

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

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

Plaintiffs,

v.

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

Defendants.

No. 00 CE 31

Judge Michael J. Murphy

**DEFENDANT JAMES BAUMGARTNER'S VERIFIED
ANSWER AND COUNTERCLAIM**

VERIFIED ANSWER

FILED
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CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
DOROTHY BROWN
CLERK

Defendant James Baumgartner ("Baumgartner"), through his attorneys, as his answer to the complaint of plaintiffs Board of Election Commissions of the City of Chicago, Langdon D. Neal, Richard A. Cowen, and Theresa M. Petrone, states as follows:

Complaint, ¶ 1: This is a proceeding for declaratory and injunctive relief under Sections 2-701, 11-101 and 11-102 of the Code of Civil Procedure (735 ILCS 5/2-701, 5/11-01 and 5/11-102) for (a) the purpose of determining a question in actual controversy between the parties concerning whether the Defendants either jointly, severally or in the alternative are in violation of the election laws of the State of Illinois and the United States that prohibit the buying and selling of votes in elections for public office, and (b) for the purpose of obtaining injunctive relief against Defendants enjoining Defendants either jointly, severally or in the alternative from further violations of the election laws of the State of Illinois and the United States prohibiting the buying or selling of votes at the November 7, 2000 General Election (hereinafter referred to as the "Election") to be conducted in the State of Illinois. The Complaint also seeks other equitable and legal relief against Defendants, either jointly, severally or in the alternative, including but not limited to the award of damages to Plaintiffs and to members of a class consisting of all citizens of the State of Illinois for the deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States and of the State of Illinois.

ANSWER: Baumgartner admits that the above statements properly characterized this action at the time it was filed in the Circuit Court of Cook County on October 16, 2000.

Complaint, ¶ 2: Plaintiff BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO (the "Board") is a governmental entity created by Section 6-21 of The Election Code (10 ILCS 5/6-21) and is charged, pursuant to Section 6-26 of The Election Code (10 ILCS 5/6-26), with conducting all elections in the city of Chicago, Illinois.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint.

Complaint, ¶ 3: Plaintiff LANGDON D. NEAL ("Neal") is a duly appointed Commissioner and the Chairman of the Board whose oath of office requires him to support and abide by the Constitution of the United States and of the State of Illinois and the laws passed in pursuance thereof. (10 ILCS 5/6-21, 5/6-24) Neal is also a citizen and resident of, and a registered voter in, the city of Chicago, Illinois who is qualified to vote and intends to vote at the Election to be conducted in the City of Chicago and in the State of Illinois, for the purpose of electing federal, state, county and judicial officers, including President and Vice President of the United States.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 4: Plaintiff RICHARD A COWEN ("Cowen") is a duly appointed Commissioner of the Board whose oath of office requires him to support and abide by the Constitution of the United States and of the State of Illinois and the laws passed in pursuance thereof. (10 ILCS 5/6-21, 5/6-24) Cowen is also a citizen and resident of, and a registered voter in, the city of Chicago, Illinois who is qualified to vote and intends to vote at the Election to be conducted in the City of Chicago and in the State of Illinois, for the purpose of electing federal, state, county and judicial officers, including President and Vice President of the United States.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 5: Plaintiff THERESA M. PETRONE ("Petrone") is a duly appointed Commissioner of the Board whose oath of office requires her to support and abide by the Constitution of the United States and of the State of Illinois and the laws passed in pursuance thereof. (10 ILCS 5/6-21, 5/6-24) Petrone is also a citizen and resident of, and a registered voter in, the city of Chicago, Illinois who is qualified to vote and intends to vote at the Election to be conducted in the City of Chicago and in the State of Illinois, for the purpose of electing federal, state, county and judicial officers, including President and Vice President of the United States.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 6: Upon information and belief, Defendants HANS BERNHARD ("Hans Bernhard"), LUZIUS A. BERNHARD ("Luzius Bernhard"), OSKAR OBEREDER ("Obereder"), and CHRISTOPH JOHANNES MUTTER ("Mutter") are residents of and/or conduct business in Vienna, Austria. Upon information and belief, Hans Bernhard currently owns and/or operates an Internet web site entitled "Voteauction.com" that transacts business within the State of Illinois. Upon information and belief, Luzius Bernhard is the named registrant of the "Voteauction.com" domain name and the site's administrative and technical contact. Upon information and belief, Obereder and Mutter are coordinators for the "Voteauction.com" web site.

ANSWER: Baumgartner admits that Hans Bernhard owned and/or operated an Internet web site entitled "Voteauction.com" at the time of the filing of the Complaint, but denies that the web site Voteauction.com transacted business within the State of Illinois. Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the remaining allegations of this paragraph of the Complaint.

Complaint, ¶ 7: Upon information and belief, Defendant JAMES BAUMGARTNER ("Baumgartner") is a resident of the State of New York. Upon information and belief, Baumgartner created and operates or operated an Internet web site entitled "Voteauction.com" that transacts business within the State of Illinois.

ANSWER: Baumgartner admits that at the time this action was filed on October 16, he was a resident of the State of New York. At the time of the filing of this Answer,

Baumgartner is a resident of Massachusetts. Baumgartner admits that he created and operated an Internet web site entitled "Voteauction.com" but denies that Voteauction.com transacted business in the State of Illinois.

Complaint, ¶ 8: Upon information and belief, Defendant DOMAIN BANK, INC. ("Domain Bank") is a corporation organized and doing business under the laws of the State of Pennsylvania and its principal place of doing business is in the State of Pennsylvania. Domain Bank provides data processing and preparation services in computer graphics for Voteauction.com and the persons and/or businesses that own and/or operate Voteauction.com.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of the first sentence of this paragraph of the complaint. Baumgartner denies the allegations of the second sentence of this paragraph.

Complaint, ¶ 9: Jurisdiction is vested in this Court pursuant to Art. 6, Sec. 9, of the Illinois Constitution; the Code of Civil Procedure, 735 ILCS 5/2-701, 5/11-101, and 5/11-102; the Circuit Courts Act, 705 ILCS 35/26; and The Election Code, 10 ILCS 5/1-1 et seq.

ANSWER: Baumgartner admits that the Circuit Court of Cook County has jurisdiction over this action.

Complaint, ¶ 10: Defendants, nonresidents of the State of Illinois having transacted business within the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(a)(1).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 11: Defendants, nonresidents of the State of Illinois having committed tortious acts within the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(a)(2).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 12: Defendants, nonresidents of the State of Illinois having made and/or performed a contract or promise substantially connected with the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(a)(7).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 13: Defendants, nonresidents of the State of Illinois having conspired with others to violate the election laws of the State of Illinois and of the United States and commit tortious acts within the State of Illinois as alleged herein below, have submitted to the jurisdiction of this Court pursuant to 735 ILCS 5/2-209(c).

ANSWER: Baumgartner denies the allegations of this paragraph of the Complaint.

Complaint, ¶ 14: All individual Plaintiffs are residents of the city of Chicago, the County of Cook, and the State of Illinois.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the Complaint.

Complaint, ¶ 15: All individual Defendants are nonresidents of the State of Illinois.

ANSWER: Baumgartner admits the allegation that he is a nonresident of the State of Illinois and further states, on information and belief, that at the commencement of

this action and since that time, the other individual defendants are also non-residents of the State of Illinois.

Complaint, ¶ 16: Venue is properly vested in this Court pursuant to Section 2-101 of the Code of Civil Procedure (735 ILCS 5/2-101).

ANSWER: This paragraph of the Complaint consists of a legal conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 17: At the Election, registered and qualified voters in the State of Illinois will vote for and elect persons to be Electors of President and Vice President of the United States, Members of U.S. House of Representatives, State Senators, Representatives in the General Assembly, Supreme, Appellate and Circuit Judges, and various county officers.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint.

Complaint, ¶ 18: At the Election, voters in the State of Illinois will vote for President and Vice President of the United States by marking an official ballot listing the names of the candidates of each political party or group for President and Vice President. Such votes are not deemed or taken as direct votes for the candidates for President and Vice President, but instead to the Presidential vote as votes for Electors of President and Vice President of the United States selected by the political parties or groups. Persons elected as Electors of President and Vice President must, following the Election, meet in Springfield, Illinois and cast their vote for President and Vice President of the United States. (Art. 2, §1, U.S. Const.; 10 ILCS 5/21-2 through 5/21-4) The State of Illinois is entitled to twenty-two "electoral votes." The candidates for President and Vice President of the United States receiving the most electoral votes cast by electors in the various States shall be declared elected.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint.

Complaint, ¶ 19: The Board is vested with sole statutory power and duty to conduct the Election to be held within the territorial limits of the City of Chicago in accordance with election laws of the State of Illinois and of the United States.

ANSWER: This paragraph of the Complaint consists of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 20: As part of its duties, the Board has prepared, printed and distributed and will prepare, print and distribute absentee ballots to qualified voters who make application for such ballots. Specifically, the Board will mail absentee ballots from their offices in the city of Chicago, Illinois to all eligible absentee voters.

ANSWER: Baumgartner is without sufficient knowledge and information so as to form a belief as to the truth of the allegations of this paragraph of the complaint.

Complaint, ¶ 21: Sections 19-5 and 20-5 of The Election Code require that absentee voters certify under penalty of perjury that they have marked their ballots in secret. (10 ILCS 5/19-5, 5/20-5)

ANSWER: This paragraph of the Complaint consists of a legal conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 22: Sections 19-6 and 20-6 of The Election Code require that absentee voters return their marked absentee ballots directly to the Board in its offices in Chicago, Illinois only in the manner prescribed therein, namely: by mail, by personal delivery, by delivery of the voter's spouse, parent, child, brother or sister, or by a licensed messenger or motor carrier. (10 ILCS 5/19-5, 5/20-5)

ANSWER: This paragraph of the Complaint consists of a legal conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 23: The Board is further vested with the sole statutory power and duty to process such absentee ballots for tabulation and counting and to canvass the returns and results of said election in its offices in Chicago, Illinois, all in accordance with the election laws of the State of Illinois and of the United States.

ANSWER:

This paragraph of the Complaint consists of a legal conclusion, which Baumgartner need neither admit nor deny.

Complaint, ¶ 24: Upon information and belief, Baumgartner created a web site on the computer Internet known as "Voteauction.com." In or about August 2000, the Voteauction web-site began appearing on the Internet at "http://www.voteauction.com." True and correct copies of Voteauction.com's web-site pages are made a part hereof and are attached hereto as EXHIBIT A. The affidavit of Daniel Doyle, who printed copies of the Voteauction.com web pages as they appear in EXHIBIT A and attests that they are true and correct copies thereof, is attached hereto as EXHIBIT B.

ANSWER:

Baumgartner admits the allegations of the first two sentences of this paragraph of the Complaint. As to the third sentence, Baumgartner admits that true and correct copies of some of Voteauction.com's web-site pages were attached to the Complaint as Exhibit A, but denies that all of Voteauction.com's web-site pages were included in that Exhibit. As to the fourth sentence, Baumgartner admits that the affidavit of Daniel Doyle is attached to the Complaint as Exhibit B, but is without sufficient knowledge and information so as to form a belief as to the truth of the remaining allegations of this sentence.

Complaint, ¶ 25: Defendants, through the Voteauction.com web site, solicit and allow individuals, including Illinois residents, to "sell" their votes for the Election and solicit and allow individuals or corporations, including Illinois residents and corporations, to "bid" on or buy such votes. See EXHIBIT A, 1-19.

ANSWER:

Baumgartner admits that Voteauction.com contained text suggesting that individuals "sell," and that individuals and corporations "bid" on or buy votes for the Election, but further states that all of Voteauction.com, including such text, was political and artistic satire and parody, such that any specific portion of text or feature of Voteauction.com, when read in context of the entire web site, could not reasonably be construed as providing a real

auction forum for the actual purchase or sale of votes. Baumgartner denies that Voteauction.com allowed individuals and/or corporations actually to sell or buy any vote.

Complaint, ¶ 26: The Voteauction.com web site states in part, "Now you can profit from your election capital by selling your vote to the highest bidder." See EXHIBIT A, 1. The web site solicits and allows persons to register with Voteauction.com by going to an on-line computer screen, filling in the form on the screen provided (including name, address and political affiliation), and then clicking the "Submit" button on the computer screen. See EXHIBIT A, 6-7.

ANSWER: Baumgartner admits that the text of Voteauction.com was accurately quoted, in part, in the first sentence of this paragraph of the Complaint. Baumgartner admits the remaining allegations of this paragraph, but further incorporates by reference his response to paragraph 25 of this Complaint, and further states that soliciting and allowing persons to fill out Voteauction.com's registration pages was part of the satire and parody.

Complaint, ¶ 27: The Voteauction.com web site states that as of October 12, 2000, as many as 1,131 Illinois residents have registered on-line through Voteauction.com, offering their votes for sale for the Election. Upon information and belief, some of these Illinois residents are also residents of the city of Chicago. See EXHIBIT A, 16.

ANSWER: Baumgartner admits that Voteauction.com at one time stated that as of October 12, 2000, as many as 1,131 Illinois residents registered on-line through Voteauction.com, offering their votes for sale for the Election, but denies that the statement was true. Baumgartner admits that of those Illinois residents who actually did register, some were also residents of Cook County. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 28: Defendants, by and through Voteauction.com, solicit and allow Illinois individuals and corporations to "bid" on the votes being offered for sale by registering on-line using a computer screen registration form. Bidders submit bids for a block of votes consisting of all the votes offered for sale in any particular state. The Voteauction.com

web site provides that the starting bid for each state is \$100, with a minimum bid increase of \$50. The Voteauction.com web site states in part, "The winning bidder for each state will be able to choose who the group will vote for en masse." The Voteauction.com web site states, "The winning bidder will have to contact the voteauction.com voters in order to provide payment and for the voters to provide verification." See EXHIBIT A, 8-19.

ANSWER: Baumgartner admits that the text of Voteauction.com is accurately quoted, in part, in the fourth and fifth sentences of this paragraph of the Complaint. Baumgartner admits the remaining allegations of this paragraph, but further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 29: The Voteauction.com web site states that as of October 12, 2000 the highest bid offered for the purchase of Illinois residents' votes for the Election was \$14,000, equaling \$12.38 per vote. See EXHIBIT A, 16.

ANSWER: Baumgartner admits that Voteauction.com at one time stated that as of October 12, 2000 the highest bid offered for the purchase of Illinois residents' votes for the Election was \$14,000, equaling \$12.38 per vote, but denies that the statement was true. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 30: Articles posted on the Voteauction.com web site indicate that Baumgartner "had planned for voters to mail him absentee ballots to verify the selections." See EXHIBIT A, 29-30, *Vote-selling Web site to be revived, possibly offshore*, CNN.com, August 25, 2000. In an article appearing on August 17, 2000 in the *The Lycos Network*, a copy of which is posted on the Voteauction.com web site and included herewith in EXHIBIT A, 32-34, Baumgartner is reported as stating that potential vote sellers were being notified that the Voteauction legal agreement, which was still being drafted, would be sent out at the end of the month. Baumgartner is also reported as saying that he was "considering a process in which the Voteauction participant fills out an absentee ballot and votes for whomever they want in every race but the presidency. Whether that choice will be Bush, Gore, Nader, Buchanan, or someone else entirely is determined by the outcome of the online auction." "Then when the time comes, whoever wins the auction decides who this group is going to vote for," Baumgartner is quoted as saying, "So I tell those people you should vote for this person. Then they fill in the form, and then they send it to me. And I just verify that they're voting for the correct person." See EXHIBIT A, 34.

ANSWER: Baumgartner admits that that the articles referenced above were accurately quoted and/or paraphrased, in part, but denies that the statements that he was reported to have made were true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 31: In an article appearing on *The Lycos Network* on September 6, 2000, a copy of which is posted on Voteauction.com's web site and included herewith in EXHIBIT A, an unidentified spokesman for Voteauction.com is reported to have said:

"Verification will now be the responsibility of the winning bidder. ***They can choose from a variety of methods for verification of the votes. They may have the voters send in their absentee ballots for verification, they may have the voters take photographs inside the voting booth, or they go to the honor system – that is the system that many vote-purchasing endeavors have used in the past. We have chosen to have the winning bidders responsible for the verification because it would not be feasible to have people send their absentee ballots all the way to Austria and have us send them back to America within an appropriate time frame."

See EXHIBIT A, 42-43.

ANSWER: Baumgartner admits that that the article referenced above was accurately quoted, in part, but denies that the purported statements were true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 32: The Voteauction.com web site states that for the Election, Voteauction.com "is concentrating on just the U.S. Presidential election" but that Voteauction.com hopes that in future it will be able to "grow our business into every election market niche from Senatorial races to municipal water commissioner." See EXHIBIT A, 19.

ANSWER: Baumgartner admits that the text of Voteauction.com was accurately quoted, in part. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 33: The Voteauction.com web site states that it will not receive any money from the auction. However, Bernhard has stated that "We bought the domain name and related business because we see this as a serious business venture in which we can make money." See EXHIBIT A, 19, 29.

ANSWER: Baumgartner admits that the text of Voteauction.com was accurately quoted, in part, and that Bernhard was reported to have made the statement attributed to him, above. However, Baumgartner is without sufficient information to form a belief as to whether or not Bernhard actually made the above statement, and, in any event, upon information and belief, Baumgartner denies that the substance of the statement attributed to Bernhard is true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 34: Nowhere on the Voteauction.com web site does it state that the selling and buying of votes, or offering to buy or sell votes is illegal or that the individuals selling or offering to sell their votes, and individuals buying or offering to buy votes may be committing a crime. See EXHIBIT A, 1-22.

ANSWER: Baumgartner admits that the text he created for Voteauction.com does not state that the selling and buying of votes, or offering to buy or sell votes is illegal and that the individuals selling or offering to sell their votes, and individuals buying or offering to buy votes may be committing a crime. However, Baumgartner denies that "nowhere on the Voteauction.com web site" do such statements appear. In fact, such statements can be found on the message board and in some of the articles posted on Voteauction.com. See e.g., messages posted by A.L. Zimmer, General Counsel of the Illinois State Board of Elections, Exhibit B hereto at pp.2-3 and Exhibit A to Complaint at 105, no. 6; see also Exhibit A to Complaint at 24, 26, 27, 33, 35,36, 41, 45, 48, 55, 56, 57, 59, 63, 66, 67,74, 78, 85, 89, 93. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 35: The laws of the State of Illinois and of the United States prohibit the selling and buying of votes.

ANSWER: The allegations of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 36: Section 29-1 of The Election Code (10 ILCS 5/29-1) provides, "Any person who knowingly gives, lends or promises to give or lend any money or other valuable consideration to any other person to influence such other person to vote *** or to influence such other person to vote for or against any candidate or public question to be voted upon at any election shall be guilty of a Class 4 felony." Thus, vote buying is illegal under Illinois law and any person giving or promising to give money to Illinois residents to influence them to vote or to vote for or against any candidate to be voted upon at the Election is guilty of a Class 4 felony, which is punishable by imprisonment for 1 to 3 years.

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part. The remaining allegations of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 37: Section 29-3 of The Election Code (10 ILCS 5/29-3) provides, "Any person who votes for or against any candidate or public question in consideration of any gift or loan of money or for any other valuable consideration *** shall be guilty of a Class 4 felony." Thus, vote selling is illegal under Illinois law and any person voting for or against any candidate on the Illinois ballot for the Election in consideration of any money or other valuable consideration is guilty of a Class 4 felony, which is punishable by imprisonment for 1 to 3 years.

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part. The remaining allegations of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 38: Any person *attempting* to sell or buy votes in Illinois has committed an offense under Illinois law and is guilty of a Class 4 felony that is punishable by imprisonment for 1 to 3 years. (10 ILCS 5/29-13; 720 ILCS 5/2-12; 720 ILCS 5/8-4) Thus, any person in Illinois who has attempted to sell his or her vote at the Election by registering with Voteauction.com to sell his or her vote, and any person who has attempted to buy the votes of Illinois residents for the Election by registering with Voteauction.com to bid on such votes, has committed a Class 4 felony.

ANSWER: The allegations of the first sentence of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny. Baumgartner denies the remaining allegations of this paragraph and further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 39: Any person who *solicits* another to sell or buy votes in Illinois has committed an offense under Illinois law and is guilty of a Class 4 felony that is punishable by imprisonment for 1 to 3 years. (10 ILCS 5/29-13; 720 ILCS 5/2-12; 720 ILCS 5/8-1) Defendants, by and through Voteauction.com, are guilty of soliciting others to sell or buy votes in Illinois and have committed a Class 4 felony.

ANSWER: The allegations of the first sentence of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny. Baumgartner denies the remaining allegations of this paragraph and further incorporates by reference his response to paragraph 25 and 26 of the Complaint.

Complaint, ¶ 40: Any person who *conspires* with another to sell or buy votes in Illinois has committed an offense under Illinois law and is guilty of a Class 4 felony that is punishable by imprisonment for 1 to 3 years. (10 ILCS 5/29-13; 720 ILCS 5/2-12; 720 ILCS 5/8-2) Defendants have conspired with others to sell and buy votes of Illinois and are guilty of conspiring to sell and buy votes in Illinois under the laws of the State of Illinois.

ANSWER: The allegations of the first sentence of this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny. Baumgartner denies the remaining allegations of this paragraph and further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 41: Anyone who marks or tampers with an absentee ballot of another person or takes an absentee ballot of another person in violation of Section 19-6 of The Election Code (See ¶22 above) so that an opportunity for fraudulent marking or tampering is created is guilty of a Class 3 felony under Illinois law. (10 ILCS 5/29-20)

ANSWER:

This paragraph consists of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 42: By requiring those offering to sell their votes to submit their absentee ballots to Defendants or to others so as to verify their voting selections, Defendants are guilty of (a) conspiring with others to commit absentee fraud, (b) soliciting others to commit absentee vote fraud, and (c) attempted absentee vote fraud.

ANSWER:

Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of this Complaint.

Complaint, ¶ 43: Title 18, Section 597 of the United States Code (18 U.S.C. §597) provides, "Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote shall be fined not more than \$1,000 or imprisoned not more than one year or both; and if the violation was willful, shall be fined not more than \$10,000 or imprisoned not more than two years, or both."

ANSWER:

Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 44: Title 42, Section 1973i(c) of the United States Code (42 U.S.C. § 1973i(c)) provides that for Federal elections, "Whoever knowingly or willfully *** pays or offers to pay or accepts payment for *** voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

ANSWER:

Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 45: Thus, any person in Illinois who has knowingly or willfully offered to sell his or her vote at the Election, which is also a Federal election, by registering with Voteauction.com to sell his or her vote, and any person who has knowingly or willfully offered

to buy the votes of Illinois residents for the Election by registering with Voteauction.com to bid on such votes, has committed a criminal offense under 18 U.S.C. §597 and 42 U.S.C. §1973i(c).

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 46: Title 42, Section 1973i(c) of the United States Code (42 U.S.C. § 1973i(c)) also provides that for Federal elections, "Whoever knowingly or willfully *** conspires with another individual for the purpose of *** illegal voting *** shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 47: Thus, Defendants have committed a violation of 42 U.S.C. §1973i(c) in that they have conspired for the purpose of illegal voting.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 48: Title 42, Section 1973gg-10 of the United States Code (42 U.S.C. § 1973gg-10) provides that in any Federal election, "A person ****knowingly and willingly deprives, defrauds, or attempts to deprive or defraud the residents of a State of a fair and impartially conducted election process by *** the procurement, casting, or tabulation of ballots that are known by the person to be made materially false, fictitious, or fraudulent under the laws of the State in which the election is held, shall be fined in accordance with title 18 *** or imprisoned not more than 5 years, or both." Thus, federal law secures the right of voters in a State to have fair and impartially conducted elections.

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part. The remaining allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 49: Defendants, by and through Voteauction.com, have knowingly and willfully deprived and defrauded, and will deprive and defraud, Plaintiffs and all citizens of the State of Illinois of a fair and impartial election by procuring ballots that are known to be materially false and fraudulent under the laws of the State of Illinois.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 50: Article 3, Section 3 of the Constitution of the State of Illinois (Art. 3, § 3 Ill. Const.) guarantees Illinois citizens the right to "free and equal" elections. Under this provision, elections are free only when the voters are subjected to no intimidation or improper influence and when every voter is allowed to cast his or her own ballot as his or her own judgment and conscience dictate. When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections are destroyed.

ANSWER: Baumgartner admits that the above-referenced constitutional provision is accurately quoted, in part. The remaining allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 51: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, by and through Voteauction.com, have deprived and will deprive the Plaintiffs and all Illinois citizens of their constitutional right to free and equal elections.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 52: Defendants have been warned that the buying or selling of votes in Illinois is a Class 4 felony. See September 20, 2000 and October 5, 2000 electronic mail messages from A. L. Zimmer, General Counsel, Illinois State Board of Elections to the Voteauction.com "Message Board," which is posted on Voteauction.com's web site. See EXHIBIT A, 107-108.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. The messages cited in this paragraph were directed to Illinois voters, not to defendants. See Exhibit B hereto at pp. 2-3.

Complaint, ¶ 53: In an article appearing on *CNN.com* on August 25, 2000, a copy of which is posted on *Voteauction.com*'s web site and included herewith as EXHIBIT A, Hans Bernhard is reported to have said that his holding company would operate *Voteauction.com* outside of the United States to circumvent federal and state laws that forbid purchasing and buying ballots. See EXHIBIT A, 29.

ANSWER: Baumgartner admits that Bernhard was reported to have made the above statement. However, Baumgartner is without sufficient information to form a belief as to whether or not Bernhard actually made the above statement, and, in any event, upon information and belief, Baumgartner denies that the substance of the statement attributed to Bernhard is true. Baumgartner further incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 54: Notwithstanding warnings that the buying and selling of votes is illegal under Illinois law and notwithstanding their own admissions that their conduct violates state and federal laws, Defendants have continued to knowingly and willfully violate the election laws of the State of Illinois and of the United States by encouraging, soliciting and allowing the residents of Illinois and others through the *Voteauction.com* web site to sell and buy votes for candidates at the Election.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

COUNT I

Complaint, ¶ 1-54: Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 54 herein as their allegations 1 through 54 of Count I.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 54 as his responses to allegations 1 through 54 of Count 1.

Complaint, ¶ 55: A dispute and controversy has arisen between the Plaintiffs and the Defendants concerning the right of Defendants to use and operate an Internet web site as an auction forum for the purpose of encouraging, soliciting and allowing residents of Illinois to sell their votes to be cast at the Election and encouraging, soliciting and allowing individuals and corporations to "bid" on and buy such votes.

ANSWER: Baumgartner admits that a dispute has arisen between the Plaintiffs and the Defendants concerning the right of Defendants to use and operate the Internet web site Voteauction.com but denies the remaining allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his responses to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 56: Defendants' continued use and operation of the Internet web site known as Voteauction.com as an auction forum for purpose of encouraging, soliciting and allowing residents of Illinois to sell their votes to be cast at the Election and encouraging, soliciting and allowing individuals and corporations to "bid" on or buy such votes constitutes knowing and willful violations of the election laws of the State of Illinois and of the United States that will result in illegal and fraudulent voting at the Election if not prevented.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his responses to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 57: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such

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

ANSWER: The allegations in this paragraph of the Complaint consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 58: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, owe a duty to Plaintiffs and to all citizens of the State of Illinois not to deprive them or defraud them of their rights and privileges under the Constitutions and laws of the State of Illinois and of the United States to a free and equal election and to a fair and impartially conducted election process.

ANSWER: The allegations in this paragraph of the Complaint consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 59: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have deprived and defrauded, and will deprive and defraud, the Plaintiffs and all citizens of the State of Illinois of their rights and privileges under the Constitutions and laws of the State of Illinois and of the United States to a free and equal election and to a fair and impartially conducted election process.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint. Baumgartner also incorporates by reference his response to paragraphs 25 and 26 of the Complaint.

Complaint, ¶ 60: An actual controversy exists between the Plaintiffs and the Defendants.

ANSWER: Baumgartner admits the allegations of this paragraph of the Complaint. Baumgartner also incorporates by reference his responses to paragraph 25 and paragraph 26 of the Complaint.

COUNT II

Complaint, ¶ 1-60: Plaintiffs re-allege and incorporate by reference the allegations contained in paragraphs 1 through 60 of Count I herein as their allegations 1 through 60 of Count II.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 60 of Count I as his responses to allegations 1 through 60 of Count II.

Complaint, ¶ 61: Unless injunctive relief is granted, Defendants will continue to violate the election laws of the State of Illinois and of the United States and to deprive Plaintiffs and all citizens of the State of Illinois of their rights and privileges under the Constitution of the United States and of the State of Illinois and the laws passed pursuant thereof to a free and equal election and to a fair and impartially conducted election process.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 62: Unless injunctive relief is granted, Defendants' illegal and tortious conduct will allow the ballot box to become the receptacle of fraudulent votes, thus infecting the result of the Election with fraud.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 63: Unless injunctive relief is granted, Defendants' illegal and tortious conduct may affect the results of the Election for President and Vice President of the United States as well as for other offices.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 64: The Plaintiffs will suffer immediate and irreparable injury in fulfilling their statutory duties to provide for the orderly and lawful administration of this election unless Defendants' illegal and tortious conduct is enjoined forthwith. Plaintiffs Neal, Cowen and Petrone, as well as all citizens of the State of Illinois will, unless Defendants'

conduct is enjoined forthwith, suffer irreparable injury to their rights as citizens of the State of Illinois to a free and fair election.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 65: Given the nature of the injuries to result [sic] from Defendants' illegal and tortious conduct, neither Plaintiffs nor the citizens of the State of Illinois will have an adequate remedy at law in which to redress Defendants' conduct because the injuries suffered are of such a nature that damages may not be reasonably ascertained.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 66: Absent immediate relief, Plaintiffs will, in fact, be denied meaningful relief because the right to vote in the Election will be rendered moot after the Election.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 67: The threatened injury to the Plaintiffs and to the citizens of the State of Illinois will be immediate, certain and great if injunctive relief is denied while the loss or inconvenience to the Defendants (not being able to engage in an illegal enterprise) will be comparatively small and insignificant if injunctive relief is granted.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 68: Plaintiffs have a reasonable likelihood of prevailing on the merits of this claim.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 69: The granting of injunctive relief in this case will not have an injurious effect on the public and, in fact, will better serve the interests of the public than if not granted.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

COUNT III

Complaint, ¶ 1-60: Plaintiffs Neal, Cowen and Petrone re-allege and incorporate by reference the allegations contained in paragraphs 1 through 60 of Count I herein as their allegations 1 through 60 of Count III.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 60 of Count I as his responses to allegations 1 through 60 of Count III.

Complaint, ¶ 61: Plaintiffs Neal, Cowen and Petrone, pursuant to Section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801), bring this action on their own behalf and on behalf of all citizens of the State of Illinois, except those who have offered to sell their votes and those who have bid on the votes being offered as alleged above (the "class"). The class is so numerous that joinder of all members is impractical; questions of law and fact are common to the class; adequate representation of claims of representative parties exists and a class action is an appropriate litigation procedure in terms of time, effort and expense and uniformity of decision.

ANSWER: Baumgartner admits that Plaintiffs brought this case as a purported class action. Baumgartner denies the remaining allegations in this paragraph.

Complaint, ¶ 62: Article 3, Section 3 of the Constitution of the State of Illinois (Art. 3, §3. Ill. Const.) guarantees Illinois citizens the right to "free and equal" elections. Under this provision, elections are free only when the voters are subjected to no intimidation or improper influence and when every voter is allowed to cast his or her own ballot as his or her judgment and conscience dictate. When the ballot box becomes the receptacle of fraudulent votes, the freedom and equality of elections is destroyed.

ANSWER: Baumgartner admits that the above-referenced constitutional provision is accurately quoted, in part. The remaining allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 63: Under Title 42, Section 1973gg-10 of the United States Code (42 U.S.C. §1973gg-10), federal law secures the right of voters in a State to have fair and impartially conducted elections.

ANSWER: The allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 64: Section 29-17 of The Election Code (10 ILCS 5/29-17) provides that "Any person who subjects, or causes to be subjected, a citizen of the State of Illinois or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws of the United States or the State of Illinois, relating to registration to vote, the conduct of elections, voting, or the nomination or election of candidates for public or political party office, shall be liable to the party injured or any person affected, in any action or proceeding for redress."

ANSWER: Baumgartner admits the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 65: Under Section 29-17, Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, owe a duty to Plaintiffs Neal, Cowen and Petrone and to each member of their class of their rights not to subject them to a deprivation of any rights or privileges secured under the Constitution and laws of the State of Illinois and of the United States, including those secured by Article 3, Section 3 of the Illinois Constitution and by 42 U.S.C. §1973gg-10 relating to voting, the conduct of election or the election of candidates for public office.

ANSWER: The allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 66: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have unlawfully subjected Plaintiffs Neal, Cowen and Petrone and each member of their class to the deprivation of their rights and privileges under Article 3, Section 3 of the Illinois Constitution to a free and equal election for the Election and Defendants have breached their duty to Plaintiffs and the class members.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 67: Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have unlawfully subjected Plaintiffs Neal, Cowen and Petrone and each member of their class to the deprivation of their rights under 42 U.S.C. §1973gg-10 to a fair and impartially conducted election for the November 7, 2000 General Election and Defendants have breached their duty to Plaintiffs and the class members.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 68: Plaintiffs Neal, Cowen and Petrone and each member of their class have suffered injuries due to Defendants' unlawful deprivation of Plaintiffs' and class members' constitutional and legal rights and Defendants' breach of duty toward Plaintiffs and the class members.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint

Complaint, ¶ 69: Defendants are, therefore, liable to Plaintiffs Neal, Cowen and Petrone and to each member of their class under Section 29-17 of The Election Code for the deprivation of their rights and privileges secured by the Constitution or laws of the United States and of the State of Illinois as enumerated above.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

COUNT IV

Complaint, ¶ 1-60: Plaintiffs Neal, Cowen and Petrone re-allege and incorporate by reference the allegations contained in paragraphs 1 through 60 of Count I herein as their allegations 1 through 60 of Count IV.

ANSWER: Baumgartner incorporates by reference his responses to paragraphs 1 through 60 of Count I as his responses to allegations 1 through 60 of Count IV.

Complaint, ¶ 61: Plaintiffs Neal, Cowen and Petrone, pursuant to Section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801), bring this action on their own behalf and on behalf of all citizens of the State of Illinois, except those who have offered to sell their votes and those who have bid on the votes being offered as alleged above (the "class"). The class is so numerous that joinder of all members is impractical; questions of law or fact are common to the class; adequate representation of claims of representative parties exists and a class action is an appropriate litigation procedure in terms of time, effort and expense and uniformity of decision.

ANSWER: Baumgartner admits that Plaintiffs brought this case as a purported class action. Baumgartner denies the remaining allegations in this paragraph.

Complaint, ¶ 62: Section 29-19 of The Election Code (10 ILCS 5/29-19) provides in part that "Whoever knowingly or willfully *** conspires with another individual for the purpose of encouraging *** illegal voting, or pays or offers to pay or accepts payment *** for voting shall be liable to the party injured or any other person affected, in an action or proceeding for redress."

ANSWER: Baumgartner admits that the above-referenced statute is accurately quoted, in part.

Complaint, ¶ 63: Under Section 29-19, Defendants and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, owe a duty to Plaintiffs Neal, Cowen and Petrone and to each member of their class not to conspire with others for the purpose of encouraging illegal voting.

ANSWER: The allegations in this paragraph consist of legal conclusions, which Baumgartner need neither admit nor deny.

Complaint, ¶ 64: Defendants, and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have knowingly and willfully conspired for the purpose of encouraging illegal voting.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 65: Defendants, and all those acting in concert with them, including those Illinois residents who have or will sell their votes or who have or will buy such votes, have by their unlawful conspiracy to encourage illegal voting breached their duty to Plaintiffs Neal, Cowen and Petrone and each member of their class and Plaintiffs Neal, Cowen and Petrone and each member of their class have suffered injuries as a result of said breach.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

Complaint, ¶ 66: Defendants are, therefore, liable to Plaintiffs Neal, Cowen and Petrone and to each member of their class under Section 29-19 of The Election Code for conspiring to encourage illegal voting.

ANSWER: Baumgartner denies the allegations in this paragraph of the Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

1. The Complaint should be dismissed, or, in the alternative, judgment on the pleadings should be awarded to Baumgartner, pursuant to sections 2-615 of the Illinois Code of Civil Procedure, because the facts alleged in the Complaint do not support plaintiffs' allegations that any defendant, including Baumgartner, used or operated Voteauction.com as a real auction site for the actual purchase or sale of votes in violation of any election or criminal law of Illinois or the United States.

Rather, the facts alleged therein demonstrate that Voteauction.com was political and social satire and parody, protected by the First Amendment to the Constitution of the United States. Incorporated herein are Exhibit A to Plaintiffs' Complaint (a print-out of the majority of the pages of Voteauction.com as of October 12, 2000) and paragraphs 25 - 34 of Baumgartner's Answer.

Second Affirmative Defense

2. The Complaint should be involuntarily dismissed pursuant to Section 2-619 of the Code of Civil Procedure, as to defendant Baumgartner, because the facts alleged in the pleadings and Baumgartner's supporting affidavit establish that Baumgartner did not intend to use or operate and did not in fact use or operate Voteauction.com as a real auction site for the actual purchase or sale of votes in violation of any criminal or election law of Illinois or the United States, but rather that Voteauction.com was political and artistic satire and parody on the Internet, protected by the First Amendment to the Constitution of the United States. Incorporated herein are Exhibit A to Plaintiffs' Complaint, paragraphs 25-34 of Baumgartner's Answer thereto, Paragraphs 6-30 of Baumgartner's Counterclaim, Exhibits A and B to the Answer and Counterclaim, and Baumgartner's affidavit.

Third Affirmative Defense

3. The injunctive remedy sought and obtained on a preliminary basis by plaintiffs is an unconstitutional prior restraint on political, artistic, and Internet speech, protected by the First Amendment. The allegations of the First and Second Affirmative Defenses are hereby incorporated herein.

Fourth Affirmative Defense

4. The crime of conspiracy for the purpose of illegal voting, as defined by 42 U.S.C. sec. 1973i(c), pursuant to which plaintiffs have charged defendants with conspiracy, applies to only a single form of conspiracy, i.e., conspiring with another individual, so that a conspiracy with more than one other individual falls outside the scope of Sec. 1973i(c). As defendants are accused of participating in the conspiracy with each other and with over 1,000 Illinois residents, *see* Complaint at par. 47 and Plaintiffs' Memorandum of Law in support of Motion for a Temporary Restraining Order or Preliminary Injunction at 17, 20-21, therefore Baumgartner cannot be guilty of conspiracy under this section as a matter of law.

VERIFIED COUNTERCLAIM

Counter-plaintiff James Baumgartner, by his attorneys, makes this counter-complaint as follows:

Preliminary Statement

1. This counter-complaint asserts a civil rights action pursuant to 42 U.S.C. sec. 1983, 28 U.S.C. sec. 2201 *et seq.*, and Sections 2-701 and 11-108 of the Illinois Code of Civil Procedure (735 ILCS 5/2-701 and 5/11-108) for declaratory and other relief. Counter-plaintiff James Baumgartner is one of the defendants in the underlying action. Baumgartner created and operated Voteauction.com, an Internet web site, constructed around the tongue-in-cheek proposal that the individual voter could cash in on the big money in politics by registering to sell his vote to the highest bidder. As such, Voteauction.com was a political satire and parody of the American campaign finance system and the on-line commercial market. Counter-defendant is

the Board of Elections of the City of Chicago ("the Board"), the institutional plaintiff in the underlying action. Counter-defendant, along with three individual commissioners of the Board, filed suit in the Circuit Court of Cook County ("Circuit Court") to close down Voteauction.com on the grounds that its operation violated various federal and state election and criminal laws that prohibit the buying and selling of votes. Counter-defendant obtained a preliminary injunction from the Circuit Court on October 18 that resulted in the removal of Voteauction.com from the Internet and enjoined Baumgartner (and his co-defendants) from operating any such site, or substantially similar site, in the future. The counterclaim alleges that the injunction sought and obtained by the counter-defendants violates Baumgartner's rights to free speech and assembly under the First Amendment to the Constitution of the United States and operates as an unconstitutional prior restraint on his political and artistic expression.

2. Counter-plaintiff Baumgartner seeks (1) a declaratory judgment that Voteauction.com is protected political and artistic expression and that the injunction violates his First Amendment rights; (2) to vacate the preliminary injunction entered on October 18, in connection with which Baumgartner has filed, contemporaneously with this Answer and Counterclaim, his Motion to Vacate Injunction; and (3) an award of compensatory damages for the injuries he sustained as a result of the violation of his First Amendment rights.

Parties

3. The counter-plaintiff is James Baumgartner, one of the defendants in the underlying action. Baumgartner was a resident of New York at the time the Complaint was filed and is now a resident of Massachusetts.

4. The counter-defendant is the Board of Election Commissioners of the City of Chicago, a governmental entity created by Section 6-21 of The Election Code of Illinois.

5. The counter-defendant has at all times pertinent hereto acted under color of law.

Statement of the Claim

6. Baumgartner, a graduate student at Rensselaer Polytechnic Institute ("RPI") in New York State, created the Internet web site entitled "Voteauction.com" for his master's thesis in Electronic Art. Baumgartner conceived of Voteauction.com as a work of performance art on the Internet that would satirize and parody the American campaign finance system and Internet commerce. His purpose was to comment critically and generate discussion on a major problem in American government: the ability of corporate interests to buy political candidates. Baumgartner did not intend to operate, and did not operate, Voteauction.com as a real auction site where votes actually could be bought and sold.

7. Voteauction.com first appeared on the Internet on approximately August 1, 2000. It consisted of text, ironic in tone, describing how the "soft money" system in politics operates, criticizing the great amount of money spent by corporate donors to influence the candidates and by the candidates and their campaigns to influence the voters, and discussing the history of the role of money in politics. It also included the option for site visitors to "register" to sell their votes to be cast in the November, 2000 national election to the highest bidder, as well as an option for corporations or other groups to "bid" to buy blocks of votes. It also included links to other web sites discussing campaign finance-related issues, including the official web sites of the Democratic and Republican presidential candidates; other satirical web sites, such as www.billionairesforbushorgore; and (as they were published) to on-line articles discussing the web site itself. A message board, which site visitors could use to communicate with the site and each other, was added at a later date. A hard copy of the majority of pages of the Voteauction.com web site, as of October 12, 2000, absent the actual screens filled out by

registrants and the actual messages posted to the message board, is contained in Exhibit A to the Complaint filed by counter-defendant in the Circuit Court and incorporated, by reference, into the Complaint. See Complaint at par. 24; Affidavit of Daniel Doyle, attached as Exhibit B to Complaint. The screens filled out by Illinois registrants, as of August 18, are attached to this Answer and Counterclaim as Exhibit A and incorporated herein. A selection of messages posted to the message board (between September 23 and October 19) by site visitors is attached to this Answer and Counterclaim as Exhibit B and also incorporated herein. By his signature on this pleading, and also by affidavit, filed contemporaneously with this Counterclaim, Baumgartner verifies that Exhibits A and B are true and correct hard copies of comments from Illinois residents for the period from August 1-August 18 and selected messages from September 23 to October 19, respectively, posted by site visitors on Voteauction.com.

8. Baumgartner's intention in launching Voteauction.com was to advance his belief that the American campaign financing system is corrupt and to initiate and facilitate a forum for discussion about problems with that system, in which an audience of site visitors across the United States and even around the world could participate. The Internet presented an ideal forum to transmit his satiric message to a potential audience of millions and engage them in debate and discussion. For this reason, an important component of Voteauction.com was its interactive nature. Several components of Voteauction.com were designed to facilitate this interaction: the option to "register" to "sell" or "bid" on a vote; the option for the registrant to give a reason why he or she desired to sell his vote; the creation of "voter empowerment kits" that included sample letters, highly ironic in tone, to candidates and/or corporations to convey their disgust with the system of campaign contributions; and the message board.

9. In conjunction with his thesis advisors, Baumgartner determined that it was important that his web site look like a real business, at first blush, in order to further the parody and satire and make his points about the corrupting influence of money on the election. He also intended for Voteauction.com to parody the explosion of dot-com start-ups in their naïve enthusiasm to make money from an emerging market. To this end, he came up with the idea to pass himself off as a young business entrepreneur in interviews and press releases.

10. While Baumgartner intended that the site look real to the casual observer, the site was bursting with none too subtle indications -- from its ironic text and accompanying graphics, to the clearly tongue-in-cheek voter empowerment kits, to the links to other web sites, and to the inclusion of the message board, among others -- that made readily apparent to the reasonable person, upon further inspection, the satiric nature and message of the site.

11. The site was also designed in such a way that it could not be used for the actual purchase or sale of a vote. The site was not constructed to match up those who registered to "buy" and "sell," or to verify information given by those registrants. In addition, Baumgartner did not intend to, and did not, link "buyers" and "sellers" through any avenue outside of the site or verify any registrants' information. To Baumgartner's knowledge, no person who registered on the site actually sold his or her vote, or purchased a vote, through Voteauction.com.

12. Although numbers were posted to the web site that indicated that more than 15,000 individuals (1131 of whom were purported to be from Illinois) registered on Voteauction.com, as well as the current amount of bids, these numbers were fictitious, created and regularly updated by Baumgartner as part of his goal to have the site appear to be a real vote auction at first blush. In fact, only a fraction of that number -- somewhere in the range of 1,000 to 3,000 people -- filled out the "sell" registration page, and approximately 5-10 people, none of whom are residents of

Bernhard shared his purpose to use the site to generate attention and discussion, both in the United States and abroad, of the effect of money on politics, and not to create a real auction where votes were actually bought and sold.

17. The site was then reopened on or about August 23, although the registration pages may not have been active at this time. On or about August 30, the registration pages were reactivated. Baumgartner began creating the fictitious numbers for the number of registered persons and status of bids after the site was back on-line. On or about September 23, he set up the message board. Baumgartner had direct access to the site in order to add to or change its content up until mid-September, when such direct access was cut off in order to secure the site from hackers.

18. On October 16, counter-defendants filed the underlying action in the Circuit Court of Cook County in Chicago, Illinois, seeking a preliminary injunction to close down Voteauction.com on the grounds that its operation violated various federal and state election and criminal laws. The Court granted the requested injunction ex parte on October 18.

19. Baumgartner first learned of the suit when counsel for counter-defendants contacted him on October 16 to advise him that he was named as a defendant in the underlying lawsuit. Counsel for counter-defendants had not contacted Baumgartner prior to filing this suit.

20. Upon learning of the suit, Baumgartner immediately stopped creating numbers for and ended all involvement with Voteauction.com.

21. Baumgartner was unable to secure local counsel in time to appear in circuit court in Chicago by October 18 to defend against the motion for a preliminary injunction.

22. The Preliminary Injunction Order provides that defendants, and "all those acting in concert with them," are enjoined from:

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

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

23. As a result of the Circuit Court's Preliminary Injunction Order, the domain name Voteauction.com was revoked, access to the site through the World Wide Web was denied, and ultimately Voteauction.com was removed from the Internet. Following the issuance of the Order, Baumgartner ceased to have any access to or control over the site.

24. On October 31, Baumgartner removed the circuit court action to the United States District Court for the Northern District of Illinois. Counter-defendant then moved to remand it back to the Circuit Court. The federal court granted the motion to remand on February 6, 2001, returning the case to the Circuit Court.

25. Counter-defendant knew or ought to have known that Voteauction.com was a satire and parody, and not a real auction site established for the purpose of buying or selling votes, but nonetheless decided to sue Baumgartner and seek to enjoin Voteauction.com in order to prohibit even the satirical suggestion that the election system is tainted, insofar as the Board feared that suggestion could relate to Illinois and the city of Chicago. Prior to filing this suit, counter-defendant, through its Chairman, stated to the press:

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

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

(Complaint, Exh. A at 81.) In other articles, Board spokesman Tom Leach was quoted as follows:

When you read the Web site, it's almost like a parody or theater, but our concern is that some of our people registering on there are taking this seriously.... It's something that Chicago is sensitive about. Anywhere you go in the country and you talk about Chicago elections, you're going to get the snickers like, you know, "Vote early, vote often," and the cemetery stuff.

Zitrin, *Officials Move to Shut Vote-Selling Web Site*, APBnews.com, October 17, 2000 (attached hereto as Exhibit C).

We've said from the beginning that they make think it's a parody... [b]ut we don't think it's funny.

Anderson, *Voteauction Booth is Closed*, Wirednews, October 21, 2000 (attached hereto as Exhibit D). Thus, counter-defendants understood or ought to have understood that Baumgartner was not really auctioning votes. Certainly prior to filing suit and obtaining the preliminary injunction, counter-defendant did nothing to eliminate any confusion it may have had about Voteauction.com. Nonetheless, despite the great First Amendment interests at stake, counter-defendants proceeded ex parte to obtain a preliminary injunction shutting down Voteauction.com.

26. The Preliminary Injunction Order requested and obtained by counter-defendants shut down Voteauction.com just three weeks prior to the November 7, 2000 presidential election, a time during which citizen attention to and interest in campaign related issues was extremely high. When the site was shut down, Baumgartner lost his chosen and unique channel of communication and intended audience for purposes of sending and discussing his message. No medium is comparable to the Internet in facilitating the dissemination of a message as well as an interactive, ongoing conversation with large numbers of people all over the world. When the site was closed down, Baumgartner's message, the association of people engaging in the advancement of shared beliefs, and the on-line interest, debate, and conversation that it increasingly was generating was extinguished.

27. After Voteauction.com was taken off the Internet pursuant to the preliminary injunction order, shortly thereafter another website, called "Vote-auction.com," was put up on the Internet. However, Baumgartner personally has had no involvement with Vote-auction.com,

including the decision to put it up on the Internet, and no control over this site or its contents. Thus, this site does not provide him with an alternative avenue, let alone a comparable one, for continuing to broadcast his message.

28. Even though the November 2000 election has now passed, Baumgartner desires to have the option of restoring Voteauction.com to the Internet in the future. He believes that his message about the problems with the campaign financing system remains as important as ever. He believes that Voteauction.com generated increased interest and stimulating discussion on such issues and could have a role in fueling the movement for campaign finance reform. For these reasons, he wants to have the ability to put the site (or a substantially similar site, using the construct of a vote auction to send a satirical message) back up on the Internet, and to do so with the domain name Voteauction.com, by which his former site was known. However, it is his understanding that the preliminary injunction entered by the Circuit Court of Cook County prohibits him from doing so. As long as such injunction is in place, he is afraid to create and operate any Internet web site that uses the construct of a vote auction in this fashion, for fear that doing so will subject him to contempt sanctions in this proceeding, and possibly criminal prosecution.

29. In addition, as a direct result of the lawsuit filed and preliminary injunctive relief obtained by counter-defendants, Baumgartner was unable to complete his graduate thesis on schedule and will have to spend at least one additional semester at RPI to do so. The lawsuit and injunction also required him to change the nature and date of his final presentation of his thesis and forego a press conference he had intended as the culmination of his project, which adversely affected the project itself. Furthermore, since Baumgartner cannot refer potential employers to view his web site on-line as he created it, he fears that his prospects for employment may be

impaired. As a direct result of the lawsuit and the preliminary injunction, particularly in the first few weeks after learning of the Board of Election's suit, Baumgartner also endured a great deal of stress that was manifested, in part, by his having difficulty eating and sleeping and a rapid weight loss. Baumgartner has also incurred substantial attorneys' fees in connection with the lawsuit, the preliminary injunction proceedings, and these proceedings in connection with his motion to vacate the preliminary injunction.

30. As a result of the preliminary injunction order sought and obtained by counter-defendant, Baumgartner has incurred substantial damages as described in paragraphs 26-29 above, including irreparable injury due to violation of his First Amendment rights.

Claims for Relief

COUNT I

DECLARATORY JUDGMENT

31. Counter-plaintiff re-alleges and incorporates by reference the allegations contained in Paragraphs 1 through 30 herein as his allegations 1-30 of Count I.

32. A dispute and controversy has arisen between the counter-plaintiff and counter-defendant concerning the right of counter-plaintiff to use and operate an Internet web site that uses the construct of a "vote auction," as satire and parody, to send a critical message and generate discussion and debate about the influence of corporate campaign donations on American politics.

33. Counter-plaintiff, by operating the Internet web site Voteauction.com, was engaged in political and artistic expression that is protected by the First Amendment to the Constitution of the United States.

34. The preliminary injunction entered by the Circuit Court on October 18, 2000, is an unconstitutional prior restraint on counter-plaintiff's political, artistic, and Internet speech, in violation of the First Amendment.

35. Counter-plaintiff, by operating the Internet web site Voteauction.com, did not violate any criminal or election law of Illinois.

WHEREFORE, counter-plaintiff requests that this Court:

1. Issue a declaratory judgment in accordance with Section 2-701 of the Code of Civil Procedure against the counter-defendant, as follows:

- a. The Court declare that counter-plaintiff, by operating the Internet web site Voteauction.com, was engaged in political and artistic expression that is protected by the First Amendment to the Constitution of the United States;
- b. The Court declare that the Preliminary Injunction Order entered on October 18, 2000, is an unconstitutional prior restraint on counter-plaintiff's political, artistic, and Internet speech, in violation of the First Amendment;
- c. The Court declare that counter-plaintiff, by operating the Internet web site Voteauction.com, did not violate the criminal or election

law of Illinois or the United States as enumerated in the Complaint or any other such laws;

- d. The Court declare that counter-defendant owes counter-plaintiffs his costs and attorneys' fees for this action; and
- e. The Court order such other relief as the Court may deem just.

COUNT II

REQUEST TO VACATE INJUNCTION

36. Counter-plaintiff re-alleges and incorporates by reference the allegations contained in Paragraphs 1-35 of Count I herein as his allegations 1 through 35 of Count II.

37. Because Voteauction.com is political and artistic satire and parody protected by the First Amendment to the Constitution of the United States, the preliminary injunction requested and obtained by counter-defendant operates as an unconstitutional prior restraint on Baumgartner's and his site visitors' political expression and prevents Baumgartner from restoring Voteauction.com, or any substantially similar site using the construct of a vote auction to send a satirical message, in the future.

38. The preliminary injunction requested and obtained by counter-defendant is overbroad and is not narrowly tailored to serve a compelling state interest, and thereby impinges on protected political and artistic speech and assembly, in violation of the First Amendment.

39. The preliminary injunction requested and obtained by counter-defendant was wrongfully issued and should be vacated. Counter-defendant has not, and cannot, meet the test in this Circuit for preliminary injunctive relief:

- a. Counter-defendant is unlikely to prevail on the merits of the underlying case, because James Baumgartner did not violate any

criminal or election law, or cause anyone else to violate any such law, in connection with the operation of Voteauction.com;

- b. Counter-defendant did not, and will not, suffer irreparable harm in the absence of the preliminary injunction, because Baumgartner and the web site were not in fact engaging in any illegal vote buying or selling. Therefore, the site posed no threat either to the authority of the laws of Illinois or the United States or to the legitimacy of the November 2000 elections;
- c. Balancing the harms to the parties, counter-plaintiff Baumgartner has suffered irreparable injury due to the deprivation of his First Amendment rights to freedom of speech and assembly, as well as substantial damages due to the deprivation of these rights, and remains chilled from exercising his First Amendment rights, while Voteauction.com posed no real threat of injury to counter-plaintiffs either prior to, or subsequent to, the November, 2000 elections; and
- d. As the public interest weights heavily in favor of having access to a free flow of constitutionally protected speech, the issuance of the preliminary injunction was not in the public interest. Rather, vacating the injunction would serve the public interest in the First Amendment rights of free speech and assembly.

WHEREFORE, counter-plaintiff requests that this Court vacate the Preliminary Injunction Order entered on October 18, 2000, by the Circuit Court of Cook County, thereby allowing counter-plaintiff to restore Voteauction.com to the Internet.

COUNT III

SEPARATE ACTION AT LAW FOR DAMAGES

FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS

40. Counter-plaintiff re-alleges and incorporates by reference the allegations contained in Paragraphs 1-39 of Count II herein as his allegations 1 through 39 of Count III.

41. Counter-plaintiff is entitled to recover damages due to counter-defendant having requested and obtained a wrongfully issued injunction and due to counter-defendant's violations of his First Amendment rights. Due directly to these acts on the part of counter-defendant, counter-plaintiff has incurred substantial damages for which counter-defendant is liable.

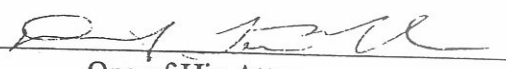
WHEREFORE, counter-plaintiff requests that this Court:

- a. Grant counter-plaintiff an award of compensatory damages;
- b. Award counter-plaintiff his attorneys' fees, costs, and expenses pursuant to 42 U.S.C. sec. 1988; and
- c. Award such further relief as the Court deems just under the circumstances.

Respectfully submitted,

JAMES BAUMGARTNER

Dated: March 30 2001

By: 
One of His Attorneys

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VERIFICATION BY CERTIFICATION

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

A handwritten signature in cursive script, appearing to read 'James Baumgartner', written over a horizontal line.

James Baumgartner

CERTIFICATE OF SERVICE

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

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Phillip J. Robertson
Assistant Attorney General
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Office of the Attorney General
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on this 30th day of March 2001.



David L. Ter Molen