

I.
DISCOVERY CONTROL PLAN

1. The facts are undisputed but if disputes arise, Plaintiffs intend to conduct discovery under a Level 2 discovery control plan.

II.
JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court in this cause by TEX. CONST. art. V § 8, TEX. GOV'T. CODE § 24.011. *A&T Consultants, Inc. v. Sharp*, 904 S.W.2d 671-72 (Tex. 1995). Specifically jurisdiction is vested in this Court where recounts of elections are involved. TEX. ELEC. CODE § 211.006.

III.
FACTUAL BACKGROUND

3. This controversy arises out of a Request for Recount by the Texas Democratic Party nominee for the office of District 105 Texas House of Representatives. This House District is located entirely within Dallas County, Texas. The Recount, though not presently scheduled, will be conducted by Toni Pippins-Poole. TEX. ELEC. CODE §§ 67.002(a)(1); 211.002(7); 213.001(a); 213.002(a).
4. The Recount Committee has the statutory responsibility to count the votes in this recount under the direct management and supervision of the Recount Supervisor or the Recount Committee Chair, who is appointed by the Recount Supervisor, and who have the responsibility to make all final decisions as to how votes are to be counted. *Id.* §§ 213.002(c); .006(a).

5. The election for District 105 of the Texas House of Representatives included a significant number of straight-party votes. A straight-party vote is one in which the voter marks a single box for a particular political party and then, with certain exceptions, that vote counts as a vote for each of that party's candidates for office on the ballot. *Id.* § 65.007.
6. Section 65.007, in its entirety, provides as follows:

“§65.007. Tallying Straight-Party Votes

 - (a) In an election in which a single square is provided on the ballot for casting a straight-party vote, the tally lists shall contain spaces for tallying those votes.
 - (b) Except as provided by Subsection (c) or (d), each straight-party vote shall be tallied for the party receiving the vote instead of being tallied for the individual candidates of the party. The total number of straight-party votes tallied for each party shall be added to the total votes received for each of the party nominees individually.
 - (c) If a ballot indicates a straight-party vote and a vote for an opponent of one or more of that party's nominees, a vote shall be counted for the opponent and for each of the party's other nominees whether or not any of those nominees have received individual votes.
 - (d) If a ballot indicates straight-party votes for more than one party, those votes may not be tallied and a vote shall be counted for each candidate receiving an individual vote if no other individual notes are received in that race. If no candidate receives an individual vote, the portion of the ballot for offices may not be counted.”
7. For various reasons, voters often cast a straight-party vote and then also cast a vote for some or all of that same party's candidates. Some voters simply do not trust that the straight-party vote will actually allocate a vote for each individual nominee of the party. In some instances, the voter has some particular reason to want to make sure that their vote counts for a particular

candidate. In other words, the voter, either because of mistrust of the straight-party vote or because of a person's connection to a candidate of that party, wishes to "make sure" or "emphasize" their vote for that candidate.

8. The voter does this by marking their ballot for a straight-party vote. In addition, the voter then marks their ballot for the individual candidates. Historically, under the provisions of § 65.007 and its predecessors, these "make sure" or "emphasis" votes have been ignored and the straight-party vote has simply been counted as a vote for each of the particular party's candidates. This has been true throughout all of the years of the use of paper ballots, mechanical voting machines, punch card ballots and scanner ballots.
9. Recently, however, counties have been purchasing, with the Secretary of State's approval, electronic voting devices commonly referred to as "DRE's." In this election, Dallas County used DRE's for early voting only. Mail-in voting was done by the use of paper ballots and voting on Election Day was done with paper/electronic scan ballots. Voting for the disabled on Election Day was permitted on DRE's.
10. When counting the mail-in paper ballots and electronic scan paper ballots, § 65.007 was followed and "make sure" or "emphasis" votes were ignored and a vote counted for each candidate selected in the straight-party vote.

11. The DRE's, however, which are mini-computers, are programmed in a manner that each "make sure" or "emphasis" vote for a candidate of the same party cancels the straight-party vote for that particular candidate. Initially, it is not possible for a DRE voter to cast a straight-party vote for more than one political party, so that statutory exception in § 65.007 is never implicated in a DRE ballot. The computers, however, are programmed such that a straight-party vote marks not only that box, but each box for each of that party's candidates. Thus, when a voter wants to cast a "make sure" or "emphasis" vote for a particular candidate of that same party, it has the effect of unmarking the box for that particular candidate. Moreover, when counting these electronic ballots, the DRE system is programmed to count the individual votes for each candidate, rather than simply counting the straight-party vote and then counting a vote for each of that particular party's nominees as provided by § 65.007.
12. The Recount Committee, however, will be manually counting all DRE votes, and thus has the opportunity of counting DRE straight-party votes in the manner provided by § 65.007.
13. Plaintiff has learned, however, that officials in the Elections Division of the Office of Secretary of State have issued directions to the Recount Supervisor and the Recount Committee that DRE straight-party votes must be manually counted in the same incorrect manner as the computer system tabulated them.

14. This Secretary of State directive leaves the Defendants no discretion but to count straight-party votes in the manner directed by the officials of the Office of the Secretary of State, regardless of the mandate of § 65.007.

**IV.
CAUSE OF ACTION FOR MANDAMUS**

15. Pursuant to the Texas Election Code, “[e]ach authority responsible for performing a function in a recount shall perform the function diligently.” TEX. ELEC. CODE § 211.006(a). This provision “is enforceable by writ of mandamus.” *Id.* § 211.006(b).
16. Additionally, at common law, mandamus is available upon showing a legal duty to perform a nondiscretionary act; a demand for performance and a refusal.” *Stoner v. Massey*, 586 S.W.2d 843, 846 (Tex. 1979). However, no demand is necessary by Plaintiff, because in light of the Secretary of State’s directive such a demand would be “pointless.” *Id.*
17. A duty is nondiscretionary, or ministerial, when the authority charged with taking action has no power to choose between different alternatives within legal bounds.
18. Under § 65.007 of the Texas Election Code a straight-party vote for a particular political party counts as a vote for each of that party’s candidates unless 1) there is a vote for a candidate of a different political party, or 2) there is a straight-party vote for more than one political party. This provision is mandatory and leaves no discretion to election officials as to how a straight-party vote must be counted.

19. The Secretary of State's directive contravenes § 65.007 in that it commands the Recount Supervisor and Recount Committee Chair to not count votes for Plaintiff's District 105 candidate when there has been a straight-party vote for the Democratic party and no vote for any opponent of Plaintiff's District 105 candidate.
20. The terrible irony is that under the Secretary of State's directive, DRE voters are disenfranchised with respect to those particular candidates that the voters most want to vote for, while those who vote using every other type of voting method have their votes counted as required by § 65.007.
21. Because § 65.007 is nondiscretionary and makes no exception for the type of voting device used, Plaintiff is entitled to a mandamus directing the Recount Supervisor and the Recount Committee Chair to count DRE straight-party votes the District 105 candidate of that particular political party unless the voter voted for an opponent of that political party's District 105 candidate.

**V.
PRAYER FOR RELIEF**

Plaintiffs request that a Writ of Mandamus be issued to Defendants requiring that in the Recount for the office of Texas Representative, District 105, straight-party votes cast on DRE's be counted as votes for the District 105 candidate of that particular political party unless the voter voted for an opponent of that political party's District 105 candidate. Plaintiff further requests any other relief to which it may show itself justly entitled.

Respectfully submitted,



RANDALL BUCK WOOD

State Bar No. 21905000

RAY, WOOD, & BONILLA
2700 Bee Caves Road
Austin, Texas 78746
Telephone: (512) 328-8877
Facsimile: (512) 328-1156

CLAY LEWIS JENKINS

State Bar No. 10617450

516 West Main Street
Waxahachie, Texas 75165
Ph: 972/938-2529
Fax: 972/938-7676

ATTORNEYS FOR ROMANO

CHAD W. DUNN

State Bar No. 24036507
General Counsel
Texas Democratic Party
K. Scott Brazil
BRAZIL & DUNN

4201 FM 1960 West, Suite 530
Houston, Texas 77068
Telephone: (281) 580-6310
Facsimile: (281) 580-6362

**ATTORNEYS FOR THE TEXAS DEMOCRATIC
PARTY and BOYD RICHIE, CHAIRMAN**

G. Kevin Buchanan

State Bar No. 00787161
Melissa J. Bellan
State Bar No. 24040506

G. KEVIN BUCHANAN, P.C.
200 Premier Place
5910 N. Central Expressway
Dallas, Texas 75206
Telephone: (214) 378-9500
Facsimile: (214) 378-9600

**Attorneys for Plaintiffs THE DALLAS
COUNTY DEMOCRATIC PARTY and
DARLENE EWING, CHAIRWOMAN**