AlaFile E-Notice

03-CV-2017-901909.00

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# NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

VICTORIA TUGGEY ET AL V. JOHN MERRILL, SECRETARY OF STATE ET AL
03-CV-2017-901909.00

The following complaint was FILED on 12/7/2017 4:18:22 PM

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TIFFANY B. MCCORD
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MONTGOMERY, AL, 36104

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
TIFFANY B. MCCORD, CLERK

**IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA**

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|---|---|---|
| **PAMELA MILES, DAN DANNENMUELLER,** | **}** | |
| **VICTORIA TUGGLE and DR. PAUL HARD,** | **}** | |
| **Plaintiffs,** | **}** | |
| **V.** | **}** | **CV-2017-** |
| **JOHN MERRILL, in his personal and** | **}** | |
| **professional capacity as Secretary of State,** | **}** | |
| **and ED PACKARD, Administrator of** | **}** | |
| **Elections** | **}** | |
| **of Alabama** | **}** | |

**COMPLAINT**

## PRELIMARY STATEMENT

1. Defendants John Merrill and Ed Packard are failing to carry out their duties to instruct county election officials to preserve all election materials as required by law. Specifically, Defendants, according to information provided by them, indicate they do not and will not instruct election officials in each of the Alabama counties to preserve digital ballot images created by digital voting machines used throughout the state even though they are instructing such county officials to preserve “write-in” digital ballots.
2. As a result of Defendants’ failure to comply with Alabama’s public records law, digital ballot images used for tabulating votes and possible post-election adjudication will be destroyed following the December 12, 2017 special election for United States Senate in Alabama. The issue continues to be ripe through all elections scheduled in 2018.

3. Plaintiffs believe the failure of defendants to require that all election materials including digital ballot images violates Alabama's public records law and infringes upon their right to a fair and accurate election.

## JURISDICTION AND VENUE

4. This Court has jurisdiction and venue over this matter because Montgomery County is the seat of government in Alabama.

## PARTIES

5. Plaintiff Pamela Miles is a resident of Madison County. She is a registered voter in Alabama.
6. Plaintiff Dan Dannemueller is a resident of Elmore County. He is a registered voter in Alabama.
7. Plaintiff Paul Hard is a resident of Montgomery County. He is a registered voter in Alabama.
8. Plaintiff Victoria Tuggle is a resident of Cullman County, She is a registered voter in Alabama.

## BOND

Plaintiffs argue that bond is inappropriate in this matter as the only remedy applied for is that the Defendants order county election officials to press a button ordering "all" images will be saved. This can be effectuated with electronic mail.

The Defendants have been notified this action was pending, and have not responded.

## STATEMENT OF FACTS

### Defendants Fail To Preserve Digital Ballot Images Created By Voting Equipment Used in Alabama Elections.

9. Alabama counties use election equipment manufactured by Election System and Software (ES&S), a company based in Omaha, Nebraska. More than 80% of the state will be using DS200 and DS850 digital scanners to count the votes in the December 12, 2017 special election for United States Senate.

10. Voters in Alabama cast either a paper ballot that is fed through either a DS200 or DS850 digital scanning device or by an M100 optical scanning device, depending upon the county. Digital scanners count the digital images of the ballots rather than the paper ballots themselves while optical scanners count the paper ballots. Ballot images are therefore in the chain of custody and constitute public records.

11. Digital ballot voting machines provide three options on the machine with respect to the handling and preserving of digital ballot images:

* None

* All Processed Images

* Processed Write-in Images Only

12. Defendants have confirmed that in previous elections and in the December 12, 2017 special election, they have instructed and are instructing election officials of all Alabama counties using the ES&S DS200 or similar digital ballot scanning devices to preserve "Processed Write-in Images" only. As a result, county election officials or workers under their supervision automatically destroy all other digital ballots following the election.

13. Digital ballots are a "public record" pursuant to Alabama law which defines the term *public records* to "include all written, typed or printed books, papers, letter, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business…" Ala. Code (1970) § 41-13-1.

14. Alabama election officials are required to save ballots and other election materials for six (6) months in the case of state elections and twenty-two (22) months in federal elections.

## CLAIM FOR RELIEF

### Alabama Public Records Law

14. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs as is fully set forth herein.

15. The Alabama statute defining "public record" states that "the term 'public records' **shall include all** written typed or printed books, papers, letters, documents and maps **made or received in pursuance of law by public officers** of the state, counties, municipalities and other subdivisions of government **in the transaction of public business** and shall include any record authorized to be made by any law of this state belonging or pertaining to any court of record **or any other public record authorized by law** or any paper, pleading, exhibit or other writing filed with in or by any such court, office or officer. Ala. Code (1970) § 41-13-1.

16. Alabama election officials have an affirmative duty to preserve ballot images under Federal statute, 52 USC 20701 which requires the retention of all records, papers, and materials by officials of elections, including ballots. Digital ballot images fall within the category of such records since they are ballots that are used for tabulating election results.

17. Defendants violate Alabama's public records law and Plaintiffs' right to a fair and accurate election by failing to instruct county election officials to preserve all ballot images.

18. Without the preservation of these digital ballot images, Defendants' rights to a fair and accurate election could be denied.

WHEREFORE, Plaintiffs pray this Court will issue a temporary restraining order to order Defendants to inform county election directors to preserve digital ballot images or files of the December 12, 2017 special election for United States Senate.

Plaintiffs further pray this Court will set a date within 10 days of the execution of said restraining order for an evidentiary hearing on a preliminary injunction in this cause.

Plaintiffs further pray that upon a final hearing of this cause, the Court will declare that Defendants have a duty to preserve and instruct Alabama county election officials to preserve all digital ballot images and files produced in the State of Alabama.

Respectfully submitted, this 7th day of December, 2017

/s/ Priscilla Black Duncan (DUN033)

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