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TO: Venango County Board of Elections

FROM: Charles A. Pascal, Jr., Esquire
Special Counsel to the Venango County Board of Elections

DATE: October 19, 2011

**RE: Opinion Memorandum
Regarding ES&S Letter of October 13, 2011**

This memorandum is written as an Opinion Memorandum regarding the issues raised by the letter from Timothy J. Hallett, Associate General Counsel of ES&S, dated October 13, 2011.

In that letter, Mr. Hallett indicates that it is the position of ES&S that Venango County, through the Board of Elections, is in “inadvertent” violation of its March 22, 2006 COSTARS-10 Voting System Agreement; specifically, Mr. Hallett cites to the language contained in paragraph 3(b) of the General Terms section of that Agreement, which states:

“3. Prohibited Uses: Customer shall not take any of the following actions with respect to the ES&S Software or the Documentation: (b) Cause or permit any use, display, loan, publication, transfer of possession, sublicensing or other dissemination of the ES&S Software or Documentation, in whole or in part, to or by any third party without ES&S’ prior written consent.”

Following receipt of the above mentioned October 13, 2011 letter, we were requested by Craig Adams, Chairperson of the Board of Elections, to analyze the issues involved and to make a recommendation to the Board of Elections regarding how to proceed.

After thorough review of the COSTARS-1- Voting System Agreement, dated March 2, 2006, the September 22, 2011 letter from Mr. Hallett, the October 13, 2011 letter from Mr. Hallett, as well as emails between Denise Jones and Wil Wesley of ES&S dated September 13, 2011 and September 21, 2011, as well as the contracts entered into between the Board of Elections and Venango County with David Eckhardt and Greg Kesden, we have come to the following conclusions:

1. Neither the Board of Elections, nor the County has "cause[d] or permit[ted] any use, display, loan, publication, transfer of possession, sublicense, or other dissemination of the ES&S Software or documentation, in whole or in part, to any third party..."

Messrs. Eckhardt and Kesden are agents of the principal (the Board of Elections and the County), not third parties. As principal, the Board of Elections has explicitly authorized them to act for the principal, using their special expertise in conducting a forensic audit of the election.

The agents' temporary possession and use of software and election data for purposes specified by the principal is legally tantamount to possession by the principal, the Board of Elections. Under the principles of agency law, their actions that are pursuant to actual authority are the actions of the principal.

Hence, for legal analysis of powers and duties, vis a vis ES&S under the contract, Messrs. Eckardt and Kesden are analyzed as the Board of Elections, not as separate entities and not as third parties.

2. The Board of Elections is conducting a duty or function authorized by statute, specifically by the Pennsylvania Election Code. Therefore, the action of the Board, as conducted by their agents, is not *ultra vires*; rather, it is readily foreseeable that a Board of Elections would perform any duty or function which it is statutorily authorized by the text of the Pennsylvania Election Code to perform.

3. ES&S was advised of the plans of the Board of Elections to conduct a forensic audit throughout the summer. The Board of Elections, through various means, and through various county employees, communicated with Wil Wesley of ES&S regarding the proposal to conduct a forensic audit throughout the summer and autumn months. It should be quite easy to demonstrate ES&S' knowledge of this proposal for several months.

Further, on September 13, 2011, Denise sent a copy of the proposed contract between the Board of Elections and Messrs. Eckhardt and Kesden to Wil Wesley, asking for ES&S' input into those contracts. In response to that communication, Ms. Jones received a letter from Mr. Hallett which provided no meaningful input into the process, nor did it provide any objection to a forensic audit being performed. In fact, in Mr. Hallett's letter of September 22, 2011, he states that "ES&S is confident that any well defined and *independent* audit conducted by the County and the Board will conclude that ES&S' voting systems are accurate, secure and reliable...."

It is obvious that ES&S, as a company which deals with computer software, is well aware of what a "forensic audit" entails, and what the process for such a procedure would be; there is no way for any "forensic audit" to be conducted without first making a forensic copy of that which is to be analyzed. It is further obvious that ES&S, through Mr. Hallett, anticipated that the audit would be "independent," that is, conducted by an agent of the Board of Elections.

It is disingenuous at best for ES&S to claim, in their letter of October 13, 2011, that they "learned" about this process from a news article dated after the process had begun. In addition to all of the above notice which ES&S had regarding this process, Denise Jones sent another email to Wil Wesley on September 21, 2011 at 10:41 a.m., inviting ES&S representatives to be present at the County when Messrs. Eckhardt and Kesden were scheduled to make their forensic copies on September 26, 2011 at 2:00 p.m. In that email, Ms. Jones wrote: "They want to image the

hard disk storage of the Unity Tabulation Machine.” The response from Mr. Wesley, on September 21, 2011 at 11:36 a.m., was “Thanks for the update...I will call you shortly.”

This email exchange was then followed, the following day, by the letter from Mr. Hallett, discussed above.

As such, it is crystal clear that ES&S was fully aware of the plans of the Board of Elections for some time; it is further obvious that there was regular and detailed communication from the Board of Elections to ES&S regarding the fact that there was to be a forensic audit, that contracts were being signed, and that the Unity System was to be copied on a particular date. Throughout all of this, ES&S did not object to the conduct of a forensic audit by the Board. Therefore, any potentially legitimate objection which ES&S may have had to this process has, in my opinion, been waived.

In conclusion, for the reasons detailed above, it does not appear to me that ES&S has a legally cognizable claim for breach of contract. The forensic audit is being conducted by the Board of Elections pursuant to their powers enumerated in the Pennsylvania Election Code. The forensic audit is being conducted by persons who are contractually and legally defined as agents of the Board of Elections—thus, the forensic audit is being conducted by the Board of Elections and not a third party. And third, should ES&S have had a potentially legitimate objection to this process and the actions of the Board at some point, they have waived their right to assert it at this time because they had ample knowledge and opportunity to do so, but failed to do so in a timely manner.

The above, in my opinion, should be the position taken by the Board of Elections in this matter. Therefore, it would be my recommendation that we should recommend that the forensic audit should continue, and that Messrs. Eckhardt and Kesden should be directed to proceed. Should the Board of Elections agree with this position, I will then communicate this position to Messrs. Eckhart and Kesden, as well as with Solicitor Winkler and Attorney Hallett.

END
