UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, *et al.*, Plaintiffs, v. KURT S. BROWNING, *et al.*, Defendants.	Case No: 3:01-cv-1275-J-Adams/HTS

PLAINTIFFS' OPPOSITION TO MOTION TO VACATE DOCKET NUMBERS 294, 295, 215, AND 216 AND OPPOSITION TO MOTION FOR DISMISSAL OF THE CASE

Plaintiffs, American Association of People with Disabilities, Daniel O'Connor, Kent Bell, and Beth Bowen (collectively "AAPD"), submit the following memorandum of law in opposition to Defendant Jerry Holland's, Supervisor of Elections in Duval County, Florida ("Defendant"), Motion to Vacate Amended Order (Doc. 294) and Judgment (Doc. 295) Entered on September 20, 2007, Order Entered on March 24, 2006 (Doc. 215), Judgment Entered on March 26, 2004 (Doc. 216), for Dismissal of Case and Supporting Memorandum ("Motion to Vacate").

AAPD also opposes Defendant's request for oral argument on his Motion to Vacate. The facts of this case are not complicated and this Court has already determined many of the legal issues. Thus, there is no need for oral argument because the parties can adequately brief the remaining issues.

Defendant's Motion to Vacate is yet another in the series of attempts before this Court and the Eleventh Circuit to sidestep the final judgment entered by this Court and to delay

payment of the AAPD's attorneys' fees and expenses that are authorized by the Americans with Disabilities Act (the "ADA"). *See* 42 U.S.C. §12205. This Motion to Vacate is among Defendant's five attempts[1] to stall the current proceedings since the Eleventh Circuit dismissed Defendant's interlocutory appeal. Even since filing this current Motion to Vacate, Defendant filed a Notice of Appeal as to the September 20, 2007 Amended Order and Judgment, seeking review of all matters that came before this Court. *See* Dkt. 324. The only issue that the current notice of appeal cannot cover is AAPD's attorneys' fees, costs and expenses, which will only become ripe after this Court rules on the issue In order to avoid yet a third appeal and avoid further delay in finishing this nearly seven-year-old case, this Court should award AAPD its fees, expenses and costs in order to properly place all potentially appealable matters before the Eleventh Circuit at once so that it may resolve all remaining issues in this matter once and for all.

In his Motion to Vacate, the Defendant relies on four arguments, none of which should sway the Court from its current, proper path in resolving the remaining issues of fees and costs:

- First, the Defendant attempts to vacate this Court's judgment that Defendant violated the ADA by claiming that the Help Americans Vote Act ("HAVA") somehow supersedes or limits the application of the ADA. Yet the Defendant's position is unsupported by the law or the facts because (1) HAVA expressly states that it does not supersede or limit the application of the ADA and (2) neither the Eleventh Circuit nor this Court relied on HAVA. The Defendant's current motion is simply a transparent attempt to avoid paying AAPD's attorneys' fees, expenses and costs that are awarded to the prevailing party under the ADA.

[1] Defendant's recent attempts to delay include Defendant's Motion to the Eleventh Circuit Requesting Addition of Directions (filed 8 weeks ago); Defendant's Supplement to Motion Requesting Addition of Directions (filed 3½ weeks ago); Defendant's Motion to Stay Further Action Until the Court of Appeals Enters Final Order (Dkt. 297) (filed 4 weeks ago); the current Motion to Vacate (Dkt. 315) (filed 2½ weeks ago); and Defendant's Notice of Appeal as to the September 20, 2007 Amended Order and Judgment (Dkt. 324) (filed 3 days ago).

- Second, the Defendant improperly argues that more than the appealable interlocutory orders (*i.e.*, the injunctive relief) were before the Eleventh Circuit. In fact, the Defendant's current position directly contradicts the facts and his prior position in opposing AAPD's attempt to seek Rule 54(b) certification when he opposed AAPD's attempt to bring all matters before the Eleventh Circuit.[2]

- Third, the Defendant characterizes the Eleventh Circuit's dismissal of its interlocutory appeal as holding that HAVA moots this case without citation to, or support from, the Eleventh Circuit.

- Fourth, the Defendant relies on case law that is neither controlling nor persuasive here.[3]

Defendant's Motion to Vacate should be denied because it is an improper attempt to avoid judgment and to delay the conclusion of these proceedings.

I. Background

AAPD sued the Defendant in this Court on November 8, 2001, nearly a year before HAVA was enacted,[4] to remedy the Defendant's discriminatory practices against them by failing to provide voting machines accessible to disabled voters. Dkt. 1. The Defendant discriminated against disabled voters before AAPD filed this suit and continued to do so until well after AAPD won a declaratory judgment. *See* Dkt. 290. Specifically, this Court held a bench trial from September 23, 2003 to October 1, 2003 and entered its Findings of Fact and Conclusions of Law on March 24, 2004. Dkt. 215. On March 26, 2004, this Court entered a declaratory judgment[5] in which:

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[2] "Defendant/Appellant responds by asserting that there is no need for Rule 54(b) certification in light of the exception to Rule 54 in cases involving injunctive relief and the appeal provisions of 28 U.S.C. §1292(a)(1)." Dkt. 241 (April 28, 2004 Order denying AAPD's request for Rule 54(b) Certification), pp. 1-2.

[3] As discussed in more detail below, the Defendant principally relies on *Troiano v. Supervisor of Elections*, 382 F.3d 1276 (11th Cir. 2004).

[4] HAVA was enacted as Public Law 107–252 on October 29, 2002.

[5] This Court subsequently clarified that the March 26, 2004 Declaratory Judgment is now considered a final judgment against the Defendant. Dkt. 294.

1. It held that the Defendant violated 28 C.F.R. §35.151(b) ("Ruling 1");

2. It directed the Defendant to have at least one voting machine accessible to disabled voters (without assistance) at 20% of the polling places in Duval County, Florida ("Ruling 2"); and

3. It required the Defendant to have Diebold touch screen voting machines with audio capacity certified on or before May 14, 2007 ("Ruling 3"). Dkt. 216.

On May 31, 2004, the Defendant appealed the Declaratory Judgment and other orders to the Eleventh Circuit. Dkt. 217. Importantly, the Defendant appealed no final rulings, and no rulings were certified as final for appeal under Rule 54(b). The Eleventh Circuit questioned its jurisdiction over the appeal, asking whether all claims against all parties had been resolved, making the case ready for appeal. *See* Dkt. 239, Exh. A (letter from Eleventh Circuit questioning appellate jurisdiction). This question of appellate jurisdiction arose because the Defendant appealed non-injunctive rulings without a certification under Rule 54(b).

On April 28, 2004, AAPD sought an emergency Rule 54(b) certification from this Court which the Defendant opposed. Dkt. 239. Specifically, the Defendant stated that the March 24 and 26, 2004 Order and Judgment "are clearly injunctive orders which may be appealed pursuant to 28 U.S.C. § 1292(a)(1)." Dkt. 240, p. 1. Shortly thereafter, on June 24, 2004, the Eleventh Circuit ordered the appeal to proceed under 28 U.S.C. § 1292 (a)(1) with respect to this Court's March 24 and 26, 2004 Order and Judgment. The Eleventh Circuit did not allow the appeal of this Court's non-injunctive Ruling 1 that the Defendant violated 28 C.F.R. § 35.151(b). *See* Dkt. 254.

Despite opposing AAPD's motion for Rule 54(b) certification, Defendant sought review of the scope of the appellate jurisdiction on July 7, 2004. Exh. A. The Eleventh Circuit declined to review its jurisdiction without comment. *See* Exh. B.

On April 16, 2004, while the Eleventh Circuit wrangled with its jurisdiction, this Court reluctantly stayed the injunction. Dkt. 232, p. 4. The Court also stated:

> The court takes issue with Defendant's repeated reference to the uncertified voting machines and the implication that he was an innocent bystander during the acquisition process for those machines. Defendant Stafford is solely responsible for having selected and purchased machines that had not yet been certified when other machines with similar capabilities had been certified by the State of Florida.

Dkt. 232, p. 3, fn. 1.

This Court dissolved the stay of injunctive relief on September 28, 2004 (Dkt. 267) in response to AAPD's request (Dkt. 255) that sought accessible voting machines for the November 2004 elections. The Defendant received emergency relief from the Eleventh Circuit in the form of a stay pending appeal. Dkt. 275. Yet the Defendant's compliance with this Court's judgment – which he began even before he filed the interlocutory appeal and completed during its pendancy –mooted the interlocutory appeal. For example, the Defendant filed several reports with this Court reporting the steps he was taking to comply with the judgment. In each report, the Defendant specifically admitted that he was taking these steps pursuant to this Court's orders and never once mentioned HAVA:

- April 12, 2004 – the Defendant filed a plan with this Court to comply with the injunctive relief granted by the Court in Ruling 2 (that is, for placing accessible machines in 20% of the voting districts). Dkt. 227. In the plan, the Defendant, specifically stated that "***[p]ursuant to the Court's order dated March 24, 2006 [sic] and final judgment dated March 26, 2004, Supervisor John Stafford provides this Report ...***"

Dkt. 227, p. 1 (emphasis added).

- May 14, 2004 – the Defendant filed with this Court a report indicating that he would comply with Ruling 3 of the Declaratory Judgment issued by the Court (that is, that the Diebold touch screen voting machines with audio capacity were certified) and admitted that "Defendants [Hood and Kast in their respective official capacities], by

> undersigned counsel and ***pursuant to the Court's [March 24, 2004] Order, hereby submit this final report to the court*** ..."

Dkt. 248, p. 1 (emphasis added). Thus, by May 14, 2004, less than two months after the Court entered its Declaratory Judgment and before the Eleventh Circuit could consider the appeal, the Defendant had complied with nearly all aspects of the Declaratory Judgment except for purchasing and deploying the required accessible voting machines.

By September 30, 2004, after AAPD filed additional motions and briefing to this Court, it obtained the final relief that it won in the Declaratory Judgment. The parties submitted an agreement that the Defendant would adopt and fulfill the plan it filed on April 12, 2004 (with only minor changes). Dkt. 268. The Court adopted the agreement by its Order dated October 4, 2004. Dkt 271. In the agreement, the Defendant admitted that he was complying with the Declaratory Judgment that this Court awarded to AAPD:

> ***In light of this Court's September 28, 2004, ruling lifting the stay pending appeal, and this Court's March 24, 2004, Order,*** Plaintiffs and Defendant John Stafford ("Defendant") hereby move this Court to adopt the [April 12, 2004 plan] ... by requiring Defendant to install the machines at the precincts identified ...

Dkt. 268, p. 1 (emphasis added). The appeal subsequently progressed as follows:

- January 26, 2005 – the Eleventh Circuit heard oral argument in this case.
- August 8, 2005 – over six months after oral argument and after the Defendant complied with nearly the entire Declaratory Judgment, the Eleventh Circuit certified two questions to the District Court: (1) whether a contract was in place for purchasing enough accessible voting machines to place one in each voting district, and (2) whether the accessible voting machines would be in place for the subsequent election. Dkt. 282, p. 5-6. The Eleventh Circuit specifically stated that if the Defendant met these two conditions, then "this case is moot because any order by this court would have no effect on the [Defendant's] actions."[6] Dkt. 282, p. 5.

[6] Although the Eleventh Circuit was aware that Defendant raised the issue of HAVA and Local Ordinances, the only issue it was concerned with was "whether the machines will in fact be in place for the next election." *See*

Importantly, the Eleventh Circuit did not address or cite HAVA in its decision to certify its questions to this Court or to dismiss the appeal.

- August 22, 2005 – this Court held an evidentiary hearing regarding Defendant's compliance with the remaining portion of the interlocutory orders. *See* Dkt. 285. One day later, this Court answered both of the Eleventh Circuit's questions in the affirmative. Dkt. 285. This Court properly did not address or mention HAVA. *See* Dkt. 285.

- August 15, 2007 – two years after the Court answered the certified questions, the Eleventh Circuit recognized that the Defendant received accessible voting machines and deployed them by November 17, 2005. Dkt. 290. In its Order, the Eleventh Circuit made no mention of HAVA. *See* Dkt. 290.

Simply put, after November 17, 2005, there was nothing left for the Eleventh Circuit to decide. Since the Defendant complied with all portions of this Court's Order and Judgment, the Eleventh Circuit dismissed the interlocutory appeal as moot. Dkt. 290, p. 3. Importantly, the Eleventh Circuit did not dismiss the appeal because it found AAPD had no valid cause of action, that this Court committed any error, or that the Defendant complied with HAVA (or any other regulation) – to the contrary, it simply had nothing to resolve since the answers to its certified questions revealed that AAPD had obtained all of the injunctive relief won in the Declaratory Judgment.

With the interlocutory appeal over, this Court properly clarified that the judgments in this case were final and entered an Order on September 20, 2007 as well as a Final Judgment. Dkts. 294 and 295. It also permitted the parties to file their post-trial motions such as applications for costs and fees. Dkt. 294, p. 5. The State of Florida and AAPD have properly proceeded to comply with the Court's directives. The Defendant has filed numerous pleadings in this Court and the Eleventh Circuit attempting to delay the resolution of this

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Dkt. 282, p. 5. The Court of Appeals made it clear that once the Defendant provided accessible voting machines, "this case is moot because any order by this court would have no effect on the City's action." *Id.* In other words, HAVA had no role in making this case moot – only the Defendant's voluntary compliance did.

case. This Court should reject such tactics and bring this six-year old case to conclusion by ordering the Defendant to pay the fees, costs and expenses that the ADA allows.

II. HAVA Does Not Trump the ADA

On its face, HAVA explicitly provides that "nothing in this Act may be construed to ... supersede, restrict, or limit the application of .... The Americans With Disabilities Act of 1990 (42 U.S.C. §§ 12101, *et seq.*)." 42 U.S.C. § 15545(a)(5) (2002). This Court has also already ruled that HAVA does not render this case moot because "HAVA makes clear that it is not to be construed as superseding or limiting the application of the ADA...." *See* Dkt. 215, p. 28 n. 10; Dkt. 124, p. 20 n. 9. The Defendant's argument in its Motion to Vacate implies the contrary and ignores the plain language of the statute and this Court's prior ruling. *See* Dkt. 315. The Defendant even admitted at trial that it is "not suggesting that [its] plans under HAVA somehow excuse [it] from complying with the Americans With Disabilities Act." Dkt. 169, pp. 73:24-74:2. Simply put, AAPD brought this suit under the ADA, not under HAVA. Defendants Motion to Vacate thus contradicts the language of HAVA as well as the Defendant's own admission to this Court.

Also, since HAVA's provisions do not excuse Defendant's violations of the ADA, Defendant's allegation that the Eleventh Circuit "reviewed the record to determine whether the [Defendant] had complied with HAVA" is irrelevant. *See* Dkt. 315, p. 4. The fact that HAVA was enacted after AAPD filed suit is irrelevant because HAVA's statutory language makes it clear that it does not supersede or limit AAPD's cause of action under the ADA. 42 U.S.C. § 15545(a)(5). In sum, HAVA cannot nullify AAPD's victory under the ADA as a matter of law. The Court should reject the Defendant's transparent attempts to delay the award of AAPD attorneys' fees, expenses, and non-taxable costs under 42 U.S.C. § 12205.

III. The Eleventh Circuit Only Dismissed The Injunctive Relief Before It

The Eleventh Circuit only dismissed the interlocutory appeal of the injunctive issues before it and nothing else. And the only reason the Eleventh Circuit dismissed the interlocutory appeal was because the Defendant's compliance with this Court's order and judgment left no issues on appeal for the Eleventh Circuit to consider. Nothing more was before the Eleventh Circuit. This Court properly interpreted the Eleventh Circuit's Order and mandate and proceeded to final judgment and post-trial motions.

A. The Defendant Helped Ensure that the Eleventh Circuit Only Had Jurisdiction Over the Injunctive Relief

Defendant asserts that its appeal was only dismissed as to the prior rulings, Docket Numbers 42 and 124, while all parts of this Court's March 24 and 26, 2004 Order and Judgment were before the Eleventh Circuit. *See* Dkt. 315, p. 3. Defendant's claim is not only wrong, but it flatly contradicts his previous position to this Court. Specifically, in opposing AAPD's emergency motion for a Rule 54(b) certification, the Defendant indicated that the March 24 and 26, 2004 Order and Judgment "are clearly injunctive orders which may be appealed pursuant to 28 U.S.C. § 1292(a)(1)." Dkt. 240, p. 1. This Court agreed with Defendant and restated the injunctive relief granted in the March 24 and 26, 2004 Order and Judgment. Dkt. 241. Thus, Defendant clearly knew as early as 2004 that the injunctive relief issues were all that that was before the Eleventh Circuit.

Significantly, the Defendant opposed the opportunity to ensure that all parts of this Court's March 24 and 26, 2004 Order and Judgment were properly before the Eleventh Circuit through a Rule 54(b) certification. *See* Dkt. 240. The Court acknowledged Defendant's opposition and declined to provide a Rule 54(b) certification. *See* Dkt. 241. The Eleventh Circuit, in turn, limited the appeal solely to a review of this Court's injunctive relief orders. *See* Dkt. 254.

B. This Court Properly Interpreted the Order From the Eleventh Circuit

The Defendant claims that there can be no doubt that the Eleventh Circuit may dismiss the entire case. *See* Dkt. 315, p. 5. This might be correct if the entire case was before the Eleventh Circuit, but it is simply wrong where only portions of the judgment were appealed. *See Pitney Bowes, Inc. v. Mestre*, 701 F.2d 1365, 1375 (11th Cir. 1983) ("Where the appellant notices the appeal of a specified judgment or a part thereof, however, this court has no jurisdiction to review other judgments or issues ..."). Here, the Eleventh Circuit made specific, contested findings of jurisdiction. *See* Dkt. 254; Exhs. A, B, and C. It found that it only had jurisdiction over the injunctive relief and assumed jurisdiction only as to those issues. *Pitney Bowes*, 701 F.2d at 1375. The remainder of the jurisdiction for this case remained with the District Court. *Id.* It is now too late for the Defendant to seek to undo its opposition to the Rule 54(b) certification or seek retroactive certification.

IV. Defendant's Statement that the Eleventh Circuit Relied on HAVA is Unjustified

Defendant claims that the Eleventh Circuit relied upon the Defendant's compliance with HAVA in rendering this action moot. *See* Dkt. 315, p. 4. Despite the Defendant's current reliance on HAVA, when the Eleventh Circuit certified its two questions to the District Court, it did not rely upon HAVA, only on the Defendant's actions mooting the relief granted. *See* Dkt. 282. Recognizing the issue presented by the Eleventh Circuit, when this Court answered both of the Eleventh Circuit's questions, it similarly did not rely on HAVA and, in fact, did not even mention HAVA. *See* Dkt. 285. Finally, once the Eleventh Circuit dismissed the injunctive relief on August 15, 2007, the Eleventh Circuit did not rely upon or even mention HAVA. *See* Dkt. 290.

Most telling is that the Defendant did not mention or rely on HAVA when it complied with this Court's order and judgment. Specifically, in 2004, the Defendant filed a number of

reports with the Court[7] reporting its progress. In each report, the Defendant expressly admitted that it was acting pursuant to this Court's orders and never once even mentioned HAVA when doing so.[8] Since this case was brought before HAVA was enacted and is not premised on HAVA or its requirements, Defendant's belated attempt to interject HAVA into these proceedings is irrelevant. This is particularly true since HAVA required compliance by January 1, 2006 and the Defendant's discriminatory behavior all occurred before November 17, 2005. *See* Dkt. 290.

The Defendant is wrong when he states that the Eleventh Circuit did not consider whether the Defendant complied with the District Court's March 24 and 26, 2004 Order and Judgment. *See* Dkt. 315, p. 4. Since HAVA does not supersede or limit the ADA and the Eleventh Circuit made no mention of HAVA, HAVA cannot be the basis for the Eleventh Circuit's decision. *See* 42 U.S.C. § 15545(a)(5); Dkt. 282 and 290. To the contrary, the appealed decision – the District Court's injunctive relief from the March 24 and 26, 2004 Order and Judgment – was the only thing properly before the Eleventh Circuit[9] and the only reasonable items for the Eleventh Circuit to consider in reaching its decision.

V. The *Troiano* Case is Neither Controlling Nor Persuasive in This Case

In its legal argument, the Defendant relies almost entirely on the *Troiano* case for legal support of his position. *See* Dkt. 315, pp. 6-8; *Troiano v. Supervisor of Elections*, 382 F.3d 1276 (11th Cir. 2004). This reliance is unjustified. Specifically, the actions of the Palm Beach County Supervisor of Elections, the defendant in the *Troiano* case, are vastly different from the actions of the Defendant. For example, the *Troiano* case was brought on

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[7] *See* pages 4 to 6, *supra*.

[8] *See* pages 5 to 6, *supra*.

[9] *See* pages 8 to 9, *supra*.

February 10, 2003, after HAVA was enacted, while this case was brought in November of 2001 under the ADA before HAVA's enactment. *See* Dkt. 1; *Troiano*, 382 F.3d at 1281; 42 U.S.C. §§ 12101, *et seq*. The Palm Beach County Supervisor of Elections provided accessible equipment in all voting precincts in two elections ***before she was sued***. *Troiano*, 382 F.3d at 1281. In this case, the Defendant continued to discriminate and failed to provide accessible equipment until after the AAPD sued him, after the case went to trial, after the AAPD won a declaratory judgment that the Defendant violated the ADA and after this Court ordered him to provide accessible equipment. In summary, the *Troiano* found the case was moot because the Supervisor of Elections ceased the discriminatory behavior before the plaintiff sued him. In this case, the Defendant failed to stop discriminative until after the AAPD sued him for violating the ADA, not HAVA, and won a declaratory judgment.

VI. Conclusion

This is the Defendant's fifth attempt since September to delay or avoid paying AAPD's statutorily mandated attorney's fees, expenses and costs. This Court properly held that the judgment is final. All that remains is for the Court to rule on the post-trial motions without further distractions from the Defendant. The Court should reject the Defendant's attempts to delay and to confuse the issues by arguing compliance with inapplicable case law and a statute that was never part of the case and, as a matter of law, does not excuse Defendant's violations of the ADA. Additionally, despite the Defendant's notice of appeal, AAPD respectfully requests that the Court rule on AAPD upcoming application for its fees, expenses and costs in order to place all potentially appealable issues before the Eleventh Circuit, thereby preventing future piecemeal appeals and further delay in concluding this nearly seven-year-old case. This continued pattern of delay by Defendant is unwarranted and Defendant's Motion to Vacate should be DENIED.

Respectfully submitted,

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Dated: October 22, 2007

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 22, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following as well: Ernst D. Mueller, Esq., Office of General Counsel, 117 West Duval Street, Suite 480, Jacksonville, FL 32202, Attorneys for Defendant Jerry Holland, George Lee Waas, Attorney General's Office for the State of Florida, Department of Legal Affairs, The Capitol, Suite PL-01, Tallahassee, FL 32399-1050, Attorney for Defendants Kurt S. Browning and Amy Tuck.

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