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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ELECTION SYSTEMS & SOFTWARE, LLC,
a Delaware limited liability company, as
successor in interest to PREMIER ELECTION
SOLUTIONS, INC., a Delaware corporation,

Plaintiff,

v.

KING COUNTY, WASHINGTON, a political
subdivision of the State of Washington,

Defendant.

NO.
COMPLAINT
JURY DEMAND

Plaintiff Election Systems & Software, LLC, successor in interest to Premier Election Solutions, Inc. (“ES&S”), for its claims for relief against Defendant King County, Washington (“County”), alleges the following:

I. PARTIES

1. ES&S is a Delaware limited liability company with its principal place of business in Omaha, Nebraska.

1 2. ES&S is a Delaware citizen.

2 3. ES&S is a major developer, manufacturer and seller of voting machine and
3 software products.

4 4. ES&S is the successor in interest to Premier Election Solutions, Inc.

5 5. The County is a home rule charter county and a political subdivision of the
6 State of Washington.

7 6. The County is a Washington citizen.

8 **II. JURISDICTION AND VENUE**

9 7. This Court has jurisdiction over this action pursuant to 28 U.S.C.
10 § 1332(a)(1), as the amount in controversy exceeds the sum or value of \$75,000.00, exclusive
11 of interest and costs, and the action is between citizens of different states.

12 8. This Complaint arises in part under the Declaratory Judgment Act, 28 U.S.C.
13 §§ 2201-02.

14 9. This Court may declare the rights and other legal relations of the parties in this
15 case under 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 because there exists an actual and
16 justiciable controversy concerning the rights of, and legal relations between, ES&S and the
17 County.

18 10. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(a)(2)
19 because the contract that is the subject of this dispute originated in the Western District of
20 Washington and has a forum selection clause that states any claim or suit concerning the
21 contract may only be filed in either the King County Superior Court or the U.S. District
22 Court for Western District of Washington, in Seattle.

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1 11. Further, venue is proper in this judicial district pursuant to 28 U.S.C.
2 § 1391(a)(3) because the County is subject to personal jurisdiction in the Western District of
3 Washington.

4 **III. FACTUAL ALLEGATIONS**

5 12. In July of 2011, ES&S and the County executed a formal written Contract
6 Amendment in which the fee for a certain service described in the Contract Amendment as
7 “DIMS/DXI Maintenance and Support” was inadvertently misstated by ES&S, as it misstated
8 the parties’ agreed upon quarterly fee as the annual fee, causing the fee to be exactly one-
9 fourth of the fee to which the parties had agreed previously. Attached and incorporated
10 herein as Exhibit “A” is a true and correct copy of the Contract Amendment.

11 13. While converting the parties’ negotiated and agreed upon contract amendment
12 to paper, ES&S made a unilateral mistake with regard to the fee for the DIMS/DXI
13 Maintenance and Support by inadvertently using the quarterly fee (\$57,270.49 in 2011 and
14 \$59,275.00 in 2012, 2013, and 2014) as the annual fee (which should have been \$229,081.96
15 in 2011 and \$237,100.00 in 2012, 2013, and 2014) and, thereby, incorrectly inserting the fee
16 numbers in the table on page two of the Contract Amendment.

17 14. The table on page two of the Contract Amendment (which contained the
18 incorrect fee numbers) reads as follows:

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| DIMS/DXI Maintenance and Support Fees | | | | |
|--|--------------------|--------------------|--------------------|--------------------|
| From: | 01/01/11 | 01/01/12 | 01/01/13 | 01/01/14 |
| To: | 12/31/11 | 12/31/12 | 12/31/13 | 12/31/14 |
| First Calendar Quarter | \$14,317.62 | \$14,818.75 | \$14,818.75 | \$14,818.75 |
| Second Calendar Quarter | \$14,317.62 | \$14,818.75 | \$14,818.75 | \$14,818.75 |
| Third Calendar Quarter | \$14,317.62 | \$14,818.75 | \$14,818.75 | \$14,818.75 |
| Fourth Calendar Quarter | \$14,317.63 | \$14,818.75 | \$14,818.75 | \$14,818.75 |
| Total | \$57,270.49 | \$59,275.00 | \$59,275.00 | \$59,275.00 |

15. The table on page two of the Contract Amendment should have read as follows:

| DIMS/DXI Maintenance and Support Fees | | | | |
|--|---------------------|---------------------|---------------------|---------------------|
| From: | 01/01/11 | 01/01/12 | 01/01/13 | 01/01/14 |
| To: | 12/31/11 | 12/31/12 | 12/31/13 | 12/31/14 |
| First Calendar Quarter | \$57,270.49 | \$59,275.00 | \$59,275.00 | \$59,275.00 |
| Second Calendar Quarter | \$57,270.49 | \$59,275.00 | \$59,275.00 | \$59,275.00 |
| Third Calendar Quarter | \$57,270.49 | \$59,275.00 | \$59,275.00 | \$59,275.00 |
| Fourth Calendar Quarter | \$57,270.49 | \$59,275.00 | \$59,275.00 | \$59,275.00 |
| Total | \$229,081.96 | \$237,100.00 | \$237,100.00 | \$237,100.00 |

1 16. Based on previous negotiations, the County was aware at the time it received
2 the written Contract Amendment from ES&S that ES&S had incorrectly used the quarterly
3 fee number as the annual fee number.

4 17. In fact, both Anh Nguyen, the senior deputy prosecuting attorney for the
5 County, and Evelyn Arnold, the Elections Superintendent for the County, specifically knew
6 that ES&S had made the unilateral mistake.

7 18. Anh Nguyen, the senior deputy prosecuting attorney for the County, had
8 knowledge of ES&S's mistake as evidenced by the e-mail ("E-mail") she received from Tom
9 O'Brien of ES&S on Wednesday, May 4, 2011, which stated as follows:

10 To summarize our proposal for DIMS/DXI fees for 2011, the quarterly
11 DIMS and DXI fees combined (before tax) are \$63,633.88. This
12 consists of \$53,028.23 for DIMS VR maintenance and \$10,605.65 for
13 DXI. We have proposed, and the County has accepted, that the
14 existing DIMS VR Contract be amended to adjust the quarterly DIMS
15 VR Fee to \$57,270.49, and include DXI functionality under this
16 agreement. For years following 2011, we will commit to a quarterly
17 fee of \$59,275.00 for 2012, 2013, and 2014 in exchange for a formal
18 commitment by the County to subscribe for maintenance for this 3
19 year period. ...

20 Attached and incorporated herein as Exhibit "B" is a true and correct copy of the E-mail.

21 19. Evelyn Arnold, the Elections Superintendent for the County, also received the
22 E-mail that contains the above-quoted material and, accordingly, had knowledge of ES&S's
23 mistake.

24 20. The price set forth in the E-mail was consistent with the price contained in
ES&S's proposed settlement that it sent to Sherril Huff, the Elections Director, in a letter
dated February 22, 2011. Attached and incorporated herein as Exhibit "C" is a true and
correct copy of the February 22, 2011, letter.

1 21. In paragraph III of the February 22, 2011, letter sent to Sherril Huff, ES&S
2 proposed “that the existing DIMS VR Contract be amended to adjust the DIMS VR
3 [quarterly] Fee to \$57,270.49, and include DXI functionality under this agreement.”

4 22. The only subsequent substantive communications regarding the DIMS/DXI
5 Maintenance and Support fee occurred between Evelyn Arnold and Kathy Rogers, a vice
6 president of ES&S, in an e-mail exchange, and telephone call.

7 23. On May 31, 2011, Evelyn Arnold sent Kathy Rogers an e-mail asking “if
8 there was a possibility for ES&S to lower the annual maintenance fee.” Attached and
9 incorporated herein as Exhibit “D” is a true and correct copy of a May 31, 2011, e-mail
10 Evelyn Arnold sent Kathy Rogers.

11 24. In a reply e-mail also dated May 31, 2011, Kathy Rogers responded that she
12 would check on that request “with the VR and finance folks [] tomorrow and will let you
13 know.” Attached and incorporated herein as Exhibit “E” is a true and correct copy of Kathy
14 Rogers’ reply e-mail dated May 31, 2011.

15 25. Subsequently, on or about June 13, 2011, Kathy Rogers left a voicemail with
16 Evelyn Arnold in which Kathy specifically told Evelyn that the fee for DIMS/DXI
17 Maintenance and Support would not be lowered and would remain the same as proposed in
18 the February 22, 2011, e-mail.

19 26. In a June 14, 2011, follow-up telephone call between Evelyn Arnold, Laird
20 Hail, and Anh Nguyen, acting as representatives of the County on one side, and Kathy
21 Rogers, Tom O’Brien, and Tim Hallett, acting as representatives of ES&S on the other side,
22 Kathy Rogers reiterated that the fee for DIMS/DXI Maintenance and Support would remain
23 the same as originally proposed.

1 27. The County knew and had agreed that the quarterly (not annual) fee was to be
2 \$57,270.49 in 2011 and \$59,275.00 in 2012, 2013, and 2014.

3 28. Nevertheless, when ES&S's officials drafted the Contract Amendment, ES&S
4 inadvertently and mistakenly inserted the wrong numbers into the table located on page 2 of
5 the Contract Amendment.

6 29. When the County attempted to make its first payments under the Contract
7 Amendment, ES&S discovered its unilateral mistake and rejected the payments as
8 inadequate.

9 30. ES&S explained to the County that such unilateral mistake had occurred and
10 stated that the County knew that such mistake had occurred.

11 31. The County refused to acknowledge its knowledge of the unilateral mistake
12 and the correct amount due and owing under the Contract Amendment.

13 32. Effective October 1, 2011, Premier Elections Solutions, Inc. was merged into
14 Election Systems & Software, Inc.

15 33. Effective October 1, 2011, Election Systems & Software, Inc. was converted
16 to Election Systems & Software, LLC, a Delaware limited liability company.

17 34. ES&S holds all the right, title and interest to the Contract Amendment.

18 35. On October 24, 2011, the County received notice from ES&S of ES&S's
19 claim described in this Complaint.

20 36. In a letter dated November 4, 2011, the County denied ES&S's claim
21 described in this Complaint.

1 45. ES&S is entitled to a judgment declaring either that ES&S may rescind the
2 Contract Amendment or that the parties must reform the Contract Amendment to reflect the
3 fee structure described in the table located in Paragraph 15 herein.

4 46. ES&S requests in accordance with FRCP 57 that the Court order a speedy
5 hearing of this claim for declaratory relief and, therefore, advance it on the Court's calendar.

6 ***B. REFORMATION OF CONTRACT***

7 47. ES&S incorporates the allegations of paragraphs 1 through 46 as if fully set
8 forth herein.

9 48. The Contract Amendment does not reflect the terms of the parties' contract.

10 49. The Court should reform the Contract Amendment so that it is consistent with
11 the terms agreed to by the parties by substituting the annual amounts for the quarterly
12 amounts, as the parties intended.

13 ***C. RESCISSION OF THE CONTRACT AMENDMENT***

14 50. ES&S incorporates the allegations of paragraphs 1 through 49 as if fully set
15 forth herein.

16 51. As a material term of the Contract Amendment, ES&S always intended that
17 the amount stated as the annual payment amount in the Contract Amendment would be the
18 amount due each quarter. Absent its unilateral mistake, ES&S would not have entered into
19 the Contract Amendment.

20 52. Should ES&S establish that as part of the Contract Amendment, ES&S never
21 intended that the amount stated as the annual payment amount in the Contract Amendment
22 would be the amount due annually but only intended that the amount stated as the annual
23 payment amount in Contract Amendment would be the amount that is due each quarter for
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1 that year and that the County knew the same, then there was never a meeting of the minds as
2 to this material term, and the Contract Amendment should be rescinded under the doctrine of
3 unilateral mistake and the parties returned to the positions they were in prior to the Contract
4 Amendment.

5 53. Should ES&S establish that as part of the Contract Amendment, ES&S never
6 intended that the amount stated as the annual payment amount in the Contract Amendment
7 would be the amount due annually but only intended that the amount stated as the annual
8 payment amount in Contract Amendment would be the amount that is due each quarter for
9 that year, then there was never a meeting of the minds as to this material term, and the
10 Contract Amendment should be rescinded under the doctrine of mutual mistake and the
11 parties returned to the positions they were in prior to the Contract Amendment.

12 ***D. BREACH OF CONTRACT***

13 54. ES&S incorporates the allegations of paragraphs 1 through 53 as if fully set
14 forth herein.

15 55. ES&S and the County entered into a contract in which the County agreed to
16 pay \$57,270.49 each quarter during 2011 for DIMS/DXI Maintenance and Support and
17 \$59,275.00 each quarter during 2012, 2013, and 2014 for DIMS/DXI Maintenance and
18 Support.

19 56. The County has materially breached the terms of the contract by failing to pay
20 ES&S the proper amount for its DIMS/DXI Maintenance and Support services.

21 57. ES&S and ES&S performed all conditions precedent and substantially
22 performed its duties under the contract, or such conditions precedent and performance have
23 been waived.

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1 58. The County's breach has proximately caused damage to ES&S.

2 ***E. BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING***

3 59. ES&S incorporates the allegations of paragraphs 1 through 58 as if fully set
4 forth herein.

5 60. The law implies a covenant of good faith and fair dealing into every contract,
6 including the oral contract the parties reached and the Contract Amendment. The conduct of
7 the County, as alleged above by reference, constitutes a breach of the covenant of good faith
8 and fair dealing.

9 61. As a result of the County's breaches of its duty of good faith and fair dealing,
10 ES&S has been damaged in an amount to be proven at the time of trial.

11 ***F. QUANTUM MERUIT***

12 62. ES&S incorporates the allegations of paragraphs 1 through 61 as if fully set
13 forth herein.

14 63. At the specific request of the County, ES&S has provided and continues to
15 provide services valued to the County at \$57,270.49 each quarter during 2011 for DIMS/DXI
16 Maintenance and Support and will provide services to the County valued at \$59,275.00 each
17 quarter during 2012, 2013, and 2014 for DIMS/DXI Maintenance and Support.

18 64. The County promised to pay ES&S the reasonable value of the work
19 performed in labor, services, material and equipment furnished by ES&S.

20 65. The reasonable value of the work performed in labor, services, material and
21 equipment furnished by ES&S for which ES&S has not been paid is in an amount subject to
22 proof at trial.

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