

IN THE SUPREME COURT OF OHIO

Moss, et al.,
Contestors,
-v-
Bush, et al.,
Contestees.

Case No. **04-2088**

Original Action to Contest Election

CONTESTORS' EMERGENCY MOTION FOR EMERGENCY EXPEDITED HEARING AND EMERGENCY EXPEDITED RELIEF TO PREVENT SPOILIATION OF EVIDENCE AND TO PRESERVE DOCUMENTARY AND ELECTRONIC EVIDENCE

Richard N. Coglianese
Assistant Attorney General
Constitutional Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Telephone: 614/466-2872
Fax: 614/728-7592

Clifford O. Arnebeck, Jr. (0033391)
Counsel of Record for Contestors
1351 King Ave., 1st Floor
Columbus, Ohio 43212
Telephone: 614-481-8416
Fax: 614-481-8387
arnebeck@aol.com

Robert J. Fitrakis (0076796)
Counsel for Contestors
1240 Bryden Road
Columbus, Ohio 43205
Telephone: 614-253-2571
Fax: 614-227-5301
truth@freepress.org

Susan Truitt (0018766)
Counsel for Contestors
2338 Abington Road
Columbus, Ohio 43221
Telephone: 614-487-1759
Fax: 614-487-1759
susan_truitt@yahoo.com

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DEC 17 2004
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Of counsel:
Peter Peckarsky
1615 L Street, NW
Washington, DC 20036
Columbus telephone: 614/481-8416
Columbus fax: 614/481-8387

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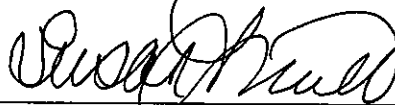
CONTESTORS' EMERGENCY MOTION FOR AN EMERGENCY EXPEDITED HEARING AND EMERGENCY EXPEDITED RELIEF TO PREVENT SPOILIATION OF EVIDENCE AND TO PRESERVE DOCUMENTARY AND ELECTRONIC EVIDENCE

Pursuant to Ohio Supreme Court Rule 14(A) and 14 (C) and Ohio Rule of Civil Procedure 7, the Contestors respectfully request that this Court issue an emergency order preventing spoliation of evidence and preserving evidence for the captioned contest and providing as follows:

- (1) Pursuant to R.C. 3599.34 and 3506.14, the Secretary of the State, his employees, all county Boards of Election, and all of their employees and contractors and anyone acting in concert with them is hereby ordered not to re-program, erase, modify or otherwise tamper with any data on or in or contained in any storage device which is or was attached to any electronic voting machines owned at present or on November 2, 2004, by Ohio or any county Board of Elections.
- (2) All county Boards of Election are directed to impound under seal all voting machines, all vote tabulating machines, all vote tabulating computers, all memory

cards, all results slips or tapes produced by any of the foregoing types of equipment, all test results or test decks of any equipment used in the November 2, 2004, election, and all precinct or other poll books used in connection with the November 2, 2004, election.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan Truitt", written over a horizontal line.

Susan Truitt (0018766)
Counsel for Contestors
2338 Abington Road
Columbus, Ohio 43221
Telephone: 614-487-1759
Fax: 614-487-1759
susan_truitt@yahoo.com

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION

Contestors' have filed a petition under R.C. 3515.08 to contest the certified results of a statewide election. The contested election is the election for electors to vote for the President and Vice President of the United States for the terms commencing January 20, 2005 and between Contestees Bush and Cheney and the competing ticket of John Kerry and John Edwards. This motion is being filed to protect evidence relevant to the contests.

R.C. 3599.34 prohibits the destruction of ballots until the time has expired for using them in a recount or in a contest of election. Under R.C. 3515.08 et seq., the time for using ballots and related electronic information as evidence in the contests has not expired.

The Affidavit of Sherole Eaton, Deputy Director of the Hocking County Board of Elections, dated December 13, 2004 (attached hereto as Exhibit A), establishes that a representative of Tri Ad (which per the affidavit maintains the voting machines and vote tabulators in Hocking County) manipulated the tabulator and related computer prior to the commencement of the recount in Hocking County. (N.b. Counsel is advised that the company involved is known as Triad.)

The transcript of the sworn testimony of Catherine L. Buchanan (attached hereto as Exhibit B) given on December 14, 2004, at a community public hearing in Toledo, Ohio, establishes that the Diebold OptiScan machines were being re-programmed. The re-programming involves deleting information from the memory cards in the central tabulating machine.

Further, in a December 2, 2004, letter from Kay E. Baker, Director, Shelby County Board of Elections to Harvey Wasserman of Columbus, Ohio (Exhibit C attached hereto), Ms. Baker writes that "tabulator test decks were discarded after [the] election. . ." The destruction of these

test decks appears to be a violation of R.C. 3506.14.

Accordingly, contestors request emergency relief as set forth in the motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan Truitt", written over a horizontal line.

Susan Truitt (0018766)
Counsel for Contestors
2338 Abington Road
Columbus, Ohio 43221
Telephone: 614-487-1759
Fax: 614-487-1759
susan_truitt@yahoo.com

December 13, 2004

Sherrie Eaton

Re: General Election 2004, Hocking County - Tri Ad
Dell Computer about 14 years old - No tower

On Friday, December 10, 2004, Michael from Tri Ad called in the AM to inform us that he would be in our office in the PM on the same day. I asked him why he was visiting us. He said, "to check out your tabulator, computer and that the attorneys will be asking some tricky questions and he wanted to go over some of the questions they may ask". He also added that there would be no charge for this service.

He arrived about 12:30PM. I hung his coat up and it was very heavy, I made a comment about it being so heavy. He Lisa Schwartz, Director, and I chatted for a few minutes. He proceeded to go to the room where our computer and tabulation machine is kept. I followed him into the room. I had my back to him when he turned the computer on. He stated that the computer was not coming up, I did see some commands at the lower left hand of the screen but no menu. He said that the battery in the computer was dead and that the stored information was gone. He said that he could put a patch on it and fix it. My main concern was - what if this happened when we were ready to do the recount. He proceeded to take the computer apart and call his office to get information to input into our computer. Our computer is fourteen years old and as far as I know it has always worked in the past. I asked him if the older computer, that is in the same room, could be used for the recount. I don't remember exactly what he said but I did relay to him that the computer was old and a spare. At some point he asked if he could take the spare computer apart and I said "yes". He took both computers apart. I don't remember seeing any tools and he asked Sue Wallace, Clerk, for a screwdriver. She got it for him. At this point I was frustrated about the computer not performing and feared that it wouldn't work for the recount. I called Gerald Robitette, board chairman, to inform him regarding the computer problem and asked him if we could have Tri Ad come to our office to run the program and tabulator for the recount. Gerald talked on the phone with Michael and Michael assured Gerald that he could fix our computer. He worked on the computer until about 3:00PM and then asked me which precinct and the number of the precinct we were going to count. I told him, Good Hope 1 #17. He went back into the tabulation room. Shortly after that he stated that the computer was ready for the recount and told us not to turn the computer off so it would charge up.

Before Lisa ran the tests, Michael said to turn the computer off. Lisa said, "I thought you said we weren't to turn it off". He said turn it off and right back on and it should come up. It did come up and Lisa ran the tests. Michael gave us instructions on how to explain the rotation, what the tests mean, etc. No advice on how to handle the attorneys but to have our Prosecuting Attorney at the recount to answer any of their legal questions. He said not to turn the computer off until after the recount.

He advised Lisa and I on how to post a "cheat sheet" on the wall so that only the board members and staff would know about it and what the codes meant so the count would come out perfect and we wouldn't have to do a full hand recount of the county. He left about 5:00PM.

My faith in Tri Ad and the Xenia staff has been nothing but good. The realization that this company and staff would do anything to dishonor or disrupt the voting process is distressing to me and hard to believe. I'm being completely objective about the above statements and the reason I'm bringing this forward is to, hopefully, rule out any wrong doing.

Sherrie L. Eaton

EX. A

Grace Stahl
Notary Public

2-15-06

1 CATHERINE L. BUCHANAN,

2 A witness called on behalf of the complaintant having
3 been duly sworn by the reporter was examined and
4 testified on her oath as follows:

5

6 DIRECT EXAMINATION Cont.

7

8 MS. BUCHANAN: But then it was lunchtime.
9 So, we ate lunch and then came back and we
10 waited, and then that's when they told us that
11 Dibolt was coming to reprogram the computer,
12 which doesn't make any sense. I mean, if you're
13 going to recalibrate a machine, you calibrate it
14 before you do testing to make sure that it's
15 going to go okay.

16 MR. FITRAKIS: So they tested, did they
17 count anything after they tested it?

18 MS. BUCHANAN: They just counted the
19 results, supposedly, in another room--

20 MR. FITRAKIS: - (inaudible) -

21 MS. BUCHANAN: --but we didn't witness
22 that.

23 MR. FITRAKIS: And then as a result of
24 that, then afterwards you were told that Dibolt
25 was coming in to reprogram the machines?

Ex B-1

1 MS. BUCHANAN: Yes. Why? If they're
2 performing fine, if all the test results are
3 fine, why do they need to reprogram the machine?
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Ex B-2

1 THE STATE OF OHIO)

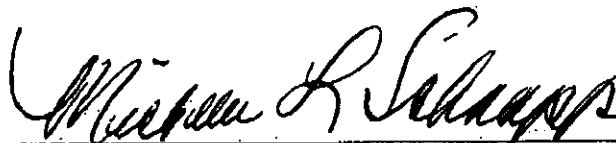
2 COUNTY OF LUCAS)

3

4 I, Michelle L. Schnapp, a stenotype reporter and
5 notary public in and for Lucas County, Ohio, hereby
6 certify that the matters set forth in the caption to the
7 foregoing hearing are true and correct; that the
8 witness, CATHERINE L. BUCHANAN appeared before me at the
9 time and place set forth; that said witness was first
10 duly sworn by me to tell the truth, the whole truth, and
11 nothing but the truth, and thereupon proceeded to
12 testify in said cause; that the questions of counsels
13 and the answers of said witness was taken down in
14 machine shorthand by me and thereafter reduced to
15 type-writing under my direction; and that the foregoing
16 pages comprise a true and correct transcript of the
17 testimony given and the proceedings had during the
18 taking of said hearing.

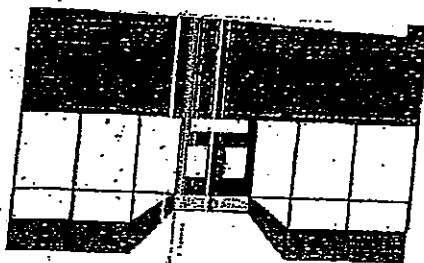
19 I further certify that I am not a relative or
20 employee or attorney or counsel of any of the parties
21 hereto, nor a relative or employee of such attorney or
22 counsel; nor do I have any interest in the outcome or
23 events of the action.

24 WITNESS MY HAND AND SEAL OF OFFICE, this the 15th
25 day of December, A.D., 2004.



Michelle L. Schnapp
Court Reporter and Notary Public
in and for Lucas County, Ohio
My Commission Expires 12/11/06

Ex B-3



SHELBY COUNTY BOARD OF ELECTIONS

129 East Court St., Sidney, Ohio 45355
Phone (937) 498-7207 FAX (937) 498-7326
Email: sbdelec@bright.net

BOARD MEMBERS:
Ralph W. Erickman, Chairman
Ellen D. Joslin

Ralph A. Bauer
Donald W. Lochar

OFFICE STAFF:
Kay B. Baker, Director
Dawn Billing, Deputy

CLERK:
Trina Riebrun

December 2, 2004

Harvey Wasserman
735 Euclaire Ave.
Columbus, OH 43209-2409

Dear Mr. Wasserman:

We have received your faxed Public Records Request, and will attempt to answer your questions as follows:

1. None exist -- no problems during that time period
2. No results slips (ballots are not counted at the precinct level)
3. Not Applicable (N/A)
4. N/A
5. Unofficial results available (copies made -- 17 pages)
6. Have individual precinct reports (copies made -- 76 pages)
7. Have none already generated, don't know if this can be done, or how to do it
8. Copies made -- 4 pages
9. N/A
10. Sheet typed up -- 1 page
11. Sheet typed up (see no. 10)
12. N/A

EX C-1

14. Have a March 1989 Operator's Guide from Business Records Corporation (now ES&S) on file for inspection (44 pages, two-sided—did not copy)
15. N/A
16. Tabulator test deck reports were discarded after election, to reduce paperwork and confusion with official results
17. This is not a record we would generate for our use in the office, nor do we know how
18. Same as no. 17
19. Copies made (5 pages)
20. N/A
21. Copies made (26 pages)
22. Already made available (see no. 5)
23. Already made available (see no. 21)

The 155 pages of copies listed above will amount to \$15.50 (\$0.10 per page) and will be available for pick-up as soon as copies are paid for. Additional charge to disassemble spiral-bound Election Tabulation System Operator's Guide and make copies, if requested. Our office is open from 9:00 a.m. until 4:00 p.m. Monday through Friday. We will be closed Monday, December 13, for a District Meeting, and also closed Friday, December 24 and 31.

Sincerely,

Kay E. Baker

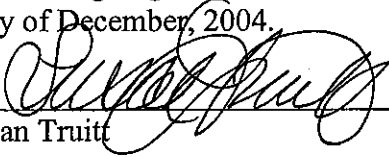
Kay E. Baker
Director

KEB

EX C-2

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion was served upon all the following by U.S. mail, postage prepaid, this 17th day of December, 2004.



Susan Truitt

Richard N. Coglianesse
Assistant Attorney General
Constitutional Section
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

George W. Bush
43 Prairie Chapel Ranch
Crawford, Texas 76638

Richard B. Cheney
242 West 14th Street
Casper, Wyoming 82601

Karl C. Rove
616 Crystal Creek Drive
Austin, Texas 78746

Bush-Cheney '04, Inc.
P.O. Box 684
Arlington, VA 22216