

IN THE SUPREME COURT OF PENNSYLVANIA

**COUNTY OF FULTON, FULTON
COUNTY BOARD OF
ELECTIONS, STUART L. ULSH,**

in his official capacity as County
Commissioner of Fulton County
and in his capacity as a resident,
taxpayer and elector in Fulton
County, **and RANDY H. BUNCH,**
in his official capacity as County
Commissioner of Fulton County
and in his capacity as a resident,
taxpayer and elector of Fulton
County,

Petitioners/Appellees,

v.

**SECRETARY OF THE
COMMONWEALTH,**

Respondent/Appellant.

No.: 3 MAP 2022

**PETITIONERS/APPELLEES'
ANSWER TO
RESPONDENT/APPELLANT'S
EMERGENCY APPLICATION**

**Filed on Behalf of
Petitioners/Appellees:**

**County of Fulton, Fulton
County Board of Elections,
Stuart L. Ulsh, and Randy H.
Bunch**

Counsel of record:

Thomas W. King, III, Esq.

PA. I.D. No. 21580

tking@dmkcg.com

DILLON, MCCANDLESS, KING,

COULTER & GRAHAM L.L.P.

128 West Cunningham Street

Butler, PA 16001

James M. Stein, Esq.

PA. I.D. No. 84026

jstein@co.fulton.pa.us

DICK, STEIN, SCHEMEL,

WINE & FREY, LLP.

119 North Second Street

McConnellsburg, PA 17233

Douglas J. Steinhardt, Esq.

PA. I.D. No. 73891

dsteinhardt@floriolaw.com

Steinhardt, Cappelli,

Tipton & Taylor, LLC

235 Broubalow Way

Phillipsburg, NJ 08865

IN THE SUPREME COURT OF PENNSYLVANIA

COUNTY OF FULTON, FULTON
COUNTY BOARD OF ELECTIONS,
STUART L. ULSH, in his official
 capacity as County Commissioner of
 Fulton County and in his capacity as a
 resident, taxpayer and elector in Fulton
 County, and **RANDY H. BUNCH**, in his
 official capacity as County
 Commissioner of Fulton County and in
 his capacity as a resident, taxpayer and
 elector of Fulton County,

Petitioners/Appellees,

v.

SECRETARY OF THE
COMMONWEALTH,

Respondent/Appellant.

No.: 3 MAP 2022

RELEVANT PROCEDURAL HISTORY

This matter arises from a request to Fulton County from the Pennsylvania Senate Intergovernmental Operations Committee to inspect the County's voting machines. A true and correct copy of Senator Dush's letter dated December 10, 2021, is attached hereto as, "Exhibit A."

On December 17, 2021, Appellant filed her Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021, seeking to postpone the Committee's inspection.

Following oral argument on Appellant's Emergency Application the Court issued the following Order:

NOW, December 21, 2021, following oral argument on the Secretary of the Commonwealth's Emergency Application for an Order Prohibiting Spoliation of Key Evidence, and *upon agreement of the parties*, the inspection of Fulton County's voting machines by Envoy Sage, LLC, presently scheduled for December 22, 2021, shall be postponed to January 10, 2022, by which time the parties will have negotiated protocols for said inspection.

A true and correct copy of the Order of the Commonwealth Court dated December 21, 2021, 277 M.D. 2021, is attached hereto as "Exhibit B." (emphasis added).

On January 3, 2022, Dominion Voting Systems, Inc. filed an Application for Intervention, claiming an interest in the present litigation through the Contract between Dominion Voting Systems, Inc. and Appellees. Section 13.2 of such Contract provides,

[s]ubject to the requirements of the Customer's public record laws ("PRL"), neither Party shall disclose the other Party's Confidential Information to any person outside their respective organizations *unless disclosure is made in response to, or because of, an obligation to any federal, state, or local government agency or court with appropriate jurisdiction, or to any person properly seeking discovery before any such agency or court.*

A true and correct copy of the Contract between Dominion Voting Systems, Inc. and Appellees is attached hereto as, "Exhibit C."

Further, Section 13.3 of the County's Agreement with Dominion Voting Systems provides that,

[i]f Dominion fails to obtain such court order enjoining such disclosure, the Customer will release the requested information on the date specified. *Such release shall be deemed to have been made with Dominion's consent* and shall not be deemed to be a violation of law or this Agreement.

See Ex. C, at § 13.3 (emphasis added).

Following a January 7, 2021, Hearing on Dominion's Application to Intervene, a hearing at which neither Dominion nor Appellant presented any witnesses, the Court denied Dominion's Application to Intervene. See Proposed Intervenor Dominion Voting Systems' Witness and Exhibit Lists; See *also* Respondent's Answer to the Emergency Application of Dominion Voting Systems, Inc. for Leave to Intervene For the Purpose of Seeking a Protective Order. In the Commonwealth Court's January 10, 2022 Memorandum Opinion and Order, the Court stated,

[a]lthough Dominion may have an enforceable contractual interest in general, it has not shown that determination of this matter in particular – which concerns only statutory authority for decertification – will affect that legally enforceable interest.

A true and correct copy of the Commonwealth Court's Memorandum Opinion and Order dated January 10, 2022, is attached hereto as, "Exhibit D."

On January 7, 2022, immediately following the hearing on Dominion's Application to Intervene, the Court held a status conference regarding the

inspection of Appellees' voting machines. As a result of this status conference, the Court issued its January 7, 2022, Order stating,

NOW, January 7, 2022, upon consideration of letters submitted by Respondent and Petitioners on January 6, 2022, and following a status conference, *upon agreement of the parties*, this Court's order of December 21, 2021 is hereby AMENDED to postpone the inspection of Fulton County's voting machines by Envoy Sage, LLC, to Wednesday, January 12, 2022. The parties are ORDERED to negotiate, in good faith, protocols that will apply to said inspection. Further, the parties shall file a joint status report advising of the status of their negotiations no later than 1:00 p.m. on Tuesday, January 11, 2022.

A true and correct copy of the Court's Order dated January 7, 2022, is attached hereto as, "Exhibit E." (emphasis added).

On January 10, 2022, Appellant filed an Emergency Application to Reschedule the January 12, 2022, Inspection due to the Unavailability of Respondent's Expert. The Commonwealth Court subsequently issued an Order dated January 11, 2022, stating,

NOW, January 11, 2022, upon consideration of the Emergency Application of Respondent to Reschedule the January 12, 2022, Inspection due to the Unavailability of Respondent's Expert, and Petitioners' Answer thereto, this Court's order of January 7, 2022, is hereby AMENDED to postpone the inspection of Fulton County's voting machines by Envoy Sage, LLC, to no earlier than 1:00 p.m. on Friday, January 14, 2022.

A true and correct copy of the Court's Order dated January 11, 2022, is attached hereto as, "Exhibit F."

On January 13, 2022, at 4:02 P.M., Appellant filed her Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, From Proceeding. However, Appellant's "Renewed" Emergency Application is incorrectly titled. Appellant's original Emergency Application was entitled, "Respondent's Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021," which Emergency Application sought a protective order, not a preliminary injunction.

On January 14, 2022, the Commonwealth Court issued its Memorandum Opinion and Order stating,

the Court will not generally enjoin the inspection, much less enter what would essentially be an ex parte injunction purporting to bind Envoy Sage, among others. Because the Secretary has failed to carry her burden to show that the inspection or its effects are evidence deserving a preservation order . . . Respondent's Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding is DISMISSED as improvidently filed.

A true and correct copy of the Commonwealth Court's Memorandum Opinion and Order dated January 14, 2022, 277 M.D. 2021, is attached hereto as "Exhibit G."

SUMMARY OF THE ARGUMENT

Appellant's appeal of the Commonwealth Court's Memorandum Opinion and Order dated January 14, 2022, is improper as the Court's Order

is not a final Order of the Commonwealth Court pursuant to 42 Pa. C.S. § 723. Rather the Court's Order is an interlocutory Order, unrelated to any issue currently before the Court, as raised by Appellees' Amended Petition for Review.

Additionally, the Court's January 14, 2022, Order is not an appealable Order pursuant to Pa. R.A.P. 311(a)(4) as the Court's opinion did not grant or deny an injunction. While improper, as the Committee's inspection does not concern evidence related to this matter, Appellant's Emergency Applications were discovery motions seeking a protective Order. It was not until the Appellant's January 13, 2022 "Renewed" Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, From Proceeding, that the title of Appellant's pleading requested injunctive relief. Indeed, as noted by the Commonwealth Court, "there is no underlying pleading to support a preliminary injunction request." See Ex. G, Pg. 2.

Neither the Committee nor Envoy Sage were sued so as to make them a party to any proceeding for a preliminary injunction. As the underlying matter was never an injunction proceeding, no hearing was ever requested or scheduled relative to a preliminary injunction (and hence there is no such record for this Court to review). When given the opportunity to present

witnesses at the hearing on Dominion's Application to Intervene, neither Appellant nor Dominion took the opportunity to create a record. See Proposed Intervenor Dominion Voting Systems' Witness and Exhibit Lists; See *also* Respondent's Answer to the Emergency Application of Dominion Voting Systems, Inc. for Leave to Intervene For the Purpose of Seeking a Protective Order. This appeal cannot serve as an attempt to invoke this Court's original jurisdiction relative to an injunction and no King' Bench petition has been filed by the Secretary in this matter. See Appellant's Notice of Appeal. ("There is no verbatim record of the proceedings relating to Respondent's Emergency Applications or Petitioners' responses thereto.")

Lastly, the Commonwealth Court's Order dated January 14, 2022, is not a collateral Order pursuant to Pa. R.A.P. 313 as Appellant's Renewed Emergency Application seeks an Order to prevent spoliation of evidence when in fact there is no evidence being sought or produced in this matter for the underlying case.¹ As noted by the lower Court, "[a] party that engages in spoliation faces numerous sanctions at the court's discretion, ranging from an inference that the evidence would have been adverse to the spoliator, to

¹ It should also be noted that Appellant has already had an opportunity to inspect Appellees' voting machines in the course of the present litigation. On October 12, 2021, Appellant inspected Appellees' voting machines, utilizing Mr. Ryan Macias, founder of RSM Election Solutions, LLC to conduct such an examination. Neither Ryan Macias nor RSM Election Solutions, LLC possess EAC accreditation to inspect voting machines, but the Secretary used them nonetheless.

prohibiting other evidence offered by the spoliator, to striking portions of pleadings or complete dismissal.” See Ex. G, at 3. See also *Shearer v. Hafer*, 177 A.3d 850, 860 (Pa. 2018) (quashing appeal of discovery order where Appellant’s claims will not be irreparably lost as other remedies are available).

**PETITIONERS/APPELLEES’ ANSWER TO
RESPONDENT/APPELLANT’S EMERGENCY APPLICATION**

Petitioners/Appellees, by and through their undersigned counsel, hereby file the within Answer to Respondent/Appellant’s Emergency Application to Stay Third-Party Inspection of Electronic Voting System Scheduled to Begin at 1:00 P.M. on January 14, 2022, stating in support thereof as follows:

1. Denied. This case arose through Petition for Review seeking a declaration that, “Respondent’s decertification of Petitioners’ Democracy Suite 5.5A Voting System, by letter dated July 20, 2021, was arbitrary, capricious, and legally improper, and an error of law, as Respondent failed to comply with the mandates of 25 P.S. § 3031.5(b), and that such decertification dated July 20, 2021, should be stricken and rendered null and void.” See Petitioners’ Amended Petition for Review, Pg. 14.

2. Denied as stated. Appellant’s decision to decertify Fulton County’s voting machines was improper as Section 3031.5(b) of

Pennsylvania's Election Code requires that, "if Respondent reexamines a previously certified system, Respondent shall examine the system and make and file a report with the Pennsylvania Department of State, attested by her signature and the seal of her office, stating whether the system so reexamined can be safely used in elections." *Id.* at 13, *citing* 25 P.S. § 3031.5(b). No such examination, as required by Section 3031.5(b) of Pennsylvania's Election Code, was conducted by Appellant prior to the July 20, 2021, decertification of Fulton County's voting machines.

3. Admitted in part, denied in part. It is admitted that Appellant issued Directive 1 of 2021. It is denied that Directive 1 of 2021 was a proper exercise of the Appellant's authority as Directive 1 of 2021 improperly usurps and interferes with the undertaking of the duties and responsibilities of County Boards of Elections, as set forth in 25 P.S. § 2642(g), *et seq.*; and further, Directive 1 of 2021 decertifies electronic voting systems without the conduct of an examination of the system, in violation of 25 P.S. § 3031.5(b). *Id.* at 13, 20.

4. Denied as stated. Appellees challenge the Secretary's decertification of Fulton County's voting systems as, "Respondent failed to reexamine Petitioners' voting system (election machines) prior to decertification in violation of 25 P.S. § 3031.5(b)." *Id.* at 12.

5. Denied as stated. Appellees' claims are based in the failure of the Secretary to conduct an examination of Fulton County's voting machines prior to their July 20, 2021, decertification, in violation of the requirements of 25 P.S. § 3031.5(b).

6. Denied. In response to a request from the Chairman of the Pennsylvania Senate Intergovernmental Operations Committee, Cris Dush, Appellees scheduled a special meeting of the Fulton County Board of Elections advertised for December 22, 2021, to permit the Committee to conduct an examination of the County's voting machines. See Ex. A. By letter dated December 16, 2021, Appellees informed the Department of State of the time, date, and place of inspection and informed the Department that the inspection would be open to the public as a public meeting of the Fulton County Board of Elections. Thereafter, the inspection was postponed, "by agreement," until January 10, 2022, and once again until January 14, 2022, thereby giving Appellant advanced notice of the Committee's inspection. See Ex. G, at Pg. 2.

7. Denied. It is denied that Appellant is entitled to the relief sought in their December 17, 2021, Emergency Application for an Order Prohibiting Spoliation of Key Evidence as, "[Appellant] has failed, however, to demonstrate a critical element of each of the three [*Capricorn*] factors – that

the data or state of the System subject to inspection constitutes evidence in this matter worthy of protection. The spoliation doctrine protects evidence, not information in general. The Secretary has not persuaded the Court that she, or Petitioners for that matter, will use any data obtained from the System as evidence in this proceeding.” *Id.* at 4.

8. Denied as stated. The inspection of Fulton County’s voting machines is being conducted by the Pennsylvania Senate Intergovernmental Operations Committee, at the request of the Committee’s Chairman, Cris Dush. Appellees are cooperating with the Committee’s request pursuant to Article 9, Section 5 of the Pennsylvania Constitution which provides,

A municipality by act of its governing body may, or upon being required by initiative and referendum in the area affected shall, cooperate or agree in the exercise of any function, power or responsibility with, or delegate or transfer any function, power or responsibility to, one or more other governmental units including other municipalities or district, the Federal government, any other state or its governmental units, or any newly created governmental unit.

Pa. Const. art. IX, § 5.

9. Denied. Paragraph 9 speaks to a written Order of Court dated December 21, 2021, the terms of which speak for itself.

10. Denied as stated. Appellees have made clear from the beginning that the planned December 22, 2021, inspection of Fulton County’s voting machines was being conducted for the purpose of, “comply[ing] with the

request ([which was forwarded to Appellant December 15, 2021]) of the Pennsylvania Senate Intergovernmental Operations Committee as forwarded to us by its Chairman, Senator Chris [sic] Dush.” See Exhibit D to Petitioners’ Answer to Respondent’s Emergency Application for an Order Prohibiting Spoliation of Key Evidence.

11. It is admitted that the Appellant requested, and agreed to, the Court’s postponement of the inspection scheduled for January 10, 2022. See Ex. E.

12. It is admitted that the Court conducted a status conference dated January 7, 2022, regarding an inspection protocol for the Committee’s inspection of Fulton County’s voting machines. At all such times, the Secretary simply demanded certain protocol and did not demand that the Court enjoin the inspection.

13. Denied. Paragraph 13 speaks to a written Order of Court dated January 7, 2022, the terms of which speak for itself. By further answer, Appellees complied with the Court’s January 7, 2022, Order of Court by negotiating with Appellant and Counsel for Dominion to establish a protocol. To this end, Envoy Sage, LLC assisted in creating Appellees’ January 10, 2022, proposed protocol agreement, which agreement sets forth the comprehensive inspection protocol, and a list of credentials of the

technicians, of Envoy Sage, LLC. See Attachments A-C of Exhibit A to Joint Report on Status of Negotiations.

14. It is admitted that the Court, at Appellant's request, postponed the inspection until January 14, 2022.

15. It is admitted that Appellant file her Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, From Proceeding, at 4:02 P.M. on January 13, 2022. By further answer, Appellant's request for injunctive relief in this matter is improper as, "there is no underlying pleading to support a preliminary injunction request." See Ex. G at Pg. 5.

16. Denied. Paragraph 16 refers to Appellant's "Renewed" Emergency Application, the terms of which speak for itself. By further answer, Appellees have provided a list of the credentials of the technicians of Envoy Sage, LLC; Appellees have clearly identified the principal for Envoy Sage, LLC as the Pennsylvania Senate Intergovernmental Operations Committee; Envoy Sage, LLC is willing to be bound by any inspection protocol agreement negotiated by the parties; and Envoy Sage, LLC has crafted a comprehensive six (6) page inspection protocol to ensure that the inspection of Fulton County's voting machines will not compromise the

integrity of any data contained on the machines. See Appellees' Response to Respondent's Renewed Emergency Application.

17. It is admitted that the Commonwealth Court entered an Order dated January 14, 2022, denying Respondent's "Renewed" Emergency Application. By further answer, the Court's Order dated January 14, 2022:

- a. is not a final appealable Order of the Commonwealth Court pursuant to 42 Pa. C.S. § 723 as the Order at issue is an Interlocutory Order, unrelated to the issues of the underlying case, as neither party will receive any of the information or data retrieved in the Committee's inspection;
- b. is not appealable pursuant to Pa. R.A.P. 311(a)(4) as, "there is no underlying pleading to support a preliminary injunction request," See Ex. G at Pg. 5; and
- c. is not an appealable collateral Order pursuant to Pa. R.A.P. 313 as Appellant's Renewed Emergency Application seeks an Order to prevent spoliation of evidence when in fact there is no evidence being sought or produced in this matter for the underlying case.² As noted by the lower Court, "[a] party that engages in spoliation faces numerous sanctions at the court's discretion, ranging from an inference that the evidence would have been adverse to the spoliator, to prohibiting other evidence offered by the spoliator, to striking portions of pleadings or complete dismissal." *Id.* at 3. See also *Shearer v. Hafer*, 177 A.3d 850, 860 (Pa. 2018) (quashing appeal of discovery order where Appellant's claims will not be irreparably lost as other remedies are available).

² It is true that the County had hoped that the information produced by the Committee's investigation would be useful to it in the underlying case. However, upon inquiry, it was advised by the Committee that any information obtained would be used only for investigation purposes by the Committee. After the County was made aware of this development, Appellees so advised the Appellant and the Court.

18. Denied as stated. Appellees' arguments below concern the failure of the Secretary to examine Fulton County's voting machines prior to decertification, as required by Section 3031.5(b) of Pennsylvania's Election Code. Such arguments do not necessitate the review of Fulton County's voting system as it presently exists, but rather concern the authority of the Secretary to decertify the machines in the first place. See Petitioners' Amended Petition for Review. By further answer, Envoy Sage, LLC has assured Appellees of the continued integrity of any data contained on Fulton County's voting machines. Envoy Sage has crafted a six (6) page inspection protocol that provides for a controlled zone to maintain strict chain of custody of all voting machine components, provides for the specific devices Envoy Sage will utilize to ensure the integrity of the data contained on the machines, and video recording of the inspection within the controlled zone to ensure compliance with the protocol. See Attachments A-C of Exhibit A to Joint Report on Status of Negotiations.

19. Denied. Paragraph 19 refers to a written Order of Court dated January 14, 2022, the terms of which speak for itself. To the extent that Paragraph 19 seeks to characterize such Order, the same is denied.

20. Denied as stated. Appellees' arguments below concern the failure of the Secretary to examine Fulton County's voting machines prior to

decertification, as required by Section 3031.5(b) of Pennsylvania's Election Code. Such arguments do not necessitate the review of Fulton County's voting system as it presently exists, but rather concern the authority of the Secretary to decertify the machines in the first place. See Petitioners' Amended Petition for Review. By further answer, Envoy Sage, LLC has assured Appellees of the continued integrity of any data contained on Fulton County's voting machines. Envoy Sage has crafted a six (6) page inspection protocol that provides for a controlled zone to maintain strict chain of custody of all voting machine components, provides for the specific devices Envoy Sage will utilize to ensure the integrity of the data contained on the machines, and video recording of the inspection within the controlled zone to ensure compliance with the protocol. See Attachments A-C of Exhibit A to Joint Report on Status of Negotiations.

21. Denied as stated. Appellees are prejudiced by the repeated rescheduling of the Committee's inspection as Appellees are required to secure space for the inspection, provide for the presence of County election employees, and provide for the presence of the County Sheriff for security. These are all expenses that the County has incurred on three (3) occasions now. By further answer, Envoy Sage has ensured the continued integrity of any data contained on the County's voting machines through their creation

of a six (6) page inspection protocol that provides for a controlled zone to maintain strict chain of custody of all voting machine components, provides for the specific devices Envoy Sage will utilize to ensure the integrity of the data contained on the machines, and video recording of the inspection within the controlled zone to ensure compliance with the protocol. See Attachments A-C of Exhibit A to Joint Report on Status of Negotiations.

WHEREFORE, Appellees respectfully request that this Honorable Court deny Appellant's Emergency Application, dismiss the Appellant's Appeal dated January 14, 2022, and relinquish jurisdiction to the Court below so that the inspection of Fulton County's voting machines may proceed.

Respectfully submitted,

**DILLON, McCANDLESS, KING,
COULTER & GRAHAM, L.L.P.**

By: /s/ Thomas W. King, III
Thomas W. King, III
PA. I.D. No. 21580
tking@dmkcg.com

**Dick, Stein, Schemel,
Wine & Frey, LLP**
James M. Stein, Esq.
PA. I.D. No. 84026
jstein@co.fulton.pa.us

**Steinhardt, Cappelli,
Tipton & Taylor, LLC**
Douglas J. Steinhardt, Esq.
PA. I.D. No. 73891
dsteinhardt@floriolaw.com

VERIFICATION

I, Stuart L. Ulsh, Chairman of the Fulton County Board of Commissioners, and of the Fulton County Board of Elections, am authorized to make this verification. I verify that the statements made in the foregoing document are true and correct to the best of my knowledge, information, and belief. I understand that the statements herein are made subject to the penalties of perjury of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



Stuart L. Ulsh, Chairman

WELLSBORO OFFICE
6 MAIN STREET
WELLSBORO, PA 16901
570-724-5231 • FAX: 570-723-5119

BROOKVILLE OFFICE
73 SOUTH WHITE STREET, SUITE 5
BROOKVILLE, PA 15825
MAIN OFFICE PHONE NUMBER: 814-646-7272
FAX: 814-646-7275

HARRISBURG OFFICE
SENATE BOX 203028
HARRISBURG, PA 17120
717-787-7084

EMAIL: cdush@pasen.gov
WEB: www.senatorcrisdushpa.com
FACEBOOK: [facebook.com/SenatorCrisDushPA](https://www.facebook.com/SenatorCrisDushPA)



Senate of Pennsylvania

25TH DISTRICT
SENATOR CRIS DUSH

COMMITTEES

INTERGOVERNMENTAL OPERATIONS, CHAIR
LOCAL GOVERNMENT, CHAIR
STATE GOVERNMENT, VICE CHAIR
COMMUNICATIONS & TECHNOLOGY
GAME AND FISHERIES
LABOR & INDUSTRY
VETERANS AFFAIRS &
EMERGENCY PREPAREDNESS

MEMORANDUM

To: Fulton County Commissioners and Board of Elections

From: Chairman Cris Dush

Date: December 10, 2021

A handwritten signature in black ink, appearing to read "Cris Dush".

Re: Intergovernmental Operations Chairman's Request to Examine Voting Machines

Fulton County Leaders,

The Pennsylvania Senate Intergovernmental Operations Committee is investigating the Pennsylvania (PA) election system. Our purpose is to confirm our election systems' security and integrity, ensure current law is adequate moving forward, as well as restoring PA Residents' confidence in the results of our elections.

Voting machines are at the heart of modern elections in Pennsylvania. Therefore, this aspect of our election system is a central part of our investigation. As Chair of the Committee and in furtherance of the investigation being conducted by the Committee, the following is requested:

- Permission to collect the digital data from the election computers and hardware used by Fulton County, Pennsylvania in the November 2020 election.

We are willing to coordinate with your designated representative(s) to have this work performed in a manner that limits disruptions to your operations, and which preserves the equipment and data.

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board :
of Elections, Stuart L. Ulsh, in his :
official capacity as County :
Commissioner of Fulton County and :
in his capacity as a resident, taxpayer :
and elector in Fulton County, and Randy :
H. Bunch, in his official capacity as :
County Commissioner of Fulton County :
and in his capacity as a resident, :
taxpayer and elector of Fulton County, :
Petitioners :
: :
v. :
: :
Secretary of the Commonwealth, :
Respondent : No. 277 M.D. 2021

ORDER

NOW, December 21, 2021, following oral argument on the Secretary of the Commonwealth's Emergency Application for an Order Prohibiting Spoliation of Key Evidence, and upon agreement of the parties, the inspection of Fulton County's voting machines by Envoy Sage, LLC, presently scheduled for December 22, 2021, shall be postponed to January 10, 2022, by which time the parties will have negotiated protocols for said inspection.

MARY HANNAH LEAVITT, President Judge Emerita

Order Exit
12/21/2021

VOTING SYSTEM AND MANAGED SERVICES AGREEMENT
BY AND BETWEEN
DOMINION VOTING SYSTEMS, INC.
AND FULTON COUNTY, PA

This Managed Services Agreement (the “Agreement”), dated April 1, 2019 (the “Effective Date”), for a voting system services, software licenses and related services is made by and between Fulton County, PA, having its principal office located at 116 W. Market Street, Suite 203 McConnellsburg, PA 17233 (hereinafter the “Customer”), and Dominion Voting Systems Inc., having its principal office located at 1201 18th Street, Suite 210, Denver, CO 80202 (hereinafter “Dominion”). This Agreement may refer to Dominion and the Customer together as the “Parties,” or may refer to Dominion or the Customer individually as a “Party.”

WHEREAS, the Customer desires to purchase voting system services, and software use licenses; and

WHEREAS, Dominion designs, manufactures, licenses, and provides services for its voting systems.

NOW THEREFORE, in consideration of the mutual covenants contained herein, and in accordance with the terms and conditions set forth herein, Dominion agrees to license and furnish the System (as defined herein) to the Customer.

1. **Composition of Agreement.** Exhibits A and B are attached and incorporated herein by reference and form a part of this Agreement. This Agreement consists of the terms and conditions contained in the following sections and the listed Exhibits:

Exhibit A: Pricing/Payment Summary and Deliverables Description
Exhibit B: Software License Terms and Conditions

2. **Definitions.** For the purposes of this Agreement, the following are defined terms:

- 2.1. “Acceptance” and variations thereof, means the successful completion by the Customer of the acceptance testing performed on each component of Dominion Hardware and Software, after delivery in accordance with testing criteria developed and agreed to by the parties, or the occurrence of other events defined in Section 8.
- 2.2. “Confidential Information” means those materials, documents, data, and technical information, specifications, business information, customer information, or other information of a Party (the “Disclosing Party”) maintains as trade secrets or confidential and which are disclosed to a another Party (the “Receiving Party”) in tangible form conspicuously marked as “confidential,” or with words having similar meaning, which includes without limitation, Dominion Software and associated documentation.
- 2.3. “Dominion Hardware” means the ImageCast[®] system hardware as more specifically described in Exhibit A.

- 2.4. "Dominion Software" means software and firmware programs licensed to the Customer by Dominion and any associated documentation as more specifically described in Exhibit A.
- 2.5. "Election" means a single election event administered by the Customer including any absentee and early voting activity associated with the election event. Election shall not mean any follow-on events occurring after the initial election event, including without limitations, run-offs or recall replacements elections. Any follow on event shall be considered an Election in and of itself.
- 2.6. "Election Management System Hardware" or "EMS Hardware" means third party hardware required for operating Dominion Software as used in conjunction with the Dominion Hardware.
-
- 2.7. "License" has the meaning set forth in Section 7.
- 2.8. "System" means the combination of Dominion Software, Dominion Hardware and EMS Hardware.
- 2.9. "Third Party Software" means manufacturer supplied software, or firmware owned by third parties, which Dominion provides to Customer pursuant to sublicenses or end user license agreements with the owners of such Third Party Software. Third Party Software includes, but is not limited to, various operating systems, software drivers, report writing subroutines, and firmware.
3. **Term of Agreement.** The Term of this Agreement shall begin on the Effective Date and shall continue until December 31, 2026, unless sooner terminated or extended as provided herein.
4. **Dominion's Responsibilities.** Dominion shall:
- 4.1. Deliver the System and services as described in Exhibit A - Pricing and Payment Summary and Deliverables Description.
- 4.2. Provide the Customer with a Dominion Software use License as described in Exhibit B - Software License Terms.
- 4.3. Assign a Dominion project manager ("Dominion Project Manager") to oversee the general operations of the project. The Dominion Project Manager will be the primary contact for all project needs. The Dominion Project Manager will be responsible for all deliverables and services including, resource planning and coordination, product delivery, issue resolution and for all administrative matters such as invoices and payments.
- 4.4. Assist in the Acceptance testing process as required by Section 8 herein.

- 4.5. Provide Customer with one (1) reproducible electronic copy of the documentation.
- 4.6. Provide invoices to Customer pursuant to the payment schedule in Exhibit A and the payment terms described in Section 5.1 herein.

5. Customer's Responsibilities. Customer shall:

- 5.1. Pay invoices in a timely manner and no later than thirty (30) calendar days from receipt of a Dominion invoice.
 - 5.1.1. Dominion shall issue invoices to Customer pursuant to the invoice schedule listed in Exhibit A.
 - 5.1.2. ~~Payments specified in this Section 5 are exclusive of all excise, sale, use and other taxes imposed by any governmental authority, all of which shall be reimbursed by the Customer. If the Customer is exempt from taxes, Customer shall supply Dominion a tax exemption certificate or other similar form demonstrating its exempt status.~~
- 5.2. Assign a Customer project manager ("Customer Project Manager"), who shall be responsible for review, analysis and acceptance of the System and the coordination of Customer personnel, equipment, vehicles and facilities. The Customer Project Manager shall be empowered to make decisions on behalf of the Customer with respect to the work being performed under this Agreement. The Customer Project Manager shall also have direct access to the Customer's top management at all times for purposes of problem resolution.
- 5.3. Conduct Acceptance testing process as required by Section 8.
- 5.4. Customer shall provide reasonable access and entry into all Customer property required by Dominion to perform the services described in this Agreement. All such access and entry shall be provided at Customer's expense.
- 5.5. When applicable, for election setup and database creation services as described in Exhibit A, the Customer shall review and approve or identify issues to all Dominion deliverables related to such service within two (2) business days of receipt by the Customer. In the event the Customer discovers an issue, it shall provide written notice to Dominion immediately following the discovery of any issue and Dominion shall rectify the issue at no additional cost to the Customer. In the event the Customer approves the deliverable and subsequent to such approval, request that a change be made to the deliverable, then Dominion may provide the change at an additional cost based upon Dominion's then current published service rates.

6. Title and Risk of Loss.

- 6.1. Title to the System. The System shall be provided by Dominion to the Customer as part of the managed services described herein. Title to the System or any portion thereof, shall not pass to the Customer and shall remain with Dominion.
- 6.2. Software. Dominion Software and Third Party Software is licensed, not sold. The original and any copies of the Dominion Software, or other software provided pursuant to this agreement, in whole or in part, including any subsequent improvements or updates, shall remain the property of Dominion, or any third party that owns such software.
- 6.3. Risk of Loss. Dominion shall bear the responsibility for all risk of physical loss or damage to each portion of the System until such portion is delivered to the Customer. Customer shall provide Dominion with a single location for shipment and Dominion shall not be responsible for shipping to more than one location. To retain the benefit of this clause, Customer shall notify Dominion of any loss or damage within ten (10) business days of the receipt of any or all portions of the System, or such shorter period as may be required to comply with the claims requirements of the shipper, and shall cooperate in the processing of any claims made by Dominion.

7. Software License and Use.

- 7.1. License. Upon mutual execution of this Agreement, Dominion grants to the Customer, and the Customer accepts a non-exclusive, non-transferable, license ("License") to use the Dominion Software subject to the terms and conditions of this Agreement and the Software License Terms attached hereto as Exhibit B.
- 7.2. Third Party Software. The System includes Third Party Software, the use of which is subject to the terms and conditions imposed by the owners of such Third Party Software. Customer consents to the terms and conditions of the third party License Agreements by Customer's first use of the System.

8. Acceptance.

- 8.1. Dominion Software or Dominion Hardware Testing. After delivery of Dominion Software or Dominion Hardware, the Customer will conduct Acceptance testing of such units, in accordance with the Acceptance criteria developed, updated, and delivered to Customer in writing, from time to time, by Dominion. Such Acceptance testing shall occur at a time mutually agreed upon by the Parties, but no later than ten (10) business days after installation.
- 8.2. System Acceptance Testing. To the extent not tested as part of the testing pursuant to Subsections 8.1, upon completing the installation of the System, the Customer

will conduct system acceptance testing, according to the Acceptance test procedures developed and updated, from time to time, by Dominion. Such Acceptance testing shall occur at a time mutually agreed upon by the Parties, but no later than ten (10) business days after installation of the System.

8.3. Acceptance/Rejection. After testing, if the Dominion Software, Dominion Hardware, or the System does not conform to user documentation or Dominion provided Acceptance criteria, Customer will notify Dominion in writing within five (5) business days. Dominion will, at its own expense, repair or replace the rejected Dominion Software, Dominion Hardware, or System within thirty (30) days after receipt of Customer's notice of deficiency. The foregoing procedure will be repeated until Customer finally accepts or rejects the Dominion Software, Dominion Hardware, or System in writing in its sole discretion.

8.4. System Conformance. Customer will not refuse to grant Acceptance of the System, in whole or in part, solely for the reason that it fails to conform with the specifications, requirements and functions set out in the Agreement in a manner that does not affect the performance of the System, in whole or in part. In such instance of non-conformity, Dominion shall provide a plan of action to cure such non-conformity with reasonable dispatch.

9. Warranties.

9.1. Dominion Software Warranty. The Dominion Software warranty is subject to the terms and conditions of Exhibit B - the Software License Terms.

9.2. Third Party Products. The warranties in this Sections 9 do not apply to any third party products. However, to the extent permitted by the manufacturers of third party products, Dominion shall pass through to Customer all warranties such manufacturers make to Dominion regarding the operation of third party products.

9.3. Dominion Hardware Warranty Terms. Dominion warrants that when used with the hardware and software configuration purchased through or approved by Dominion, each component of Dominion Hardware will be free of defects that would prevent the Dominion Hardware from operating in conformity in all material respects with its specifications as documented by Dominion. The Dominion Hardware Warranty shall remain in effect during the Agreement Term.

9.4. Dominion Hardware Warranty Services. If any Dominion Hardware component fails to operate in conformity with its specifications during the warranty period, Dominion shall provide a replacement for the Dominion Hardware component or, at Dominion's sole option, shall repair the Dominion Hardware component, so long as the Dominion Hardware is operated with its designated Dominion Software and with third party products approved by Dominion for use with the Dominion Hardware. The following conditions apply to the Dominion Hardware warranty:

9.4.1. Customer shall bear the shipping costs to return the malfunctioning component of Dominion Hardware to Dominion, and Dominion shall bear the costs for standard shipping of the repaired or replaced component of Dominion Hardware to Customer.

9.4.2. The following services are not covered by this Agreement, but may be available at Dominion's current time and material rates:

9.4.2.1. Replacement of consumable items including but not limited to batteries, paper rolls, ribbons, seals, smart cards, and removable memory devices, scanner rollers, disks, etc.;

9.4.2.2. Repair or replacement of Dominion Hardware damaged by accident, disaster, theft, vandalism, neglect, abuse, or any improper usage;

9.4.2.3. Repair or replacement of Dominion Hardware modified by any person other than those authorized in writing by Dominion;

9.4.2.4. Repair or replacement of Dominion Hardware from which the serial numbers have been removed, defaced or changed.

9.5. No Other Warranties. DOMINION DISCLAIMS ALL OTHER WARRANTIES, AND REPRESENTATIONS, WHETHER WRITTEN, ORAL, EXPRESS, OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY BASED ON A COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE.

10. Force Majeure. Should any circumstances beyond the control of Dominion or Customer occur that delay or render impossible the performance of any obligation due under this Agreement, such obligation will be postponed for the period of any delay resulting from any such circumstances, plus a reasonable period to accommodate adjustment to such extension, or cancelled if performance has been rendered impossible thereby. Such events may include, without limitation, accidents; war, acts of terrorism; natural disasters; labor disputes; acts, laws, rules or regulations of any government or government agency; or other events beyond the control of both Dominion and Customer. Neither Party shall be liable under this Agreement for any loss or damage to the other Party due to such delay or performance failures. Notwithstanding the foregoing, both Parties shall use their commercially reasonable efforts to minimize the adverse consequences of any such circumstances. This Section shall not operate to excuse any Party from paying amounts that are owed pursuant to this Agreement.

11. Indemnification. Dominion, at its sole expense, will indemnify and defend the Customer, its officers, agents and employees from and against any loss, cost, expense or liability (including but not limited to attorney's fees and awarded damages) arising out of a claim, suit or action that the System infringes, violates, or misappropriates a Third Party's patent, copyright, trademark, trade secret or other intellectual property or proprietary rights.

12. Limitation of Liability. DOMINION'S TOTAL AGGREGATE LIABILITY FOR ANY LOSS, DAMAGE, COSTS OR EXPENSES UNDER OR IN CONNECTION WITH THIS AGREEMENT, HOWSOEVER ARISING, INCLUDING WITHOUT LIMITATION, LOSS, DAMAGE, COSTS OR EXPENSES CAUSED BY BREACH OF CONTRACT, NEGLIGENCE, STRICT LIABILITY, BREACH OF STATUTORY OR ANY OTHER DUTY SHALL IN NO CIRCUMSTANCES EXCEED 200% OF THE TOTAL DOLLAR AMOUNT OF THE AGREEMENT. NEITHER PARTY SHALL BE LIABLE FOR ANY LOSS OF PROFITS, LOSS OF BUSINESS, LOSS OF DATA, LOSS OF USE OR ANY OTHER INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE WHATSOEVER, HOWSOEVER ARISING, INCURRED BY THE OTHER PARTY OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT, NEGLIGENCE OR OTHER TORT, EVEN IF THE PARTIES OR THEIR REPRESENTATIVES HAVE BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANYTHING IN THE AGREEMENT TO THE CONTRARY, THIS SECTION DOES NOT LIMIT (1) THE INDEMNIFICATION OBLIGATION UNDER SECTION 11, (2) DAMAGES CAUSED BY DOMINION'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

13. Confidential Information.

- 13.1. Each Party shall treat the other Party's Confidential Information as confidential within their respective organizations and each Party shall be given the ability to defend the confidentiality of its Confidential Information to the maximum extent allowable under the law prior to disclosure by the other Party of such Confidential Information.
- 13.2. Subject to the requirements of the Customer's public record laws ("PRL"), neither Party shall disclose the other Party's Confidential Information to any person outside their respective organizations 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.
- 13.3. Any specific information that Dominion claims to be confidential must be clearly marked or identified as such by the Customer. To the extent consistent with PRL, Customer shall maintain the confidentiality of all such information marked by Dominion as confidential. If a request is made to view such Confidential Information, Customer will 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, the Customer will release the requested information on the date specified. Such release shall be deemed to have been made with Dominion's consent and shall not be deemed to be a violation of law or this Agreement.

14. Assignment. Neither Party may assign its rights, obligations, or interests in this Agreement without the written consent of the other Party, providing however that Dominion may assign the

proceeds of this Agreement to a financial institution without prior consent of the Customer but with written notice to Customer.

15. Termination.

15.1 For Default. In the event either Party violates any provisions of this Agreement, the non-violating Party may serve written notice upon the violating Party identifying the violation and a providing a reasonable cure period. Except as otherwise noted herein, such cure period shall be at least thirty (30) days. In the event the violating Party has not remedied the infraction at the end of the cure period, the non-violating Party may serve written notice upon the violating Party of termination, and seek legal remedies for breach of contract as allowed hereunder. If the breach identified in the notice cannot be completely cured within the specified time period, no default shall occur if the Party receiving the notice begins curative action within the specified time period and thereafter proceeds with reasonable diligence and in good faith to cure the breach as soon as practicable.

15.2 For Non-Appropriation of Funds. The Customer shall not be obligated for payments hereunder for any future fiscal year unless or until the Customer appropriates funds for this Agreement in Customer's budget for that fiscal year. In the event that funds are not appropriated, then this Agreement may be terminated by the Customer as the end of the last fiscal year for which funds were appropriated. Termination of this Agreement by the Customer under this Section 15.2 shall not constitute a breach of this Agreement by the Customer. Customer shall notify Dominion in writing of such non-appropriation at the earliest possible date which, in any event, shall be prior to Dominion performing services during any fiscal year for which an appropriation has not been made. In the event Customer notifies Dominion that sufficient funds have not been appropriated, or if in fact sufficient funds have not been appropriated, to compensate Dominion in accordance with this Agreement, Dominion may suspend Dominion's performance and terminate all Dominion licenses under this Agreement. Suspension of performance and termination of all Dominion licenses by Dominion in accordance with this section 15.2 shall not constitute a breach of this Agreement by Dominion.

15.3 For Non-Certification of the Voting System. In the event that Dominion does not achieve State of Pennsylvania voting system certification for the System provided to the Customer as part of this Agreement (as more specifically described in Exhibit A) by June 30 2019, then the Customer may terminate this Agreement at will. Should the Agreement be terminated pursuant to this Section 15.3, Dominion shall refund all payments made by the Customer. In addition, Dominion shall pay for all costs associated with retrieving the System from the Customer.

16. Legality and Severability. This Agreement and the Parties' actions under this Agreement shall comply with all applicable federal, state and local laws, ordinances, rules, regulations, court orders, and applicable governmental agency orders. If any term or provision of this Agreement is held to be illegal or unenforceable, the remainder of this Agreement shall not be affected thereby

and each term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. The Parties agree that any court reviewing this Agreement shall reform any illegal or unenforceable provision to carry out the express intent of the parties as set forth herein to the fullest extent permitted by law.

17. Survival. The provisions of Sections 2, 9, 10, 11, 13, 16, 18, and 19 shall survive the expiration or termination of this Agreement.

18. Choice of Law. Interpretation of this Agreement shall be governed by the laws of the Customer's State, and the courts of competent jurisdiction located in the Customer's State will have jurisdiction to hear and determine questions relating to this Agreement.

19. Waiver. Any failure of a Party to assert any right under this Agreement shall not constitute a waiver or a termination of that right or any provisions of this Agreement.

20. Independent Contractor. Dominion and its agents and employees are independent contractors performing professional services for the Customer and are not employees of the Customer. Dominion and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of Customer vehicles, or any other benefits afforded to employees of the Customer as a result of this Agreement. Dominion acknowledges that all sums received hereunder are personally reportable by it for income tax purposes as self-employment or business income and are reportable for self-employment tax.

21. Notices. All notices required or permitted to be given hereunder shall be given in writing and shall be deemed to have been given when personally delivered or by nationally recognized overnight carrier or mailed, certified or registered mail, return receipt requested, addressed to the intended recipient as follows:

If to Dominion:

Dominion Voting Systems, Inc.
Attn: Contracts Administrator
1201 18th St., Ste. 210
Denver, CO 80202

If to the Customer:

Fulton County Director of Elections & Voter Registration
~~Attn: Karen Hann~~
116 W. Market Street, Suite 203
McConnellburg, PA 17233

22. Entire Agreement. This Agreement and its Exhibits incorporated herein by reference constitute the entire agreement, understanding and representations between Dominion and the Customer, and supersede and replace all prior agreements, written or oral. No modifications or representations to the Agreement shall be valid unless made in writing and signed by duly authorized representatives of both the Customer and Dominion, and incorporated as an Addendum hereto.

23. Third-Party Beneficiary. No person shall be a third-party beneficiary pursuant to this Agreement. No obligation of Dominion or Customer may be enforced against Dominion or Customer, as applicable, by any person not a party to this Agreement.

Signature Page Follows

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the date first above written.

DOMINION VOTING SYSTEMS, INC.



AUTHORIZED SIGNATURE

John Poulos

PRINTED NAME

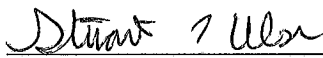
President & CEO

TITLE

8/14/2019

DATE

FULTON COUNTY, PA



AUTHORIZED SIGNATURE

Stuart L Ulsch

PRINTED NAME

Commissioner Chair

TITLE

8/20/19

DATE

EXHIBIT A
VOTING SYSTEM AGREEMENT
BY AND BETWEEN DOMINION VOTING SYSTEMS
AND FULTON COUNTY, PA

PRICING SUMMARY AND DELIVERABLES DESCRIPTION

1. Pricing/Payment Summary and Descriptions

1.1 **Pricing and Payment Summary.** The total annual managed service contract pricing shall equal **\$31,931.00**/year for a total of eight (8) years. The following is the invoicing schedule for the annual Customer payments. The Customer shall pay invoices in a timely manner and no later than thirty (30) calendar days from receipt of a Dominion invoice. All payments shall be made in U.S. Dollars. Pricing does not include shipping or any applicable taxes.

~~1.1.1 Year 1 shall cover the time period from the Agreement Effective Date through December 31, 2019. The Year 1 invoice of \$31,931.00 will be issued immediately after System certification by the State of Pennsylvania. Under no circumstance will payment be made by the Customer until the System is certified for use by the State of Pennsylvania and all Acceptance testing has been completed to the satisfaction of Customer.~~

1.1.2 Year 2: 1/1/2020 – 12/31/2020: **\$31,931.00** invoice will be issued on 1/1/2020

1.1.3 Year 3: 1/1/2021 – 12/31/2021: **\$31,931.00** invoice will be issued on 1/1/2021

1.1.4 Year 4: 1/1/2022 – 12/31/2022: **\$31,931.00** invoice will be issued on 1/1/2022

1.1.5 Year 5: 1/1/2023 – 12/31/2023: **\$31,931.00** invoice will be issued on 1/1/2023

1.1.6 Year 6: 1/1/2024 – 12/31/2024: **\$31,931.00** invoice will be issued on 1/1/2024

1.1.7 Year 7: 1/1/2025 – 12/31/2025: **\$31,931.00** invoice will be issued on 1/1/2025

1.1.8 Year 8: 1/1/2026 – 12/31/2026: **\$31,931.00** invoice will be issued on 1/1/2026

2. System Description - Prices of equipment, technical facilities, software, and other related services for voting, vote counting, and result processing.

DESCRIPTION	QTY
Central Scanning Solution: Absentee / Central Count	
ImageCast Central Kit: Canon M160II Document scanner includes: ImageCast Central Software, Dell Optiplex 7440 All-in-One, iButton programmer and key, cables	2
In-Person Voting Solution: Polling Location Hardware	
ImageCast X BMD (21 inch) Kit includes: ICX Firmware, Tablet, 5 voter activation cards, printer, cables, power cord	15
Universal Power Supply (UPS) for ICX BMD	15
Audio Tactile Interface (ATI) Accessible Unit	15
ImageCast X Voting Booth - Standard	12
ICX Prime BMD Bag Kit	15

Election Management Hardware	
Democracy Suite EMS Express Server Configuration Kit - Up to 7 clients	1
EMS Client Workstation Configuration Kit	1
Adjudication Workstation Kit	1
Software Licenses	
Democracy Suite (EMS) Application	1
ICC Adjudication Application	1
Automated Test Decks Application	1
Support and Implementation Services	#
Project Management	5
Training	5
On-Site Election Support (3 days for each Election)	2

3. Detailed Descriptions

3.1 ***ImageCast Central Scanner (ICC)***. The ImageCast Central Scanner is commercial off-the-shelf digital scanners configured to work with the ImageCast Central Software for high speed ballot tabulation. Each ImageCast Central Scanner includes the following components:

- 3.1.1 Canon M160II document scanner
- 3.1.2 ImageCast Central Software
- 3.1.3 OptiPlex 7440 All-in-One Series with pre-loaded software
- 3.1.4 iButton Security Key
- 3.1.5 iButton Programmer and iButton Key Switch & Cat5 RJ 45 Cables used with Democracy Suite to transfer security and election information to the iButtons for use with the ICC.

3.2 ***ImageCast® X ("ICX")***.

3.2.1 Application: ImageCast X BMD is a touchscreen in-person voting device and ballot marking device. Voting sessions are initiated on the tablet by either a smart card or the entry of a numeric code based on activation. The ballot is loaded directly onto the standalone device. All voting activity is performed at the tablet, including accessible voting. Accessible voting interfaces connect to the tablet via an Audio Tactile Interface or ATI. After the voter reviews the ballot selections, a paper ballot is created for the voter from a printer in the voting booth. The printed ballot contains a written summary of the voter's choices, as well as a 2D barcode which is read by Dominion's ImageCast Precinct tabulator. No votes are stored on the ImageCast X-BMD unit. All votes can be tabulated and stored both the ImageCast Precinct Tabulators.

3.2.2 Components: ImageCast X BMD is composed of a 21" Avalue touchscreen, Android OS 4.4.4, DC 19V input, HP LaserJet Pro M402dne laser printer, 6' cable, 5 smart cards, and 8GB flash drive.

- 3.3 **Audio Tactile Device ("ATI").** The ATI connects to the ICX via the port located on the right side of the unit. A set of headphones connects directly to the ATI controller. Following the audio voting process using the ATI controller, the ICX-BMD printer produces a marked paper ballot which serves as the official ballot record.
- 3.4 **ImageCast Software.** The Parties will enter into software licenses for the ImageCast software, substantially in the form of Exhibit B to this Agreement. The Dominion software includes, without limitation:
- 3.4.1 AuditMark¹. For each ballot that is scanned and accepted into the unit, a corresponding ballot image is created and stored for audit purposes. The image consists of two parts described below.
- The top portion of the image contains a scanned image of the ballot.
 - The bottom portion consists of a machine-generated type-out showing each mark that the unit interpreted for that particular ballot. This is referred to as an AuditMark.
-
- 3.5 **Democracy Suite Software** is suite of election management software that supports all ImageCast voting channels from a single comprehensive database. The Democracy Suite EMS consists of the following components:
- 3.5.1 Election Event Designer (EED). The EED Client Application is the primary application used for the definition and management of election event. EED is responsible for the definition of election projects. Each election project is represented as an instance of the election domain database with associated set of election project file based artifacts. The definition of the election project can be initiated by importing the election data through the Election Data Translator (EDT) module from external systems or by defining election project entities without importing external data. It is important to note that an election project initiated through EDT can be further modified within the EED Client Application. The system can generate two types of paper ballots:
- Proofing ballots – ballots produced to allow election officials the ability to proof ballot content and styling. These ballots cannot be processed by the ImageCast as they don't have proper ballot barcodes. These ballots are overprinted with the text "Proofing Ballots – date/time"
 - Official ballots – represent production ready, press ready ballots in PDF format with barcodes and without any overprinting.
- 3.5.2 Results Tally and Reporting (RTR). The RTR Client Application is the application used for the tally, reporting and publishing of election results.
- 3.5.3 ImageCast Adjudication Application. The Adjudication application is a client and server application used to review and adjudicate ImageCast Central Scanner ballot images. The application uses tabulator results files and scanned images to allow election administrators to make adjudications to ballots with auditing and reporting capabilities. The Adjudication Application examines such voter exceptions as overvotes, undervotes, blank contests,

¹ AuditMark is a registered trademark of Dominion Voting Systems Inc.

blank ballots, write-in selections, and marginal marks. The application works in two basic modes: election project setup and adjudication. The Adjudication Application can be used in a multi-client environment. Adjudication Application eliminates the need to physically rescan ballots, which can potentially damage the originals and cause chain-of-custody concerns

- 3.5.4 Audio Studio. The system uses Cepstral, a third-party text-to-audio synthesizer, to automatically generate audio ballots for the ImageCast X Ballot Marking Device. The County also has the option to import human-recorded audio, with or without the use of Audio Studio. Pronunciation may be modified using the Cepstral's Swifttalker application. The system outputs audio ballots (PNG images, SPX audio files and XML definition files), definition reports (XML, Excel or HTML files), and election definition files required to program the ImageCast X.
- 3.5.5 Automated Test Deck (ATD). ATD is an application used to create test decks for running Pre-Logic and Accuracy Test with marking pattern requirements. The application can be used to access the election database and produce a set of print-ready PDFs and results tables for testing.

3.6 ***Support and Implementation Services.***

- 3.7.1 Project Management Support. Dominion will provide Project management support to oversee the general operations of the Project through the Agreement Term. The Project manager is responsible for arranging all meetings, visits and consultations between the parties and for all administrative matters such as invoices, payments and amendments. The Parties shall develop and finalize a Project implementation plan including a training and delivery schedule. The Parties agree that during the course of the implementation, changes to the Project schedule may be required. Any changes to the Project schedule must be mutually agreed to by both Parties and such agreement shall not be unreasonably withheld.
- 3.7.2 System Acceptance Testing Support. Dominion will provide direct onsite training and support during the System Acceptance Testing period.
- 3.7.3 ImageCast X – This training introduces the ImageCast X system with an emphasis on the operation of the hardware. Students can expect to learn general operations, logic and accuracy testing, Election Day setup and operation, and troubleshooting.
- 3.7.4 ImageCast® ICC – This training introduces the ImageCast ICC with an emphasis on the operation of the hardware. Students can expect to learn general operations, logic and accuracy testing, ballot scanning operation, and troubleshooting. In addition, training will include resolution via the adjudication application.
- 3.7.5 EMS Server Installation, Configuration & Testing. Dominion will provide a minimum total of one (1) day of direct onsite support for EMS Server installation, configuration & testing.

- 3.7.6 Democracy Suite EMS System – Training covers defining an election project in Democracy Suite EED. Topics include importing jurisdictional information, ballot layout, proofing and printing, election file creation (ICX, and ICC), automated test deck creation, loading elections, tallying results (including adjudication tally), and generating reports.
- 3.7.7 On-Site Election Day Support. Dominion will provide three (3) days (inclusive of travel) of direct onsite election support for two (2) elections.
- 3.8 ***Travel and Expenses included.*** All costs of Dominion transportation, lodging and meal expenses are included during the Agreement Term.
- 3.9 ***Ongoing telephone support.*** Telephone support shall be available for Customers during the Term of the Agreement at no additional costs.
- 3.10 ***Other Services, Consumables or Equipment.*** Any other services, consumables or equipment not specifically identified in this Agreement are available for purchase by the Customer at the then current Dominion list price.
-

EXHIBIT B

SOFTWARE LICENSE TERMS AND CONDITIONS

This Exhibit B is part of the Agreement between Dominion and Customer to which it is attached.

1. Definitions. Capitalized terms used herein have the meaning given in the Agreement unless otherwise defined herein.

1.1. "Agreement" means the agreement between the Parties for the use of the licensed Software to which this Exhibit B is attached and incorporated into.

1.2. "Licensee" means Customer, as the term is defined in the Agreement.

1.3. "Licensor" means Dominion Voting Systems, Inc.

1.4. "Software" means Dominion Software, as the term is defined in the Agreement.

1.5. "Specifications" means descriptions and data regarding the features, functions and performance of the Software, as set forth in user manuals or other applicable documentation provided by Licensor.

1.6. "Third-Party Products" means any software or hardware obtained from third-party manufacturers or distributors and provided by Licensor hereunder.

2. License Terms.

2.1. License Limitations. Licensee's use of the Software pursuant to the License granted in the Agreement is subject to the terms herein. Licensee may only use the Software for its own internal business purposes and conducting elections and solely in conjunction with the EMS Hardware. The License shall only be effective during the Term and cannot be transferred or sublicensed.

2.2. Print Copyright License. Subject to the Print Copyright License terms and conditions as defined in Schedule A attached hereto, Licensor grants to Licensee a non-exclusive, non-transferable print copyright license as defined in Schedule A.

2.3. Third-Party Products. When applicable, Licensor hereby sublicenses any software that constitutes or is contained in Third-Party Products, in object code form only, to Licensee for use during the Term.

2.4. No Other Licenses. Other than as expressly set forth herein, (a) Licensor grants no licenses, expressly or by implication, and (b) Licensor's entering into the Agreement will not be deemed to license or assign any intellectual property rights of Licensor to Licensee or any third party. Licensee agrees not to use the Software as a service bureau for elections outside the Licensee's jurisdiction and agrees not to reverse engineer or otherwise attempt to derive the source code of the Software. The Licensee shall have no power to transfer or grant sub-licenses for the Software. Any use of all or any portion of the Software not expressly permitted is strictly prohibited.

2.5. Intellectual Property Infringement Indemnification. If a third party claims that the Software or System infringes any United States patent, copyright, trade secret or similar

intellectual property right, Dominion shall defend Licensee against such claim at Dominion's expense and pay all damages that a court finally awards against Licensee. If such a claim is made or appears possible, Dominion shall, within sixty (60) days of such claim, and at its option: (a) secure for Licensee the right to continue to use the infringing portion of the Software or System; or (b) modify or replace the Software and System so that it is non-infringing but retains equivalent functionality. If neither of the foregoing options is reasonably available, Dominion shall require Licensee to return the Software or System, and Dominion shall refund Licensee amounts calculated pursuant to the Software License fee, on a pro-rate basis. The foregoing notwithstanding, Dominion shall have no obligation to indemnify Licensee for any infringement claim based on Licensee's modification or misuse of the Software, if the claim would have been avoided had the Software not been modified or misused.

3. Payment. In consideration of the grant of the license, the Licensee shall pay the license fees set forth in the Agreement and Exhibit A of the Agreement.

4. Upgrades and Certification. During the Term, Licensors may provide upgrades to Licensee under the following terms and conditions.

4.1. Upgrades. In the event that Licensors, at its sole discretion, certifies a Software upgrade under the applicable laws and regulations of the Customer's State, Licensors shall make the certified Software upgrade available to the Licensee at no additional cost.

4.2. Certification Requirement. Notwithstanding any other terms of this Agreement, Licensors shall not provide, and shall not be obligated to provide under this Agreement any upgrade, enhancement or other software update that has not been certified under the applicable provisions of the election laws and regulations of the Customer's State.

5. Prohibited Acts. The Licensee shall not, without the prior written permission of Licensors:

5.1. Transfer or copy onto any other storage device or hardware or otherwise copy the Software in whole or in part except for purposes of system backup;

5.2. Reverse engineer, disassemble, decompile, decipher or analyze the Software in whole or in part;

5.3. Alter or modify the Software in any way or prepare any derivative works of the Software or any part of parts of the Software;

5.4. Alter, remove or obstruct any copyright or proprietary notices from the Software, or fail to reproduce the same on any lawful copies of the Software.

6. Return of Software. Upon termination or expiration of this Agreement, Licensee shall forthwith return to Licensors all Software in its possession or control, or destroy all such Software from any electronic media, and certify in writing to Licensors that it has been destroyed.

7. Warranties. The following warranties will apply to all Software during the Term.

7.1. Software Warranty Terms. Licensor warrants that the Software will function substantially in accordance with the Specifications during the Term. The Licensor also warrants that the Software will comply with the voting system certification requirements and laws of the Customer's State (collectively the "Requirements") in effect as of the date the Software is certified by the certification authority of the Customer's State. This provision applies to the initially installed Software as well as any subsequent upgrades pursuant to Section 4 herein. However, the Licensor will not be required to make modifications to the Software or System as a result of changes in the Requirements. The foregoing warranty will be void in the event of the Software (i) having been modified by any party other than Licensor or (ii) having been used by the Licensee for purposes other than those for which the Software was designed by Licensor. If Licensor establishes that a failure of the foregoing warranty that is reported by Licensee is not covered by the foregoing warranty, the Licensee shall be responsible for the costs of Licensor's investigative and remedial work at Licensor's then current rates.

7.2. Corrections. If the Licensee believes that the Software is not functioning substantially in accordance with the Specifications or Requirements, the Licensee shall provide Licensor with written notice of the material failure within thirty (30) days of discovering the material failure, provided that the Licensee can reproduce the material failure to Licensor. The Licensor shall correct the deficiencies, at no additional cost to the Licensee and incorporate such corrections into the next version certified by the Customer's State.

7.3 Third-Party Products. The warranties herein do not apply to any Third-Party Products. However, to the extent permitted by the manufacturers of Third-Party Products, Licensor shall pass through to Licensee all warranties such manufacturers make to Licensor regarding the operation of such Third-Party Products.

7.4. NO OTHER WARRANTIES. EXCEPT AS SET FORTH IN THE AGREEMENT AND HEREIN, LICENSOR DISCLAIMS ALL OTHER REPRESENTATIONS AND WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS, OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY BASED ON A COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE.

SCHEDULE A

PRINT COPYRIGHT LICENSE TERMS AND CONDITIONS

1. **Definitions.** For the purposes of this Agreement, the following are defined terms:
 - 1.1. "Derivative Works" means any work that is based upon or derived from the Licensor's voting systems' ballots, including without limitation, sample ballots and voting booklets.
 - 1.2. "Voting Systems' Ballots" means any ballot created for use with any voting system owned or licensed by the Licensor.
2. **Print Copyright License and Use.**

- 2.1. Copyright License Grant. Licensor grants to the Licensee a non-exclusive, non-transferable copyright license to print, reproduce, distribute or otherwise copy the Licensor's Voting Systems' Ballots and any Derivative Works (collectively the "Materials") pursuant to the terms and conditions of this Schedule A.
- 2.2. Copyright License Use. Other than as expressly set forth herein, (a) Licensor grants no other licenses, expressly or by implication, and (b) Licensor's entering into and performing the Agreement will not be deemed to license or assign any intellectual property rights of Licensor to Licensee or any third party, (c) the copyright license granted herein cannot be transferred or sublicensed and the Voting Systems' Ballots or Derivative Works cannot be reproduced by any third party without the prior written consent of the Licensor, including without limitation:
 - (i) any commercial or non-commercial printer
 - (ii) any third party vendor using ballot on demand system.
- 2.3. Rights and Interests. All right, title and interest in the Material, including without limitation, any copyright, shall remain with the Licensor.

3. No Copyright Warranties. EXCEPT AS SET FORTH HEREIN, LICENSOR DISCLAIMS ALL REPRESENTATIONS AND WARRANTIES, WHETHER WRITTEN, ORAL, EXPRESS, OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY WARRANTY BASED ON A COURSE OF DEALING, COURSE OF PERFORMANCE OR USAGE OF TRADE.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board : of Elections, Stuart L. Ulsh, in his : official capacity as County : Commissioner of Fulton County and : in his capacity as a resident, taxpayer : and elector in Fulton County, and Randy : H. Bunch, in his official capacity as : County Commissioner of Fulton County : and in his capacity as a resident, : taxpayer and elector of Fulton County, : Petitioners :	:	
v. :	:	No. 277 M.D. 2021
Secretary of the Commonwealth, :	:	Heard: January 7, 2022
Respondent :	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE LEAVITT

FILED: January 10, 2022

Before the Court is the Emergency Application for Leave to Intervene for the Limited Purpose of Seeking a Protective Order (Application to Intervene) filed by Dominion Voting Systems, Inc. (Dominion). Petitioners have filed an Answer in opposition to the Application to Intervene, and Respondents have filed an Answer in support. For the following reasons, the Court denies the Application to Intervene.

This matter arises from Petitioners' 4-count Amended Petition for Review, seeking, *inter alia*, to reverse Respondent's decertification of Dominion's Democracy Suite 5.5A voting system (System) for use in elections in the County of

Fulton (County). After Respondent initially certified the System in 2019, the County leased two such machines from Dominion and used them in the 2020 General Election. Thereafter, the County contracted with Wake Technology Services Inc. (Wake TSI) to inspect the System in conjunction with the County's investigation of the processes used in the election. On July 8, 2021, Respondent issued Directive 1 of 2021, which prohibits county boards of elections from allowing third-party examination of state-certified voting systems, and provides for decertification of any system so examined. On July 20, 2021, Respondent issued a letter to the County decertifying the System under Section 1105-A of the Pennsylvania Election Code¹ for the stated reason that the County had allowed a third-party examination. Petitioners filed a Petition for Review to challenge Respondent's decertification.

When Respondent learned that Petitioners planned to allow another third party, Envoy Sage, LLC, to inspect the System on December 22, 2021, she filed an emergency application to prohibit spoliation of evidence that would allegedly occur during the inspection. Respondent asserted that the County might use the work of Envoy Sage in its action to set aside the Respondent's decertification.

After a status conference on December 21, 2021, this Court entered an order to reflect the agreement of the parties to negotiate protocols for the inspection and to postpone the inspection to January 12, 2022.

Dominion, which created the System and leases it to the County, now seeks to intervene on the ground that Envoy Sage's scheduled inspection of the System will violate the "Voting System and Managed Services Agreement" (Contract) between Dominion and the County and will disclose confidential

¹ Act of June 3, 1937, P.L. 1333, *as amended*, added by the Act of July 11, 1980, P.L. 600, 25 P.S. §3031.5.

information protected thereunder. The Court held a hearing on the Application to Intervene on January 7, 2022.

Pennsylvania Rule of Civil Procedure 2327 provides:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

- (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
- (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
- (3) such person could have joined as an original party in the action or could have been joined therein; or
- (4) *the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.*

PA.R.Civ.P. 2327 (emphasis added). Pennsylvania Rule of Civil Procedure 2329 states as follows:

Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; *but an application for intervention may be refused, if*

- (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
- (2) the interest of the petitioner is already adequately represented; or
- (3) the petitioner has unduly delayed in making application for intervention *or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.*

PA.R.Civ.P. 2329 (emphasis added).

In sum, intervention is warranted where determination *of the action in question* may “affect any legally enforceable interest” of the intervenor. PA.R.Civ.P. 2327. However, an application “may be refused” in the specific circumstances set forth in PA.R.Civ.P. 2329. Such a refusal rests in this Court’s discretion, and stands absent a manifest abuse of that discretion. *Deitrick v. Northumberland County*, 846 A.2d 180, 185 (Pa. Cmwlth.), *appeal denied*, 856 A.2d 836 (Pa. 2004).

Dominion argues that its “legally enforceable interest” here stems from the Contract.² Dominion insists that the Contract prohibits the County from allowing third-party access to the System and confidential information therein, and expressly authorizes Dominion to seek judicial action to protect its contractual interest in the

² The Contract, which was admitted as evidence by joint stipulation at the hearing, provides, in relevant part:

13. Confidential Information.

13.1. [E]ach Party shall be given the ability to defend the confidentiality of its Confidential Information to the maximum extent allowable under the law prior to disclosure by the other Party of such Confidential Information.

13.2. Subject to the requirements of the Customer's public record laws (“PRL”), neither Party shall disclose the other Party's Confidential Information to any person outside their respective organizations 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.

13.3. To the extent consistent with PRL, Customer shall maintain the confidentiality of all such information marked by Dominion as confidential. If a request is made to view such Confidential Information, Customer will 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, the Customer will release the requested information on the date specified. Such release shall be deemed to have been made with Dominion.

Contract §13, Ex. 1 at 7.

face of any mandatory third-party access imposed on the County (though Dominion maintains that the County is providing access to Envoy Sage only voluntarily). The County responds that this matter concerns Respondent's authority to decertify one county's voting machines under the Election Code, and that this matter will not determine, and is thus wholly unrelated to, any interest Dominion may have under the Contract.

The Court agrees with Petitioners. Although Dominion may have an enforceable contractual interest in general, it has not shown that determination of *this matter* in particular—which concerns only statutory authority for decertification—will affect that legally enforceable interest. The County can choose to allow third-party access to the System, as it did with the Wake TSI inspection. This Court's order of December 21, 2021, merely postponed the scheduled inspection with the consent of the parties. Even if the County's voluntary actions violate the Contract, those actions are independent of *this matter*, and should be litigated, if at all, in an independent action.


The parties and Dominion conceded during the hearing that, in order to grant the Application to Intervene, the Court would need to construe the Contract. But this matter concerns decertification and election investigation under the Election Code, and is not the appropriate forum for the construction and vindication of private contractual rights.

Moreover, even if Dominion had shown that its contractual rights might be affected by the determination of this matter, the Court would deny the Application to Intervene on another basis. As Petitioners persuasively argue, Dominion had notice of the planned Envoy Sage inspection by, at the very latest, December 16, 2021, when the County's solicitor directly informed Dominion of the inspection by

letter. Arguably, Dominion had notice earlier, by either August 18, 2021, when Petitioners instituted this matter, or October 13, 2021, when Respondent authorized another third party to inspect the System. Even a small delay is “undue” when, as here, the Court has ordered the parties to proceed on a strict timeframe.

The other disjunct of Rule 2329(3) is also met: intervention would unduly delay and prejudice adjudication of the parties’ rights. This Court has already twice postponed the scheduled inspection, and Dominion’s Application to Intervene, filed exactly one week before the first rescheduled January 10, 2022, inspection date, would unquestionably delay it further if granted. This would hinder resolution of this matter—which, again, concerns decertification, not third-party access—and the County’s ability to prepare for upcoming elections. Although a party may intervene “at any time” under Rule 2327, delay in the face of actual or constructive knowledge of the action, and the prejudicial effect thereof in this matter, persuades the Court to exercise its discretion against intervention. *See Appeal of Austerlitz*, 437 A.2d 804, 805 (Pa. Cmwlth. 1981); *In re Upper Chichester Township*, 415 A.2d 1250, 1253 (Pa. Cmwlth. 1980); *see also* 7 GOODRICH AMRAM 2D § 2329:8 (“The [undue delay] standard is a flexible one, not capable of mathematical definition.”).

Because this matter is not the appropriate vehicle for litigating Dominion’s private contractual interests, and because Dominion unduly delayed intervention to the prejudice of the parties, the Court will deny intervention.

A handwritten signature in black ink, appearing to read 'Mary Hannah Leavitt', with a long horizontal stroke extending to the right.

MARY HANNAH LEAVITT, President Judge Emerita

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board :
of Elections, Stuart L. Ulsh, in his :
official capacity as County :
Commissioner of Fulton County and :
in his capacity as a resident, taxpayer :
and elector in Fulton County, and Randy :
H. Bunch, in his official capacity as :
County Commissioner of Fulton County :
and in his capacity as a resident, :
taxpayer and elector of Fulton County, :
Petitioners :
v. : No. 277 M.D. 2021
Secretary of the Commonwealth, :
Respondent :

ORDER

NOW, January 10, 2022, upon consideration of the Emergency Application for Leave to Intervene for the Limited Purpose of Seeking a Protective Order (Application to Intervene) filed by Dominion Voting Systems, Inc., the Application to Intervene is DENIED.

~~Wasser in~~

MARY HANNAH LEAVITT, President Judge Emerita

Order Exit
01/10/2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board :
of Elections, Stuart L. Ulsh, in his :
official capacity as County :
Commissioner of Fulton County and :
in his capacity as a resident, taxpayer :
and elector in Fulton County, and Randy :
H. Bunch, in his official capacity as :
County Commissioner of Fulton County :
and in his capacity as a resident, :
taxpayer and elector of Fulton County, :
Petitioners :
v. : No. 277 M.D. 2021
Secretary of the Commonwealth, :
Respondent :

PER CURIAM

ORDER

NOW, January 7, 2022, upon consideration of letters submitted by Respondent and Petitioners on January 6, 2022, and following a status conference, upon agreement of the parties, this Court's order of December 21, 2021 is hereby AMENDED to postpone the inspection of Fulton County's voting machines by Envoy Sage, LLC, to Wednesday, January 12, 2022.

The parties are ORDERED to negotiate, in good faith, protocols that will apply to said inspection. Further, the parties shall file a joint status report advising of the status of their negotiations no later than 1:00 p.m. on Tuesday, January 11, 2022.

Order Exit
01/07/2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board :
of Elections, Stuart L. Ulsh, in his :
official capacity as County :
Commissioner of Fulton County and :
in his capacity as a resident, taxpayer :
and elector in Fulton County, and Randy :
H. Bunch, in his official capacity as :
County Commissioner of Fulton County :
and in his capacity as a resident, :
taxpayer and elector of Fulton County, :
Petitioners :
v. : No. 277 M.D. 2021
Secretary of the Commonwealth, :
Respondent :

PER CURIAM

ORDER

NOW, January 11, 2022, upon consideration of the Emergency Application of Respondent to Reschedule the January 12, 2022, Inspection due to the Unavailability of Respondent's Expert, and Petitioners' Answer thereto, this Court's order of January 7, 2022, is hereby AMENDED to postpone the inspection of Fulton County's voting machines by Envoy Sage, LLC, to no earlier than 1:00 p.m. on Friday, January 14, 2022.

The parties shall continue negotiating protocols that will apply to said inspection. Further, the parties' joint status report, currently due on January 11, 2022, shall now be due no later than 4:00 p.m. on January 13, 2022.

Order Exit
01/11/2022

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Fulton, Fulton County Board :
of Elections, Stuart L. Ulsh, in his :
official capacity as County :
Commissioner of Fulton County and :
in his capacity as a resident, taxpayer :
and elector in Fulton County, and Randy :
H. Bunch, in his official capacity as :
County Commissioner of Fulton County :
and in his capacity as a resident, :
taxpayer and elector of Fulton County, :
Petitioners :
v. : No. 277 M.D. 2021
Secretary of the Commonwealth, :
Respondent :

MEMORANDUM AND ORDER

Before the Court is Respondent Secretary of the Commonwealth's (Secretary) December 17, 2021, Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021 (Application to Preserve Evidence), seeking relief in the nature of a preservation order against the potential spoliation of evidence in this original jurisdiction matter. Also before the Court is the Secretary's January 13, 2022, Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding (Application to Enjoin Inspection). For the following reasons, the Court denies the Application to Preserve Evidence and dismisses the Application to Enjoin Inspection as improvidently filed.

This matter arises from Petitioners' 4-count Amended Petition for Review, challenging the Secretary's decertification of the Democracy Suite 5.5A voting system (System) the County of Fulton (County) leases from Dominion Voting

Systems, Inc. (Dominion) for use in elections in the County. After the Secretary initially certified the System in 2019, the County leased two such machines from Dominion and used them in the 2020 General Election. Thereafter, the County contracted with Wake Technology Services Inc. to inspect the System in conjunction with the County's investigation of the processes used in the election. Thereafter, on July 8, 2021, the Secretary issued Directive 1 of 2021, which prohibits county boards of elections from allowing third-party examination of state-certified voting systems, and provides for decertification of any system so examined. On July 20, 2021, the Secretary issued a letter to the County decertifying the System under Section 1105-A of the Pennsylvania Election Code¹ for the stated reason that the County had allowed a third-party examination. Petitioners filed an original jurisdiction Amended Petition for Review seeking declaratory and injunctive relief to reverse the decertification.

When the Secretary learned that Petitioners planned to allow another third party, Envoy Sage, LLC (Envoy Sage), to inspect the System on December 22, 2021, she filed an emergency application to prohibit spoliation of evidence that would allegedly occur during the inspection. The Secretary asserted that the County might use the work of Envoy Sage in the County's action to set aside the decertification.

After a status conference on December 21, 2021, this Court entered an order to reflect the agreement of the parties to negotiate protocols for the inspection and to postpone the inspection to January 10, 2022. The Court subsequently issued orders further postponing the inspection to January 14, 2022, to accommodate further negotiation and the attendance of the Secretary's technical expert at the

¹ Act of June 3, 1937, P.L. 1333, *as amended*, added by the Act of July 11, 1980, P.L. 600, 25 P.S. §3031.5.

inspection. On January 13, 2022, the parties filed a Joint Status Report advising that they remain, after weeks of negotiation, unable to agree on mutually acceptable protocols. At the same time, the Secretary filed the Application to Enjoin Inspection, asking the Court to postpone the inspection yet again in light of the parties' failure to agree.

The Application to Preserve Evidence is premised on the alleged risk of spoliation of evidence, which is “the non-preservation or significant alteration of evidence for pending or future litigation.” *Pyeritz v. Commonwealth*, 32 A.3d 687, 692 (Pa. 2011). A party that engages in spoliation faces numerous sanctions at the court’s discretion, ranging from an inference that the evidence would have been adverse to the spoliator, to prohibiting other evidence offered by the spoliator, to striking portions of pleadings or complete dismissal. *See Schroeder v. Department of Transportation*, 710 A.2d 23, 27 (Pa. 1998); *King v. Pittsburgh Water & Sewer Authority*, 139 A.3d 336, 346 (Pa. Cmwlth. 2016). These sanctions are applied in proportion to the severity of the spoliation, and Pennsylvania courts have refined a standard that applies particularly to spoliation of electronically stored evidence. *See PTSI, Inc. v. Haley*, 71 A.3d 304, 316 (Pa. Super. 2013) (citing Pa.R.Civ.P. 4009.1 and explanatory comment to the 2012 amendment thereto, discussing proportionality standard for electronic spoliation).

In addition to these well-developed sanctions that militate against spoliation, courts occasionally issue preservation orders during discovery. *See, e.g., King*, 139 A.3d at 340 (“In its most obvious form, spoliation occurs in the context of pending litigation when a party breaches a court’s preservation of evidence order.”); *PTSI*, 71 A.3d at 318 (discussing compliance with trial court’s preservation order). Our Supreme Court has cited favorably to the balancing test set forth in

Capricorn Power Company, Inc. v. Siemens Westinghouse Power Corp., 220 F.R.D. 429, 433-34 (W.D. Pa. 2004), for purposes of determining whether a party is entitled to such an order. *See Pyeritz*, 32 A.3d at 694. *Capricorn Power* directs a court to balance the following three factors:

- (1) the level of concern the court has for the continuing existence and maintenance of the integrity *of the evidence in question* in the absence of an order directing preservation of the evidence;
- (2) any irreparable harm likely to result to the party seeking the preservation of *evidence* absent an order directing preservation; and
- (3) the capability of an individual, entity, or party to maintain the *evidence* sought to be preserved, not only as to the evidence's original form, condition or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

Capricorn Power, 220 F.R.D. at 433-34 (emphasis added).

The Secretary, as the party seeking the preservation order, bears the burden under this test. She has failed, however, to demonstrate a critical element of each of the three factors—that the data or state of the System subject to inspection constitutes *evidence* in this matter worthy of protection. The spoliation doctrine protects evidence, not information in general. The Secretary has not persuaded the Court that she, or Petitioners for that matter, will use any data obtained from the System as evidence in this proceeding.

Petitioners, who initiated this case and will therefore establish the evidentiary scope of this litigation, have expressly disclaimed such a use, stating that they “are not conducting an inspection of the voting machines. Petitioners are complying with a request from Senator Cris Dush, Chairman of the Intergovernmental Operations Committee of the Pennsylvania Senate [IOC]. The

IOC's expert, Envoy Sage, is conducting the inspection on behalf of the Committee" (Joint Status Report, Appx. 1, at 3 (pagination supplied).) The inspection, and the data it may generate or alter, are not evidence in this matter, which concerns the principally legal issue of the Secretary's decertification authority under the Election Code. Thus, the *Capricorn Power* test is so strained here as to be virtually inapplicable, as all three of its factors contemplate evidence as the thing which is to be protected. If only information, not evidence, is at risk, there can be no level of concern for the integrity of evidence, no irreparable harm from destruction of evidence, and no capability to preserve evidence. Even if the inspection does affect evidence later used in this case, sanctions discourage spoliation.

Moreover, there is no underlying pleading to support a preliminary injunction request. The Application to Preserve Evidence is a discovery motion sounding in the spoliation-preservation framework discussed above, which carries its own legal standard distinct from that of injunctive relief. *See Treppel v. Biovail Corp.*, 233 F.R.D. 363, 370 (S.D.N.Y. 2006) (noting that "[i]nstead of importing the standards for injunctive relief, some courts have instituted a balancing test for determining whether to issue a preservation order," and citing *Capricorn Power*). Given our analysis under that balancing test, the Court will not generally enjoin the inspection, much less enter what would essentially be an *ex parte* injunction purporting to bind Envoy Sage, among others. Because the Secretary has failed to carry her burden to show that the inspection or its effects are evidence deserving a preservation order, the Court hereby enters the following Order:

ORDER

NOW, January 14, 2022, Respondent's Emergency Application for an Order Prohibiting Spoliation of Key Evidence Scheduled to Occur on December 22, 2021, is **DENIED**.

Further, Respondent's Renewed Emergency Application for an Order to Enjoin the Third-Party Inspection Currently Scheduled for January 14, 2022, from Proceeding is **DISMISSED** as improvidently filed.



MARY HANNAH LEAVITT, President Judge Emerita