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## I. INTRODUCTION

On August 18, 2021, the County of Fulton, Fulton County Board of Elections, and Fulton County Commissioners Stuart L. Ulsh and Randy H. Bunch,<sup>1</sup> (collectively, Fulton County or County) filed a Petition for Review<sup>2</sup> in the Commonwealth Court’s original jurisdiction against the Secretary of the Commonwealth (Secretary), challenging the Secretary’s decertification of Voting Equipment<sup>3</sup> the County leased from Dominion Voting Systems, Inc. (Dominion).<sup>4</sup> The Secretary decertified the Dominion Voting Equipment in Fulton County’s possession after the County permitted a third-party consultant known as Wake TSI, Inc. (Wake TSI) to inspect the Voting Equipment following its use in the 2020 General Election.

Fulton County’s five-count Petition for Review raises various questions involving, *inter alia*, the division of authority between the Secretary and county boards of elections as it relates to the certification and inspection of voting equipment under the Pennsylvania Election Code.<sup>5</sup>

While the Petition for Review remains pending before the Commonwealth Court, a discovery dispute has taken center stage. In December 2021, and January 2022, respectively, the Secretary filed two applications in the Commonwealth Court seeking to prohibit a third-party inspection of Fulton County’s Dominion Voting

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<sup>1</sup> Commissioners Ulsh and Bunch brought the instant action in their official capacities as Fulton County Commissioners and in their individual capacities as residents, taxpayers, and electors.

<sup>2</sup> On September 17, 2021, Fulton County filed an Amended Petition for Review. For purposes of this Report, all references to Fulton County’s “Petition for Review” refers to amended version.

<sup>3</sup> For purposes of this Report and Recommendation, the term “Voting Equipment” refers to all equipment leased from Dominion Voting Systems, Inc. (Dominion) to Fulton County in the April 1, 2019 Lease Agreement, admitted as Secretary’s Exhibit 12.1.

<sup>4</sup> As discussed in Part II *infra*, Dominion is an intervenor in this matter. For purposes of the instant contempt proceedings, Dominion adopts the Secretary’s position.

<sup>5</sup> Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 2601-3591.

Equipment, asserting such inspection would irreparably spoliage key evidence in the underlying litigation. By order dated January 14, 2022, the Commonwealth Court denied the Secretary's emergency applications, and the Secretary filed an immediate appeal. Ancillary to that appeal – and as an extra precaution to preserve the merits of the spoliation question pending before the Supreme Court – the Secretary sought an emergency stay of the Commonwealth Court's Order, which was granted by a single-Justice order on January 14, 2022 (Single-Justice Order), and thereafter confirmed by the full Supreme Court on January 27, 2022 (Injunction Order).

On October 18, 2022, the Secretary filed an application in the Supreme Court requesting an order holding Fulton County in contempt and imposing sanctions, alleging it violated the Supreme Court's Injunction Order by allowing a different third party known as Speckin Forensics, LLC (Speckin) to inspect the Dominion Voting Equipment at issue in this litigation on July 13 and 14, 2022.

On October 21, 2022, the Supreme Court appointed the undersigned to serve as Special Master (Special Master or Master) to: (1) ascertain whether the Secretary's requested finding of contempt is civil or criminal in nature; (2) afford the parties such process as is due in connection with that determination; (3) develop an evidentiary record; and (4) prepare a report containing proposed findings of facts and recommendations concerning the Secretary's requested relief. (Supreme Ct. Order, 10/21/2022 (Appointment Order)). In conformity with the dictates of the Appointment Order, the undersigned Master hereby submits the following report and recommendations.

## **II. BACKGROUND & PROCEDURAL HISTORY**

For a thorough understanding of the events leading up to the instant contempt proceedings, the background and procedural history of this litigation follows.

### *Factual Background*

Unless otherwise indicated, the following factual background is as alleged in Fulton County's Petition for Review. On January 17, 2019, the Secretary approved and certified Dominion's Democracy Suite 5.5A voting systems for use in Pennsylvania's elections. (Petition for Review ¶ 18.) In April of 2019, Fulton County leased Voting Equipment from Dominion, which was subsequently used by the County in the November 3, 2020 General Election. (*Id.* ¶¶ 19-20.)

Following the 2020 General Election, Wake TSI performed an investigation and assessment of Fulton County's election systems and the processes utilized in the 2020 General Election. (*Id.* ¶ 28.) According to Wake TSI's report, its assessment "consisted of a review of operating and application system file dates, operating system and application log files, ballot images, and related files." (*Id.* ¶ 30, Ex. E.) Following its assessment, Wake TSI issued a report dated February 19, 2021, concluding that Fulton County conducted the 2020 General Election "in a diligent and effective manner and followed the directions of the Commonwealth." (*Id.* ¶ 32.)

On July 8, 2021, several months after Wake TSI's investigation and report, the Secretary issued "Directive 1 of 2021" (Directive 1), which prohibited county boards of elections from providing physical, electronic, or internal access to third parties for purposes of conducting an examination of state-certified electronic voting systems. (*Id.* ¶ 33, Ex. F.) Directive 1 called for the decertification of any voting equipment that was previously accessed by a third party and revoked funding for counties whose voting equipment was now decertified pursuant to the directive. (*Id.*)

On July 20, 2021, the Secretary issued a letter to Fulton County's solicitor stating:

As a result of the access granted to Wake TSI, Fulton County's certified system has been compromised and neither Fulton County; the vendor, Dominion []; nor the Department of State can verify that the impacted components of Fulton County's leased voting system are safe to use in future elections. Due to these actions and after careful consideration . . . I have no other choice but to decertify the use of Fulton County's leased [Dominion voting system] last used in the November 2020 election.

(*Id.* ¶ 37, Ex. H.)

*Fulton County's Petition for Review*

In response to the Secretary's decertification letter, Fulton County filed the Petition for Review in the Commonwealth Court's original jurisdiction seeking declaratory and injunctive relief against the Secretary. In Count I, Fulton County argues the Secretary failed to examine its Voting Equipment prior to decertification in violation of Section 1105-A(c) of the Election Code, 25 P.S. § 3031.5(c).<sup>6</sup> (*Id.* ¶¶ 42-49.) In Count II, Fulton County argues that at the time of Wake TSI's investigation, it was permitted to use the assistance of a third-party vendor to analyze the security of the Voting Equipment pursuant to Section 302(g) of the Election Code, 25 P.S. § 2642, and the Secretary's then-current directives. (*Id.* ¶¶ 50-68.) In Count III, Fulton County submits that Directive 1 usurps the power of the boards of elections granted under Section 302(g) of the Election Code. (*Id.* ¶¶ 69-73.) In Count IV, Fulton County asserts the Secretary is without authority to withhold funding from Fulton County to purchase new voting equipment. (*Id.* ¶¶ 74-79.) Last, in Count V, Fulton County seeks an order enjoining the Secretary from

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<sup>6</sup> Added by the Act of July 11, 1980, P.L. 600.

decertifying its Voting Equipment and withholding funding for the purchase of new voting equipment.<sup>7</sup> (*Id.* ¶¶ 80-88.)

### *Spoliation Dispute*

While the Petition for Review was pending in the Commonwealth Court, on December 17, 2021, the Secretary filed an “Emergency Application Seeking to Prohibit the Spoliation of Key Evidence Scheduled to Occur on December 22, 2021” (Emergency Application). Therein, the Secretary alleged that Fulton County scheduled a third-party inspection of the Dominion Voting Equipment at issue in this litigation by a third-party contractor known as Envoy Sage, LLC (Envoy Sage) on December 22, 2021. The Secretary sought to enjoin the Envoy Sage inspection, asserting that Fulton County’s Voting Equipment – “in particular, its status and condition following Wake TSI’s ‘examination’” – constitutes “key evidence” in this case, which would be irreparably spoliated by a third-party inspection. (Emergency Application at 1, 4.) Specifically, the Secretary requested an order from the Commonwealth Court enjoining Fulton County:

(1) from providing any third party (other than Dominion []) with access to the electronic voting machines in Fulton County’s possession that are leased from Dominion [], including but not limited to allowing the inspection by Envoy Sage currently scheduled for December 22, 2021, pending further order of this Court, and (2) take all necessary steps – which may include returning the machines to Dominion [] in a manner that maintains chain of custody – to preserve those machines, and any data

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<sup>7</sup> On October 18, 2021, the Secretary filed a single preliminary objection in the nature of a demurrer to Count III of the Petition for Review. Therein, the Secretary asserted that Section 1105-A(c) of the Election Code, 25 P.S. § 3031.5(c), expressly authorized her to issue Directive 1. The Commonwealth Court directed briefing on the preliminary objection, which was argued before a panel in March of 2022. On May 23, 2022, the Commonwealth Court issued an opinion and order overruling the Secretary’s preliminary objection and directing her to file an answer to Fulton County’s Petition for Review. The Secretary complied, and the pleadings are presently closed.

stored therein, in a secured and unaltered state pending further order of the Court.

(Emergency Application at 17 (Wherefore Clause)).

Fulton County filed an answer to the Secretary’s Emergency Application, opposing her requested relief on several bases. First, Fulton County asserted that the Secretary already utilized a third-party entity known as RSM Election Solutions, LLC (RSM Election Solutions) to inspect Fulton County’s Voting Equipment on October 13, 2021. (Answer to Emergency Application at 10.) Second, Fulton County explained that on December 10, 2021, it received a letter from the Pennsylvania Senate Intergovernmental Operations Committee (IOC) requesting that Fulton County “permit the ‘collect[ion of] the digital data from the election computers and hardware used by Fulton County, Pennsylvania in the November 2020 election.’” (*Id.* at 11.) Fulton County acquiesced to the IOC’s request and scheduled an examination of the Dominion Voting Equipment used by Fulton County in the November 2020 general election. (*Id.*) On these bases, Fulton County argued that the Secretary’s alleged concerns over the preservation of data contained on Fulton County’s Voting Equipment were illusory and fraught with hypocrisy, as the Secretary “already had an opportunity to inspect the systems with a third-party entity and there is no evidence that any such inspection by the [IOC’s contractor, Envoy Sage,] will compromise the equipment.” (*Id.* at 13.)

The Commonwealth Court heard oral argument on the Secretary’s Emergency Application and Fulton County’s answer thereto on December 21, 2021, and thereafter issued an order memorializing the agreement made by the parties during argument to postpone Envoy Sage’s inspection to January 10, 2022, by which time the parties were directed to have negotiated adequate inspection protocols.

On January 3, 2022, Dominion sought to intervene in the discovery dispute and filed an Emergency Application for Leave to Intervene for the Limited Purpose of Seeking a Protective Order (Intervention Application). The Commonwealth Court held a hearing on the intervention request on January 7, 2022, and thereafter denied intervention by memorandum and order dated January 10, 2022. Dominion immediately appealed the Commonwealth Court’s order denying intervention to the Pennsylvania Supreme Court, and ultimately succeeded to intervene.<sup>8</sup> *See Fulton County, et al. v. Secretary of the Commonwealth* (Pa., No. 4 MAP 2022).

On January 6, 2022, following the Commonwealth Court’s receipt of letters from the Secretary and Fulton County regarding the status of negotiations, the Court held a status conference, and thereafter postponed the inspection once more until January 12, 2022, and ordered the parties to continue their good faith efforts to negotiate adequate inspection protocols. (*See* Cmwlth. Ct. Order, 1/7/2022.)

On January 10, 2022, the Secretary filed an application to reschedule the January 12, 2022 inspection due to the unavailability of the Secretary’s expert. On January 11, 2022, the Commonwealth Court issued an order postponing the inspection to no earlier than 1:00 p.m. on January 14, 2022, and again ordered the parties to continue negotiating inspection protocols.

On January 13, 2022, the Secretary filed a “Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, From Proceeding” (Renewed Emergency Application), explaining that the parties were unable to negotiate adequate protocols for the inspection and renewing her request that the Commonwealth Court enjoin the inspection from proceeding in its entirety.

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<sup>8</sup> On March 21, 2022, the Supreme Court reversed the Commonwealth Court’s decision and granted Dominion’s Intervention Application for the limited purpose of seeking a protective order.

On January 14, 2022, the Commonwealth Court issued a memorandum and order denying the Secretary’s Emergency Application and dismissing the Renewed Emergency Application as improvidently filed. The Commonwealth Court concluded that the Secretary failed to establish that the data or state of the Voting Equipment subject to inspection constitutes evidence in this litigation worthy of protection. In other words, the Secretary failed to persuade the Court that she, or Fulton County, will use any data obtained from Envoy Sage’s inspection as evidence in this proceeding, which the Commonwealth Court characterized as “concern[ing] the principally legal issue of the Secretary’s decertification authority under the Election Code.” (Cmwlth. Ct. Mem. & Order, 1/14/2022, slip op. at 5.)

*Secretary’s Appeal – 3 MAP 2022*

The Secretary immediately appealed the Commonwealth Court’s January 14, 2022 Order to the Supreme Court, thus squarely putting at issue the question of whether the Dominion Voting Equipment in Fulton County’s possession constitutes evidence in the underlying litigation worthy of protection. Ancillary to her appeal, the Secretary filed an “Emergency Application to Stay Third-Party Inspection of Electronic Voting System Scheduled to Begin at 1:00 p.m. on January 14, 2022” (Emergency Application for Stay). The Emergency Application for Stay sought an interim order to protect the Voting Equipment from potential spoliation by a third-party inspection, which was functionally the Secretary’s requested relief on the merits, pending the Supreme Court’s ultimate merits disposition of whether such Voting Equipment was worthy of protection. In the Single-Justice Order, executed by Justice Wecht on January 14, 2022, the Supreme Court granted the Emergency Application for Stay on a temporary basis pending consideration of the request by the full court. The Single-Justice Order specifically “stayed and enjoined” the

inspection of Fulton County’s electronic Voting Equipment scheduled to begin at 1:00 p.m. on January 14, 2022, pending further order of the Court. (Supreme Ct. Order, 1/14/2022.)

On January 27, 2022, the full Supreme Court issued its Injunction Order reaffirming the Single-Justice Order that granted the Secretary’s Emergency Application for Stay. Specifically, the Injunction Order stated: “[t]he single-Justice Order entered on January 14, 2022, staying the lower court’s ruling and enjoining the proposed third-party inspection of Fulton County’s electronic voting equipment, shall remain in effect pending the disposition of the above-captioned appeal.” (Supreme Ct. Order, 1/27/2022.)

*Application for Contempt & Sanctions*

Several months after the issuance of the Injunction Order, on October 18, 2022, the Secretary filed in the Supreme Court an “Application for an Order Holding [Fulton County] in Contempt and Imposing Sanctions” (Application for Contempt & Sanctions). Therein, the Secretary alleged that the County directly violated the Supreme Court’s Injunction Order by allowing Speckin, an unaccredited third party, to manipulate and image the Dominion Voting Equipment at issue in this litigation. (Application for Contempt & Sanctions at 24.) The Secretary explained that she learned of this violation through a breach of contract action Fulton County filed against Dominion Voting Systems in the Fulton County Court of Common Pleas (Fulton County Complaint). The Fulton County Complaint, which attached a September 15, 2022 report by Speckin as an exhibit, unequivocally stated that “copying and analysis” of the Dominion Voting Equipment in Fulton County’s possession took place on July 13 and 14, 2022. (*Id.* at 25.) Given the “deliberate, willful nature of [Fulton County’s] misconduct, as well as its prejudicial effect on

both election security and the Secretary’s rights as a litigant,” the Secretary asked the Supreme Court to hold Fulton County in contempt, dismiss their lawsuit with prejudice, award the Secretary her fees and costs, and require Fulton County to return the Voting Equipment to the custody of Dominion. (*Id.* at 27-28.)

In response to the Secretary’s Application, the Supreme Court issued its October 21, 2022 Appointment Order designating the undersigned to serve as Special Master, and specifically directing as follows:

2. The Special Master shall ascertain whether the requested finding of contempt is civil or criminal in nature. The Special Master shall then take all steps necessary to afford the parties such process as is due in connection with that determination.
3. The Special Master shall consider the Application and develop an evidentiary record on the averments therein.
4. The Special Master shall prepare a report containing proposed findings of fact and recommendations concerning the relief sought, which the Special Master shall file with this Court on or before November 18, 2022.
5. The Special Master shall make a recommendation to this Court with respect to each of the forms of relief sought in the Application, including: (1) a finding of contempt; (2) the imposition of sanctions; (3) the award of counsel fees; and (4) dismissal of the underlying litigation.

(Supreme Ct. Order, 10/21/2022, at 2.)

### **III. CONTROLLING LEGAL PRINCIPLES**

In accordance with Paragraph 2 of the Appointment Order, the Special Master begins by summarizing the following legal principles, which bear directly on the Master’s determination of “whether the requested finding of contempt is civil or criminal in nature,” and concomitant obligation to “take all steps necessary to afford

the parties such process as is due in connection with that determination.” (Supreme Court Order, 10/21/2022 at 2.)

Contempt proceedings may be criminal or civil in nature.<sup>9</sup> This distinction is “extremely important” because it determines the due process rights of the alleged contemnor. *Penn Cambria Sch. Dist. v. Penn Cambria Educ. Ass’n*, 578 A.2d 994, 998 (Pa. Cmwlth. 1990). “It is . . . difficult to distinguish between civil and indirect criminal contempt.” *Brocker v. Brocker*, 241 A.2d 336, 340 (Pa. 1968). “[T]here is no bright line distinction between the two varieties of contempt, because civil and criminal contempt share common attributes (which plagues litigants, counsel and the [c]ourts). . . .” *Com. Acting by Kane v. Flick*, 382 A.2d 762, 765 (Pa. Cmwlth. 1978). However, the decisions of our Supreme Court agree that the fundamental and controlling difference between civil and criminal contempt proceedings is the “**dominant purpose**” of the sanctions that are to be imposed:

Generally, contempt can be criminal or civil in nature, and depends on whether the core purpose of the sanction imposed is to vindicate the authority of the court, in which case the contempt is criminal, or whether the contempt is to aid the beneficiary of the order being defied, in which case it is civil. *Commonwealth v. Marcone*, 410 A.2d 759, 762 (Pa. 1980); *In re Martorano*, 346 A.2d 22, 27-28 (Pa. 1975). Civil contempt orders, in turn, usually occur as one of two sub-species: compensatory or coercive. *Bata v. Cent.-Penn Nat’l Bank*, 293 A.2d 343, 354 n.21 (Pa. 1972) (“*Bata III*”); *Brocker*, 241 A.2d at 339. Compensatory civil contempt, as its moniker suggests, involves compensation that is paid to the party whom the contempt has harmed. *Bata III*, 293 A.2d at 352-53 & n.13; *Brocker*,

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<sup>9</sup> Contempt may also be direct (when it occurs in the presence of the court) or indirect (when it occurs elsewhere), and indirect contempt often takes the form of disobedience to a court order. See *Knaus v. Knaus*, 127 A.2d 669, 671 (Pa. 1956). The Secretary’s Application for Contempt & Sanctions relates only to conduct occurring outside the court’s presence, so these proceedings are for indirect contempt.

241 A.2d at 339. On the other hand, a coercive civil contempt citation[] is intended to coerce the disobedient party into compliance with the court's order through incarceration and/or monetary punishment. *Bata III*, 293 A.2d at 354 n.21; *Brocker*, 241 A.2d at 339; *Knaus*, 127 A.2d at 673.

*Commonwealth v. Bowden*, 838 A.2d 740, 761-62 (Pa. 2003) (cleaned up). Thus, remedial (*i.e.*, civil) contempt sanctions are either coercive or compensatory, but cannot be punitive, because punitive sanctions sound in criminal contempt. *See* 1 STANDARD PENNSYLVANIA PRACTICE 2d § 5:4 (2022) (collecting cases, and distinguishing coercive and/or compensatory civil contempt, which is remedial, from criminal contempt, which is designed for “punishing the contemnor”). The Supreme Court has long relied on this “dominant purpose” test. *See* Stephen E. Skovron, *Contempt—Discovering the Lower Court’s Dominant Purpose—Crozer-Chester Medical Center v. Moran*, 522 Pa. 124, 560 A.2d 133 (1989), 63 TEMP. L. REV. 363, 373 (1990) (citing, *e.g.*, *Commonwealth v. Charlett*, 391 A.2d 1296, 1298 (Pa. 1978) (“We have consistently held that in determining whether a contempt citation is civil or criminal contempt, our guide is the dominant purpose of the court.”); *In re Martorano*, 346 A.2d 22, 27 (Pa. 1975); *Woods v. Dunlop*, 334 A.2d 619, 622 n.2 (Pa. 1975); *Brocker*, 241 A.2d at 338).

In *Knaus v. Knaus*, 127 A.2d 669 (Pa. 1956), our Supreme Court established five factors that can assist in determining the dominant purpose of the contempt relief sought. These factors, if satisfied, suggest that a contempt proceeding is civil rather than criminal:

- (1) Where the complainant is a private person as opposed to the government or a governmental agency;
- (2) where the proceeding is entitled in the original injunction action and filed as a continuation thereof as opposed to a separate and independent action;
- (3) where holding the defendant in contempt affords relief to a private party;
- (4) where the

relief requested is primarily for the benefit of the complainant; and (5) where the acts of contempt complained of are primarily civil in character and do not of themselves constitute crimes or conduct by the defendant so contumelious that the court is impelled to act on its own motion.

*Knaus*, 127 A.2d at 673.

Applying the foregoing principles at the outset of these proceedings, the Special Master examined each contempt sanction sought in the Application for Contempt & Sanctions, and determined that each is civil, not criminal, in nature. (See 10/27 Tr. 3-4; Special Master Order, 11/3/2022 ¶ 2 (“The Special Master hereby incorporates by reference in this Order a determination, as agreed by the parties, that the instant contempt proceedings are in the nature of civil contempt.”).) Because of that determination, when recommending sanctions based on a finding of contempt in these proceedings, the Special Master will consider only the least restrictive sanctions necessary to accomplish the remedial purposes of civil contempt. See *Dep’t of Env’tl. Prot. v. Cromwell Twp.*, 32 A.3d 639, 653 (Pa. 2011). To the extent any of the requested contempt relief appears principally punitive in purpose, rather than remedial, the Special Master will not recommend that relief. However, though civil contempt sanctions may incidentally vindicate the authority of the court and, thus, appear punitive, “the test is the dominant purpose, not the incidental result.” *Altemose Const. Co. v. Bldg. & Const. Trades Council of Phila.*, 296 A.2d 504, 517-18 (Pa. 1972) (citing *Gompers v Buck’s Stove & Range Co.*, 221 U.S. 418, 441 (1911)). Thus, the Special Master has analyzed the dominant purpose of each aspect of the relief requested in the Application for Contempt & Sanctions, as follows.

First,<sup>10</sup> the Secretary seeks assessment of attorney’s fees and costs against the County based, in part, on a contempt finding.<sup>11</sup> She characterizes this relief as compensatory, arguing that the alleged contempt resulted in spoliation of evidence that would have been favorable to her. This spoliation, she argues, compromised the factual integrity of this lawsuit and prejudiced the Secretary’s ability to raise factual issues regarding how the Wake TSI Inspection may have compromised the Voting Equipment, thus justifying the Secretary’s decertification and issuance of Directive 1. (Application for Contempt & Sanctions at 30-32.) The Special Master concluded that, if contempt is shown, the County’s payment of the Secretary’s attorney’s fees and costs in the underlying litigation would be compensation for the Secretary having lost the opportunity to litigate this matter using the evidence on which she would have relied for her defense. Any spoliation of that evidence essentially would strand her costs-to-date in this matter because she would be unable to litigate an important factual issue raised by the Petition for Review—that her decertification of the Dominion Voting Equipment was without a factual basis. Further, fines or monies paid to the other party, as opposed to the court, are remedial and civil in nature. *Jackson v. Hendrick*, 764 A.2d 1139, 1142 (Pa. Cmwlth. 2000) (citing *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988)). Accordingly, to the extent this relief is based on a contempt finding, it is civil in nature.

Second, and relatedly, the Secretary requests dismissal of the underlying litigation. (Application for Contempt & Sanctions at 35-38.) As with attorney’s fees

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<sup>10</sup> The Special Master has re-ordered the Secretary’s requested relief for the purpose of analysis.

<sup>11</sup> The Secretary also seeks attorney’s fees and costs independent of a contempt finding, on the basis that the County has engaged in obdurate, vexatious, and/or bad-faith conduct justifying fees and cost awards under statutory and procedural law. See Sections VI.B.1 & VI.B.2, *infra*.

and costs, this sanction may be justified on grounds independent of contempt.<sup>12</sup> To the extent it relies on a contempt finding, the Special Master concluded that this relief is compensatory in nature for the same reasons as articulated above relating to the Secretary's request for attorney's fees and costs, so it sounds in civil contempt.

Third, the Secretary asks that the County be ordered to return the Dominion Voting Equipment to Dominion's custody, which she characterizes as a coercive civil contempt sanction. (Application for Contempt & Sanctions at 31-32.) She argues that this is the only way to ensure any future, ongoing compliance with the Injunction Order, which is important to prevent "any further incursions" into the Dominion Voting Equipment, which is "critical election infrastructure." (*Id.* at 32.) The Special Master has considered the important purposes of the Injunction Order, as elaborated at subsection VI.A.1, *infra*, which remain relevant at least as long as the Secretary's appeal to the Supreme Court remains pending. Accordingly, the Special Master concluded that, if a risk of continued violation of the Injunction Order is shown, removing the Dominion Voting Equipment from the County's custody and control would serve to prevent such conduct, and thus could be principally coercive in nature, rather than punitive.

Finally, the Special Master concluded that the five *Knaus* factors indicate that these are civil contempt proceedings. Preliminarily, the first and third factors turn on whether the party seeking contempt is a private party or a governmental actor. Here, the Secretary has attributes of both: she is a government official, but she is participating in this litigation as a Respondent, which places her in a position analogous to that of a private party defending litigation. Importantly, she is not acting as a governmental actor pursuing contempt incident to an enforcement action

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<sup>12</sup> In support, the Secretary cites caselaw imposing sanctions for violation of a discovery and/or preservation order under Pa. R.Civ.P. 4019. *See* Section VI.B, *infra*.

or other public proceeding that she initiated in her role as an official. Thus, the Special Master analyzed the *Knaus* factors as follows: (1) The complainant is the Secretary, who, as discussed, has some attributes of a private party in this litigation; (2) the Application for Contempt & Sanctions was filed at the Supreme Court's ongoing docket pertaining to the Secretary's appeal (3 MAP 2022), not as a separate action; (3) any relief afforded will benefit the Secretary, whose role in this litigation, as discussed, is similar to a private party; it may also afford relief to Dominion, which is a private party; (4) the requested relief principally benefits the Secretary, who is the complainant; and (5) the acts complained of are substantially civil in nature, and the County invokes statutory authority for taking them; and the Court is not acting on its own motion. On balance, analysis of these factors further supports the Special Master's threshold determination that these proceedings are for civil contempt. *See Knaus*, 127 A.2d at 673.

Given this analysis, the Special Master reached the aforementioned determination and afforded the parties the level of due process applicable in these civil contempt proceedings. This generally entails notice and an opportunity to be heard. For civil contempt that is ongoing, and for which conditional imprisonment or fines may be used to compel compliance, a five-step process applies. *See Commonwealth ex rel Magaziner v. Magaziner*, 253 A.2d 263 (Pa. 1969) (requiring: 1) a rule to show cause why attachment should not issue; 2) an answer and hearing; 3) a rule absolute (*i.e.*, an arrest); 4) a hearing on the contempt citation; and 5) an adjudication of contempt). "Fulfillment of all five factors is not mandated, however," and where the contempt proceedings stem from violation of a court order that has been litigated by the parties, due process "requires no more than notice of the violations alleged and an opportunity for explanation and defense." *W. Pittston*

*Borough v. LIW Invs., Inc.*, 119 A.3d 415, 421 n.10 (Pa. Cmwlth. 2015). As repeatedly evidenced by the Special Master’s various orders, the written record of these proceedings, and the recitation of this matter’s procedural history before the Special Master, *see* Part IV, *infra*, the Special Master has afforded all parties robust procedural safeguards to secure their due process rights in these civil contempt proceedings.

#### **IV. PROCEEDINGS BEFORE THE SPECIAL MASTER**

##### **A. Pre-Hearing Discovery**

###### *October 24, 2022 Order*

Following the appointment of the undersigned to serve as Special Master, the Special Master issued an October 24, 2022 Order: (1) directing Fulton County to file an answer to the Secretary’s Application for Contempt & Sanctions, (2) directing the parties to file memoranda of law addressing the nature of the contempt relief requested; and (3) scheduling a status conference for October 27, 2022. (*See* Special Master Order, 10/24/2022.)

###### *October 27, 2022 Status Conference*

The Special Master convened a status conference on October 27, 2022 to discuss the parties’ memoranda of law regarding the nature of the contempt relief requested and confer regarding appropriate case management deadlines in accordance with the November 18, 2022 deadline set by the Supreme Court. The Special Master explained that based on the memoranda received, it appeared that the Secretary is seeking relief in the nature of civil contempt, to which all parties agreed. (10/27 Tr. 3-4.)

Following agreement by the parties that the proceedings would continue in the nature of civil contempt, the Special Master requested the parties’ input on how

best to develop an evidentiary record, as directed by the Appointment Order, within the relevant timeframe. Counsel for the Secretary (Attorney Wiygul) indicated his belief that the forthcoming evidentiary hearing could be expedited if the parties were permitted to conduct “targeted discovery in advance of the hearing.” (10/27 Tr. 5.) More specifically, Attorney Wiygul proposed that the Secretary depose Commissioners Ulsh and Bunch and serve targeted discovery requests on Fulton County for the purpose of producing facts relating to “what was actually done here in the way of the inspection by Speckin, who [] actually did it, at whose behest it was done, who commissioned it, who paid for it, because obviously one of the questions is [] are petitioners responsible for the inspection?” (10/27 Tr. 7). As to proposed document requests, Attorney Wiygul indicated that his client would be “seeking discovery regarding communications among the petitioners about the inspection and to the extent that they [] talked about the injunction” along with “contractual documents, documents regarding [] who engaged Speckin and what they were asked to do, who paid for the reports, items of [] that nature.” (10/27 Tr. 8.) Counsel concluded his request by stating that the Secretary is “very mindful of the time and the deadline that the Supreme Court has set. This would not be sprawling. This would be very targeted. And I think that in the end, it could make the hearing itself more expedient because we would know [] what evidence we’d want to adduce and put on the record.” (10/27 Tr. 8.)

Counsel for Fulton County (Attorney Carroll) orally objected to the Secretary’s pre-hearing discovery proposal, advancing his position that the Special Master must make a legal ruling on the scope of the Supreme Court’s Injunction Order before permitting any discovery to proceed.<sup>13</sup> (10/27 Tr. 9.)

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<sup>13</sup> The October 27, 2022 Status Conference was the first time Attorney Carroll argued a legal ruling on the scope of the Injunction Order was necessary before discovery could proceed.

Following this request for initial legal rulings, the Special Master clarified that per the Supreme Court’s order, her role is to ascertain whether the requested finding of contempt is civil or criminal, provide the accordant due process to the parties, create an evidentiary record as it relates to the Secretary’s Application for Contempt & Sanctions, and prepare a report containing proposed findings of fact and recommendations concerning the relief sought. (10/27 Tr. 9-10.) Consequently, the Special Master specifically advised that factual development is necessary, and that pre-hearing discovery shall be used to expedite the development of the evidentiary record given the constrained timeframe. (10/27 Tr. 11.)

Following the pre-hearing discovery discussion, the Special Master asked the parties to propose a date for the evidentiary hearing, at which time Attorney Carroll indicated that he was unavailable the week of October 31, 2022 – November 4, 2022, due to a previously scheduled vacation. (10/27 Tr. 12, 15.) Attorney Carroll proposed the hearing be scheduled to begin November 9, 2022, and advised the Special Master that he would be available during his vacation week to respond to discovery requests and the other matters in advance of the hearing. (10/27 Tr. 13.)<sup>14</sup>

Over the Secretary’s objection to having a hearing during the week of November 7th, which was the week of the midterm elections, the Special Master

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<sup>14</sup> The exchange was specifically as follows:

[Attorney Carroll]: How about – how about the 9<sup>th</sup>? Would that work, because the [] the week of the [sic] through the 4<sup>th</sup> I am completely unavailable.

[The Court]: Unavailable to be in a hearing, but you would make yourself available to deal with the discovery requests and other matters that need to be done in order to prepare for the hearing. Am I correct?

[Attorney Carroll]: I can do that. Yes.

(10/27 Tr. 13.)

accommodated Attorney Carroll's previously scheduled vacation, and advised that the evidentiary hearing would be held on November 9, 2022, as Attorney Carroll suggested. (10/27 Tr. 18.) The Special Master further directed the parties to provide a joint proposal, if possible, setting forth proposed deadlines for pre-hearing discovery. (10/27 Tr. 19.) In an order following the conclusion of the status conference, the Special Master memorialized these directives and ordered the parties to provide their joint scheduling proposal no later than October 28, 2022 at 11:59 a.m. (Special Master Order, 10/27/2022.)

#### *Parties' Pre-Hearing Discovery Proposals*

On October 28, 2022, the Special Master received separate discovery proposals from the parties. The Secretary filed a proposed pre-hearing discovery schedule, while Fulton County's filing again requested the Special Master issue predicate legal rulings regarding the scope the Supreme Court's Injunction Order, and broadly asserted that Fulton County is not subject to any discovery absent such rulings. (See Fulton County's Separate Discovery Proposal and Request for Briefing on Motions Requesting Certain Rulings from the Court (Fulton County's Separate Discovery Proposal)).<sup>15</sup> The remainder of Fulton County's filing objected to any and all discovery in the instant contempt proceedings, setting forth global objections based on (1) attorney-client privilege; (2) exemptions under the Right-to-Know Law<sup>16</sup> (RTKL); (3) disclosures that would violate individual constitutional rights, including, but not limited to, the Fifth Amendment to the United States Constitution, U.S. CONST. amend. V, and (4) other applicable evidentiary privileges. (*Id.* at 7-9.)

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<sup>15</sup> Fulton County's Separate Discovery Proposal is the second time Attorney Carroll argued a legal ruling on the scope of the Injunction Order was necessary before discovery could proceed.

<sup>16</sup> Act of February 14, 2008, P.L. 6, 65 P.S. §§ 67.101-67.3104.

### *Rule to Show Cause*

Following review of the parties' separate proposals, and in accordance with the notice and hearing due process safeguards afforded to parties in civil contempt proceedings, the Special Master issued a rule to show cause order on October 28, 2022 (Rule to Show Cause). Therein, the Special Master issued a rule upon Fulton County to show cause why the Secretary was not entitled to the relief requested in her Application for Contempt & Sanctions and scheduled a hearing in connection with the Rule for November 9, 2022, as originally proposed by Fulton County.

In regard to pre-hearing discovery and Fulton County's renewed request for predicate legal rulings and its global objections to discovery, the Special Master again indicated that pre-hearing discovery was permissible and necessary in this matter, and ordered the parties to proceed as follows:

5. Discovery in advance of the hearing shall proceed strictly as follows:

(a) The Secretary shall serve any requests for production of documents on Fulton County, via email, no later than **October 28, 2022, at 8:00 p.m.**

(b) Fulton County and Dominion shall serve any requests for production of documents, via email, on the opposing party no later than **October 31, 2022, at 12:00 noon.**

(c) The parties shall serve written interrogatories, requests for admissions, and proposed deposition questions (excluding follow-up questions), if any, via email, on the opposing party, no later than **October 31, 2022, at 12:00 noon.**

(d) Responses, productions, and objections, if any, to the discovery requests served pursuant to Paragraph 5(a)-(c) shall be completed and returned to the requesting party no later than **November 2, 2022, at 12:00**

**noon.** Objections filed after November 2, 2022, at 12:00 noon will be considered waived and will not be entertained by the Court.

(i) To the extent objections are raised on privilege grounds, the party asserting privilege shall simultaneously serve a privilege log identifying the following information with respect to each withheld document or communication: (1) the date of the document or communication; (2) its author or sender; (3) all persons receiving the document or communication and any copies; (4) the nature and form of the document or communication (e.g., letter, memorandum, phone call, etc.); (5) the subject matter identified in the document or communication; and (6) the specific privilege claimed and the basis for such claim or other reason the document or communication is asserted to be non-discoverable.

(e) Counsel are reminded of their obligation to act in good faith to resolve all discovery disputes. To the extent objections to any discovery requests served remain, the parties shall file an appropriate motion, including but not limited to a motion in limine, with this Court no later than **November 3, 2022, at 12:00 noon**, and shall attach a supporting memorandum of law.

(f) Joint stipulations of fact and the authenticity or admissibility of exhibits may be filed at any time in advance of the start of the hearing.

(g) Counsel shall make every effort to resolve any discovery disputes that arise without Court involvement.

(Rule to Show Cause ¶ 5.) As set forth in Paragraph 5(d), the Special Master fixed a deadline of November 2, 2022, at noon, for the parties to lodge any objections to pre-hearing discovery requests. Cognizant of the global privilege objections raised by Fulton County during the October 27, 2022 status conference, as reiterated in its

Separate Discovery Proposal, and so that the Special Master could have the ability to timely review, consider, and dispose of said objections as applied to specific discovery requests propounded on the County, the Special Master carefully detailed the process by which a party may object to a discovery request on privilege grounds.<sup>17</sup> (See Rule to Show Cause ¶ 5(d)(i) (requiring an objector to serve a privilege log containing six categories of information along with any privilege objections).) Furthermore, the Special Master fixed a deadline of November 3, 2022, at noon, for the parties to file any motions relating to outstanding discovery objections. The Rule to Show Cause specifically reminded the parties of their obligation to participate in pre-hearing discovery in good faith. (*Id.* ¶ 5(e).)

*Fulton County's First Request to Enjoin Discovery*

On November 1, 2022, Fulton County filed in the Supreme Court an “Emergency Application for a Preliminary Injunction to Enjoin Discovery in Special Master Proceedings and to Compel Legal Rulings Preceding Said Discovery” (First Application for Preliminary Injunction).<sup>18</sup> Therein, Fulton County asked the Supreme Court to enjoin the pre-hearing discovery ordered by the Special Master in the Rule to Show Cause, renewed its request for predicate legal rulings on, *inter alia*, the scope of the Supreme Court’s Injunction Order, and relodged its global objections to any and all discovery as previously set forth in its Separate Discovery Proposal.

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<sup>17</sup> The Special Master required a privilege log be served simultaneously with any privilege objections so that the Special Master had the information necessary to dispose of any and all privilege objections in advance of the evidentiary hearing.

<sup>18</sup> Fulton County’s First Application for Preliminary Injunction is the third time Attorney Carroll argued a legal ruling on the scope of the Injunction Order was necessary before discovery could proceed.

By order dated November 2, 2022, the Supreme Court granted Fulton County's First Application for Preliminary Injunction on a temporary basis pending expedited consideration by the full Court. (Supreme Ct. Order, 11/2/2022.)

Later on November 2, 2022, the Supreme Court issued an order referring Fulton County's First Application for Preliminary Injunction to the Special Master for decision. (Supreme Ct. Order, 11/2/2022 (Per Curiam Order).) The Supreme Court explained that its order is "without prejudice to [Fulton County's] rights to seek discovery-related relief before the Special Master in due course **and in full conformity with any prior or future orders or directives issued by the Special Master.**" (*Id.* (emphasis added).) Because the Supreme Court's earlier order temporarily granting Fulton County's injunction request impacted the discovery production deadline set forth in Paragraph 5(d) of the Special Master's Rule to Show Cause, the Supreme Court extended the deadline for responses, productions, and objections to discovery requests to 12:00 noon on November 3, 2022, and the deadline for the parties' submission of any discovery objections by motion to 12:00 noon on November 4, 2022. The Supreme Court specifically ordered that the remainder of the Special Master's Rule to Show Cause shall remain in effect unless subsequently modified or displaced.

*Secretary's Emergency Application to Compel Depositions*

On November 3, 2022, the Secretary filed an Emergency Application to Compel the Depositions of Commissioners Stuart L. Ulsh, Randy H. Bunch, and Paula J. Shives on November 4 and 5, 2022 (Application to Compel Depositions). Therein, the Secretary averred that on October 31, 2022, in accordance with the deadline set forth in the Special Master's Rule to Show Cause, the Secretary served on Fulton County's counsel: (1) proposed deposition questions; (2) a notice of

remote video deposition for Commissioner Ulsh on November 4, 2022 at 9:00 a.m.; (3) a notice of remote video deposition for Commissioner Bunch on November 4, 2022, at 2:00 p.m.; and (4) a notice of remote video deposition for Commissioner Paula J. Shives on November 5, 2022, at 10:00 a.m. (Application to Compel Depositions at 5.) Despite timely serving the aforementioned discovery, Fulton County failed to respond to the Secretary’s request to confirm that the Commissioners would appear at the depositions as scheduled. The Secretary alleged that instead of acting in good faith to complete pre-hearing discovery, Fulton County has “given every indication that they will refuse to produce the Commissioners for the depositions the Secretary has scheduled.” (*Id.* at 1.) Accordingly, the Secretary asked the Special Master to issue an order compelling the Commissioners’ depositions.

*Secretary’s Notice Concerning Fulton County’s Responses and Objections to the Secretary’s Discovery*

Also on November 3, 2022, the Secretary filed a “Notice Concerning [Fulton County’s] Responses and Objections to the Secretary’s Discovery” (Discovery Notice) advising the Special Master of the status of pre-hearing discovery. Therein, the Secretary indicated that she served the following discovery requests on Fulton County in accordance with the deadlines set forth in in Paragraphs 5(a)-(c) of the Rule to Show Cause: (1) Proposed Deposition Questions; (2) Interrogatories; (3) Requests for Production; and (4) Requests for Admissions. The Secretary advised that Fulton County did not file any responses or objections to the Secretary’s Proposed Deposition Questions by 12:00 noon on November 3, 2022, the deadline set forth in the Special Master’s Rule to Show Cause as amended by the Supreme

Court's November 2, 2022 Order.<sup>19</sup> The Secretary further advised that Fulton County did serve responses and objections to the Secretary's Interrogatories, Requests for Productions, and Requests for Admissions before the response deadline, however, those responses "interpose[d] blanket, meritless objections to all, or virtually all of the Secretary's discovery requests, and evidence [Fulton County's] ongoing failure to engage in the discovery process in good faith." (Discovery Notice at 1, Exs 1-3.)

The Secretary attached Fulton County's responses to the Discovery Notice. Each response asserted an 11-page "standard objection and response" on the basis that "the discovery that has been propounded by the Secretary and Intervenor Dominion would constitute automatic waiver of Fulton County's rights to due process and to its rights to raise exemptions, exclusions, protections, and/or privileges which would otherwise be available to Fulton County." (Discovery Notice, Ex. 1 at 2; Ex. 2 at 2; Ex. 3 at 2.) Fulton County went on to describe these purported "exemptions, exclusions, protections and/or privileges" as stemming from: (1) the underlying litigation in this matter; (2) the RTKL; (3) the Fulton County Complaint; and (4) a currently pending administrative appeal by Fulton County concerning Dominion's request for information in a RTKL matter. (*Id.*) Additionally, Fulton County asserted "other statutory and common-law privileges and protections," including, the attorney-client privilege, the work-product protection, the deliberative process privilege, investigatory protection, and the Fifth

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<sup>19</sup> In a subsequent order dated November 3, 2022, the Special Master extended the deadline for discovery responses to November 3, 2022 at 8:00 p.m. (Special Master Order, 11/3/2022.) Despite this extension, Fulton County never filed responses or objections to the Secretary's Proposed Deposition Questions. Per Paragraph 5(d) of the Rule to Show Cause, untimely objections "will be considered waived and will not be entertained by the Special Master." (*See* Special Master Order, 10/28/2022.)

Amendment Privilege. (*Id.*) Following the standard objection and response, Fulton County responded to nearly all individual questions and requests with the following paragraph:

In addition to the standard response noted above, and to the extent that a response is required, the Speckin Report has already been produced in the breach of contract action, and that action explains the purpose of the Speckin Report, and Fulton County having already admitted to having the Speckin Report prepared in the normal course of its due diligence and in execution of its duties and responsibilities, and that speaks for itself, and in addition to the standard objection above, this request is overly broad and burdensome in that its reference to communication between Fulton County (and presumably all members, employees, attorneys, consultants, and/or experts) and any other person is absurdly onerous.

(Discovery Notice, Exs. 1-3.)

*Special Master's November 3, 2022 Order*

On November 3, 2022, after considering the Secretary's Application to Compel Depositions, the Secretary's Discovery Notice, and Fulton County's First Application for Preliminary Injunction (as referred to the Special Master by the Supreme Court), the Special Master issued an order. Cognizant that Fulton County's request to enjoin discovery remained pending before the Special Master for consideration, and that the Supreme Court's extended deadline for response to discovery had passed, the Special Master declined to order the Commissioners to appear at the remote depositions scheduled for November 4 and 5, 2022, and again extended the deadline for Fulton County to file responses and/or objections to the Secretary's Proposed Deposition Questions to 8:00 p.m. on November 3, 2022. The Special Master indicated she would reconsider whether to compel depositions at a later date.

To the extent Fulton County again requested a stay of discovery pending a preliminary legal ruling regarding the scope of the Supreme Court’s order, the Special Master clarified that the scope of the order presents a mixed question of law and fact, upon which the Special Master would develop an evidentiary record and make a recommendation, as specifically directed by the Supreme Court in its Appointment Order and later confirmed in its November 2, 2022 Order. Moreover, to the extent that Fulton County’s First Application for Preliminary Injunction requested evidentiary determinations on the various asserted privileges and other evidentiary protections on a global basis, the Special Master declined to grant such relief but reiterated that she “will entertain any and all unresolved objections in accordance with Paragraph 5(d) and (e) of the Special Master’s Rule to Show Cause,” or in other words, on a question-by-question basis, and with the benefit of the information provided by the accompanying privilege log. (Special Master Order, 11/3/2022.) Finally, the order directed the parties to appear for a status conference, via WebEx, on November 4, 2022.

*Secretary’s Application for Discovery Sanctions and Incorporated Memorandum  
of Law*

Prior to the November 4, 2022 status conference, the Secretary filed an Application for Discovery Sanctions against Fulton County. Therein, the Secretary alleged that despite repeated discovery-related extensions by order of the Supreme Court and the Special Master, Fulton County failed to provide any meaningful responses to the Secretary’s written discovery requests, and instead “continued to deny the legitimacy of the discovery process altogether, in defiance of the Supreme Court’s clear Order directing the Special Master to develop an evidentiary record concerning the issues raised in the Secretary’s Application for Contempt [&

Sanctions].” (Application for Discovery Sanctions at 1.) The Secretary further argued that although she served carefully crafted targeted discovery requests, Fulton County continues to respond with the same recycled and meritless global objections they raised in different forms at the October 28, 2022 Status Conference, the Separate Scheduling Proposal, and the First Emergency Application for Preliminary Injunction. The Secretary maintained that Fulton County has failed to explain how any of the Secretary’s specific discovery requests implicate any of the cited privileges or protections. Moreover, the Secretary noted that the global objections are particularly improper given the Special Master’s directive that all objections must be raised and disposed of in reference to specific discovery requests, as opposed to general objections to the pre-hearing discovery process. The Secretary argued this behavior constitutes dilatory, obdurate, vexatious, and bad-faith litigation conduct that warrants sanctions. *See* 42 Pa.C.S. § 2503, Pa.R.Civ.P. 4014, 4019. The Secretary requested that as a sanction, the Special Master deem admitted each of the Secretary’s Requests for Admissions, and take as established, the following facts:

- Petitioners, including Commissioners Ulsh and Bunch individually, as well as Speckin, were aware of the Supreme Court’s January 27, 2022 Injunction and the Secretary’s pending appeal in this action at all relevant times, including during any deliberations concerning whether and how to conduct the Speckin Inspection, and whether and how to notify anyone of the Speckin Inspection before or after it occurred. (*See* [Requests for Production] 1, 2; Interrogatories 11, 14).
- Commissioners Ulsh and Bunch were aware and believed before the Speckin Inspection occurred that the Speckin Inspection would violate the terms of the Injunction. (*See* [Request for Production] 2; Interrogatory 11).

- While each of the Petitioners (but not Commissioner Shives) authorized and permitted the Speckin Inspection, the idea, planning, and funding for the Speckin Inspection came from an external source. (*See* [Request for Production] 1; Interrogatories 1, 10, 12, 13, 15, 16).
- Deliberations concerning whether and how to allow the Speckin Inspection to proceed were conducted behind closed doors, and without public notice or participation. (*See* [Requests for Production] 3, 4, 12; Interrogatory 3).
- The decision to allow the Speckin Inspection did not stem from a vote of all three Fulton County Commissioners. (*See* [Request for Production] 12; Interrogatory 2).
- Commissioner Shives was not informed of the Speckin Inspection before it occurred. (*See* [Request for Production] 12; Interrogatory 2).
- The Speckin Inspection itself was conducted behind closed doors, and without public notice or participation. (*See* [Request for Production] 11; Interrogatories 8-9).
- The Voting Machines are at an ongoing risk of further harm if left in the hands of Petitioners. (*See* [Requests for Production] 7, 8).
- The Speckin Inspection rendered it impossible to tell whether, and if so, how, the information on the impacted electronic voting machines has been altered. (*See* [Requests for Production] 9-11; Interrogatories 4-8).
- Attorney Stephanie Lambert has represented Petitioners in connection with this action. (*See* Interrogatory 17).<sup>[20]</sup>
- Attorneys Lambert and Carrol[1] are being paid by a source other than Fulton County for the legal services they have and are providing to Petitioners in connection with this action. (*See* Interrogatory 18).

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<sup>20</sup> An explanation of Attorney Stephanie Lambert's involvement in the instant case appears at Section IV(B), *infra*.

(Application for Discovery Sanctions at 13-14.)

*Fulton County's Second Request to Enjoin Discovery*

Also before the status conference, the Court received another filing from Fulton County titled “Motion for Predicate Legal Rulings and to Exclude Certain Discovery Requested by the Secretary” (Motion for Predicate Legal Rulings).<sup>21</sup> Therein, Fulton County asserted yet again that:

[a] legal ruling concerning whether Fulton County actually violated the Supreme Court’s orders enjoining the inspection of voting machines must be made before Fulton County is subjected to discovery in the instant proceedings, especially since the discovery sought threatens Fulton County’s due process rights, protections, and privileges it would otherwise be able to assert in the underlying litigation (which is only in an interlocutory appeal status), the litigation by and between Fulton County and Dominion, its general rights to withhold information under the RTKL, and the individual constitutional rights of its members.

(Motion for Predicate Legal Rulings at 53.) In terms of relief, the County requested:

a legal ruling on the scope of the Supreme Court’s January Orders, and, if discovery proceeds, a categorical determination as to Fulton County’s rights given that there remains underlying litigation, additional litigation by and between Fulton County and Dominion, and Fulton County’s general rights and privileges under law, including the RTKL.

(*Id.* at 55 (Wherefore Clause).)

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<sup>21</sup> Fulton County’s Motion for Predicate Legal Rulings is the fourth time Attorney Carroll argued a legal ruling on the scope of the Injunction Order was necessary before discovery could proceed.

*November 4, 2022 Status Conference & Subsequent Order*

The Special Master convened a status conference on November 4, 2022, to discuss the County's Motion for Predicate Legal Rulings, the Secretary's Application for Discovery Sanctions, and to receive an update on the status of pre-hearing discovery. After providing all parties the opportunity to speak and advance their positions, the Special Master issued an order disposing of several requests in the parties' filings. First, to the extent the County continued to advance its position that there are no factual issues in the instant contempt proceedings which require discovery, the Special Master specifically denied any and all requests to stay discovery on that basis, and concluded that there are indeed relevant factual issues that warrant discovery to facilitate development of an evidentiary record, as directed and confirmed by the Supreme Court's orders. Next, the Special Master denied Fulton County's request for the resolution of the following legal issues in advance of discovery. First, the Special Master concluded that Fulton County failed to raise a proper objection by generally asserting the existence of the underlying litigation in this matter, as it failed to prove that a privilege or objection arises solely on that basis. The Special Master reached the same conclusion in regard to Fulton County's contention that the pending breach of contract action between Fulton County and Dominion functioned generally as a shield to discovery in the instant contempt proceedings. Third, the Special Master overruled Fulton County's objections based on alleged protections afforded under the RTKL, concluding that the RTKL is wholly inapplicable to the instant proceedings. *See Off. of the Dist. Att'y of Phila. v. Bagwell*, 155 A.3d 1119, 1138 (Pa. Cmwlth. 2017) ("The analysis of whether a record is discoverable in this jurisdiction and beyond is entirely distinct from whether the record is accessible under the RTKL.").

Next, addressing Fulton County’s blanket discovery objections, which included attorney-client privilege, the work product doctrine, the deliberative process privilege, and the asserted violation of individual constitutional rights of the Commissioners or of other unspecified persons, the Special Master noted that the County has not, at any time, availed itself of the opportunity to raise objections to discovery on a question-by-question basis as directed by the Special Master in her prior orders. As the objector to a discovery request bears the burden of demonstrating non-discoverability, the Special Master overruled each of Fulton County’s blanket objections for failure to assert them with sufficient specificity. Finally, to the extent Fulton County alleged that responding to the Secretary’s discovery requests will unduly favor Dominion’s interest in this or other litigation, the Special Master denied any relief on that basis, noting that all parties to these proceedings will continue to be treated impartially, fairly, and with robust due process protections.

Finally, the Special Master’s order directed Fulton County to make Commissioner Ulsh, Commissioner Bunch, and Commissioner Shives available for depositions on November 7 or 8, 2022, and directed the Secretary to serve revised Notices of Depositions on Fulton County no later than November 5, 2022. The Special Master held the Secretary’s Application for Discovery Sanctions in abeyance pending conclusion of the evidentiary hearing.

*Fulton County’s Second Emergency Application for Preliminary Injunction*

On the morning of November 7, 2022, Fulton County filed, in the Supreme Court, a second “Emergency Application for a Preliminary Injunction to Enjoin Depositions Scheduled for November 7, 2022 and to Have Special Master Rule on Fulton County’s Legal Issues Raised in its Motion Objecting to Discovery” (Second

Application for Preliminary Injunction).<sup>22</sup> Again, Fulton County advanced the same arguments regarding the need for predicate legal rulings, and lodged the same blanket objections to the pre-hearing discovery process, both of which had been previously rejected by the Special Master. On November 7, 2022, the Supreme Court summarily denied Fulton County's Second Application for Preliminary Injunction. (Supreme Court Order, 11/7/2022.)

*Secretary's Application for an Order Holding Fulton County in Contempt and Imposing Sanctions for Violation of the Special Master's November 4, 2022 Order*

On the same day, the Special Master received an application from the Secretary seeking an order holding Fulton County in contempt and imposing sanctions for the alleged violation of the Special Master's November 4, 2022 Order (Application for Contempt of Master's Order). Therein, the Secretary explained that in accordance with the November 4, 2022 Order, the Secretary served notices of deposition on counsel for Fulton County on November 5, 2022 at 2:20 p.m., scheduling depositions of Commissioners Ulsh, Bunch, and Shives for November 7 at 9:30 a.m. and 2:30 p.m., and for November 8, at 10:00 a.m., respectively. (Application for Contempt of Master's Order ¶ 5, Ex. 2.) At approximately 8:05 a.m. on November 7, 2022, counsel for Fulton County informed the Secretary's counsel that his clients would not appear for the noticed depositions and that they would likewise not appear at the evidentiary hearing scheduled for November 9, 2022. (*Id.* ¶ 6.) In light of this alleged willful violation of the Special Master's November 4, 2022 Order, the Secretary requested an order (1) holding Fulton County in contempt; (2) imposing a \$1,000 per hour penalty until such time as Fulton

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<sup>22</sup> Fulton County's Second Application for Preliminary Injunction is the fifth time Attorney Carroll argued a legal ruling on the scope of the Injunction Order was necessary before discovery could proceed.

County makes the Commissioners available for depositions; (3) granting the relief sought in the Secretary’s Application for Discovery Sanctions; (4) awarding the Secretary all costs and fees in connection with the noticed depositions of Commissioners Ulsh and Bunch; and (5) the attachment (*i.e.* arrest) of Commissioners Ulsh and Bunch to ensure their appearance at the November 9, 2022 evidentiary hearing. (*Id.* ¶ 10.)<sup>23</sup>

*Special Master’s November 8, 2022 Order*

The Special Master issued an order on November 8, 2022, directing Fulton County to file an answer to the Secretary’s Application for Contempt of Master’s Order no later than 4:00 p.m. on the same day, and indicated that the Secretary’s Application would be held in abeyance pending the conclusion of the evidentiary hearing. Noting that the Supreme Court denied Fulton County’s Second Application for Preliminary Injunction, the Special Master cautioned that all parties properly served with a notice to attend the evidentiary hearing must appear.

*Fulton County’s Third Request for Injunctive Relief*

Instead of filing an answer to the Secretary’s Application for Contempt of Master’s Order, Fulton County submitted a filing entitled “Fulton County’s Motion and/or Reply to Secretary’s Motion and to Suspend Proceedings Against County Commissioners During Election Under Pennsylvania Law and to Stay Pending

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<sup>23</sup> The Secretary also asked that in addition to the request for established facts set forth in her Application for Discovery Sanctions, that the Master find the following two additional facts as established:

- Attorney Stephanie Lambert has represented Fulton County in connection with this action.
- Attorneys Lambert and Carrol[l] are being paid by a source other than Fulton County for the legal services they have provided and are providing to Fulton County in connection with this action.

(Secretary’s Application for Contempt of Master’s Order, Proposed Order.)

Application for Injunction in the Supreme Court” (Third Request for Injunctive Relief).<sup>24</sup> Therein, Fulton County asserted, for the first time, that the Commissioners could not appear at the November 9, 2022 hearing, as it would impede them from performing their official duties as required by the Election Code. Fulton County requested the Special Master immediately suspend all proceedings, issue a ruling that Fulton County Commissioners not be impeded from performing their election-related duties, and grant a stay pending a forthcoming application to the Supreme Court.<sup>25</sup>

*Special Master’s November 8, 2022 Order*

By order dated November 8, 2022, the Special Master denied Fulton County’s request to suspend proceedings. The Special Master explained that the hearing was scheduled on November 9, 2022, at Attorney Carroll’s suggestion, to accommodate **Attorney Carroll’s** vacation schedule, and at **no** time until the eve of the hearing had counsel ever raised the prospect of the Commissioners’ official duties interfering with their attendance at a hearing on that date. Accordingly, the Special Master convened the hearing as scheduled on November 9, 2022.

**B. Evidentiary Hearing**

*Preliminary Matters - Motion to Appear pro hac vice (11/9/2022)*

Early on the morning of November 9, 2022, the first day of the Special Master’s hearing, Attorney Carroll filed a motion before the Master requesting *pro*

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<sup>24</sup> Notably, Fulton County’s Third Request for Injunctive Relief is the **sixth** time Attorney Carroll argued a legal ruling on the scope of the Injunction Order was necessary before discovery could proceed.

<sup>25</sup> At the beginning of the November 9, 2022 evidentiary hearing, counsel for Fulton County indicated its intent to file a writ of injunction in the United States Supreme Court, which is apparently the forthcoming application referenced in its Third Request for Injunctive Relief. (11/9 Tr. 16-17.) No such writ was ever filed.

*hac vice* admission of Stefanie Lambert Junttila, Esquire, of the Law Office of Stefanie L. Lambert PLLC (Attorney Lambert) (*See* Motion to Appear *pro hac vice*, Consent to Designation, and Request to Electronically Receive Notices of Electronic Filing (Motion to Appear *pro hac vice*.) Attorney Lambert, who is a licensed attorney in Michigan, was present in court along with Attorney Carroll at the beginning of the hearing that morning. (11/9 Tr. 2, 5.) The Secretary opposed the Motion to Appear *pro hac vice*, on several bases: It was not filed at least three days prior to Attorney Lambert’s purported appearance in these proceedings required by Pennsylvania Bar Admission Rule 301(b)(2)(ii);<sup>26</sup> it did not contain a representation regarding pending disciplinary proceedings against Attorney Lambert, as required by Pennsylvania Rule of Civil Procedure 1012.1(c)(2), and the Secretary believed there are such proceedings pending against her in Michigan;<sup>27</sup> and there was good cause to deny the motion pursuant to Pennsylvania Rule of Civil Procedure 1012.1(e).<sup>28</sup> (11/9 Tr. 7-12.)

After discussion on the record, the Special Master declined to grant the Motion to Appear *pro hac vice*, for two reasons. First, the motion was not timely

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<sup>26</sup> It provides:

The motion for the applicant’s candidacy for *pro hac vice* admission shall be filed by the sponsor with the clerk of the court in which or with the magisterial district judge before which the case is pending at least three days prior to the appearance before the court or magisterial district judge by the attorney, barrister, or advocate seeking *pro hac vice* admission . . . .

Pa.B.A.R. 301(b)(2)(ii).

<sup>27</sup> It provides, in relevant part: “[The *pro hac vice*] candidate shall state whether he or she . . . is subject to any disciplinary proceedings. The candidate shall provide a description of the circumstances under which the disciplinary action has been brought . . . .” Pa.R.Civ.P. 1012.1(c)(1),(2).

<sup>28</sup> Pa.R.Civ.P. 1012.1(e) directs that “[t]he court shall grant the motion unless the court, in its discretion, finds good cause for denial,” and an official note lists various grounds for such good cause.

filed at least three days before Attorney Lambert's appearance as the Bar Admission Rules require. (*Id.* at 27-28.) The Master noted that Attorney Lambert has admittedly been representing Fulton County since April 2022, and had not given a good reason for the late filing of the motion. (*Id.*) This functionally deprived the Special Master, and the Court's Office of the Prothonotary, of the time necessary to evaluate the motion's completeness and compliance with applicable rules. Second, the Special Master noted that the Motion to Appear *pro hac vice* was substantively deficient because it lacked a fee payment certification from the IOLTA Board, which is required by Pennsylvania Rule of Civil Procedure 1012.1(b)(1). (*Id.* at 28.)

Though declining to grant the Motion to Appear *pro hac vice* at that time, the Special Master did permit Attorney Lambert to remain in the courtroom in a limited advisory capacity, as follows:

I will allow [Attorney Lambert] to participate in an advisory capacity which will enable [her] to sit at counsel table. And although [she] wouldn't be able to question witnesses or speak to the court, [she] could assist Attorney Carroll, confer with him and assist him in his representation of the parties here.

(*Id.* at 28-29.) Attorney Lambert then requested the ability to cure any substantive deficiencies in the motion, and the Special Master reiterated that she must, at minimum, provide the required fee payment certification, and that she would remain in an advisory capacity only in the meantime. (*Id.* at 29.)

Attorney Lambert remained at counsel table in an advisory capacity throughout the hearing on November 9, 2022. On the morning of November 10, 2022, Attorney Carroll provided the Special Master with an updated certification from the Michigan State Bar showing Attorney Lambert in good standing, but did not provide the requisite IOLTA Board fee payment certification. (11/10 Tr. 6-8.)

The Secretary renewed her objection to the Motion to Appear *pro hac vice*, and the Master determined to continue proceeding with Attorney Lambert in an advisory capacity only, pending correction of the deficiencies in, and further review of, the motion. (*Id.*)

Later that same day, the Special Master noted that the Motion to Appear *pro hac vice* contained unsigned verifications, both from the sponsoring attorney and from Attorney Lambert, and directed Attorney Carroll to file an amended motion for *pro hac vice* admission curing those and the other outstanding deficiencies. (11/10 Tr. 310.) Attorney Lambert did not attend, appear, or participate in any capacity at the final day of the hearing on November 14, 2022.

As of the date of this Report, no amended motion for admission *pro hac vice* has been filed in these proceedings. Had a conforming amended motion been filed, the Special Master would have addressed it in due course. Absent that, the Special Master permitted Attorney Lambert to assist in a limited, advisory role as discussed above, for two important reasons. First, had a timely and complete motion been filed, the Special Master would have considered it in due course and could have exercised her discretion to admit Attorney Lambert *pro hac vice*. To bar Attorney Lambert from any form of participation pending an amended motion would, thus, have exalted form over substance.

Moreover, given the paramount importance of due process in these contempt proceedings, as underscored by the Supreme Court's October 21, 2022 Order appointing the Special Master, the Master concluded that limited advisory participation by Attorney Lambert was necessary to afford Fulton County representation by their chosen counsel. Attorney Carroll appeared to benefit from consulting Attorney Lambert, who has been familiar with this matter since April

2022, just as the Secretary was represented by multiple attorneys of record who consulted one another.<sup>29</sup> To require Attorney Carroll to go it alone in these fast-paced proceedings could have seriously prejudiced Fulton County. The Master acted accordingly to allow Fulton County to receive their desired representation, while also holding Attorney Carroll ultimately responsible for that representation.

Finally, the Master notes that this approach is not without historical precedent in the Courts of the Commonwealth. *See Commonwealth v. Stovall*, 166 A.3d 1227 (per curiam) (Pa. 2017) (denying petition for allowance of appeal from Pennsylvania Superior Court decision affirming judgment of sentence, after trial court refused to grant defendant's counsel's noncompliant *pro hac vice* application, but instead allowed counsel to participate in defense at trial in an advisory capacity).

#### *Three-Day Hearing*

The Special Master held a three-day hearing,<sup>30</sup> at which the Secretary presented four witnesses, and documentary and demonstrative evidence. In support of her Application for Contempt & Sanctions, the Secretary presented the testimony of Commissioner Ulsh, Commissioner Bunch, and Commissioner Shives. Commissioners Ulsh and Shives testified before the Special Master in person on November 9, 2022. Due to a medical emergency, Commissioner Bunch testified before the Special Master via WebEx video conferencing on November 14, 2022. In addition to the Commissioners' testimony, the Secretary also offered the expert

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<sup>29</sup> The Master recognizes that, during the hearing, the Secretary stated a concern on the record that Attorney Lambert's involvement in the proceedings had gone beyond the limited advisory role the Master authorized. (*See* 11/10 Tr. 22-23.) In so arguing, the Secretary twice stated that she was not requesting any ruling as to Attorney Lambert's participation, (*id.*), and she did not request any such ruling by the Master at any other time.

<sup>30</sup> The hearing took place on November 9, 10, and 14, 2022. The hearing convened in the Pennsylvania Judicial Center, Harrisburg, on November 9 and 10, 2022, and in the Widener Building, Philadelphia, on November 14, 2022.

testimony of Ryan Macias, sole proprietor of RSM Election Solutions, a subject matter consulting firm that works in critical election infrastructure, election technology, and election security within the United States and abroad. (11/10 Tr. 27:23-28:22.) Mr. Macias was offered as an expert in the fields of election technology and election security. (11/10 Tr. 70:21-72:5.)

After the hearing, the parties filed written submissions with proposed findings of fact and proposed recommendations for each specific request for relief sought by the Secretary in the Application for Contempt & Sanctions and addressing outstanding evidentiary issues. Based on these witnesses' testimony and the documentary and demonstrative evidence admitted, the Special Master proposes the following findings of fact.

## **V. PROPOSED FINDINGS OF FACT**

During the evidentiary hearing, the Special Master had the opportunity to assess the credibility of the witnesses during the presentation of their testimonies. Based on that assessment, the Special Master specifically concludes that Commissioner Shives and Ryan Macias presented credible testimony to the Special Master. The Special Master also concludes that to the extent Commissioner Ulsh and Commissioner Bunch responded to questions, their testimony is also deemed credible. However, as reflected in the transcripts, Commissioner Ulsh and Commissioner Bunch invoked the Fifth Amendment<sup>31</sup> privilege against self-incrimination in response to the vast majority of questions asked of them on direct examination. Accordingly, the Special Master neither credits nor discredits those portions of Commissioner Ulsh's and Commissioner Bunch's testimony, but draws

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<sup>31</sup> The Fifth Amendment to the United States Constitution declares, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

reasonable adverse inferences based on their assertions of the privilege, in accordance with the law of this Commonwealth. *See Harmon v. Mifflin Sch. Dist.*, 713 A.2d 620, 623 (Pa. 1998); *Sawko v. Sawko*, 625 A.2d 692, 695 (Pa. Super 1993); *Crozer-Chester Medical Center v. May*, 531 A.2d 2, 6 (Pa. Super. 1987); *City of Philadelphia v. Kenny*, 369 A.2d 1343, 1349 (Pa. Cmwlth. 1977), *cert. denied*, 434 U.S. 923 (1977) (collecting cases).<sup>32</sup> In accord with these threshold determinations, the Special Master proposes the following findings of fact:

1. Fulton County is a County of the Eighth Class organized and existing under the laws of the Commonwealth of Pennsylvania with its administrative offices located in McConnellsburg, Fulton County. (Sec. Ex. 3 ¶ 5.)

2. Fulton County Board of Elections (the “Board of Elections”) has jurisdiction over the conduct of elections in Fulton County, in accordance with the Pennsylvania Election Code. 25 P.S. § 2641(a).

3. The Fulton County Board of Elections consists of the three Fulton County Commissioners. 25 P.S. § 2641(b).

4. The Board of Elections acts according to a majority vote of all of its members. (11/9 Tr. 46:22-25 (Ulsh); 214:7-11 (Shives); 11/14 Tr. 13:25-14:1-4 (Bunch)); 25 P.S. § 2643(a) (“All actions of [the Board of Elections] **shall be** decided by a majority vote of **all** the members.” (emphasis added).)

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<sup>32</sup> The Special Master is cognizant that the adverse inference from failure to testify cannot, on its own, carry a party’s burden in a civil case. *See Cruz v. Workers’ Comp. Appeal Bd. (Kennett Square Specialties)*, 99 A.3d 397, 42 (Pa. 2014) (“[T]he inference to be drawn from a party’s failure to testify serves to corroborate the evidence produced by the opposing party . . . . [W]e have never suggested that a party could satisfy its burden of proof in a civil cause solely through reliance on the defendant’s failure to testify.”); *see also Petrone v. Unemployment Comp. Bd. of Rev.*, 557 A.2d 1118, 1121 (Pa. Cmwlth. 1989) (same). To the extent the following proposed findings of fact cite Commissioner Ulsh’s and Commissioner Bunch’s testimonies invoking the Fifth Amendment, those proposed findings of fact are separately supported by the credited testimony of other witnesses and/or documentary evidence of record.

5. Stuart L. Ulsh is the Chairman of the Fulton County Board of Commissioners and of the Board of Elections. (Sec. Ex. 3 ¶ 7; 11/9 Tr. 45:23-46:2 (Ulsh); 11/14 Tr. 14:5-9 (Bunch).)

6. Commissioner Ulsh has held those positions for seven years. (11/9 Tr. 46:10-21 (Ulsh).)

7. Randy H. Bunch is the Vice-Chairman of the Fulton County Board of Commissioners and of the Board of Elections. (Sec. Ex. 3 ¶ 8; *see* 11/9 Tr. 47:2-9 (Ulsh); 11/9 Tr. 214:12-16 (Shives); 11/14 Tr. 13:14-24 (Bunch).)

8. Paula J. Shives is the minority representative of the Fulton County Board of Commissioners and the Board of Elections. (11/9 Tr. 213:18-22 (Shives); 11/9 Tr. 47:2-9 (Ulsh); 11/14 Tr. 14:5-9 (Bunch).)

9. Commissioner Ulsh, Commissioner Bunch, and Commissioner Shives have served as the County Commissioners and the members of the Board of Elections at all times since the November 2020 election. (11/9 Tr. 47:10-14 (Ulsh); 11/9 Tr. 213:23-214:20 (Shives); 11/14 Tr. 14:10-23 (Bunch).)

10. Pursuant to a Voting System and Managed Services Agreement by and between Dominion and Fulton County, dated April 1, 2019 (the “Dominion Lease Agreement”), Fulton County leased Voting Equipment, and was granted a license to use certain electronic voting software, from Dominion. (Sec. Ex. 12.1; 11/9 Tr. at 47:21-23 (Ulsh); 11/9 Tr. 230:8-16 (Shives).) That electronic voting machine hardware and software are components of the election infrastructure that the United States Department of Homeland Security has designated as “critical infrastructure,” meaning that “the incapacity or destruction” of that infrastructure “would have a debilitating impact on [national] security.” 42 U.S.C. § 5195c(e); (11/10 Tr. 29:7-31:14 (Macias).)

11. The Dominion Lease Agreement expressly prohibits Fulton County from “[t]ransfer[ring] or copy[ing] onto any other storage device or hardware or otherwise copy[ing] the Software in whole or in part except for purposes of system backup.” (Sec. Ex. 12.1, Ex. B § 5.1.)

12. In accordance with that prohibition, Section 13.2 of the Dominion Lease Agreement requires Fulton County to keep Dominion’s Confidential Information (including the software) confidential within its organization, “unless disclosure is made in response to, or because of, an obligation to any federal, state, or local governmental agency or court with appropriate jurisdiction, or to any person properly seeking discovery before any such agency or court.” (Sec. Ex. 12.1 § 13.2.)

13. Section 13.3 of the Dominion Lease Agreement further provides that, in the event that a request is made by a governmental entity, Fulton County is required to “notify Dominion of such request and the date the information will be released to the requestor unless Dominion obtains a court order enjoining such disclosure. If Dominion fails to obtain such court order enjoining such disclosure, [Fulton County] will release the requested information on the date specified.” (Sec. Ex. 12.1 § 13.3.)

14. Fulton County used certain Dominion Voting Equipment acquired pursuant to the Dominion Lease Agreement for the conduct of the November 2020 General Election. (Sec. Ex. 3 ¶¶ 20-21; 11/9 Tr. 61:23-62:2 (Ulsh); 230:8-21 (Shives).)

15. Fulton County has not used the Dominion Voting Equipment used in the 2020 General Election for the conduct of any subsequent elections. (11/9 Tr. 233:19-234:2 (Shives); 62:3-15 (Ulsh).)

16. Fulton County does not intend to use the Dominion Voting Equipment here at issue, or other Dominion voting machines, in future elections. (11/9 Tr.

235:4-18 (Shives); Fulton County’s Answer to Application for Contempt & Sanctions at 2, 10 (Oct. 26, 2022); Fulton County’s Memorandum of Law at 6 (Oct. 26, 2022); Fulton County’s Emergency Application for Preliminary Injunction at 25-26 (Nov. 1, 2022).)

17. Fulton County, the Fulton County Board of Elections, Commissioner Ulsh, and Commissioner Bunch have filed suit against Dominion, premised on Dominion’s alleged breach of the Dominion Lease Agreement with respect to the Voting Equipment used in the 2020 General Election. (Sec. Ex. 27).)

18. On September 14, 2021, the Board of Elections voted to enter into a lease-to-own agreement to use Hart electronic voting equipment for future elections (the “Hart Agreement”). (Sec. Ex. 12.8 at 2; 11/9 Tr. 234:3-25 (Shives); 77:4-78:3 (Ulsh).)

19. The Board of Elections ultimately exercised the option to purchase the Hart voting equipment pursuant to the Hart Agreement. (11/9 Tr. 235:10-14 (Shives); 78:4-7 (Ulsh).)

20. Following the November 2020 General Election, Commissioners Ulsh and Bunch permitted Wake TSI to inspect and copy components of Fulton County’s Dominion Voting Equipment (the “Wake TSI Inspection”). (Sec. Ex. 3 ¶ 29; Sec. Ex. 2 (Fulton County Director of Elections Letter to Acting Secretary of the Commonwealth (May 4, 2021)); 11/9 Tr. 78:8-14, 89:15-20 (Ulsh); 235:19-23 (Shives); 11/14 Tr. 25:13-18, 27:12-16 (Bunch).)

21. As part of the “inspection,” unidentified “Wake [TSI] employees took backups of key data on the [Dominion Voting Equipment], includ[ing] the election database, results files, and Windows system logs. In addition, Wake TSI used a system imaging tool to take complete hard drive images of these computers to be

able to perform further examination. They also obtained complete images of two USB thumb drives that had been used on election night to transfer results files from the election computers to the computer [Fulton County] used to upload results to the SURE portal.” (Sec. Ex. 2.)

22. While the Board of Elections discussed the potential for some sort of an inspection, there was never a vote to allow the Wake TSI Inspection to occur. (11/9 Tr. 235:19-236:22, 240:22-241:2 (Shives); 129:5-10 (Ulsh); 11/14 Tr. 30:5-9 (Bunch).)

23. To the contrary, Commissioners Ulsh and Bunch authorized the Wake TSI Inspection as individuals. (11/9 Tr. 235:19-236:22 (Shives); 78:8-14 (Ulsh); 11/14 Tr. 30:5-9 (Bunch).)

24. Commissioner Shives did not learn that the Wake TSI Inspection had occurred until after the inspection was complete. (11/9 Tr. 236:23-237:6 (Shives); 127:2-5 (Ulsh); 11/14 Tr. 30:10-15 (Bunch).)

25. Commissioner Shives only learned that the Wake TSI Inspection had occurred as a result of a December 31, 2021 text message from the Fulton County Director of Elections, Patti Hess, to a group including, *inter alia*, Commissioners Ulsh, Bunch, and Shives. (Sec. Ex. 38; 11/9 Tr. 242:4-246:3, 247:23-248:17 (Shives); 116:19-122:18, 126:18-129:21 (Ulsh).)

26. The thread of text messages confirms that Commissioner Shives did not know about the inspection before it occurred, that Commissioner Bunch was present for the Wake TSI Inspection, that there was no vote on the inspection, and Senator Mastriano directed all counties to perform the inspection or be subpoenaed “to prove votes.” (Sec. Ex. 38.; *see* 11/9 Tr. 242:4-246:3, 247:23-248:17 (Shives).)

27. Fulton County has never entered into any contract with Wake TSI. (11/9

Tr. 241:20-22; 250:22-251:4 (Shives); 11/14 Tr. 31:13-15 (Bunch).)

28. There was no public notice, or notice to the Secretary or to Dominion, of the Wake TSI Inspection before it was conducted. (11/9 Tr. 241:3-11 (Shives); 113:19-22, 130:6-10 (Ulsh); 11/14 Tr. 30:16-20, 35:24-36:10 (Bunch).) This is supported by Commissioner Shives' testimony. (*See Proposed Findings of Fact (PFF) ¶¶ 27-28.*)

29. It is undisputed that Wake TSI is not and has never been a federally-accredited Voting System Test Lab or a National Laboratory officially utilized by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency. (11/10 Tr. 73:10-12 (Macias); 11/9 Tr. 155:14-16 (Ulsh); 11/14 Tr. 41:11-14, 51:22-52:19 (Bunch).)

30. It is undisputed that Commissioners Ulsh and Bunch knew that Wake TSI is not and has never been a federally-accredited Voting System Test Lab or a National Laboratory officially utilized by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency. (11/10 Tr. 73:10-12 (Macias); 11/9 Tr. 155:14-16 (Ulsh); 11/14 Tr. 41:11-14, 51:22-52:19 (Bunch).)

31. On July 8, 2021, the Secretary issued Directive 1 of 2021 (Directive 1). (Sec. Ex. 39; 11/9 Tr. 134:9-20 (Ulsh); 255:24-256:8 (Shives); 11/14 Tr. 36:17-25 (Bunch).)

32. No later than the end of July 2021, Commissioners Ulsh, Bunch, and Shives understood that the Secretary's position was that counties are not permitted to allow third parties to image components of their electronic voting systems. (11/9 Tr. 134:9-20, 135:23-136:5 (Ulsh); 256:9-20 (Shives); 11/14 Tr. 37:2-17 (Bunch).)

33. In fact, the Secretary's position was discussed at meetings of the Commissioners. (11/9 Tr. 256:21-257:2 (Shives).)

34. Commissioners Ulsh and Bunch opposed the Secretary’s prohibition on the future use of the Dominion Voting Equipment inspected by Wake TSI, as well as her decision to issue Directive 1. (11/9 Tr. 257:3-7 (Shives); 137:17-22, 138:8-14 (Ulsh); 11/14 Tr. 37:18-38:5 (Bunch).)

35. On August 18, 2021, Fulton County, the Board of Elections, and Commissioners Ulsh and Bunch, in their official **and individual** capacities, filed this lawsuit against the Secretary, challenging the Secretary’s authority to prohibit the future use of Fulton County’s Dominion Voting Equipment and the Secretary’s authority to issue Directive 1. (Sec. Ex. 3; 11/9 Tr. 257:8-13 (Shives); 138:15-23 (Ulsh); 11/14 Tr. 38:6-10 (Bunch).)

36. In December 2021, Fulton County provided public notice that they intended to permit a third-party entity, an entity called Envoy Sage, LLC, to access Fulton County’s Dominion Voting Equipment and to copy, or image, all of the data stored thereon (the “Proposed Envoy Sage Inspection”). (11/9 Tr. 257:17-23 (Shives); 139:24- 140:6 (Ulsh); 11/14 Tr. 38:11-21 (Bunch).)

37. It is undisputed that Envoy Sage is not and has never been a federally-accredited Voting System Test Lab or a National Laboratory officially utilized by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency. (11/10 Tr. 73:16-18 (Macias); 11/9 Tr. 155:10-13 (Ulsh); 11/14 Tr. 52:5-9 (Bunch).)

38. It is undisputed that Commissioners Ulsh and Bunch knew that Envoy Sage is not and has never been a federally-accredited Voting System Test Lab or a National Laboratory officially utilized by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency. (11/10 Tr. 73:16-18 (Macias); 11/9 Tr. 155:10-13 (Ulsh); 11/14 Tr. 52:5-9 (Bunch).)

39. Upon learning of Fulton County’s plan, both the Secretary and Dominion objected to any third-party inspection of Fulton County’s Dominion Voting Equipment. (11/9 Tr. 257:24-258:3 (Shives); 144:15-23 (Ulsh).)

40. Both the Secretary and Dominion took legal action to try to prevent Fulton County from allowing Envoy Sage—or any other third-party—from accessing or imaging Fulton County’s Dominion Voting Equipment. (11/9 Tr. 258:4- 10 (Shives); 11/14 Tr. 42:5-10 (Bunch).)

41. Specifically, the Secretary filed an Emergency Application for an Order Prohibiting the Spoliation of Key Evidence Scheduled to Occur on December 22, 2021 (the “Application to Prevent Spoliation”), which sought an order preventing Fulton County “from providing any third party (other than Dominion) with access to [Fulton County’s Dominion Voting Equipment], including but not limited to allowing the [Proposed Envoy Sage Inspection],” and further asked the Commonwealth Court to “take all necessary steps . . . to preserve those machines, and any data stored thereon, in a secured and unaltered state.” (Sec. Ex. 8, at 17.)

42. The Application to Prevent Spoliation explained that the Proposed Envoy Sage Inspection “grossly disregarded [Fulton County’s] obligations as litigants to preserve evidence.” (*Id.* at 10.)

43. In this regard, the Application pointed out that the proposed inspection risked altering the software and data on Fulton County’s voting system, and explained that merely connecting a storage device to electronic equipment may substantially alter—intentionally or unintentionally—the condition of the software and data on that equipment. (*Id.* at 13-15.)

44. The Secretary cautioned that “once such data is altered, it may be difficult, if not impossible, to trace things back to determine the *status quo ante*, *i.e.*,

to see what data, if any, was altered, and how.” (*Id.*)

45. In support of the Secretary’s position, the Application to Prevent Spoliation attached an affidavit of Ryan Macias, an expert in the field of election technology and security. (Sec. Ex. 8 at 83-89 of 104.)

46. As Mr. Macias explained in his affidavit, and again in his testimony before the Special Master, providing third parties with access to Fulton County’s Voting Equipment presents a grave risk to maintaining the integrity and security of the equipment and the data residing therein. (Sec. Ex. 7 ¶¶ 7-13 (Dec. 17, 2021 Affidavit of Ryan Macias); 11/10 Tr. 83:6-24 (Macias).)

47. As Mr. Macias further explained, the Proposed Envoy Sage Inspection presented this risk even though there was a set of protocols—albeit inadequate ones—that Envoy Sage was meant to follow, and even though the Secretary and her experts were to be permitted to observe the inspection. (*Id.*)

48. The risks Mr. Macias identified were not unique to an inspection performed by Envoy Sage; rather, they were applicable to potential third-party inspections by other parties as well. (11/10 Tr. 85:4-14 (Macias).)

49. On January 13, 2022, facing an inspection scheduled to proceed at 1:00 p.m. the next day, the Secretary filed a Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding. (Sec. Ex. 14.)

50. The Renewed Application again argued that the inspection “threatened to spoliage key evidence in the case.” (Sec. Ex. 14, at 2.) The Secretary again asked for an order “enjoin[ing] the [proposed] inspection from proceeding.” (*Id.* at 20.)

51. Commissioners Ulsh, Bunch, and Shives were aware of the Secretary’s Application to Prevent Spoliation and Renewed Application, as well as the contents

thereof, at or around the time they were filed. (11/9 Tr. 258:21-259:15 (Shives); 154:20-24, 156:23-157:5 (Ulsh); 11/14 Tr. 39:21-24, 42:25-43:7, 43:17-20 (Bunch).)

52. By January 13, 2022, at the latest, Fulton County was aware that it remained the Secretary's position that no inspection of Fulton County's Dominion Voting Equipment should go forward except as party discovery in this case subject to a strict protective order preventing disclosure to third parties. (11/9 Tr. 258:11-17, 259:12-15 (Shives); 158:18-159:5 (Ulsh); 11/14 Tr. 38:22-39:3, 47:20-48:11 (Bunch).)

53. Dominion also opposed the Proposed Envoy Sage Inspection as violative of their Lease Agreement with Fulton County. (Sec. Ex. 12.06 (Letter from Counsel for Dominion to Counsel for Fulton County (Dec. 17, 2021)); 11/14 Tr. 41:5-42:4, 42:5-10 (Bunch).)

54. On January 3, 2022, Dominion moved to intervene in this action "for the limited purpose of securing a protective order to enforce the terms of [the Dominion Lease Agreement]" and block any attempts by Fulton County to allow a third-party inspection in violation of those terms. (Sec. Ex. 10.)

55. Dominion took the position that Fulton County was prohibited from allowing third parties—or even Fulton County itself—to copy or transfer any of the software found on Fulton County's Dominion Voting Equipment, except for purposes of system backup. (*See id.*; 11/9 Tr. 258:11-16 (Shives); 153:18-154:3 (Ulsh); 11/14 Tr. 41:5-42:4 (Bunch).)

56. Indeed, Dominion maintained that "any inspection of its equipment and software in possession of the County be conducted by a federally-accredited Voting System Test Lab or any National Laboratory officially utilized by the U.S.

Department of Homeland Security’s Cybersecurity and Infrastructure Agency.” (Sec. Ex. 10 ¶ 13.)

57. Commissioners Ulsh, Bunch, and Shives were aware of Dominion’s Motion to Intervene, and the arguments raised therein, at or around the time Dominion’s motion to intervene was filed. (11/9 Tr. 257:24-259:15 (Shives); 155:5-9 (Ulsh); 11/14 Tr. 42:21-24 (Bunch).)

58. On January 10, 2022, the Commonwealth Court entered an Order denying Dominion’s motion to intervene. (Cmwlth. Ct. Order, 1/10/2022.)

59. In the morning of January 14, 2022, with the Proposed Envoy Sage Inspection set to commence later that day, the Commonwealth Court issued an order denying the Secretary’s applications to enjoin that inspection. (Cmwlth. Ct. Order, 1/14/2022.)

60. The Proposed Envoy Sage Inspection was thus set to go forward, with Commissioners Ulsh, Bunch, and Shives in attendance. (11/9 Tr. 159:17-23 (Ulsh); 11/9 Tr. 261:13-263:8 (Shives); 11/14 Tr. 44:8-17 (Bunch).)

61. Following the Commonwealth Court’s Order denying the Secretary’s applications to block the inspection, the Secretary immediately appealed to the Pennsylvania Supreme Court and sought an emergency injunction from that Court to enjoin any third-party inspection of the Dominion Voting Equipment in Fulton County’s custody until the Court resolved the Secretary’s appeal. (Sec. Ex. 15.)

62. In support of her application, the Secretary pointed out that the third-party inspection would likely alter the data on Fulton County’s electronic Voting Equipment and/or make it impossible to determine whether or how the data on that equipment had been altered—thus spoliating important evidence probative of what Wake TSI had done, citing the December 17, 2021 Affidavit of Ryan Macias in

support. (*Id.*)

63. As the Secretary noted, “the need for a preservation order ar[ose] out of the substantial risk that [the] inspection w[ould] irretrievably alter the state of the electronic voting system” because “**the performance of th[e] inspection itself** threaten[ed] to alter the condition of key evidence in this case, *i.e.*, the voting machines and the data stored thereon.” (Sec. Ex. 18, at 26 (Reply in Support of Respondent/Appellant’s Emergency Application to Stay Third-Party Inspection of Electronic Voting System (Jan. 19, 2022) (emphasis in original)).)

64. Explaining that an immediate injunction was needed to avoid irreparable harm, the Secretary noted that what she sought in this appeal was “reversal of the Commonwealth Court’s denial of her applications to ... prohibit **any third-party inspection** of Fulton County’s electronic voting system from going forward.” (*Id.* (emphasis added).)

65. Moments before the inspection was set to begin, Justice Wecht of the Pennsylvania Supreme Court issued the Single-Justice Order granting the Secretary’s application on a temporary basis, pending consideration by the full Court. (Sec. Ex. 16.)

66. Commissioners Ulsh, Bunch, and Shives were present together in a room at the Fulton County Courthouse when a representative of the Pennsylvania Supreme Court called to announce the Single-Justice Order. Commissioners Ulsh, Bunch, and Shives learned of the Single-Justice Order at or around the time it was issued. (11/9 Tr. 262:6-263:8 (Shives); 161:5-7, 15-16 (Ulsh); 11/14 Tr. 45:17-46:3, 46:10-13 (Bunch).)

67. Following the Single-Justice Order, Fulton County—specifically, Commissioners Ulsh and Bunch—opposed the Secretary’s application for an

injunction pending appeal and filed a brief arguing against it. (Sec. Ex. 17; 11/9 Tr.264:5-17 (Shives); 161:17:2 (Ulsh).)

68. On January 27, 2022, the full Supreme Court entered the Injunction Order granting the Secretary's Application and stating that "[t]he Single-Justice Order entered on January 14, 2022, staying the lower court's ruling and enjoining the proposed third-party inspection of Fulton County's electronic [V]oting [E]quipment, shall remain in effect pending the disposition of the above-captioned appeal." (Sec. Ex. 19.)

69. Commissioners Ulsh, Bunch, and Shives learned of the Injunction Order at or around the time it was issued. (11/9 Tr. 267:5-15 (Shives); 164:19-22 (Ulsh); 11/14 Tr. 49:6-9 (Bunch).)

70. Commissioners Ulsh, Bunch, and Shives understood that the Injunction was to remain in effect through the pendency of the Secretary's appeal. At all relevant times, all three Commissioners were aware that the Secretary's appeal remained pending during the entire period from January 27, 2022, through the date of the evidentiary hearing. (11/9 Tr. 267:5-15, 268:6-15 (Shives); 165:10-166:6 (Ulsh); 11/14 Tr. 49:10-50:9, 54:8-13 (Bunch).)

71. On January 19, 2022, Dominion appealed the Commonwealth Court's single-judge January 10, 2022 Order to the Supreme Court. (Sec. Ex. 20.)

72. On March 21, 2022, the Supreme Court reversed the Commonwealth Court's single-judge Order and permitted Dominion to intervene in this case to seek a protective order. (Sec. Ex. 46.)

73. Commissioners Ulsh, Bunch, and Shives were aware of Dominion's Appeal, including the arguments raised therein, at or around the time it was filed. (11/9 Tr. 268:16-269:9 (Shives); 168:5-169:3 (Ulsh); 11/14 Tr. 50:20-51:21, 52:20-

53:12 (Bunch).)

74. On April 19, 2022, the law firm that had represented Fulton County from the inception of this case filed a Praecipe withdrawing its appearance. (Praecipe for Withdrawal of Appearance, 1/19/2022).)

75. As reflected in publicly posted meeting minutes, on April 12, 2022, the Board of Elections had decided “to remove [that firm] as special counsel for the County of Fulton regarding election matters.” (Sec. Ex. 22; 11/9 Tr. 282:4-22, 283:17-19 (Shives); 188:5-25 (Ulsh); 11/14 Tr. 63:11-18 (Bunch).)

76. During the same meeting, the Commissioners determined, by a 2-1 vote, “to appoint the Law office [sic] of Stefanie L. Lambert PLLC and Attorney Thomas J. Carroll as special counsel to represent the County of Fulton relating to past election matters and election equipment with legal services being pro bono.” (Sec. Ex. 22; 11/9 Tr. 283:20-284:19 (Shives); 190:10-14, 191:5-192:19 (Ulsh); 11/14 Tr. 63:19-24 (Bunch).)

77. Commissioners Ulsh and Bunch voted in favor of engaging Lambert and Carroll; Commissioner Shives opposed that decision. (*Id.*)

78. Fulton County is not paying Attorneys Lambert and Carroll for their legal services in connection with this matter. (11/9 Tr. 285:21-286:7 (Shives); 11/14 Tr. 64:16-65:7 (Bunch).)

79. Stefanie L. Lambert, who has also gone by the names Stefanie Lynn Junttila and Stefanie Lambert Junttila, was sanctioned by the federal district court for her actions in *King v. Whitmer*, No. 20-13134 (E.D. Mich.). (Sec. Ex. 4, at 10, 26 n.11, 93 n.77, 107 n.110.)<sup>33</sup>

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<sup>33</sup> When the Special Master was considering the Motion to Appear *pro hac vice*, Attorney Lambert represented to the Special Master that the sanctions against her in *King v. Whitmer* are currently on appeal.

80. In addition to imposing sanctions, the federal court sent a copy of its decision to the Michigan Attorney Grievance Commission (Attorney Lambert is a member of the Michigan bar), referring Attorney Lambert, among other attorneys representing the plaintiffs in that case, “for investigation and possible suspension or disbarment.” (*Id.* at 110.)

81. Separately, the Governor, Attorney General, and Secretary of State of Michigan filed a joint disciplinary grievance against Attorney Lambert, seeking her disbarment. (Sec. Ex. 40.)

82. On September 21, 2022, Fulton County, represented by Attorney Carroll, filed the Fulton County Complaint. (Sec. Ex. 27.)

83. Attorney Carroll signed and verified the Complaint on September 20, 2022. (*Id.* at pp. 27-28.)

84. The Fulton County Complaint referred to the activities of an entity called Speckin, as detailed in Speckin’s report (the “Speckin Report”), a copy of which was attached to the Fulton County Complaint. (Sec. Exs. 26, 27.)

85. As stated in the Speckin Report, which is dated September 15, 2022, “[a] total of six hard drives were tendered for copying and analysis.” (Ex. 26 at 1; 11/9 Tr. 269:23-270:4 (Shives); 180:24-181:16 (Ulsh); 11/14 Tr. 53:13-18, 54:14- 18, 61:2-4 (Bunch).)

86. The Speckin Report indicated that “[t]he images of the drives that are the subject of this report were created on July 13-14, 2022.” (Ex. 26 at 1.) The Speckin Report further indicated that “[t]he hard drives from the computers were removed and connected them [sic] to a Forensic workstation.” (*Id.* at 2; 11/9 Tr. 269:23-270:4 (Shives); 180:24-181:16 (Ulsh); 11/14 Tr. 61:2-4. (Bunch).)

87. Speckin proceeded to copy five drives “during [Speckin’s] time onsite

in Pennsylvania.” (Sec. Ex. 26 at 1; 11/9 Tr. 269:23-270:4 (Shives); 180:24-181:16 (Ulsh); 11/14 Tr. 61:2-4 (Bunch).)

88. The “forensic image of each drive was saved on its own new unused Western Digital 4TB USB hard drive. This allowed for a later duplication and examination of the evidence.” (Sec Ex. 26 at 1; 11/9 Tr. 269:23-270:4 (Shives); 180:24-181:16 (Ulsh); 11/14 Tr. 61:2-4 (Bunch).)

89. The sixth hard drive was purportedly “not operable at the time of [Speckin’s] imaging and therefore was not copied” during Speckin’s July 13-14 trip to Fulton County, though the Speckin Report notes that Speckin may “attempt[]” to image that drive “at a later time with a more time-consuming procedure.” (Sec. Ex. 26 at 1; 11/9 Tr. 269:23-270:4 (Shives); 180:24- 181:16 (Ulsh); 11/14 Tr. 61:2-4 (Bunch).)

90. The voting equipment imaged as part of the Speckin Inspection was the same Dominion Voting Equipment that was used in the 2020 General Election, the same Voting Equipment that was the subject of the Wake TSI Inspection. (11/10 Tr. 101:19-102:20 (Macias); 11/9 Tr. 169:10-19 (Ulsh); 269:23-12 (Shives); 11/14 Tr. 53:19-54:3 (Bunch).)

91. Speckin is not and has never been a federally-accredited Voting System Test Lab or a National Laboratory officially utilized by the U.S. Department of Homeland Security’s Cybersecurity and Infrastructure Security Agency. (11/10 Tr. 73:22-24 (Macias); 11/9 Tr. 269:23-270:12 (Shives); 155:18-22 (Ulsh); 11/14 Tr. 52:10-19 (Bunch).)

92. Commissioners Ulsh and Bunch knew that Speckin is not and has never been a federally-accredited Voting System Test Lab or a National Laboratory officially utilized by the U.S. Department of Homeland Security’s Cybersecurity and

Infrastructure Security Agency. (11/10 Tr. 73:22-24 (Macias); 11/9 Tr. 269:23-270:12 (Shives); 155:18-22 (Ulsh); 11/14 Tr. 52:10-19 (Bunch).)

93. Speckin is a private entity that had never previously and has never since been engaged to perform any services for Fulton County and had not been directly involved in Fulton County's conduct of any elections. (11/9 Tr. 279:19-22 (Shives); 176:10-13 (Ulsh); 11/14 Tr. 59:7-10 (Bunch).)

94. It is unclear precisely how the Speckin Inspection came about, but a log retrieved from Commissioner Ulsh's desk shows that on April 12, 2022, Commissioners Ulsh and Bunch took possession of the key to the room in which Fulton County's Dominion Voting Equipment had been stored, and returned the key on August 1, 2022, shortly after the Speckin Inspection. (Sec. Ex. 47; 11/9 Tr. 274:12-276:22 (Shives); 11/14 Tr. 65:22-66:20 (Bunch); *accord* Sec. Ex. 45 (Minutes of Meeting of the Fulton County Commissioners, Oct. 25, 2022) ("Commissioner Shives asked [Director of Elections Patti] Hess if she had knowledge of how the door [for the room where Fulton County's Dominion election equipment was stored] became unlocked for the [Speckin Inspection]. Hess answered that Commissioner Ulsh and Commissioner Bunch asked for the key and since it was two commissioners asking she didn't question it.").)

95. On April 12, 2022, the same date on which Commissioners Ulsh and Bunch took possession of the key to the Voting Equipment room, the Commissioners voted by majority to hire Attorneys Lambert and Carroll as special counsel to represent Fulton County relating to past election matters and election equipment. (*See* PFF ¶¶ 75-77.)

96. Commissioners Ulsh and Bunch were in possession of the key to the room in which Fulton County's Dominion Voting Equipment had been stored on the

dates of the Speckin Inspection, *i.e.*, July 13-14, 2022. (*See* Sec. Ex. 45 at 2 (pagination added); 11/9 Tr. 173:9-11 (Ulsh); 11/14 Tr. 57:2-5 (Bunch).)

97. The Speckin Inspection was not the result of a vote of the Board of Elections. No such vote was ever held regarding whether to permit the Speckin Inspection. (11/9 Tr. 273:5-7 (Shives); 172:8-11 (Ulsh); 11/14 Tr. 56:6-10 (Bunch).)

98. Commissioner Shives did not learn that the Speckin Inspection had occurred until the Fulton County Complaint was filed in September of 2022. (*See* Sec. Ex. 45; 11/9 Tr. 216:14-217:14, 270:20-23, 272:11-17 (Shives); 173:3-5 (Ulsh).)

99. Commissioner Shives did not agree with the decision to allow the Speckin Inspection. (11/9 Tr. 217:15-23, 284:13-19 (Shives).)

100. Neither Fulton County nor the Board of Elections entered into a contract with Speckin Forensics, and neither Fulton County nor the Board of Elections is compensating Speckin for the work performed in relation to the Speckin Report. (11/9 Tr. 272:2-273:10 (Shives); 11/9 Tr. 175:19-25 (Ulsh); 11/14 Tr. 59:7-10 (Bunch).)

101. There was no public notice, or notice to the Secretary or to Dominion, of the Speckin Inspection before it occurred, or before September 2021. (11/9 Tr. 273:24-274:5 (Shives); 172:21-23 (Ulsh); 11/14 Tr. 56:18-22 (Bunch).)

102. Commissioners Ulsh and Bunch were present for the Speckin Inspection. (11/9 Tr. 276:8-277:18 (Shives); 180:15-21 (Ulsh); 11/14 Tr. 57:16-17 (Bunch).)

103. Commissioners Ulsh and Bunch knew that by allowing the Speckin Inspection to proceed, they would be in violation of the Supreme Court's Injunction Order. (11/9 Tr. 267:5-15 (Shives); 176:14-177:5 (Ulsh); 11/14 Tr. 59:11-16

(Bunch).)

104. The Speckin Inspection spoliated Fulton County's Dominion Voting Equipment from an evidentiary perspective—the risk of which motivated the Secretary's Emergency Application to Stay Third Party Inspection in the first instance. (*See* Sec. Ex. 15; Sec. Ex. 28 (Oct. 17, 2022 Affidavit of Ryan Macias).)

105. The Secretary's expert, Mr. Macias, was able to identify the specific pieces of Dominion Voting Equipment that were imaged as part of the Speckin Inspection, according to the Speckin Report, by comparing the service tag numbers listed in the Speckin Report to the service tag numbers Mr. Macias had previously logged during a limited visual inspection of Fulton County's Dominion Voting Equipment in October 2021. (11/10 Tr. 102:2-20, 203:10-17, 204:6-12, 205:10-206:12 (Macias).)

106. As Mr. Macias testified, the risks he previously identified with respect to the Proposed Envoy Sage Inspection were realized by the Speckin Inspection: the Speckin Inspection has made it impossible to determine with any confidence whether or to what extent the data on the equipment had been altered. (11/10 Tr. 108:19-24, 111:14-113:2 (Macias).)

107. All chain of custody has been broken, and it is now impossible to determine what the state of the Dominion Voting Equipment was immediately after the Wake TSI Inspection. That is, the Speckin Inspection rendered the Voting Equipment unreliable as evidence of what Wake TSI did, and it is impossible to reverse that effect. (11/10 Tr. 109:16-110:19, 111:9-13 (Macias).)

## VI. RECOMMENDATIONS FOR RELIEF SOUGHT

### A. Finding of Contempt

#### 1. *Scope of Injunction Order*

1. An order giving rise to contempt for its violation “must have been **definite, clear, and specific**—leaving no doubt or uncertainty in the mind of the contemnor of the prohibited conduct.” *In re Contempt of Cullen*, 849 A.2d 1207, 1210 (Pa. Super. 2004) (quoting *Lachat v. Hinchliffe*, 769 A.2d 481, 488-89 (Pa. Super. 2001)).

Because the order forming the basis for civil contempt must be strictly construed, any ambiguities or omissions in the order must be construed in favor of the defendant. In such cases, a contradictory order or an order whose specific terms have not been violated will not serve as the basis for a finding of contempt. . . . A person may not be held in contempt of court for failing to obey an order that is too vague or that cannot be enforced.

*Id.* (quoting *Lachat*, 769 A.2d at 488-89).

2. As with any other type of order, “[t]o determine whether to hold a person in contempt under an injunction, a court must assess what the injunction means,” and a contempt finding as to an injunction will “often turn upon the scope of its terms.” See F. Andrew Hessick & Michael T. Morley, *Interpreting Injunctions*, 107 VA. L. REV. 1059, 1074 n.59 & accompanying text (hereinafter Hessick & Morley) (quoting 1 CHARLES FISK BEACH, JR., COMMENTARIES ON THE LAW OF INJUNCTIONS § 261, at 272 (1895)). Unlike for other types of legal instruments, however, “virtually nothing has been written about the proper method for interpreting injunctions.” (*Id.* at 1062.)

3. The Secretary initially requested an order from the Commonwealth

Court enjoining Fulton County:

(1) from providing **any** third party (other than Dominion []) with access to the electronic voting machines in Fulton County's possession that are leased from Dominion [], including but not limited to allowing the inspection by Envoy Sage currently scheduled for December 22, 2021, pending further order of this Court, and (2) **take all necessary steps**—which may include returning the machines to Dominion [] in a manner that maintains chain of custody—to **preserve those machines**, and any data stored therein, in a secured and unaltered state pending further order of the Court.

(Emergency Application at 17 (Wherefore Clause) (emphasis added).) The Commonwealth Court denied that request, and the Secretary appealed that denial.

4. The Secretary's appeal to the Supreme Court put squarely at issue the question of whether the Dominion Voting Equipment at issue in the underlying litigation constituted evidence worthy of preservation. The Secretary's Emergency Application for Stay functioned to preserve that precise question, thus allowing the Supreme Court to consider the merits of the Secretary's appeal, and, if decided in her favor, have the ability to effectuate that disposition.

5. The applications leading up to the Injunction Order made it clear that the Secretary and Dominion sought to preserve the Dominion Voting Equipment's status quo pending rulings on appeal by the Supreme Court, both as to Dominion's right to intervene and the Secretary's request for a preservation order preventing any third-party inspections, which the Commonwealth Court denied. The Commissioners were aware of those filings, and made their own filings opposing them in the Commonwealth Court and the Supreme Court. (PFF ¶¶ 67, 69, 70, 73.)

6. As evidenced by the foregoing procedural posture, the Injunction Order is in the nature of an injunction pending appeal, as distinct from an ordinary

preliminary injunction. “An injunction pending appeal is applicable only during the period of appeal while a preliminary injunction . . . would apply through a court’s decision on the merits of a permanent injunction.” *SEIU Healthcare Pa. v. Commonwealth*, 104 A.3d 495, 498 (Pa. 2014).

7. Because ordinary preliminary injunctions can last for months or years pending a court’s disposition of the merits of a case, courts may have good reasons to construe them strictly, textually, and without resort to purpose.<sup>34</sup> However, an injunction pending appeal typically presents both a shorter duration, and also a clearer purpose: to preserve the status quo, thus allowing the appellate court to decide the issue without it becoming moot and unreviewable.

8. Because the applications that elicited the Injunction Order clearly related to the collateral discovery issue on appeal, there was no need for any party to speculate or guess about the purpose of the Injunction Order, as there might have been in a garden variety injunction case. *Cf.* *Hessick & Morley* at 1088. In granting an injunction pending appeal on such narrow issues, the Supreme Court obviously intended to preserve its ability to render an appellate decision that was meaningful. And **any** subsequent inspection of the Dominion Voting Equipment would moot out that appeal and prevent a meaningful resolution of the issues on appeal. Those issues were Dominion’s right to protect its property and the Secretary’s right to preserve evidence for her defense, which both depended entirely upon preventing further inspection of the Dominion Voting Equipment.

9. In light of this obvious purpose that was known to the parties, Fulton County’s narrow constructions of the Injunction Order are untenable.

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<sup>34</sup> *See Hessick & Morley* at 1086-88 (advocating that courts adopt a modified textualist approach to interpreting injunctions, and arguing that other methodologies, such as a focus on the purpose or intent of the injunction, would “require parties to speculate about a judge’s motivations when entering an injunction or how a judge will weigh various competing policies in interpreting it”).

10. First, it cannot be that the Injunction Order “prohibited only that inspection that was to occur—and that did not in fact occur—on January 14, 2022.”<sup>35</sup> This would lead to an absurd reading of the full-Court Injunction Order issued January 27, 2022, which obviously did not intend to restrain an inspection that could only have happened in the past.

11. Second, the Injunction Order was not limited to inspections of “active” Voting Equipment still in use that had not been decertified.<sup>36</sup> This position finds no textual support in the Injunction Order. Construing the Injunction Order so narrowly—to exclude the very Dominion Voting Equipment at issue in the underlying litigation and on appeal before the Supreme Court—would defeat the purpose of the Injunction Order altogether. The Supreme Court recognized that the Injunction Order was the only way to avoid mootness of what was on appeal, which was the issue of whether any further inspection should be permitted in light of the spoliation concerns. A reading of the Injunction Order that ignores the pending litigation and appeals gives no effect to the stay pending appeal.

12. Put simply, and as discussed above, no reasonable interpretation of the Injunction Order would render it inapplicable to the Speckin Inspection. That inspection directly implicated the ground on which the Injunction Order was sought—avoiding spoliation of evidence. Equally telling, the interpretation the County now attempts to give the Injunction Order—whereby it applied only to an inspection by a particular entity (Envoy Sage), on behalf of a particular party (the IOC), on a particular date (January 14, 2022), is unsupported by any of the grounds

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<sup>35</sup> (Fulton County’s Separate Discovery Proposal at 5.)

<sup>36</sup> *Cf.* Fulton County’s Answer to Secretary’s Application for Contempt & Sanctions at 12 (asserting that “the now defunct Dominion machines are not considered voting equipment within the meaning of the [Supreme] Court’s Order after they were made useless by [the Secretary’s] actions and mothballed”).

offered to the Supreme Court in support of the Secretary’s application for the Injunction. Indeed, if anything, these grounds supported prohibition of the Speckin Inspection to an even greater degree than they supported prohibition of the Proposed Envoy Sage Inspection.

13. For the foregoing reasons, the Speckin Inspection violated the Injunction Order.

## 2. *Elements of Contempt*

14. “[I]n civil contempt proceedings the burden is on the complaining party to prove noncompliance by a preponderance of the evidence.” *Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977).

15. The elements of a finding of civil contempt are as follows:

Mere noncompliance with a court order is not by itself sufficient to prove contempt; rather, the complaining party must prove:

(1) That the contemnor had notice of the specific order or decree which he is alleged to have disobeyed;

(2) That the act constituting the contemnor’s violation was volitional; and

(3) That the contemnor acted with wrongful intent.

*Waggle v. Woodland Hills Ass’n, Inc.*, 213 A.3d 397, 403 (Pa. Cmwlth. 2019) (quoting *W. Pittston Borough*, 119 A.3d at 421); *accord Margolis v. Margolis*, 273 A.3d 1059 (Pa. Super. 2022); *Habjan v. Habjan*, 73 A.3d 630, 637 (Pa. Super. 2013); *MacDougall v. MacDougall*, 49 A.3d 890, 892 (Pa. Super. 2012), *appeal denied*, 75 A.3d 1282 (Pa. 2013).

16. The elements of civil contempt “may be proved by circumstantial evidence and logical inference from other facts.” *Waggle*, 213 A.3d at 403.

17. The first element—notice of the specific order that is alleged to have been violated—“may be fulfilled when the contemnor has actual knowledge of the order, despite never having been personally served with the order.” *Marian Shop, Inc. v. Baird*, 670 A.2d 671, 673 (Pa. Super. 1996).

18. However, in addition to actual notice, the contemnor must have a basis to believe that the order is authoritative and controlling, such that he could face consequences for failure to comply. *Id.* (citing *Neshaminy Plaza II v. Kelly*, 346 A.2d 884 (Pa. Cmwlth. 1975) (dismissing contempt citations based on unsigned copy of order in question)).

19. Fulton County does not dispute that it had notice of the Supreme Court’s Injunction Order at the time it permitted the Speckin Inspection to occur in July 2022. The County’s counsel of record received electronic notification of the Supreme Court’s January 14, 2022 and January 27, 2022 Orders via PACFile. And the record shows that Commissioners Ulsh, Bunch, and Shives were aware of the Injunction at the time it issued, including because all three Commissioners were in the room in Fulton County when it was announced that the Supreme Court had enjoined the Proposed Envoy Sage Inspection. (*See* PFF ¶ 66.) Thus, the Commissioners and the County had actual notice of the Injunction Order and a basis to believe it was authoritative.

20. Fulton County does not dispute that the act of permitting the Speckin Inspection, which violated the Injunction Order, was volitional. Indeed, the County concedes as much in its filings.<sup>37</sup> Further, the record shows that Commissioners

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<sup>37</sup> *See, e.g.*, Fulton County’s Separate Discovery Proposal at 6 (“Fulton County has already submitted that it conducted the [Speckin] inspection . . . .”); Answer to Secretary’s Application for Contempt & Sanctions at 14 (stating that the Speckin Inspection took place “with the . . . approval of Fulton County”); Fulton County’s Motion for Predicate Legal Rulings at 19 (“Fulton

Ulsh and Bunch deliberately obtained access to the locked room where the Dominion Voting Equipment at issue was stored. (See PFF ¶¶ 94-96.) Thus, the County’s allowing of the Speckin Inspection was volitional.

21. “Wrongful intent can be inferred from circumstantial evidence.” *Waggle*, 213 A.3d at 403. “[W]hen making a determination regarding whether a defendant acted with wrongful intent, the court should use common sense and consider context, and wrongful intent can be imputed to a defendant by virtue of the substantial certainty that his actions will violate the court order.” *Jordan v. Pa. State Univ.*, 276 A.3d 751, 766-67 (Pa. Super. 2022) (quoting *Commonwealth v. Reese*, 156 A.3d 1250, 1258 (Pa. Super. 2017), *reargument denied* (July 13, 2022)).

22. The Speckin Inspection was apparently conducted in secret. Although the decision to allow the Speckin Inspection concerned property possessed by the government and subject to the Injunction Order, Commissioners Ulsh and Bunch permitted the Speckin Inspection without putting the question to a vote of the Fulton County Board of Elections or informing their fellow Commissioner and Board of Elections member Shives, and without providing any public notice of the Speckin Inspection. (See PFF ¶¶ 97-98,101.)<sup>38</sup>

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County [has] clearly conceded that it . . . conducted [the Speckin] inspection”); *id.* at 29 (stating that “the Speckin Report [was] commissioned by Fulton County in July 2022”).

<sup>38</sup> The Secretary cites statutes that, she argues, require the type of public notice that is absent from the record here. (See Secretary’s Post-Hearing Submission at 70-71 & n.14. (citing Section 303 of the Election Code, 25 P.S. § 2643 (“All actions of a county board [of elections] shall be decided by a majority vote of all the members.”); Sections 5 & 8 of The Sunshine Act, 65 Pa.C.S. §§ 705, 708 (requiring that the vote of each member of an agency be “publicly cast and, in the case of roll call votes, recorded”, *id.* § 705, that any executive sessions held by agencies—and the reason for which they were held—“must be announced at the open meeting occurring immediately prior or subsequent to the executive session,” *id.* § 708(b), and that any official action on discussions held during an executive session “shall be taken at an open meeting,” *id.* § 708(c)).

23. The County argues that, because the Fulton County Board of Elections is authorized by the Election Code to inspect voting equipment, the County's actions were authorized and not wrongful. (*See* Fulton County's Proposed Findings of Fact and Conclusions of Law (Fulton County's Post-Hearing Submission) at 12-17.) However, the extent of the County's inspection authority, and any limits thereon, is the subject of the underlying dispute in this litigation, and is also limited by the requirements of the other statutes discussed above. Such authority does not, by itself, vitiate a finding of wrongful intent, which turns on a factual inquiry considering all relevant circumstances. Nor does such authority excuse noncompliance with the Injunction Order, which was duly issued by a court of competent jurisdiction.<sup>39</sup>

24. Despite the County's assertions in their filings, no witness offered any testimony showing that the Speekin Inspection was done in good-faith reliance on the County's Election Code authority. The absence of testimony corroborating the County's claimed legitimate basis for the inspection provides further circumstantial evidence of wrongful intent.

25. Finally, as will appear on the record of these proceedings, the County repeatedly violated the Special Master's orders, in an apparent effort to conceal facts

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The County responds with argument that it did not violate these provisions. But the question of whether the County complied with these legal requirements is not before the Special Master for disposition. The relevant inquiry is whether the facts on the record show wrongful intent, not whether they show compliance with statutory law. Significantly, there is no testimony in the record supporting the County's legal claims that the Speekin Inspection was conducted in good faith pursuant to statutory authority.

<sup>39</sup> “[A]n order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.” *Phila. Marine Trade Ass’n v. Int’l Longshoremen’s Ass’n*, *Locs. 1291, 1332, 1566, 1242 & 1242-1*, 453 Pa. 43, 49-50, (Pa. 1973) (quoting *United States v. Mine Workers*, 330 U.S. 258, 293 (1947)). The County never requested that the Supreme Court clarify, modify, or vacate the Injunction Order in the roughly six months between its issuance and the Speekin Inspection.

surrounding the Speckin Inspection and to prevent development of an evidentiary record. The County violated the Special Master’s order requiring it to produce Commissioners Ulsh, Bunch, and Shives for depositions. The County’s counsel also failed to timely inform Commissioner Shives—who ultimately offered testimony adverse to the County—that the Secretary had served on her a notice to attend the evidentiary hearing. (*See* 11/9 Tr. 215:21-216:3, 222:7-225:20 (Shives).) These actions provide further circumstantial evidence of wrongful intent. *Commonwealth v. Boyle*, 447 A.2d 250, 255-56 (Pa. 1982) (“Evidence of the misconduct of a party in connection with the trial is admissible as tending to show that the party guilty of the misconduct is unwilling to rely on the truth of his cause, or is conscious that it is an unjust one.”)

26. Accordingly, Fulton County’s allowing of the Speckin Inspection was done with wrongful intent.

27. For the foregoing reasons, the Special Master recommends that Fulton County (as defined herein) be adjudged in civil contempt of the Injunction Order.

### 3. *Relief Based on Proposed Contempt Finding*

#### **Counsel Fees and Costs**

28. The Master’s proposed finding of civil contempt, (Recommendations ¶ 27), generally supports the award of the Secretary’s fees and costs against the County. This relief is purely compensatory and a justifiable civil contempt sanction. *Mrozek v. James*, 780 A.2d 670, 674 (Pa. Super. 2001) (“Counsel fees are a proper element of a civil contempt order.”). However, the Master will carefully tailor all recommended relief to use the least restrictive sanctions necessary to accomplish the remedial purposes of civil contempt. *See Cromwell Twp.*, 32 A.3d at 653.

29. As indicated by the procedural history of this matter, the Supreme Court

granted, on an interim basis, the Secretary's request to enjoin third-party inspections of the Voting Equipment pending disposition of the Secretary's appeal. As the Secretary succeeded before the Supreme Court in obtaining her desired injunction, she is entitled to the fees and costs she expended in obtaining that relief, given that the County's contempt of the Injunction Order deprived the Secretary of the interim relief the Supreme Court had granted. Thus, fees and costs chargeable to the County should run from the Secretary's filing of the Emergency Application on December 17, 2021 in the Commonwealth Court, which initiated the spoliation dispute that culminated in the Injunction Order.

30. Accordingly, the Special Master recommends that, on the basis of a finding of civil contempt, the County be ordered to pay the Secretary's costs and fees in this matter, limited to the Secretary's costs and fees pertaining to the following: 1) litigation of the spoliation issue, beginning in the Commonwealth Court with the Secretary's filing of the Emergency Application on December 17, 2021, and continuing through the Secretary's appeal on that issue to the Supreme Court, docketed at 3 MAP 2022; and 2) the instant contempt proceedings in the Supreme Court and before the Special Master.

### **Dismissal**

31. The Secretary has also sought relief in the form of dismissal of the underlying upon a finding of contempt. For the following reasons, the Special Master does not recommend the Secretary's requested dismissal of the entire litigation, but recommends a less restrictive sanction that will adequately compensate the Secretary for the spoliation of evidence effected by the Speckin Inspection

32. The County continues to argue that "the issues in the underlying

[litigation] are purely concerning the legal question” of the Board of Elections’ and the Secretary’s authority under the Election Code.” (Fulton County’s Post-Hearing Submission at 20-21.) Because they view the underlying merits of this case as purely legal, Fulton County argues that “the actual integrity of the machines, and the extent to which they were inspected and/or compromised by the Wake TSI [Inspection] is not at issue in the underlying litigation,” *id.* at 21, and that the effect of any inspection on the Voting Equipment “has nothing to do” with their underlying claims against the Secretary, *id.* at 23.

33. The Secretary argues that the state of the Dominion Voting Equipment post-Wake TSI Inspection—which is the status quo it sought to preserve by pursuing the Injunction Order—is central evidence in the underlying litigation, because it goes to the issue of whether there was a factual basis for the Secretary’s decertification of the Dominion Voting Equipment as having been compromised. Thus, the spoliation of that evidence “strikes at the heart of this lawsuit.” (Secretary’s Post-Hearing Submission at 82.)

34. The County’s merits argument, that no facts or evidence are relevant to the underlying litigation, remains to be decided, but not at this juncture. As the Secretary has put it, “the fact that [the County has] **an** argument that may be purely legal does not change the fact that [it has] **other** arguments for which the electronic voting machines are key evidence.” (Emergency Application for Stay (1/14/2022) ¶ 20 (emphasis in original).) In granting the Injunction Order pending appeal in response to that very argument, the Supreme Court has already decided that, at least on an interim basis, the Dominion Voting Equipment must be preserved so that the Supreme Court can determine the very issue of whether they are evidence in this matter.

35. Accordingly, the Master recommends that it be ordered that, to the extent any fact relating to the effect of any inspection of the Dominion Voting Equipment is or becomes relevant in the underlying litigation, that fact will be conclusively established in the Secretary's favor. This is justified based on the Master's recommended finding of civil contempt, (Recommendations ¶ 27), as it is purely compensatory: it places the Secretary back in the position she would have been in if the County had honored the Injunction Order, which would have preserved any evidence in the Dominion Voting Equipment and allowed the Secretary to discover and use it in her defense. Unlike dismissal of the underlying action, which the Secretary acknowledges is a "harsh" remedy, (Secretary's Post-Hearing Submission at 80), the less restrictive factual sanction recommended here has no punitive effect, incidental or otherwise.

#### **Removal of Voting Equipment from County's Custody and Control**

36. Finally, based on the Master's proposed finding of civil contempt, (Recommendations ¶ 30), the Special Master recommends that in order to secure the Dominion Voting Equipment from any further incursions, and as an appropriate coercive sanction for civil contempt, the Supreme Court should order the removal of the Dominion Voting Equipment from Fulton County's custody and control until further order of court. *See Capital Bakers, Inc. v. Loc. Union No. 464*, 422 A.2d 521, 524-25 (Pa. Super. 1980) (where union and its members had violated injunction prohibiting certain violent conduct at employer's plant, and the prohibited conduct had been conducted from a black van parked near the plant, the court's order "direct[ing] the removal of the van to a site not less than one-quarter mile away from any plant entrance" was a proper civil-contempt sanction); *see also Commonwealth v. Honore*, 150 A.3d 521, 526 (Pa. Cmwlth. 2016) ("Courts have broad discretion in

fashioning and administering a remedy for civil contempt.” (internal quotation marks omitted)).

37. Removal of the Voting Equipment will not prejudice the County’s legitimate interest in managing future elections; the County has disclaimed any future use of the Dominion Voting Equipment.<sup>40</sup>

38. The Secretary requests that the Voting Equipment be returned to Dominion. (Secretary’s Post-Hearing Submission at 77-78.) The County points out that it is involved in a lawsuit against Dominion for breach of contract and breach of warranty pursuant to the Fulton County Complaint over this same Voting Equipment. (*See* Fulton County’s Post-Hearing Submission at 2.) The Master recognizes the County’s argument that it retains an ongoing interest in possession of the voting equipment pursuant to its claims in the Fulton County Complaint.

39. Given the ongoing dispute between Fulton County and Dominion under the Fulton County Complaint, the Special Master does not recommend that the Voting Equipment be returned to Dominion at this time. Instead, the Special Master recommends that the County be ordered to relinquish the Dominion Voting Equipment into the custody and control of a neutral escrow agent pursuant to an agreement between the County, Dominion, and the escrow agent. The escrow agent would hold the Dominion Voting Equipment in trust until further order of court.

40. The Master further recommends that the County should be ordered to

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<sup>40</sup> *See, e.g.*, Fulton County’s Answer to Secretary’s Application for Contempt & Sanctions at 5 (“Fulton County voted unanimously to approve execution of the contract to purchase its election equipment from Hart for all future elections.”); *id.* at 6-7 (“[B]ecause Fulton County had lost all confidence in the performance of Dominion, it subsequently stopped using Dominion Voting Systems and contracted with another provider.”); Fulton County’s Separate Discovery Proposal at 4 (“Fulton County severed its relationship with Dominion and decided to stop using the services of Dominion for the provision of election services and equipment to Fulton County . . . [T]he subject machines and equipment . . . w[ill] never be used again.”).

bear all costs of the escrow or trust arrangement.

## **B. Imposition of Sanctions**

### *1. Elements of Sanctions*

41. Independent of civil contempt, the Secretary seeks sanctions under the fee-shifting provisions of Section 2503 of the Judicial Code<sup>41</sup> and Pennsylvania Rule of Appellate Procedure 2744,<sup>42</sup> both of which target litigation conduct that is “dilatory, obdurate, or vexatious.”

42. The Commonwealth Court recently described the meaning of those terms, for purposes of fee awards under the Judicial Code, as follows:

“**[V]exatious** conduct [is] ‘without reasonable or probable cause or excuse; harassing; annoying.’” According to the Pennsylvania Superior Court, [g]enerally speaking, ‘**obdurate**’ conduct may be defined in this context as ‘stubbornly persistent in wrongdoing.’ [Webster’s Ninth

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<sup>41</sup> It provides, in relevant part:

“The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter: . . . . (7) Any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter . . . (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.”

42 Pa. C.S. § 2503.

<sup>42</sup> It provides, in relevant part:

In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including

(1) a reasonable counsel fee and

(2) damages for delay at the rate of 6% per annum in addition to legal interest, if it determines . . . that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious.

Pa.R.A.P. 2744.

New Collegiate Dictionary] 815 (1987). Conduct is ‘**dilatory**’ where the record demonstrates that counsel displayed a lack of diligence that delayed proceedings unnecessarily and caused additional legal work. *In re Est. of Burger*, 852 A.2d 385, 391 (Pa. Super. 2004) (emphasis added), *aff’d*, 587 Pa. 164, 898 A.2d 547 (2006).

*MFW Wine Co., LLC v. Pennsylvania Liquor Control Bd.*, 276 A.3d 1225, 1240 (Pa. Cmwlth. 2022) (cleaned up).

43. Additionally, Section 2503(9) of the Judicial Code allows imposition of fees and costs for conduct that is “otherwise . . . in bad faith.” “The term ‘bad faith’ used in Section 2503(9) of the Judicial Code means “fraud, dishonesty or corruption.” *MFW Wine*, 276 A.3d at 1240.

44. The County’s actions allowing the Speckin Inspection were “vexatious” because they were without reasonable excuse and harassed the Secretary’s interest in the underlying litigation in light of the clear purpose and applicability of the Injunction Order pending disposition of the Secretary’s appeal to the Supreme Court, of which the County was aware. (*See* PFF ¶¶ 69-70.) Even absent the Supreme Court’s Injunction Order, the County actively litigated the issue of whether the Dominion Voting Equipment in its possession constituted evidence, which triggered its duty as a litigant to preserve such evidence. *See King v. Pittsburgh Water & Sewer Auth.*, 139 A.3d 336, 348 (Pa. Cmwlth. 2016) (duty to preserve evidence attaches when the party knows litigation against it is pending or likely, and it is foreseeable that discarding the evidence would be prejudicial). The County failed to present any reasonable excuse for disregarding this duty.

45. The County’s actions allowing the Speckin Inspection were also “obdurate,” based on the facts underlying the Master’s recommended conclusion that Commissioners Ulsh and Bunch acted with wrongful intent in allowing the Speckin Inspection, in violation of the Injunction Order of which they were aware.

(See PFF ¶¶ 101-103; Recommendations ¶ 26.)

46. And because the record shows that the County concealed the Speckin Inspection, not only from the public, the Secretary, and Dominion, but also from Commissioner Shives, a duly elected public official of the County, the County's actions were in bad faith. (See PFF ¶¶ 97-98,101.)

47. Accordingly, based on the recommended findings of fact cited above, the Master recommends a finding that the County engaged in vexatious, obdurate, and bad-faith conduct in this litigation, within the meaning of Section 2503 of the Judicial Code, 42 Pa. C.S. § 2503, and Pennsylvania Rule of Appellate Procedure 2744, Pa.R.A.P. 2744, which supports the award of counsel fees to the Secretary under those provisions.

48. Rule 4019 of the Pennsylvania Rules of Civil Procedure specifically authorizes the imposition of sanctions, including dismissal, for the failure “to obey an order of court respecting discovery.” Pa. R.Civ.P. 4019. Additionally, courts possess inherent power to sanction parties for spoliation of evidence, independent of any contempt finding. *See, e.g., Mount Olivet Tabernacle Church v. Edwin L. Wiegand Div.*, 781 A.2d 1263, 1269 (Pa. Super. Ct. 2001), *aff'd*, 811 A.2d 565 (Pa. 2002); *see also Schroeder v. Dep't of Transp.*, 710 A.2d 23 (Pa. 1998) (adopting the spoliation doctrine of the United States Court of Appeals for the Third Circuit).

49. Insofar as a principal purpose of the Injunction Order was to preserve important evidence against spoliation pending appeal, the Injunction Order “respect[s] discovery.” As the Secretary pointed out in her application, there was a “substantial risk” that, absent the Injunction Order, “undetectable spoliation of evidence” could have occurred. (Sec. Ex. 18, at 28.)

50. Based on the Special Master's proposed findings that Fulton County

willfully violated the Injunction Order, thus spoliating key evidence in the suit that the County itself had brought, the Master recommends that sanctions be imposed for failure to obey a discovery order, Pa.R.Civ.P. 4019, and also on the basis of spoliation of key evidence that arose from the actions of the County and prejudiced the Secretary's ability to defend the underlying litigation, *see Mount Olivet Tabernacle Church*, 781 A.2d at 1269 (considering elements of fault and prejudice when assessing spoliation sanctions).

2. *Relief Based on Sanctions*

51. The Master recommends that the proposed findings of obdurate, vexatious, and bad-faith conduct, and for sanctions for spoliation of evidence, serve as alternative bases for granting the relief proposed by the Special Master as set forth in Subsection VI.A.3, *supra*. (See Recommendations ¶¶27-40.)



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**RENÉE COHN JUBELIRER**, President Judge of the  
Commonwealth Court of Pennsylvania Appointed as  
Special Master