matter and they prevailed in the litigation:

(i) it is highly doubtful that Defendants would have any money for subsequent claims and the named plaintiffs' action "might," as a "practical matter," impede other Illinois citizens from getting compensation, and

(ii) a damage award in a subsequent action would leave Defendants "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations...." because subsequent plaintiffs would be seeking damages for the exact same action of Defendants.

the judgment should not be for an aggregate sum but should segregate and award to each the damages or relief to which he is properly entitled.

Furthermore:

More current case law continues to follow these precedents. Multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount; they cannot aggregate claims where none of the claimants satisfies the jurisdictional amount. Because the underlying causes of action which plaintiffs brought... were separate and distinct, we find that they cannot aggregate their respective awards to satisfy the jurisdictional amount.

Id. See also Poindexter, 1991 WL 278454, *2 ("Where relief is sought for the breach of separately negotiated instruments, it is difficult, if not impossible, to imagine how the interest to be vindicated could be characterized as a common interest belonging to the group alone rather than to the individual plaintiffs."); Loizon, 950 F.Supp. at 253 (quoting Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir. 1990)) ("If the parties claim individual injuries from the underlying causes of action, the claims are separate and distinct and aggregation is not allowed.").

Here the claims are not separate and distinct because resolving this matter only involves determining whether the Defendants breached a duty owed to the group (all Illinois citizens) and what any potential damages would be.⁷ No "separate and distinct" inquiries need to be made because no distinction can be made between any Illinois citizen in determining Defendants' liability or in ascertaining damages. As alleged by Plaintiffs, if Defendants are liable to anyone, they are liable to everyone.

In sum, the putative class actions in this case are ones of the kind in which aggregation of claims has been allowed. Indeed, this case presents a clear and prototypical example of when aggregation is appropriate, and any way it is viewed, the complaint alleges

⁷ And Baumgartner once again assures the Court that he did not enable the selling or buying of votes in Illinois or anywhere else.

claims for the "common and undivided" rights of Illinois citizens that can not, in anyway, be viewed as separate and distinct. Aggregation of damages is therefore appropriate in determining the amount-in-controversy.⁸

II. The Purpose of Local Rule 81.2(a) is to Clarify the Amount-in-Controversy

Local Rule ("LR") 81.2(a) "establishes a procedure for establishing the amount in controversy, but it is not the exclusive way." Huntsman Chemical Corp. v Whitehorse Technologies, Inc., 1997 WL 548043, at *6 (N.D. Ill. Sept. 2, 1997). That is because the purpose of the rule "is to clarify the parties' position as to the amount-in-controversy." Ibrahim v. Old Kent Bank, 1999 WL 259944, at *4 (N.D. Ill. April 8, 1999). See also International Test and Balance, Inc. v. Associated Air and Balance Council, 1998 WL 957332, at *4 (N.D. Ill. Dec. 23, 1998) (LR 81.2 "was enacted so the laborious task of evaluating the amount in controversy could be avoided."). To this end, the procedures established by LR 81.2(a) seek (1) a good faith statement by the defendant that the amount meets the jurisdictional standard, and (2) a statement by the plaintiff as to the damages it seeks.⁹ Through its Second Amended Notice of

⁸ Also, "[a] claim is more likely to be characterized as joint if the defendant has no interest in the apportionment of an award among the plaintiffs." 15 Moore's Federal Practice, 3d 102.108[3][b], at 194 (3d ed. 2000). Needless to say, Baumgartner does not care how any potential damages are apportioned.

⁹ LR 81.2(a) asks that a party removing a case from state court provide:

- (1) a statement by each of the defendants previously served in the state court action that it is his, her or its good faith belief that the amount in controversy exceeds the jurisdictional amount; and
- (2) with respect to at least one plaintiff in the Illinois action, either—
 - (A) a response by such plaintiff to an interrogatory or interrogatories (see Ill.S.Ct. Rule 213) as to the amount in controversy, either (i) stating that the damages actually sought by that plaintiff exceed the jurisdictional amounts or (ii) declining to agree that the damage award to that plaintiff will in no event exceed the jurisdictional amount; or
 - (B) an admission by such plaintiff in response to a request for admissions (see Ill.S.Ct. Rule 216(a)), or a showing as to the deemed admission by such plaintiff by reason of plaintiff's failure to serve a timely denial to such a request (see

Removal, and now through this memorandum, Baumgartner states that it is his good faith belief that the amount-in-controversy (whether aggregated or not) exceeds \$75,000.

Notably, Plaintiffs do not deny that this is the case. Indeed, they refused to take a position when this issue was first raised before the Court. Even if Plaintiffs ultimately (and oddly) do take the position that the voting rights they avowedly sue to safeguard are not worth enough to satisfy the jurisdictional amount, Plaintiffs' insistence that Rule 81.2(a) be mechanically followed is not justified by any good reason; or for that matter any reason at all. Plaintiffs can easily tell the Court and Baumgartner now whether Plaintiffs believe their damage claims satisfy the jurisdictional amount. Nothing would be served by forcing Baumgartner to go to state court, propound discovery and wait 30 days for an answer that Plaintiffs should be able to furnish now.¹⁰ As Plaintiffs' concede, the rule is not mandatory and whether it is to be enforced depends upon considerations of judicial economy. Plaintiffs' Mem. at 5-6. See International Test, 1998 WL 957332, at *4 (In determining whether to remand, the court's primary concern was "the interest of judicial economy."). Yet Plaintiffs' seek a result that will only disserve judicial economy.

Plaintiffs also suggest that Baumgartner is improperly shifting his burden of demonstrating that diversity jurisdiction exists. While that is certainly the burden of the removing party, LR 81.2(a) and the state procedural rules it employs obligate Plaintiffs to provide the amount of damages it seeks. Plaintiffs cannot prevent Baumgartner from meeting his burden by suggesting that, because the burden is his, Plaintiffs have the right to remain mute.


Ill.S.Ct. Rule 216(c)), in either event conforming to the statement or declination to agree described in subparagraph (2)(A) of this rule.

¹⁰ If the case was remanded and Plaintiffs responded to discovery requests by stating that the amount is greater than \$75,000, then Baumgartner would simply remove the case once again. See Benson v. SI Handling Systems, Inc., 188 F.3d 780, 782 (7th Cir. 1999) ("Neither [28 U.S.C.] § 1447(c) nor anything else in the sections of the Judicial Code devoted to removal forbids successive removals.").

III. Conclusion.

Aggregation is appropriate because Counts III and IV are paradigmatic examples of plaintiffs uniting to enforce a single right “in which they have a common and undivided interest....” Zahn, 414 U.S. at 294. And no logical case can be made, when looking at the complaint at the time of removal, that any separate interests or claims exist among the putative class in Counts III and IV. Because that class comprises all Illinois citizens, the amount of damages must surely exceed \$75,000. Instead of admitting that point, Plaintiffs criticize Baumgartner for not following the procedure outlined in LR 81.2(a). But given the nature of this case and the wasted time and effort that would result from remand, the least burdensome and most efficient means of determining the amount-in-controversy is for Plaintiffs to simply state whether they are seeking more than \$75,000.

Respectfully submitted,

By: 
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Attorneys for Defendant
James Baumgartner

Dated: November 28, 2000

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN, and THERESA M. PETRONE,)

Plaintiffs,)

v.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
OSKAR OBEREDER, CHRISTOPH JOHANNES)
MUTTER, JAMES BAUMGARTNER and DOMAIN)
BANK, INC.,)

Defendants.)

No. 00 CE 31
Judge Michael J. Murphy

FILED
01 APR -2 AM 9:01
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
COUNTY DIVISION
DOROTHY BROWN
CLERK

**DEFENDANT JAMES BAUMGARTNER'S COMBINED MOTIONS
FOR, ALTERNATIVELY, DISMISSAL, JUDGMENT ON
THE PLEADINGS, OR SUMMARY JUDGMENT**

Defendant James Baumgartner, by his attorneys, hereby moves this Court, pursuant to Section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615) to dismiss the Complaint or, in the alternative, for judgment on the pleadings. In the alternative, Baumgartner moves for involuntary dismissal of the Complaint pursuant to Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619). Finally, Baumgartner alternatively moves, pursuant to Section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005), for summary judgment in his favor. Baumgartner brings these combined motions pursuant to Section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1). In support of this motion, Baumgartner states as follows:

1. This case concerns the Internet web site Voteauction.com, which purportedly solicited and allowed individuals to "sell" and individuals and groups to "bid" on votes to be cast in the November 2000 presidential election. Plaintiffs, the Board of Election Commissioners of the City of Chicago and three individual Commissioners, sought and obtained from the Circuit

Court of Cook County a preliminary injunction that prohibits defendants from operating Voteauction.com on the grounds that such operation violated numerous federal and state criminal and election laws. On October 31, Baumgartner removed the action to the United States District Court for the Northern District of Illinois. Plaintiffs then filed a motion to remand, which the District Court granted on February 6, 2001, thereby returning the case to this Court. By agreement, the parties extended Baumgartner's time to answer or otherwise plead until March 30, 2001.

Section 2-615 Motion to Dismiss or for Judgment on the Pleadings

2. The Complaint fails to state a claim upon which relief may be granted, requiring its dismissal under Section 2-615. The facts alleged in the Complaint do not support plaintiffs' allegations that any defendant, including James Baumgartner, intended to use or operate or actually used or operated Voteauction.com as a real auction site for the actual purchase or sale of votes in violation of any election or criminal law of Illinois or the United States. Rather, Exhibit A to the Complaint, which is incorporated therein expressly by the Complaint and by Section 2-606 of the Code of Civil Procedure, demonstrates that the challenged portions of Voteauction.com, viewed in context, were not illegal solicitations to buy or sell votes but rather integral parts of a political and artistic work of satire and parody. *See Perkaus v. Chicago Catholic High School Athletic League*, 140 Ill. App. 3d 127, 134, 488 N.E.2d 623, 627 (1st Dist. 1986) (for purposes of a motion to dismiss, where exhibit attached to complaint contradicts allegations of the complaint, the exhibit controls). *See also Jefferson v. Ambroz*, 90 F.3d 1291, 1296 (7th Cir. 1996) (“[I]f a plaintiff chooses to ‘plead particulars, and they show he has no claim, then he is out of luck – he has pleaded himself out of court’”), citing *Thomas v. Farley*, 31

F.3d 557, 558-59 (7th Cir. 1994); *Bennett v. Schmidt*, 153 F.3d 516, 519 (1998) (litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail).

3. Because political and artistic satire and parody is protected by the First Amendment to the Constitution of the United States, *see e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Complaint must be dismissed. *See Flip Side, Inc. v. Chicago Tribune Co.*, 206 Ill. App. 3d 641, 656, 564 N.E.2d 1244, 1254 (1st Dist. 1990) (where complained of materials published by newspaper could not reasonably be taken literally, they were not sufficient to state a cause of action for defamation as a matter of law, and complaint must be dismissed under section 2-615, noting, in addition, "[t]his is not merely an aphorism of Illinois law, it is part of the first amendment guarantee of free speech which we all enjoy as Americans").

4. In addition to Exhibit A to plaintiffs' Complaint, additional parts of Voteauction.com that were not included by plaintiffs in Exhibit A – namely, the comments of site visitors who registered on Voteauction.com and the actual messages posted to the message board – further demonstrate, in conjunction with Exhibit A, that Voteauction.com was satire and parody. The comments of the Illinois registrants and selections from the message board are attached to defendant Baumgartner's Answer and Counterclaim as Exhibits A and B, respectively. While normally the Court can consider only the allegations of the complaint upon deciding a motion to dismiss under section 2-615, under the circumstances presented here – where plaintiffs' exhibit does not reflect the complete work at issue, and defendant's exhibits provide the additional material – the Court can consider defendant's exhibits as well. *See Flip Side, Inc.*, 206 Ill. App. 3d at 651, 564 N.E.2d at 1250-51 (court must view statements alleged to be actionable in their full context to decide whether complaint could withstand section 2-615 motion; where plaintiffs' exhibit showed only a portion of the full work from which the challenged statements were taken,

court will review exhibits submitted by defendants showing the entire work at issue). *Compare Green v. Wolin Levin Corp.*, 2000 WL 1499438 (N.D. Ill.) at *3 (“documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in plaintiffs’ complaint and are central to her claim”), citing *Venture Associates Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Duferco Steel, Inc. v. M/V Kalisti*, 121 F.3d 321, 324 n.3 (7th Cir. 1997) (same).

5. In the alternative, Baumgartner is entitled to judgment on the pleadings in his favor. The pleadings on file – plaintiffs’ Complaint, considered either alone or in conjunction with defendant Baumgartner’s Answer and Counterclaim – show that there are no disputed, material facts between the parties. Rather, the pleadings establish that James Baumgartner did not use or operate Voteauction.com as a real auction site for the actual purchase or sale of votes and that Voteauction.com was political and social satire and parody. Plaintiffs have pleaded no non-conclusory facts to contradict this affirmative defense. Thus, Baumgartner is entitled to judgment in his favor as a matter of law. *See Sarno v. Akkeron*, 292 Ill. App. 3d 80, 84, 684 N.E.2d 964, 968 (1st Dist. 1997) (where an affirmative defense is apparent from the face of the complaint, it is a proper subject for a section 2-615 motion for judgment on the pleadings).

6. These grounds in support of dismissal or, in the alternative, judgment on the pleadings, pursuant to Section 2-615 are set forth in further detail in the attached Memorandum in Support of Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment.

Section 2-619 Motion for Involuntary Dismissal

7. In the alternative, Baumgartner is entitled to dismissal of the Complaint pursuant to Section 2-619(a)(9) of the Code of Civil Procedure.

8. Even if the Court finds that it cannot consider Baumgartner's Exhibits A and B in deciding the Section 2-615 motion, the Court can surely consider them under Section 2-619(a)(9) as "other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). See *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 91-92, 672 N.E.2d 1207, 1216 (1996); *Perkaus*, 140 Ill. App. 3d at 134-35, 488 N.E.2d at 627-28. As noted above, these exhibits, together with Exhibit A to the Complaint, show that Voteauction.com, when viewed in its entirety, reasonably could not be interpreted as anything other than satire and parody.

9. In addition, Baumgartner has also filed an affidavit in support of his section 2-619 motion. Through his Answer and Counterclaim, exhibits filed thereto, and affidavit, he has established the following, undisputed material facts: that Voteauction.com was conceived of, created, and operated as a work of political and artistic satire and parody, that he did not intend to use and did not use Voteauction.com actually to buy or sell, or to conspire, solicit, or allow any individual or group of persons to buy or sell any vote, and that no vote was bought or sold, to his knowledge. These averments are not simply denials of allegations in plaintiffs' Complaint but constitute affirmative matter defeating the claim. See *Gilmore v. City of Zion*, 237 Ill. App. 3d 744, 753, 605 N.E.2d 110, 116 (2d Dist. 1992) (finding affidavit included affirmative matters in the nature of a defense which negated the plaintiff's cause of action). Plaintiffs do not allege any non-conclusory facts in their Complaint that contradict these assertions. Because Baumgartner has submitted uncontestable affirmative matter establishing that he did not violate any election or criminal law of Illinois or the United States, and in fact was engaging in protected expressive activity, the Complaint should be dismissed.

10. These grounds in support of dismissal pursuant to Section 2-619 are set forth in further detail in the attached Memorandum in Support of Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment.


Section 2-1005 Motion for Summary Judgment

11. Summary judgment is appropriate where the pleadings, affidavits, and supporting materials on file establish that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005. As an alternative to dismissal or judgment on the pleadings under Section 2-615 and/or dismissal under section 2-619, Baumgartner is entitled to summary judgment in his favor on plaintiffs' claims.

12. Baumgartner's arguments in support of summary judgment pursuant to Section 2-1005 are set forth in detail in the attached Memorandum in Support of Combined Motions For, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment.

WHEREFORE, defendant James Baumgartner moves this Court to dismiss the Complaint or, in the alternative, to award judgment on the pleadings or summary judgment on the complaint in his favor.

Respectfully submitted,

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Attorneys for Defendant
James Baumgartner

Dated: March 30, 2001

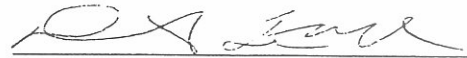
CERTIFICATE OF SERVICE

David L. Ter Molen, an attorney, hereby certifies that he caused a true and correct copy of Defendant James Baumgartner's Combined Motions for, Alternatively, Dismissal, Judgment on the Pleadings, or Summary Judgment, and Memorandum in Support thereof, to be served upon all counsel of record by messenger delivery, as follows:

James M. Scanlon
James M. Scanlon & Associates
70 West Madison Street
Suite 3600
Chicago, Illinois 60602

Phillip J. Robertson
Assistant Attorney General
Nursing Home Bureau
State of Illinois
Office of the Attorney General
100 West Randolph Street
Chicago, IL 60601

on this 30th day of March 2001.



David L. Ter Molen

Cited Authorities Found Only on Electronic Database

Huntsman Chemical Corp. v Whitehore Technologies, Inc., 1997 WL 548043 (N.D. Ill. Sept. 2, 1997).

Ibrahim v. Old Kent Bank, 1999 WL 259944 (N.D. Ill. April 8, 1999).

International Test and Balance, Inc. v. Associated Air and Balance Council, 1998 WL 957332, (N.D. Ill. Dec. 23, 1998)

Poindexter v. National Mortgage Corp., 1991 WL 278454 (N.D. Ill. Dec. 23, 1991).

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois.

HUNTSMAN CHEMICAL CORPORATION,
Plaintiff,
v.
WHITEHORSE TECHNOLOGIES, INC.,
Defendant.

No. 97 C 3842.

Sept. 2, 1997.

MEMORANDUM OPINION AND ORDER

COAR, District Judge.

*1 This matter is before the court on the motion of plaintiff, Huntsman Chemical Corporation ("Plaintiff" or "Huntsman"), to remand this matter to the Circuit Court of LaSalle County, Illinois. Defendant, Whitehorse Technologies, Inc. ("Defendant" or "Whitehorse") opposes the motion.

Background

On or about December 2, 1996, Plaintiff commenced the instant action in the Circuit Court for the 13th Judicial Circuit of LaSalle County, Illinois. The Complaint alleges property and consequential damages caused by an explosion involving a pentane-recovery system designed by Defendant and sold to Plaintiff. On April 18, 1997, Defendant filed a motion to dismiss in the Circuit Court of LaSalle County. The basis for seeking dismissal was Plaintiff's failure to attach to its complaint a certificate of merit as required by Illinois law in product liability actions. Plaintiff, acknowledging the defect, sought leave to amend its complaint and cure the omission. After a full round of briefing, on May 19, 1997, the motion to dismiss was denied and the motion for leave to amend granted. Defendant was ordered to answer or otherwise respond to the amended complaint within 28 days. Instead of complying with that order, Defendant filed a Notice of Removal on May 27, 1997 in the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 1446.

Plaintiff contends that Defendant's Notice of Removal, filed 166 days after receipt of Plaintiff's initial pleading, was filed too late. Defendant

contends that the filing of the removal notice was timely because it was done within 30 days of receipt of Plaintiff's response to Defendant's request for admission acknowledging that the amount in controversy was in excess of \$75,000, exclusive of interest and costs. To determine which party is correct requires review of a statute, a rule, and several cases.

The Statute

28 U.S.C. § 1446(b) provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant ... of a copy of the initial pleading.... If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant ... of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable....

Id.

The Positions of the Parties

In making its argument in support of timeliness, Defendant necessarily contends that "the case stated by the initial pleading" was not removable. Defendant asserts that neither the original nor the amended complaint alleged a specific damage amount. Indeed, as Defendant points out, under the pleading rules in Illinois courts, Plaintiff was prohibited from pleading a specific amount, except as necessary to establish the jurisdiction of the particular (state) court in which the action was brought. In Defendant's view, a case is removable under the first paragraph of section 1446(b) when, from a review of the initial pleading (only), "it may be ... ascertained that the case is one which is or has become removable...." Defendant looks to the second paragraph of section 1446(b) to explain the language of the first. Under this analysis, because the initial complaint failed to allege that the amount in controversy exceeded \$75,000, the case was not removable and did not, indeed could not, become removable until Defendant received "a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable...." In Defendant's view, that did not happen until Defendant received Plaintiff's answer admitting the amount in controversy. Moreover, Defendant reads the second paragraph of section 1446(b) to require that the word

"paper" as used in that paragraph refers only to paper(s) received after the initial pleading.

*2 Plaintiff, on the other hand, reads section 1446(b) differently. Essentially, Plaintiff agrees that the test for determining whether receipt of the initial pleading begins the running of the thirty-day removal period is whether Defendant can ascertain whether the case is removable. Plaintiff disagrees, however, with the contention that the act of "ascertaining" is limited to merely reading the initial pleading. Plaintiff argues that in determining whether the case is removable for purposes of tolling the thirty-day period, a defendant must read the initial pleading in light of facts known to the defendant outside of the pleading. Thus, for example, where an initial pleading alleges complete diversity of citizenship, but fails to allege the requisite jurisdictional amount, receipt by the defendant of the initial pleading commences the running of the thirty-day removal period where the defendant knew (at the time of receipt of the pleading) that the amount in controversy was sufficient for federal jurisdiction.

Plaintiff's alternative theory is that the receipt by Defendant of "papers" claiming amounts in excess of \$75,000 before the filing of the initial pleading, tolled the removal period under the second paragraph of section 1446(b) upon receipt by the Defendant of the initial pleading. Plaintiff also disagrees with Defendant's view that the word "papers" is confined to documents received subsequent to the initial pleading.

DISCUSSION

The literal language of section 1446(b) compels neither the interpretation of the Defendant nor that of the Plaintiff. Defendant has not disputed the fact of pre-filing receipt of written communications indicating that Plaintiff's claim greatly exceeded the dollar amount required for federal jurisdiction.

How do you determine whether the case stated (in the initial pleading) is removable under section 1446(b)? One way is to focus only on the pleading itself. If all the predicates for the assertion of jurisdiction are not affirmatively pled, the case stated is not removable. But there is another construction: Look at not only the pleading but also at other information known by the defendant seeking removal. Under this latter view, if the parties are of the diverse citizenship but the complaint says nothing about the amount in controversy, the case stated may yet be removable if, on the basis of facts known to the defendant, there is a

reasonable probability that the "amount in controversy" requirement is met. Where a defendant knows at the time of receipt of the initial pleading in a state court action that the requirements for federal diversity jurisdiction are met, does the thirty-day period for removing the case commence even though the initial complaint fails to set forth the existence of the jurisdictional requirements? Where a party has received written information as to the existence of a claim in excess of the amounts required for federal jurisdiction prior to the filing of a state action, does the thirty-day period for removal commence upon receipt of a pleading naming that party as a defendant but failing to allege a jurisdictional amount?

*3 It should be noted that the case law on these issues is muddled. The courts have combined two related, but different, issues: 1) when is it too soon or too late for a defendant to file a notice of removal, and 2) what quantum of proof is necessary to satisfy a defendant's burden of demonstrating that the jurisdiction requirements are met? Most of the cases cited by the parties are offered as authority in connection with the timing issue but actually involve the issue of proof. While the concerns addressed in both types of cases are related, they are not the same and care must be taken in reading too much into the "proof" cases.

In *Chapman v. Powermatic, Inc.*, 969 F.2d 160 (5th Cir.1992) relied on by *Whitehorse*, the plaintiff sued the defendant in state court by way of a complaint that alleged complete diversity of citizenship but did not plead a specific amount of damages. The defendant did not file a notice of removal within thirty days of service of the complaint, even though the defendant had notice that the amount in controversy was in excess of the jurisdictional threshold by virtue of a letter from plaintiff's attorney setting forth damages. This letter was received by defendant prior to the filing of the complaint. The letter demanded compensation in an amount in excess of \$800,000. More than thirty days after the filing of the complaint, defendant tendered an interrogatory to the plaintiff seeking the amount of claimed damages. Within thirty days after receipt of the interrogatory answer, defendant filed its notice of removal. Plaintiff filed a motion to remand arguing that the removal notice was untimely. The Court of Appeals for the Fifth Circuit read section 1446 as providing a two-step analysis for determining timeliness:

The first paragraph provides that if the case stated by the initial pleading is removable, then notice of removal must be filed within thirty days from the

receipt of the initial pleading by the defendant; and the second paragraph provides, if the case stated by the initial pleading is not removable, then notice of removal must be filed within thirty days from the receipt of an amended pleading, motion, order or other paper from which the defendant can ascertain that the case is removable.

Id. at 161.

As to the first step, the Fifth Circuit held that the thirty-day time period begins to run

from the defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount....

Id. at 163.

To its credit, the court did not suggest that its interpretation of the language was compelled by the literal language of the statute, but rather rested its view on what it considered the better policy result. Thus, the Fifth Circuit concludes that the interest in providing a bright line rule for defendants is more important than the interest in addressing the forum issue quickly.

*4 Whitehorse argues that Rule 3 of the Local General Rules of the United States District Court for the Northern District of Illinois ("Local Rule") supports its conclusion that removal was premature until it asked, and Huntsman answered, an interrogatory seeking to quantify the amount in controversy. Local Rule 3 provides as follows:

RULE 3 REMOVALS (Effective, January 17, 1997)

Where one or more defendants seek to remove an action from an Illinois state court based upon diversity of citizenship, and where the complaint does not contain an express ad damnum, as to at least one claim asserted by at least one plaintiff, in an amount exceeding \$75,000 (exclusive of interest and costs) that is based on express allegations in that claim in conformity with that ad damnum, the notice of removal shall include in addition to any other matters required by law:

1. a statement by each of the defendants previously served in the state court action that it is his, her or its good faith belief that the amount in controversy exceeds \$75,000; and

2. with respect to at least one plaintiff in the Illinois action, either:

(a) a response by such plaintiff to an interrogatory or interrogatories (see Ill.S.Ct. Rule 213) as to the

amount in controversy, either (1) stating that the damages actually sought by that plaintiff exceed \$75,000 or (2) declining to agree that the damage award to that plaintiff will in no event exceed \$75,000; or

(b) an admission by such plaintiff in response to a request for admissions (see Ill.S.Ct. Rule 216(a)), or a showing as to the deemed admission by such plaintiff by reason of plaintiff's failure to serve a timely denial to such a request (see Ill.S.Ct. Rule 216(c)), in either event conforming to the statement or the declination to agree described in subparagraph 2(a) of this rule.

The receipt by the removing defendant or defendants of the response by a plaintiff referred to in subparagraph 2(a) or of the admission by a plaintiff referred to in paragraph 2(b), or the occurrence of the event giving rise to a deemed admission by a plaintiff referred to in subparagraph 2(b) shall constitute the receipt of a paper from which it may first be ascertained that the case is one which is or has become removable within the meaning of 28 U.S.C. § 1446(b). Where the defendant or defendants do not include the statement required by paragraph 1 of this rule, or do not comply with one of the alternatives described in paragraph 2 of this rule, the action will be subject to remand to the state court for failure to establish a basis of federal jurisdiction.

Local Rule 3 addresses generally the very limited problem faced by federal district courts in analyzing the jurisdictional basis of matters removed from Illinois state courts pursuant to section 1446(b). In particular, the rule addresses the problem of the jurisdictional amount. In substance, it requires that the notice of removal contain a statement by each defendant that the amount in controversy requirement has been met and as to at least one plaintiff, either an interrogatory answer or an admission acknowledging (or refusing to acknowledge) that the jurisdictional amount is met. If the notice of removal omits either of the two required statements, "the action will be subject to remand to the state court for failure to establish a basis of federal jurisdiction."

*5 Whitehorse's reliance on the local rule is misplaced for two reasons, both arising out of the decision of the Seventh Circuit Court of Appeals in *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 376 (7th Cir.1993). In that removed action, the question of subject matter jurisdiction was raised on appeal. One of the jurisdictional grounds raised by the defendant was diversity of citizenship. Judge Milton Shadur of

the United States District Court for the Northern District of Illinois was sitting on the panel by designation. Judge Shadur suggested (in dissent) a procedure that anticipated Local Rule 3: [FN1]

FN1. It should be no surprise that Judge Shadur was the author of Local Rule 3. In *Schneider v. American TransAir, Inc.*, No. 96C8402 1996 WL 74536 (N.D.Ill.Dec. 24, 1996), Judge Shadur said that Local Rule 3 is the equivalent of the procedure suggested in his dissent in *Shaw*. As we shall see, that is not quite accurate.

Why not announce a prospective rule, to control the subject matter jurisdictional determinations in all such future cases, under which the removing diversity defendant must submit to the district court either (1) a showing of the plaintiff's dollar demand (something that in my experience happens in almost all cases before suit is filed) or (2) the result of a quantifying interrogatory to plaintiff--with either of the showings to serve as a precondition to the establishment of the amount in controversy and hence as a precondition to its removal.

Id. at 378. (dissenting, Shadur, J.)

Unfortunately for Whitehorse, the majority of the panel, while praising the procedure and recommending it to removing defendants thought it too limiting and rejected it as a jurisdictional requirement:

We stop short, however, of declaring that this is the only means by which a defendant can establish to a reasonable probability that jurisdiction exists.

Id. at 367.

Whitehorse's reliance on the local rule is even more untenable because the procedure deemed too restrictive by the majority in *Shaw*, is more expansive than that described in the rule itself. [FN2] Remember that Judge Shadur's formulation in *Shaw* required either the result of it quantifying interrogatory (or request to admit), or some other "showing of plaintiff's dollar demand." Clearly, Judge Shadur contemplated that a copy of plaintiff's demand letter written before the complaint was filed, was as effective as a post-filing interrogatory answer. Why the possibility of some "other showing" did not find its way into Local Rule 3 is unclear. What is clear, however, is that the local rule does not adopt the rationale of *Chapman* as the rule for this district.

FN2. In retrospect, the last sentence of Local Rule 3 may be too forceful in light of the majority holding in *Shaw*. Unless "will be subject to remand" is read to mean "may be remanded unless the removing defendant establishes the jurisdictional amount by some other means," the rule is not a correct statement of the law.

In *Mielke v. Allstate Ins. Co.*, 472 F.Supp. 851 (E.D.Mich.1979), the district court concluded that "there is no reason to allow a defendant additional time if the presence of grounds for removal are unambiguous in light of the defendant's knowledge and the claims made in the initial complaint." This court agrees. The purpose for the time limit in section 1446 is to resolve the issue of removal as soon as possible and to allow the case to proceed in whichever forum is appropriate without fear of uprooting the proceedings and transplanting them elsewhere. This case is an example of the wisdom of such a policy. Having failed at a counterattack utilizing a procedural device available in the state (but not the federal) forum, Whitehorse formally asked a question (by way of interrogatory), the answer to which it already knew--what is the amount in controversy? The Plaintiff answered giving Whitehorse a number consistent with the pre-filing demand. Having "discovered" this information, Whitehorse filed its notice of removal with all deliberate haste. Under these facts, the interrogatory was a charade designed to legitimate Whitehorse's blatant delay in seeking removal until it first tried to get the case dismissed in state court. Such a sham should not be countenanced even in the name of a bright-line test that would protect defendants confronted with ambiguous information concerning the amount in controversy.

*6 The section 1446(b) triggering event is the acquisition of information by the defendant that allows it to determine whether the case is removable. How that information is acquired is immaterial. The quality and quantum of information required is that sufficient to satisfy defendant's obligations under Rule 11. Certainty is not required--all that a conscientious defendant needs is a reasonable basis in fact to believe that diverse citizenship and the amount requirements are satisfied. Once the notice of removal is filed, the defendant may still be called upon to establish a reasonable probability that the requisite amount in controversy is involved. See *Shaw*, 994 F.2d at 366. Local Rule 3 establishes a procedure for establishing the amount in controversy, but it is not the exclusive way. Where, as here, the defendant is placed on

1997 WL 548043

(Cite as: 1997 WL 548043, *6 (N.D.Ill.))

Page 6

notice of the amount in controversy by a demand letter received prior to the filing of the complaint, he may not claim an inability to ascertain removability by the lack of an ad damnum clause in the complaint itself.

For the reasons stated above, this matter is remanded to the Circuit Court of LaSalle County.

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern
Division.

Nashat W. IBRAHIM, on behalf of himself and all
others similarly situated,
Plaintiff,

v.

OLD KENT BANK, Defendant.

No. 99 C 999.

April 8, 1999.

MEMORANDUM OPINION AND ORDER

KOCORAS, District J.

*1 This matter comes before the court on the plaintiff's motion to remand. For the reasons set forth below, we deny the plaintiff's motion.

BACKGROUND

On or about January 21, 1999, the plaintiff, Nashit W. Ibrahim ("Ibrahim"), filed a two-count complaint in the Circuit Court of Cook County, Illinois, County Department, Chancery Division, alleging the defendant Old Kent Bank ("Old Kent") violated the Illinois Motor Vehicle Retail Installment Sales Act ("MVRISA"), 815 ILCS 375, et seq., the Illinois Consumer Fraud and Deceptive Business Practices Act ("the Consumer Fraud Act"), 815 ILCS 505/1, et seq., and the Illinois Sales Finance Agency Act ("the Sales Finance Act"), 205 ILCS 660/1, et seq., through its practice of collecting money from persons who signed vehicle retail installment contracts as buyers or co-buyers without first determining whether such buyers took possession of the vehicle.

Ibrahim's complaint seeks: (1) compensatory damages; (2) punitive damages under the Consumer Fraud Act and the Sales Finance Act; (3) injunctive relief; and (4) attorney's fees and costs. Ibrahim purports to bring his complaint on behalf of two classes of individuals: Class A and Class B. Each class consists of individuals with the following characteristics: (1) they signed a vehicle retail installment sales contract as a buyer, co-buyer or co-signer; (2) they did not actually receive the vehicle; (3) Old Kent sought to collect money from them; and (4) they are not the parents or spouse of the co-

applicant that was assigned to Old Kent. [FN1] The only apparent difference between Class A and Class B is the date the purported class member signed the contract: individuals who signed before January 1, 1997 are members of Class A, while individuals who signed after January 1, 1997 are members of Class B.

FN1. In *Lee v. Nationwide Cassel, L.P.*, 174 Ill.2d 540, 675 N.E.2d 599, 601-602 (1996), the Illinois Supreme Court held that MVRISA § 18 prohibits a person from being held primarily liable under a motor vehicle retail installment contract if that person does not actually receive the vehicle and is not the spouse or parent of a person who actually receives the vehicle, even if that person is named as an owner on the vehicle's title.

On February 16, 1999, Old Kent filed its timely notice of removal, pursuant to 28 U.S.C. § 1441, based upon diversity jurisdiction. Ibrahim thereafter filed the present motion to remand. Stripping away the vernacular, Ibrahim essentially argues that we should grant his motion to remand because Old Kent failed to satisfy the requirements of Local Civil Rule 3 when it filed its Notice of Removal. Local Civil Rule 3 requires, inter alia, that where a defendant seeks to remove an action from an Illinois court based solely on diversity of citizenship, and where the complaint does not contain an express ad damnum in excess of \$75,000, a defendant's notice of removal must:

- i. include a statement that it is the defendant's good faith belief that the amount in controversy exceeds \$75,000, and
- ii. include (a) a response from at least one plaintiff to either an interrogatory or request to admit that the damages plaintiff actually seeks exceed \$75,000 or (b) plaintiff's refusal to agree that plaintiff's damage award will in no event exceed \$75,000.

Local Civil Rule 3 applies in the present matter: the sole basis for Old Kent's removal of this action is diversity of citizenship and Ibrahim's complaint does not contain an express ad damnum seeking in excess of \$75,000. It is undisputed that Old Kent did not propound either an interrogatory or request to admit on Ibrahim as Local Civil Rule 3 requires. For these reasons, and these reasons alone, Ibrahim argues, we should grant his motion to remand.

*2 Before we address the merits of Ibrahim's motion, we set forth the legal standard that guides our analysis.

LEGAL STANDARD

Under 28 U.S.C. § 1441, a defendant may remove an action from state court to federal court if the federal court would have had jurisdiction over the lawsuit as originally filed by the plaintiff. Under 28 U.S.C. § 1447(c), however, the action may be remanded to state court if it appears that the district court lacks subject matter jurisdiction. The burden of establishing federal jurisdiction rests on the party seeking to preserve removal. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir.1993). Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir.1993). Any doubts regarding jurisdiction should be resolved in favor of remanding the action to state court. *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir.1976). With these principles in mind, we turn to Ibrahim's motion to remand.

DISCUSSION

We first note that Ibrahim presents no real substantive argument in support of his motion to remand. Rather, he argues that because Old Kent failed to satisfy the procedural requirements of Local Civil Rule 3, we should remand this action back to state court. As set forth more fully below, we find Old Kent properly removed this matter and sufficiently established subject matter jurisdiction in this court. For this reason, we deny Ibrahim's motion to remand, notwithstanding Old Kent's apparent failure to comply with Local Civil Rule 3.

Old Kent removed this action based upon diversity of citizenship. Although it is unclear that all class members are citizens of Illinois, Ibrahim does not challenge Old Kent's assertion that complete diversity exists between the parties. The only question is whether the \$75,000 amount-in-controversy requirement of 28 U.S.C. § 1332 is satisfied. The Seventh Circuit has held that § 1332's amount-in-controversy requirement is satisfied if the class representative meets the jurisdictional amount; the claims of the non-representative class members may fail to meet the jurisdictional amount while still falling within the court's supplemental jurisdiction. See *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930-31 (7th Cir.1996) (interpreting 28 U.S.C. § 1367). The question we must answer is whether the amount-in-controversy applicable to Ibrahim exceeds the \$75,000 threshold amount. We think it does.

As noted above, Ibrahim seeks compensatory damages, punitive damages, injunctive relief and attorney's fees. In analyzing the jurisdictional threshold question, we are allowed to aggregate: (1) the amount Ibrahim seeks as compensatory damages; (2) Ibrahim's proportionate share of punitive damages; (3) the value of Ibrahim's proportionate share of injunctive relief; and (4) Ibrahim's proportionate share of attorney's fees. *Karpowicz v. General Motors Corp.*, 1997 WL 156542 (N.D.Ill.1997) (*Kocoras, J.*) (court found jurisdictional threshold satisfied in purported class action alleging violations of the Illinois Consumer Fraud Act). We examine each of these elements separately.

*3 In his complaint, Ibrahim seeks compensatory damages for, inter alia, (1) sums he allegedly paid in violation of the relevant Illinois statutes; (2) his purported obligation on a contract that is not legally enforceable against him; (3) damage to his credit; and (4) the time, effort and money he expended defending himself against Old Kent's collection efforts. Ibrahim gives no indication of the amounts he has paid on the vehicle retail installment contract applicable to him, although we note that the amount to be paid for the car under the contract is \$16,146. More importantly, we need not identify a specific amount of compensatory damages at issue; we simply recognize that compensatory damages are but one factor we consider in deciding the amount-in-controversy question. See *Karpowicz*, 1997 WL 156542 at *4 ("The plaintiff has indicated that his compensatory damages will probably amount to less than \$10,000.").

We next turn to the pro rata values to Ibrahim of the injunctive relief sought and attorney's fees. Unlike the *Karpowicz* case, where we held the value of injunctive relief to the purported class representative was "negligible," we think injunctive relief in the present matter would have some value to Ibrahim. In *Karpowicz*, the plaintiff alleged the defendant violated the Illinois Consumer Fraud Act by selling cars on which the paint peeled off of horizontal surfaces, telling consumers it would correct the problem and failing to do so. The *Karpowicz* plaintiff would have gained very little from a court order barring the defendant from continuing the alleged practice. In the present matter, however, Ibrahim complains that Old Kent repeatedly sends him requests to pay on the underlying vehicle contract. If we order Old Kent to cease this practice, we think Ibrahim would gain something of value, particularly where he claims

losses from his efforts to stop Old Kent's practice. Turning to Ibrahim's pro rata value of attorney's fees, we have no opinion on the value of this relief, where Ibrahim gives no indication of the potential size of the class. See Karpowicz, 1997 WL 156542 at *4 ("The pro rata share of an attorneys fees award would also probably be quite small, given the plaintiffs' assertion that the class will consist of "hundreds" of Illinois consumers.").

The final factor for our analysis is Ibrahim's proportionate share of punitive damages. In Karpowicz, we held:

Where punitive damages are required to satisfy the jurisdictional amount in a diversity case, a two-part inquiry is necessary. The first question is whether punitive damages are recoverable as a matter of state law. If the answer is yes, the court has subject matter jurisdiction unless it is clear "beyond a legal certainty that the plaintiff would under no circumstances be entitled to recovery the jurisdictional amount." *Cadek v. Great Lakes Dragway, Inc.*, 58 F.3d 1209, 1211-12 (7th Cir.1995) (quoting *Risse v. Woodard*, 491 F.2d 1170, 1173 (7th Cir.1974)).

*4 Karpowicz, 1997 WL 156542 at*4.

In the present matter, it is undisputed that punitive damages may be available, in particular situations, under both the Consumer Fraud Act, see 815 ILCS 505/10a(a), and the Sales Finance Act, see 205 ILCS 660/16. We think it significant that Ibrahim alleges Old Kent continues to send him collection notices even after he repeatedly notified the bank that he never possessed the vehicle in question. Whether such conduct may give rise to punitive damages is not for us to decide today. Simply, we cannot say beyond a

legal certainty that punitive damages, should they be awarded, combined with Ibrahim's compensatory damages, attorney's fees and the value of injunctive relief, will not exceed the \$75,000 threshold. For this reason, we must find the amount-in-controversy requirement is satisfied. *Cadek*, 58 F.3d at 1211- 12.

We briefly address Ibrahim's argument with respect to Local Civil Rule 3. We recognize that Old Kent failed to satisfy the requirements of Local Civil Rule 3. We have previously stated, however, that "the purpose of [Local Civil Rule 3] is to clarify the parties' position as to [the] amount-in-controversy." Karpowicz, 1997 WL 156542 at *4 (allowing for removal of action even where defendant failed to satisfy the requirements of Local Civil Rule 3). Other courts in our circuit have similarly refused to remand an otherwise removable action simply because a defendant failed to satisfy Local Civil Rule 3's requirements. See *International Test and Balance, Inc. v. Associated Air and Balance Council*, 1998 WL 957332 at *4 ("Local Civil Rule 3 was enacted so the laborious task of evaluating the amount in controversy could be avoided. Nonetheless, as the Local Civil Rule 3's 'subject to' language implies, application of the rule is not mandatory."). Because we have already engaged in the analysis of the amount-in-controversy question, and we find the \$75,000 jurisdictional threshold satisfied, we refuse to remand this matter solely because Old Kent failed to satisfy the requirements of Local Civil Rule 3.

CONCLUSION

For the reasons set forth above, we deny Ibrahim's motion to remand.

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Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern
Division.

INTERNATIONAL TEST AND BALANCE, INC.,
Plaintiff,

v.

ASSOCIATED AIR AND BALANCE COUNCIL,
and Certain Members Thereof, Whose
Identities Presently are Unknown, Defendants.

No. 98 C 2553.

Dec. 23, 1998.

OPINION and ORDER

NORGLÉ, J.

*1 Before the court are Plaintiff's Motion to Remand and Motion to Reconsider. For the following reasons, both motions are denied.

I. BACKGROUND

The facts and further procedural background of this case are recited in the court's Opinion and Order of July 15, 1998. See *International Test and Balance, Inc. v. Associated Air Balance Council*, 14 F.Supp.2d 1033 (N.D.Ill.1998). A brief summary follows.

On March 27, 1998, *International Test and Balance, Inc.* ("International") filed a three-count complaint against its former trade association, *Associated Air Balance Council* ("AABC"), and certain unknown members of AABC, in the Circuit Court of Cook County, Illinois. The origin of the dispute is International's disagreement over progressive discipline that AABC imposed upon it after AABC received complaints that International was failing to comply with AABC standards. That discipline eventually resulted in International's expulsion from AABC.

The gravamina of International's complaint are Counts I and II, which allege conspiracy in restraint of trade and an unlawful monopoly, respectively, in violation of the Illinois Antitrust Act, 740 ILCS 10/3. International's complaint also includes a claim for common law intentional interference with contract. In its prayer for relief, International seeks treble damages under the Illinois Antitrust Act and an

injunction that would reinstate its membership in AABC.

On April 27, 1998, AABC removed the case to federal court, claiming diversity of citizenship under 28 U.S.C. § 1332. International subsequently added a "wrongful expulsion" claim and moved for a preliminary injunction based on Count I. The court denied the motion, holding that International failed to show a reasonable likelihood of success on the merits. 14 F.Supp.2d at 1046. Additionally, the court expressed reservations as to whether it had subject matter jurisdiction under the diversity statute. See *id.* at 1035 n. 1; see generally *Wisc. Dept. of Corrections v. Schacht*, 118 S.Ct. 2047, 2052 (1998) (where court notices potential defect in assertion of diversity jurisdiction, it must raise the issue *sua sponte*). The court's remarks are excerpted here:

Because "federal courts are courts of limited jurisdiction," *Matter of County Collector*, 96 F.3d 890, 895 (7th Cir.1996), the court has a "nondelegable duty to police the limits of federal jurisdiction with meticulous care." *Market Street Assocs. Ltd v. Frey*, 941 F.2d 588, 590 (7th Cir.1991); see also *Krueger v. Cartwright*, 996 F.2d 928, 930 (7th Cir.1993); *Fed.R.Civ.P. 12(h)(3)*. It does not escape the court's attention that there are jurisdictional issues in this case. First, because International's complaint includes allegations against "unknown members" of AABC, the citizenship of those members is unknown. Nonetheless, "naming a John Doe defendant will not defeat the named defendants' right to remove a diversity case if their citizenship is diverse from that of the plaintiffs." *Howell v. Tribune Entertain. Co.*, 106 F.3d 215, 218 (7th Cir.1997); see also *Salztein v. Bekins Van Lines, Inc.*, 747 F.Supp. 1281, 1283 n. 4 (N.D.Ill.1990). The named party here, AABC, is, standing alone, of diverse citizenship. However, certain membership organizations "take the citizenship of each member." *Indiana Gas Co., Inc., v. Home Ins. Co.*, 141 F.3d 314, 316 (7th Cir.1998); *Nat'l Assoc. of Realtors v. Nat'l Real Estate Assoc.*, 894 F.2d 937, 940 (7th Cir.1990) (citizenship of incorporated trade association was that of its members because the members were the real parties in interest); *Nat'l Assoc. of Realtors*, 699 F.Supp. 678, 679 n. 3 (N.D.Ill.1988). On the other hand, "for purposes of diversity jurisdiction[,] a corporation is a corporation is a corporation." *Cote v. Wadel*, 796 F.2d 981, 983 (7th Cir.1986). If AABC assumes the citizenship of its members, then jurisdiction may be absent because AABC has

admitted in its later pleadings that it has one member in Illinois (citizenship unknown) (see Def.'s Mem. in Opp'n at 7.), the state where International is a citizen. With an abundance of caution, the court proceeds under Cote, and concludes that diversity jurisdiction exists because the citizenship of International is diverse from the citizenship of AABC. See Nat'l Assoc. of Realtors, 894 F.2d at 939-40 (concluding that for diversity purposes, the inquiry into the relevant citizenship of an incorporated trade association depends upon whether the members or the association are the real parties in interest).

*2 14 F.Supp.2d at 1035 n. 1.

Although the court proceeded to deny International's motion, it ordered the parties to submit briefs addressing the issue of subject matter jurisdiction. The parties complied with the court's order, and International filed two additional motions: (1) a motion to reconsider; and (2) a motion to remand. Because the issue of jurisdiction must be resolved conclusively, the court addresses International's motion to remand forthright.

II. DISCUSSION

A. Removal and Subject Matter Jurisdiction

A defendant seeking to remove any civil action from a state court must file "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). This statement must include a basis for federal jurisdiction, as removal from state court to a federal court is appropriate only where the federal court would have original jurisdiction over a suit. 28 U.S.C. § 1441(a); *Davis v. Rodriguez*, 106 F.3d 206, 208 (7th Cir.1997); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir.1993). In its Notice of Removal, AABC asserted federal jurisdiction under the diversity statute, 28 U.S.C. § 1332.

Two requirements must be satisfied for diversity jurisdiction under § 1332. First, under the rule of complete diversity, there must be diversity of citizenship "between all plaintiffs on the one hand and all the defendants on the other." *Barbers v. Bishop*, 962 F.Supp. 124, 125 (N.D.Ill.1997), vacated on other grounds, 132 F.3d 1203 (7th Cir.1997); see also *Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 217 (7th Cir.1997). Second, the amount in controversy must exceed \$75,000, exclusive of interest and costs. See § 1332(a)(1).

International argues that AABC's notice is defective because there is neither diversity of citizenship nor the requisite amount in controversy in this case. First, International argues that the individual members of AABC are the real parties in interest here, and thus that one AABC member is apparently a citizen of Illinois destroys diversity of citizenship. Second, International argues that AABC fails to show that the amount in controversy requirement is met because International does not claim damages in an amount in excess of \$75,000. International asserts that the primary relief it seeks is non-monetary, in the form of an injunction ordering that its membership in AABC be reinstated.

A plaintiff's choice of forum is presumed proper and valid. Accordingly, the removal statute should be read narrowly, and "[a]ny doubts regarding jurisdiction should be resolved in favor of remanding the action to state court." *Bristol Oaks, L.P., v. Chapman, III*, 95 C 7145, 1996 WL 73654, at * 1 (citing *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir.1976)). The party seeking to preserve removal bears the burden of establishing federal jurisdiction, and so it "must present evidence of federal jurisdiction once the existence of that jurisdiction is fairly cast into doubt." *In Re Brand Name Prescription Drugs*, 123 F.3d 599, 607 (7th Cir.1997). "[F]or purposes of removal jurisdiction, [federal courts] are to look at the case as of the time it was filed in state court—prior to the time the defendants filed their answer in federal court." *Schacht*, 118 S.Ct. at 2053; see also *Cook v. Winfrey*, 141 F.3d 322, 326 (7th Cir.1998). The court may review evidence not included in the record at the time of removal if that evidence "sheds light on the situation which existed when the case was removed." *Harmon v. Oki Systems*, 115 F.3d 477, 480 (7th Cir.1997).

1. Diversity of Citizenship

*3 AABC meets its burden with respect to diversity of citizenship. Where a corporation is a party, it "is deemed to be a citizen of any state in which it has been incorporated and of the state where it has its principal place of business." *Krueger v. Cartwright*, 996 F.2d 928, 931 (7th Cir.1993); see also 28 U.S.C. § 1332(c)(1). Diversity of citizenship is present here because on the one hand, AABC is incorporated in California and its principal place of business is Washington, D.C., while on the other, International has dual citizenship in Illinois. [FN1] To this end, the court rejects International's assertion that the apparent Illinois citizenship of an AABC member destroys

diversity. As the court concluded in its initial opinion, "for purposes of diversity jurisdiction[,] a corporation is a corporation is a corporation." *Cote v. Wadel*, 796 F.2d 981, 983 (7th Cir.1986); see also *Nat'l Assoc. of Realtors v. Nat'l Real Estate Assoc.*, 894 F.2d 937, 939 (7th Cir.1990) (stating that there is generally no distinction between a membership corporation and a shareholder corporation for purposes of determining corporate citizenship).

FN1. As already noted, the citizenships of the unidentified AABC members that International names separately as defendants are not relevant to the court's jurisdictional inquiry. See *Howell*, 106 F.3d at 218 ("[N]aming a John Doe defendant will not defeat the named defendants' right to remove a diversity case if their citizenship is diverse from that of the plaintiffs.").

Moreover, AABC, rather than its members, is the real party in interest here (as for the claims against AABC); the court finds no reason to conclude otherwise. To determine whether diversity of citizenship exists, the court must disregard nominal or formal parties and instead determine whether the real parties in interest are of diverse citizenship. See *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460 (1980); *Security Center, Inc. v. AT & T*, 94 C 6707, 1995 WL 307267, at *3 (N.D.Ill. May 16, 1995). "A real party in interest is the person who, under governing substantive law, possesses the right sought to be enforced." *Garbie v. Chrysler Corp.*, 8 F.Supp.2d 814, 818 (N.D.Ill.1998). Conversely, the person whom a right is sought to be enforced against, i.e., the person who is to be enjoined, is also a real party in interest. See *Security Center, Inc.*, 1995 WL 307267, at *3.

Here, the origin of the dispute is AABC's expulsion of International based on International's failure to comply with AABC membership rules. Consequently, International seeks to enforce its rights under Illinois law against AABC, primarily by seeking an injunction that would reinstate its membership in the association. Thus, AABC members are not on the "front line" in this litigation, and though they would ultimately bear the costs, any effect on them would merely be "trickled down." See *Nat'l Assoc. of Realtors*, 894 F.2d at 939. Indeed, "the law does not lift the corporate veil in search of the ultimate incidence of the corporation's transactions; the tracing out of the incidence is too complicated a process to make it a feasible preliminary to establish federal jurisdiction." *Id.* This case essentially involves a membership

compliance dispute between an association and one of its members; AABC is therefore the real party in interest. Cf. *id.* (trade association would be the real party in interest if it brought a breach of contract action).

2. Amount in Controversy

*4 As a preliminary matter, the court notes that neither party addresses whether Local Civil Rule 3 should apply. See N.D. ILL. CIVIL R. 3. Local Civil Rule 3 provides the proper procedure a defendant must follow upon filing a notice of removal. In relevant part, Local Civil Rule 3 requires that the notice of removal include: (1) a good-faith statement by each defendant that the amount in controversy requirement has been met; and (2) as to at least one plaintiff, either (2)(a) an interrogatory answer or (2)(b) an admission or deemed admission, that acknowledges (or refuses to acknowledge) that the jurisdictional amount is met. See *id.*; see also *Sawisch v. Circuit City Stores, Inc.*, 960 F.Supp. 154, 154-55 (N.D.Ill.1997); *Huntsman Chemical Corp. v. Whitehorse Tech, Inc.*, 97 C 3842, 1997 WL 548043, at *4 (N.D.Ill. Sept. 2, 1997). If a defendant fails to satisfy either of these requirements, "the action will be subject to remand to the state court for failure to establish a basis for federal jurisdiction." N .D. ILL. CIVIL R. 3.

Local Civil Rule 3 was enacted so the laborious task of evaluating the amount in controversy could be avoided. Nonetheless, as the Local Civil Rule 3's "subject to" language implies, application of the rule is not mandatory. See *Huntsman Chemical Corp.*, 1997 WL 548043, at *6 ("Local Rule 3 establishes a procedure for establishing the amount in controversy, but it is not the exclusive way."). Because this case has progressed with this court and the parties have already briefed the issue of jurisdiction, the court, in the interest of judicial economy, declines to apply Local Civil Rule 3 to the instant case. See *Karpowicz v. General Motors Corp.*, 97 C 1390, 1997 WL 156542, at *4 (N.D.Ill. March 28, 1997) ("[W]here the parties have fully briefed the removal ... we think that strict adherence to the rule is unnecessary.").

"[W]hen deciding whether a claim meets the minimum amount in controversy, the plaintiff's evaluation of the stakes must be respected." *Barbers v. Bishop*, 132 F.3d 1203, 1205 (7th Cir.1997). "A plaintiff can always stay under the minimum amount in controversy by waiving the right to more," *Brand Name*, 123 F.3d at 607, yet once a case is properly

removed, a plaintiff cannot destroy diversity jurisdiction by amending its complaint to plead an amount under the jurisdictional minimum. See *Schacht*, 118 S.Ct. at 2053; *Barbers*, 132 F.3d at 1205; *Chase v. Shop 'N Save Warehouse*, 110 F.3d 424, 429 (7th Cir.1997). If the amount in controversy is uncontested, the court "will accept the plaintiff's good faith allegation of the amount in controversy unless it 'appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount.'" *Rexford Rand Corp. v. Ancel*, 58 F.3d 1215, 1218 (7th Cir.1995) (quoting *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938)); see also *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1121 (7th Cir.1998).

*5 However, where the amount in controversy is challenged, the party asserting jurisdiction is required to submit "competent proof" that the amount in controversy exceeds \$75,000. See *Target Mkt. Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1142 (7th Cir.1998); *Rexford Rand Corp.*, 58 F.3d at 1218; *Garbie*, 8 F.Supp.2d at 820. "Competent proof means proof to a reasonable probability that jurisdiction exists." *Rexford Rand Corp.*, 58 F.3d at 1218 (internal quotations and citation omitted); see also *Chase*, 110 F.3d at 427; *Schlessinger v. Salimes*, 100 F.3d 519, 521 (7th Cir.1996). Thus, "[t]he correct test ... in a removal case ... is whether a defendant can show to a reasonable probability that more than the required amount is in controversy." *Garbie*, 8 F.Supp.2d at 820. [FN2]

FN2. For a discussion on the various burdens of proof that federal courts apply when determining whether the amount in controversy is satisfied, see *Watterson v. GMRI, Inc.*, 14 F.Supp.2d 844, 847-50 (W.D.Va.1997).

Because this is a commercial case, as opposed to a personal injury action, Illinois law did not preclude International from pleading a specific amount of damages in its complaint. See *Barbers*, 132 F.3d at 1205 (citing 735 ILCS 5/2-604). Nonetheless, International's complaint lacks any mention of a specific amount of monetary damages that the company seeks to recover. The only reference to damages is in International's prayer for relief, where it asks "to be awarded the costs of this action, reasonable attorney's fees, and damages in an amount to be determined at trial, which damages shall be trebled in accordance with the provisions of the Illinois Antitrust Act, 740 ILCS 10/7(2)." (Compl. at 9.) AABC, of course, refers to the availability of

treble damages under the Illinois Antitrust Act [FN3] as support that the amount in controversy is satisfied. According to AABC, International's claim to treble damages, along with its tortious interference claim and prayer for injunctive relief, "implied that [International's] damages exceeded \$75,000." (AABC Resp. at 3.) (AABC correctly omits any reference to alleged damages from International's wrongful expulsion claim because International added that claim post-removal.)

FN3. The court assumes for the limited purpose of this jurisdictional inquiry that AABC is subject to liability under the Illinois Antitrust Act. As the court noted in its initial opinion, the Illinois Antitrust Act "was intended to apply only to conduct relating to for-profit enterprises." *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1065 (citing 740 ILCS 10/2).

AABC's mere reference to an implied amount of damages is arguably insufficient to carry its burden. However, AABC also asserts that under the "either viewpoint" rule, the value of an injunction reinstating International's membership exceeds the requisite amount in controversy. Under the "either viewpoint" rule, the party asserting jurisdiction in a case involving injunctive relief chooses between two alternative inquiries to establish the amount in controversy: (1) whether the value of the injunction to the plaintiff exceeds the statutory minimum; or (2) whether, from the defendant's perspective, "the injunction sought by the plaintiffs would require some alteration in the defendant's method of doing business that would cost the defendant at least the statutory minimum amount." *Brand Name*, 123 F.3d at 609. Here, AABC submits the affidavit of its Executive Director, Kenneth M. Sufka, to support its assertion that the value of an injunction to International exceeds \$75,000. Sufka states that "the amount of balancing work directly attributable to AABC membership is approximately \$300,000 per year per member." (AABC Resp., Ex. 2, ¶ 6.) Based on this contention, along with International's prayer for treble damages, the court concludes that AABC has shown to a reasonable probability that the amount in controversy exceeds \$75,000. [FN4] Because AABC has met its burden of establishing jurisdiction under the diversity statute, International's motion to remand is denied.

FN4. Because AABC has established the requisite amount in controversy on these grounds, the court need not address AABC's two other assertions in support of the requisite amount in controversy: (1) that AABC's cost of compliance with an injunction

reinstating International's membership would be in excess of \$100,000 (AABC Resp., Ex. 2, ¶ 11.); and (2) that the amount of alleged damages stemming from International's claim of tortious interference is reflected in a related action for breach of contract that International filed in the District of Utah. In that diversity action, International seeks damages in the amount of \$217,299 against Western Sheet Metal, Inc., a contractor on the project that led to International's expulsion from AABC.

*6 As a postscript, the court notes the apparent inconsistency in International's steadfast refusal to concede that the amount in controversy exceeds \$75,000 and its claim that AABC membership is crucial for survival in the test and balancing industry. (Of course, subject matter jurisdiction is not dictated by the parties' consent.) Having said that, the court's denial of International's motion for a preliminary injunction is not necessarily subject to the same inconsistency. A primary basis for the court's denial of International's motion for preliminary injunction was that International failed to meet its burden to establish that AABC had market power. 14 F.Supp.2d at 1042. That membership in AABC may be valuable to some degree does not necessarily equate with the existence of market power and the ability to unlawfully hinder competition. [FN5] International will have the opportunity to prove otherwise at trial. But the limited question here is a jurisdictional inquiry as to whether AABC has shown the requisite amount in controversy to a reasonable probability.

FN5. The court notes that the National Environmental Balancing Bureau is another national association which represents the air balance industry. (See AABC Resp., Ex. 2, ¶ 4.)

B. Motion to Reconsider

Having concluded that it has jurisdiction over this action, the court turns to International's motion to reconsider the denial of its motion for a preliminary injunction. Before addressing the merits of International's motion, the court recites the applicable standards for a motion to reconsider.

There is no "Motion for Reconsideration" codified in the Federal Rules of Civil Procedure. There are, however, Rules 59(e) ("Motion to Alter or Amend Judgment") and 60(b) ("Relief From Judgment or Order" based upon "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence;

Fraud, Etc."). Though International neglects to explicitly cite any rule as the basis for its motion, the fact that it challenges the merits of the court's decision means that it must fall under either Rule 59(e) or Rule 60(b). See *United States v. Deutsch*, 981 F.2d 299, 300 (7th Cir.1992). Further, because International filed its motion to reconsider within ten days of entry of judgment as computed by Fed.R.Civ.P. 6(a), the court will review the motion under Rule 59(e). See *Britton v. Swift Trans. Co., Inc.*, 127 F.3d 616, 618 (7th Cir.1997) ("[T]he key factor in determining whether a 'substantive motion' is cognizable under Rule 59 or Rule 60 is its timing.").

"The only grounds for a Rule 59(e) motion ... are newly discovered evidence, an intervening change in the controlling law, and manifest error of law." *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir.1998). Rule 59(e) "is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment [citation], or to present evidence that was available earlier." *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir.1995); see also *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir.1996). "The rule essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." *Russell v. Delco Remy Div. of Gen. Motors Corp.*, 51 F.3d 746, 749 (7th Cir.1995). Whether to grant or deny a Rule 59(e) motion "is entrusted to the sound judgment of the district court." *Matter of Prince*, 85 F.3d 314, 324 (7th Cir.1996).

*7 In its initial opinion, the court denied International's motion for a preliminary injunction because International failed to establish the "threshold consideration" for the issuance of such a motion: the plaintiff's ability to show a reasonable likelihood of success on the merits. See *Platinum Home Mortg. Corp. v. Platinum Financial Grp.*, 149 F.3d 722, 726 (7th Cir.1998). International rested its motion for a preliminary injunction on its alleged ability to prevail on Count I, i.e., to show that its expulsion was an unlawful restraint of trade in violation of the Illinois Antitrust Act, 720 ILCS 10/3. 14 F.Supp.2d at 1039. The court concluded that International failed to carry its burden in several respects: (1) International appeared to confuse the antitrust theory applicable to its asserted facts (see *id.* at 1041); (2) International did not attempt to define the relevant market (see *id.* at 1042); (3) International failed to show that AABC membership allows the exercise of market power or

that it provides exclusive access to a necessary business element (see *id.*); (4) International failed to show that its expulsion had an adverse impact on competition (see *id.* at 1046); and (5) International relied on distinguishable cases (see *id.* at 1042-46).

Because International simply rehashes its earlier arguments, the court finds no reason to disturb its ruling. For instance, International argues that the court "did not consider sufficiently the relative harm that is presented here if the requested relief is not granted." (Int'l Mem. in Supp. at 4.) The court, however, was not required to reach the comparative harm analysis because International failed to demonstrate a reasonable likelihood of success on the merits. See *Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir.1998); see also *Green River Bottling Co. v. Green River Corp.*, 997 F.2d 359, 361 (7th Cir.1993); *Abbot Lab. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir.1992). And as the court noted in its initial opinion, International failed to submit adequate arguments in support of the well-established elements for a preliminary injunction. See 14 F.Supp.2d at 1039.

Next, International attacks the court's primary reason for denying its motion, i.e., International's failure to define the relevant market and present at least some evidence of market power. Yet International concedes that it is still unwilling to attempt to define the relevant market and instead attempts to switch that burden to AABC. (Int'l Mem. in Supp. at 6.) Contrary to International's assertion, a mere conclusory allegation of the relevant market does not suffice for purposes of meeting its burden at the preliminary injunction stage. (Though International's mere allegation would likely survive a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6)). In any event, International still fails to submit any evidence indicating that AABC has market power. A sample of International's empty references to factual evidence on market power is the self-serving question it asks: "If there were no substantial market advantages for Plaintiff in being a member of AABC, then why would Plaintiff be so concerned about being unfairly and anticompetitively excluded from membership?" (Int'l Mem. in Supp. at 7.)

*8 In sum, the court previously held that International failed to carry its burden for the "extraordinary and drastic remedy" of a preliminary injunction. *Boucher v. School Bd. of Greenfield*, 134 F.3d 821, 823 (7th Cir.1998). It is well established that a court's opinions

are not "mere first drafts, subject to revision and reconsideration at a litigant's pleasure." See *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D.Ill.1988). International presents no reasons under Rule 59(e) that persuade the court to reconsider its earlier holding. International's motion to reconsider is hence denied.

C. AABC's Exemption Under the Illinois Antitrust Act

The court's discussion is not complete, however. As noted in the court's initial opinion, the Illinois Antitrust Act "was intended to apply only to conduct relating to for-profit enterprises." *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1065 (7th Cir.1997) (citing 740 ILCS 10/2). It is therefore quite surprising that International seeks reconsideration given that the court already expressed serious doubts as to whether AABC, as a non-profit organization, is subject to liability under the Illinois Antitrust Act. Indeed, regardless of the court's prior analysis, the application of 740 ILCS 10/2 leaves International's likelihood of success at nil. In its initial opinion, the court noted that it would leave that issue for another day because the parties had not raised the issue; that day has come. Because AABC, as a non-profit organization, is exempt under the Illinois Antitrust Act, Counts I and II of International's complaint are hereby dismissed. [FN6]

FN6. Although International's now-dismissed claims under the Illinois Antitrust Act provided the basis for the requisite amount in controversy, the court will retain jurisdiction over the remaining counts. See generally *Herremans*, 157 F.3d at 1121 (expressing doubt that upon dismissal of counts that provide the requisite amount in controversy, that a court could decline jurisdiction under 28 U.S.C. § 1367 over surviving supplementary state counts).

III. CONCLUSION

For the foregoing reasons, the court denies International's Motion to Remand and its Motion to Reconsider. Additionally, International's claims against AABC under the Illinois Antitrust Act are hereby dismissed.

IT IS SO ORDERED.

END OF DOCUMENT

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern
Division.

Howard POINDEXTER, Plaintiff,
v.
NATIONAL MORTGAGE CORPORATION,
Defendant.

No. 91 C 4223.

Dec. 23, 1991.

MEMORANDUM OPINION AND ORDER

LEINENWEBER, District Judge.

*1 Defendant, National Mortgage Corporation ("National"), removed this consumer class action to federal court under 28 U.S.C. § 1441(b). The parties are now before the court on the motion of plaintiff, Howard Poindexter ("Poindexter"), to remand this action to the Circuit Court of Cook County. Plaintiff argues that because the amount-in-controversy requirement has not been satisfied the court is deprived of subject matter jurisdiction.

BACKGROUND

Plaintiff originally brought this action in the Circuit Court of Cook County on behalf of himself and two classes of persons who 1) were obligated on a mortgage owned by defendant or 2) had their escrow deposits computed by National in the same manner as plaintiff.

According to plaintiff, National "systematically imposed late charges on veterans and their families in excess of those authorized under their mortgages ... [and] required the class members to deposit into their accounts amounts in excess of those their mortgages provided for." *Cmplt.* at 1. Poindexter brought the class action in order to secure a declaratory judgment as to the legality of National's practices, an injunction against their continuance, an order requiring National to recompute the affected mortgages and credit the excessive charges and profits to principal, as well as attorneys fees and other relief.

On July 8, 1991, National filed a notice of removal with this court. National contends this court has jurisdiction pursuant to 28 U.S.C. §§ 1332 and 2201. No federal claims are alleged.

DISCUSSION

A class action is not within the diversity jurisdiction of the federal courts unless the jurisdictional amount requirement is satisfied with respect to the claims of each named plaintiff and each class member. See *Snyder v. Harris*, 394 U.S. 332, 335 (1969); *Zahn v. Int'l. Paper Co.*, 414 U.S. 291, 301 (1974). The jurisdictional amount requirement must be satisfied in removal actions to the same extent as in original actions. *Goldberg v. C.P.C. Int'l., Inc.*, 678 F.2d 1365, 1367 (4th Cir.1982). Where the defendant petitions for removal to federal court, it has the burden of proving that removal is proper. *Ortiz v. GMAC*, 583 F.Supp. 526, 530 (N.D.Ill.1984).

1. Aggregation

National does not allege that the compensatory damages sought by plaintiff meet the jurisdictional amount requirement as to each plaintiff and class member. Instead, it argues that, if aggregated, the cost of its compliance with the injunctive and declaratory relief sought would far exceed the total sum of \$50,000. Defendant asks the court to determine the amount in controversy from the "defendant's viewpoint" and find that it has satisfied the jurisdictional amount requirement.

In arguing that its aggregate costs satisfy the jurisdictional amount requirement, National relies on *McCarty v. Amoco Pipeline*, 595 F.2d 389, 395 (7th Cir.1979). In *McCarty*, the plaintiffs sought to enjoin Amoco from operating a pipeline located upon an easement they had previously held. The action was removed to federal court by Amoco. In denying the plaintiff's motion for remand, the Seventh Circuit explained that the determination of jurisdictional amount may be made by examining the value of the case from the viewpoint of either the plaintiff or the defendant. Since the cost to the defendant of implementing the injunction would exceed \$10,000, the court found that removal was proper. 595 F.2d at 395. [FN1]

*2 In *McCarty*, however, no class was alleged, let alone certified. Thus, defendant's reliance on *McCarty* is misplaced. *McCarty* simply stands for the proposition that the court may consider the "defendant's viewpoint" when determining jurisdictional amount. With only one plaintiff seeking relief, \$10,000 was sufficient to satisfy the

jurisdictional amount requirement. However, a court applying the "McCarty" rule in a class action setting must pro rate the defendant's cost among the class members. Any interpretation of McCarty which fails to require a pro rata calculation violates the rule against non-aggregation spelled out in Zahn, 414 U.S. at 301, and Snyder, 394 U.S. at 335.

According to Poindexter, the most he or any individual class plaintiff could receive by way of damages is \$7,920. Defendant does not dispute that, under the general rule of non-aggregation, this alleged damage estimate fails to satisfy the jurisdictional amount requirement. Rather, defendant argues that plaintiff's claims for injunctive and declaratory relief constitute a "common and undivided interest" of all class members. Therefore, defendant argues, plaintiff's claims may be aggregated in order to satisfy the jurisdictional amount requirement.

Defendant, however, has misunderstood the test for "common and undivided interest." An interest is "common and undivided" where only the class as a whole is entitled to the relief requested. See Griffith v. Sealtite Corp., 903 F.2d 495, 498 (7th Cir.1990); O'Brien v. Continental Ill. Nat'l. Bank, 443 F.Supp. 1131, 1138 (N.D.Ill.1975). Where named plaintiffs and class members are attempting to obtain individual payments from the defendant, or other relief to which any single one of them would be entitled, their rights are "separate." See Nat'l. Org. for Women, et al. v. Mutual of Omaha Ins. Co., 612 F.Supp. 100 (D.D.C.1985). In Nat'l. Org. for Women, the court explained that the "issue is whether the plaintiffs possess a common interest that belongs exclusively to the group." 612 F.Supp. at 105. Where relief is sought for the breach of separately negotiated instruments, it is difficult, if not impossible, to imagine how the interest to be vindicated could be characterized as a common interest belonging to the group alone rather than to the individual plaintiffs.

Here, the class is definitely not asserting a "common and undivided" interest. Each class member has a separate mortgage contract and note, each class member could in theory bring an individual action for National's overcharges and for an order enjoining any future breach. Therefore, plaintiff's claims may not be aggregated to satisfy the jurisdictional amount requirement.

2. Aggregation of Punitive Damages and Attorney's fees

Defendant also argues that the potential attorney's fees and punitive damages should be attributed to the class as a whole and treated as a "common fund" in order to meet the jurisdiction amount requirement. While the Seventh Circuit has not yet had the opportunity to address the question, the court believes that punitive damages and attorney's fees are attributed to each plaintiff and class member on a pro rata basis where the claims are "separate" and "independent." The rule against aggregation cannot be circumvented simply because a plaintiff seeks punitive damages and attorney's fees. See Goldin v. American Airlines, Inc., 1990 WL 77630 (N.D.Ill.1990); See also Goldberg, 678 F.2d at 1367.

*3 From the face of plaintiff's complaint, it is clear that a pro rata calculation of the cost of injunctive relief, coupled with a pro rata award of attorney's fees and punitive damages, will not exceed \$50,000. Indeed, National does not attempt to argue that the jurisdictional amount requirement is satisfied under a pro rata calculation.

3. Award of Attorney's fees

The removal statute provides that "an order remanding a case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). In order to receive an award of attorney's fees, the plaintiff need only show that the action was removed improvidently. See Locklear v. State Farm Mutual Auto Ins. Co., 742 F.Supp. 679, 681 (S.D.Ga.1989); Schmidt v. Nat'l. Org. for Women, 562 F.Supp. 210, 215 (N.D.Fla.1983).

Here, it is clear that the potential damage award to which plaintiffs are entitled does not approach \$50,000 per class member. If it did, defendants would not have spilled so much ink asking the court to consider defendant's cost of compliance in the aggregate. In light of the existing case law prohibiting aggregation, this court believes that the action was removed improvidently. Plaintiffs are, therefore, awarded attorney's fees incurred in litigating their motion to remand.

CONCLUSION

As the party seeking removal, National must show that this court possesses subject matter jurisdiction over the present action. National has failed to carry its burden. Plaintiff's motion to remand is therefore granted. The case is remanded to the Circuit Court

1991 WL 278454
(Cite as: 1991 WL 278454, *3 (N.D.Ill.))

Page 4

of Cook County.

IT IS SO ORDERED.

FN1. At the time *McCarty* was decided, the jurisdictional amount requirement was only \$10,000.

END OF DOCUMENT

CERTIFICATE OF SERVICE

David L. Ter Molen, an attorney, hereby certifies that he caused a copy of the foregoing Notice of Removal to be served by messenger upon the following counsel:

James M. Scanlon
James M. Scanlon & Associates
70 W. Madison Street, Suite 3600
Chicago, IL 60602

on this 28th day of November, 2000.



David L. Ter Molen

To the attention:

**James M. Scanlon
James M. Scanlon & Associate
70 West Madison Street, Suite 3600
Chicago, Illinois 60602
Tel.: +1-312-977-4881
Fax: +1-312-782-8162**

To be brought to the attention of:

Judge Michael J. Murphy

Berlin, October 30th, 2000

In the case pending

**Between Bernhard e.a. / Board of Election commissioners of the City of Chicago,
Langdon D. Neal, Richard A. Cowen, Theresa M. Petrone before the Circuit Court
of Cook County**

- 00 CE 031 -

I ask for the suspension of the case and for the continuation of the case in written procedure.

I, Luzius A. Bernhard, am incapable of appearing in person before the Circuit Court of Cook County for the specific hearing set on October 30th, 2000, or any other date.

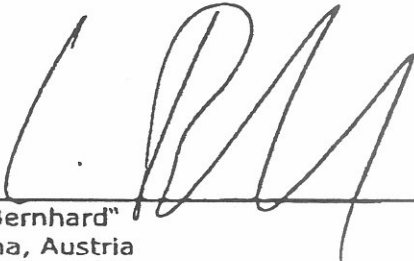
I am, at the moment, searching for legal representation by an american attorney, who would represent me in the case and who is admitted before the the Circuit Court of Cook County.

However, I was not able to assign an attorney in time for the hearing on this Monday, October 30th, 2000, 10:30 a.m., local time. Concerning the specifics of the myself residing in Europe, i.e. outside the United States of America, I therefore pledge for indulgence and suspension of the case, respectively for a 30-day period until the setting of a new date for this hearing.

Concerning the specific issues brought along in the case so far I prefer not to comment on these issues at the time, as I do not consider myself able to understand the specifics of the the U.S., or Illinois legal system. I therefore again pledge for indulgence until I have found legal representation within reasonable time.

Please excuse my poor English.

Singed and dated,


Luzius A. Bernhard, aka „Hans Bernhard“
Kurrentgasse 10/22, 1010 Vienna, Austria

cc: Bechert, Schliepack, Wutzler, Rechtsanwälte in Bürogemeinschaft
Fax: +49-30-28096462

EXHIBIT

tabbles

6

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JOHN B. CASEY
CRAIG M. CRIST
GERALD J. JENNINGS**
REBECCA M. VACCARIELLO
ALSO ADMITTED IN MA *
ALSO ADMITTED IN FL **

October 24, 2000

SARATOGA COUNTY OFFICE
55 FOURTH STREET
WATERFORD, NY 12188
(518) 237-3904
(O: COUNSEL)
CHRISTOPHER M. SCARINGE

Via Facsimile (312-782-8162) and First Class Mail

James M. Scanlon, Esq.
James M. Scanlon & Associates, P.C.
70 West Main Street, Suite 3600
Chicago, Illinois 60602

Re: Board of Elections Commissioners of the City of Chicago, et al. v. Baumgartner, et al.
Case No.: 00 CE 31

Dear Mr. Scanlon:

Enclosed please find an affidavit executed by my client, James Baumgartner, with respect to the above-referenced matter.

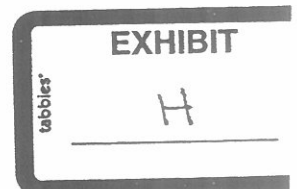
Please give me a call when you have had an opportunity to review the affidavit.

Very truly yours,

DREYER BOYAJIAN LLP

By: *Daniel J. Stewart*
Daniel J. Stewart

DJS:cl
Enclosure



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

In the Matter of the Investigation
of Voteauction.com

STATE OF NEW YORK :
 :SS.:
COUNTY OF ALBANY :

JAMES M. BAUMGARTNER, being duly sworn, deposes and says:

1. I am a resident of the State of New York, and a graduate student at Rensselaer Polytechnic Institute ("RPI"). I am providing this affidavit to assist the federal government in connection with their investigation of a website entitled "Voteauction.com".

2. I developed the idea for Voteauction.com in approximately March of 2000, as a part of a graduate thesis that I am scheduled to deliver at RPI in November (A copy of the announcement of my thesis is attached as Exhibit A). The thesis is in the area of electronic art. I had, through my research, become genuinely concerned about the topic of money in politics. I wanted to create a website that would evoke public commentary concerning an issue which is the core of this nation, democracy, and whether or not elections are in essence for sale. It appeared to me that there was an election industry in America, and voters were considered to be a commodity, to be purchased and sold.

3. I then went to work trying to develop a website which I thought could be realistic enough to generate the attention that I

felt this issue deserved. The website is consistent with a long tradition of Internet art which seeks to fool the media by parodying a corporate site. In addition, in interviews that I gave, I would pass myself off as a business entrepreneur. This was done to make people question the site, and to generate discussion on the topic.

4. I believe, however, that a review of the complete website demonstrates that the site is in fact a political parody, and satire. This was adequately pointed out by the comments contained on the message board by those who had spent some time studying the site. (Selected comments are attached as Exhibit B).

5. At no time did I ever intend to buy or sell any votes, or facilitate any third party buying or selling a vote. As far as I am aware, no vote was ever sold or purchased. The site itself had no way to verify the names of the individuals who signed up to sell their vote. There was no mechanism to transfer the names of potential buyers with potential sellers. Based on my review, it was clear many individuals who signed up were in fact fictional. For example, Michael Eisner of the Disney Corporation signed up. As far as I know, only a very small number of people, possibly in the area of seven, ever actually signed up to purchase a vote while I had it up and running. Of those, I don't know of any who did not understand that it was a political parody.

6. On or about August 17, 2000, I had an interview at Wirednews.com concerning the site. There was a substantial amount of traffic on the site after that interview. However, the site was only up and running for two days after the interview. On the second day, I received, through an intermediary, information from an official with the New York State Board of Elections. Based upon that information, I shut the site down, and I never reopened it.

7. At some time thereafter, I came in contact with Hans Bernhard, also known as Luzius Bernhard, who indicated his desire to rejuvenate the site. I did not know Hans Bernhard prior to this, although I was aware that he was an Internet activist, having previously been involved in etoy. It is my understanding that the purpose for him to resurrect the site would be the same purpose I had, which was to generate publicity on the issue, both here and abroad, of the effect of money on politics.

8. I executed a domain name registration change, so that Hans could restart the site. None of my information on the site was copyrighted. It is my understanding that the site was then reopened, and remained open until it was recently closed, as required by a court in Chicago, Illinois after the filing of a preliminary injunction by the Chicago Board of Elections.

9. It should be noted that on the website, there was information concerning the present status of bids on votes, and

dollar amounts were assigned. The numbers contained therein were all fictional. I generated fake numbers at first on a daily basis, and then I went on a weekly basis until approximately October 16, 2000. I am no longer in communication with Hans Bernhard, nor do I have any involvement with the website.

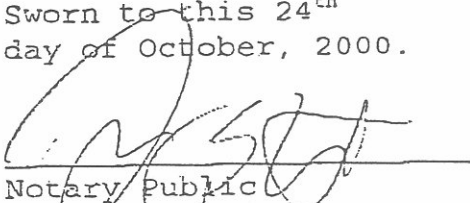
10. There has been some press concerning the fact that I allegedly sold "this business" to Hans in Austria, and that Hans had a profit motive for pursuing the website. In fact, Hans and I agreed that I would sell the site for one Eurodollar, and even that was never provided. Nor was it my understanding that Hans intended to make money off this site. His interest, as was mine, was purely that of political satire and parody. It was also felt that by introducing a "foreigner", the site would generate even more attention.

11. I want to emphasize that at no time was it my intent to have people buy or sell votes. Indeed, my intent was exactly the opposite. I wanted to bring attention to the fact that companies and political parties are treating votes as commodities in a way which I feel is destructive to our country. Free elections are the underpinning of our democracy, which is our most sacred and cherished value. I regret that anyone believed that Voteauction.com was a direct threat to the integrity of a particular election.

12. This affidavit is submitted in part so that any interested governmental agency can understand the true facts behind the website, and can release this information to the public to assure the public of the integrity of the November 7, 2000 elections. Again, the purpose of Voteauction.com was not to undermine the integrity of the election process, but simply to point out for public discussion that there is a problem with money in politics.

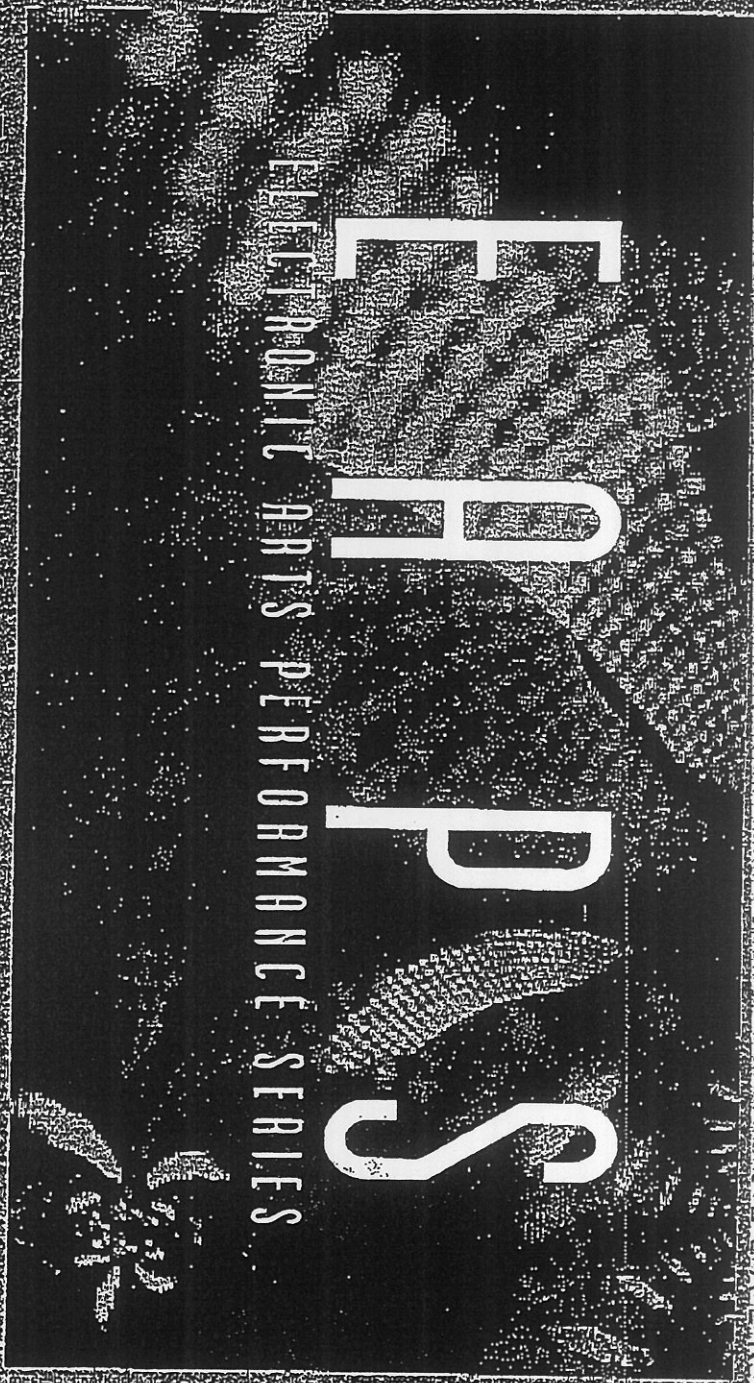

James M. Baumgartner

Sworn to this 24th
day of October, 2000.


Notary Public

DANIEL J STEWART
Notary Public, State of New York
No. 02ST4953215
Qualified in Warren County
Commission Expires July 10, 2002

INTEGRATED ELECTRONIC ARTS APPRENTICESHIP



EAPS

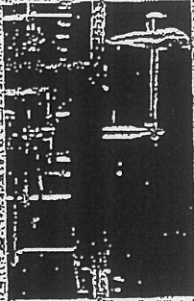
ELECTRONIC ARTS PERFORMANCE SERIES

EAPS

MISSION IS TO PROGRAM PUBLIC PERFORMANCES AND PARTICIPATE IN
PUBLISHING AND PROMOTING ARTISTS WHO EXPLORE
THE HORIZONS OF ELECTRONIC ART

Although the program is in its infancy, it is a very exciting one. We are looking for artists who are interested in exploring the possibilities of electronic art. We are looking for artists who are interested in exploring the possibilities of electronic art. We are looking for artists who are interested in exploring the possibilities of electronic art.

ELECTRONIC ARTS PERFORMANCE SERIES fall 2000



Achievement Award at the beginning of a grand finale, the capstone of letter life, the message: INVENTION AND INNOVATION is assembled and dissolved. He is also the inventor of the popular children's toy, toozers, and Zous, and is a partner in the company Handson Toys which is as possible for its realization in the market.



of the artist (the Arts) the fashion Kodak Worldwide Independent Film Make Product Grant, and a Rockefeller MacArthur Foundation grant. Her most recent work includes Dormirundo, a documentary about the discomfort of being - she lives and works in Mexico City.



of the artist (the Arts) the fashion Kodak Worldwide Independent Film Make Product Grant, and a Rockefeller MacArthur Foundation grant. Her most recent work includes Dormirundo, a documentary about the discomfort of being - she lives and works in Mexico City.



Ganson has been creating mechanical sculpture for over twenty years and is currently an artist-in-residence at Massachusetts Institute of Technology, and has exhibited his sculpture in both the US and Europe. Past exhibitions include the Decoroda Museum and Sculpture Park, Reed/Maresca Gallery, New York, the Garbiller Center at Harvard University, and Technorama in Winterthur, Switzerland. He is also an ongoing permanent exhibition at the MIT Museum.

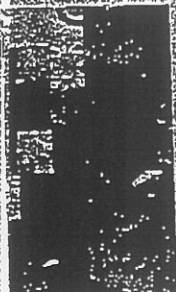
Ganson is the creator of an interactive award trophy for the 1999 and 1998 Lemelson-MIT Lifetime Achievement Award. The trophy is a grand finale, the capstone of letter life, the message: INVENTION AND INNOVATION is assembled and dissolved. He is also the inventor of the popular children's toy, toozers, and Zous, and is a partner in the company Handson Toys which is as possible for its realization in the market.

Imena Guevas is obsessed with the micro-movements of daily life, with the border between truth and fiction. With the impossibility of reality, Her work relentlessly seeks out the layers of lies covering the everyday representations of reality and systematically explores the fiction of national identity and gender. Her videos have been shown in festivals such as the New York Film Festival, Sundance, Berlin, and Montreal, and she was the featured artist at Video Viewpoints in the Museum of Modern Art in New York. Among the many grants she has received are those from the FONCA (Mexican National Endowment for the Arts), the Eastman Kodak Worldwide Independent Film Make Product Grant, and a Rockefeller MacArthur Foundation grant. Her most recent work includes Dormirundo, a documentary about the discomfort of being - she lives and works in Mexico City.

We feel what we have always been and what we have already become. Prosthetics were once a sign of lack. Now prosthetics become a symptom of excess. The body must operate with extended awareness, laboriously and with surrogate bodies and machines. Steiff discusses issues of identity and awareness through a presentation of his pedormantes with visual material and a demonstration of the Third Hand and the Muscle Stimulation system.

Steiff is an Australian artist who has performed extensively in Japan, Europe, and the USA. His works incorporate new music, dance and experimental theater. He has used such diverse technologies as medical prosthetics, robotics, virtual reality and the internet to explore alternate, intimate, and involuntary interfaces between human and non-human bodies. His work in fact focuses on the confusion of his disjunction, as he pushes the limits of our understanding of inanimate and animate human and non-medical science. Steiff actively explores the role of body and movement in the unfolding narratives of our highly technologized contemporary environment.

Of Edus Jan, Kenjo Frank, Schlegel, Mada Klein, Alexander Oer, Miriam Knutskoop, Rob Schroder, Joost Heijde, Procter, Frank, Schlegel, assembled a group of artists from diverse backgrounds. Experimental, feature and documentary filmmaking, TV production, graphic design, fine art and weaving. Co-film and reassemble a pair of earlier video works. Sonic acts and sonic images, two series of shorts on the inter-digital and electronic music.



Director: Jan Kerkhof. Frank Scherffer, Aiqia Kien, Alexander Or, Mham Kusthoop, Rob Scudder, Josselyn Reid, producer. Frank Scherffer assembled a group of artists from diverse backgrounds, experimental, feature and documentary filmmaking. Production, graphic design, fine art and weaving. To repair and reassemble a palette of earlier video works, sonic acts and sonic images, two series of short stories, the base section of cinema and electronic music.

Yarkho Ström is an elegiac subtitle to a narrative Charles Manson, Scherffer, not by any coincidence.



Ben Rubin uses sounds, solitaire and hand made controllers to create live sonic landscapes and multi-media improvisations, installations and performance works. Rubin is a frequent collaborator with Laurie Anderson, Ann Hamilton, Betsy Akron, Arto Lindsay, Diller Scofidio, Steve Reich, the Builders Association, and other artists.

Zeena Parkins, just a habit and one, a kind performer, uses prepared and electronic processing to create a kind of noise while the harmony is coded in embodied silence. Both women sing from their kind of vocal ranges, Brazil on having a good herede. Her rock bands since 1969 and currently leading a band called Naphtal, vocalizing in tempo, bands as well as straight classical, jazz and new music ensembles both women play electric guitar and computer hardware computer music.



Naphtal is a duo of electronic music, York University's music technology program and conducts live interactive radical and end-pieces in a digital music studio. Her programs, Brazil on (D.M.A. composition, Columbia University) creates of wave synthesis, D.A.T. sound tracks and samples from Columbia's computer music lab.

Voiceaction

The American ideal of a capitalistic and democratic society is the core of the project. Voiceaction.com will allow citizens to vote on the issues of the day. The project will culminate in a press conference on Tuesday, November 7. Election day. The election will be a referendum on the issue.

Edi Alter is director of the N. Undergraduate Film Festival and director of cinema, computer, sound.com.

Voteauction.com Message Board

WHY?*Re: Welcome to the Voteauction.com Message Board (Admin)**Date: Oct 15, 12:34**From: irenicon*

when we registered to sell our vote we gave reasons for doing so. i would personally like to be able to read the reasons that people gave for selling their votes. anyone else interested? i think this could be accomplished without breach of confidentiality.

Good Suggestion*Re: WHY? (irenicon)**Date: Oct 15, 12:37**From: Admin <voteauction@mail.com>*

Good suggestion, we will forward your message to voteauction.com and hopefully they will include some of the "reasons" in the next update.

does your vote really matter?*Re: Welcome to the Voteauction.com Message Board (Admin)**Date: Oct 18, 11:01**From: Optional*

It seems like everyone thinks that the person (people) elected actually do(es) something. Grow up and face the truth. It will get done regardless if you vote, don't vote or sell your vote. If you can get a few bucks...why not. After all the American dream is to "live long and prosper". Whoops...that is the vulcan greeting.

Effect of Voteauction.com on Electoral College*Date: Sep 15, 11:19**From: Red Porphyry <porphyry@vnet.net>*

I've taken a close look at your entire site and I must admit that as a political parody site, voteauction.com is exceptionally well done. As a real auction site for putting up votes for bid, however, there's at least one fascinating possible consequence. If it turns out that a lot of Americans are willing to sell their votes and a lot of other Americans are willing to buy them, voteauction.com may end up tipping the popular vote for U.S. President one way or the other in a particular state. If that were to happen, the electors for that particular state may simply decide to ignore their state's popular vote and instead "vote their conscience". In most states the electors still retain this prerogative, since technically the popular vote in a state is merely a "suggestion" that the citizens of a state give to the electors on who they think would make the best president. The electors are not necessarily required to follow this "suggestion", and in the event that the popular vote in a state is tipped one way or another through vote buying, probably won't. Ironically, voteauction.com may thus end up helping to restore the Electoral College as a functional political institution in the U.S.

oteauction.com Message Board

Red --

no, i think...

Re: Effect of Voteauction.com on Electoral College (Red Porphyry)
Date: Sep 27, 17:15
From: Hal

...you are wrong. It is against the law for the electorate to disregard the popular vote.

Also, by empowering the electorate, you empower the chuminess and back-scratching that has long been the staple of American politics.

Also, it will further strengthen the bipartisanship that is tearing this country apart. The dominant party in the electorate will vote for their party's candidate.

However, ideas like voteauction.com, contrary to what the politicians who are trying to keep the status quo are trying to lead us to believe, empower the voters, nobody else.

Using this service allows us to say what has long been ignored by the politicians: Americans feel disenchanting by politics and are emotionally and personally distant from the politicians.

The fact that there are only 6k voters registered to use voteauction.com says even more: American voters are so disenchanting that they don't care about the vote at all. Just look at the public apathy towards both the elections as well as voteauction.

Cite, please.

Re: no, i think... (Hal)
Date: Sep 29, 11:03
From: Red Porphyry <porphvrv@vnet.net>

Hal writes:

...you are wrong. It is against the law for the electorate to disregard the popular vote.

My response:

Cite, please.

Red --

Half right

Re: Cite, please. (Red Porphyry)
Date: Oct 01, 19:56

Whatever you may think of the intellectual underpinnings of a law that criminalizes the sale or purchase of votes, or the offer to do so, the sale or purchase of a vote is still a class 4 felony in Illinois and the offer to purchase a vote or to sell a vote is the inchoate offense of solicitation. Illinois residents who sell their votes or offer to do so expose themselves to criminal penalties, like it or not.

Reply to Cautionary Reply

Re: CAUTIONARY REPLY

Date: Oct 05, 09:21

From: Steven Imparl, Esq. <steven@imparl.net>

Here is the problem I see. This site is clearly a funny parody and public education site. I don't think any reasonable person could construe this site as a real solicitation, conspiracy, or attempt to buy or sell votes.

Look at the entire Web site--the totality of the circumstances. You will see many links to commentary about issues to voters. However, you will not see any specifics regarding how the alleged buying and selling of votes will take place or any real steps in furtherance of such an activity. What I do see is a heavy-handed attempt by the government to quash political speech.

This uproar in Illinois all apparently started because an oversensitive commissioner of Chicago's Board of Elections was offended by this site which recalled unpleasant memories of corruption in the city government of Chicago. That really is just too bad. This site offers a lot of valuable links to other sites that will be of interest to voters.

To attempt to shut this site down would be to trammel on free political speech protected by both the United States and Illinois Constitutions. That government officials have nothing better to do with their time than to harass a Web site that exemplifies our treasured legal and social traditions of freedom of expression is gravely disappointing.

Steven D. Imparl, Attorney and Counselor at Law, Chicago, Illinois

So why move to a server in Bulgaria?

Re: Reply to Cautionary Reply (Steven Imparl, Esq.)

Date: Oct 05, 14:23

From: Reality Check

Well Steven it is fine to say, "this site is clearly a funny parody and public education site". However if that is so then why was it sold to Vienna businessman, Hans Bernhard who put this site up on a server in Bulgaira? This is no longer in the hands of James Baumgartner who created it.

As for not seeing "any[thing] regarding how the alleged buying and selling of votes will take place or any real steps in furtherance of such an activity", if I give my name and address it is just a matter of mailing me the specifics and a check. Are you really so naive as to think that just because it doesn't spell out the details that there aren't any?

Voteauction.com Message Board

The real threat here isn't so much in the legality of buying or selling votes but the transfer of votes to people outside of the voting district. Specifically to persons who are otherwise ineligible to vote such as foreign nationals. This in theory can result in someone such as Slobodan Milosevic or Saddam Husayn buying votes. Do you really want either of these men voting in U.S. elections? And no this is not like them having influence. This is them having votes! Votes with the same power as though you or I voted.

The site is clearly a parody

Re: So why move to a server in Bulgaria? (Reality Check)

Date: Oct 05, 17:54

From: Boho

The VoteAuction web site is clearly a parody based on the lack of details regarding payment, exemplified by the total lack of voter authentication. There's no check to make sure that a voter is actually registered in a given district, nor that the voter doesn't register multiple times with VoteAuction. Without these fundamental protections (and more), no serious auction could occur, and thus VoteAuction must be considered a parody.

On a second topic, I don't understand how VoteAuction looks any more sinister than PACs and other soft money in terms of allowing people outside of a voting district to have influence within that district. In particular, consider the contributions from residents of the state of Utah to the last governor's race in Idaho, and to a recent senatorial race in Massachusetts. In both elections, the LDS (mormons) from Utah contributed significant funds to back LDS candidates. I think such behavior weird, but I don't think it's illegal (according to the laws of the three states in question).

Once you allow monetary contributions that end up going for political advertising, you lose any moral high ground regarding selling votes. Donors are contributing moeny with the expectation that voters will be swayed. Why not make the process more efficient?

Boho

Untitled

Re: So why move to a server in Bulgaria? (Reality Check)

Date: Oct 05, 18:42

From: Steven Imparl, Esq. <steven@imparl.net>

>Well Steven it is fine to say, "this site is clearly a funny >parody and public education site". However if that is so then >why was it sold to Vienna businessman, Hans Bernhard who put >this site up on a server in Bulgaira? This is no longer in >the hands of James Baumgartner who created it.

My guess is that it was sold to a purchaser who was willing to pay money for it. People sell things all the time. The mere fact that a sale occurred does not imply that the object of the sale is or was illegal.

> As for not seeing "any[thing] regarding how the alleged >buying and selling of votes will take place or any real steps >in furtherance of such an activity", if I give my name and >address it is just a

Voteauction.com Message Board

matter of mailing me the specifics and a >check.

I don't think there will be any mailing. As an author who writes about Internet legal issues, I filled in their form, making very clear in the comments box that I am a researcher and not selling my vote or doing anything illegal or attempting to do anything illegal. I received no response, despite the promise that I would receive e-mail.

>Are you really so naive as to think that just because it >doesn't spell out the details that there aren't any?

Me? Naive. Please, don't insult my intelligence. I have been practicing law for nearly 8 years now. There aren't many stories I haven't heard. I have seen conspiracy and I have seen solicitation. This does not appear to be either.

Furthermore, if the details are not spelled out, how can any reasonable person believe that this site does what it claims it does? Why haven't the bidding numbers changed? Why is there no posting of the highest bid? Time is running out. The election is a little over 4 weeks away. If this were some grand scheme to buy votes, I think there would have to be a much more sophisticated bidding method displayed.

> The real threat here isn't so much in the legality of buying >or selling votes but the transfer of votes to people outside >of the voting district. Specifically to persons who are >otherwise ineligible to vote such as foreign nationals. This >in theory can result in someone such as Slobodan Milosovic or >Saddam Husayn buying votes. Do you really want ether of these >men voting in U.S. elections? And no this is not like them >having influence. This is them having votes! Votes with the >same power as though you or I voted.

With all due respect, this smacks of a conspiracy theory and I just don't buy it. Notice how this site has a message board. Real auction sites don't really have message boards like this one. I think this site is accomplishing exactly what it's original owner intended for it to accomplish: to shock people and to generate discussion.

Steven Imparl, Esq., Attorney and Counselor at Law, Chicago, Illinois

I don't shock easily

Re: Untitled (Steven Imparl, Esq.)

Date: Oct 09, 13:39

From: Reality Check

>I think this site is accomplishing exactly what it's original owner intended for it to accomplish: to shock people and to generate discussion.

Steve I don't shock easily. I do however enjoy the opportunity to stir the pot, thus my taking the role of Devils Advocate. While I do agree that it appears that this site was intended as a parody you still haven't responded to the issue of the sale.

>The mere fact that a sale occurred does not imply that the object of the sale is or was illegal.

Voteauction.com Message Board

I never said anything about the legality of the site. Just it's potential for abuse as a result of the sale.

>I have been practicing law for nearly 8 years now. There aren't many stories I haven't heard. I have seen conspiracy and I have seen solicitation.

You can hit me with that one in thirteen more years.

All in all Steve I am impressed with your comments and observations. Believe it or not, I agree with you for the most part. But you have to admit that when there is potential for abuse there is always someone ready to do so. This site merely opens the door. Now we must look to see who comes through it.

Bulgaria?

Re: So why move to a server in Bulgaria? (Reality Check)

Date: Oct 18, 07:19

From: Clemens Zauner <czauner@sil.at>

- a) This site *is* a parody. Quite obvious for for any intelligent person.
- b) The Server is *not* in Bulgaria, but Vienna, Austria
- c) Hans ist not an artist. no businessman here.

d) Think before you type.

Clemens.

Get a clue, A.L.

Re: CAUTIONARY REPLY

Date: Oct 06, 10:40

From: C Wegrzyn <wegrzyn@garbageDump.com>

Come on A.L. all you've done with your heavy handed P.C. attitude is show how really "clueless" you are. Going to state or federal court won't do much. And the fact that it gets national or world-wide attention will only show what a fool you really are in Chicago.

From an ex-Chicagoan.

How will anyone know?

Re: CAUTIONARY REPLY

Date: Oct 12, 07:39

From: C Wegrzyn <wegrzyn@garbageDump.com>

What I want to know is how will A.L.Zimmer and the slime balls know whether or not I sold my vote? First you can use any of the digital money type of systems on the Internet to transfer money to

Voteauction.com Message Board

They've always been able to buy my vote*Re: Why should selling your vote be criminal? (Mr. Cynical)**Date: Oct 17, 16:41**From: Kept Man*

Gore & Dubya can take as much money as they want from the rest of you and use it to buy my vote in the form of prescription drugs, "tax credits", and other programs. Strikes me as far more moral to sell my vote to people who put up the money voluntarily instead of letting them take the money at gunpoint.

I agree*Re: They've always been able to buy my vote (Kept Man)**Date: Oct 18, 20:31**From: Curtis <Curtisf@Ruraltel.net>*

I also agree. I would much rather vote for someone that really wants my vote. If they want my vote and are willing to do anything to get it then they can have it. In this day and age it doesn't really matter who gets to be president or who gets to be governor. The bottom line they all lie and screw us the american people straight up the tail pipes. If you want my vote you can have it.

Why does bottled water have an expiration date?

Satisfaction guaranteed?*Date: Sep 26, 21:51**From: Aphrodite*

How can an investor be sure that the voters will actually vote for the specified candidate? What if they just take the money and run?

By the way- I think this site is great! Thanks for bringing this issue to light in such a creative way. Sometimes I think politicians and corporations WANT people to be bored with politics in order to keep them from going to the polls. We need more things like this site to keep things interesting.

How can you question this?*Re: Satisfaction guaranteed? (Aphrodite)**Date: Sep 26, 22:24**From: Raoul Duke, Jr.*

Come on, anyone that would sell their vote is obviously of the highest moral caliber. They would never be the type to not show the integrity or honor to keep a sacred commitment.

But seriously folks, this is a great site. Scary, but great.

Voteauction.com Message Board

Re: Why just sell votes from America?

Date: Sep 30, 12:18

From: Admin <voteauction@mail.com>

We are concentrating on just the U.S. Presidential election this year. We are treating this as a test run for the voteauction.com business model. If we feel that this is a suitably profitable venture, we will expand into many other elections all over the world, perhaps even Australia.

aussie situationRe: Untitled (Admin)

Date: Oct 06, 05:03

From: Hal

What is the difference between "free to vote" and "forced to vote?"

If you say we are free to vote in the US, yet cannot sell our vote, are we truly free?

Too bad NY'ers are excluded! >8-(

Date: Oct 01, 06:21

From: Jaded NYer <oldslimshady@eminem.com>

Too bad I have to sit this one out as an observer. Ironic that selling votes is only illegal for the "little people" while the most blatant political whores in DC routinely engage in turning 6-figure tricks with their CorpAmerica johns.

The cries of "unfair!", "illegal!" and my favorite: "What a sad, sad, shame...people fought and dies so you can vote" ring hollow and fall largely on deaf ears, since it is the very people in power, and their Corporate pimps who have succeeded in turning the entire electoral process into a fraud and a sham. I think the main reason they are complaining is that they don't want any competition;-p

Keep up the good work, and good luck to all you vote-sellers who have seen the light. You aren't doing anything new, just doing it on a smaller scale (and, might I add, deliciously overt, to boot;) The power exposed and emulated, and want a monopoly on corruption, so don't listen to them. Screw 'em if they can't take a joke, because they've been screwing the voters for decades.

GREAT site, GREAT idea, Great implementation:) Congrats to all concerned! Don't let the hypocrits and naive sheeple get you down.

UntitledRe: Too bad NY'ers are excluded! >8-((Jaded NYer)

Date: Oct 16, 17:11

From: al

Voteauction.com Message Board

was 1995, but you probably wouldn't believe me.

Horrible, I think not

Re: This is Horrible! (A True American!)

Date: Oct 05, 10:14

From: Russell Kicklighter

This is the very freedom invisioned I think. We the people, have the right to choose, and if we choose to have someone else determine who will lead this country why is that choice not respected. I also think it makes a very interesting civics lesson, (How much is your vote worth) the more valuable it is the more likely people are to examine their choices more closely.

For The People

Re: This is Horrible! (A True American!)

Date: Oct 05, 12:24

From: Selling My Vote <dupree4@yahoo.com>

This is not horrible. This is a step in the direction of True Democracy. This will stop the corporations from wasting their money on political adverstising which insults America and give the money that is being taken from the people back to the people. This is GREAT!

Don't you know a joke when you see it people??

Re: For The People (Selling My Vote)

Date: Oct 17, 09:41

From: <maryzemail@aol.com>

This site has to be pulling legs. On the other hand, the democrats have been doing this in a more discreet way for years. I have friends who are election judges and they have discovered any number of ballots cast by dead people!! The locals dems check voter lists against obituaries and haul in a bunch of unregistered voters to vote (usually absentee) using the name of the deceased. This honorable tradition was used to its ultimate by the late "Landslide Lyndon Johnson". The voters they recruit are usually homeless alcoholics willing to do anything for a drink or in a few cases a meal!!

"True Americans" make me sick

Re: This is Horrible! (A True American!)

Date: Oct 13, 07:42

From: nick

where do people who think like you live? have any "true americans" stopped to consider what a true democracy looks like? it is not what we have... when the only candidates (if you can even call them that) let into our presidential debates answer to exactly the same wealthy interests, what choice do

Voteauction.com Message Board

Just calculate how much my vote is worth based on the going rate. It seems, according to the voteauction site, this is about \$16. Submit your vote as payment of \$16 to another auction site. This pays for your CD. Now instead of empty promises, you have Beethoven's 9th.
Dov

Why not sell your vote?

Date: Oct 05, 12:55
From: [webitgrl](mailto:webitgrl@mailcity.com) <webitgrl@mailcity.com>

Come on people, let's face it, He or she with the most money generally wins! So, let's see, just how fair is that anyway. I know that I believe Gore and Bush are both idiots. I have mentally declared them equal idiots and since I can't vote for them both, I'd rather sell my vote and let someone use it that is passionate in what they believe in. Meanwhile, I'll go and enjoy a movie and popcorn Nov 7.

There ARE other options!

Re: Why not sell your vote? (webitgrl)
Date: Oct 05, 21:23
From: [Lori Whalen](mailto:lwhalen@gardener.com) <lwhalen@gardener.com>

Please remember guys, there are other candidates running for president. Each year more people vote for third party candidates. If we all did it would make a difference.

Re: There are other options

Re: There ARE other options! (Lori Whalen)
Date: Oct 05, 22:40
From: [Admin](mailto:Admin@voteauction.com) <Admin@voteauction.com>

Although the majority of bidders are from one of the two major parties, there is a significant number who support a third party candidate. Who knows, maybe Pat Buchanan and Ralph Nader supporters will be able to buy some additional votes for their candidates.

Some Thoughts About this Site and Government's Reaction to It

Date: Oct 05, 13:11
From: [Steven Imparl. Esq.](mailto:StevenImparl.net) <steven@imparl.net>

Just a few thoughts . . .

1. Somehow, looking at the entire site, I can't just see a conspiracy or a solicitation to commit voting fraud, as some governmental officials have alleged. I don't think voteauction.com is making any serious offers.

2. I have looked at the site extensively. It does appear to be a joke and a political commentary. This is especially apparent when one looks at the "Links" page, which contains several links to pages offering commentary about and suggesting the reform of campaign financing.
3. I do not see any real mechanisms in place for collecting information and turning that information into fraudulent votes, or even for accomplishing the purported auction. There seem to be no means for collecting any payments and no means for bidding.
4. The site refers to a "corporate bidder's agreement" which gives a "404" error when one tries to access it. The site does not contain a comparable "individual bidder's agreement."
5. The bidders' "ID" numbers of the persons supposedly having the high bid are suspicious: they all end in "01," "10," and "15," and several of these "ID" numbers are duplicates. Further, the amount of the current "high bid" is not even displayed--most peculiar for an auction site. If this were a real auction, how could any bidders know what bid they have to beat?
6. There are no specifics about payment or anything.
7. There has been some comment on another list I moderate that the presence of the New York disclaimer implies that some law has been violated. I reject that view.

Here's a news story about the New York issue:

<http://www.cnn.com/2000/TECH/computing/08/23/voteauction.shutdown.idg/index.h>

Further support for the view that the site is a joke and a political commentary is available at:

<http://www.fsb.com/fortunesb/articles/0,2227,966,00.html>

Moreover, the mere fact that the site says "Not Valid in New York" merely means that New York officials have successfully pressured the owner of the site to display that message. New York has tried to regulate the entire Internet before. Remember American Library Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997)?

8. While some government officials claim that this site is buying and selling votes, I find little support for that claim when I analyze the entire site. There are too many things missing on the site. (See paragraphs 3 through 6 above for a more detailed explanation of the problems inherent in claiming this site is soliciting election fraud.)
9. While I do think the site is a joke; it does not appear to be "doing" much of anything. However, it does contain quite a lot of commentary--commentary that is valuable to an informed electorate.
10. I think the original owner of the site presented it precisely for its shock value. That, IMO, is protected political speech.
11. With a considerable amount of imagination, one might conclude that this site is engaged in illegal activity. I am talking of the kind of imagination that can envision the cow jumping over the moon.

Voteauction.com Message Board

12. I don't see any real buying and selling of votes actually occurring; the "bidding" process is highly suspect and the site does not have any of the features of real auction sites like eBay, Yahoo! Auctions, and so forth.

13. Much of the commentary I have read assumes (in a rather circular fashion) that this site is indeed an auction. To that claim, I pose the following questions. Where are the notices of binding agreements to the bidders? Where are the particulars about how the "sales" are to be accomplished? Where is PayPal? <grin>

14. At best, I see a caricature of an auction that has ruffled the feathers of politicians, perhaps because it hits a bit too close to home. This site is clearly a funny parody and public education site. I don't think any reasonable person could construe this site as a real solicitation, conspiracy, or attempt to buy or sell votes.

15. Look at the entire Web site--the totality of the circumstances. You will see many links to commentary about issues to voters. However, you will not see any specifics regarding how the alleged buying and selling of votes will take place or any real steps in furtherance of such an activity. What I do see is a heavy-handed attempt by the government to quash political speech.

16. The uproar in Illinois all apparently started because an oversensitive commissioner of Chicago's Board of Elections was offended by this site which recalled unpleasant memories of corruption in the city government of Chicago. (Some of us, including me, feel that corruption still runs rampant in Chicago government.)

17. That the site offends the sensibilities of government officials--who aren't even named on the site--really is just too bad. This site offers a lot of valuable links to other sites that will be of interest to voters. If you look at the "News & Press" link, you will find some stories there that offer fascinating commentary about the American political system, cynicism in the electorate, the role of corporations and special interest groups in campaign financing, "soft money," and the role of political parties.

18. To attempt to shut this site down would be to trammel on free political speech protected by the United States Constitution. That government officials have nothing better to do with their time than to harass a Web site that exemplifies our treasured legal and social traditions of freedom of expression is gravely disappointing.

Steven Imparl, Esq.

Slowest freakin bboard I've ever used

Date: Oct 06, 05:32

From: Hal

I have a plane to catch, and I need to go to bed, so rather than post individually, I'd like to post my comments all in one place:

Slavery: You mean it's over? Since when did they outlaw salaried employees?

Third party candidates: Pat Buchanan is the closest thing to evil we have yet to see in American

Voteauction.com Message Board

politics. However, when Ross Perot garnered 24% of the vote a few years back, the bigwigs got a clear message: don't include Ross Perot anymore.

Value of a vote: My God, my indifference is only worth 2 bucks?? My lack of interest is worth far more than that!!

Other numbers: 50% divorce rate, most people take the full 10% charitable donation deduction on their taxes, illiteracy rate for high school graduates is 50%, and 75% of sampled Americans polled believe the sun revolves around the Earth.

Selling my vote for \$X is far easier to stomach by comparison.

"Real American": I see you are in the 50% of high school graduates.

Voteauction.com: Sheesh, improve the bboard please. It's a pain in the butt to use and as slow as hell. Maybe some Bulgarian mafia-boss will put up some cash to aid in the corruption and inevitable collapse of the Defenders of the Free World. And God, too.

Racism and politics: This year, both candidates appeared on the Oprah Winfrey show, the number 1 forum for both black and female "scores" (ie. voters, but politicians don't think of us in that way.) It was the first time she ever allowed candidates to appear prior to the election, and she insisted on both candidates appearing, because she is quite conscious about her popular influence. If you think votes can't be influenced by race, and more importantly, Oprah, I recommend you check the correlation between the New York Times bestseller list (for books) with Oprah's Book of the Month Club.

I have the sneaking suspicion that her job security comes from the fact that her taskmasters make sure she has a cushy, well-paying job to keep her out of politics.

The first female president will also be the first black president. Mark my words.

Final thought: Thank you all for keeping this board from degrading into a forum of name-calling and Nazi comparisons. The writing is actually half-decent here.

And funny as hell. Especially this "Hal" guy.

Voting for President

Date: Oct 06, 08:01.

From: [slinkvtech](#) [slinkyte](#)

To those of you who are going to go see movies, sit at home, etc. on Nov 7th because you don't like either Presidential Candidate...99% of the elections are local and state elections and issues. If you don't want your taxes raised, you'd better vote. If you want more funding for your local library, you'd better vote. If you don't like how your Reps at the State and Federal levels voted on issues that are important to you, you'd better vote. It is very myopic to think that Nov 7th is entirely about the office of President.

You don't know what you have until you lose it.

JAMES M. SCANLON & ASSOCIATES, P.C.

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JAMES M. SCANLON

VIA FACSIMILE #518.463.4039
ORIGINAL TO FOLLOW VIA U.S. MAIL

October 25, 2000

Mr. Daniel Stewart
Dreyer Boyajian LLP
75 Columbia Street
Albany, NY 12210

Re: Board of Election Commissioners of the City of Chicago, et al. v. Hans
Bernhard, et al

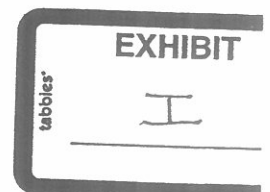
Dear Mr. Stewart:

Thank you for forwarding a copy of Mr. Baumgartner's October 24 affidavit. Per our telephone discussion this morning, there are, however, more questions that need to be resolved. Therefore, I would ask if you could pose the following questions to Mr. Baumgartner and respond by way of an additional or supplementary affidavit.

1. Regarding paragraphs 2 and 3 of the affidavit, Mr. Baumgartner states that he developed the idea for Voteauction.com in March 2000 and then went to work trying to develop the website. When did Voteauction.com begin to appear on the Internet and become operational?

2. Paragraph 5 of the affidavit addresses Mr. Baumgartner's intentions, as well as his belief that no vote was ever sold or purchased. However, no time line is indicated as to when he had access to the web site and its contents to verify that "no vote was ever sold or purchased." Paragraph 9 of the affidavit suggests that Mr. Baumgartner had access to if not control over the contents of the Voteauction.com web site as late as October 16. Can Mr. Baumgartner state from personal knowledge that as of October 16 no vote was ever sold or purchased? How about after that date?

3. Again relating to paragraph 5, although Mr. Baumgartner states that the web site itself had no way to verify the names of the individuals who signed up to sell their vote and there was no mechanism to transfer the names of potential buyers with potential sellers, this does not necessarily mean that the names of potential buyers and sellers could not have been exchanged outside the framework of the web-site either through the mail, via e-mail, or by other means. Also, the bidder's verification of the votes he or she purchased could be done outside of the web site framework - e.g., as



Hans Bernhard suggested in press statements, the highest bidders could demand that the voters deliver their absentee ballots directly to the bidders for them to check to see how they voted. Can Mr. Baumgartner state from personal knowledge that no names were exchanged between bidders and sellers? As of when? Can he state from personal knowledge that no money exchanged hands between sellers, bidders and Voteauction.com? As of when?

4. Again relating to paragraph 5, Mr. Baumgartner states, "As far as I know, only a very small number of people, possibly in the area of seven, ever actually signed up to purchase a vote while I had it up and running." What period of time is Mr. Baumgartner speaking of when he says "while I had it up and running?" Again, paragraph 9 seems to indicate that Mr. Baumgartner had some involvement and control as of October 16. And when Mr. Baumgartner says that "Based on my review, it was clear many individuals who signed up were in fact fictional," when was that review made?

5. Regarding paragraph 6, was the site shut down on August 19?

6. Regarding paragraph 7, how did Mr. Baumgartner come in contact with Hans Bernhard and when? Did these two individuals meet personally?

7. When did Mr. Baumgartner execute the domain name registration change referred to in paragraph 8?

8. Regarding paragraph 9, what was the relationship between Mr. Baumgartner and Mr. Bernhard and what is their relationship now. Because it is apparent from paragraph 9 that Mr. Baumgartner was still involved with the contents of the web site at least until October 16, were Mr. Baumgartner and Mr. Bernhard partners? Are there other partners or operatives to Mr. Baumgartner's knowledge? What precisely was Mr. Baumgartner's involvement with the web site after he "sold" the site to Mr. Bernhard? Did he have access to and control over the contents of the web site and when? Does he still have access to or control over the web site contents? When did Mr. Baumgartner's involvement with the web site end? When was the last time that Mr. Baumgartner was in contact with Mr. Bernhard? How did they communicate? Does Mr. Baumgartner know where Mr. Bernhard is now located?

9. Regarding paragraph 10 and the "sale" of the web site, were there any written agreements between Mr. Baumgartner and Mr. Bernhard? Were there any witnesses to the "sale" or to any discussions between the two parties regarding the transfer of rights to the site or the operation of the site?

10. Does Mr. Baumgartner know whether Hans Bernhard and Luzius Bernhard are one and the same person?

11. Does Mr. Baumgartner have in his possession copies of any records related to the Voteauction.com web site? Do any of those records pertain to the names and addresses of Illinois residents who registered to sell their vote or who offered to bid

Mr. Daniel Stewart
October 25, 2000
Page 3

JAMES M. SCANLON & ASSOCIATES, P.C.

on those votes? Does he know whether such records were maintained and, if so, in whose possession?

12. Does Mr. Baumgartner have any knowledge of, involvement with or control over the new web site known as "Vote-auction.com?" Does he have in his possession any documents concerning Vote-auction.com?

As I mentioned in our telephone discussion, our primary objective is to be able to determine with certainty that no vote in Illinois has been sold or purchased, and that no Illinois ballot has been compromised or subjected to fraud. Mr. Baumgartner's cooperation in supplying the above information will be instrumental in our effort to uncover the facts and to assure Illinois voters that the integrity of the November 7, 2000 election has not been compromised.

If you have any questions or wish to discuss, please do not hesitate to call me.

Sincerely,



James Scanlon

Copy: Langdon D. Neal
Richard A. Cowen
Theresa M. Petrone
Mary Bucaro, Assistant Cook County State's Attorney
Phil Robertson, Assistant Illinois Attorney General

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, COUNTY DIVISION

BOARD OF ELECTION COMMISSIONERS OF THE)
CITY OF CHICAGO, LANGDON D. NEAL,)
RICHARD A. COWEN, and THERESA M. PETRONE,)

Plaintiffs,)

v.)

HANS BERNHARD, LUZIUS A. BERNHARD,)
OSKAR OBEREDER, CHRISTOPH JOHANNES)
MUTTER, JAMES BAUMGARTNER and DOMAIN)
BANK, INC.,)

Defendants.)

No. 00 CE 31

Judge Michael J. Murphy

FILED
01 APR - 2 AM 9:03
CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
DOROTHY BROWN
CLERK

**DEFENDANT JAMES BAUMGARTNER'S VERIFIED
ANSWER AND COUNTERCLAIM**

VERIFIED ANSWER

Defendant James Baumgartner ("Baumgartner"), through his attorneys, as his answer to the complaint of plaintiffs Board of Election Commissions of the City of Chicago, Langdon D. Neal, Richard A. Cowen, and Theresa M. Petrone, states as follows:

Complaint, ¶ 1: This is a proceeding for declaratory and injunctive relief under Sections 2-701, 11-101 and 11-102 of the Code of Civil Procedure (735 ILCS 5/2-701, 5/11-01 and 5/11-102) for (a) the purpose of determining a question in actual controversy between the parties concerning whether the Defendants either jointly, severally or in the alternative are in violation of the election laws of the State of Illinois and the United States that prohibit the buying and selling of votes in elections for public office, and (b) for the purpose of obtaining injunctive relief against Defendants enjoining Defendants either jointly, severally or in the alternative from further violations of the election laws of the State of Illinois and the Unites [sic] States prohibiting the buying or selling of votes at the November 7, 2000 General Election (hereinafter referred to as the "Election") to be conducted in the State of Illinois. The Complaint also seeks other equitable and legal relief against Defendants, either jointly, severally or in the alternative, including but not limited to the award of damages to Plaintiffs and to members of a class consisting of all citizens of the State of Illinois for the deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States and of the State of Illinois.

ANSWER: Baumgartner admits that the above statements properly characterized this action at the time it was filed in the Circuit Court of Cook County on October 16, 2000.

Complaint, ¶ 2: Plaintiff BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO (the "Board") is a governmental entity created by Section 6-21 of The Election Code (10 ILCS 5/6-21) and is charged, pursuant to Section 6-26 of The Election Code (10 ILCS 5/6-26), with conducting all elections in the city of Chicago, Illinois.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint.

Complaint, ¶ 3: Plaintiff LANGDON D. NEAL ("Neal") is a duly appointed Commissioner and the Chairman of the Board whose oath of office requires him to support and abide by the Constitution of the United States and of the State of Illinois and the laws passed in pursuance thereof. (10 ILCS 5/6-21, 5/6-24) Neal is also a citizen and resident of, and a registered voter in, the city of Chicago, Illinois who is qualified to vote and intends to vote at the Election to be conducted in the City of Chicago and in the State of Illinois, for the purpose of electing federal, state, county and judicial officers, including President and Vice President of the United States.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 4: Plaintiff RICHARD A COWEN ("Cowen") is a duly appointed Commissioner of the Board whose oath of office requires him to support and abide by the Constitution of the United States and of the State of Illinois and the laws passed in pursuance thereof. (10 ILCS 5/6-21, 5/6-24) Cowen is also a citizen and resident of, and a registered voter in, the city of Chicago, Illinois who is qualified to vote and intends to vote at the Election to be conducted in the City of Chicago and in the State of Illinois, for the purpose of electing federal, state, county and judicial officers, including President and Vice President of the United States.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 5: Plaintiff THERESA M. PETRONE (“Petrone”) is a duly appointed Commissioner of the Board whose oath of office requires her to support and abide by the Constitution of the United States and of the State of Illinois and the laws passed in pursuance thereof. (10 ILCS 5/6-21, 5/6-24) Petrone is also a citizen and resident of, and a registered voter in, the city of Chicago, Illinois who is qualified to vote and intends to vote at the Election to be conducted in the City of Chicago and in the State of Illinois, for the purpose of electing federal, state, county and judicial officers, including President and Vice President of the United States.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 6: Upon information and belief, Defendants HANS BERNHARD (“Hans Bernhard”), LUZIUS A. BERNHARD (“Luzius Bernhard”), OSKAR OBEREDER (“Obereder”), and CHRISTOPH JOHANNES MUTTER (“Mutter”) are residents of and/or conduct business in Vienna, Austria. Upon information and belief, Hans Bernhard currently owns and/or operates an Internet web site entitled “Voteauction.com” that transacts business within the State of Illinois. Upon information and belief, Luzius Bernhard is the named registrant of the “Voteauction.com” domain name and the site’s administrative and technical contact. Upon information and belief, Obereder and Mutter are coordinators for the “Voteauction.com” web site.

ANSWER: Baumgartner admits that Hans Bernhard owned and/or operated an Internet web site entitled “Voteauction.com” at the time of the filing of the Complaint, but denies that the web site Voteauction.com transacted business within the State of Illinois. Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the remaining allegations of this paragraph of the Complaint.

Complaint, ¶ 7: Upon information and belief, Defendant JAMES BAUMGARTNER (“Baumgartner”) is a resident of the State of New York. Upon information and belief, Baumgartner created and operates or operated an Internet web site entitled “Voteauction.com” that transacts business within the State of Illinois.

ANSWER: Baumgartner admits that at the time this action was filed on October 16, he was a resident of the State of New York. At the time of the filing of this Answer,

Baumgartner is a resident of Massachusetts. Baumgartner admits that he created and operated an Internet web site entitled "Voteauction.com" but denies that Voteauction.com transacted business in the State of Illinois.

Complaint, ¶ 8: Upon information and belief, Defendant DOMAIN BANK, INC. ("Domain Bank") is a corporation organized and doing business under the laws of the State of Pennsylvania and its principal place of doing business is in the State of Pennsylvania. Domain Bank provides data processing and preparation services in computer graphics for Voteauction.com and the persons and/or businesses that own and/or operate Voteauction.com.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of the first sentence of this paragraph of the complaint. Baumgartner denies the allegations of the second sentence of this paragraph.

Complaint, ¶ 9: Jurisdiction is vested in this Court pursuant to Art. 6, Sec. 9, of the Illinois Constitution; the Code of Civil Procedure, 735 ILCS 5/2-701, 5/11-101, and 5/11-102; the Circuit Courts Act, 705 ILCS 35/26; and The Election Code, 10 ILCS 5/1-1 et seq.

ANSWER: Baumgartner admits that the Circuit Court of Cook County has jurisdiction over this action.

Complaint, ¶ 10: Defendants, nonresidents of the State of Illinois having transacted business within the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(a)(1).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 11: Defendants, nonresidents of the State of Illinois having committed tortious acts within the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(a)(2).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 12: Defendants, nonresidents of the State of Illinois having made and/or performed a contract or promise substantially connected with the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(a)(7).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 13: Defendants, nonresidents of the State of Illinois having conspired with others to violate the election laws of the State of Illinois and of the United States and commit tortious acts within the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(c).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 14: All individual Plaintiffs are residents of the city of Chicago, the County of Cook, and the State of Illinois.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 15: All individual Defendants are nonresidents of the State of Illinois.

ANSWER: Baumgartner admits the allegation that he is a nonresident of the State of Illinois and further states, on information and belief, that at the commencement of

this action and since that time, the other individual defendants are also non-residents of the State of Illinois.

Complaint, ¶ 16: Venue is properly vested in this Court pursuant to Section 2-101 of the Code of Civil Procedure (735 ILCS 5/2-101).

ANSWER: This paragraph of the Complaint consists of a legal conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 17: At the Election, registered and qualified voters in the State of Illinois will vote for and elect persons to be Electors of President and Vice President of the United States, Members of U.S. House of Representatives, State Senators, Representatives in the General Assembly, Supreme, Appellate and Circuit Judges, and various county officers.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint.

Complaint, ¶ 18: At the Election, voters in the State of Illinois will vote for President and Vice President of the United States by marking an official ballot listing the names of the candidates of each political party or group for President and Vice President. Such votes are not deemed or taken as direct votes for the candidates for President and Vice President, but instead to the Presidential vote as votes for Electors of President and Vice President of the United States selected by the political parties or groups. Persons elected as Electors of President and Vice President must, following the Election, meet in Springfield, Illinois and cast their vote for President and Vice President of the United States. (Art. 2, §1, U.S. Const.; 10 ILCS 5/21-2 through 5/21-4) The State of Illinois is entitled to twenty-two "electoral votes." The candidates for President and Vice President of the United States receiving the most electoral votes cast by electors in the various States shall be declared elected.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint.

Complaint, ¶ 19: The Board is vested with sole statutory power and duty to conduct the Election to be held within the territorial limits of the City of Chicago in accordance with election laws of the State of Illinois and of the United States.

ANSWER: This paragraph of the Complaint consists of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 20: As part of its duties, the Board has prepared, printed and distributed and will prepare, print and distribute absentee ballots to qualified voters who make application for such ballots. Specifically, the Board will mail absentee ballots from their offices in the city of Chicago, Illinois to all eligible absentee voters.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the complaint.

Complaint, ¶ 21: Sections 19-5 and 20-5 of The Election Code require that absentee voters certify under penalty of perjury that they have marked their ballots in secret. (10 ILCS 5/19-5, 5/20-5)

ANSWER: This paragraph of the Complaint consists of a legal conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 22: Sections 19-6 and 20-6 of The Election Code require that absentee voters return their marked absentee ballots directly to the Board in its offices in Chicago, Illinois only in the manner prescribed therein, namely: by mail, by personal delivery, by delivery of the voter's spouse, parent, child, brother or sister, or by a licensed messenger or motor carrier. (10 ILCS 5/19-5, 5/20-5)

ANSWER: This paragraph of the Complaint consists of a legal conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 23: The Board is further vested with the sole statutory power and duty to process such absentee ballots for tabulation and counting and to canvass the returns and results of said election in its offices in Chicago, Illinois, all in accordance with the election laws of the State of Illinois and of the United States.

ANSWER:

This paragraph of the Complaint consists of a legal

conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 24: Upon information and belief, Baumgartner created a web site on the computer Internet known as "Voteauction.com." In or about August 2000, the Voteauction web-site began appearing on the Internet at "http://www.voteauction.com." True and correct copies of Voteauction.com's web-site pages are made a part hereof and are attached hereto as EXHIBIT A. The affidavit of Daniel Doyle, who printed copies of the Voteauction.com web pages as they appear in EXHIBIT A and attests that they are true and correct copies thereof, is attached hereto as EXHIBIT B.

ANSWER:

Baumgartner admits the allegations of the first two

sentences of this paragraph of the Complaint. As to the third sentence, Baumgartner admits that true and correct copies of some of Voteauction.com's web-site pages were attached to the Complaint as Exhibit A, but denies that all of Voteauction.com's web-site pages were included in that Exhibit. As to the fourth sentence, Baumgartner admits that the affidavit of Daniel Doyle is attached to the Complaint as Exhibit B, but is without sufficient knowledge and information so as to form a belief as to the truth of the remaining allegations of this sentence.

Complaint, ¶ 25: Defendants, through the Voteauction.com web site, solicit and allow individuals, including Illinois residents, to "sell" their votes for the Election and solicit and allow individuals or corporations, including Illinois residents and corporations, to "bid" on or buy such votes. See EXHIBIT A, 1-19.

ANSWER:

Baumgartner admits that Voteauction.com contained text

suggesting that individuals "sell," and that individuals and corporations "bid" on or buy votes for the Election, but further states that all of Voteauction.com, including such text, was political and artistic satire and parody, such that any specific portion of text or feature of Voteauction.com, when read in context of the entire web site, could not reasonably be construed as providing a real

auction forum for the actual purchase or sale of votes. Baumgartner denies that Voteauction.com allowed individuals and/or corporations actually to sell or buy any vote.

Complaint, ¶ 26: The Voteauction.com web site states in part, “Now you can profit from your election capital by selling your vote to the highest bidder.” See EXHIBIT A, 1. The web site solicits and allows persons to register with Voteauction.com by going to an on-line computer screen, filling in the form on the screen provided (including name, address and political affiliation), and then clicking the “Submit” button on the computer screen. See EXHIBIT A, 6-7.

ANSWER: Baumgartner admits that the text of Voteauction.com was accurately quoted, in part, in the first sentence of this paragraph of the Complaint. Baumgartner admits the remaining allegations of this paragraph, but further incorporates by reference his response to paragraph 25 of this Complaint, and further states that soliciting and allowing persons to fill out Voteauction.com’s registration pages was part of the satire and parody.

Complaint, ¶ 27: The Voteauction.com web site states that as of October 12, 2000, as many as 1,131 Illinois residents have registered on-line through Voteauction.com, offering their votes for sale for the Election. Upon information and belief, some of these Illinois residents are also residents of the city of Chicago. See EXHIBIT A, 16.

ANSWER: Baumgartner admits that Voteauction.com at one time stated that as of October 12, 2000, as many as 1,131 Illinois residents registered on-line through Voteauction.com, offering their votes for sale for the Election, but denies that the statement was true. Baumgartner admits that of those Illinois residents who actually did register, some were also residents of Cook County. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 28: Defendants, by and through Voteauction.com, solicit and allow Illinois individuals and corporations to “bid” on the votes being offered for sale by registering on-line using a computer screen registration form. Bidders submit bids for a block of votes consisting of all the votes offered for sale in any particular state. The Voteauction.com

web site provides that the starting bid for each state is \$100, with a minimum bid increase of \$50. The Voteauction.com web site states in part, "The winning bidder for each state will be able to choose who the group will vote for en masse." The Voteauction.com web site states, "The winning bidder will have to contact the voteauction.com voters in order to provide payment and for the voters to provide verification." See EXHIBIT A, 8-19.

ANSWER: Baumgartner admits that the text of Voteauction.com is accurately quoted, in part, in the fourth and fifth sentences of this paragraph of the Complaint. Baumgartner admits the remaining allegations of this paragraph, but further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 29: The Voteauction.com web site states that as of October 12, 2000 the highest bid offered for the purchase of Illinois residents' votes for the Election was \$14,000, equaling \$12.38 per vote. See EXHIBIT A, 16.

ANSWER: Baumgartner admits that Voteauction.com at one time stated that as of October 12, 2000 the highest bid offered for the purchase of Illinois residents' votes for the Election was \$14,000, equaling \$12.38 per vote, but denies that the statement was true. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 30: Articles posted on the Voteauction.com web site indicate that Baumgartner "had planned for voters to mail him absentee ballots to verify the selections." See EXHIBIT A, 29-30, *Vote-selling Web site to be revived, possibly offshore*, CNN.com, August 25, 2000. In an article appearing on August 17, 2000 in the *The Lycos Network*, a copy of which is posted on the Voteauction.com web site and included herewith in EXHIBIT A, 32-34, Baumgartner is reported as stating that potential vote sellers were being notified that the Voteauction legal agreement, which was still being drafted, would be sent out at the end of the month. Baumgartner is also reported as saying that he was "considering a process in which the Voteauction participant fills out an absentee ballot and votes for whomever they want in every race but the presidency. Whether that choice will be Bush, Gore, Nader, Buchanan, or someone else entirely is determined by the outcome of the online auction." "Then when the time comes, whoever wins the auction decides who this group is going to vote for," Baumgartner is quoted as saying, "So I tell those people you should vote for this person. Then they fill in the form, and then they send it to me. And I just verify that they're voting for the correct person." See EXHIBIT A, 34.

ANSWER: Baumgartner admits that that the articles referenced above were accurately quoted and/or paraphrased, in part, but denies that the statements that he was reported to have made were true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 31: In an article appearing on *The Lycos Network* on September 6, 2000, a copy of which is posted on Voteauction.com's web site and included herewith in EXHIBIT A, an unidentified spokesman for Voteauction.com is reported to have said:

"Verification will now be the responsibility of the winning bidder. ***They can choose from a variety of methods for verification of the votes. They may have the voters send in their absentee ballots for verification, they may have the voters take photographs inside the voting booth, or they go to the honor system – that is the system that many vote-purchasing endeavors have used in the past. We have chosen to have the winning bidders responsible for the verification because it would not be feasible to have people send their absentee ballots all the way to Austria and have us send them back to America within an appropriate time frame."

See EXHIBIT A, 42-43.

ANSWER: Baumgartner admits that that the article referenced above was accurately quoted, in part, but denies that the purported statements were true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 32: The Voteauction.com web site states that for the Election, Voteauction.com "is concentrating on just the U.S. Presidential election" but that Voteauction.com hopes that in future it will be able to "grow our business into every election market niche from Senatorial races to municipal water commissioner." See EXHIBIT A, 19.

ANSWER: Baumgartner admits that the text of Voteauction.com was accurately quoted, in part. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 33: The Voteauction.com web site states that it will not receive any money from the auction. However, Bernhard has stated that “We bought the domain name and related business because we see this as a serious business venture in which we can make money.” See EXHIBIT A, 19, 29.

ANSWER: Baumgartner admits that the text of Voteauction.com was accurately quoted, in part, and that Bernhard was reported to have made the statement attributed to him, above. However, Baumgartner is without sufficient information to form a belief as to whether or not Bernhard actually made the above statement, and, in any event, upon information and belief, Baumgartner denies that the substance of the statement attributed to Bernhard is true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 34: Nowhere on the Voteauction.com web site does it state that the selling and buying of votes, or offering to buy or sell votes is illegal or that the individuals selling or offering to sell their votes, and individuals buying or offering to buy votes may be committing a crime. See EXHIBIT A, 1-22.

ANSWER: Baumgartner admits that the text he created for Voteauction.com does not state that the selling and buying of votes, or offering to buy or sell votes is illegal and that the individuals selling or offering to sell their votes, and individuals buying or offering to buy votes may be committing a crime. However, Baumgartner denies that “nowhere on the Voteauction.com web site” do such statements appear. In fact, such statements can be found on the message board and in some of the articles posted on Voteauction.com. *See e.g.*, messages posted by A.L. Zimmer, General Counsel of the Illinois State Board of Elections, Exhibit B hereto at pp.2-3 and Exhibit A to Complaint at 105, no. 6; *see also* Exhibit A to Complaint at 24, 26, 27, 33, 35,36, 41, 45, 48, 55, 56, 57, 59, 63, 66, 67,74, 78, 85, 89, 93. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 35: The laws of the State of Illinois and of the United States prohibit the selling and buying of votes.

ANSWER: The allegations of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 36: Section 29-1 of The Election Code (10 ILCS 5/29-1) provides, “Any person who knowingly gives, lends or promises to give or lend any money or other valuable consideration to any other person to influence such other person to vote *** or to influence such other person to vote for or against any candidate or public question to be voted upon at any election shall be guilty of a Class 4 felony.” Thus, vote buying is illegal under Illinois law and any person giving or promising to give money to Illinois residents to influence them to vote or to vote for or against any candidate to be voted upon at the Election is guilty of a Class 4 felony, which is punishable by imprisonment for 1 to 3 years.

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part. The remaining allegations of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 37: Section 29-3 of The Election Code (10 ILCS 5/29-3) provides, “Any person who votes for or against any candidate or public question in consideration of any gift or loan of money or for any other valuable consideration *** shall be guilty of a Class 4 felony.” Thus, vote selling is illegal under Illinois law and any person voting for or against any candidate on the Illinois ballot for the Election in consideration of any money or other valuable consideration is guilty of a Class 4 felony, which is punishable by imprisonment for 1 to 3 years.

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part. The remaining allegations of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 38: Any person *attempting* to sell or buy votes in Illinois has committed an offense under Illinois law and is guilty of a Class 4 felony that is punishable by imprisonment for 1 to 3 years. (10 ILCS 5/29-13; 720 ILCS 5/2-12; 720 ILCS 5/8-4) Thus, any person in Illinois who has attempted to sell his or her vote at the Election by registering with Voteauction.com to sell his or her vote, and any person who has attempted to buy the votes of Illinois residents for the Election by registering with Voteauction.com to bid on such votes, has committed a Class 4 felony.

ANSWER: The allegations of the first sentence of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny. Baumgartner denies the remaining allegations of this paragraph and further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 39: Any person who *solicits* another to sell or buy votes in Illinois has committed an offense under Illinois law and is guilty of a Class 4 felony that is punishable by imprisonment for 1 to 3 years. (10 ILCS 5/29-13; 720 ILCS 5/2-12; 720 ILCS 5/8-1) Defendants, by and through Voteauction.com, are guilty of soliciting others to sell or buy votes in Illinois and have committed a Class 4 felony.

ANSWER: The allegations of the first sentence of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny. Baumgartner denies the remaining allegations of this paragraph and further incorporates by reference his response to paragraph 25 and 26 of the Complaint.

Complaint, ¶ 40: Any person who *conspires* with another to sell or buy votes in Illinois has committed an offense under Illinois law and is guilty of a Class 4 felony that is punishable by imprisonment for 1 to 3 years. (10 ILCS 5/29-13; 720 ILCS 5/2-12; 720 ILCS 5/8-2) Defendants have conspired with others to sell and buy votes of Illinois and are guilty of conspiring to sell and buy votes in Illinois under the laws of the State of Illinois.

ANSWER: The allegations of the first sentence of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny. Baumgartner denies the remaining allegations of this paragraph and further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 41: Anyone who marks or tampers with an absentee ballot of another person or takes an absentee ballot of another person in violation of Section 19-6 of The Election Code (See ¶22 above) so that an opportunity for fraudulent marking or tampering is created is guilty of a Class 3 felony under Illinois law. (10 ILCS 5/29-20)

ANSWER: This paragraph consists of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 42: By requiring those offering to sell their votes to submit their absentee ballots to Defendants or to others so as to verify their voting selections, Defendants are guilty of (a) conspiring with others to commit absentee fraud, (b) soliciting others to commit absentee vote fraud, and (c) attempted absentee vote fraud.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of this Complaint.

Complaint, ¶ 43: Title 18, Section 597 of the United States Code (18 U.S.C. §597) provides, "Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote shall be fined not more than \$1,000 or imprisoned not more than one year or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 44: Title 42, Section 1973i(c) of the United States Code (42 U.S.C. § 1973i(c)) provides that for Federal elections, "Whoever knowingly or willfully *** pays or offers to pay or accepts payment for *** voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 45: Thus, any person in Illinois who has knowingly or willfully offered to sell his or her vote at the Election, which is also a Federal election, by registering with Voteauction.com to sell his or her vote, and any person who has knowingly or willfully offered

to buy the votes of Illinois residents for the Election by registering with Voteauction.com to bid on such votes, has committed a criminal offense under 18 U.S.C. §597 and 42 U.S.C. §1973i(c).

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 46: Title 42, Section 1973i(c) of the United States Code (42 U.S.C. § 1973i(c)) also provides that for Federal elections, "Whoever knowingly or willfully *** conspires with another individual for the purpose of *** illegal voting *** shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 47: Thus, Defendants have committed a violation of 42 U.S.C. §1973i(c) in that they have conspired for the purpose of illegal voting.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 48: Title 42, Section 1973gg-10 of the United States Code (42 U.S.C. § 1973gg-10) provides that in any Federal election, "A person ****knowingly and willingly deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process by *** the procurement, casting, or tabulation of ballots that are known by the person to be made materially false, fictitious, or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18 *** or imprisoned not more than 5 years, or both." Thus, federal law secures the right of voters in a State to have fair and impartially conducted elections.

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part. The remaining allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 49: Defendants, by and through Voteauction.com, have knowingly and willfully deprived and defrauded, and will deprive and defraud, Plaintiffs and all citizens of the State of Illinois of a fair and impartial election by procuring ballots that are known to be materially false and fraudulent under the laws of the State of Illinois.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 50: Article 3, Section 3 of the Constitution of the State of Illinois (Art. 3, § 3 Ill. Const.) guarantees Illinois citizens the right to “free and equal” elections. Under this provision, elections are free only when the voters are subjected to no intimidation or improper influence and when every voter is allowed to cast his or her own ballot as his or her own judgment and conscience dictate. When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed.

ANSWER: Baumgartner admits that the above-referenced constitutional provision is accurately quoted, in part. The remaining allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 51: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, by and through Voteauction.com, have deprived and will deprive the Plaintiffs and all Illinois citizens of their constitutional right to free and equal elections.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 52: Defendants have been warned that the buying or selling of votes in Illinois is a Class 4 felony. See September 20, 2000 and October 5, 2000 electronic mail messages from A. L. Zimmer, General Counsel, Illinois State Board of Elections to the Voteauction.com “Message Board,” which is posted on Voteauction.com’s web site. See EXHIBIT A, 107-108.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. The messages cited in this paragraph were directed to Illinois voters, not to defendants. See Exhibit B hereto at pp. 2-3.

Complaint, ¶ 53: In an article appearing on *CNN.com* on August 25, 2000, a copy of which is posted on *Voteauction.com*'s web site and included herewith as EXHIBIT A, Hans Bernhard is reported to have said that his holding company would operate *Voteauction.com* outside of the United States to circumvent federal and state laws that forbid purchasing and buying ballots. See EXHIBIT A, 29.

ANSWER: Baumgartner admits that Bernhard was reported to have made the above statement. However, Baumgartner is without sufficient information to form a belief as to whether or not Bernhard actually made the above statement, and, in any event, upon information and belief, Baumgartner denies that the substance of the statement attributed to Bernhard is true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 54: Notwithstanding warnings that the buying and selling of votes is illegal under Illinois law and notwithstanding their own admissions that their conduct violates state and federal laws, Defendants have continued to knowingly and willfully violate the election laws of the State of Illinois and of the United States by encouraging, soliciting and allowing the residents of Illinois and others through the *Voteauction.com* web site to sell and buy votes for candidates at the Election.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

COUNT I

Complaint, ¶ 1-54: Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 54 herein as their allegations 1 through 54 of Count I.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 54 as his responses to allegations 1 through 54 of Count 1.

Complaint, ¶ 55: A dispute and controversy has arisen between the Plaintiffs and the Defendants concerning the right of Defendants to use and operate an Internet web site as an auction forum for the purpose of encouraging, soliciting and allowing residents of Illinois to sell their votes to be cast at the Election and encouraging, soliciting and allowing individuals and corporations to "bid" on and buy such votes.

ANSWER: Baumgartner admits that a dispute has arisen between the Plaintiffs and the Defendants concerning the right of Defendants to use and operate the Internet web site Voteauction.com but denies the remaining allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his responses to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 56: Defendants' continued use and operation of the Internet web site known as Voteauction.com as an auction forum for purpose of encouraging, soliciting and allowing residents of Illinois to sell their votes to be cast at the Election and encouraging, soliciting and allowing individuals and corporations to "bid" on or buy such votes constitutes knowing and willful violations of the election laws of the State of Illinois and of the United States that will result in illegal and fraudulent voting at the Election if not prevented.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his responses to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 57: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such

votes, owe a duty to Plaintiffs and to all citizens of the State of Illinois not to violate the election laws of the State of Illinois and of the United States.

ANSWER: The allegations in this paragraph of the Complaint consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 58: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, owe a duty to Plaintiffs and to all citizens of the State of Illinois not to deprive them or defraud them of their rights and privileges under the Constitutions and laws of the State of Illinois and of the United States to a free and equal election and to a fair and impartially conducted election process.

ANSWER: The allegations in this paragraph of the Complaint consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 59: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have deprived and defrauded, and will deprive and defraud, the Plaintiffs and all citizens of the State of Illinois of their rights and privileges under the Constitutions and laws of the State of Illinois and of the United States to a free and equal election and to a fair and impartially conducted election process.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 60: An actual controversy exists between the Plaintiffs and the Defendants.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint. Baumgartner also incorporates by reference his responses to paragraph 25 and paragraph 26 of the Complaint.

COUNT II

Complaint, ¶ 1-60: Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 60 of Count I herein as their allegations 1 through 60 of Count II.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 60 of Count I as his responses to allegations 1 through 60 of Count II.

Complaint, ¶ 61: Unless injunctive relief is granted, Defendants will continue to violate the election laws of the State of Illinois and of the United States and to deprive Plaintiffs and all citizens of the State of Illinois of their rights and privileges under the Constitution of the United States and of the State of Illinois and the laws passed pursuant thereof to a free and equal election and to a fair and impartially conducted election process.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 62: Unless injunctive relief is granted, Defendants' illegal and tortious conduct will allow the ballot box to become the receptacle of fraudulent votes, thus infecting the result of the Election with fraud.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 63: Unless injunctive relief is granted, Defendants' illegal and tortious conduct may affect the results of the Election for President and Vice President of the United States as well as for other offices.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 64: The Plaintiffs will suffer immediate and irreparable injury in fulfilling their statutory duties to provide for the orderly and lawful administration of this election unless Defendants' illegal and tortious conduct is enjoined forthwith. Plaintiffs Neal, Cowen and Petrone, as well as all citizens of the State of Illinois will, unless Defendants'

conduct is enjoined forthwith, suffer irreparable injury to their rights as citizens of the State of Illinois to a free and fair election.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 65: Given the nature of the injuries to result [sic] from Defendants' illegal and tortious conduct, neither Plaintiffs nor the citizens of the State of Illinois will have an adequate remedy at law in which to redress Defendants' conduct because the injuries suffered are of such a nature that damages may not be reasonably ascertained.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 66: Absent immediate relief, Plaintiffs will, in fact, be denied meaningful relief because the right to vote in the Election will be rendered moot after the Election.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 67: The threatened injury to the Plaintiffs and to the citizens of the State of Illinois will be immediate, certain and great if injunctive relief is denied while the loss or inconvenience to the Defendants (not being able to engage in an illegal enterprise) will be comparatively small and insignificant if injunctive relief is granted.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 68: Plaintiffs have a reasonable likelihood of prevailing on the merits of this claim.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 69: The granting of injunctive relief in this case will not have an injurious effect on the public and, in fact, will better serve the interests of the public than if not granted.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

COUNT III

Complaint, ¶ 1-60: Plaintiffs Neal, Cowen and Petrone re-allege and incorporate by reference the allegations contained in paragraphs 1 through 60 of Count I herein as their allegations 1 through 60 of Count III.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 60 of Count I as his responses to allegations 1 through 60 of Count III.

Complaint, ¶ 61: Plaintiffs Neal, Cowen and Petrone, pursuant to Section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801), bring this action on their own behalf and on behalf of all citizens of the State of Illinois, except those who have offered to sell their votes and those who have bid on the votes being offered as alleged above (the "class"). The class is so numerous that joinder of all members is impractical; questions of law and fact are common to the class; adequate representation of claims of representative parties exists and a class action is an appropriate litigation procedure in terms of time, effort and expense and uniformity of decision.

ANSWER: Baumgartner admits that Plaintiffs brought this case as a purported class action. Baumgartner denies the remaining allegations in this paragraph.

Complaint, ¶ 62: Article 3, Section 3 of the Constitution of the State of Illinois (Art. 3, §3. Ill. Const.) guarantees Illinois citizens the right to "free and equal" elections. Under this provision, elections are free only when the voters are subjected to no intimidation or improper influence and when every voter is allowed to cast his or her own ballot as his or her judgment and conscience dictate. When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections is destroyed.

ANSWER: Baumgartner admits that the above-referenced constitutional provision is accurately quoted, in part. The remaining allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 63: Under Title 42, Section 1973gg-10 of the United States Code (42 U.S.C. §1973gg-10), federal law secures the right of voters in a State to have fair and impartially conducted elections.

ANSWER: The allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 64: Section 29-17 of The Election Code (10 ILCS 5/29-17) provides that “Any person who subjects, or causes to be subjected, a citizen of the State of Illinois or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States or the State of Illinois, relating to registration to vote, the conduct of elections, voting, or the nomination or election of candidates for public or political party office, shall be liable to the party injured or any person affected, in any action or proceeding for redress.”

ANSWER: Baumgartner admits the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 65: Under Section 29-17, Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, owe a duty to Plaintiffs Neal, Cowen and Petrone and to each member of their class of their rights not to subject them to a deprivation of any rights or privileges secured under the Constitution and laws of the State of Illinois and of the United States, including those secured by Article 3, Section 3 of the Illinois Constitution and by 42 U.S.C. §1973gg-10 relating to voting, the conduct of election or the election of candidates for public office.

ANSWER: The allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 66: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have unlawfully subjected Plaintiffs Neal, Cowen and Petrone and each member of their class to the deprivation of their rights and privileges under Article 3, Section 3 of the Illinois Constitution to a free and equal election for the Election and Defendants have breached their duty to Plaintiffs and the class members.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 67: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have unlawfully subjected Plaintiffs Neal, Cowen and Petrone and each member of their class to the deprivation of their rights under 42 U.S.C. §1973gg-10 to a fair and impartially conducted election for the November 7, 2000 General Election and Defendants have breached their duty to Plaintiffs and the class members.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 68: Plaintiffs Neal, Cowen and Petrone and each member of their class have suffered injuries due to Defendants' unlawful deprivation of Plaintiffs' and class members' constitutional and legal rights and Defendants' breach of duty toward Plaintiffs and the class members.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint

Complaint, ¶ 69: Defendants are, therefore, liable to Plaintiffs Neal, Cowen and Petrone and to each member of their class under Section 29-17 of The Election Code for the deprivation of their rights and privileges secured by the Constitution or laws of the United States and of the State of Illinois as enumerated above.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

COUNT IV

Complaint, ¶ 1-60: Plaintiffs Neal, Cowen and Petrone re-allege and incorporate by reference the allegations contained in paragraphs 1 through 60 of Count I herein as their allegations 1 through 60 of Count IV.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 60 of Count I as his responses to allegations 1 through 60 of Count IV.

Complaint, ¶ 61: Plaintiffs Neal, Cowen and Petrone, pursuant to Section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801), bring this action on their own behalf and on behalf of all citizens of the State of Illinois, except those who have offered to sell their votes and those who have bid on the votes being offered as alleged above (the "class"). The class is so numerous that joinder of all members is impractical; questions of law or fact are common to the class; adequate representation of claims of representative parties exists and a class action is an appropriate litigation procedure in terms of time, effort and expense and uniformity of decision.

ANSWER: Baumgartner admits that Plaintiffs brought this case as a purported class action. Baumgartner denies the remaining allegations in this paragraph.

Complaint, ¶ 62: Section 29-19 of The Election Code (10 ILCS 5/29-19) provides in part that "Whoever knowingly or willfully *** conspires with another individual for the purpose of encouraging *** illegal voting, or pays or offers to pay or accepts payment *** for voting shall be liable to the party injured or any other person affected, in an action or proceeding for redress."

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 63: Under Section 29-19, Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, owe a duty to Plaintiffs Neal, Cowen and Petrone and to each member of their class not to conspire with others for the purpose of encouraging illegal voting.

ANSWER: The allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 64: Defendants, and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have knowingly and willfully conspired for the purpose of encouraging illegal voting.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 65: Defendants, and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have by their unlawful conspiracy to encourage illegal voting breached their duty to Plaintiffs Neal, Cowen and Petrone and each member of their class and Plaintiffs Neal, Cowen and Petrone and each member of their class have suffered injuries as a result of said breach.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 66: Defendants are, therefore, liable to Plaintiffs Neal, Cowen and Petrone and to each member of their class under Section 29-19 of The Election Code for conspiring to encourage illegal voting.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

1. The Complaint should be dismissed, or, in the alternative, judgment on the pleadings should be awarded to Baumgartner, pursuant to sections 2-615 of the Illinois Code of Civil Procedure, because the facts alleged in the Complaint do not support plaintiffs' allegations that any defendant, including Baumgartner, used or operated Voteauction.com as a real auction site for the actual purchase or sale of votes in violation of any election or criminal law of Illinois or the United States.

Rather, the facts alleged therein demonstrate that Voteauction.com was political and social satire and parody, protected by the First Amendment to the Constitution of the United States. Incorporated herein are Exhibit A to Plaintiffs' Complaint (a print-out of the majority of the pages of Voteauction.com as of October 12, 2000) and paragraphs 25 - 34 of Baumgartner's Answer.

Second Affirmative Defense

2. The Complaint should be involuntarily dismissed pursuant to Section 2-619 of the Code of Civil Procedure, as to defendant Baumgartner, because the facts alleged in the pleadings and Baumgartner's supporting affidavit establish that Baumgartner did not intend to use or operate and did not in fact use or operate Voteauction.com as a real auction site for the actual purchase or sale of votes in violation of any criminal or election law of Illinois or the United States, but rather that Voteauction.com was political and artistic satire and parody on the Internet, protected by the First Amendment to the Constitution of the United States. Incorporated herein are Exhibit A to Plaintiffs' Complaint, paragraphs 25-34 of Baumgartner's Answer thereto, Paragraphs 6-30 of Baumgartner's Counterclaim, Exhibits A and B to the Answer and Counterclaim, and Baumgartner's affidavit.

Third Affirmative Defense

3. The injunctive remedy sought and obtained on a preliminary basis by plaintiffs is an unconstitutional prior restraint on political, artistic, and Internet speech, protected by the First Amendment. The allegations of the First and Second Affirmative Defenses are hereby incorporated herein.

Fourth Affirmative Defense

4. The crime of conspiracy for the purpose of illegal voting, as defined by 42 U.S.C. sec. 1973i(c), pursuant to which plaintiffs have charged defendants with conspiracy, applies to only a single form of conspiracy, i.e., conspiring with another individual, so that a conspiracy with more than one other individual falls outside the scope of Sec. 1973i(c). As defendants are accused of participating in the conspiracy with each other and with over 1,000 Illinois residents, *see* Complaint at par. 47 and Plaintiffs' Memorandum of Law in support of Motion for a Temporary Restraining Order or Preliminary Injunction at 17, 20-21, therefore Baumgartner cannot be guilty of conspiracy under this section as a matter of law.

VERIFIED COUNTERCLAIM

Counter-plaintiff James Baumgartner, by his attorneys, makes this counter-complaint as follows:

Preliminary Statement

1. This counter-complaint asserts a civil rights action pursuant to 42 U.S.C. sec. 1983, 28 U.S.C. sec. 2201 *et seq.*, and Sections 2-701 and 11-108 of the Illinois Code of Civil Procedure (735 ILCS 5/2-701 and 5/11-108) for declaratory and other relief. Counter-plaintiff James Baumgartner is one of the defendants in the underlying action. Baumgartner created and operated Voteauction.com, an Internet web site, constructed around the tongue-in-cheek proposal that the individual voter could cash in on the big money in politics by registering to sell his vote to the highest bidder. As such, Voteauction.com was a political satire and parody of the American campaign finance system and the on-line commercial market. Counter-defendant is

the Board of Elections of the City of Chicago ("the Board"), the institutional plaintiff in the underlying action. Counter-defendant, along with three individual commissioners of the Board, filed suit in the Circuit Court of Cook County ("Circuit Court") to close down Voteauction.com on the grounds that its operation violated various federal and state election and criminal laws that prohibit the buying and selling of votes. Counter-defendant obtained a preliminary injunction from the Circuit Court on October 18 that resulted in the removal of Voteauction.com from the Internet and enjoined Baumgartner (and his co-defendants) from operating any such site, or substantially similar site, in the future. The counterclaim alleges that the injunction sought and obtained by the counter-defendants violates Baumgartner's rights to free speech and assembly under the First Amendment to the Constitution of the United States and operates as an unconstitutional prior restraint on his political and artistic expression.

2. Counter-plaintiff Baumgartner seeks (1) a declaratory judgment that Voteauction.com is protected political and artistic expression and that the injunction violates his First Amendment rights; (2) to vacate the preliminary injunction entered on October 18, in connection with which Baumgartner has filed, contemporaneously with this Answer and Counterclaim, his Motion to Vacate Injunction; and (3) an award of compensatory damages for the injuries he sustained as a result of the violation of his First Amendment rights.

Parties

3. The counter-plaintiff is James Baumgartner, one of the defendants in the underlying action. Baumgartner was a resident of New York at the time the Complaint was filed and is now a resident of Massachusetts.

4. The counter-defendant is the Board of Election Commissioners of the City of Chicago, a governmental entity created by Section 6-21 of The Election Code of Illinois.

5. The counter-defendant has at all times pertinent hereto acted under color of law.

Statement of the Claim

6. Baumgartner, a graduate student at Rensselaer Polytechnic Institute ("RPI") in New York State, created the Internet web site entitled "Voteauction.com" for his master's thesis in Electronic Art. Baumgartner conceived of Voteauction.com as a work of performance art on the Internet that would satirize and parody the American campaign finance system and Internet commerce. His purpose was to comment critically and generate discussion on a major problem in American government: the ability of corporate interests to buy political candidates.

Baumgartner did not intend to operate, and did not operate, Voteauction.com as a real auction site where votes actually could be bought and sold.

7. Voteauction.com first appeared on the Internet on approximately August 1, 2000. It consisted of text, ironic in tone, describing how the "soft money" system in politics operates, criticizing the great amount of money spent by corporate donors to influence the candidates and by the candidates and their campaigns to influence the voters, and discussing the history of the role of money in politics. It also included the option for site visitors to "register" to sell their votes to be cast in the November, 2000 national election to the highest bidder, as well as an option for corporations or other groups to "bid" to buy blocks of votes. It also included links to other web sites discussing campaign finance-related issues, including the official web sites of the Democratic and Republican presidential candidates; other satirical web sites, such as www.billionairesforbushorgore; and (as they were published) to on-line articles discussing the web site itself. A message board, which site visitors could use to communicate with the site and each other, was added at a later date. A hard copy of the majority of pages of the Voteauction.com web site, as of October 12, 2000, absent the actual screens filled out by

registrants and the actual messages posted to the message board, is contained in Exhibit A to the Complaint filed by counter-defendant in the Circuit Court and incorporated, by reference, into the Complaint. *See* Complaint at par. 24; Affidavit of Daniel Doyle, attached as Exhibit B to Complaint. The screens filled out by Illinois registrants, as of August 18, are attached to this Answer and Counterclaim as Exhibit A and incorporated herein. A selection of messages posted to the message board (between September 23 and October 19) by site visitors is attached to this Answer and Counterclaim as Exhibit B and also incorporated herein. By his signature on this pleading, and also by affidavit, filed contemporaneously with this Counterclaim, Baumgartner verifies that Exhibits A and B are true and correct hard copies of comments from Illinois residents for the period from August 1-August 18 and selected messages from September 23 to October 19, respectively, posted by site visitors on Voteauction.com.

8. Baumgartner's intention in launching Voteauction.com was to advance his belief that the American campaign financing system is corrupt and to initiate and facilitate a forum for discussion about problems with that system, in which an audience of site visitors across the United States and even around the world could participate. The Internet presented an ideal forum to transmit his satiric message to a potential audience of millions and engage them in debate and discussion. For this reason, an important component of Voteauction.com was its interactive nature. Several components of Voteauction.com were designed to facilitate this interaction: the option to "register" to "sell" or "bid" on a vote; the option for the registrant to give a reason why he or she desired to sell his vote; the creation of "voter empowerment kits" that included sample letters, highly ironic in tone, to candidates and/or corporations to convey their disgust with the system of campaign contributions; and the message board.

9. In conjunction with his thesis advisors, Baumgartner determined that it was important that his web site look like a real business, at first blush, in order to further the parody and satire and make his points about the corrupting influence of money on the election. He also intended for Voteauction.com to parody the explosion of dot-com start-ups in their naïve enthusiasm to make money from an emerging market. To this end, he came up with the idea to pass himself off as a young business entrepreneur in interviews and press releases.

10. While Baumgartner intended that the site look real to the casual observer, the site was bursting with none too subtle indications -- from its ironic text and accompanying graphics, to the clearly tongue-in-cheek voter empowerment kits, to the links to other web sites, and to the inclusion of the message board, among others -- that made readily apparent to the reasonable person, upon further inspection, the satiric nature and message of the site.

11. The site was also designed in such a way that it could not be used for the actual purchase or sale of a vote. The site was not constructed to match up those who registered to “buy” and “sell,” or to verify information given by those registrants. In addition, Baumgartner did not intend to, and did not, link “buyers” and “sellers” through any avenue outside of the site or verify any registrants’ information. To Baumgartner’s knowledge, no person who registered on the site actually sold his or her vote, or purchased a vote, through Voteauction.com.

12. Although numbers were posted to the web site that indicated that more than 15,000 individuals (1131 of whom were purported to be from Illinois) registered on Voteauction.com, as well as the current amount of bids, these numbers were fictitious, created and regularly updated by Baumgartner as part of his goal to have the site appear to be a real vote auction at first blush. In fact, only a fraction of that number -- somewhere in the range of 1,000 to 3,000 people -- filled out the “sell” registration page, and approximately 5-10 people, none of whom are residents of

Bernhard shared his purpose to use the site to generate attention and discussion, both in the United States and abroad, of the effect of money on politics, and not to create a real auction where votes were actually bought and sold.

17. The site was then reopened on or about August 23, although the registration pages may not have been active at this time. On or about August 30, the registration pages were reactivated. Baumgartner began creating the fictitious numbers for the number of registered persons and status of bids after the site was back on-line. On or about September 23, he set up the message board. Baumgartner had direct access to the site in order to add to or change its content up until mid-September, when such direct access was cut off in order to secure the site from hackers.

18. On October 16, counter-defendants filed the underlying action in the Circuit Court of Cook County in Chicago, Illinois, seeking a preliminary injunction to close down Voteauction.com on the grounds that its operation violated various federal and state election and criminal laws. The Court granted the requested injunction ex parte on October 18.

19. Baumgartner first learned of the suit when counsel for counter-defendants contacted him on October 16 to advise him that he was named as a defendant in the underlying lawsuit. Counsel for counter-defendants had not contacted Baumgartner prior to filing this suit.

20. Upon learning of the suit, Baumgartner immediately stopped creating numbers for and ended all involvement with Voteauction.com.

21. Baumgartner was unable to secure local counsel in time to appear in circuit court in Chicago by October 18 to defend against the motion for a preliminary injunction.

22. The Preliminary Injunction Order provides that defendants, and "all those acting in concert with them," are enjoined from:

- A. Using or operating any Internet web site that encourages or allows residents of Illinois to sell their votes to be cast at the November 7, 2000 General Election.
- B. Using, operating,, facilitating or accessing domain name "voteauction.com" and to remove such web site from the Internet completely or, in the alternative, to modify the Internet web site known as "voteauction.com" so as to remove any illegal content.
- C. Allowing or continuing registration of the Internet domain name "voteauction.com" or any other domain name offering substantially the same service as voteauction.com.
- D. Using or operating in the State of Illinois any Internet web site by any name in any manner that would violate prohibitions in the laws of the State of Illinois and of the United States against the buying and selling of votes in elections.
- E. Accepting from residents of the State of Illinois any registration or offer to sell votes or to buy votes at auction through voteauction.com and to modify their web site to indicate that all registrations or offers to sell votes and/or buy votes from Illinois residents will be denied.

Preliminary Injunction Order at 4, pars. 1A-E.

23. As a result of the Circuit Court's Preliminary Injunction Order, the domain name Voteauction.com was revoked, access to the site through the World Wide Web was denied, and ultimately Voteauction.com was removed from the Internet. Following the issuance of the Order, Baumgartner ceased to have any access to or control over the site.

24. On October 31, Baumgartner removed the circuit court action to the United States District Court for the Northern District of Illinois. Counter-defendant then moved to remand it back to the Circuit Court. The federal court granted the motion to remand on February 6, 2001, returning the case to the Circuit Court.

25. Counter-defendant knew or ought to have known that Voteauction.com was a satire and parody, and not a real auction site established for the purpose of buying or selling votes, but nonetheless decided to sue Baumgartner and seek to enjoin Voteauction.com in order to prohibit even the satirical suggestion that the election system is tainted, insofar as the Board feared that suggestion could relate to Illinois and the city of Chicago. Prior to filing this suit, counter-defendant, through its Chairman, stated to the press:

In Chicago we react strongly and quickly to this type of activity -- *whether it's tongue-in-cheek or not* -- because we need to guard our reputation here that this is a place where voting activity is legal and above board and beyond reproach.

Sherrif, *Votes for sale online in the US*, The Register, October 5, 2000 (emphasis added).

(Complaint, Exh. A at 81.) In other articles, Board spokesman Tom Leach was quoted as follows:

When you read the Web site, it's almost like a parody or theater, but our concern is that some of our people registering on there are taking this seriously.... It's something that Chicago is sensitive about. Anywhere you go in the country and you talk about Chicago elections, you're going to get the snickers like, you know, "Vote early, vote often," and the cemetery stuff.

Zitrin, *Officials Move to Shut Vote-Selling Web Site*, APBnews.com, October 17, 2000 (attached hereto as Exhibit C).

We've said from the beginning that they make think it's a parody... [b]ut we don't think it's funny.

Anderson, *Voteauction Booth is Closed*, Wirednews, October 21, 2000 (attached hereto as Exhibit D). Thus, counter-defendants understood or ought to have understood that Baumgartner was not really auctioning votes. Certainly prior to filing suit and obtaining the preliminary injunction, counter-defendant did nothing to eliminate any confusion it may have had about Voteauction.com. Nonetheless, despite the great First Amendment interests at stake, counter-defendants proceeded ex parte to obtain a preliminary injunction shutting down Voteauction.com.

26. The Preliminary Injunction Order requested and obtained by counter-defendants shut down Voteauction.com just three weeks prior to the November 7, 2000 presidential election, a time during which citizen attention to and interest in campaign related issues was extremely high. When the site was shut down, Baumgartner lost his chosen and unique channel of communication and intended audience for purposes of sending and discussing his message. No medium is comparable to the Internet in facilitating the dissemination of a message as well as an interactive, ongoing conversation with large numbers of people all over the world. When the site was closed down, Baumgartner's message, the association of people engaging in the advancement of shared beliefs, and the on-line interest, debate, and conversation that it increasingly was generating was extinguished.

27. After Voteauction.com was taken off the Internet pursuant to the preliminary injunction order, shortly thereafter another website, called "Vote-auction.com," was put up on the Internet. However, Baumgartner personally has had no involvement with Vote-auction.com,

including the decision to put it up on the Internet, and no control over this site or its contents. Thus, this site does not provide him with an alternative avenue, let alone a comparable one, for continuing to broadcast his message.

28. Even though the November 2000 election has now passed, Baumgartner desires to have the option of restoring Voteauction.com to the Internet in the future. He believes that his message about the problems with the campaign financing system remains as important as ever. He believes that Voteauction.com generated increased interest and stimulating discussion on such issues and could have a role in fueling the movement for campaign finance reform. For these reasons, he wants to have the ability to put the site (or a substantially similar site, using the construct of a vote auction to send a satirical message) back up on the Internet, and to do so with the domain name Voteauction.com, by which his former site was known. However, it is his understanding that the preliminary injunction entered by the Circuit Court of Cook County prohibits him from doing so. As long as such injunction is in place, he is afraid to create and operate any Internet web site that uses the construct of a vote auction in this fashion, for fear that doing so will subject him to contempt sanctions in this proceeding, and possibly criminal prosecution.

29. In addition, as a direct result of the lawsuit filed and preliminary injunctive relief obtained by counter-defendants, Baumgartner was unable to complete his graduate thesis on schedule and will have to spend at least one additional semester at RPI to do so. The lawsuit and injunction also required him to change the nature and date of his final presentation of his thesis and forego a press conference he had intended as the culmination of his project, which adversely affected the project itself. Furthermore, since Baumgartner cannot refer potential employers to view his web site on-line as he created it, he fears that his prospects for employment may be

impaired. As a direct result of the lawsuit and the preliminary injunction, particularly in the first few weeks after learning of the Board of Election's suit, Baumgartner also endured a great deal of stress that was manifested, in part, by his having difficulty eating and sleeping and a rapid weight loss. Baumgartner has also incurred substantial attorneys' fees in connection with the lawsuit, the preliminary injunction proceedings, and these proceedings in connection with his motion to vacate the preliminary injunction.

30. As a result of the preliminary injunction order sought and obtained by counter-defendant, Baumgartner has incurred substantial damages as described in paragraphs 26-29 above, including irreparable injury due to violation of his First Amendment rights.

Claims for Relief

COUNT I

DECLARATORY JUDGMENT

31. Counter-plaintiff re-alleges and incorporates by reference the allegations contained in Paragraphs 1 through 30 herein as his allegations 1-30 of Count I.

32. A dispute and controversy has arisen between the counter-plaintiff and counter-defendant concerning the right of counter-plaintiff to use and operate an Internet web site that uses the construct of a "vote auction," as satire and parody, to send a critical message and generate discussion and debate about the influence of corporate campaign donations on American politics.

33. Counter-plaintiff, by operating the Internet web site Voteauction.com, was engaged in political and artistic expression that is protected by the First Amendment to the Constitution of the United States.

34. The preliminary injunction entered by the Circuit Court on October 18, 2000, is an unconstitutional prior restraint on counter-plaintiff's political, artistic, and Internet speech, in violation of the First Amendment.

35. Counter-plaintiff, by operating the Internet web site Voteauction.com, did not violate any criminal or election law of Illinois.

WHEREFORE, counter-plaintiff requests that this Court:

1. Issue a declaratory judgment in accordance with Section 2-701 of the Code of Civil Procedure against the counter-defendant, as follows:
 - a. The Court declare that counter-plaintiff, by operating the Internet web site Voteauction.com, was engaged in political and artistic expression that is protected by the First Amendment to the Constitution of the United States;
 - b. The Court declare that the Preliminary Injunction Order entered on October 18, 2000, is an unconstitutional prior restraint on counter-plaintiff's political, artistic, and Internet speech, in violation of the First Amendment;
 - c. The Court declare that counter-plaintiff, by operating the Internet web site Voteauction.com, did not violate the criminal or election

law of Illinois or the United States as enumerated in the Complaint or any other such laws;

- d. The Court declare that counter-defendant owes counter-plaintiffs his costs and attorneys' fees for this action; and
- e. The Court order such other relief as the Court may deem just.

COUNT II

REQUEST TO VACATE INJUNCTION

36. Counter-plaintiff re-alleges and incorporates by reference the allegations contained in Paragraphs 1-35 of Count I herein as his allegations 1 through 35 of Count II.

37. Because Voteauction.com is political and artistic satire and parody protected by the First Amendment to the Constitution of the United States, the preliminary injunction requested and obtained by counter-defendant operates as an unconstitutional prior restraint on Baumgartner's and his site visitors' political expression and prevents Baumgartner from restoring Voteauction.com, or any substantially similar site using the construct of a vote auction to send a satirical message, in the future.

38. The preliminary injunction requested and obtained by counter-defendant is overbroad and is not narrowly tailored to serve a compelling state interest, and thereby impinges on protected political and artistic speech and assembly, in violation of the First Amendment.

39. The preliminary injunction requested and obtained by counter-defendant was wrongfully issued and should be vacated. Counter-defendant has not, and cannot, meet the test in this Circuit for preliminary injunctive relief:

- a. Counter-defendant is unlikely to prevail on the merits of the underlying case, because James Baumgartner did not violate any

- criminal or election law, or cause anyone else to violate any such law, in connection with the operation of Voteauction.com;
- b. Counter-defendant did not, and will not, suffer irreparable harm in the absence of the preliminary injunction, because Baumgartner and the web site were not in fact engaging in any illegal vote buying or selling. Therefore, the site posed no threat either to the authority of the laws of Illinois or the United States or to the legitimacy of the November 2000 elections;
- c. Balancing the harms to the parties, counter-plaintiff Baumgartner has suffered irreparable injury due to the deprivation of his First Amendment rights to freedom of speech and assembly, as well as substantial damages due to the deprivation of these rights, and remains chilled from exercising his First Amendment rights, while Voteauction.com posed no real threat of injury to counter-plaintiffs either prior to, or subsequent to, the November, 2000 elections; and
- d. As the public interest weights heavily in favor of having access to a free flow of constitutionally protected speech, the issuance of the preliminary injunction was not in the public interest. Rather, vacating the injunction would serve the public interest in the First Amendment rights of free speech and assembly.

WHEREFORE, counter-plaintiff requests that this Court vacate the Preliminary Injunction Order entered on October 18, 2000, by the Circuit Court of Cook County, thereby allowing counter-plaintiff to restore Voteauction.com to the Internet.

COUNT III

SEPARATE ACTION AT LAW FOR DAMAGES

FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS

40. Counter-plaintiff re-alleges and incorporates by reference the allegations contained in Paragraphs 1-39 of Count II herein as his allegations 1 through 39 of Count III.

41. Counter-plaintiff is entitled to recover damages due to counter-defendant having requested and obtained a wrongfully issued injunction and due to counter-defendant's violations of his First Amendment rights. Due directly to these acts on the part of counter-defendant, counter-plaintiff has incurred substantial damages for which counter-defendant is liable.


WHEREFORE, counter-plaintiff requests that this Court:

- a. Grant counter-plaintiff an award of compensatory damages;
- b. Award counter-plaintiff his attorneys' fees, costs, and expenses pursuant to 42 U.S.C. sec. 1988; and
- c. Award such further relief as the Court deems just under the circumstances.

Respectfully submitted,

JAMES BAUMGARTNER

Dated: March 30 2001

By: 
One of His Attorneys

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VERIFICATION BY CERTIFICATION

Under penalties provided by Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the attached instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

A handwritten signature in black ink, appearing to read 'James Baumgartner', written over a horizontal line.

James Baumgartner

CERTIFICATE OF SERVICE

David L. Ter Molen, an attorney, hereby certifies that he caused a true and correct copy of the foregoing document to be served upon all counsel of record by messenger delivery, as follows:

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Phillip J. Robertson
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on this 30th day of March 2001.



David L. Ter Molen