

- ii. **JULIAN C. VILLA JR.**, Chairman, Smartmatic TIM Corporation, with last known addresses at No. 74 JalanSetiabakti, Damansara Heights 50490, KL, Malaysia, and 16th floor, Accralaw Tower, Second Avenue Corner 30th Street. Crescent Park West, Bonifacio Global City, 0399 Taguig Metro Manila, Philippines;
- iii. **ARMANDO R. YANES**, Chief Financial Officer, Smartmatic International Corporation, with last known addresses at N°4 Stafford House, Garrison Savannah, St. Michael, Barbados W.I. BB 14038 and 16th floor, Accralaw Tower, Second Avenue Corner 30th Street. Crescent Park West, Bonifacio Global City, 0399 Taguig Metro Manila, Philippines;
- iv. **SALVADOR P. AQUE**, Senior Vice President of Total Information Management Corporation and Member of the Board of Directors of Smartmatic TIM Corporation, with last known addresses at 2250 P. Burgos St., Pasay City and 16th floor, Accralaw Tower, Second Avenue Corner 30th Street. Crescent Park West, Bonifacio Global City, 0399 Taguig Metro Manila, Philippines;
- v. **ALBERTO R. CASTRO**, member of the Board of Directors, with last known addresses at 16th floor, Accralaw Tower, Second Avenue Corner 30th Street. Crescent Park West, Bonifacio Global City, 0399 Taguig Metro Manila, Philippines;
- vi. **JACINTO R. PEREZ, JR.**, member of the Board of Directors, with last known addresses at 1211 Consuelo St., Singalong, Manila and 16th floor, Accralaw Tower, Second Avenue Corner 30th Street. Crescent Park West, Bonifacio Global City, 0399 Taguig Metro Manila, Philippines; and
- vii. **MARIAN IVY REYES-FAJARDO**, member of the Board of Directors, with last known addresses at 71-B Tindalo St., Monte Vista Subdivision, Marikina, and 16th floor, Accralaw Tower, Second Avenue Corner 30th Street. Crescent Park West, Bonifacio Global City, 0399 Taguig Metro Manila, Philippines.

NATURE OF CHARGES

4. Complainants charge Respondents with violating the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019) as well as provisions of other relevant criminal statutes.

5. The violations arose out of the Respondents' involvement –and conspiracy with one another – in the negotiations for, the drafting of, and the implementation of the unconstitutional and illegal PCOS automated electoral system for the 10 May 2010 and 13 May 2013 national and local elections.

(Attached as **ANNEX A** is a copy of the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections.)

BACKGROUND FACTS

6. On 22 December 1997, the Philippine Congress enacted Republic Act No. 8436 (RA 8436) which authorizes COMELEC to use an automated election system (AES) for the process of voting, counting of votes and canvassing/consolidating the results of the national and local elections. RA 8436 also mandated the COMELEC to acquire automated counting machines (ACMs), computer equipment, devices and materials; and to adopt new electoral reforms and printing materials.

7. On 23 January 2007, Congress passed Republic Act No. 9369, amending RA 8436. The pertinent provisions of RA 9369 provides:

SEC. 6. Section 6 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC. 5 Authority to Use an Automated Election System. - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: Provided, that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission: Provided, further, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen: Provided, finally, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. In succeeding regular national or local elections, the AES shall be implemented nationwide."

SEC. 10. Section 8 of Republic Act No. 8436 is hereby amended to read as follow:

"SEC.12. Procurement of Equipment and Materials. - To achieve the purpose of this Act, the Commission in authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or board. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness."

"In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid."

8. On 07 January 2009, COMELEC submitted to the Department of Budget and Management a P13.9 Billion-budget for the automation of the 2010 elections.

9. On 05 March 2009, the Philippine Senate passed the P11.3 Billion supplemental budget for the automation of the 2010 elections.

10. On 19 March 2009, eleven (11) prospective bidders obtained bid documents from COMELEC for the automation of the 2010 elections. Only seven (7) bidders passed the bidding requirements.

11. On 24 March 2009, Pres. Gloria Macapagal-Arroyo signed into law Republic Act No. 9525 which allocates funds for the automation of the 2010 elections.

12. On 30 March 2009, COMELEC held a pre-bidding conference.

13. On 04 May 2009, COMELEC conducted the public bidding, originally set on April 27. The bidding was moved to another date due to the request of four bidders which needed additional time to modify their respective proposals.

14. COMELEC-SBAC disqualified Avante and Indra Systems Consortium for failure to comply with bid requirements. IndraSistemas S.A, Hart Intercivic and Strategic Alliance Holdings Inc. did not submit an ISO certification. Avante was stricken out of the list after it failed to submit documents proving that it has engaged in three similar projects.

15. On 08 May 2009, COMELEC disqualified all seven (7) bidders for failing to meet bid requirements.

16. On 14 May 2009, COMELEC-SBAC reconsidered four bidders: IndraSistemas (Strategic Holdings, Inc./Hart Intercivic); Smartmatic/Total Information Management Corp.(Smartmatic-TIM); AMA group of companies/Election System and Software and Gilat/F.F. Cruz and Company, Inc./Filipinas Systems.

17. On 26 May 2009, Center for People Empowerment in Governance (CenPEG), a non-government organization, sent a request letter to COMELEC, specifically requesting a copy of the source code of the following:

- (a) Precinct Count Optical Scan (PCOS) programs;
 - (b) the Board of Canvassers Consolidation/Canvassing System (BOC CCS) programs for the municipal, provincial, national, and congressional canvass;
 - (c) the COMELEC server programs; and
 - (d) the source code of the in-house COMELEC programs called the Data Capturing System (DCS) utilities.¹
- 1) In sending its request letter to COMELEC, CenPEG invoked the following pertinent portion of Section 12 of RA 9369:

x xxx

Once an AES technology is selected for implementation, the Commission shall promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review thereof.²

18. On 9 June 2009, Respondents Melo, Sarmiento, Ferrer, Velasco who were then Chairman and Commissioners and presently sitting Commissioner Tagle, approved Resolution No. 8608 which resolved to:

1. *Approve the report/recommendation of the SBAC dated June 3, 2009, confirming TIM/Smartmatic as the bidder with the "Lowest Calculated Bid" and to award the contract for the automation of the elections on May 10, 2010 to said joint venture;*
2. *To direct the SBAC to issue the Notice of Award to TIM/Smartmatic, with instructions to post a performance security in an amount no less than five percent (5%) of the contract price and to issue the Notice to Proceed after the posting of said performance security and approval of the contract; and,*
3. *To authorize Chairman Jose A.R. Melo, as Head of the procuring agency to sign the contract with TIM/Smartmatic.*

*(Attached as **ANNEX B** is a copy of the COMELEC Resolution No. 8608)*

19. On 10 June 2009, COMELEC awarded the contract to Smartmatic-TIM to supply the 82,000 precinct count optical scan (PCOS) machines to be used in the 2010 elections with its bid offer of P7.2 Billion.

20. Nevertheless, Smartmatic violated the Bid Specifications of COMELEC by not putting in their Financial Bid any amount for the provision of the Digital

¹ Please see CENPEG v. COMELEC, Philippine Supreme Court case G.R. No. 189546, September 21, 2010.

² Please see CENPEG v. COMELEC, Philippine Supreme Court case G.R. No. 189546, September 21, 2010.

Signatures of the Board of Election Inspectors- therefore making Smartmatic's proposed Automated Election System non-compliant with RA 9369 and COMELEC's Terms of Reference (TOR).

21. It was clear in Bid Bulletin No. 10, issued in April 2009 by COMELEC that Smartmatic was supposed to propose a WORM (write once, read many) Technology for data storage, but instead Smartmatic used the compact flash (CF) Cards which can be written over many times and therefore non-compliant.

22. Just like Avante and Indra, Smartmatic International, the Registered Bidder, is not ISO-Certified. Smartmatic used the ISO Certification of Jarltech of Taiwan, one of their Suppliers, which was not a member of the Smartmatic-TIM Consortium. But when Jarltech could not manufacture the required number of PCOS machines on the specified time-table, they dropped Jarltech and got a manufacturer in China.

23. Smartmatic is not the owner of the Technology but outsourced the Automated Election System to Dominion International, in violation of the Bid Specification of COMELEC and the Philippine Procurement Law.

24. On 24 June 2009, COMELEC granted CenPEG's request for the source code of the PCOS and the CCS. Nevertheless, COMELEC denied CenPEG's request for the source code of the DCS. COMELEC reasoned that the DCS was a "system used in processing the Lists of Voters which is not part of the voting, counting and canvassing systems contemplated by R.A. 9369."

25. Further, COMELEC reasoned that if the source code for the DCS were to be divulged, unscrupulous individuals might change the program and pass off an illicit one that could benefit certain candidates or parties.³

26. Subsequent to this however, the COMELEC would refuse access to the PCOS Source Code as well, for a variety of unjustifiable reasons.

27. On 29 June 2009, TIM President Jose Mari Antuñez, told then COMELEC Chairman Jose Melo that TIM was withdrawing from its partnership with Smartmatic citing "irreconcilable differences" and "loss of confidence."

28. On 30 June 2009, COMELEC, TIM and Smartmatic, were set to sign the contract for the P7.2 Billion deal, but the deal was called off because TIM had not signed the incorporation papers.

29. Then COMELEC Chairman Melo also ordered the suspension of the contract negotiations with Smartmatic and TIM due to the latter venture's failure to submit their incorporation papers. COMELEC Chairman Melo also stated that

³Please see CENPEG v. COMELEC, Philippine Supreme Court case G.R. No. 189546, September 21, 2010.

the joint venture's certificate of registration from the Securities and Exchange Commission was important because it would establish the legality of the partnership between Smartmatic and TIM stating that "If there is no such document, who are we signing the contract with?"⁴

30. Then COMELEC Chairman Melo gave TIM and Smartmatic until 03 July 2009 to iron out their differences.

31. On 03 July 2009, TIM and Smartmatic allegedly patched up their differences. COMELEC Chairman Melo stated that TIM and Smartmatic are set to sign the incorporation papers of their joint venture.

32. COMELEC Chairman Melo also hoped that COMELEC and the alleged joint venture of TIM and Smartmatic would sign the contract for the project by 10 July 2009 (Friday).⁵

33. On 06 July 2009, TIM and Smartmatic signed and filed their joint venture agreement before the Securities and Exchange Commission SEC.⁶

34. On 9 July 2009, H. Harry L. Roque, Jr., Joel R. Butuyan, Romel R. Bagares, Gilbert T. Andres, Allan Jones F. Lardizabal, Immaculada D. Garcia, Erlinda T. Mercado, Ma. Azucena P. Maceda, Alvin A. Peters and Francisco A. Alcuaz, who are members of the civil society group Concerned Citizens Movement, and five (5) other persons⁷--- filed before the Philippine Supreme Court a "Petition for Certiorari, Prohibition and Mandamus," versus the Philippine Commission on Elections (COMELEC), the Commission on Elections-Special Bids and Awards Committee (COMELEC-SBAC), the Department of Budget and Management, Smartmatic, and TIM. Their case was docketed as G.R. No. 188456, and was entitled "Roque, Jr. et al. vs. COMELEC, et al."⁸

35. The substance of their Supreme Court petition was to enjoin the signing and/or the implementation of the contract for the first ever nationwide automation of a Philippine election. This automated election was to be conducted during the 10 May 2010 national and local elections. Roque, et al. argued that the automation contract violated Philippine laws, and jurisprudence.

36. On 13 July 2009, CenPEG once more asked COMELEC for the source code of the PCOS, together with other documents, programs, and diagrams related to the AES, since the

⁴ Back to Manual Voting: RP partner quits consortium; poll automation in peril, Philippine Daily Inquirer, June 30, 2009, p.6.

⁵ Automation is back on track, Manila Standard Today, July 4, 2009, p.1.

⁶ Smartmatic, TIM give SEC joint venture papers, By Kristine L. Alave Philippine Daily Inquirer, First Posted 17:13:00 07/06/2009, <http://newsinfo.inquirer.net/breakingnews/nation/view/20090706-214142/Smartmatic-TIM-give-SEC-joint-venture-papers>.

⁸ Please see "Roque, et al. v. COMELEC, et al.," Philippine Supreme Court case G.R. No. 188456, September 10, 2009. The Philippine Supreme Court Decision on this case can be accessed online at <http://sc.judiciary.gov.ph/jurisprudence/2009/september2009/188456.htm>.

COMELEC still did not release even the kinds of source code that it said it was approving for release.⁹

37. On 17 July, 20 July, and on 24 August 2009, CenPEG sent follow-up letters to COMELEC.¹⁰

38. On 26 August 2009, COMELEC replied to CenPEG's stating that the source code CenPEG wanted did not yet exist since:

(a) COMELEC had not yet received the baseline source code of the provider, Smartmatic, since payment to it had been withheld as a result of a pending suit;

(b) its customization of the baseline source code was targeted for completion only in November 2009;

(c) under Section 11 of R.A. 9369, the customized source code still had to be reviewed by "an established international certification entity," which review was expected to be completed by the end of February 2010; and

(d) only then would the AES be made available for review under a controlled environment.¹¹

39. On 10 September 2009, the Philippine Supreme Court promulgated its Decision in "*Roque, Jr. et al. vs. COMELEC, et al.*," docketed as G.R. No. 188456, denying the petition of Complainants Roque et al.¹²

40. On 28 September 2009, Complainants Roque et al. filed a Motion for Reconsideration to the 10 September 2009 Decision of the Supreme Court in G.R. No. 188456.¹³

41. On 5 October 2009, CenPEG filed before the Philippine Supreme Court a petition for *Mandamus* against COMELEC, seeking to compel COMELEC to immediately make its source codes available to CenPEG and other interested parties.¹⁴ CenPEG's petition was docketed as G.R. No. 189546 and entitled "*CenPEG v. COMELEC.*"

⁹Please see *CENPEG v. COMELEC*, Philippine Supreme Court case G.R. No. 189546, September 21, 2010.

¹⁰*Id.*

¹¹*Id.*

¹²Please see "*Roque, et al. v. COMELEC, et al.*," Philippine Supreme Court case G.R. No. 188456, September 10, 2009. The Philippine Supreme Court Decision on this case can be accessed online at <http://sc.judiciary.gov.ph/jurisprudence/2009/september2009/188456.htm>.

¹³Please see "*Roque, et al. v. COMELEC, et al.*," Philippine Supreme Court case G.R. No. 188456, September 10, 2009. The Philippine Supreme Court Decision on this case can be accessed online at <http://sc.judiciary.gov.ph/jurisprudence/2009/september2009/188456.htm>.

¹⁴*Id.*

42. On 10 February 2010, the Philippine Supreme Court promulgated its Resolution denying Complainants Roque et al.'s Motion for Reconsideration to the 10 September 2009 Decision in "Roque, et al. v. COMELEC, et al."¹⁵

43. On 10 September 2009, the Philippine Supreme Court promulgated its Decision in "*Roque, Jr. et al. vs. COMELEC, et al.*," docketed as G.R. No. 188456, denying the petition of authors Roque, et al.¹⁶

44. On 5 October 2009, the Center for People Empowerment in Governance (CenPEG)---a non-governmental organization-- filed before the Philippine Supreme Court a "*Petition for Mandamus*" against COMELEC, seeking to compel COMELEC to immediately make the source codes to be used in the May 2010 automated Philippine elections available to CenPEG and other interested parties.¹⁷ CenPEG's petition was docketed as G.R. No. 189546 and entitled "*CenPEG v. COMELEC.*"

45. On 21 June 2010, CenPEG filed a manifestation and omnibus motion before the Supreme Court, and reiterated its prayer for the issuance of a writ of *mandamus* in their case despite the fact that the May 10, 2010 Philippine elections for which the subject source code was to be used had already been held. CenPEG claimed that the source code remained important and relevant "not only for compliance with the law, and the purpose thereof, but especially in the backdrop of numerous admissions of errors and claims of fraud."¹⁸

46. On 21 September 2010—or four (4) months after the May 10, 2010 automated Philippine elections, the Philippine Supreme Court issued a Resolution in "*CenPEG v. COMELEC,*"¹⁹ directing the COMELEC to make the source codes, for the AES technologies selected, immediately available to CenPEG and all other interested political parties or groups for independent review. As held by the Supreme Court in its 21 September 2010 Resolution:

The pertinent portion of Section 12 of R.A. 9369 is clear in that "once an AES technology is selected for implementation, the Commission shall promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review thereof." The COMELEC has offered no reason not to comply with this requirement of the law. Indeed, its only excuse for not disclosing the source code was that it was not yet available when CenPEG asked for it and, subsequently, that the review had to be done, apparently for

¹⁵ The 10 February 2012 Resolution of the Philippine Supreme Court in "*Roque, et al. v. COMELEC, et al.*," can be accessed online at <http://sc.judiciary.gov.ph/jurisprudence/2010/february2010/188456.htm>.

¹⁶ Please see "*Roque, et al. v. COMELEC, et al.*," Philippine Supreme Court case G.R. No. 188456, September 10, 2009. The Philippine Supreme Court Decision on this case can be accessed online at <http://sc.judiciary.gov.ph/jurisprudence/2009/september2009/188456.htm>.

¹⁷ *Id.*

¹⁸ Please see *CENPEG v. COMELEC*, Philippine Supreme Court case G.R. No. 189546, September 21, 2010.

¹⁹ G.R. No. 189546, Sept. 21, 2010.

security reason, "under a controlled environment." The elections had passed and that reason is already stale.

WHEREFORE, the Court GRANTS the petition for mandamus and DIRECTS the COMELEC to make the source codes for the AES technologies it selected for implementation pursuant to R.A. 9369 immediately available to CenPEG and all other interested political parties or groups for independent review.

SO ORDERED.²⁰

47. On 23 April 2010, Author Teofisto Guingona, Jr., former Vice-President of the Philippines, filed before the Philippine Supreme Court---aside from five (5) other persons²¹--- a "Petition for Mandamus" against COMELEC. The said petition was entitled "Guingona, Jr., et al. v. COMELEC," and docketed as G.R. No. 191846. Author Guingona asked the Philippine Supreme Court to compel COMELEC to explain fully the complete details of its preparations for the 10 May 2010 automated Philippine elections. Guingona's petition was due to the unraveling of alarming events of leading to the May 2010 automated Philippine elections.

48. On 06 May 2010, or four (4) days before the 10 May 2010 automated Philippine elections, the Supreme Court promulgated its Decision in "Guingona, Jr., et al. vs. COMELEC" granting Guingona, et al.'s petition for mandamus. The dispositive portion of the 06 May 2010 Supreme Court Decision states:

WHEREFORE, we GRANT the petition in part. Respondent Commission on Elections is ORDERED, within two (2) days from receipt of this Resolution, to disclose to petitioners and the public the following:

1. The nature and security of all equipment and devices, including their hardware and software components, to be used in the 10 May 2010 automated elections, as provided for in Section 7 of Republic Act No. 9369;

2. The source code for review by interested parties as mandated by Section 12 of Republic Act No. 9369;

3. The terms and protocols of the random manual audit, as mandated by Section 24 of Republic Act No. 9369;

4. A certification from the Technical Evaluation Committee that the entire Automated Election System is fully functional and that a continuity plan is already in place, as mandated by Sections 9 and 11 of Republic Act No. 9369; and

²⁰Please see CENPEG v. COMELEC, Philippine Supreme Court case G.R. No. 189546, September 21, 2010.

²¹BISHOP LEO A. SORIANO, QUINTIN S. DOROMAL, FE MARIA ARRIOLA, ISAGANI R. SERRANO, and ENGR. RODOLFO LOZADA.

5. *The certification protocol and the actual certification issued by the Department of Science and Technology that the 240,000 Board of Election Inspectors all over the country are trained to use the Automated Election System, as required by Section 3 of Republic Act No. 9369.*

This Resolution is immediately executory.

*SO ORDERED.*²²

49. Further, the Philippine Supreme Court in “*Guingona, Jr. v. COMELEC*,”²³ noted that just days before the 10 May 2010 automated Philippine elections, COMELEC still failed to disclose the source code for the PCOS to interested parties as mandated by Section 12, of R.A. 9369. As noted by the Supreme Court:

Petitioners in *Roque v. COMELEC*¹¹ in fact pressed COMELEC for a source code review. **To this day, however, COMELEC has yet to disclose the source code as mandated by law.** In any case, considering the lack of material time, the Court in the exercise of its equity jurisdiction may even dispense with the requirement of proof of a prior demand in this case.²⁴ (*Emphasis and underscoring supplied*)

50. Moreover, the Philippine Supreme Court took judicial notice of an alarming event in “*Guingona, Jr. v. COMELEC*,”²⁵ specifically the recall of 76,000 compact flash cards, to wit:

The Court further takes judicial notice of the fact, as widely reported in print and broadcast media, that with just six days to go before the 10 May 2010 elections, COMELEC recalled 76,000 compact flash cards following widespread failure of the PCOS machines to read and tally the votes during the machine test conducted by COMELEC and Smartmatic. COMELEC spokesman James Jimenez was quoted as saying, “Right now we are assuming that all of the machines were affected. We have stopped the testing and are pulling out all memory cards for reconfiguration.”²⁶

51. On 10 May 2010, a National and Local Elections was conducted using for the first time the PCOS automated elections.

²²Please see “*Guingona, et al. v. COMELEC*,” Philippine Supreme Court case G.R. No. 191846. The Philippine Supreme Court 06 May 2010 Decision can be accessed online at <http://sc.judiciary.gov.ph/jurisprudence/2010/may2010/191846.htm>.

²³*Id.*

²⁴*Id.*

²⁵G.R. No. 191846, May 6, 2010.

²⁶*Id.*

52. On 11 September 2012, Smartmatic International Corporation, *inter alia*, filed a complaint for breach of contract before the Superior Court of Delaware, United States, against Dominion--- the software provider for the PCOS machines used by Smartmatic during the May 2010 automated Philippine elections. The Smartmatic complaint states, *inter alia*, that Dominion International breached its obligations under the License Agreement with Smartmatic by, among other things:

“(7) failing to place in escrow the required source code, hardware design and manufacturing information.”²⁷

(Attached as **ANNEX C** are relevant pages of the redacted version of the Smartmatic complaint filed last 11 September 2012 in the Delaware courts in the US.)

53. Dominion subsequently filed an Answer to the Complaint. Among other things,

(Attached as **ANNEX D** are relevant pages of the redacted version of Dominion’s Answer filed on October 17, 2012 in the Delaware courts in the US.)

54. In a 17 February 2013 Philippine Star online news, it reported that the Technical Evaluation Committee (TEC)—composed of the COMELEC, the Department of Science and Technology and the Commission on Information and Communications Technology—in a resolution “noticed the lack of [a] certified source code...”²⁸

55. Moreover, in the same 17 February 2013 news report, even the current COMELEC Chairman Sixto Brillantes admitted that:

“One argument is that in 2010, we had an election although no one actually saw the source code. Nobody even knew what was inside the Central Bank (where the source code was supposedly kept),” he said.²⁹

(A copy of the 17 February 2013 Philippine Star online news is herein attached as **ANNEX E**.)

56. Sometime in the last quarter of 2012 and/or shortly thereafter, Respondent COMELEC Commissioners once again entered into a series of contracts with Smartmatic-TIM to supply the country with the same PCOS technology for use in the 13 May 2013 midterm elections, including provisions of transmission equipment, CF cards, 82,000 PCOS machines, and technical support, for a sum of nearly P8 billion.

²⁷<http://www.scribd.com/doc/110048368/Smartmatic-Complaint-Vs-Dominion> Last accessed 20 February 2013.

²⁸<http://www.philstar.com/headlines/2013/02/17/909767/comelec-no-more-mock-elections> Last accessed 20 February 2013.

²⁹<http://www.philstar.com/headlines/2013/02/17/909767/comelec-no-more-mock-elections> Last accessed 20 February 2013.

57. The same AES provided by Smartmatic and TIM during the May 2010 elections was used by responsible officers of the COMELEC in the 13 May 2013 automated Philippine elections.

58. At the heart of this complaint is this, public and private Respondents conspired to develop and put in place an automated electoral system under the full control and supervision of a foreign entity –Smartmatic–in violation of both the Constitution and relevant statutes, inasmuch as such system denies the Filipino electorate the sanctity of the ballot.

59. Consider what lengths they took to favour Smartmatic with contracts that are grossly disadvantageous to the government and to the Filipino people, and all in violation the Constitution and relevant statutes in the process:

Respondent COMELEC Commissioners and officers, in connivance with Smartmatic and/or Smartmatic-TIM corporate directors and/or offices, committed gross inexcusable negligence, to the gross disadvantage of the government and the Filipino electorate and in violation of the automation law, when they proceeded to enter into an agreement with Smartmatic-TIM despite the fact that Smartmatic was a mere licensee of Dominion Voting Company, as a result of which the integrity of the national and local elections of 10 May 2010 and 13 May 2013 was held hostage, if not seriously compromised, by foreign interests.

60. Responsible officers of the COMELEC and their cohorts in Smartmatic TIM took to great lengths to misrepresent facts to the Filipino people and even to the Supreme Court, where the PCOS technology was challenged several times. Every possible leeway was extended by the COMELEC just so that a highly questionable technology being peddled by Smartmatic would be utilized in not just the 10 May 2010 elections but also in the recent 13 May 2013 elections.

61. Respondent COMELEC Commissioners were fully complicit with Smartmatic TIM corporate directors and/or officers in their knowledge of the fact that Smartmatic is not an owner of the technology but merely a licensee of a technology developed a third party, Dominion Voting.

62. They cannot deny this because in the bidding process for the automated process, one of the major issues raised against Smartmatic was the fact that Dominion Voting Company of Canada is the owner of the PCOS Technology.

63. In fact, they were informed of this through the Report/Recommendation of the 2010 Automation Election Project Procurement submitted to the COMELEC en banc by the Special Bids and Awards Committee dated 3 July 2009. The said Report/Recommendation clearly stated that PCOS was the subject of a licensing agreement between Smartmatic and Dominion.

64. Having been informed of the fact of the licensing agreement between Smartmatic and Dominion, the Respondent COMELEC commissioners should have had acted more cautiously in dealing with Smartmatic.

65. They should have had investigated further the implications of the licensing agreement on the automation contract which was to be signed with Smartmatic.

66. Despite having been forewarned of the licensing agreement, the COMELEC still proceeded with entering into an agreement with Smartmatic.

67. Now, such contract with Smartmatic TIM has been shown to be manifestly and grossly disadvantageous to the Philippine Government and to the Filipino electorate as a whole.

68. The disadvantage is brought about by the fact that Smartmatic is a mere licensee whose performance of its obligations under the contract with the Philippine Government is contingent upon the continued existence and validity of its agreement with a third party which is outside of the Philippine jurisdiction.

69. The disadvantage on the Government is highlighted in the recent suit³⁰ filed by Smartmatic before the Court of Chancery of the State of Delaware on 11 September 2012.

70. In the said verified complaint, Smartmatic alleged that-

“12. In 2009, Smartmatic International and Dominion International executed a License Agreement in which Dominion granted to Smartmatic a worldwide license to market, make, use, and sell precinct count optical scan (“PCOS”) voting systems utilizing Dominion’s optical scan voting system technology. The License Agreement obligated Dominion International to provide Smartmatic International with, among other things, the hardware, software, firmware, and technical support needed to enable

³⁰The suit is entitled “Smartmatic International Corporation, Smartmatic USA Corporation, Smartmatic International Holding B.V. v. Dominion Voting Systems International Corporation, Dominion Voting Systems, Inc., Dominion Voting Systems Corporation and Iron Mountain Intellectual Property Management, Inc.” and is docketed as “Civil Action No. 7844-VCP.

Smartmatic to exploit the broad license granted by Dominion.”³¹

71. But according to Dominion’s answer to the complaint, Smartmatic had no authority to sell the machines to the COMELEC, as the license to market the technology it had given to Smartmatic had already expired. And despite the expiration of this license, Smartmatic still sold the PCOS technology to COMELEC – another 81,000 machines – for the 13 May 2013 mid-term elections.

72. This was made clear in Dominion’s answer to the Smartmatic complaint, where, by way of an affirmative defense, it said that since it had already rescinded the licensing contract with Smartmatic, it was not anymore obliged to allow Smartmatic to use its software and PCOS voting system:

“52. Upon information and belief, on or about March 30, 2012, in preparation for the 2013 election in the Philippines, COMELEC and Smartmatic TIM executed an agreement by which COMELEC would purchase the remaining approximately 81,000 PCOS voting machines, which it had previously leased for the 2010 election (i.e., in addition to the 920 machines that it purchased in 2010). Upon information and belief, the sales contract required upgrades, which would involve revisions to Dominion’s software, not previously provided to Smartmatic International. Only Dominion has the expertise necessary to perform the required upgrades.

53. *Smartmatic International did not disclose this contract to Dominion International when it was executed and has refused to produce a copy to Dominion International despite Dominion International’s requests.*

54. *In or about June 2012, the Supreme Court of the Philippines issued a decision upholding, against a local challenge, the agreement between COMELEC and Smartmatic TIM for the purchase of the remaining approximately 81,000 upgraded Dominion PCOS voting machines which COMELEC had used for the 2010 election on a leased basis.*

55. *On June 14, 2012, Dominion International, through counsel, wrote to Smartmatic International to advise it that, due to the termination of the License Agreement, Smartmatic International was no longer licensed to provide those 81,000 machines to COMELEC, and that Dominion had no obligation to undertake the upgrades. A copy of the letter is attached hereto as Exhibit C.*

56. *The initial SOW attached to the License Agreement by its terms did not extend to the 2013 election. The License Agreement provided that additional work beyond the initial SOW would have to be negotiated as part of a new SOW. Although Smartmatic and Dominion had preliminary discussions*

³¹ Paragraph 12 of the Verified Complaint of Smartmatic, Smartmatic et al., v Dominion et al., supra

about a possible SOW for future collaboration in the Philippines, the parties failed to reach agreement.

57. *Smartmatic's continued efforts in the Philippines to sell 81,000 prospectively- upgraded Dominion PCOS voting machines to COMELEC without a license from Dominion International and without a new SOW violates Dominion Canada's and Dominion International's ownership rights in the voting machines and associated technology.*³²

73. Notably, the upgrades which Smartmatic is obligated to provide under its contract with COMELEC is the same upgrades which according to the Dominion, only it *"has the expertise necessary to perform the required upgrades."*

74. It may be recalled that under the "Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections" between the COMELEC and Smartmatic TIM Corporation, it is provided that-

"8.7 The PROVIDER agrees to provide updates to COMELEC without charge, and the license referred to above shall apply to such updates."

75. Further, Smartmatic recognized that in order fulfil its obligations under the contract awarded by the COMELEC, it needs to secure a license from Dominion. Thus, Smartmatic averred that

*"In 2009, Smartmatic sought to contract with the Republic of the Philippines ("Philippines") Commission on Elections ("COMELEC") to provide certain technology and services to modernize and automate the Philippines National Elections ("Philippines Election Modernization Project" or "Project"). One of the COMELEC's requirements for the Project was an election solution that had the ability to read and interpret data from paper ballots, and Smartmatic determined that certain PCOS technology marketed by Dominion would likely satisfy this requirement and be compatible with Smartmatic's election products. Consequently, Smartmatic began negotiating with Dominion the terms for a license authorizing it to manufacture and sell voting systems which would incorporate Dominion's PCOS technology."*³³

76. Moreover, Smartmatic alleged in its verified complaint that "In reliance on the parties' obligations set form in the MOU, the Binding Term Sheet, and the license agreement, Smartmatic TIM, a Philippine-based Joint Venture Company, executed a contract with COMELEC in July 2009 to provide a paper-

³² Paragraph 56 of the Verified Counterclaim contained in the Answer, Verified Counterclaim, and Verified Third Party Complaint of the Dominion Defendants filed on 17 October 2012, and Verified Third Party Complaint of the Dominion Defendants filed on 17 October 2012

³³ Paragraph 14 of the Verified Complaint of Smartmatic, Smartmatic et al., v Dominion et al., supra

based automated election system for the Project utilizing the Licensed Technology.”³⁴

77. Notably, while Smartmatic anchored its performance of contract with the COMELEC on the existence of the license with Dominion, it is now bringing suit against the latter for the termination of the same License Agreement.

78. In the Delaware case, Smartmatic alleged that Dominion International breached its obligation under the License Agreement by:

“(1)improperly purporting to terminate the License Agreement based upon an incorrect and pretextual interpretation of the geographic scope of the Agreement’s non-compete clause;

(2) failing to deliver fully functional technology for use in the 2010 Philippines national election;

(3) failing to provide timely technical support during and after the Philippines election;

(4) failing to work collaboratively with Smartmatic to find alternative uses for the Licensed Products;

(5) failing to provide Smartmatic with information relating to the Licensed Technology, including new developments to the Licensed Technology;

(6) intentionally frustrating Smartmatic’s right to market, lease, and sell the Licensed Technology; and

(7) failing to place in escrow the required source code, hardware design, and manufacturing information.”³⁵

79. On the other hand, Dominion International, in its Verified Counterclaim asserted that-

*“17. Upon information and belief, the Philippines required PCOS systems for the 2010 election. Because **Smartmatic neither owned nor had access to PCOS voting systems**, in or about early 2009 Smartmatic approached Dominion about an agreement to license Dominion’s PCOS voting systems, including hardware, software and firmware. Xxx*

20. Upon information and belief, on or about July 10, 2009, Smartmatic TIM entered into a contract with the Philippines Election Commission (“COMELEC”) for the provision of PCOS voting machines and other systems for the 2010 Philippines’ national

³⁴Paragraph 17 of the Verified Complaint of Smartmatic, Smartmatic et al., v Dominion et al., supra

³⁵Paragraph 12 of the Verified Complaint of Smartmatic, Smartmatic et al., v Dominion et al., supra

election. Although the COMELEC/Smartmatic TIM contract required PCOS voting systems that Dominion International would be providing, Smartmatic International did not disclose that contract to Dominion International when it was executed and has refused to provide a copy to Dominion International despite several requests by Dominion International. Upon information and belief, the contract essentially called for COMELEC to lease approximately 82,000 PCOS voting machines for 2010 from Smartmatic TIM with an option to purchase them at a later time for use in future elections.

21. Upon information and belief, Smartmatic TIM won the bidding process in the Philippines by submitting a price for PCOS voting systems that was only approximately one-third of what it had discussed with Dominion. As a result, during re-negotiations with Dominion in the summer and fall of 2009, Smartmatic International insisted that Dominion reduce its price per unit from per voting machine to per machine and threatened to terminate the License Agreement if Dominion International did not accede to those demands.

Xxx

23. On October 9, 2009, Dominion International and Smartmatic International entered into a PCOS Framework License Agreement (the "License Agreement") that superseded all prior agreements between Dominion and Smartmatic.... Consistent with Dominion International's intent to provide a limited license to Smartmatic International and protect Dominion Canada's market positions in Canada and the United States, the License Agreement provided, essentially, that Smartmatic International:

a. would have a nonexclusive license to sell Dominion International's PCOS voting systems throughout the world other than Canada and the United States (Section 2.1)

h. would pay Dominion International a license fee for each voting machine delivered by Smartmatic to a third party (Section 4); and

i. would enter into individual Statements of Work ("SOWs") with Dominion International for technical support, maintenance and upgrades for voting systems sold to individual foreign countries (Section 1.6).
(Emphasis supplied)

80. One of the unhappy results of this legal tussle between Smartmatic and Dominion is that until now no honest-to-goodness review of the Source Code for the PCOS has been done. This point will be discussed in greater detail below.

81. Needless to say, the mere pendency of the litigation between Smartmatic and Dominion in the United States of America clearly attests to the fact that the contract between COMELEC and Smartmatic is manifestly and grossly disadvantageous to the Government.

Respondent COMELEC Commissioners and officers, in connivance with Smartmatic and/or Smartmatic-TIM corporate directors and/or offices, committed gross inexcusable negligence, to the gross disadvantage of the government and the Filipino electorate and in violation of the automation law when failed to or otherwise did not *onduct pilot testing as mandated by law.*

82. Respondents failed to conduct pilot testing the system as mandated by Republic Act No. 8436, as amended by Republic Act No. 9369, which failure is gross inexcusable negligence that caused injury to the Government and to the Filipino people.

83. The amendatory law reads-

SEC. 6. *Section 6 of Republic Act No. 8436 is hereby amended to read as follows:*

*"SEC. 5 Authority to Use an Automated Election System. - To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: Provided, that for the regular national and local election, which shall be held immediately after effectivity of this Act, **the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission:** Provided, further, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen: Provided, finally, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. In succeeding regular national or local elections, the AES shall be implemented nationwide." (Emphasis supplied)*

84. While the Supreme Court already ruled in *Roque et al., vs, COMELEC*³⁶ that the pilot testing is not a mandatory requirement for the choice of system in, or a prerequisite for, the full automation of the May 2010 elections,

³⁶ G.R. No. 188456, September 10, 2009

the fact still remains that the COMELEC failed to discharge its positive duty conferred by law to conduct the pilot testing. Hence, the COMELEC officials were grossly negligent in not pilot testing the system and such gross inexcusable negligence resulted to the injury to the Philippine Government.

85. In *Roque et al., vs, COMELEC*, the Supreme Court did not rule on liability, if any, of the officials of COMELEC in not seeing to it that the proviso in the law is observed. It only ruled on the question of whether the pilot testing was mandatory for full automation of the May 2010 elections. The ruling in that case reads-

“From the practical viewpoint, the pilot testing of the technology in question in an actual, scheduled electoral exercise under harsh conditions would have been the ideal norm in computerized system implementation. The underscored proviso of Sec. 6 of RA 8436 is not, however, an authority for the proposition that the pilot testing of the PCOS in the 2007 national elections in the areas thus specified is an absolute must for the machines’ use in the 2010 national/local elections. The Court can concede that said proviso, with respect to the May 2007 elections, commands the COMELEC to automate in at least 12 defined areas of the country. But the bottom line is that the required 2007 automation, be it viewed in the concept of a pilot test or not, is not a mandatory requirement for the choice of system in, or a prerequisite for, the full automation of the May 2010 elections.”

86. In the oral arguments before the Philippine Supreme Court, Smartmatic admitted that the only testing conducted at that point was at the air-conditioned premises of the Commission on Elections. When told that this was insufficient if the intention was to see if the PCOS could withstand the heat, humidity and even the fact that it would have to be delivered to far-flung provinces, Smartmatic alleged that the COMELEC testing was sufficient.

87. In the pending Delaware suit between Smartmatic and Dominion, the grossly inexcusable negligence of COMELEC officials may be gleaned from the response of Dominion with respect to the testing required, to wit:

“... Smartmatic failed to control processing and delivery timelines and as a consequence failed to conduct standard and routine industry-wide testing of the voting system prior to deployment despite the fact that Dominion International had told Smartmatic that it was standard and routine in the industry and needed to be done and despite the fact that Smartmatic had known the necessity of such testing and conducted such testing in prior elections in other countries. Dominion further avers that it nevertheless proposed a solution to issues that arose during belated testing post-deployment, which solutions would have been easy and inexpensive to implement had Smartmatic conducted such timely routine and standard industry-wide testing prior to

deployment.”³⁷ (*Emphasis supplied*)

88. As Dominion states, a pilot testing of a new technology is standard and routine industry practice which the COMELEC failed to observed. The fact that it was inserted in the law supports the position that the requirement to pilot test the system in at least two highly urbanized cities, and further, in two provinces each in Luzon, Visayas and Mindanao constituted standard industry practices known to Congress whose wisdom the COMELEC should have deferred to.

89. Further, this point was recognized by the Honorable Senior Associate Justice Antonio Carpio in his dissenting opinion:

“One need not search far and wide to see the wisdom, logic and practicality for this legislative insistence on transforming our electoral processes from manual to automated gradually in phases. As Senator Gordon puts it, the ultimate goal is to “take the kinks out of the system” before deploying it full scale. Indeed, in systems implementation, a pilot run or a parallel run before full turn-over to the new system is a norm.

Thus, even as Congress gave the COMELEC discretion in choosing the appropriate technology, Congress insisted on a phased implementation involving local government units from each of our three major island groupings cognizant as it was of the difficulties inherent in automating elections in an archipelago as dispersed as ours, with an average nationwide telecommunications coverage of not more than 75%.”

**Respondent COMELEC
Commissioners and officers, in
connivance with Smartmatic
corporate directors and/or offices,
committed gross inexcusable
negligence, to the gross
disadvantage of the government and
the Filipino electorate and in violation
of the automation law, *when they
did not or refused to make available
and open for review the source code.***

90. Respondents did not comply with the law on source code review as mandated by Republic Act No. 8436, as amended by Republic Act No. 9369, and, such non-compliance is gross inexcusable negligence causing injury to the Government.

91. The pertinent provision of the amendatory law reads -

³⁷ Response 37, Answer, Verified Counterclaim, and Verified Third Party Complaint of the Dominion Defendants filed on 17 October 2012

SEC. 9. New section 8,9, 10 and 11 are hereby provided to read as follows:

xxx

"SEC. 10. *The Technical Evaluation Committee.* - The Commission, in collaboration with the chairman of the Advisory Council, shall establish an independent technical evaluation committee, herein known as the Committee, composed of a representative each from the Commission, the Commission on Information and Communications Technology and the Department of Science and Technology who shall act as chairman of the Committee.

"The Committee shall be immediately convened within ten (10) days after the effectivity of this Act."

"SEC. 11. *Functions of the Technical Evaluation Committee.* - The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercises, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act based, among others, on the following documented results:

1. The successful conduct of a field testing process followed by a mock election event in one or more cities/municipalities;
2. The successful completion of audit on the accuracy, functionally and security controls of the AES software;
3. **The successful completion of a source code review;**
4. A certification that the source code is kept in escrow with the *Bangko Sentral ng Pilipinas*;
5. **A certification that the source code reviewed is one and the same as that used by the equipment;** and
6. The development, provisioning, and operationalization of a continuity plan to cover risks to the AES at all points in the process such that a failure of elections, whether at voting, counting or consolidation, may be avoided.

xxx

SEC. 12. Section 10 of Republic Act No. 8436 is hereby amended to read as follows:

"SEC.14. *Examination and Testing of Equipment or Device of the AES and Opening of the Source Code for Review.* - The Commission shall allow the political parties and candidates or their

representatives, citizens' arm or their representatives to examine and test.

"The equipment or device to be used in the voting and counting on the day of the electoral exercise, before voting start. Test ballots and test forms shall be provided by the Commission.

"Immediately after the examination and testing of the equipment or device, parties and candidates or their representatives, citizen's arms or their representatives, may submit a written comment to the election officer who shall immediately transmit it to the Commission for appropriate action.

"The election officer shall keep minutes of the testing, a copy of which shall be submitted to the Commission together with the minute of voting."

"Once an AES technology is selected for implementation, the Commission shall promptly make the source code of that technology available and open to any interested political party or groups which may conduct their own review thereof."

92. The source code for the AES is essential and very important since it is the "mind" of the AES. A "source code" is defined in Section 2 of RA 9369 as the *"human readable instructions that define what the computer equipment will do."*

93. In *Roque, Jr. et al. vs. COMELEC, et al.*," docketed as G.R. No. 188456, the Philippine Supreme Court said one of its bases for rejecting challenges to the PCOS–run AES instituted by the COMELEC is that "the Source Code for the 2010 AES shall be available and opened for review by political parties, candidates and the citizens' arms or their representatives", thereby providing a guard against fraud.

94. Until now, the Source Code for the PCOS used in the 10 May 2010 elections has not been reviewed because the same was only belatedly released to COMELEC by the feuding parties – Smartmatic and Dominion –just a few days before election day on 13 May 2013.

95. The review will normally take about six months according to IT experts. Thus, there was not enough time to conduct the review before the elections.

96. Furthermore, the mere act of depositing with the Bangko Sentral ng Pilipinas the DVD containing the Dominion source code, encrypted using passwords of SLI, Dominion, and Comelec, does not constitute "... make[ing] the source code of the technology available and open to political parties and interested groups for their own review" as mandated by law.

97. It is the height of COMELEC to allow the sanctity of our ballot to be held hostage by foreign entities quibbling over their share of the Filipino taxpayers' money.

98. Worse, Respondent COMELEC commissioners even wanted the political parties to do the source code review under conditions and terms agreed upon by COMELEC and Smartmatic, in accordance with their contract which stipulates that:

Article 7.2 The system software, hardware, and source code, including documentation will be open for inspection at any time in a controlled environment under guidelines formulated and agreed by both parties.

96. The provision for a "controlled environment" is actually founded on Smartmatic's claims to proprietary considerations. COMELEC is required to respect the intellectual property rights of Smartmatic, (or more accurately, Dominion Voting Systems, the developer of the technology), such that the provision for the examination of the software can only be done according to the terms set by Private Respondent Smartmatic. In other words, the requirement of a "controlled environment" means that Private Respondent Smartmatic has been given blanket authorization to determine what to disclose to the public and what not to in regard to the source code in question. But without full disclosure of the source code, the people will not know exactly how PCOS machines read their votes.

97. The late arrival of the source code, it should be noted may be attributed to the court filing referred to above by Smartmatic International Corporation, *inter alia*, against Dominion--- the provider of the software used in the PCOS machines.

98. Again, in its verified complaint, Smartmatic charged that Dominion International breached its obligations under the License Agreement with Smartmatic by:

"(7) failing to place in escrow the required source code, hardware design and manufacturing information."³⁸

99. Smartmatic's Complaint and Dominion's answer³⁹ reveal shocking details of misrepresentations on the part of Smartmatic and the COMELEC, and further underscores the point of how COMELEC had ceded Philippine sovereignty to a foreign corporation over its electoral system.

100. Smartmatic claims to be in the business of supplying automated election system, but the truth is that when it bid for the PCOS system, it offered

³⁸<http://www.scribd.com/doc/110048368/Smartmatic-Complaint-Vs-Dominion> Last accessed 28 May 2013.

³⁹<http://www.namfrel.com.ph/v2/news/bulletin/Dominion%20response%20to%20Smartmatic%20Oct%2017,%202012.pdf> Last accessed 28 May 2013.

to sell to the COMELEC both hardware and software owned by its erstwhile principal competitor, Dominion.

101. That the COMELEC even allowed this situation should boggle the mind of any citizen.

102. Smartmatic further charged that Dominion failed to deliver a working system to the Philippines: “During a test of the automated voting system conducted shortly before the Election, COMELEC and Smartmatic discovered a defect in the Licensed Technology—Dominion International’s software failed to correctly read and record the paper ballot.”

103. This is yet another confirmation of the cavalier way in which the COMELEC handled concerns by many in the Philippines about the reliability of the PCOS system.

Respondent COMELEC commissioners, in connivance with Smartmatic and/or Smartmatic-TIM corporate directors and/or officers, committed gross inexcusable negligence, to the gross disadvantage of the government and the Filipino electorate and in violation of the automation law, when they failed to ensure that Smartmatic put in place the required telecommunication facilities to support PCOS transmissions for the 10 May 2010 national and local elections.

104. The COMELEC’s SBAC’s Bid Bulletin No. 6 states that for the Electronic Transmission System, Smartmatic has to provide for the telecommunications facilities for areas without these facilities, to wit:

The electronic transmission service has to be available more than 99% of the time. For areas without power and telecommunications facilities, the winning bidder has to provide for these required facilities and include the same in its proposal. In short, communications coverage should be 100%.⁴⁰

105. This is in consonance with Component 2 of the Technical Specifications laid out by the COMELEC in the RFP:

⁴⁰http://www.comelec.gov.ph/modernization/2010_natl_local/SBAC/sbac_bid_bulletin/bid_bulletin_no6_041309.html

**COMPONENT 2
PROVISION FOR ELECTRONIC TRANSMISSION
USING PUBLIC TELECOMMUNICATION NETWORKS**

1. The service shall provide all the transmission requirements of the system.
2. The service shall have a designed availability of >99%.
3. The service shall be available from 3:00 PM on Election Day to 3:00 PM the following day or until all election results have been transmitted.
4. The service shall cover 100% of all clustered precincts covered by this RFP.
5. The service may utilize wireless, wired or satellite-based connection, or a combination thereof.
6. All related requirements by the service which are needed to make it fully operational for the duration of the project shall be included in the proposal/offer, including the software and hardware.

106. Pursuant to Articles 21.1 and 21.4 of the 10 July 2009 Automation Contract, Bid Bulletin No. 6 forms part of the entire agreement between Public Respondent COMELEC and Private Respondents. Articles 21.1 and 21.4 of the 10 July 2009 Automation Contract stipulates that:

**ARTICLE 21
CONTRACT DOCUMENTS**

21.1 "Contract Documents" refers to the following documents, and they [sic] are hereby incorporated and made integral parts of this Contract:

xxx xxx xxx
Annex "P", "P1" to "P24"- Bid Bulletins 1 to 25

xxx xxx xxx

21.4 This Contract, together with the Contract Documents, constitutes the entire agreement between the parties. xxx⁴¹

107. Smartmatic failed to comply with their contractual obligation to provide for telecommunications facilities for areas without these facilities, not just for the May 10, 2010 elections but also for the May 13, 2013 elections.

108. **First**, nowhere in the schedule of payments of the Automation Contract did it provide for any allocation on the building of telecommunications facilities. Article 4 of the Automation Contract stipulates:

⁴¹ Pp. 21-22 of 10 July 2009 Contract.

**ARTICLE 4
CONTRACT FEE AND PAYMENT**

4.1 CONTRACT AMOUNT

COMELEC shall pay the PROVIDER the aggregate contract amount of Seven Billion One Hundred Ninety One Million Four Hundred Eighty Four Thousand Seven Hundred Thirty Nine Pesos and Forty-Eight Centavos (**Php7,191,484,739.48**), exclusive of value-added tax, if any, for the lease of Goods and purchase of Services under this Contract.

4.1.1 The Contract Amount shall be paid as the Goods and Services are delivered and/or progress is made in accordance with the following Schedule of Payments which takes into account the agreed critical milestones based on the Revised Timeline:

Project Initialization, Set up Project Management Team (PMT) and	
Project Systems including all SW licenses & firmware	10%
Delivery of Development Set (20 units)	5%
Report on Transmission and Logistics	5%
Delivery of Functional System and Software Agreement	5%
Delivery of EMS and CCS (HW, SW and Website)	5%
Complete System Including Customization and	
Voter Education Materials/Website	5%
Field Testing, Mock Election, TEC Systems Certification, Training of Trainers	5%
Delivery of PCOS Machines (Nov - 12K; Dec - 30K)	17.5%
Second Delivery of PCOS Machines (Jan - 30K; Feb - 10.2K)	17.5%
Commencement of Ballot Production	2.5%
Delivery of Ballots	7.5%
Configuration of Machines, Final Checking of systems, including transmission and Sealing	<u>5%</u>
Subtotal	<u>90%</u>
 Election Day Services	

&Completion Report and
Final Acceptance in lieu of
Retention of Warranty Security,
within thirty (30) days from
receipt of Final Report 10%

**Performance Security - 5% (based on final acceptance of
completion report as provided In Article 8.1, paragraph 2)*

109. The only reference to an “Electronic Transmission System” that the schedule of payments of the Automation Contract has is merely a “Report on Transmission and Logistics (5%).”

110. With the willing and willful acquiescence of Respondent Commissioners, Smartmatic utterly failed to comply with this requirement in the May 10, 2013 elections; it also failed to do so in the May 13, 2013 elections.

111. **Second**, in public pronouncements prior to the May 20, 2013 elections, the COMELEC made it appear that there is also a provision for satellite communication as back-up, in case the public telecommunications network on which the transmission system primarily proves inadequate for the transmission needs of the automated election system.

112. And yet the contract between the Commission on Elections and the Smartmatic-TIM joint venture does not actually provide for satellite transmission of election results, in violation of the Request for Proposal-Terms of Reference (RFP-TOR) to the contract issued on May 11, 2009.

113. COMELEC targeted that by May 2010, it will have achieved the following:

- Modems (transmission device with at least GPRS capabilities for the PCOS units) – 48,000 units
- USB modems with GPRS capabilities – 2, 400 units
- Testing & Sealing and Election Day:
 - **445,880 GPRS cellphone service (voice/data)**
 - 2 Central Server link service
 - 2 Back-Up Server link service
 - 2 COMELEC link service
 - 2 Congress link service
 - 2 KBP/Parties link service

- Warehouse link service & EMS Center link service
- Contingency links (satellite) service

114. Note that while the Contract purportedly provided for “contingency links (satellite) service,” all that it actually supplies as transmission equipment for the PCOS machines are ordinary mobile phone units that are only GPRS capable, with at least one unit assigned per polling center, as outlined in ANNEX H [list of goods (Component 2: Electronic Transmission Service)] and ANNEX H (list of services: Electronic Transmission Service)] of the contract.

115. That means 48,000 mobile phone units but not a single unit has satellite transmission capability. Indeed all the listed equipment pertain merely to GPRS-enabled mobile phones. That no such provision for satellite capability has been made is proven by the fact that the budget allocation for transmission is merely P195 million, which is just enough for a GPRS system.

116. **Third**, various public pronouncements by officials of Public Respondent COMELEC strongly indicate that Private Respondents will not be able to comply with their contractual obligation to provide for the telecommunications facilities for areas without these facilities

117. On 24 September 2009, Respondent COMELEC Chairman Jose Melo himself made a public statement that the proposed automated elections will be in peril if its contracted suppliers, Smartmatic and TIM, failed to ensure that there is the infrastructure for the transmission system nationwide.⁴²

118. Even the Acting Director of Public Respondent COMELEC’s Information Technology Department, Jeannie Flororito, had revealed at the time of the 10 May 2010 elections that at least 25 percent of the Philippines is not hooked to a telecommunications system.⁴³

119. Respondent Melo further added that “we would likely go manual if that 25 percent is not provided with an appropriate technology.”⁴⁴

120. But Bid Bulletin No. 6 and Component 2 of the Technical Specifications clearly require 100 PERCENT communications and transmissions coverage. ANYTHING LESS THAN THIS IS IN VIOLATION OF THE TERMS AND PROVISIONS OF THE AUTOMATION CONTRACT.

121. The problem would be repeated again in the 13 May 2013 elections, which was marked by widespread failure to transmit, with the

⁴² Marie Surbano and Gerry Baldo, *No certainty yet for auto polls, says Comelec chief*, The Daily Tribune, p.1 (September 25, 2009).

⁴³ *Id.*

⁴⁴ *Id.*

incumbent COMELEC chairman Sixto Brillantes admitting that 18,000, or 24-25 percent of the around 78,000 machines deployed in the midterm elections, conked out and could not be transmitted.⁴⁵

122. This is a figure much higher than the threshold of 2 percent of machines failing to transmit on election day set by the COMELEC itself.

123. Hence, these events clearly show that Respondent COMELEC commissioners and Respondent Smartmatic-TIM corporate directors and/or officers conspired to enter into contracts grossly disadvantageous not only to the Philippine government but above all, to the Filipino electorate.

Respondent COMELEC Commissioners and officers, in connivance with Smartmatic and/or Smartmatic-TIM corporate directors and/or offices, committed gross inexcusable negligence, to the gross disadvantage of the government and the Filipino electorate and in violation of the automation law, when they failed to or otherwise did not ensure that the SMARTMATIC-PCOS Machines provide for a Voter Verified Paper Audit Trail (VVPAT), among many other safeguards, to ensure the integrity and security of the machines used in the automated elections.

124. One major flaw of the PCOS machines bought by the Philippine government from provider SMARTMATIC is that it does not provide for Voter Verified Paper Audit Trail or VVPAT.

125. The PCOS machines currently used in the Automated Elections in the Philippines does not provide the voter information as to whether or not it accurately read and recorded the votes as cast in the ballot.

126. The PCOS machines print no receipt or any paper print out that tells the voter the names of the persons or the name of the partylist organization that the computer recorded as having been voted for by a particular voter. There is neither capability for the voter to see how the machine appreciated his or her ballot digitally, i.e., via an LCD screen or any other similar means.

127. This is in clear violation of the minimum system capabilities as required by Section 7 of RA 9369 amending Section 6 of RA 8436. Subsections (e) and (n) state:

⁴⁵Brillantes' Tantrums, Philippine Daily Inquirer, Editorial, Opinion Section May 24, 2013, available at <http://opinion.inquirer.net/53257/brillantes-tantrums><last visited, May 28, 2013>

SEC.6. Minimum System Capabilities. - "The automated election system must at least have the following functional capabilities:

*(e) Provision for voter verified paper audit trail;
xxx*

(n) Provide the voter a system of verification to find out whether or not the machine has registered his choice;

Furthermore, the inability of the PCOS machines to allow voters to verify whether or not the machines correctly read their votes violates Section 9 of RA 9369 amending Section 11 which provides:

SEC. 11. Functions of the Technical Evaluation Committee. - The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercises, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act xxx

128. Assuming however that the PCOS machines are in fact capable of producing receipts as alleged by SMARTMATIC President Cesar Flores, Respondent COMELEC Commissioners were grossly and inexcusably negligent when they failed to ensure that this function of the PCOS machine is made to work in the 10 May 2010 elections.

Respondent COMELEC Commissioners and officers, in connivance with Smartmatic and/or Smartmatic-TIM corporate directors and/or offices, committed gross inexcusable negligence, to the gross disadvantage of the government and the Filipino electorate and in violation of the automation law, when they failed to or otherwise did not ensure the accuracy of the SMARTMATIC-PCOS Machines used in the Automated Elections.

129. Based on COMELEC requirements and specifications, the PCOS machines to be used in the Automated Elections of 2010 need to have accuracy rate of 99.995% or higher. This is provided for in the Terms of Reference of the bidding for the automated election of 2010. The required accuracy rate means that of only 1 vote out of every 20,000 case may be miscounted.

130. In a study conducted by Dr. Felix P. Muga II, it was found that the accuracy rating of the SMARTMATIC-PCOS machines is way below the standard set forth by the COMELEC.

131. The results of the Random Manual Audit (RMA) commissioned by the COMELEC itself after the 2010 elections, held in June and July of that year, found that the PCOS machines only had an accuracy rating of 99.6%. This means that the PCOS machines had 80 miscounts for every 20,000 voting marks that it appreciated.

132. According to Dr. Muga, the total number of ovals that was shaded in the May 2010 elections per voter ranges from 24 to 34. One valid shaded oval is equivalent to one valid vote. Thus, each voter in the last election had 24 to 34 votes.

133. In his study, for computational simplicity, it was assumed that the average number of votes per ballot is 28. The actual sample size of the RMA for the AES of 2010 is 1,046 precincts covering 540,942 ballots. Thus, it is safe to say that the average number of ballots per precinct in the AES of 2010 was 517. Hence, the average number of votes per precinct of the AES of 2010 is 14,476.

134. At 14,476 votes per precinct, the 99.995%-accurate PCOS machine will miscount 0.72 votes only. This is less than one vote. Thus, the ToR-specified PCOS machine is practically error-free.

135. However, at 14,476 votes per precinct, the 99.6%-accurate SMARTMATIC-PCOS machine miscounted 57.90 votes or 57 votes. Since there are 76,347 precincts, it follows that the 99.6%-accurate SMARTMATIC-PCOS machines miscounted about 4,351,779 votes.

136. What is more worrying is that in the 2012 mock elections held in Congress in preparation for the 2013 midterm elections, the accuracy rating shown by the PCOS machines dropped to 97.215%. Whereas in 2010 the PCOS machines had 80 miscounts per 20,000 votes, in 2012, the miscounts rose to 557 per 20,000 votes.

137. This is in clear violation of the COMELEC Terms of Reference for the purchase of the PCOS machines which provides for a 99.995% accuracy rating.

138. It furthermore violates Section 7 of RA 9369 amending Section 6 of RA 8436 which provides for minimum system capabilities of the PCOS machines including subparagraph b which requires:

SEC.6. Minimum System Capabilities. - "The automated election system must at least have the following functional capabilities:

(b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results.

It is furthermore in violation of Section 9 of RA 9369 amending Section 11 which provides:

SEC. 11. Functions of the Technical Evaluation Committee. - The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercises, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act xxx

The failure to ensure that the machines are accurate in the 2010 elections, compounded by the continued use of these machines in the 2013 elections, the testing of which showed even more inaccuracy, respondents have been grossly negligent in their responsibilities and duties. In so doing, they have caused irreparable injury to the Philippine government.

Respondent COMELEC Commissioners and officers, in connivance with Smartmatic and/or Smartmatic-TIM corporate directors and/or offices, committed gross inexcusable negligence, to the gross disadvantage of the government and the Filipino electorate and in violation of the automation law, when they failed to or otherwise did not require (1) the proper Digital Signature on the Election Returns as well as the Certificates of Canvass from the PCOS Machines and the use of WORM CF Cards in the 10 May 2010 election, which failure undermined the integrity in the transmission of Votes.

139. In order to ensure that the transmission of votes is secure, a digital signature is required to be electronically and digitally signed on the election returns thus Section 19 of RA 9369 amending Section 18 of RA 8436 provides:

SEC.22. The election returns transmitted electronically and digitally signed shall be considered as official election results and shall be used as the basis for the canvassing of votes and the proclamation of a candidate.

The same is required of certificates of canvass from Section 20 of RA 9369 amending Section 21 of RA 8436:

SEC.25. The certificates of canvass transmitted electronically and digitally signed shall be considered as official election results and shall be used as the basis for the proclamation of a winning candidate.

The digital signature ensures the security of the ERs and COCs that will be transmitted from these PCOS machines. It is important to note that many studies have shown that the biggest problem in the integrity of Philippine election is in the canvassing of

votes. *Electoral fraud in the Philippines occurs most often in the canvassing process. As such, the security of the canvass is of utmost importance.*

Under the Terms of Reference that the COMELEC provided to the bidders of the AES-2010, Section 4 provides:

Section 4. "Counting, Consolidation and Generation of ER"

xxx

4.5 The BEI shall digitally sign and encrypt the internal copy of the ER xxx

140. Clearly, the intention of the COMELEC was to require for a manner akin to the signing done by the BEI in the manual elections. However, this time, instead of a signature in the paper Election Return or Certificate of Canvass, the signature is done digitally. What is clear however, is that it is a person that does the signing. Specifically, the signing shall be done by the members of the BEI.

141. Section 25 providing for a new Section 30 outlines the requirement for the electronic signatures on the ERs and CoCs as follows:

SEC.30. Authentication of Electronically Transmitted Election Results. – The manner of determining the authenticity and due execution of the certificates shall conform with the provisions of Republic Act No. 7166 as may be supplement or modified by the provision of this Act, where applicable, by appropriate authentication and certification procedures for electronic signatures as provided in Republic Act No. 8792 as well as the rules promulgated by the Supreme Court pursuant thereto.

142. In turn, Republic Act 8792 provides the following regarding electronic signatures:

Section 5. Definition of Terms - For the purposes of this Act, the following terms are defined, as follows:

(e) "Electronic Signature" refers to any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or electronic document or any methodology or procedures employed or adopted by a person and executed or adopted by such person with the intention of authenticating or approving an electronic data message or electronic document.

143. In a paper by IT expert Pablo R. Manalastas entitled "Gearing for AES 2013: The Imperative of An Independent Source Code Review" for the Filipino IT for Elections National Conference on June 13, 2011, he explained the manner by which digital signatures are made. In the paper, he states that a BEI member, to digitally sign ERs, must have a pair of cryptographic keys. He will have a private key which he generates himself, and a public key which he

submits, along with documentation on his identity, to a Certificate Authority who will create a digital certificate stating that the given public key belongs to him can do digital signing of an ER without divulging to the PCOS machine his private key.

144. However, based on Bid Bulletin 10 by the COMELEC on 15 April 2009, COMELEC-SBAC issued Bid Bulletin No. 10 stating that the, “digital signature shall be assigned by the winning bidder to all members of the BEI and the BOC (whether city, municipal, provincial, district).”

145. This means that in the 2010 elections, the public and private keys which form the digital signature of a member of the BEI or BOC, and which is used to authenticate the transmitted ER and COC, are assigned by SMARTMATIC.

146. This is because Article 21 of the Contract between COMELEC and SMARTMATIC provides that all bid bulletins issued by the COMELEC shall form part of the agreement between COMELEC and SMARTMATIC thus:

Therefore, the digital signatures that shall be used by the members of the BEI and the BOC shall all be assigned by SMARTMATIC.

147. This means however that the private key is not private at all! What should be a secret key known only to the member of the BEI or BOC is actually assigned by SMARTMATIC. This means that they have the ability to “unlock” the transmitted ER or COC, and then seal it again using the private key which is known to them since it them who generated and assigned it.

148. Further, the public and private key which are used in the Philippine elections which create the digital signature in ERs are actually not provided by people but by the PCOS machines. The public and private keys are actually digitally stored inside the machines which “sign” them. As such, not only are the keys which create the digital signature assigned by SMARTMATIC, but it is their provided machines which “sign” the ERs in violation of its own bid bulletin which states that the digital signature shall be assigned to the members of the BEI and the BOC, presumably for the member to digitally sign the ERs and COCs.

149. By allowing SMARTMATIC to assign the public and private keys which forms the digital signature attached to the ERs and COCs, the COMELEC has effectively abdicated its duty to ensure the security of the vote to the prejudice of the Filipino people.

150. Further, the integrity of the 2010 national and local elections was seriously compromised when COMELEC allowed SMARTMATIC-TIM to use rewritable CF cards instead of write-once-read many (WORM) ones, as provided for in COMELEC’s own Request for Proposal for the said elections. COMELEC also did not provide for a comprehensive final testing and sealing of these same cards, as well as their designated back-ups, before the 10 May 2010 elections. By their nature, rewritable CF cards can be tampered with easily.

151. The problem with the CF cards was demonstrated distressingly by the recall of 76,000 of these cards by Smartmatic just days before the 10 May 2010 elections because of defects; while it was able to replace the defective CF cards, there was no telling if the replacements were subjected to final test sealing, as they were immediately deployed to the field.

152. Without the indispensable cooperation and participation of Respondent COMELEC Commissioners and officers, the Respondent Smartmatic and Smartmatic-TIM corporate directors and/or officers would not have been able to introduce the terribly faulty PCOS automated electoral system in the 10 May 2010 national and local elections.

153. Without the their willing complicity, Respondent COMELEC Commissioners and officers would not have signed the questionable contracts with Smartmatic-TIM for the PCOS system.

154. Without the indispensable cooperation and participation of Respondent COMELEC Commissioners and officers, in the negotiations for and the signing of the contracts the government of the Philippines would not have been represented in and bound by these irregular, graft-ridden contracts.

155. Meanwhile, without the indispensable cooperation and participation of Respondent Smartmatic and Smartmatic-TIM corporate directors and/or officers, their firms would not have been represented in and bound by the terms of the contracts in question and would not have been able to receive the benefits, rights and privileges due them, including the nearly P 15 billion in Filipino taxpayers' money generated by these contracts.

156. The foregoing acts committed by Respondents are declared unlawful and made punishable under RA 3019 as well as under the relevant provisions of the Revised Penal Code and other special laws.

157. Considering all of the above circumstances, there are strong grounds to charge all of the Respondents with violation of :

Section 3 (e) of RA 3019, for “[c]ausing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith, or gross inexcusable negligence.

158. Further, there are strong grounds to charge all the Respondents --- who are or were public officers at the time the assailed contracts --- with violation of:

Section 3 (a) of RA 3019 for “[p]ersuading, inducing or influencing another public officer to perform an act constituting a violation of

rules and regulations duly promulgated by competent authority or an offense in connection with the official duties of the latter, or allowing himself to be persuaded, induced, or influenced to commit such violation or offense.”

157. Moreover, there are strong grounds to charge all the Respondent COMELECCommissioners with violation of Art. 208 of the Revised Penal Code, which provides for a penalty of prison correccional upon a public official who in dereliction of his or her duties, “shall maliciously refrain from instituting prosecution or the punishment of violators of the law or shall tolerate the commission of offenses.”

159. In addition, their willing omissions also constitute misconduct under administrative law, defined as “intentional wrongdoing or deliberate violation of a rule of law or standard of behavior” in connection with “the performance of official functions and duties of a public officer.”

160. There are also strong grounds to charge the Respondents who are private citizens for conspiring with the Respondents who are public officials in committing the criminal violation of laws as above-discussed.

161. We therefore jointly execute this Complaint-Affidavit to attest to the truth of the foregoing and to cause the prosecution of herein Respondents for violations of the above-mentioned provisions of various criminal statutes.

Affiants further sayeth naught.

HON. TEOFISTO T. GUINGONA, JR.

FR. JOSE P. DIZON

RODOLFO NOEL I. LOZADA, JR.

ANNA LEAH ESCRESA-COLINA

GREGORIO T. FABROS

HECTOR A. BARRIOS

EVITA L. JIMENEZ

CERTIFICATION

SUBSCRIBED AND SWORN to before me this ____ day of June 2013. I hereby certify that I have personally examined the affiants and am satisfied that they voluntarily executed and understood their affidavit.

