

IN THE COURT OF COMMON PLEAS, LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

SEAN GILL, ET. AL.	:	
	:	
Plaintiffs,	:	
	:	NO. 2022-C-1849
v.	:	
	:	
LEHIGH COUNTY BOARD OF	:	
ELECTIONS, ET. AL.	:	
	:	
Defendants.	:	
_____	:	

MOTION/APPLICATION FOR STAY AND INJUNCTION PENDING APPEAL

Under Pa. R. A. P. 1732(a), plaintiffs file this application to stay the Order of this Court dated October 18, 2022, and for an order granting a preliminary injunction pending appeal and aver as follows:

1. On September 9, 2022, the Court entered a stipulation of the parties whereby defendants agreed not to receive ballots at drop box locations until further order of the Court. A copy of that stipulation is attached at Exhibit 1.
2. On October 18, 2022, this Court entered an order denying plaintiffs' motion for a preliminary injunction. A copy of that order is attached at Exhibit 2.
3. The October 18, 2022 order was not received by the parties until October 19, 2022.
4. On October 19, 2022, plaintiffs filed a notice of appeal to the Commonwealth Court of Pennsylvania. A copy of the Notice of Appeal is attached at Exhibit 3.

5. Under Pa. R. A. P. 1732(a), a party may apply for a stay of an order of the trial court pending appeal and an order granting an injunction pending appeal.

6. That application must first ordinarily be made to the trial court. Pa. R. Civ. P. 1732(a).

7. Plaintiffs request that this Court modify the its October 18, 2022 Order to state that the defendants may not receive ballots at drop boxes until further order of the Commonwealth Court.

8. Indeed, notwithstanding defendants' statement they were suspending their intended implementation of the drop boxes pending resolution of this litigation, Hayden Mitman, *Lehigh County stops using election dropboxes pending court decision*, October 18, 2022, <https://www.wifw.org/2022/10/18/lehigh-county-stops-using-election-dropboxes/>, plaintiffs understand that defendants plan to immediately begin using drop boxes to receive ballots.

9. Plaintiffs also request, conjunctively or in the alternative, that the Court grant an injunction pending appeal prohibiting defendants, or anyone acting with them or through them, from receiving ballots at drop boxes until further order of the appellate court.

10. The Court should modify its October 18, 2022 order and/or grant plaintiffs an injunction pending an appeal to prevent irreparable harm to the plaintiffs.

11. Plaintiffs will be irreparably harmed if unmonitored drop boxes are used by the defendants because there is a substantial likelihood that their state and federal constitutional rights will be harmed.

12. Plaintiffs will suffer irreparable harm in that the void or invalid ballots will dilute their validly cast ballots— and the validly cast ballots of other voters— thereby impinging on their fundamental right to vote.

13. There is no dispute that mailed or absentee ballots returned by someone other than the voter are void, invalid, and should not be counted. *In re Canvass of Absentee Ballots of November 4, 2003 Gen. Election*, 577 Pa. 231, 843 A.2d 1223 (2004) (“[the] “in person” delivery requirement is mandatory, and that the absentee ballots of non-disabled persons who had their ballots delivered in contravention of this mandatory provision are void.”); *Donald J. Trump for President, Inc. v. Boockvar*, 2020 WL 5407748, at *9 (W.D. Pa. Sept. 8, 2020) (“everyone now agrees that the election code forbids third-party ballot delivery.”); *Pierce v. Allegheny Cty. Bd. of Elections*, 324 F.Supp.2d 684, 691 (W.D. Pa. 2003) (entering preliminary injunction voiding and barring the counting of 937 absentee ballots delivered by third parties.)

14. Under the United States Constitution, **“the right to vote can neither be denied outright** □ **nor destroyed by alteration of ballots,** □ **nor diluted by ballot-box stuffing.”** *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (citations omitted) (emphasis added).

15. Indeed, “[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when

such impairment resulted from dilution by a false tally, [] or by a refusal to count votes from arbitrarily selected precincts, [], or by a stuffing of the ballot box.” *Baker v. Carr*, 369 U.S. 186, 208 (1962) (citations omitted)

16. “The right of all qualified citizens to vote in state elections is constitutionally protected, through the Fourteenth Amendment, against intentional conduct by state officials which seriously undermines the fundamental fairness of the electoral process.” *Marks v. Stinson*, 1994 WL 146113, at *33 (E.D. Pa. Apr. 26, 1994)

17. Under the Pennsylvania Constitution, voters have a right to free, fair, and equal elections. Art. I, § 5.

18. The Board of Elections’ use of drop boxes that are not monitored in person substantially threatens plaintiffs’ federal constitutional rights because of the risk that void and invalid ballots would be placed in those drop boxes.

19. A stay pending appeal and/or an injunction pending appeal is necessary to stave off post-election chaos. *Pennsylvania Democratic Party v. Boockvar*, 238 A.2d 345 (Pa. 2020) (“[w]e additionally conclude that voters’ rights are better protected by addressing the impending crisis at this point in the election cycle on a statewide basis rather than allowing the chaos to brew, creating voter confusion regarding whether extensions will be granted, for how long, and in what counties.”)

20. If unauthorized third parties deliver ballots to the unmonitored drop boxes, post-election chaos will occur.

21. The results of county *and statewide* elections would be cast into doubt, including our race for United States Senate and Governor of the Commonwealth.

22. Litigation would ensue. County and statewide election results would be delayed until that litigation was resolved.

23. The acrimony of 2020 would return.

24. Accordingly, plaintiffs are entitled to stay pending appeal and/or an injunction pending appeal:

- a. an injunction is necessary to prevent irreparable harm that cannot be adequately compensated by damages because Defendants' actions constitute a violation of the Election Code and the United States and Pennsylvania constitutions;
- b. greater injury will result from refusing Plaintiffs' injunctive relief than from granting it;
- c. an injunction will properly restore the parties to the status as it existed immediately prior to the Court's October 18, 2022 Order;
- d. Plaintiffs are likely to prevail on the merits of their case;
- e. an injunction is reasonably suited to abate the offending activity; and
- f. the issuance of a preliminary injunction will not adversely affect the public interest, but rather will support and perpetuate the public interest in ensuring free, fair, and equal elections.

WHEREFORE, plaintiffs respectfully request that this Court grant their motion/application for stay and injunction pending appeal.

Respectfully submitted,

Dated: October 19, 2022

/s/Walter S. Zimolong

Walter S. Zimolong, III, Esquire
James J. Fitzpatrick, III, Esquire
ZIMOLONG LLC

wally@zimolonglaw.com

james@zimolonglaw.com

P. O. Box 552

Villanova, PA 19085

(215) 665-0842

/s/ Nicholas R. Barry

(admitted *pro hac vice*)

America First Legal Foundation

Tennessee Bar No. 031963

nicholas.barry@aflegal.org

611 Pennsylvania Ave SE #231

Washington, DC 20003

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CERTIFICATION OF SERVICE

Under Local Rule 208.3(b)(3), I certify that on the date indicated below I caused to be served on defendants and intervenor via email and the Court's e-filing system a copy of plaintiffs' application for stay and injunction pending appeal.

Respectfully submitted,

Dated: October 19, 2022

/s/Walter S. Zimolong
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James J. Fitzpatrick, III, Esquire
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**IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION – LAW**

SEAN GILL, ET. AL.,	:	
	:	
Plaintiffs	:	No. 2022-C-1849
	:	
v.	:	
	:	Assigned Judge:
LEHIGH COUNTY BOARD OF	:	Hon. Thomas A. Capehart
ELECTIONS, ET. AL	:	
	:	
Defendants	:	

STIPULATION

AND NOW, COME the parties to the action, and undersigned counsel, for the purposes of the above-entitled action only, do hereby stipulate and agree as follows:

1. Defendants shall not receive ballots at drop box locations until the October 7, 2022 hearing on the Motion for a Preliminary Injunction and further Order of the Court.
2. Defendants may receive mailed and absentee ballots in person at the Lehigh County Board of Elections, Lehigh County Government Center, 17 South Seventh Street, Allentown, PA 18101 between the hours of 8:00 a.m. and 4:00 p.m. prior to the October 7, 2022 hearing on the Motion for a Preliminary Injunction and further order of the Court.
3. Defendants, and anyone acting through, with, or on behalf of them, shall not accept, count, or canvass any mailed or absentee ballot that Defendants, or anyone acting through, with, or on behalf of them, reasonably know was delivered by a person other than the voter himself or herself, unless such ballot was delivered by an authorized designated agent of a disabled voter.


J.



RESPECTFULLY SUBMITTED,

ON BEHALF OF DEFENDANTS:

/s/ Sarah M. Murray, Esq.

SARAH M. MURRAY, ESQ.
PA Attorney ID No. 203206
Deputy County Solicitor
Lehigh County Government Center
Department of Law – Room 440
17 South 7th Street
Allentown, PA 18101
Phone: 610-782-3180
Email: sarahmurray@lehighcounty.org
Attorney for Defendants, Lehigh County
Board of Elections, Phillips Armstrong,
Jennifer Allen, Dennis Nemes, Timothy A.
Benyo, and Diane Gordian

ON BEHALF OF PLAINTIFFS:

/s/ Walter S. Zimolong III, Esq.

WALTER S. ZIMOLONG III, ESQ.
Zimolong, LLC
P.O. Box 552
Villanova, PA 19085-0552
Phone: 215-665-0842
Email: wally@zimolonglaw.com
Attorney for Plaintiffs, Sean Gill, Robert
Smith, Tim Ramos, and Jackie Rivera

Dated: September 9, 2022

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IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

Sean Gill, Robert Smith, Tim Ramos, Jackie Rivera :
- VS - : File No. 2022-C-1849
Lehigh County Board of Elections, Phillips :
Armstrong, Jennifer Allen, Dennis Nemes, : Assigned Judge: Thomas A. Capehart
Timothy A Benyo, Diane Gordian :
-VS- :
Pennsylvania Alliance for Retired Americans :

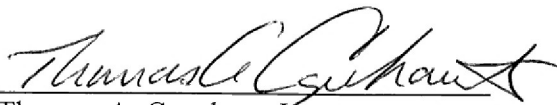
ORDER

AND NOW this 18th day of October, 2022, upon consideration of the Petitioners' Motion for Mandatory Preliminary Injunction filed September 1, 2022, the Petition for Emergency Special Injunction filed on September 6, 2022, the Answers in opposition thereto, and following the hearing thereon held October 7, 2022, before the undersigned, and for the reasons expressed in the accompanying Opinion,

IT IS HEREBY ORDERED that Petitioners' Motion for Preliminary Injunction is DENIED.

IT IS FURTHER ORDERED that based upon the Stipulation filed on September 9, 2022, the Petition for Emergency Special Injunction is DENIED as MOOT.

BY THE COURT:


Thomas A. Capehart, J.



IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL COURT DIVISION

File No.: 2022-C-1849

Miscellaneous Mandamus

Sean Gill, Robert Smith, Tim Ramos, Jackie Rivera

- VS -

Lehigh County Board of Elections, Phillips Armstrong, Jennifer Allen,
Dennis Nemes, Timothy A Benyo, Diane Gordian

Copies of this Order were e-mailed/mailed to all counsel of record and pro se litigants on
10/19/2022.

236 NOTICE

Pursuant to Pa.R.C.P. § 236, notice is hereby given that an order, decree, or judgment in
the above captioned matter has been entered.

Andrea E. Naugle
Clerk of Judicial Records

**NOTICE: All parties and counsel must maintain correct and current contact information,
INCLUDING E-MAIL ADDRESSES, with the Clerk of Judicial Records Civil Division as
well as through E-File & Serve.**

Noah Baron, Esq

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Timothy Ford, Esq

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~~Dilworth Paxson LLP
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1500 Market St
Philadelphia PA 19102~~

IN THE COURT OF COMMON PLEAS, LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

SEAN GILL, ET. AL.

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Plaintiffs,

NO. 2022-C-1849

v.

LEHIGH COUNTY BOARD OF
ELECTIONS, ET. AL.

Defendants.

NOTICE OF APPEAL

TO THE PROTHONOTARY:

Notice is hereby given that plaintiffs, Sean Gill, Robert Smith, Tim Ramos, and Jackie Rivera hereby appeal to the Commonwealth Court of Pennsylvania from the Order entered in this matter on October 18, 2022, which is attached hereto as Exhibit A.

The Order has been entered on the docket as evidenced by the attached docket entry attached at Exhibit B.

Respectfully submitted,

/s/Walter S. Zimolong
Walter S. Zimolong, III, Esquire
James J. Fitzpatrick, III, Esquire
ZIMOLONG LLC
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(215) 665-0842

Dated: October 19, 2022



/s/ Nicholas R. Barry
(admitted *pro hac vice*)
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IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

Sean Gill, Robert Smith, Tim Ramos, Jackie Rivera	:
- VS -	:
Lehigh County Board of Elections, Phillips Armstrong, Jennifer Allen, Dennis Nemes, Timothy A Benyo, Diane Gordian	:
-VS-	:
Pennsylvania Alliance for Retired Americans	:

File No. 2022-C-1849
Assigned Judge: Thomas A. Capehart

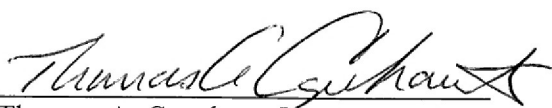
ORDER

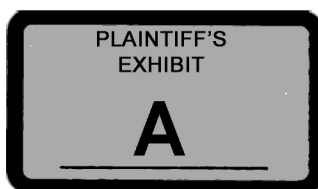
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IT IS FURTHER ORDERED that based upon the Stipulation filed on September 9, 2022, the Petition for Emergency Special Injunction is DENIED as MOOT.

BY THE COURT:


Thomas A. Capehart, J.



IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL COURT DIVISION

File No.: 2022-C-1849

Miscellaneous Mandamus

Sean Gill, Robert Smith, Tim Ramos, Jackie Rivera

- VS -

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Dennis Nemes, Timothy A Benyo, Diane Gordian

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Clerk of Judicial Records

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Sarah M Murray, Esq	✓ sarahmurray@lehighcounty.org	County of Lehigh Department of Law Room 440 17 S 7th St Allentown PA 18101
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REGISTER OF ACTIONS
CASE No. 2022-C-1849

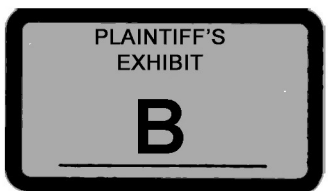
Sean Gill, Robert Smith, Tim Ramos, Jackie Rivera - VS - Lehigh County Board of Elections, Phillips Armstrong, Jennifer Allen, Dennis Nemes, Timothy A Benyo, Diane Gordian

Case Type: **Miscellaneous Mandamus**
 Date Filed: **09/01/2022**
 Location: **Civil Records**

PARTY INFORMATION

Defendant	Allen, Jennifer	Attorneys Joshua Mazin, Esq <i>Retained</i> Sarah M Murray, Esq <i>Retained</i> 610-782-3180(W)
Defendant	Armstrong, Phillips	Joshua Mazin, Esq <i>Retained</i> Sarah M Murray, Esq <i>Retained</i> 610-782-3180(W)
Defendant	Benyo, Timothy A	Joshua Mazin, Esq <i>Retained</i> 610-365-2670(W) Sarah M Murray, Esq <i>Retained</i> 610-782-3180(W)
Defendant	Gordian, Diane	Joshua Mazin, Esq <i>Retained</i> Sarah M Murray, Esq <i>Retained</i> 610-782-3180(W)
Defendant	Lehigh County Board of Elections	Joshua Mazin, Esq <i>Retained</i> Sarah M Murray, Esq <i>Retained</i> 610-782-3180(W)
Defendant	Nemes, Dennis	Joshua Mazin, Esq <i>Retained</i> Sarah M Murray, Esq <i>Retained</i> 610-782-3180(W)
Interested Party	Pennsylvania Alliance for Retired Americans	Timothy Ford, Esq <i>Retained</i> 215-575-7017(W) Adam Bonin, Esq <i>Retained</i> 267-242-5014(W)

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Uzoma N Nkwonta, Esq
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Nicholas R Barry, Esq
Retained

Plaintiff Ramos, Tim

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Nicholas R Barry, Esq
Retained

Plaintiff Rivera, Jackie

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Nicholas R Barry, Esq
Retained

Plaintiff Smith, Robert

Walter S Zimolong, III Esq
Retained
609-932-8836(W)

Nicholas R Barry, Esq
Retained

EVENTS & ORDERS OF THE COURT

HEARINGS

09/12/2022 **CANCELED** Hearing (9:30 AM) (Judicial Officer Capehart, Thomas A.)
Judge's Order

10/07/2022 Hearing (9:30 AM) (Judicial Officer Capehart, Thomas A.)
Pet for Prelim Injunction AND Pet to Intervene
Result: Hearing Held

OTHER EVENTS

09/01/2022 **New Action Complaint**
See orig.

09/01/2022 **Miscellaneous Mandamus**

09/01/2022 **Motion**
Filed by Pltfs. Memorandum attached

09/06/2022 **Rule & Scheduling Order**
Copies & 236 notice mld/dktd 9/6/2022

09/06/2022 **Praeipce to Attach/Substitute**

09/06/2022 **Praeipce to Attach/Substitute**

- 09/06/2022 **Petition**
Emergency. Filed by pltfs. Memorandum & Exhibit(s) attached.
- 09/07/2022 **Acceptance of Service**
- 09/07/2022 **Praecipe for Appearance**
by J S Mazin Esq for Dfts
- 09/08/2022 **Scheduling Order:**
Copies & 236 notice mld/dktd 09/08/22
- 09/09/2022 **Order**
the parties agree & stipulation as stated within/TAC. Copies & 236 notice mld/dktd 9/12/22.
- 09/09/2022 **Petition**
Filed by Pennsylvania Alliance for Retired Americans.
- 09/09/2022 **Answer - Reply - Response**
Filed by Pennsylvania Alliance for Retired Americans.
- 09/11/2022 **Answer - Reply - Response to Motion**
Filed by Proposed Intervenor-Dft Pennsylvania Alliance for Retired Americans.
- 09/12/2022 **Praecipe for Appearance**
by S M Murray, Esq. for Dfts.
- 09/12/2022 **Motion**
Filed by Proposed Intervenor Pennsylvania Alliance for Retired Americans. Exhibit(s) attached.
- 09/12/2022 **Order**
Hearing scheduled on 09/12/22 is cancelled. Hearing scheduled on 10/07/22 at 9:30 a.m. remains scheduled. Copies & 236 notice mld/dktd 09/12/22.
- 09/12/2022 **Rule & Scheduling Order**
Copies & 236 notice mld/dktd 09/12/22.
- 09/16/2022 **Motion**
for Admission Pro Hac Vice. Filed by A C Bonin, Esq. Exhibit(s), attached.
- 09/16/2022 **Exhibits (Proposed)**
- 09/16/2022 **Motion**
for Admission Pro Hac Vice. Filed by A C Bonin, Esq. Exhibit(s), attached.
- 09/16/2022 **Exhibits (Proposed)**
- 09/16/2022 **Motion**
for Admission Pro Hac Vice. Filed by A C Bonin, Esq. Exhibit(s), attached.
- 09/16/2022 **Exhibits (Proposed)**
- 09/23/2022 **Motion**
for Admission Pro Hac Vice. Filed by W S Zimolong Esq. Exhibit(s) attached.
- 09/27/2022 **Answer - Reply - Response**
Filed by Dfts
- 09/27/2022 **Answer - Reply - Response**
to Petition. Filed by Dfts
- 09/27/2022 **Memorandum**
Filed by Dfts
- 09/27/2022 **Answer - Reply - Response**
Filed by Interested Party Pennsylvania Alliance for Retired Americans
- 09/27/2022 **Memorandum**
Filed by Interested Party Pennsylvania Alliance for Retired Americans
- 09/29/2022 **Correspondence**
- 10/03/2022 **Order**
Petition to Intervene is Granted/TAC. Copies & 236 notice mld/dktd 10/3/2022.
- 10/03/2022 **Answer - Reply - Response**
Filed by Pltfs
- 10/03/2022 **Order**
The Order entered 10/03/22 at 1:16pm granting intervention is Vacated as improvidently granted. See orig./TAC. Copies & 236 notice mld/dktd 10/04/22.
- 10/03/2022 **Correspondence**
- 10/04/2022 **Answer - Reply - Response to Motion**
Filed by Pltfs.
- 10/04/2022 **Certificate**
of Service
- 10/04/2022 **Undeliverable Mail**
for T. Ford, Esq. Resent 10/05/22
- 10/11/2022 **Praecipe for Appearance**
by C Ghormoz, Esq. for Interested Party Pennsylvania Alliance for Retired Americans.
- 10/12/2022 **Findings of Fact and Conclusions of Law**
Filed by Dft
- 10/12/2022 **Memorandum**
(Supplemental). Filed by Dfts
- 10/12/2022 **Memorandum**
Filed by pltfs
- 10/12/2022 **Findings of Fact and Conclusions of Law**
Proposed Filed by pltf.
- 10/12/2022 **Brief**
Filed by Interested Party PA Alliance for Retired Americans
- 10/12/2022 **Findings of Fact and Conclusions of Law**
(Proposed) Filed by Interested Party PA Alliance for Retired Americans
- 10/18/2022 **Order**
Motion is Denied./TAC Copies & 236 notice mld/dktd 10/19/2022
- 10/18/2022 **Opinion**
/s/ TAC. Copies and 236 Notice mld/dktd 10/19/2022

FINANCIAL INFORMATION

Defendant Lehigh County Board of Elections
 Total Financial Assessment
 Total Payments and Credits
Balance Due as of 10/19/2022

28.50
 28.50
 0.00

09/12/2022	Transaction Assessment			28.50
09/12/2022	E-File Electronic Payment	Receipt # E-2022-12053	Lehigh County Board of Elections	(28.50)

Interested Party Pennsylvania Alliance for Retired Americans
 Total Financial Assessment
 Total Payments and Credits
Balance Due as of 10/19/2022

85.50
 85.50
 0.00

09/16/2022	Transaction Assessment			28.50
09/16/2022	E-File Electronic Payment	Receipt # E-2022-12367	Pennsylvania Alliance for Retired Americans	(28.50)
09/16/2022	Transaction Assessment			28.50
09/16/2022	E-File Electronic Payment	Receipt # E-2022-12372	Pennsylvania Alliance for Retired Americans	(28.50)
09/16/2022	Transaction Assessment			28.50
09/16/2022	E-File Electronic Payment	Receipt # E-2022-12374	Pennsylvania Alliance for Retired Americans	(28.50)

Plaintiff Gill, Sean
 Total Financial Assessment
 Total Payments and Credits
Balance Due as of 10/19/2022

291.50
 291.50
 0.00

09/01/2022	Transaction Assessment			177.50
09/01/2022	E-File Electronic Payment	Receipt # E-2022-11536	Gill, Sean	(177.50)
09/01/2022	Transaction Assessment			28.50
09/01/2022	E-File Electronic Payment	Receipt # E-2022-11597	Gill, Sean	(28.50)
09/07/2022	Transaction Assessment			28.50
09/07/2022	E-File Electronic Payment	Receipt # E-2022-11838	Gill, Sean	(28.50)
09/12/2022	Transaction Assessment			28.50
09/12/2022	E-File Electronic Payment	Receipt # E-2022-12043	Gill, Sean	(28.50)
09/23/2022	Transaction Assessment			28.50
09/23/2022	E-File Electronic Payment	Receipt # E-2022-12782	Gill, Sean	(28.50)

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