

1 DISTRICT COURT CASE NO. 2004CV1281

2 BOULDER COUNTY, COLORADO

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4 REPORTER'S TRANSCRIPT

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6 SEWARD DEAN SCHOOLER, JR., a registered Colorado elector;
7 ERIC JOHN HARMAN, a registered Colorado elector; MARGIT A
8 JOHANSSON, a registered Colorado elector; JOHN JAMES KEANY
9 III, a registered Colorado elector; RALPH SHNELVAR, a
registered Colorado elector; and GARY L. HORTON, a
registered Colorado elector,

Plaintiffs,

10 vs.

11 LINDA N. SALAS, in her official capacity as Boulder County
12 Clerk and Recorder; and DONETTA DAVIDSON, in her official
capacity as Colorado Secretary of State,

13 Defendants.

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15 The hearing in this matter commenced before the
16 HONORABLE MORRIS W. SANDSTEAD, JR., Judge of the District
Court, on Monday, October 25, 2004.

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20 FOR THE PLAINTIFFS: ROBERT J. CORRY, JR., Esq.

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22 FOR DEFENDANT SALAS: LESLIE LACY, Esq.

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24 FOR DEFENDANT DAVIDSON: MELODY MIRBABA, Esq.

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1 P R O C E E D I N G S

2 THE COURT: This is 04CV1281. It's entitled
3 Seward Dean Schooler, Junior and others versus Linda Salas
4 and others. Enter your appearances, please.

5 MR. CORRY: Good afternoon, Your Honor. Robert J.
6 Corry, Junior for the plaintiffs, who are all present in
7 court with the exception of Gary Horton who couldn't make
8 it.

9 MS. LACY: Leslie Lacy, Assistant County Attorney.
10 Number 14470. And with me here today are Linda Salas,
11 Boulder County Clerk and Recorder, the defendant in this
12 action, and also Neil McClure, who is the general manager of
13 Hart InterCivic in Colorado.

14 THE COURT: I have a question for the plaintiffs.

15 MS. MIRBABA: Your Honor, may I enter my
16 appearance? Melody Mirbaba, 31242. I'm appearing on behalf
17 of the Secretary of State. And I do not have a
18 representative with the Secretary of State here today.

19 THE COURT: Who has the burden of proof and what
20 is the standard?

21 MR. CORRY: Your Honor, the burden of proof is on
22 us, and the standard is I believe by a preponderance of the
23 evidence.

24 THE COURT: Not beyond a reasonable doubt?

25 MR. CORRY: I don't think so in this context.

1 It's an election issue under 1-1-113.

2 THE COURT: Do you know?

3 MS. LACY: I'm -- well, Your Honor, I'm hoping you
4 had a chance to read my brief.

5 THE COURT: Yeah, but I didn't understand it.

6 MS. LACY: Well, the plaintiff has characterized
7 this as a 106 action and an action for declaratory relief.
8 However, neither of those provisions contemplates a hearing
9 on the merits and a decision within two days of commencing
10 an action. Both of them require compliance with the general
11 rules of civil procedure with an answer within 20 days and
12 time to prepare.

13 And frankly, you know, we are prepared to proceed
14 if the Court wants to do this. But -- we are ready. But
15 the County definitely feels railroaded in trying to present
16 a full case when we've had less than two days to prepare.

17 I think if the Court really examines this action
18 it is much more in the nature of a Rule 65 request for
19 preliminary injunction. And with respect to that it's a
20 very high standard of proof.

21 He's asking for expedited relief, which is what
22 makes it a request for preliminary injunction. He's asking
23 the County to take affirmative steps to have ballots
24 re-printed to obliterate bar codes and serial numbers on the
25 eve of an election.

1 By virtue of the fact that he's asking for
2 affirmative relief from the judge that makes it a mandatory
3 injunction, which is even a much higher standard that he has
4 to prove.

5 And certainly he has the burden of proof. And
6 under Rule 65 he has to prove that he has a probability of
7 success on -- high probability of success on the merits and
8 that the granting of the relief will not disserve the public
9 interests and that the balance of equities favors the
10 granting of the relief requested.

11 THE COURT: Well, let me try to understand what
12 provision of Rule 106 or the plaintiffs -- or what are the
13 plaintiffs relying on?

14 MR. CORRY: Well, we're relying on Rule 106 as
15 well as C.R.S. 1-1-113.

16 THE COURT: Read me the very specific language in
17 Rule 106.

18 MR. CORRY: Rule 106(a)(4)(VIII), Your Honor,
19 which --

20 THE COURT: The Court may accelerate or continue
21 any action which, in the discretion of the court, requires
22 acceleration or continuance.

23 What is this?

24 MR. CORRY: That is --

25 THE COURT: Would it better if you told me what

1 the old language that was abolished? Is this mandamus, is
2 this quo warranto, is this --

3 MR. CORRY: No. This is declaratory relief, Your
4 Honor. We're asking that the judge -- that the Court
5 declare the ballots that Boulder County intends to use in
6 the general election to be in violation of the constitution.

7 THE COURT: Well, wait a minute. What's the rule
8 for declaratory relief?

9 MR. CORRY: Rule for declaratory relief I believe
10 is Colorado Rule of Civil Procedure 57. And the statutory
11 basis for why we're here today is C.R.S. 1-1-113. That
12 subsection (1) does say the burden of proof is on the
13 petitioner. It does not specify the standard of review.

14 THE COURT: Well, why do you think I think it
15 might be beyond a reasonable doubt? Why do you think I
16 might think that?

17 MR. CORRY: I think you probably think that
18 because this is an expedited proceeding and we are seeking
19 affirmative relief in the sense that we are seeking for the
20 Court to issue a declaration that would prevent the
21 defendants from doing something. And perhaps that's why
22 Your Honor thinks it's beyond a reasonable doubt.

23 THE COURT: Well, if you challenge a particular
24 statute as unconstitutional you have to prove that beyond a
25 reasonable doubt.

1 MR. CORRY: That is correct.

2 THE COURT: And you're not challenging the
3 statute. You're challenging a --

4 MR. CORRY: An action, a planned action in
5 enforcing the statutes. Actually we embrace the statutes.
6 We don't challenge any of them. We believe that the
7 statutes as they exist prohibit what the Boulder County
8 Clerk intends to do.

9 MS. LACY: Your Honor, I would suggest that he is
10 challenging a statute because 1-5-407(1.6) specifically
11 requires that ballots that contain ballot stubs may be
12 numbered -- or shall be numbered, and that they may contain
13 distinguishing marks as long as the ballot secrecy is
14 protected. So the County Clerk is abiding by the state
15 statute.

16 I would submit that that statute must be
17 unconstitutional if indeed it doesn't apply to this
18 situation.

19 MR. CORRY: If Your Honor is ready, I can briefly
20 respond to that.

21 THE COURT: Well, just a minute. I'm looking at
22 Rule 56 -- 57.

23 (Pause.)

24 THE COURT: Rule 57 says Power to Declare Rights.
25 District and superior courts within their respective

1 jurisdictions shall have the power to declare rights, status
2 and other legal relations whether or not further relief is
3 or could be claimed.

4 How does that -- read me that statute. Tell me
5 why we're here. What are you bringing this action under?

6 MR. CORRY: We're bringing this action under
7 Rule 57 and also under 1-1-113. I'd be happy to --

8 THE COURT: Read me the language first in Rule 57
9 that tells me what you're bringing this action under.

10 MR. CORRY: The language that Your Honor just read
11 actually under Rule 57.

12 THE COURT: Well, then explain it to me. District
13 and superior courts within their respective jurisdictions
14 shall have the power to declare rights, status and other
15 legal relations.

16 MR. CORRY: Right.

17 THE COURT: What does that mean?

18 MR. CORRY: We were seeking a declaration from
19 Your Honor that A, the ballots that are currently -- that
20 the Boulder County Clerk currently wants to issue on
21 election day are unconstitutional under the Colorado
22 constitution Article VII section 8 which says no
23 distinguishing marks on ballots.

24 And then our second --

25 THE COURT: Read the whole thing. Make this --

1 play like you're talking to a fifth grader so I fully,
2 totally understand what you're here for and what you really
3 mean.

4 MR. CORRY: Okay, Your Honor. We want a
5 declaration that those ballots are unconstitutional.

6 THE COURT: Because?

7 MR. CORRY: Because they have distinguishing marks
8 on them.

9 THE COURT: Well, tell me -- better -- better read
10 me the language of the constitution very specifically. What
11 is the language of the constitution?

12 MR. CORRY: The language of the constitution is
13 that no ballots shall be marked in any way whereby the
14 ballot can be identified as the ballot of the person casting
15 it.

16 THE COURT: All right. So it doesn't prohibit
17 marking the ballots.

18 MR. CORRY: It prohibits marking the ballots in a
19 way whereby the ballot can be identified.

20 THE COURT: So you can mark on the ballot.

21 MR. CORRY: You can put an X there if it doesn't
22 permit somebody to identify that ballot as the ballot of the
23 person.

24 THE COURT: So what you have to prove -- what you
25 have to prove -- and what's the extent of which do you have

1 to prove that it's -- if there's any way possible -- any way
2 possible or if there's -- just not likely or it could happen
3 or maybe it could happen of being able to identify the
4 person who cast the ballot?

5 MR. CORRY: The constitution said any way. It
6 doesn't say likely. It doesn't say probable. Constitution
7 says any way.

8 So we have to prove if there's any way to identify
9 that the ballot can be identified as the ballot of the
10 person casting it, then that mark is unconstitutional.

11 THE COURT: What's your proof? Give me an offer
12 of proof. What are you going to prove?

13 MR. CORRY: We have witnesses, Your Honor, the
14 plaintiffs and also an expert witness that we seek to
15 introduce testimony. A couple of our witnesses are
16 candidates past and present in Boulder County. Other
17 witnesses are --

18 THE COURT: What are they going to say that's
19 going to prove to me that it's possible to determine who
20 cast a ballot in Boulder County?

21 MR. CORRY: The witnesses will say that it's
22 possible for somebody who is within the Boulder County
23 Clerk's office to identify the serial number. It's possible
24 for a poll watcher to identify the serial number. It's
25 possible for a -- during a re-count to identify the serial

1 number.

2 It's possible when ballots are being assessed and
3 looked at for write-in candidates -- and there is a write-in
4 candidate as Your Honor knows for District Attorney. Those
5 ballots have to be looked at by human eyes. So it's
6 possible that people who look at those ballots and assess
7 them will also know the serial number of certain people who
8 have voted in this election. And that is how these ballots
9 are unconstitutional.

10 THE COURT: So you're saying you have to prove a
11 possibility?

12 MR. CORRY: And it's also --

13 THE COURT: You have to prove a possibility by a
14 preponderance; right?

15 MR. CORRY: Right.

16 THE COURT: Or a possibility by beyond a
17 reasonable doubt.

18 MR. CORRY: I believe the standard is
19 preponderance. But even if it's beyond a reasonable doubt I
20 think we can satisfy that standard as well with the
21 testimony that we are going to introduce.

22 THE COURT: Well, it seems to -- I'm trying to
23 figure out if lay persons can testify to that. This sounds
24 like the subject of expert testimony.

25 MR. CORRY: One of our witnesses we will seek to

1 be admitted as an expert witness before Your Honor. He's
2 not a plaintiff. His name is Al Kowlicz. We have provided
3 his resume to the other side. And we would seek his
4 testimony before Your Honor as an expert witness. He has
5 been qualified as an expert witness in previous court
6 proceedings that I've actually been involved with.

7 THE COURT: What's his field?

8 MR. CORRY: Pardon me?

9 THE COURT: What is his expertise?

10 MR. CORRY: His expertise is he's got many years
11 in the computer industry, and he's also got many years in
12 the voting -- in the issue of voting and elections. He's
13 been involved with a number of elections either as a
14 campaign manager, a poll watcher. He studied the issue.
15 He's got specific education and training in the area.

16 THE COURT: So wait a minute. So I can hear --
17 well, let's assume we have the most ingenious, most
18 brilliant expert in the world right at the cutting edge, and
19 that person can hack into the United States Department of
20 Defense they're so smart. And therefore, they could testify
21 that under unusual circumstances they could find out who
22 cast these ballots. Is that sufficient proof?

23 MR. CORRY: I think it is, Your Honor.

24 And that actually brings up a point. A couple of
25 our witnesses are very knowledgeable in data and computers

1 and how things are hacked into and stolen they will testify.
2 And these are lay plaintiff witnesses, but they say -- but
3 they still understand how these work. And they will be able
4 to testify about how data can be hacked into, and also the
5 value of this data.

6 THE COURT: How are you going to prove how these
7 ballots in this case are going to be done?

8 MR. CORRY: Well, we can't prove a negative, Your
9 Honor. But we can prove that the probability is there, and
10 especially the intensive --

11 THE COURT: The probability? I mean, anything --
12 lawyers all the time ask this question, and they must teach
13 it in law school, is it possible that. Well, it's totally
14 irrelevant what's possible, you know. Anything is possible.
15 I know the answer to that, anything is possible.

16 And you're asking me to say since anything is
17 possible, it's possible that somebody could find out who
18 cast a ballot. Therefore, it's unconstitutional.

19 MR. CORRY: Well, actually we're asking you to say
20 that the Colorado constitution already has a check against
21 this. And we're asking you to enforce what the supreme law
22 of our state has is a check against it. Of course even if
23 this law is enforced there's still obviously always the
24 possibility.

25 THE COURT: I don't understand that. I don't

1 understand that. It doesn't say in there -- it says no
2 mark. It doesn't prohibit marking. Is it prohibits marking
3 such that you could identify the ballot.

4 And you're asking me to find that since it's
5 possible, maybe possible, if 1 in 10 billion chance it could
6 happen, therefore, it's unconstitutional, that's what you
7 want me to interpret the statute -- or the constitution.

8 MR. CORRY: Well, I don't think our offer of proof
9 would say it's 1 in 10 million, Judge. I think that what we
10 would prove --

11 THE COURT: 1 in 1 million?

12 MR. CORRY: I think what we would prove, Your
13 Honor, is that there is a way whereby the ballots can be
14 identified as the ballot of the person casting it under the
15 current system that Boulder intends to use. And then we're
16 arguing that that is unconstitutional under Article VII
17 section 8. And if you look at that --

18 THE COURT: Well, take this -- how about this
19 example; I'm that person who the voter brings their ballot,
20 and I have a secret little marker. And you hand me your
21 ballot, and I put a dot seen by ultraviolet light on that;
22 so that, when we go through the ballots I remember I wrote
23 down their name and I can go back and look at those ballots
24 when they're being counted, and I have a little ultraviolet
25 light and I find the name. And I know that's possible;

1 right?

2 MR. CORRY: I think it is possible. And there are
3 laws against that currently.

4 THE COURT: Okay. There's laws against going
5 after and finding out who cast the ballot.

6 MR. CORRY: That's right. And whoever put that
7 ultraviolet mark on the ballot --

8 THE COURT: Right.

9 MR. CORRY: -- would probably -- without knowing
10 more facts, would probably be violating existing laws that
11 are cited by both sides in our respective briefs.

12 THE COURT: By the same token, the person who
13 memorized the number or the bar code, whatever, they would
14 be committing a crime.

15 MR. CORRY: It depends on who that person is. I
16 think if that person is the voter himself on his ballot, I
17 don't think that that person would be committing a crime.

18 But if it were a third party, a government
19 employee, a poll watcher, a County Clerk and Recorder or
20 employee thereof, and I think if that person memorized the
21 serial number that is on the ballots and then used that for
22 whatever reason, or even just memorized it for his own
23 purposes, yes, I do think that person would be violating the
24 law.

25 But what we are trying to say is that Boulder

1 County ballots make it much easier for people to violate the
2 law, which is why the Colorado constitution says no
3 markings.

4 THE COURT: How -- and you're going to have
5 evidence to that. How does it make it easier? What's your
6 testimony about what makes it easier?

7 MR. CORRY: Without the serial number there is no
8 way for any person to intimidate another voter saying
9 there's a serial number, buy and sell votes. There's
10 nothing to memorize, there's nothing that shows up in the
11 digital image that the ballots are reproduced that we'll
12 have testimony about. There's no mechanism.

13 So what Boulder is doing creates the mechanism for
14 fraud, creates the mechanism for illegalities and creates
15 the mechanism for improprieties.

16 THE COURT: Okay.

17 MR. CORRY: That's what the Colorado constitution
18 contemplates.

19 THE COURT: Here is what I'm going to do. I'm
20 going to take the testimony of the County and the State
21 first so I know what the evidence is about what these
22 ballots look like, what they -- how they're to be used and
23 why they did it this way. And then you can cross-examine
24 them.

25 But you still have the burden of proof even though

1 I'm going to make them go forward so I can understand what
2 the facts are.

3 MR. CORRY: Thank you, sir.

4 THE COURT: Call your first witness.

5 MS. LACY: Your Honor, if I might respond briefly
6 to the standard of proof.

7 Colorado Supreme Court in City of Boulder --
8 Bickel V. City of Boulder, which was interpreting state
9 constitution of election provision TABOR, the TABOR
10 provision, held that the standard of proof for election
11 matters, including constitution provisions is substantial
12 compliance just so the Court is clear on that.

13 THE COURT: Substantial compliance with what?

14 MS. LACY: With the election laws and the -- and
15 the -- and TABOR is an election law, and so is the provision
16 that Mr. Corry just cited. They're all election laws. And
17 the standard is substantial compliance. It's reiterated
18 several times in the code as well.

19 THE COURT: So it's -- is that between --

20 MS. LACY: I mean, we're going to meet a much,
21 much higher standard here today. We're going to prove to
22 the Court that secrecy for the voter and the ballot is not
23 an issue at all, that the system has been approved by an
24 independent testing authority following very, very stringent
25 federal standards.

1 Secretary of State has certified it pursuant to
2 those standards. Those same -- and those standards
3 absolutely require pursuant to the Help America Vote Act
4 that was passed by congress in the year 2002 that privacy
5 and secrecy are paramount.

6 THE COURT: All right. Tell me again what
7 substantial compliance means. I mean, see, I understand by
8 a preponderance of the evidence, whichever is more probable
9 than not. And I understand what beyond a reasonable doubt
10 is. But I don't understand when you're telling me that the
11 standard is substantial -- if this conduct by putting the
12 serial numbers on substantially complies with --

13 MS. LACY: The requirement for secrecy and privacy
14 of the ballot, that then it is sufficient under Colorado
15 Supreme Court law.

16 THE COURT: All right. Call your witness.

17 MS. LACY: I think the Court is recognizing that
18 elections are not -- are never absolutely flawless. And a
19 standard of perfection when you're dealing with so many
20 individuals handling ballots, election judges, individuals
21 who do all sorts of -- there's hundreds of thousands of
22 people who are voting in this county-wide election, that a
23 standard of perfection is certainly impossible.

24 We'd like to call Linda Salas, please.

25 LINDA SALAS,

1 called as a witness by the Defendant, having been first duly
2 sworn, was examined and testified as follows:

3 THE COURT: You may be seated. Please state your
4 name and spell it for the record.

5 THE WITNESS: My name is Linda Salas. I'm the
6 Boulder County Clerk and Recorder.

7 DIRECT EXAMINATION

8 BY MS. LACY:

9 Q Ms. Salas, as Boulder County Clerk and Recorder
10 are you involved with the elections functions at your
11 office?

12 A Yes, I am.

13 Q And can you describe generally what that entails?

14 A I'm involved in every detail of the elections. I
15 assist with data entry, I answer phone calls, assist with
16 absentees, making contacts, the procedures regarding the
17 elections, processing of documentation for voters, making
18 plans to provide to the Secretary of State as far as
19 procedures for every election process, working with all the
20 jurisdictions and the parties.

21 Q How long have you been Boulder County Clerk and
22 Recorder?

23 A I took office in January of 2003.

24 Q And what was your occupation prior to that time?

25 A I was a municipal clerk for over 15 years in

1 Louisville, Erie, and deputy clerk in the City of Boulder.

2 Q Were you involved in the County choice for a new
3 voting system?

4 A Yes, I was.

5 Q Can you describe the public process that was
6 involved with choosing the voting system?

7 A Yes. When the Help America Vote Act came into
8 place all counties with punch card systems throughout the
9 country had to replace their punch card systems by January,
10 2004.

11 At the same time all of the county clerks in part
12 of the Help America Vote Act was the requirement by 2006 to
13 put at least one DRE, which is a direct record electronic
14 voting system for people with disabilities into place in
15 one -- in every polling location.

16 So at the time Boulder County had to replace their
17 punch card systems not only because of the Help America Vote
18 Act, but also because our punch card system was 29 years
19 old, and we had started to have a possibility of failure
20 with one of our counting systems with that.

21 So what we decided to do is because the DRE, the
22 touch screen systems were something very new, they're
23 similar to your ATM machines that you use at the banks to
24 withdraw, we decided that we needed assistance on that
25 because we knew that not only people with disabilities would

1 want to use the system, but probably the general voting
2 population would also be interested in it.

3 So we put together -- we invited people from
4 various parts of the community, we invited the
5 representatives from the major and minor political parties,
6 League of Women Voters, we invited municipal clerks from
7 small, medium and large municipalities, we also invited
8 county clerks from other counties small, medium and large,
9 we had people with disabilities, we had people from the
10 minority community as participants in the process.

11 The clerk's office was there just basically to
12 administer and assist the decisions and the process. We
13 were there to help provide information for them. We
14 provided the RFP. We drafted the RFP. That of course was
15 reviewed by the County Attorneys, our purchasing people, our
16 IT people also.

17 Q And was the specific system that the County chose,
18 Ballot Now, was it available for -- were there
19 demonstrations provided with respect to how it might work?

20 A Yes. Not only did we have our meetings with our
21 review committee, but all of our meetings were open to the
22 public.

23 We not only had the regular meetings open to the
24 public, we had what we called a voters fair where people who
25 came to the regular meetings could also come in and test the

1 DREs, ask our vendors any questions about their various
2 portions of their systems. And we did that twice.

3 Q What were the specific reasons that the County
4 chose the Ballot Now system?

5 A Well, one of the reasons is because the voting
6 population -- several of the people within the County were
7 very concerned about the DRE system because of the lack of a
8 paper trail or an audit in the system. The Elections
9 Commission was to put together a group to review the DREs
10 and establish standards. And standards had not been
11 established at that time.

12 Boulder County still needed to have a paper-based
13 system because of absentee ballots. And if the
14 Commissioners would ever decide they wanted to do another
15 mail ballot, we would have to have a paper-based system.

16 So when we looked at the systems we looked at not
17 only DRE, but we also looked at a regular system that we
18 could use for absentee and mail ballot elections.

19 And the reason that we were very impressed with
20 the system is a couple of things. Some of our -- the people
21 that are here that are sitting in this courtroom had
22 concerns about other processes with other systems that we
23 had used in the past.

24 Our punch card system, the debolt (phonetic)
25 system that they could not see what was going on on the

1 computer systems as we were processing the vote tallies.

2 And this system is a much more transparent system.
3 It actually projects the image of what's on the screen -- on
4 the computer screen onto the wall so that the judges and
5 poll watchers can actually watch the process because by
6 statute poll watchers are only allowed to come within 6 feet
7 of the process. This allows them to stand back and still
8 see what's going on with the process. It's a much more
9 transparent process.

10 The other reason we were also very interested in
11 this process was the Ballot On Demand. As you know when you
12 have early voting we have 318 different ballot styles.

13 The average age of our judges are 74. When you
14 have thousands of people coming through, they are supposed
15 to be looking out and trying to pull the appropriate ballot
16 styles for that individual. And of course we never know how
17 many people are going to be coming to the polls. Ballot On
18 Demand allows them to print as the voter comes in and print
19 the appropriate ballot style for that voter.

20 Q Did you feel that the system addressed the
21 security concerns that you would have as the elected
22 official?

23 A We did. One of the things when we talked about
24 the current system that we had in the paper-based system in
25 the sequential number is that we did not want to have ballot

1 stubs on there, ballot stubs on a ballot.

2 If a voter comes up and receives a ballot, they go
3 to deposit it into the ballot box. If the judge happens to
4 look away, that person could drop that ballot into the
5 ballot box with their stub. That stub definitely does
6 associate that ballot with that voter.

7 On the current system that we're using now we do
8 not associate any numbers in the poll book to the voter.
9 The sequential number is strictly used for ballot
10 management.

11 Because we have a multiple-page ballot you have to
12 keep the ballot packet for that voter packet with that
13 sequential number. And it also has to be in 1, 2, 3 page
14 number.

15 If you have a 74-year-old judge that gets a
16 thousand ballots out of a ballot box with multiple pages and
17 happens to drop it, it's an impossibility for them to try to
18 put it back into order.

19 If we do that, if that were to happen or the
20 sequential numbers are scratched out, the judges then on
21 election night, we would have to duplicate every one of
22 those ballots to run through the system.

23 The system recognizes page 1 as a vote cast. If
24 you do not have the pages in sequential order plus page
25 number order, if you separate pages 2 and 3 from page 1 it

1 will count -- it will run through and say okay, you have one
2 vote, but the other two pages will be rejected until you
3 bring them back together.

4 Q You're saying that if the pages are separated and
5 only one page is found that the entire three-page ballot is
6 duplicated with those votes on that one page for each page
7 that's found?

8 A For each page. So if it's a three-page -- so if
9 it's a three-page ballot and we have three-page ballots that
10 are actually five pages because they're three pages front
11 and back, front and back, and the front of one page, if the
12 voter was to scratch off the bar code on that, we could not
13 just replace that one page where they scratched out the bar
14 code. We would have to actually replicate that entire
15 packet of ballot to that individual because the sequential
16 numbers have to match.

17 Q Can you describe, Ms. Salas, what type of security
18 controls are in place throughout the conduct of the election
19 to insure ballot secrecy?

20 A We don't put any of the sequential numbers, we
21 don't associate them at all with the voters. It is strictly
22 used for ballot management.

23 The judges are instructed not to put any of the
24 sequential numbers in. In fact, our poll book has changed.
25 In the past when there was a stub associated with a ballot,

1 you would write that stub number down and associate it with
2 that voter. As I said, if the voter didn't get the stub
3 removed before they put it into the actual ballot box, you
4 could then associate that particular ballot with that voter.

5 The same with absentee ballots. The process with
6 an absentee on the old stub process is you sent the entire
7 ballot with the stub attached to it. The voter -- the voter
8 then would cast their ballot, return it back. That stub
9 number would be on the inside of the -- inside of the
10 envelope for the return ballot, and that the judges would
11 then separate and tear the stub off.

12 On the new system because there are no stubs there
13 are no associations. Once that ballot is removed from the
14 envelope, it is no longer -- there is no way to associate it
15 to that voter.

16 But we also have multiple judges that work
17 together from varying party affiliations. So no one really
18 works alone. In the precincts, polling locations we have
19 judges of various political parties, affiliations that work
20 together in teams.

21 When you bring them back to our location and
22 handling absentee ballots, we have people that are working
23 in a partnership democrat or republican, a libertarian with
24 another party, they sit across from each other. One has the
25 envelope, the other one takes the ballot out, the other one

1 puts the envelope upside down so you can't see the name of
2 the voter. And then they open and flatten out the ballot,
3 and then that goes into a transfer case which is then
4 sealed. We track the seal number on there also.

5 When the voter brings the ballot in the polling
6 location we have secrecy sleeves. Our ballots are enormous
7 this election. They are 11 by 17 inches. We have secrecy
8 sleeves for people to use. But what they're doing sometimes
9 is they're putting in the secrecy sleeve on top so they can
10 transport it over and deposit it into our ballot box that is
11 secured.

12 Q Now, do election judges know ahead of time who
13 else they might be working with on these teams you
14 mentioned?

15 A They get a list on the Saturday before the
16 election for the polling location. Because they have to
17 contact those people to make sure that they're going to be
18 coming to the polling locations.

19 When they go into the polling locations they
20 really don't know exactly what position they're going to be
21 working. The supply -- whoever may say we need to work
22 together or somebody go out and put the 100-foot limit. At
23 the end of the day they work together as a team to do the
24 ballot counting. So nobody is just by themselves with a
25 ballot.

1 Q At the point where the ballots are scanned how
2 does that happen?

3 A We have people who are trained to use our
4 scanners. A lot of them are staff that are sworn in that
5 are actually using the computer equipment. We've requested
6 representatives from each of the parties for ballot
7 resolution.

8 So there are four people working on a scanning
9 team, there are eight scanners, we have four people. In
10 each of the scanning teams we try to put different party
11 affiliations working together. There's a check and
12 balancing there.

13 One person is actually at the computer. The other
14 one is making sure that they're following all the steps and
15 procedures and process. Then you have the two resolution
16 judges that are --

17 Q I want to interrupt for the sake of the judge and
18 ask exactly what is the scanning process?

19 A Okay. What happens is because we have a digital
20 imaging system as we get the ballots in it is considered
21 part of the optical scan family except that ours actually
22 captures the digital image of the ballot.

23 At the polling locations or in the past with the
24 punch card system, it reads the punch card system, it would
25 read the light that would penetrate through the hole so that

1 it would know that there was a vote cast at that particular
2 location.

3 If it was not punched in a designated location
4 that was indicated by the system this is where a vote would
5 be it would kick it out, or if you had two punches.

6 This system is very similar. It reads the
7 markings within a designated area for the boxes. What it
8 does is actually captures an image of -- digital image of
9 the ballot.

10 If there are any issues with the ballot we go
11 through and say -- say we get a precinct of 500 ballots, we
12 run that through the scanner, and we ask the system are
13 there any blank ballots. And it could be because of a voter
14 who had received an absentee ballot may have voted with a
15 yellow highlighter and the system may not catch the yellow
16 highlighter. So then it would say yes, there is a blank
17 ballot. You would flash that ballot up and look at it.

18 One of the ways for the judges to actually know if
19 that is a blank ballot and for them is to have that
20 sequential number to go and physically look at the ballot to
21 make sure that it truly is blank or that they didn't use a
22 yellow highlighter to mark a ballot. Because as we all know
23 with elections, the intent is voter intent. We need to make
24 sure that we are capturing the voter intent. So that is one
25 of the ways.

1 The other issue is if there is an over-vote the
2 system will let you know that there is a ballot that has
3 either an over-vote or a write-in candidate. The system
4 then will highlight the location of the over-vote, and the
5 judges will then look at that.

6 And it flashes very quickly, and the judges will
7 say, you know, there's two black solid marks, that's an
8 over-vote. Or yeah, he marked it this way all the way
9 through. He might have put a little dot there because he
10 was resting his pen.

11 So the judges, the resolution team actually looks
12 at the voter intent of any over-votes. And then if there is
13 a write-in candidate, of course they need to make a
14 determination whether that candidate is a viable candidate
15 or certified candidate or just somebody wrote in Goofy or
16 Bill Smith or whatever.

17 Q How many scanners are operating at the same time?

18 A Eight.

19 Q Who all is allowed in the room during this
20 scanning process?

21 A Only election officials that have been appointed
22 by our office, judges that have been appointed by the
23 parties, official poll watchers, and of course our staff,
24 and then Hart as the vendor.

25 Q Are judges allowed to take notes or engage in

1 other activities, the judges that are at the scanning
2 machines?

3 A No. Actually the only thing that a judge may do
4 is if there is a ballot that is rejected by the system
5 because either somebody has marked in the bar code or the
6 ballot is damaged, then they would need to make a notation
7 so that that ballot must be duplicated and so that it goes
8 to a duplication team.

9 Q So in the few seconds that a particular ballot
10 image is flashed on the screen, how would -- is it possible
11 for anyone in that room to know who voted on that ballot?

12 A It is so quick and there are so many ballots going
13 on -- I mean, because as the ballots come in in the transfer
14 cases from the various precincts, we are having runners who
15 are taking those transfer cases and taking it to the various
16 machines, whoever is free next that's where the next
17 transfer case goes.

18 And people who come to work on election night, we
19 don't particularly have them assigned to any position like
20 we're going say you're a runner. When they come we say we
21 need a runner, you need to go here.

22 So it isn't like they know ahead of time that
23 they're going to be runners. They may not have access to a
24 particular ballot box. It's just you never know when the --
25 when the polling places are going to be bringing in their

1 ballots. Some come in very early. Some come in a lot later
2 because it takes them a lot longer.

3 Q If a voter hasn't informed someone what their
4 number is, is there anything on the image that would tell
5 them who had voted that ballot?

6 A Not unless they told them the sequential number,
7 and the judge kind of looked sideways very quick. And
8 unless that ballot had something on it that would -- that
9 would require the resolution team to look at it, you would
10 never see that ballot.

11 Q And approximately how many seconds per ballot is
12 the team working through these ones that require resolution?

13 A Most generally it's very quick because it's pretty
14 evident what the voter intent was, you know. They had maybe
15 over-voted, they wrote I meant to vote for this one. I
16 mean, it's pretty quick.

17 Q Where are we currently with respect to the
18 election calendar?

19 A We are about seven -- nine days out from the
20 elections. We have been doing early voting for the past
21 week. We have sent out thousands of absentee ballot
22 requests. We have been averaging just in our Boulder
23 location on 33rd approximately a thousand voters a day since
24 we started last Monday of people coming in and early voting
25 just in the Boulder location. The other three locations

1 have been averaging around 600 or more voters a day.

2 Q Have ballots been printed yet for the general
3 election?

4 A Yes, they have.

5 Q How many?

6 A They were required by law to be in our hands by
7 October the 4th. We have printed approximately 200,000
8 ballots at a cost of around \$160,000.

9 Q Would it be possible to have ballots -- just
10 possible in terms of timing to have ballots re-printed
11 without bar codes or serial numbers prior to general
12 election day in time for the election?

13 A No, there would not be at this point in time
14 because we had had our request in and had our set-up done
15 months ago. The hold-up for us -- and we were the first
16 county to get out our absentees because we had our ballots.
17 We had two different ballot styles ready to go because of
18 the Ralph Nader issue; so that, as soon as the Court made
19 the determination our judges -- our printers were able to
20 print those ballots out.

21 Other counties were delayed. And as I heard about
22 as of a week ago, some of them were having still issues with
23 trying to get ballots out.

24 It takes several hours to print ballots because it
25 has -- it is not just stagnant information that you put on

1 there. Not every ballot is the same. As I said, we have
2 318 different ballot -- precinct and ballot styles because
3 of split precincts, special districts, the jurisdictions.

4 Q If the Court grants the plaintiffs' request to
5 have voters obliterate the bar codes, what would the
6 consequences be for the election?

7 A Well, Boulder County has been last in getting our
8 results. It would take us weeks dependent upon if it was
9 made public and every voter went through and obliterated the
10 bar codes on there, we would have to go through and
11 recreate, hand recreate every ballot for every voter who did
12 that.

13 Q And what kind of ballots -- would there be bar
14 codes on these new ballots?

15 A Yes, there would be. The system requires a bar
16 code in order for the first ballot to run through to
17 recognize that as a vote cast.

18 Q And if the judge grants the plaintiffs' request to
19 have what I'll call a human readable number -- and how many
20 digits is that, the number?

21 A It's around six digits

22 Q Six-digit number. If he grants the request to
23 have that six-digit number obliterated, what would the
24 consequence be to the election?

25 A As I said, if a judge were to grab a package of

1 500 ballots out of the ballot box and drop it, there would
2 be no way for us to put those ballots back in sequential
3 number order to match all the pages would be 1, 2, 3, or 1,
4 2. We could put that together, but the sequence numbers may
5 not match.

6 Back in 1979 I think it was Adams County had a
7 multiple ballot. And that's part of the issue with the
8 fine -- with these optical scan systems. There are some
9 counties that are using an 8 and a half inch by 22-inch page
10 ballot both sides at seven-point. And they're providing
11 magnifying glasses because it's very difficult to manage
12 multiple-page ballots.

13 The only way to do that is with the sequential
14 numbering on there to associate a packet of ballots
15 together, plus the page numbering on the ballot. We would
16 never be able to if they were out of sequence.

17 And as we know, we ask the voters please make sure
18 you put it back into 1, 2, 3 order. We know that we have --
19 we instruct the judges to do the same. But as we know,
20 there are always human errors in there, and they may put the
21 bottom stack that's the part of the -- part -- part of the
22 page with the top stack. If you didn't have those
23 sequential numbers you can not marry those back together
24 again.

25 MS. LACY: No further questions.

1 THE COURT: Questions from the -- go ahead.

2 MS. MIRBABA: I'll be real brief.

3 CROSS-EXAMINATION

4 BY MS. MIRBABA:

5 Q Good afternoon, Ms. Salas. I just wanted to
6 clarify one thing. You were talking about having to
7 replicate the ballot if the bar code and serial number is
8 marked off. Who would be responsible for replicating the
9 ballots, our judges, the election judges?

10 A The election judges.

11 MS. MIRBABA: Thank you.

12 THE COURT: Cross-examine?

13 MR. CORRY: Yes.

14 CROSS-EXAMINATION

15 BY MR. CORRY:

16 Q Good afternoon.

17 A Good afternoon.

18 Q So Boulder County is the only county in the state
19 of Colorado that has serial numbers on its ballots, isn't
20 it?

21 A Arapahoe County originally had the Ballot On
22 Demand. The laws that are currently in place are based on
23 the Arapahoe County Ballot Now.

24 Q But for this election Boulder County is the only
25 one?

1 A I cannot address or speak for any other county,
2 sir.

3 Q You're not aware of any other county in the state
4 of Colorado that is currently using these serial numbers?

5 MS. LACY: Asked and answered.

6 THE COURT: Well, what's relevant about that?

7 MR. CORRY: Well, I think it's relevant because
8 their testimony is that the serial numbers are required.
9 Otherwise, the system can't count it. But there are 63
10 other counties in the state of Colorado that it's not
11 required. That's why it's relevant. But I'll move on.

12 Q (By Mr. Corry) Prior elections in Boulder County
13 you did not employ the serials numbers, did you?

14 A We used stubs.

15 Q Okay. And the serial number was on the stub, not
16 on the part of the ballot that the voter marks; right?

17 A That is correct.

18 Q And the stub was torn off from the ballot and was
19 not traceable to the ballot itself, was it?

20 A If the voter had removed the ballot (sic). But if
21 the voter had dropped in the ballot in the ballot box with
22 the stub, you could have associated that ballot back to the
23 voter.

24 The same with the absentee. The absentee ballots
25 come back with the stub on the ballot. The vote -- the

1 ballot stub was left on the ballot and returned with the
2 voter's actual name.

3 Q But talking about election day, normal traditional
4 voting normally the stub is not left on the ballot?

5 A That is correct.

6 Q But this year Boulder is not using any stubs;
7 right?

8 A That is correct.

9 Q So Boulder has departed from its former system
10 whereby there was no serial number on the ballot itself to
11 having a serial number on the ballot now?

12 A That's correct.

13 Q For the -- the first time ever in Boulder County
14 to your knowledge as the chief of elections in Boulder;
15 right?

16 A In Boulder --

17 Q Okay.

18 A -- I cannot address in the past. I was not the
19 clerk in the past. So all I can speak to is what I
20 currently know.

21 Q Of course. And in your expertise as the top
22 election official in Boulder County currently you're not
23 aware that Boulder County has ever used the serial numbers
24 on the ballots before; right?

25 A I think I'm not sure whether there was any in the

1 past. I would -- I could not address that as I said.

2 Q Okay. You just don't know.

3 Now, is there a public process to choose this
4 system and open bidding and a competitive process to choose?

5 A Yes, there was. And this was part -- the Ballot
6 Now and Ballot On Demand was part of the process. They
7 demo'd that during one of our open meetings to the public.
8 They also did it in -- presented that at a public hearing
9 with the County Commissioners. They actually projected the
10 image on the wall, they printed the ballots on-site during a
11 public hearing.

12 Q Okay. And you indicated this was a competitive
13 process. How many proposals or bids did you receive in and
14 consider?

15 A We originally received 15, and the review
16 committee narrowed it down to 5. We brought those people
17 back in for in-depth presentations, and we had another
18 voters fair.

19 Q This is a completely open process? Any taxpayer
20 or --

21 A That's correct.

22 Q -- elector, anybody can get the documents from
23 this competitive bidding process?

24 A I -- my understanding is an RFP is not a public
25 process because it provides proprietary information and

1 bidding information.

2 Q Okay. So if somebody wanted to find out --

3 MS. LACY: Your Honor, I'm not sure why the
4 competitive bidding process itself is relevant to the
5 question of ballot secrecy.

6 MR. CORRY: Well, this is cross-examination. And
7 it came up on direct examination. So I think --

8 MS. LACY: We didn't talk about competitive
9 bidding. We talked about the public process, the ability to
10 see the ballots last spring.

11 THE COURT: What's relevant about it? What do you
12 want me to infer from this?

13 MR. CORRY: Well, what I'd like to show is that
14 actually it's not a public and open process, that there is
15 secret proprietary information that nobody can obtain. And
16 nobody -- and people have tried to obtain it and have not
17 been able to obtain it.

18 THE COURT: Therefore?

19 MR. CORRY: Therefore, the system -- the system is
20 flawed because it's secret, it's not open to the public.

21 MS. LACY: Your Honor, we're discussing a Colorado
22 Open Records Act that recognizes trade secret privileges.
23 We don't control that.

24 MR. CORRY: Well, they testified to it on direct,
25 so I was merely cross-examining on that. They were trying

1 to make it be this open and good and everybody is happy type
2 of process, and I don't think it was. It certainly wasn't
3 that.

4 THE COURT: Totally irrelevant to the issues I
5 need to decide.

6 MR. CORRY: Okay. I'll move on then.

7 Q (By Mr. Corry) Ms. Salas, when were you first told
8 of the problem with Boulder's new system in regards to
9 Article VII section 8 of the Colorado constitution?

10 A Can you tell me -- could you read that Article to
11 me, please?

12 Q Sure. That's the Article that governs secrecy,
13 confidentiality in voting.

14 A We -- we had discussed that. We had been aware of
15 the sequential number. We had requested from the Secretary
16 of State's office the -- we requested not to associate a
17 ballot stub with the voter.

18 We had decided that -- we made a determination
19 that had we put any of the sequential numbers in the voter
20 registration or the voter system which would be similar to
21 putting the stub on, number on, we did not want to do that.
22 We felt that that would be a violation of the voter secrecy.
23 So we do not associate any of those numbers with a voter.

24 All we do is put in the check for if they received
25 one ballot, two ballot, or third ballot. Because by law

1 they can only receive three ballots. If they failed to vote
2 after the third ballot they are not to receive an additional
3 ballot.

4 Q Let me ask the question again. When were you
5 first told or when did you first hear of the possible
6 complaints?

7 A We were questioned after the primary election.
8 And we were very open. We had been very open about the
9 sequential number. We've never hidden that.

10 Q When were you questioned after the primary
11 election?

12 A They just asked if there was a sequential number.
13 That was the only time that we had been questioned about it.
14 One newspaper reporter did print their sequential number in
15 the paper, but there was no access to the ballot. We do not
16 allow the images or any of that information to be public.

17 Q So you don't recall any complaints you received
18 before the primary election about this?

19 A Not complaints, sir. There may have been
20 questions regarding the sequential numbers.

21 Q Those came from Boulder County voters, those
22 questions?

23 A There may have been a few. There were not --
24 there were not that many, sir.

25 Q Okay. And was there any -- did they have any way

1 of knowing that there was going to be a serial number on
2 there until they went and voted?

3 A It was very public. We showed them that, the
4 sequential number. We talked about it during our hearings
5 that that was used for ballot management.

6 Q And this was originally intended by your office to
7 be used -- this system to be used only for absentee ballots;
8 correct?

9 A Only all mail ballots, any type of paper-based
10 system.

11 Q So originally your office did not contemplate
12 using this for election day normal show-up voting; right?

13 A We would have, sir, because by statute the DREs
14 were only required one per precinct. We did look at those.
15 We weren't sure how our review committee would react to the
16 DREs. That's why we brought a review committee, because
17 they would either hate them or love them. That's why we
18 didn't make the determination on the DREs. The review
19 committee liked the Hart system. They liked the paper-based
20 system.

21 Q Okay. Now, did the DREs -- what are you referring
22 to when you say DREs?

23 A Direct record electronic recording. As I stated
24 earlier it's very similar to the ATM machines that you would
25 use.

1 Q Right.

2 And but as part of this process you testified to
3 the County Commissioners, the Boulder County Commissioners
4 that the ballots would have a stub, didn't you?

5 A I don't remember us saying that, sir, because we
6 were concerned about that. So we addressed that we would
7 talk to the Secretary of State's office about that. And we
8 did contact them and get a dispensation from the Secretary
9 of State's office on the Ballot Now system not to require us
10 to have a stub on the system.

11 Q So you don't recall telling the Boulder County
12 Commissioners that these ballots on election day voting
13 would have a -- a -- a stub?

14 A I don't remember, sir.

15 Q But it's possible you might have told them that?

16 A It's possible I may have.

17 Q Okay. But why did you change your mind then?

18 A Because as with any elections you look at and you
19 change procedures based on what you feel is the best for the
20 election process.

21 And as you look -- because it is a new system and
22 we were looking at the system, you make determinations about
23 what you think will best suit the needs of the citizens, the
24 best secrecy for the citizens.

25 You -- anytime you have a new system you're not

1 aware, or as you go through you think this will work based
2 on previous experience. But you have to change, you have to
3 modify. Just as laws change, we have to change also.

4 Q Wouldn't it be better then given that you value
5 citizen input, wouldn't it be better if Hart InterCivic were
6 to open its system, open its technology to the public so it
7 can look at this technology instead of it being proprietary?

8 A Sir, I'm here to discuss the sequential number and
9 not the proprietary information. I don't think that the
10 proprietary information really has to do with the secrecy of
11 the sequential number.

12 Q Right. But my question is wouldn't it be better
13 if Hart just opened its system so everybody could look at it
14 and let the sun shine in?

15 A I can't speak to that, sir.

16 Q But why can't you? You selected the Hart system,
17 didn't you?

18 MS. LACY: Your Honor, relevance.

19 THE COURT: What's relevant?

20 MR. CORRY: Well, the relevance of this is that
21 she has testified under their system that they have these
22 serial numbers are required, the system won't work without
23 these serial numbers. And basically her position is just
24 trust us, it has to be that way.

25 Whereas, we've got people who would like to take a

1 look at this technology, who would like to take a look at
2 this system and it's closed. They're not letting us do it.
3 So I think it's --

4 MS. LACY: Your Honor, it's beyond the Clerk and
5 Recorder's control, access to the system.

6 THE COURT: What's possibly relevant about this in
7 the context of why we're here today?

8 MR. CORRY: Because her testimony is that the
9 serial number is required under their system, but then we
10 can't assess how it's required. They're just -- the
11 government is asking us to trust them essentially without
12 opening its system up to public scrutiny. It's a secret
13 system. We don't have --

14 THE COURT: But that doesn't go to the issue of
15 whether or not these -- the issue, the narrow issue here
16 today is whether or not those things, those bar codes or
17 whatever they are, are on -- is it possible for somebody to
18 tie that to a specific person, voter.

19 So all of this stuff about different technologies
20 and this technology is not as good as some other, I don't
21 care. It's not relevant to this issue.

22 MR. CORRY: I don't think plaintiffs are saying
23 one technology is better than another technology because we
24 can't -- because we don't even have this technology, we
25 can't even look at this technology.

1 MS. LACY: Your Honor, Clerk and Recorder
2 addressed exactly the question as to why the sequence
3 numbers are on the ballots. She requested them of the
4 vendor -- and why the bar codes are on the ballots. She
5 already addressed that.

6 MR. CORRY: I don't think she has. Let me ask her
7 then.

8 Q (By Mr. Corry) Why are the bar codes and serial
9 numbers on the ballots?

10 A For ballot management.

11 Q Okay. And why do you need those bar codes and
12 sequential numbers for ballot management?

13 A As I stated earlier, because they are based on
14 sequential 1, 2, 3 page numbering. A packet is associated
15 to a voter, not associated to the voter in the sense that
16 it's associated to your name, but one packet of three pages
17 of one ballot is given to a voter to go vote. That needs to
18 be kept together in order for that ballot to count.

19 Page 1 counts as the vote cast to show that one
20 voter has voted. In order for the rest of the ballot to be
21 counted it needs to be kept in the sequential and page
22 number order so that it can say this is a packet of ballot.
23 It's supposed to have four pages. Here are the four pages.

24 If the other pages are separated from that, it's
25 not saying that that vote has been counted because the first

1 page which indicates as a vote cast is not there.

2 We would then have to take -- if a voter only
3 casts the two pages and didn't vote the first ballot, the
4 first page, we would have to go then and get a whole new
5 packet. The judges would have to leave the first page blank
6 because they would have no idea how the voter intended to
7 vote. They would have to leave it blank. And then they
8 would have to replicate the following pages.

9 Q But it is possible to manage and count votes
10 without serial numbers on the pages that the voter votes,
11 isn't it?

12 A If -- as I said earlier, if a 74-year-old judge
13 drops those ballots and they go spewing all over the place,
14 there is no way for us to put those ballot packets together
15 so that the system would run it through. We would run it
16 through and it would reject because --

17 Q I'm not sure I understand what's wrong with a
18 74-year-old judge by the way.

19 A I'm not saying that -- or any judge could drop it.
20 I apologize. It's just that the average age of our judges
21 are 74 years old. These ballots are very large, they're
22 very --

23 Q Are you saying these people are incompetent?

24 A I am not saying that. I apologize.

25 THE COURT: Just wait until you get over 60.

1 THE WITNESS: Because that was not -- that was not
2 my intent is to insult them. But that is a known fact in
3 Boulder County that we have a lot of older judges that are
4 working.

5 These ballots are very large. They're very
6 difficult for a judge to grab and pull out. And even if it
7 was a young person your age and you -- and you dropped it,
8 it would be very difficult for us. We would spend all of
9 our time running them through the system going okay, there's
10 the sequential such and such, and it looks like 15 pages
11 down are the other two pages that go to that.

12 We would have to sit there and put them back
13 together, or we would just have to say okay, we hope that
14 these go together, but we'll replicate every one of these
15 ballots so that they're in a packet order so the system
16 could run it through.

17 Q (By Mr. Corry) Okay. But I guess what I'm saying
18 is it is possible. In fact, Boulder has done it in the past
19 in fact where you don't have to have the serial number on
20 the ballot itself to manage the ballots; right?

21 A But there were other bar codes on the punch card
22 systems. There are bar codes on optical scan systems.

23 Q But that was all on the stub that got torn off of
24 the ballot; right?

25 A I can't address it if I don't know. I can't

1 remember what the punch cards looked like.

2 Q Well, you've been Clerk and Recorder now for what,
3 two years?

4 A We didn't use the stubs when I -- or the punch
5 cards, sir, when I was here.

6 Q And --

7 A So I don't -- I don't -- I can't remember. It's
8 been a while. When I was a clerk in Erie for four years we
9 were statutory, we ran our own elections. We did not do
10 coordinated elections with the County.

11 Q Right. And you didn't have serial numbers on
12 those ballots, did you?

13 A They did have -- they did have bar codes on them
14 because they were optical scans.

15 Q Right. But you didn't have serial numbers visible
16 to the human eye, did you?

17 A No. But also those systems were precinct-based
18 counting systems. That system would allow you to take that
19 ballot, run it through, it would kick that ballot out and
20 tell that judge -- that voter that you over-voted so that
21 judge could immediately -- or that voter could correct that.

22 But because we -- our people did not want any kind
23 of electronic voting systems at the precinct level, we don't
24 have that opportunity. So when we have it we have to do
25 ballot management. We have to look at the ballots. We have

1 to be able to find that ballot to see voter intent.

2 If you had a precinct-based optical scan system,
3 you over-voted it or whatever, the system would
4 automatically kick it out. And then the judge would tell
5 that voter you have the option to either request a
6 replacement ballot or the system will accept it as it is.

7 We don't have that at the precinct level. People
8 are just filling out papers, depositing it in a ballot box.
9 We have to go then and look at voter intent in order for us
10 to find these ballots or blank ballots to look at them we
11 would have to run it through and go okay, I -- this looks
12 like the first page. The rest of the document looks like
13 it's 56 pages down below. We need to go down 56 pages and
14 hope those are the two pages that go together and put them
15 together so that it will count.

16 Otherwise we have to go through a precinct-based
17 count and just say well, here is a 1, here is page 3, here
18 is page 5. Now let's duplicate that entire ballot so it
19 will have sequential numbers so the system will count it.

20 Q Okay. Let's talk a little bit about voter intent.
21 When you optically look at a ballot visually there are many
22 times, many opportunities for an employee of your office to
23 look at a ballot to determine how a person actually voted;
24 right?

25 A They could do that on the punch card systems

1 because on the punch card systems there was a duplication
2 and inspection team. And those people looked at every one
3 of those ballots to make sure there wasn't a bent corner,
4 there wasn't damage to the ballot.

5 Q On those punch card systems there was no serial
6 number on the ballot?

7 A Not that I'm aware of, sir.

8 Q Okay.

9 A I can't address that.

10 Q On the new ballot there are -- there will be many
11 opportunities for individuals from your office to look at
12 those ballots themselves; right?

13 A But you have double people working. If -- judges
14 are taught if you see somebody sitting there and spending a
15 lot of time on a ballot looking at it and inspecting it,
16 checking it over -- it's normally a pretty 1, 2, 3, 1, 2, 3.

17 Q My question is there are many opportunities for
18 somebody to look at a ballot; right?

19 A Yes, sir, there are many opportunities through any
20 process.

21 Q Somebody who does a write-in candidate, for
22 example, every single one of those ballots where the
23 write-in candidate is written in will have to be looked at
24 by human eyes; correct?

25 A That's correct.

1 Q Okay. Every single ballot where strays -- there's
2 a stray mark on the ballot, those will have to be looked at
3 by human eyes, won't they?

4 A Not necessarily, sir. Depends on where that stray
5 mark is at.

6 Q But there are many times when those ballots will
7 have to be looked at by human eyes; correct?

8 A If somebody marks off into the bar code section
9 that will not be looked at. It will be kicked out of the
10 system.

11 Q Okay. And then that ballot will be counted
12 provisionally; correct?

13 A That ballot will have to be duplicated, sir.

14 Q Okay. And that then it will be counted
15 provisionally if somebody marks off --

16 A No, sir.

17 Q -- the serial number?

18 A It is counted as a regular vote.

19 The only time you do a provisional ballot is if
20 somebody comes in, doesn't have their ID, they're not on the
21 registrations, they voted at a -- which is new laws, they
22 voted at a voter registration drive and they aren't showing
23 up, they don't provide a form of ID or they moved from out
24 of state within the state and they're allowed to vote only
25 for the presidential election, that is the only time

1 provisional ballots are used. We do not use provisional
2 ballots if a ballot is damaged, sir.

3 Q Okay. So if somebody comes in and crosses off
4 that serial number and the bar code that is on their ballot,
5 that ballot will be counted along with every other ballot in
6 this election; right?

7 A We would have to duplicate that ballot, sir, in
8 order for it to run through the system and be counted.

9 Q That person's votes will still be counted; right?

10 A Yes, sir.

11 Q All right. They won't be counted even in a
12 different category. They'll be counted with all the other
13 voters at the same time; right?

14 A That is correct. May not be exactly with that
15 particular precinct as it's running through because that
16 ballot then has to be duplicated. We have to track the
17 ballot that's been replaced, we have to write down the
18 sequential numbers from the first ballot, show that we
19 replicated just like we do on the stub system, re-write down
20 the stub number that's associated to the replacement ballot.

21 Q And this new ballot that you're talking about,
22 when somebody crosses out their old serial number you said
23 that the new ballot is going to have to be filled out by
24 hand. That is going to be a different serial number, isn't
25 it?

1 A That is correct.

2 Q The voter is not going to know what that serial
3 number is, is he?

4 A That is correct.

5 Q Okay. So -- and how can you testify that it's
6 required that these serial numbers be on the ballot if you
7 can fill out a ballot and then cross off the number -- if a
8 voter can fill out the ballot and cross off the number and
9 then still have his ballot be counted -- and still have his
10 votes be counted?

11 A Because, sir, if you had thousands of judges -- or
12 thousands of voters doing that, we would never get our
13 election results in. We would have to --

14 Q Never?

15 A Not never. But it would take us weeks and months
16 to do this because we would have to replicate every
17 ballot --

18 Q So it sounds like --

19 A -- that was crossed off.

20 Q It sounds like what you're saying is there's a
21 flaw in the Hart InterCivic system, the system is imperfect?

22 A No, I'm not saying that.

23 Q And it can't handle large numbers of people
24 crossing off the ballots, the system --

25 A No, I'm not saying that, sir. I'm saying that the

1 system was designed to track ballot management with the bar
2 codes and the sequential number. This is part of the
3 system.

4 What I'm telling you is if we damage the bar code
5 it makes it difficult for us to utilize the system as it was
6 designed and as it was approved, as it was certified by the
7 State, and as it was inspected by independent reviews.

8 Q So what you're saying then is the system is
9 designed without contemplating free thinking individuals who
10 decide to put marks on their ballots on their own volition?

11 A Sir, in 1979 I think it was one of the other
12 counties had a multiple page punch card system. They did
13 not have any kind of sequential number on there. They ended
14 up I think going to court because they couldn't do -- their
15 ballot management was impossible. They could not get their
16 counts to match because there was no way for them to verify.

17 This is part of the ballot management process.
18 This has nothing to do with identification of the voter.
19 This is only utilized for ballot management.

20 Q You testified that Boulder County was one of the
21 last -- the last election there, was one of the last
22 counties to certify its results?

23 A Yes, sir.

24 Q Is it more important to be accurate or more
25 important to be fast?

1 A It's more important to be accurate, sir. And
2 that's what I've always stated. When people ask is Boulder
3 County going to be last, I said yes, we are because it is
4 more important for us to make sure that our counts are
5 accurate.

6 We take the time, we take the process. We don't
7 have precinct-based counts, optical scan systems where the
8 counting is being done on the precincts. We are doing it
9 centrally located so poll watchers can watch. We have
10 judges there to verify the information and to follow the
11 process and procedures that are in place.

12 Q So then there's no problem in your mind if a voter
13 does decide to cross off that serial number?

14 A I am not going to state, sir.

15 Q Because accuracy is more important than speed?

16 A I am not going to state that I agree one way or
17 the other whether that is okay.

18 Q So you don't have a position one way or the other?

19 MS. LACY: The clerk has already testified as to
20 exactly what would happen if a voter marks off the serial
21 number.

22 THE COURT: Sustained.

23 MS. LACY: What that means for her office.

24 THE COURT: The objection is sustained.

25 Q (By Mr. Corry) Okay. Now, if somebody does go

1 mark off their serial number from their ballot and you catch
2 them in the process of doing it, they're not going to be
3 prosecuted in any way, are they?

4 A We would report that, sir.

5 Q Who would you report that to?

6 A We would report that to our DA's office.

7 Q And --

8 A And we would also contact the Secretary of State's
9 office to make a determination.

10 Q Would you recommend to the DA that that person be
11 criminally prosecuted for marking off the serial number on
12 his ballot?

13 A I would discuss that with our attorney, sir,
14 whether that falls under prosecutable.

15 Q Okay. And so you're going to tell the DA on some
16 voter who crosses off the serial number then?

17 A Sir, if a voter casts a ballot and they crossed
18 off the bar code, there's no way that I'm going to know who
19 that voter is.

20 Q Okay. But if he doesn't cross off the serial
21 number is there a way for you to know who that voter is?

22 A No, sir. I don't sit there and I'm not watching.
23 We have thousands of voters that come through. These judges
24 are so busy, they're not sitting there looking at the
25 ballots and looking writing down any information because

1 they have thousands of voters standing in line waiting.

2 Q Can we keep it on the issues for a second since
3 you testified about that.

4 So every ballot that you receive that the serial
5 number is crossed off, are you going to give that ballot to
6 the District Attorney, or you're only going to give the ones
7 to the District Attorney that you know the voter?

8 MS. LACY: I don't know why this is relevant
9 either.

10 THE COURT: It's not relevant. I'm not going to
11 decide that either.

12 MR. CORRY: Well, this is what we've asked for in
13 our application for --

14 THE COURT: Well, what you've asked for is that
15 you want to be able to tell the voters that -- that you want
16 to be able to tell them that if they cross off this whatever
17 it is they cross off that their vote will still count. I'm
18 not going to decide that.

19 MR. CORRY: And what --

20 THE COURT: I'm deciding whether or not the idea
21 of having these things is unconstitutional because you'll be
22 able to identify the voter. That's what the issue is here.

23 There is going to be -- not this judge now, I
24 don't think any other judge is going to say right now under
25 these circumstances whether or not the vote counts if you

1 cross off the bar code.

2 MR. CORRY: Well, that's not what we're asking.
3 What we're asking is declaratory relief.

4 And this is a classic case of where declaratory
5 relief is mandated because we just heard testimony from this
6 witness that she's going to contact the District Attorney of
7 this County if she knows that somebody has crossed off a
8 serial number.

9 And the District Attorney is not a civil lawyer.
10 I mean, he's a criminal -- or she rather in this County is a
11 criminal prosecutor. And that is the classic case of where
12 injunctive or declaratory relief is merited is my clients
13 have predictability as to whether their conduct is in fact
14 criminal or not.

15 THE WITNESS: There would be no --

16 THE COURT: I don't know whether it is or not.
17 I'm not going to decide. That issue is not here.

18 MR. CORRY: It was briefed in our -- in our
19 application that's --

20 THE COURT: Well, it's just not what judges do.
21 We find facts and apply the law. And occasionally we
22 declare things, but it's usually in a private context, not
23 in a public context. And I'm not going to tell a voter
24 whether -- I don't know the answer to that.

25 MR. CORRY: Okay.

1 Q (By Mr. Corry) Well, let's talk a little bit more
2 about what cases you're going to --

3 THE COURT: Just a minute. Just a minute. I'm
4 going to recess this case and take up a case that I didn't
5 finish this morning because I promised these people that
6 this wouldn't take very long and I would finish their trial
7 management. I want to do that.

8 And we'll try to administer -- I think the reason
9 I had time today was because the five-day trial I was
10 supposed to be in, the defendant took bankruptcy, and that
11 allowed this to happen today. I think I have not filled out
12 tomorrow yet.

13 But I would like this case to be in recess until I
14 can finish. The lawyers were here most of the afternoon.

15 Would you go find them so -- I cannot make them
16 have to come back yet again because they were here from
17 9:00 or 10:00 and we didn't finish.

18 And so I'm going to take a recess, finish that. I
19 don't think it will take long, but I've been wrong before.
20 So let's be in recess.

21 (A recess was taken.)

22 THE COURT: I believe the witness Salas remains on
23 the stand. Am I correct?

24 MS. LACY: Yes, sir.

25 Q (By Mr. Corry) You understand you're still under

1 oath; right?

2 A Yes.

3 Q I left off with you discussing how you were going
4 to be referring people to the District Attorney if you knew
5 the person marked off their serial numbers. And my next
6 question was going to be on what grounds would you be
7 referring these people to the District Attorney?

8 A I said I would contact our Secretary of State's
9 office and I would contact our attorney and make a
10 determination.

11 Q And on what grounds would you believe that marking
12 off serial numbers was improper?

13 A If the ballot had been -- I can't really make a
14 determination. That's why I would have to contact the
15 Secretary of State's office and talk to our attorney to make
16 a determination whether there was any issue. I'm not an
17 attorney.

18 MS. LACY: My understanding was that the judge
19 indicated he didn't want to hear about criminal matters
20 relating to crossing out serial numbers and whether -- and
21 what the clerk's office might do whether -- or would be
22 required to do under law.

23 THE COURT: Well, I guess I'm letting him make a
24 record on something. I don't think it's relevant to what
25 I'm going to do. I mean --

1 MR. CORRY: I can move on.

2 Q (By Mr. Corry) Did you talk to the Secretary of
3 State about this previously?

4 A About what, sir?

5 Q About what might happen if somebody were to mark
6 off the serial number on their ballot? You've already
7 communicated with the Secretary of State about this; right?

8 A We talked about whether -- when we met with the
9 other parties regarding if it would be recommended for us to
10 make a statement regarding the crossing off of the code.

11 Q And the Secretary of State told you that that
12 would be illegal; right, for somebody to mark off the serial
13 number on their ballot?

14 A That she would not recommend for us to make any
15 sort of statement.

16 Q Okay. And the reason that the Secretary of State
17 told you that is because it would be putting an identifiable
18 mark on a ballot?

19 A I cannot speak on behalf of the Secretary of State
20 what her reasoning was, sir.

21 Q But your understanding of what the Secretary of
22 State told you was that it was because it would be putting
23 an identifiable mark on the ballot; right?

24 MS. MIRBABA: Objection, speculative, and this has
25 been answered.

1 THE COURT: Sustained.

2 MR. CORRY: Well, the question was about her
3 understanding.

4 THE COURT: Well, that's a little bit like another
5 question they now teach in law school that's irrelevant is
6 would it surprise you to know. And you know, that's not a
7 relevant question on any issue what surprises the witness.
8 And this question is like that one. Move on.

9 Q (By Mr. Corry) But you yourself would not believe
10 that it's illegal for anybody to mark off a serial number on
11 a ballot; right?

12 MS. LACY: Your Honor, she's testified that she
13 doesn't have a position, she would have to check with her
14 attorney and get guidance from the Secretary of State who is
15 charged with interpreting the statutes.

16 THE COURT: Sustained.

17 Q (By Mr. Corry) Are you familiar with as Boulder
18 County's chief election official that sometimes voter
19 intimidation can occur?

20 A I don't know of any direct intimidation. I've
21 never personally had anyone come to me to say that.

22 Q You never heard of a case in all of your years of
23 service where one voter tells another voter you better vote
24 this way or else? Never heard of that?

25 A I may have read it or heard it, but I've never had

1 anything directly with myself or anybody has addressed that
2 with me.

3 Q But you agree that it is a possibility; right?

4 A There's possibilities for anything.

5 Q And the state legislature has passed laws on that
6 issue; right?

7 A Yes.

8 Q Okay. Now, you were asked by your lawyer --

9 THE COURT: Does that apply to husbands and wives?
10 I suspect that my wife would vote the opposite if I told her
11 who to vote for.

12 MR. CORRY: But if there's a serial number --

13 THE COURT: Well --

14 Q (By Mr. Corry) Now, you were asked by your counsel
15 if it's possible for anyone to know how another person voted
16 under this system, but you didn't give an answer to that
17 question. So I'm going to ask it of you again. Is it -- is
18 there any way to identify the ballot as the ballot of the
19 person casting it?

20 A There is nothing associated to the voter. If you
21 as the voter want to write down your number there's no way
22 that that person -- there are eight scanners going at one
23 time.

24 Q So?

25 A It would be almost impossible for them to have

1 access to that ballot at that particular time to be able to
2 see that ballot. You would have to -- there are eight
3 different scanners as I told you earlier running at one
4 time.

5 Q Right. So you said almost impossible. That
6 doesn't mean --

7 A There is no perfect voting system out there, sir.

8 Q Okay. So it is possible then to identify the
9 ballot as the ballot of the person casting it; right?

10 A I didn't say that. I just said that if the voter
11 kept the -- it would be the voter who kept their sequential
12 number.

13 But if the voter doesn't publish that information,
14 doesn't provide that information, no one knows that
15 information. And it's almost impossible, sir, for anyone to
16 be able to know exactly what ballot is going to be viewed on
17 which system and scanned through what system.

18 Q You're familiar that there are poll watchers --

19 A Yes, sir.

20 Q -- at sites; right?

21 A Yes, sir.

22 Q And those poll watchers can vote themselves;
23 right?

24 A Can vote themselves?

25 Q Right.

1 A Are you talking about at a polling location, sir?

2 Q Right.

3 A Correct.

4 Q They can vote at their own polling location where
5 they're a poll watcher so they can be the first one in line
6 on a given day; right?

7 A I would assume.

8 Q And that poll watcher is going to know their own
9 serial number, aren't they?

10 A It -- I would -- it would be their determination
11 whether they kept their number.

12 Q Okay. And you testified earlier these are
13 sequential serial numbers?

14 A But you have multiple voters coming through at
15 different times. And one voter may not complete their
16 paperwork before another voter. So it is not necessarily
17 given out in sequential order.

18 Q So if there's a line of ten people, poll watcher
19 is number one in the line, then reasonably the nine people
20 behind that poll watcher are sequential serial numbers
21 behind that poll watcher; right?

22 A It may not be exactly in sequential. The fifth
23 person could move forward and grab a ballot. The sixth
24 person could move forward. So you don't know what person is
25 getting what ballot.

1 Q If you're assuming that can be somebody would cut
2 in line of another person; right?

3 A If their paperwork was done, they ask for the next
4 voter.

5 Q Okay. But if everything works formally and
6 there's ten people in a line and the poll watcher is number
7 one and the nine people behind that person if it's all
8 sequential would be getting sequential serial numbers behind
9 that poll watcher's serial number; right?

10 A In the primary election, sir, they were randomly
11 given out. They were not given out in sequential order.

12 Q But you print the ballots with sequential serial
13 numbers. You already testified to that, didn't you?

14 A That -- that -- are you talking about at the
15 polling location?

16 Q Yes.

17 A That is correct. They are printed with sequential
18 numbers on them.

19 Q Okay. So if a poll watcher were to note their own
20 serial number -- and then another duty of the poll watcher
21 is to write down all of the people who vote; right?

22 A The poll watcher is there to verify and see if
23 there are any challenges.

24 Q It's -- and it's perfectly legal for that poll
25 watcher or poll worker to compile a list of people who have

1 voted on election day; right?

2 A That is correct.

3 Q So that person could note their number and then
4 note the nine people who voted after that person; right?

5 A But we give them the sign-in slips. They're not
6 kept in any order. They're put together, and as people come
7 through the people that are poll watchers rifle through,
8 because it is not in alphabetical order. They go through
9 and check it off. Those are not kept in any kind of
10 specific order, sir.

11 Q What are not kept in any specific order?

12 A The sign-in slips. We use sign-in slips for the
13 voters for the poll watchers so that they have something to
14 verify who has cast a vote. We do not give them the poll
15 book.

16 And so as those come through they're just compiled
17 and put in a box. And when a voter or poll watcher wants to
18 come in and watch, wants to check off of their list who
19 voted, those are not kept in one, two, three order as the
20 number of the voter has come through.

21 Q Right. But what I'm saying is a separate list
22 could be kept and it's perfectly legal and there's nothing
23 to prevent any poll watcher from keeping a sequential list
24 of every single person who votes that day; right?

25 A If they were assuming that they were getting the

1 correct -- yes, they could. They could.

2 Q There's nothing that your office can do to stop a
3 poll watcher from listing every single person in order who
4 votes that day; right?

5 A No.

6 Q And then those serial numbers as you testified to,
7 they're lined up in sequential order; right?

8 A It depends on how the voter comes through. They
9 could have three ballots laying out, and one could be passed
10 out prior to the other.

11 Q So then is it your testimony that there's no
12 possible way that that list could be kept and matched up
13 with serial numbers and then we would know how each and
14 every single one of those serial numbers voted?

15 A I can't -- I can't address that, sir.

16 Q Why can't you address that? You're the chief
17 elections official of Boulder County.

18 A I can't. I cannot tell you for sure that any
19 voter that went in or poll watcher that went in would be
20 able to track and make sure that every vote that came in,
21 that every sequential number was the assigned sequential
22 number to that voter, sir.

23 Q So it under -- so like you have no opinion one way
24 or the other on this?

25 A The sequential number is used strictly in our

1 portion for administering the ballot management. They are
2 given out as a voter approaches. It is not necessarily that
3 the voter comes one, two, three, one, two, three.

4 You can have one voter who is taking longer and
5 may have their ballot, another voter comes through and goes
6 and takes the ballot sequence prior to the other ballot
7 number.

8 I can't tell you. I can't give a definite answer
9 that yes, that person could sit there and he would know
10 every ballot number for every voter that came through. I
11 can't tell you that.

12 Q You can't tell me that one way or the other?

13 A No, sir.

14 Q Okay. Now, when these voters leave their votes,
15 you said their votes are projected up on a screen for all to
16 see in your office; right?

17 A When who leaves?

18 Q After your -- if you're counting the votes and a
19 write-in candidate is listed, that vote is then projected up
20 on a screen, isn't it?

21 A Yes, sir.

22 Q And how many people see that?

23 A There are judges and there are our workers in
24 there. They all take an oath. They all take an oath that
25 they are not to provide or disclose any voter information.

1 They're all sworn under oath.

2 Q And that projected image includes that serial
3 number on the side of the ballot, does it not?

4 A Not of every ballot, sir. Only ballots that may
5 have an issue.

6 Q Okay. So every ballot that a person votes for a
7 write-in candidate, for example, the serial number and the
8 ballot is projected up on a screen; right?

9 A Ballots are projected, yes, sir.

10 Q And that projection shows exactly how each person
11 voted for which candidate; right?

12 A Very quickly. They hit on the issues that are a
13 problem. It highlights the area that has -- if there's an
14 over-vote it goes straight to the over-vote.

15 Q Okay. And it's slow enough for you and your
16 workers and these people that you've testified to -- to
17 identify who whose name they wrote in for the District
18 Attorney race for example?

19 A But that screen blows up and covers the rest of
20 the ballot, sir.

21 Q But you'll know that person who they voted for,
22 and you'll be able to match that up with a serial number;
23 right?

24 A I -- I'm not going to be able to associate that
25 serial number with a voter. I'm going to associate that

1 serial number with that ballot.

2 Q Okay.

3 A Not with a voter.

4 Q And this data is also compiled into a centralized
5 location; right?

6 A That data is -- you will need to speak to Hart
7 InterCivic regarding that. I am not going to be able to
8 testify as a witness about the process of the system.

9 Q Okay. But you understand as the person who
10 selected Hart InterCivic to do this system, you understand
11 that the data is compiled and kept in a centralized
12 location; right?

13 A It is put onto an MBB. It is not part of the
14 system.

15 Q So as part of that data somebody could find out
16 cross correlations; in other words, how people voting on
17 certain ballot initiatives and then what candidates those
18 same voters voted for; right?

19 A No, sir, because when the tally is done the
20 sequential numbers are no longer associated with that count.
21 So there's no way that you could go and say this ballot
22 voted this way, sir.

23 Q So you don't have these digital images that are
24 projected and kept? You said that an individual copy of
25 each image is retained; right?

1 A I didn't say anything today about that at all,
2 sir.

3 Q Okay. So is an individual image of each ballot
4 kept?

5 A Digital image is flashed. The information from
6 the tally is kept, and then it is removed from there.

7 And you would need to speak -- I can't explain the
8 entire process to you. Hart would need to address that
9 information. But the tally it is not tallied on that
10 system. It is separate from that system. It is tallied at
11 another location on another system.

12 Q Another location. Which other location?

13 A Not another location. Like from here to the wall,
14 sir.

15 Q Like from there to the wall. Where is this other
16 location?

17 A It's within the same counting room, sir. So a
18 scanner is here, the tally is done -- because we have no
19 connectivity, the systems are not connected in any way, sir.

20 Q Which systems are not connected in any way?

21 A The scanning systems. Nothing is connected to the
22 internet, so we have to manually do our tallies separate
23 from the scanning system. It is not like the punch card
24 system.

25 The punch card system was connected to the

1 network. So as tallies were -- we were running the systems
2 through, the tallies were going up onto the website.

3 We do not do that because our systems are not
4 connected in any way. They are not connected to the
5 internet in any way. They are not connected to each other
6 in any way.

7 Q And have you ever been part of a re-count effort
8 in Boulder County?

9 A Yes, I have. Not for the County.

10 Q And what happens in a re-count situation? Those
11 votes are individually counted by hand, aren't they?

12 A No, they are not, sir.

13 Q How are they counted?

14 A The law requires that you count them the same way
15 they were originally counted.

16 Q And so they are once again flashed up on the
17 screen if there's any question about that individual ballot;
18 right?

19 A Yes, sir. Or you can look at the -- if there's a
20 question and the court requires it, you could look at the
21 paper ballot, sir.

22 Q So the court can step in?

23 A Because you have to run the original ballots
24 through the system. You don't just take the image or
25 whatever that you're thinking we have and running it

1 through. You have to re-scan those ballots through the
2 system.

3 Q Right. And the same ballots that you counted
4 visually being flashed up on the screen, you got to count
5 those again, don't you?

6 A The system would count it, yes, sir. And they
7 have to be resolved the same way they were resolved
8 originally.

9 Q Are these the new ballots that you filled out
10 again with a different serial number that you count for the
11 re-count? Are they the same ballots with the original
12 serial number?

13 A I'm sorry, sir, would you say that again.

14 Q Okay. You earlier testified that in certain
15 situations if somebody has marked off the serial number you
16 will take the ballot and fill out a brand new one with a new
17 serial number. Do you remember saying that?

18 A Yes, sir.

19 Q Okay. So in a re-count situation is it the new
20 ballot that you have already filled out manually with a
21 serial number -- a different serial number or is it the old
22 ballot where the serial number has been crossed off that
23 gets looked at again?

24 A It would be the ballots that we had duplicated,
25 sir, because we can't open up the ballots that have been

1 duplicated. We seal those. Those are put into an envelope,
2 they're sealed, they're secured. We can't go in and re-open
3 those ballots.

4 Q So it's the new ballots --

5 A Yes, sir.

6 Q -- that get re-counted in the re-count?

7 A Yes, sir.

8 Q And it's also the new ballots that have been
9 already projected up on the screen; right?

10 A The new ballots that have been projected?

11 Q Right.

12 A When, sir?

13 Q In the first count when you said you project some
14 ballots up on the screen to determine the write-in for
15 example.

16 A Yes, sir.

17 Q Let's say there's a re-count on the District
18 Attorney race and you have to re-count all the write-in
19 votes. So you're going to be looking at those on a screen
20 not once, but twice; right?

21 A You're talking about if we had to have a re-count
22 we would re-look at them. So you're counting that as the
23 second time we would look at them?

24 Q Right.

25 A Yes, sir.

1 Q And you -- you alluded to the fact that a court
2 could possibly order an individual re-count of the original
3 ballots; right?

4 A If the court ordered a hand count, is that what
5 you're saying, sir?

6 Q Yes.

7 A They can do that with any system, sir.

8 Q Right. And so with this system if the court
9 orders an individual looking at the original ballots and
10 individual re-count of those original ballots, you would
11 comply with the court order, wouldn't you?

12 A Yes, sir.

13 Q And courts have ordered that in the past, haven't
14 they?

15 A Yes, sir.

16 Q Okay. So that's another opportunity for these
17 ballots with the serial numbers to be looked at again, the
18 original ballots; right?

19 A Yes, sir.

20 Q Okay. Now, you testified that there's a digital
21 image of each of these ballots that goes into a computer
22 file; right? Did you testify about that?

23 A I did not.

24 Q Okay. Does -- is there an individual image that
25 goes into a computer file of each one of these ballots?

1 A It goes onto an MBB information only, pulls out
2 the information regarding the vote tally to take over to
3 tally.

4 Q What's an MBB?

5 A It's a mobile vote -- I can't even think. Mobile
6 ballot box is what it is.

7 Q Mobile ballot box. And you can manipulate that
8 data and pull out whichever particular race you want from
9 that MBB; right?

10 A Not off the MBB, sir. The reporting
11 information -- and I'm not an expert on this, sir, so you
12 would need to talk to Hart regarding those type of
13 questions. I can tell you that we can print reports, but I
14 can't explain to you exactly how that is processed.

15 Q But you do know what the --

16 A My staff who works on that on a regular basis
17 would be the one who could answer.

18 Q But you do know what the MBB can and can't do;
19 right?

20 A The MBB is a form to transfer information.

21 Q Okay. What do you mean by transfer information?

22 A Transfer information from the scanning system over
23 to the processing for tally.

24 Q Okay. So you can't really testify whether or not
25 that information can be manipulated and moved around and

1 used to examine particular races within races and that sort
2 of thing; right?

3 A I cannot.

4 Q Okay.

5 A I'm not an expert.

6 Q It may be used for that then. And if indeed that
7 information became public, that would be very valuable
8 information, wouldn't it?

9 A I mean, I -- and I guess what are you asking, sir,
10 whether the system -- any system in the past could report
11 various races.

12 Q Well, what I'm asking you, if there's any
13 incentive for somebody to take that data and use it for
14 other purposes, because that information would be quite
15 valuable for future candidates, wouldn't it?

16 A But that information is secured, sir. We lock all
17 that information up. We put it in sealed -- with sealed
18 numbers. We track that information. It's just not there
19 for public consumption, sir.

20 Q But you testified that it's in the possession of
21 Hart; right?

22 A No, sir, I did not say that.

23 Q Okay. Do you know who the programmers are for the
24 Hart system?

25 A Our staff does all the programming for the set-up,

1 the ballot sites. Our staff is -- we have a background
2 check through CBI for our staff that handles the actual
3 tally system. It is just not open to anyone off the
4 streets. We just don't have any judge come in.

5 Q But it could be open if this court were to order a
6 re-count, wouldn't it?

7 A The re-count would be based -- the re-count would
8 be based on us running those original ballots through, sir.
9 That other information would not be part of the re-count. A
10 re-count requires that you take the original ballots and you
11 count them through the same way that you originally counted
12 them through, which is the system. It would not have
13 anything to do with the other data, sir.

14 Q So it sounds like then that Hart has no access to
15 this system and will not be involved with the counting of
16 the votes at all?

17 A Hart is there for consulting purposes if we have a
18 system problem.

19 But they also take an oath, sir. But they are --
20 our staff is the one when manages the elections. Hart does
21 not do any of the tallying. Hart does not run any of the
22 scanning equipment. Hart is there for consulting purposes
23 if we have any issues that we need to address.

24 Q So if a problem arises Hart gets involved on
25 election day; right?

1 A Yes. But we -- they are there with staff. They
2 are there in front of all the poll watchers, sir. It is all
3 in the eye of the poll watchers. It is all there in front
4 of our judges. They don't -- they aren't -- everything is
5 very visible, sir.

6 Q And Hart is not on your staff though?

7 A No, sir.

8 Q They're a private for-profit company?

9 A As are all of the vendors, sir.

10 MR. CORRY: Okay. Would you just give me a
11 second?

12 (Pause.)

13 Q (By Mr. Corry) Okay. So you consult with Hart
14 about problems that come up, and they're not on your staff.
15 And yet, they're privied to possibly how people voted if you
16 call them in to look at ballots; right?

17 A No. They don't handle any of the ballots, sir.

18 Q But you said they take an oath; right?

19 A They are a vendor that -- just like any other
20 vendor that works with any other county clerk, sir. They
21 are required by law not to -- just like any other person,
22 not to -- that are in the process in the counting room that
23 if there are any issues that they address, they are under
24 oath also, sir, that they are not to provide any
25 information.

1 They do not handle the ballots. They do not do
2 any of the tallying. Our staff is the one who does all of
3 the processing.

4 Q And this -- this data existing on your MBB system;
5 right?

6 A On our MBB system?

7 Q Right. Your mobile ballot box is the -- all of
8 the data that you compiled remains on the mobile ballot box?

9 MS. LACY: Your Honor, in the interest of time I
10 think that Mr. McClure would be much more equipped to answer
11 some of these questions about how the Hart system works, the
12 Ballot Now system.

13 MR. CORRY: That's fine. No further questions.

14 THE COURT: Any redirect?

15 MS. LACY: Just a few questions, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. LACY:

18 Q Ms. Salas, do you know under what circumstances a
19 re-count occurs in Colorado?

20 A If it's less than one-half of 1 percent of the
21 race, then it would be required by law, one-half of
22 1 percent. If a candidate wishes to have a re-count, then
23 they could request one. But they would have to pay for the
24 re-count out of their pocket.

25 Q So it's only a situation where the margin of

1 victory in a particular contest is less than .5 percent --

2 A Yes.

3 Q -- of the total?

4 A Yes.

5 Q Thank you.

6 Does the scanning occur in the same or a separate
7 venue from the polling place?

8 A Separate.

9 Q Counsel seemed to be suggesting that the judges at
10 the polls would be keeping their own separate lists of
11 voters. How likely would that be to happen?

12 A Not likely at all. The judges are so very busy.
13 They also take an oath, sworn oath that they would not
14 disclose any of the votes cast or any votes prior to
15 election. So they are sworn to secrecy that they are not to
16 disclose any voting information.

17 Q Would any other judges be likely to note that a
18 judge was acting oddly?

19 A Yes. Judges go through intense training sessions
20 with folks that are trainers. They tell them that they are
21 not supposed to talk to any of the voters about you need to
22 do this or you need to do that with your ballots or look at
23 the voters' ballots. They're very aware of voter privacy
24 and voter secrecy, as are the voters.

25 Q I want to confirm your earlier testimony. Did you

1 say that a list of names that poll watchers would be making
2 would be off a non-sequential list of voters as they came
3 in?

4 A That is correct.

5 Q Are there different judges and election officials
6 at the scanning site as there are then at the original
7 polling place or the same people?

8 A No, they are different judges that work on
9 election day. They in at 6:00 in the morning and may not
10 get completed until like 9:00, 9:30 at night. And then we
11 have different judges at the central count center.

12 Q Are any of the judges who are working at the
13 precinct, are they present in the scanning room?

14 A No.

15 Q You mentioned a number of reasons that the ballots
16 have serial numbers, that you requested that Hart include
17 serial number on the ballots, including keeping the piece of
18 paper together, the numerous multiple pages of the ballot
19 and locating ballots. Are there any other reasons?

20 A Yes. One of the main reasons is for, as I said,
21 ballot management. As you know, last year we used a
22 different system, and we ended up having to re-count our
23 ballots because our report at the end said that we had more
24 ballots than there were voters that were cast.

25 And the reason was -- is when the system was

1 running the ballots through there was a jam in the system.
2 Well, we had removed it off of our log as we tracked, but it
3 did not get removed out of the actual system that -- the
4 counting system. And so it showed that we received more
5 ballots, that we counted more ballots than there were actual
6 voters.

7 This system, once that sequence number has run
8 through it will tell you that -- that you cannot run that
9 batch through, it has already been run through, which would
10 eliminate that issue of running more than one batch through
11 more than once.

12 The other issue is if the voter who received an
13 absentee ballot went out and decided they wanted to
14 perpetrate fraud and went out, made copies of the ballot,
15 there is a thing called dupe catcher which says this ballot
16 number, this sequential number has already run through the
17 system, you cannot run this ballot through.

18 So then what we would need to then do is pull that
19 ballot, pull the original ballot that ran through, and then
20 of course then we would contact the attorneys because we
21 would have a ballot that had been duplicated, tried to run
22 through twice.

23 Q There's been a lot of discussion both on direct
24 and cross about, you know, accuracy of the system. How is
25 this system more accurate than the older system, the

1 previous system?

2 A Well, part of the issue, as I said, is that you
3 cannot run more than one batch through. You can't run that
4 batch through multiple times.

5 You also have the dupe catcher, which would then
6 tell you whether you've had somebody duplicating a ballot by
7 the audit system.

8 The paper trail system, which is what Boulder
9 County voters wanted is there. We can track every step of
10 the way as we process everything that has happened, what
11 the -- what the judges have done as far as resolution. We
12 have an audit trail throughout the entire process.

13 So it is a very concise, very well process -- not
14 well process, but it's a very well-managed process. It's
15 very precise.

16 Q Counsel has suggested that voters may be subject
17 to intimidation or to bribery in order to, you know, share
18 their vote. Wouldn't there be an easier way than this
19 scenario that's been depicted by counsel, the scenario that
20 he's drawn out?

21 A A much easier way is voters who request an
22 absentee ballot. The voter has a physical ballot there,
23 could actually show the individual who was pressuring them,
24 or if they were selling their vote could actually physically
25 see that ballot in hand to watch the voter vote it actually.

1 THE COURT: That answers my question about family.

2 Q (By Ms. Lacy) You testified that crossing out the
3 bar code and serial numbers would require duplication. Is
4 there a potential for human error in this duplication
5 process?

6 A Yes, there is, because the judges sit across from
7 each other and say this person voted for John Kerry. And
8 that person can mark -- when you have a large ballot as we
9 do and numerous ballot issues and candidates in that style
10 there is a chance that the judge -- the human error is there
11 that they accidentally mis-mark.

12 Q Do you want to go back to the days of ballot
13 stubs?

14 A No.

15 Q And why not?

16 A It's an additional -- it's an additional place
17 where there can be voter fraud. With the stubs, as I said,
18 when an absentee ballot comes in, that stub is there. Even
19 if you separated that ballot from the envelope, that stub
20 number is there. You can actually go and look up the number
21 of the stub and associate it to a voter.

22 With the current system that number -- sequential
23 number is not associated to the voter at all. When that
24 ballot is removed from that envelope that vote is not
25 associated in any way to that voter.

1 MS. LACY: No further questions.

2 THE COURT: Okay. You may step down.

3 Your next witness.

4 MS. LACY: Neil McClure, please.

5 NEIL McCLURE,

6 called as a witness by the Defendants, having been first

7 duly sworn, was examined and testified as follows:

8 THE COURT: You may be seated. Please state your

9 name and spell it for the record.

10 THE WITNESS: Neil McClure, N-e-i-l M-c-C-l-u-r-e.

11 DIRECT EXAMINATION

12 BY MS. LACY:

13 Q Mr. McClure, what is your occupation?

14 A I'm a general manager and vice president of Hart
15 InterCivic in Lafayette, Colorado.

16 Q And what is your educational background?

17 A I have a bachelor of science in electrical
18 engineering, bachelor of science in physics, master of
19 science of systems management.

20 Q And could you summarize your professional
21 experience?

22 A I have a couple of years experience in the
23 aerospace industry, seven years in the medical device
24 industry for operating room equipment, and for the last ten
25 years I've been in the election industry.

1 Q And when you say you've been in the election
2 industry, what capacity?

3 A I founded a company in 1996 to develop a new
4 electronic voting system subsequently purchased in 1999 by
5 Hart InterCivic. And I continued to manage all of the
6 research and development, testing, certification, production
7 aspects of the electronic voting system.

8 Q Are you -- besides your work with Hart InterCivic
9 are you involved in any capacity in the elections world?

10 A I've been involved in various levels. As you're
11 all probably aware, the election industry is changing and
12 evolving these days.

13 I got involved early on with the disabled
14 community and was a member of the task force for the state
15 of Texas to develop the rules required to certify an
16 accessible voting system.

17 I've been a part of the IEEE Voting System Center
18 as project manager. I provided testimony in front of the US
19 Election Assistance Commission. And most recently a
20 panelist at the Cal Tech UIT voting project on systems
21 certification and testing.

22 Q So I take it you're very familiar with how Ballot
23 Now works?

24 A Yes, ma'am.

25 Q And can you give us a brief overview of how it

1 works?

2 A Ballot Now is an imaging-based product that really
3 mirrors the current paper processes used for say an optical
4 scan system, but has brought a number of efficiencies to
5 those processes.

6 Most notably is when a document is run through the
7 scanner in Ballot Now it creates an exact electronic
8 duplicate of that whereby you can resolve any voting
9 anomalies on that electronic version without altering the
10 original document. This is in contrast to an optical scan
11 system where any voting anomalies must be re-marked, handled
12 and managed by poll workers.

13 Some of the other elements that we've brought is
14 because we are -- we're imaging the document, we can also
15 provide some intelligence to the document. And I'll get
16 back to that in a minute.

17 There's no calibration required for Ballot Now.
18 It's a very important aspect. In an optical scan system the
19 ballot is actually part of the voting system, and that the
20 scanning operation relies on the mechanical stability of the
21 paper, whereby an accurately -- so it can accurately resolve
22 the marks on it.

23 The act of scanning a ballot on -- on an optical
24 scan system tabulates it. Ballot Now, the product used by
25 Boulder, does no tabulation. So all it's doing is

1 converting an analog piece of information to paper into a
2 digital format that can be managed and used to feed into the
3 tabulation process.

4 One important aspect about no calibration required
5 for Ballot Now is its accuracy is maintained from election
6 to election; whereas, with an optical scan system you must
7 retest the accuracy for every election because of the
8 variability in the paper, because the sensors in the optical
9 scanner can wander and vary. So that must be re-verified.

10 Q And what are the bar codes that appear on the
11 ballot used for?

12 A This is part of the -- what I mentioned about
13 being able to put some additional intelligence into the
14 paper.

15 We used bar codes for a couple of reasons. One is
16 to -- we use them as markers on the ballot to correct the
17 image. So this is how we designed out the reliance on
18 printing and scanning doing any slippage or shifting of the
19 image.

20 We also can put information into those bar codes
21 that can be decoded by Ballot Now. So for example, we can
22 include an election identifier, a precinct identifier, and
23 in some cases a serial number.

24 And this really raises the integrity of the
25 election and management of the information for most of these

1 types of functions. And management of them were done
2 manually by poll workers requiring a fairly significant
3 logistical effort when you consider the number of ballots.

4 So as I stated previously, we're mirroring all the
5 paper processes. However, we're performing them in a
6 different manner that provides more efficiency and integrity
7 to the information.

8 Q Does Ballot Now enter any information about the
9 voter?

10 A Ballot Now, nor any other component of our system,
11 has any fields available to put any information about the
12 voter in them. So you're not even -- there's no place to
13 even put the information into the system, let alone retrieve
14 it.

15 Q In addition to that protection, are there other
16 measures that have been taken to make it difficult to access
17 the information in this software?

18 A Which information?

19 Q What other protective measures have been taken?

20 A We have worked through and analyzed from a systems
21 standpoint the information flow for an election. And if you
22 look at requirements for an election system, requirements
23 are really conflicting. And so it's really the challenge to
24 balance these conflicting requirements and meet the various
25 needs that are both constitutional and statutory.

1 We've provided certainly passwords and various
2 self-protection of data as part of the system. All of our
3 components are segregated; so that, we divide up where the
4 information -- if you go from ballot definition all the way
5 through Ballot Now or the scanning tabulation is a separate
6 application as well.

7 So there's various needs to meet which provide
8 security as both an operating system and an application
9 level.

10 Q Are there other jurisdictions besides Boulder
11 County that use Ballot Now?

12 A We have some 35 customers I believe in eight
13 states that are using Ballot Now today. We're certified in
14 22 different states as well. And we've never been denied a
15 certification in any state.

16 Q Does certification require that you prove up
17 certain security and privacy measures?

18 A In order to certify your system you must first be
19 compliant with the 2002 FEC, Federal Election Commission,
20 voting system standards which have a requirement for
21 protecting voter secrecy and privacy. Then the states vary
22 in their requirements for testing and verification of those
23 aspects.

24 Q What purpose does a serial number on the ballot
25 serve?

1 A The purpose of the serial number is really a means
2 for accounting for the information. It allows you to manage
3 the ballots, both whether they've been counted and prevent
4 duplicates from being entered into the system; so that, it
5 provides that management that's historically done by human
6 labor.

7 Q Do these other jurisdictions that you mentioned,
8 35 other clients, do they also use serial numbers?

9 A Yes, they all do.

10 Q To your knowledge have there been any lawsuits or
11 challenges to the use of serial numbers in those states?

12 A None other than this one.

13 Q Would Ballot Now support the use of ballot stubs?

14 A Yes, it would. Ballot Now actually has -- it's a
15 new technology. While it's classified and lumped in with
16 optical scan, it's really a different technology. And we
17 recognize that we would need to support a variety of
18 implementation scenarios as election requirements vary. And
19 so it does support ballot stubs.

20 Q Have your other clients chosen to use ballot stubs
21 or ballot serial numbers?

22 A They've all chosen to use ballot serial numbers.
23 And the reason for that is that -- I believe Ms. Salas
24 testified to is ballot serial numbers are a real source of
25 election error. And so we've provided that because we

1 understand the need to meet status quo. But we also provide
2 a more efficient approach that protects voter secrecy and
3 privacy.

4 Q And you mentioned that serial numbers have been a
5 problem in the past. You mean when they were associated
6 with ballot stubs?

7 A But the ballot stub and the ballot stub management
8 relies on very close accounting of thousands -- tens of
9 thousands, hundreds of thousands of paper ballots.

10 And as you can imagine when you use a temporary
11 work force to help manage that, they're not all accountants,
12 and it becomes a real challenge to reconcile. So now you
13 have a third piece of information that must reconcile at the
14 end of the day.

15 And in our analysis of voting processes nationally
16 we acknowledge that that was a source of error for election
17 officials, so we provided an alternative approach.

18 Q Is there any way in this voting system to
19 associate the voter with a particular ballot?

20 A Not in our system there is not.

21 Q Are there any -- are there any other on demand
22 systems besides Ballot Now?

23 A There's no other system being currently marketed
24 that would qualify as on demand.

25 Q How would you compare this system to other

1 paper-based systems?

2 A We've talked a little bit about earlier about
3 Ballot Now and how it differs from an optical scan system.
4 And to review those real quickly, as you don't have to
5 re-mark ballots, there's no calibration required, it does
6 not tabulate, which is very important when you're processing
7 early or absentee votes.

8 And it's much, much more accurate compared to an
9 optical scan; in that, the ballot is not part of the voting
10 system and that we manage information down to the finest
11 graphical information level of granularity, which is a
12 pixel. Plus we can bring some intelligence to the forum to
13 help manage the election process.

14 Q Did you have the opportunity over the course of
15 this past year to share ballot -- samples of ballots that
16 are used by Ballot Now with members of the public or in a
17 public setting?

18 A We've done several public presentations. We've
19 also conducted elections for the City of Longmont. And
20 we've participated in several public demonstrations with the
21 clerk's office.

22 Q And when did those occur, do you recall?

23 A Around the RFP time.

24 Q That would have been early last spring?

25 A Correct.

1 And then the contract election that we conducted
2 for the City of Longmont was even prior to that.

3 Q And those presentations included demonstrations of
4 the actual voting?

5 A Yes. Marking of ballots, simulated logic and
6 accuracy tests.

7 MS. LACY: No further questions. Thank you.

8 THE COURT: Cross-examine.

9 CROSS-EXAMINATION

10 BY MR. CORRY:

11 Q Okay. So Boulder is the only county in Colorado
12 that you've been able to sell this system to; right?

13 A No. Arapahoe County bought it two years ago I
14 believe.

15 Q Okay. And they use it now?

16 A No, they're not using it now.

17 Q So they paid for it, and they just decided not to
18 use it; right?

19 A They've chosen not to use it for this election,
20 that's correct.

21 Q Okay. And how much money did you make off of
22 Boulder?

23 A I don't know.

24 MS. LACY: Relevance.

25 THE COURT: Sustained.

1 Q (By Mr. Corry) All right. Now --

2 THE COURT: Although that question is going on all
3 over the country. All these companies privately doing this,
4 I wonder how much we're spending in the world today just to
5 vote.

6 MR. CORRY: Yeah.

7 THE COURT: And I guess is it worth it? I didn't
8 ask that question.

9 THE WITNESS: It's not, Your Honor.

10 THE COURT: Psychology can't possibly be worth it.

11 Q (By Mr. Corry) Now, you were present for a number
12 of the questions that I asked Clerk and Recorder Salas. And
13 your lawyer said that you could answer those questions.

14 Your tallying sub-routines available to the public
15 or are they proprietary?

16 A We have no requirement to make them available.

17 Q Okay. So you keep it a secret then?

18 A Correct.

19 Q And why do you keep it a secret?

20 A Because we have no requirement to divulge it to
21 the public.

22 Q Okay. And so you're not going to ever tell
23 anybody how you do these things until there's a law passed
24 or somebody orders you to disclose this; right?

25 A That's not necessarily true.

1 Q Okay. So under what circumstances would you
2 disclose that if you were asked to do so but there was no
3 law or no court order to do that?

4 A When it was in the best interests of the public
5 and that our corporate assets were adequately protected.

6 Q Okay. So is it in the best interests of the
7 public here in Boulder County to know how the system works?

8 A I believe they know how it works. We've
9 demonstrated that multiple times.

10 Q Okay. And you're going to release then all of the
11 sub-routines and how it works to the public?

12 A What for?

13 Q So the public can understand how your system
14 works.

15 A Well, we've demonstrated how it works.

16 Q Okay. And but the public doesn't have any
17 understanding of it; right?

18 A Well, sure they do. They understand how it works.
19 We've showed them how it conducts an election. In fact, it
20 did so successfully for the primary.

21 Q Okay. So your system you're saying is the -- the
22 public understands how it works because something is kicked
23 in the system and then the system spits something out, and
24 we don't know what happens in between and, therefore, we
25 understand how it works?

1 A You put in a known quantity of votes, and you get
2 the expected result out.

3 Q Okay.

4 A That's how you validate a system.

5 Q All right. And so we don't get the information on
6 your tallying sub-routines then?

7 A That's not a requirement for us.

8 Q Okay. Now, with your database can the sorting
9 routines be run to determine correlations of different
10 fields in the database?

11 A What -- define what you mean by correlations.

12 Q I'm talking about how if voters vote for a certain
13 measure or ballot initiative, then they vote for candidates
14 as well, can you link up those two data sets and derive some
15 information from that?

16 A Not down to a specific voter, no.

17 Q But in general in global terms like Boulder County
18 as a whole can you determine if Boulder County voters voted
19 for a certain initiative or ballot measure, and then those
20 same voters, whether they voted for or against a certain
21 candidate, do you have that data?

22 A So you -- what you want to do is run a query
23 whereby any voter that voted no on this measure, to find out
24 how they voted on some other issue?

25 Q Or candidate.

1 A Or candidate?

2 Q Right.

3 A No. There's no built in capability through --

4 Q There's no way to do that through the ballot box
5 that Ms. Salas testified about?

6 A Well, as a requirement for the voting system
7 standards we're required to record something, which is a
8 misleading term of art for the industry, called a ballot
9 image whereby we have to store each voter's record of their
10 choice set. So voter's choice set is the collective
11 elements that they have voted for on a ballot.

12 And it is really a conversion of the paper ballot.
13 I mean, we could no more do -- we could do what you're
14 asking just as you could with paper ballots. So there's
15 really no difference there.

16 Q Okay. So -- and it would be quite difficult to do
17 it with paper ballots because somebody would have to record
18 all that data and compare it; right?

19 A Everything is possible I believe, as I believe you
20 pointed out.

21 Q Okay. So but with your system, the computerized
22 system, all that data is already compiled and available,
23 isn't it?

24 A No.

25 Q Well, you just testified that it was.

1 A I said the ballot images are required to be
2 recorded.

3 Q Right. And all that information could be --
4 because you have to compile who won and who lost in every
5 election, don't you?

6 A That's a summary of the result, yes.

7 Q So all that information is summarized. So
8 wouldn't it then be possible to take the computer
9 information and the computer data and use it to cross apply
10 and correlate different issues to candidates?

11 A I'm not -- I'm not sure of what you're asking to
12 be honest with you. I mean, I told you how we're required
13 by the voting system standards to store information. If you
14 want to make the inference from that type of data element
15 that you could do that, then you -- you can make that
16 correlation. But I'm not quite sure I understand what
17 you're asking.

18 Q Okay. Let me back up then. You've got this
19 computer program and you've got this software that compiles
20 votes and spits out a result. You won't tell us how it
21 works, but you -- you've got this system and you've got this
22 software that compiles the data.

23 A I'm sorry. I'm confused. You said I won't tell
24 you how it works?

25 Q Right. You said it was proprietary.

1 A But I still have to tell you how it works, which I
2 do. And I have user manuals and other documentation that
3 tells how it works, describes its operation.

4 Q Okay. So but there are aspects of it that are
5 proprietary as you testified before?

6 A Correct.

7 Q And you said you're not going to release them
8 until you're ordered to do so; right?

9 A Well, there's -- those proprietary elements have
10 nothing to do with how it works. They are components of how
11 it works collectively.

12 Q Okay. Back to my question. You've got this
13 system that compiles results of data and how people vote on
14 different issues and different candidates. And wouldn't it
15 be possible to take all that -- all those results and
16 compile them and correlate them with different results?

17 A In the same manner it would be with a paper
18 system, yes, that's correct.

19 Q But with a paper system there's no computer
20 involved at all, is there?

21 A Well, sure. All the -- all of the information
22 that we've been counting is done by computers.

23 Q But there doesn't have to be a computer involved?

24 A If you hand count you're absolutely right.

25 Q Right. Now these bar codes that you testified

1 about, why don't you put the bar codes on the ballots after
2 they've been voted?

3 A I don't understand.

4 Q Okay. You've seen these ballots; right?

5 A Um-hum.

6 Q They've got a serial number on them, don't they?

7 A Um-hum.

8 Q A written numerical number that we can visualize
9 with our eyes?

10 A Um-hum.

11 Q Then there's a bar code that you really can't see
12 with the naked eye, but the computer can scan it; right?

13 A Correct.

14 Q And why don't you put the bar codes on the ballots
15 after the voter has already marked them?

16 A You're asking me why we don't do that?

17 Q Yeah, that's what I'm asking you.

18 A My first reaction is because it doesn't make any
19 sense.

20 Q Okay. And why doesn't it make any sense?
21 Wouldn't it have the exact same utility that you've
22 testified about?

23 A No.

24 Q Why doesn't it make any sense?

25 A Well, I mean, one of the advantages is that when

1 you print ballots it assigns the serial number. And
2 therefore, the serial number is known to the system only.
3 And so that when that ballot gets voted and was returned to
4 the system, the system is able to provide reconciliation
5 that that ballot was printed and returned. So if you put it
6 on after it's been voted, you don't have that level of
7 ballot management.

8 Q But couldn't -- if you put the bar code on after
9 it was -- it has been voted, couldn't you still feed those
10 into your system and use the bar code to do everything that
11 it used to before?

12 A You know, I mean, under what circumstances are we
13 to consider what you're supposing? I mean, in the world of
14 possibilities, sure. And from a design standpoint, sure,
15 you could do that. Would that be efficient, reliable and
16 provide integrity to the election? I don't think it
17 provides as high a measure as the way it's done now. That's
18 my opinion.

19 Q But Boulder is the only county that has these
20 serial numbers in the system?

21 A No. There's many counties that have these.

22 Q There are many counties that have visual serial
23 numbers on their ballots?

24 A Sure.

25 Q Which counties?

1 A Third largest county in the country, fifth largest
2 county in the country.

3 Q Any counties in the state of Colorado?

4 A Not for this election, no.

5 Q Are these other states governed by the Colorado
6 constitution?

7 A No, but they all have very identical requirements
8 in them.

9 Q And you're familiar with all those identical
10 requirements?

11 A I have to be, yes.

12 Q Okay. Now, but there are no counties in Colorado
13 that see fit to use these serial numbers?

14 A No. There's only one county in Colorado that's
15 using Ballot Now.

16 Q Okay. So all these other counties that don't have
17 serial numbers on their ballots, somehow they're able to
18 count their ballots, aren't they?

19 A Well, they're using an optical scan system which
20 is a 20-year-old technology. And their systems can't use
21 the efficiencies made available by serial numbers.

22 Q But your boss over here, Linda Salas, says that
23 Boulder may be the last county in the state once again to
24 release their results. How is that efficient?

25 A First of all, Linda Salas is not my boss. So can

1 you repeat the question, please?

2 MR. CORRY: Okay. Could you read it back, please?

3 (The last question was read back by the court
4 reporter.)

5 THE WITNESS: That's a matter of the selection
6 process and the implementation configuration that Boulder
7 County chose primarily through the input from the public is
8 they took an approach where they wanted to use this system
9 that provided integrity and accuracy, and knowing full well
10 that it was going to take longer to produce those results.

11 Q (By Mr. Corry) So you're saying these other 63
12 counties in Colorado are using an inefficient system?

13 A Yeah, and inaccurate in comparison to Ballot Now.
14 And if you know anything about optical scanning systems
15 you'll know that it can't produce the same results twice.

16 Q And -- and your system does produce the same
17 result twice?

18 A Yes.

19 Q Because it's linked up with a serial number that's
20 on each ballot, isn't it?

21 A No. Clearly you haven't been listening to my
22 answers. The reason why is because it doesn't require any
23 calibration. So the accuracy does not vary between
24 election. It has nothing to do with the serial numbers. I
25 told you earlier that that was for ballot management.

1 Q Right. Could you explain what you mean by
2 calibration?

3 A Sure. We'll have to get a little technical,
4 however.

5 So in -- generally in analog world, which is what
6 we live in, systems that interface to that are susceptible
7 to environmental changes in the environment.

8 So for example, in an optical scan system it has
9 something called an omitter detector. And the amount of the
10 emitted light can vary and the sensitivity of the detector
11 can vary with temperature. The paper can swell as much as
12 10 percent over an 11 and a half sheet of paper. Paper
13 expands like that. It will affect the count.

14 Ballot Now doesn't rely on these types of issues
15 and, therefore, does not require any calibration.

16 Q Now, you testified that you've got a temporary
17 work force that comes in?

18 A No. I was referring to poll workers.

19 Q And these people are not part of your company;
20 right?

21 A No. They are -- they're temporary employees for
22 the county.

23 Q Okay. So your company doesn't have temporary
24 employees?

25 A Not in this sense, no.

1 Q Okay. Now, when you testified that you were a
2 consultant for Boulder County --

3 A No, I did not say that.

4 Q Okay. Are you a consultant for Boulder County?

5 A No.

6 Q So you don't consult with Boulder County on
7 election issues and how to work your system?

8 A Define consultant.

9 Q Do you help Boulder County with working out
10 glitches in your system?

11 A I'm part of installing the system under contract
12 with Boulder County.

13 Q Okay. And so if something comes up on election
14 day where your system isn't working, you're going to work
15 with them; right?

16 A As part of our contract we have a support
17 agreement, yes.

18 Q That will be you yourself who does that; right?

19 A No.

20 Q So you'll have employees who do that?

21 A Correct.

22 Q And how many employees do you have?

23 A Company wide is 160, 170. I believe locally we
24 have 50.

25 Q And so you've got 50 employees who will assist

1 Boulder County?

2 A No. We have an account manager that's been
3 assigned to Boulder County.

4 Q Who is that?

5 A Linda Harry.

6 Q And so you've got one employee basically who will
7 assist Boulder County --

8 A Correct.

9 Q -- if something goes wrong with your system on
10 election day?

11 A Um-hum.

12 Q All right. And that employee will have access to
13 these ballots; right?

14 A Which ballots?

15 Q The ballots that are voted.

16 A I don't believe so, no.

17 Q So that person is not going to be in the room when
18 people are looking at these visual images of the ballots
19 projected on the screen?

20 A She may very well be in the room, yes.

21 Q So that person can read the serial numbers on
22 these ballots as they're projected up on a screen; right?

23 A As everybody else can, yes.

24 Q Everybody else can, okay. What do you mean by
25 everybody else?

1 A She's not the only one in the room.

2 Q Okay. And so if she knew a person's serial number
3 and then saw that ballot projected, she would know how that
4 person voted, wouldn't she?

5 A Suppose there's a possibility of that, yes.

6 Q Okay.

7 A If somebody published it in the newspaper, and
8 then she would know that -- that person's serial number.

9 Q Okay. So there is a mark on the ballot that
10 identifies the ballot as the ballot of the person casting it
11 in certain situations?

12 A No, there's not.

13 Q You just testified there's a situation where --

14 A You're twisting my words.

15 Q I'm not. I'm asking you a question. Is there any
16 way to identify the ballot as the ballot of the person
17 casting it?

18 A No.

19 Q You just testified that there is a way.

20 A Only if you're given the complete information. I
21 said the system only has a serial number on it. If through
22 some other act which would have to involve some improbable
23 or irrational event where some voter decided they wanted to
24 disclose and give up their privacy, which they're allowed to
25 under the constitution, they could provide our employee with

1 their serial number, yes.

2 Q And if somebody is forced to give up that
3 information by intimidation she would know then; right?

4 A Hopefully they would report the fact that somebody
5 was breaking the law.

6 Q Okay. Now, you heard all the testimony about what
7 would happen if somebody marks off the serial numbers. Is
8 that going to shut your system down if somebody crosses off
9 the serial numbers on the ballot?

10 A If a bar code is crossed off the ballot will be
11 rejected, yes.

12 Q And that ballot will still be counted, but just be
13 counted by a different method outside of your system; right?

14 A According to the procedures of the clerk they're
15 going to re-mark those ballots and re-run them back through
16 the scanner.

17 Q So your system is incapable of dealing with a
18 voter who decides that they don't want a serial number on
19 their ballot; right?

20 A No. It provides procedures to count their vote,
21 absolutely.

22 Q But your system doesn't count that vote?

23 A It provides for the counting of that vote.

24 Q By another system namely?

25 A Another process.

1 Q So it really wouldn't shut down your system if
2 thousands of people decided to just mark off the serial
3 numbers from their ballot, would it?

4 A No, in a sense it wouldn't. It would definitely
5 slow down the counting, the scanning process.

6 Q It detracts a little bit from the efficiency of
7 the system you've designed, but it doesn't render the entire
8 system inoperable; right?

9 A Right.

10 If we contrast this to an optical scan system, it
11 has timing marks down the side. And if you decide that you
12 want to deface your ballot, which is again against the law,
13 you can scratch through those timing marks and it won't
14 count your ballot either.

15 Q Why is it against the law in your opinion to
16 quote, deface your ballot?

17 A I believe that constitution that you quoted the
18 other day in our meeting stated that you cannot put any
19 distinguishing mark after the ballot has been prepared for
20 voting on your ballot. I think that was a quote from you,
21 sir.

22 Q Right.

23 A Yeah.

24 Q And so you would say that this distinguishing mark
25 you've placed on the ballot through your system complies

1 with that?

2 MS. LACY: I object to the form of the question.
3 He didn't call it a distinguishing mark.

4 THE COURT: Sustained.

5 Q (By Mr. Corry) Is an individual serial number on a
6 ballot that's unique a distinguishing mark?

7 A After it has been prepared?

8 Q I'm just asking you if it's a distinguishing mark
9 if it's a serial number on a ballot?

10 A It's unique to that ballot, yes.

11 MS. LACY: Your Honor, he's asking for a legal
12 conclusion.

13 THE WITNESS: Well, the question whether it's
14 applied before or after the ballot is prepared is an
15 important distinction.

16 MR. CORRY: He answered it, so he waived the
17 objection.

18 THE COURT: I don't know what a distinguishing
19 mark is for whatever terms. I mean, is this thing where
20 they cut off the thing on my face, is that a distinguishing
21 mark? I don't know.

22 Q (By Mr. Corry) And the bar code is a
23 distinguishing mark as well, isn't it?

24 A Could you define distinguishing mark, please?

25 Q Something that is different, unique.

1 A To that ballot?

2 Q Right.

3 A Correct.

4 Q And there are two distinguishing marks on each
5 ballot, a unique bar code and a unique serial number; right?

6 A It's the same element.

7 Q Okay. And those serial numbers are sequential.
8 When ballots are issued they come out in order, don't they?

9 A When the ballots are presented they come out in
10 order.

11 Q And when the ballots are handed out to the voter
12 they come out in order, don't they?

13 A No. I have no -- no knowledge of that.

14 Q But when they're printed they're in stacks and
15 they are -- then when they are presented they're given in
16 these stacks to people; right?

17 A I don't have any knowledge of that.

18 Q Well, in fact, your whole system is dependent on
19 the fact that these ballots are issued in sequence, aren't
20 they?

21 A No.

22 Q So your system would be fine if the Boulder clerk
23 shuffled up the serial numbers?

24 A As long as there is -- the pages stayed together.

25 Q So Boulder could take all of these ballots after

1 they're printed and shuffle them up like a deck of cards,
2 and that wouldn't negatively affect your system?

3 A The system doesn't care what order the serial
4 numbers come back in, which provides for the efficiency.

5 Q When designing this system you didn't take into
6 account that certain voters might not like to see numerical
7 numbers on their ballot, did you?

8 A Yes, we did.

9 Q But you just ignored that concern from people;
10 right?

11 A No, we did not.

12 Q What did you do to accommodate people who don't
13 want unique serial numbers on their ballots?

14 A We provided several different ways to configure
15 your ballot.

16 Q And what are those ways?

17 A As I mentioned previously, it supports stubs and
18 it supports bar codes without serial numbers, bar codes with
19 serial numbers, bar codes with human readable.

20 And as I stated previously it's a trade-off
21 between managing your election, and we leave that
22 configuration up to the customer. And as I stated
23 previously, all of our customers have chosen to implement
24 the bar code with serial numbers as it provides the most
25 efficient management with the highest integrity for the

1 election.

2 Q So Boulder County voters are not going to have the
3 benefits of any of these alternatives that you mentioned
4 this election; right?

5 A Not for this election.

6 MR. CORRY: Could you just give me a moment?

7 (Pause.)

8 MR. CORRY: No further questions.

9 THE COURT: Any redirect?

10 MR. CORRY: Just a few questions.

11 REDIRECT EXAMINATION

12 BY MS. LACY:

13 Q Mr. McClure, did counsel just appropriately
14 characterize in your opinion the use of a bar -- excuse me,
15 use of a ballot stub as a benefit? He characterized your
16 testimony as stating that there were benefits to the use of
17 the ballot stub.

18 A No, from a -- from an election management
19 standpoint when you factor in the purpose of the ballot stub
20 and the logistics and management associated with it, it's
21 actually an error that has caused problems for elections and
22 election officials in the past.

23 Q Counsel described a scenario where the support --
24 the Hart support person for Boulder County would be given a
25 serial number by a voter for some reason and that she would

1 be in the ballot -- the scanning room and see that ballot
2 image on a screen.

3 How likely would anyone with a serial number that
4 someone has voluntarily disclosed to them be in a room like
5 that? How likely would it be that that person would be able
6 to read a serial number in the time frame on one of the
7 machines that's available?

8 A It would be a very, very low probability.

9 Q Can you describe how that would have to happen or
10 what the --

11 A Well, there's -- there's hundreds of thousands of
12 ballots. There's eight separate stations. The precinct
13 information, the ballot boxes as I understand them are
14 brought in fairly randomly. And as a station opens up,
15 whichever ballot box from a precinct is ready goes randomly
16 to the next station.

17 So there's about three different levels of
18 randomness that would require you to even be at the right
19 station, let alone paying attention at the right time and
20 recognizing a number that's flashed up momentarily. So I
21 would say it's a very, very low probability of occurrence
22 even if you tried.

23 Q At the beginning of your testimony you were asked
24 questions about disclosing certain proprietary information.
25 And in your opinion would the sharing of this information

1 compromise the security of the ballot or compromise the
2 system, or would it be a problem in any way?

3 A This is actually part of the national debate that
4 we've been involved in regarding open source code. And this
5 is being discussed as one possible way of providing the
6 critics of electronic voting systems assurances that the
7 code is performing as advertised.

8 Now, what is not part of this national debate is
9 disclosing the code that's used for optical scan systems.
10 And the reason, including voter verification, which is also
11 part of this debate, the reason is that the paper is the
12 record.

13 And in fact, as part of the electronic system we
14 now have requirements in several states to produce a paper
15 copy of what is voted electronically. And so that way the
16 verification is meaningless because you have the paper
17 records.

18 Well, here we have the paper record, and so the
19 paper is -- is regarded as the golden record. So I'm not
20 sure of -- I think this -- I'm not sure of why this argument
21 was coming up related to a paper system.

22 MS. LACY: No further questions.

23 THE COURT: Is the source code is what's the
24 proprietary property that your company owns?

25 THE WITNESS: That's correct.

1 THE COURT: And that's why it -- and that is
2 clearly a trade secret?

3 THE WITNESS: It is.

4 And if you look at the issue from a larger
5 standpoint, you know, there has been code that has been
6 disclosed by one of the electronic vendors. And you know,
7 there's -- there's been a lot of comment about it. And
8 it's -- it's generally regarded that it's not in the public
9 interest to openly publish this code on the internet, even
10 if it wasn't a trade secret.

11 THE COURT: Well, don't -- I mean, when people --
12 companies sometimes will put trade secrets into -- sometimes
13 put source codes into escrow so that to maintain its
14 confidentiality, but so that the other company -- the
15 company who didn't develop it can use it.

16 THE WITNESS: Right. Right. We have -- we have
17 several escrow agents that have our source code, several
18 states that have our source code in escrow. And we recently
19 submitted all of our code to the National Software Reference
20 Library. That's part of the National Institute of Standards
21 and Technology.

22 THE COURT: Well, so could -- could right now the
23 state of Colorado or Boulder County, they do not have your
24 source code. But at some point they could get it if the
25 legislature put some sort of escrow agreement together or

1 something like that where they could deposit it and,
2 therefore, your system could be tested?

3 THE WITNESS: Yeah, that -- that's true. And
4 there are several states that require source -- several
5 states that require source code to be escrowed right now.
6 Colorado requires that in order to certify our system,
7 whichever version, that it complete the independent testing
8 authority process under the FEC voting system standards.

9 So we have to complete that process with a report
10 and an issued number before Colorado will review it. And
11 then we bring the system in and Colorado reviews it for some
12 of its state specific ballot logic and other requirements
13 that are not covered by the independent testing authority
14 process.

15 THE COURT: I don't know what source code is for
16 sure. I have some idea. And when I first had a case
17 involving the source code trade secrets my research located
18 a seminar like 1973 on source codes.

19 THE WITNESS: Source cord is the human readable
20 version of the software. And when you -- when you take the
21 source code and you compile it, it's called -- and it takes
22 all that extraneous information out of it and cooks it down
23 to just the logic that will talk to the computer system.

24 So that is not human readable, nor would you be
25 able to look at an executable file and understand how it was

1 written. I mean, it performs a set of functions. It has
2 information put into it, and it gives information back out.

3 THE COURT: Anything further?

4 MR. CORRY: Could I get some recross?

5 THE COURT: Only if it's on issues raised by me.

6 MR. CORRY: Okay.

7 RECCROSS-EXAMINATION

8 BY MR. CORRY:

9 Q All right. Under your system are the serial
10 numbers stored within the ballot image?

11 A Could you explain that further?

12 Q Okay. You got these ballots with serial numbers
13 on them, and you said that the ballot image is reproduced?

14 A Created.

15 Q Right. And the serial numbers are within those
16 ballot images; right?

17 A They're a part of the -- the image file, yes.

18 Q And you testified about source codes. Are these
19 ballot images stored in one or a few different places?

20 A There's stored in the database.

21 Q So just one place?

22 A Right.

23 Q Database that you have access to?

24 A Not once we install it in Boulder County, no.

25 Q And then could a particular image be called up

1 given a particular serial number?

2 A No.

3 Q And you testified about the ballot stubs --

4 MS. LACY: This is outside the scope of what the
5 judge was asking I believe.

6 THE COURT: I think that's true. Sustained.

7 MR. CORRY: Okay. Nothing further.

8 THE COURT: Let me just think. I remember hearing
9 in a math class or something that if there were an infinite
10 number of monkeys pounding on an infinite number of
11 typewriters that one of them would write Hamlet. Do you
12 believe that to be the case?

13 THE WITNESS: Well, you have to remember that I
14 have a background in physics as well.

15 THE COURT: I don't.

16 THE WITNESS: Sure, because I want to believe
17 anything is possible.

18 THE COURT: Okay. We'll be in recess until 9:30
19 tomorrow morning, okay.

20 (The hearing concluded for the day.)

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CERTIFICATE

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The above and foregoing is a true and accurate transcription of my stenotype notes taken in my capacity as Official Court Reporter, Division II, District Court, County of Boulder, State of Colorado.

Dated this the 9th day of November, 2004.

DAWN R. CHIODA, CSR, RPR
Official Court Reporter

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I N V O I C E

DATE: November 9, 2004

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