

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF HAMPTON

MARTHA M. MUGLER,)	
)	
Petitioner,)	
)	
v.)	CIVIL ACTION NO. CL21-2665
)	
A.C. CORDOZA,)	
)	
)	
Respondent.)	

RECOUNT ORDER

This matter came before the Chief Judge of the Circuit Court of the City of Hampton on November 30, 2021, for a hearing pursuant to Virginia Code § 24.2-802.1(B), to consider motions and fix final rules of procedure for the recount of ballots in the November 2, 2021 election for the House of Delegates 91st District (“HD-91 Election”). The following Rules of Procedure are established by the Full Recount Court.

It is ORDERED:

I. PERIOD PRECEDING RECOUNT

1. All voting machine keys, poll books, statements of results, printed return sheets, print-out tapes produced by computers or other machines, ballots, rejected absentee and provisional ballot envelopes, and other election records or materials used or produced in connection with the HD-91 Election, held on November 2, 2021 (the “Materials”) and previously delivered to the Clerk of the Hampton Circuit Court and York County Poquoson Circuit Court (collectively, the “Clerks”), shall remain in the safekeeping of the Clerk to whom they were delivered, who shall ensure that the Materials remain secure and undisturbed. Voting equipment

used in the HD-91 Election shall remain secure and undisturbed in the location where presently situated, and the Hampton City, Poquoson City, and York County Electoral Boards shall continue to ensure the security of the equipment until released by the Clerk or the State Board of Elections to the respective general registrar for programming and testing.

2. To the extent not already done so, the Clerks shall:
 - a. secure all paper ballots and other Materials in sealed boxes;
 - b. place all sealed boxes in a vault or other room, not open to the public or anyone other than the Clerk and their staff;
 - c. cause such vault or room to be securely locked at all times, except when access is necessary for the Clerk and their staff;
 - d. certify in writing to this Court the security measures taken by the Clerk following the election, with said certification to be provided to this Court no later than 4:00pm on December 6, 2021, via email transmission.

3. To the extent that the Clerk may have departed from any of the foregoing procedures before the entry of this Recount Order, then the Clerk shall so inform this Court in writing, explaining the nature of such departure, as soon as reasonably possible. The Clerk shall also immediately provide the certification required by this paragraph and paragraph 2 above to the Parties, and their counsel via email transmission.

4. Prior to the recount and redetermination, on November 30, 2021 at 10:00 a.m., the Clerk, the Clerk's staff, the General Registrars of the City of Hampton, City of Poquoson, and County of York (collectively hereinafter, "the General Registrars") and the General Registrars' staff, shall enter the vault or room securing the election materials for the purpose of sorting said materials relevant to the HD-91 Election specifically. Counsel or representatives for both Parties

shall be entitled to be present when the Clerks and General Registrars enter the vault or room, and for the duration of the time it takes to secure the election materials for this purpose.

5. Promptly upon request of a representative of either Party, possessing a written statement that they are a representative of the Party signed by the Party's counsel, the Clerks and General Registrars shall provide such representative with access to and copies of the following documents pertaining to the HD 91 Election from the Materials:

- a. all statements of results, original and corrected;
- b. computer print-out sheets and tapes;
- c. abstracts of votes, original and corrected;
- d. a precinct list showing the make and model of all voting machines delivered to each precinct in the 91st House District for use on election day and the number and type of machine;
- e. all reports concerning election day problems or incidents in individual precincts that participated in the HD-91 Election;
- f. pollbooks, or the equivalent containing information normally found in pollbooks (whether paper or electronic);
- g. the list of absentee ballots that were submitted through noon on November 5, 2021, including the identity of the voters voting such ballots;
- h. the list of absentee ballots that were submitted through noon on November 5, 2021, that were deemed to have a material error or omission that rendered the ballot invalid, including the identity of the voters voting such ballots;

- i. the list of absentee ballots that were cured by noon on November 5, 2021 after having been deemed to have a material error or omission, including the identity of the voters voting such ballots;
- j. the records, notes, or minutes of any meeting where the Electoral Board voted to accept or reject absentee ballots; and
- k. all other records requested by either party that are reasonably related to the conduct of the election and/or recount.

If the Clerks or General Registrars do not have any of these materials, they shall so advise the Parties' counsel and identify its location.

6. The Clerks and General Registrars shall not be required to provide information that does not already exist in a document. However, the General Registrar shall be required to account to the Court and the Parties' Counsel in writing for the following:

- a. any discrepancy between the number of accepted absentee ballots (shown in VERIS) and the number of votes counted (including overvote/undervote/write-in) in the ABS + PE precincts;
- b. any discrepancy between the number of accepted early vote ballots (shown in VERIS) and the number of votes counted (including overvote/undervote/write-in) in the EV precinct.

7. In the event Materials are maintained under seal by any of the Clerks, the Clerk, upon notice to the parties and with appropriate security measures in place, shall open the sealed materials for the purposes of granting the access provided for herein. The Clerk shall then reseal the materials and maintain them pursuant to the security measures mandated herein. The sealed materials obtained pursuant to this Order shall be treated as confidential by the Parties to this

recount, their campaigns, and their legal counsel, as well as such experts and other persons retained to provide services related to this recount. They shall not be disseminated to any other party, and they may only be used in this proceeding absent further order from this Court.

II. DATE, TIME, AND LOCATION OF RECOUNT AND VOTING MACHINERY

1. The recount of ballots and redetermination of the votes cast in the HD 91 Election shall take place on December 7 and 8 of the year 2021, beginning at 10:00 a.m. on December 7, 2021, and continuing on December 8, 2021, beginning at 10:00 a.m., if needed, to occur at the Hampton Registrar's Office for ballots cast for the City of Hampton, located at 101 Kingsway Hampton, VA 23669, at the York County Registrar's Office for ballots cast for the County of York, located at 5322 George Washington Memorial Highway, Yorktown, VA 23692, and at Poquoson City Hall for the ballots cast for the City of Poquoson, located at 500 City Hall Avenue, Poquoson, Virginia (in Council Chambers). The Clerk shall arrange for the transportation and delivery of the Materials necessary for the recount to this facility under appropriate safeguards, and the General Registrar shall arrange for the transportation and delivery of the voting and counting machines needed for the recount under appropriate safeguards.

2. The type of tabulators/scanners used for the recount and redetermination shall be determined by the Electoral Board.

3. The Hampton Registrar's Office is ordered to utilize a high-speed ballot counter to conduct their recount. The utilization of a high-speed ballot counter is essential in ensuring their recount is conducted within the Court Ordered time frame.

4. In the event the Hampton Registrar's Office is unable to meet the Court Ordered December 8, 2021 deadline, the Registrar shall promptly notify the Recount Court and all parties and motion for an extension. Said extension will be granted if deemed necessary.

III. RECOUNT COORDINATORS, RECOUNT OFFICIALS, AND ALTERNATE RECOUNT OFFICIALS

For the Recount Occurring at the City of Hampton Registrar's Office:

1. One member of the Hampton Electoral Board representing each party shall serve as a Recount Coordinator, as selected by the Recount Court. The Recount Coordinators selected are Fred Everette (Republican) and Rebecca Winn (Democrat).

2. In the event that both Democratic members of the Hampton Electoral Board are unable to serve, Martha M. Mugler shall be authorized to name a Recount Official to act as a Recount Coordinator. In the event that the Republican member is unable to serve, A.C. Cordoza shall be authorized to name a Recount Official to act as a Recount Coordinator. The Recount Coordinators and Recount Officials shall be officers of this Court acting under its jurisdiction. Nothing contained in this Order or in the procedures to be established for the recount shall be construed, however, to prevent the Parties or their counsel or representatives from communicating directly with Recount Coordinators.

For the Recount Occurring at the York County Registrar's Office:

3. One member of the York County Electoral Board representing each party shall serve as a Recount Coordinator, as selected by the Recount Court. The Recount Coordinators selected are Sandra L. Molineaux (Republican) and J. Richard Rawls (Democrat).

4. In the event that both Democratic members of the York County Electoral Board are unable to serve, Martha M. Mugler shall be authorized to name a Recount Official to act as a Recount Coordinator. In the event that the Republican member is unable to serve, A.C. Cordoza shall be authorized to name a Recount Official to act as a Recount Coordinator. The Recount Coordinators and Recount Officials shall be officers of this Court acting under its jurisdiction. Nothing contained in this Order or in the procedures to be established for the recount shall be

construed, however, to prevent the Parties or their counsel or representatives from communicating directly with Recount Coordinators.

For the Recount Occurring at the City of Poquoson Registrar's Office:

5. One member of the City of Poquoson Electoral Board representing each party shall serve as a Recount Coordinator, as selected by the Recount Court. The Recount Coordinators selected are Bonnie B. Condrey (Republican) and Taylor Bresnan (Democrat).

6. In the event that both Democratic members of the Poquoson Electoral Board are unable to serve, Martha M. Mugler shall be authorized to name a Recount Official to act as a Recount Coordinator. In the event that the Republican member is unable to serve, A.C. Cordoza shall be authorized to name a Recount Official to act as a Recount Coordinator. The Recount Coordinators and Recount Officials shall be officers of this Court acting under its jurisdiction. Nothing contained in this Order or in the procedures to be established for the recount shall be construed, however, to prevent the Parties or their counsel or representatives from communicating directly with Recount Coordinators.

For all Jurisdictions Subject to the Recount

7. Each Party shall submit to the Clerk and the Court a list of the names and addresses of Recount Officials and Alternate Recount Officials, chosen from the list of Election Officials previously appointed in the November 2, 2021, General Election pursuant to Va. Code § 24.2-115. Before submitting their lists, the Parties shall reasonably attempt, in good faith to confer with one another about their selections to ensure that duplicate officials are not selected. The persons selected by the Parties are appointed as Recount Officials and Alternative Recount Officials, subject to any disqualification by the Court for good cause shown.

8. Should a dispute arise between the recount coordinators, said matter shall be brought promptly before the Recount Court, for the Recount Court to resolve.

For the Recount Occurring at the City of Hampton Registrar's Office:

- a. There shall be five (5) Recount Teams. Each Recount Teams shall consist of two (2) total Recount Officials: one (1) Recount Official selected by Petitioner and one (1) Recount Official selected by Respondent. Changes to the number of Recount Teams may only be made by order of the Court.
- b. Each of the Parties may also name three (3) Alternate Recount Officials.

For the Recount Occurring at the York County Registrar's Office:

- c. There shall be three (3) Recount Teams. Each Recount Teams shall consist of two (2) total Recount Officials: one (1) Recount Official selected by Petitioner and one (1) Recount Official selected by Respondent. Changes to the number of Recount Teams may only be made by order of the Court.
- d. Each of the Parties may also name three (3) Alternate Recount Officials.

For the Recount Occurring at the City of Poquoson's Registrar's Office:

- e. There shall be four (4) Recount Teams. Each Recount Teams shall consist of two (2) total Recount Officials: one (1) Recount Official selected by Petitioner and one (1) Recount Official selected by Respondent. Changes to the number of Recount Teams may only be made by order of the Court.
- f. Each of the Parties may also name three (3) Alternate Recount Officials.

9. Each of the Parties shall submit to the Clerk of the Hampton Circuit Court by no later than 4:00 p.m. on December 3, 2021, the names and addresses of the Recount Officials and Alternate Recount Officials whom s/he has chosen. The persons so identified by the Parties are appointed as Recount Officials and Alternate Recount Officials.

10. The Clerk of the Hampton Circuit Court shall issue the necessary summonses to compel the attendance of the Recount Coordinators, Recount Officials and Alternate Recount Officials chosen by the Parties to appear at the location at 8:00 a.m. on the dates set for the recount, December 7, and December 8, 2021.

11. The Recount Coordinators and Recount Officials shall be officers of the Court acting under its jurisdiction and shall be subject to training as may be provided by the State Board of Elections and/or Recount Coordinators, using training materials provided by the State Board of Elections. The Parties shall be provided with 24 hours advance notice of all training sessions and logic and accuracy testing, and they shall be given the opportunity to attend any such training session. The Parties shall be provided copies of training materials 24 hours in advance of those materials being provided to Recount Coordinators and Recount Officials. Additionally, the Parties shall be permitted to observe the logistics and accuracy testing of the machinery that will be utilized in the recount and redetermination.

12. Neither Party nor the representative of either Party (including political parties and campaign committees) may undertake any in-person, telephonic, or electronic training of any Recount Coordinator, Recount Official, and/or Alternate Recount Official in their duties. No written communications from a Party or their representative to any Recount Coordinator, Recount Official, and/or Alternate Recount Official, may be made *ex parte*, and any such written communication shall be simultaneously served on all counsel for the opposing Party and filed with the Clerk (except that communications addressing only time and place of the recount, time and place of training offered by the Electoral Board, the availability to serve and similar administrative matters are not subject to this paragraph). Accordingly, the Parties and their representatives may communicate in writing with the Recount Coordinators, Recount Officials, and/or Alternate

Recount Officials regarding the recount, as long as the written communications are simultaneously served on all counsel for the opposing Party and filed with the Clerk. Nothing contained herein shall be construed to prevent any Party or the representative of any Party from encouraging Recount Coordinators, Recount Officials, and/or Alternate Recount Officials to participate in any training offered by the State Board of Elections or the Electoral Board. The State Board of Elections and/or the Electoral Board shall provide a copy of any such written training materials to counsel for both Parties.

13. The use of electronic devices to take any photographs or record any audio or video of the recount proceeding is strictly prohibited.

IV. TRAINING AND OATH OF RECOUNT COORDINATORS AND RECOUNT OFFICIALS

1. Recount Coordinators and Recount Officials shall check in on December 7, 2021, at 8:00 a.m. in the location of the recount. They shall take their oath at that time and be given instruction and training. They shall take their oath at that time and be given instruction and training. Training is to begin at 8:30 a.m. on the same day, with the recount to begin at 10:00 a.m. the same day, or immediately following the conclusion of training, whichever occurs first.

V. RECOUNT OBSERVERS

1. Each Party is entitled to have present in the same room as the recount and redetermination, one (1) Recount Observer for each Recount Team. The Parties may each appoint Persons who shall qualify as Recount Observers by submitting to the Recount Coordinators a statement, signed by a representative of or counsel for a Party, giving the person's name and authorizing him or her to represent the candidate as a Recount Observer. To provide necessary relief, the Parties may rotate Recount Observers so long as such rotation is at reasonable intervals.

Not later than December 2, 2021, at 2:00 p.m., the Parties shall exchange with one another and lodge with the Clerk the form of their respective authorization statements that will constitute the credentials of the Recount Observers. A photocopy authorization form shall suffice. In addition, each Party and counsel for each Party may be present to observe the recount.

2. The Recount Observers shall have the right to communicate with their respective campaigns and legal counsel (and vice versa) from the room(s) in which the recount is being conducted. Members of the Recount Teams, including Recount Observers, shall be allowed to bring electronic devices including cell phone, laptops, and other electronic devices into the room(s) in which the recount is being conducted so as to communicate with their respective campaigns or legal counsel, but they may not use any electronic device to photograph ballots or any other Materials. The Recount Observers and counsel for each Party shall have an unobstructed view of the work of the Recount Officials, to include training, and shall not disrupt or otherwise interfere with the conduct of the recount in any way. Nothing contained herein shall be construed to prevent the Parties or their representative, including Recount Observers, from communicating directly with the Recount Coordinators, Recount Officials and Alternate Recount Officials during the recount, but they are prohibited from interfering with the members of the Recount Team in any way. Any questions from Recount Observers or legal counsel should be directed to the supervising Recount Coordinator.

VI. CONDUCT OF RECOUNT

1. Prior to beginning the recount, the General Registrar and the Recount Coordinators shall ensure that the scanners programmed for use in the recount are tested for logic, and accuracy using marked test ballots. On or after November 29, 2021, each Party shall be given at least 24 hours prior notice of the location and time for the testing and each party is entitled to have one (1)

observer present to observe the testing, in addition to legal counsel for each party. After the test ballots have been run, the General Registrar shall print the results from the test run. If the tabulator does not accurately count and set aside the test ballots, the Recount Coordinators and General Registrar or a designated employee or contractor shall require the tabulator to be reprogrammed and shall re-run the test ballots until the electoral board and General Registrar are satisfied that the tabulator is properly programmed and performing accurate counts. The scanners shall be “reset” to zero following the conclusion of the testing in the presence of the representatives of the Parties.

2. The General Registrar shall cause an appropriate number of scanners to be programmed to count only the ballots cast in the HD 91 Election and to set aside all ballots containing write-in votes, overvotes, and undervotes, or than cannot otherwise be read by the machine for the 91st District.

3. At the conclusion of recount activities on December 7, 2021, all HD 91 Election and recount Materials shall be delivered to the Clerk who shall secure them overnight using the security measures mandated in this Recount Order and shall deliver them to the Recount Court for its hearing or—if necessary—to the location of the recount on December 8, 2021.

4. The recount shall be conducted according to the procedures and instructions contained in this Order and by the Virginia Code, and to the extent they are consistent with this Order, the recount shall be conducted in accordance with the standards promulgated by the State Board of Elections, including its publications *Recounts – Step-By-Step Instructions* and *Virginia's Guide to Hand-Counting Ballots*, both of which are incorporated by reference herein. The results shall be recorded on forms prepared by the State Board of Elections.

5. Under the direction of the Recount Coordinators, the Recount Teams shall run all optical scan ballots cast in the Election through the scanners except, if using the DS200 ballots

containing write-in votes. The ballots containing write-in votes, ballots that are set aside, any ballots not accepted by the scanner, and any ballots for which a scanner could not be programmed to meet the requirements of this Recount Order shall be hand-counted using the standards promulgated by the State Board of Election in its most recent publications *Recounts – Step-By-Step Instructions* and *Virginia's Guide to Hand-Counting Ballots*.

6. Only a Recount Official may challenge a ballot. Any Challenged Ballot (i.e., one that recount officials during the hand counting phase of the recount procedure could not agree on the validity of the ballot or the voter's intent as presented on the ballot) shall be placed in a separate envelope by the Clerk for review and determination by the Court. The written statement of any one Recount Official challenging a ballot shall be sufficient to require its submission to the Court. Prior to the conclusion of the recount in each precinct, the Recount Officials shall segregate all ballots for which there is a question regarding the ballots' validity (a "Challenged Ballot"). Prior to setting aside each Challenged Ballot, the Recount Coordinators shall provide counsel for each Party the opportunity to review it. The Recount Court may not reexamine any Challenged Ballot until (a) the recount has been completed and (b) the Parties' counsel have had reasonable opportunity to inspect all Challenged Ballots. The Recount Court shall review the Challenged Ballots in succession during its hearing, where counsel for both Parties shall be present and permitted to make arguments.

7. At the conclusion of the recount, the Recount Coordinators shall write down the number of valid ballots cast for each candidate and shall submit the results to Recount Court. The results of all recounts shall be physically delivered directly to the Recount Court or its designee, the Hampton Circuit Court Clerk. The Recount Court shall supervise the recount and

redetermination of the vote, with assistance from each Electoral Board. The Recount Court shall allow the Parties to inspect the Challenged Ballots.

8. Any person is prohibited from knowingly possessing any firearm as defined in Virginia Code § 18.2-308.2:2 within 40 feet of any building or part thereof used as the place for the recount, unless such person is (a) any law-enforcement officer or any retired law-enforcement officer qualified pursuant to subsection C of § 18.2-308.016; (b) occupying their own private property that falls within 40 feet of the recount location; or (c) an armed security officer, licensed pursuant to Article 4 (§ 9.1-138 et seq.) of Chapter 1 of Title 9.1, whose employment or performance of their duties occurs within 40 feet of any building, or part thereof, used as a place for the recount.

9. In consideration of the ongoing COVID-19 pandemic, any person entitled to attend the recount, including the Parties, Recount Coordinators, Recount Officials, Alternate Recount Officials, Recount Observers, and legal counsel (or any other Party representative) must wear a mask covering their nose and mouth. The tables for each Recount Team should be placed so that at least six (6) feet separate all people working at or observing the work at one table from the groups working at/observing the work at each other table. However, no distance requirement shall prevent the Recount Observers and legal counsel (or any other Party representative) from either Party from having a meaningful opportunity to observe the recount.

10. The Court authorizes a rolling lunch period of one-hour in duration for the recount teams to recess for lunch.

11. The Court authorizes a dinner break of one-hour in duration for the recount teams to recess for dinner, in the event it is deemed necessary to work past 5:00 p.m.

12. The Court Orders the recount teams to check in with the Recount Court at 8:00 p.m. to check progress as to the recount.

13. Members of the media and general public may be allowed in the General Registrar's Office during the recount only upon prior request and approval by the Full Recount Court, at which time the Full Recount Court may grant access with terms and conditions that ensure that no one interferes with the work of the recount or handling of any election materials.

VII. RECOUNT COURT TO CONVENE

1. The Recount Court shall convene on December 8, 2021 at 2:00 p.m., or if the recount is still being conducted at such time then immediately following the conclusion of the recount on December 8, 2021, for the purpose of determining all matters raised by the Parties pertaining to the recount and redetermination of the vote, including to hear any arguments and rule on any Challenged Ballots, and to certify to the State Board of Elections and each Electoral Board, the vote for each candidate to the recount, the results of the recount and to declare the person who received the higher number of votes to be elected.

VIII. MISCELLANEOUS

1. The City of Hampton, City of Poquoson, and County of York shall pay the costs of conducting the recount from their current fiscal year's general funds.

2. Wherever this Proposed Recount Procedural Order requires delivery of any notice or document to any Party or their counsel, such notice or document shall be provided to the following counsel of record at the email addresses indicated below:

(a) Counsel for Martha M. Mugler

Kathryn E. Yukevich: kyukevich@elias.law

Jonathan S. Berkon: jberkon@elias.law

Jeffrey Breit: jeffrey@breitcantor.com

(b) Counsel for A.C. Cordoza

Dallin Holt: dholt@holtzmanvogel.com

Jason Torchinsky: jtorchinsky@holtzmanvogel.com

IT IS SO ORDERED BY THE FULL RECOUNT COURT.

Entered this 30th day of November, 2021.

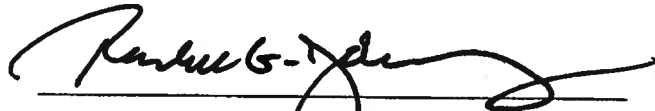

The Honorable Michael A. Gaten
Chief Judge

Hampton Circuit Court



The Honorable Victoria A.B. Willis
Judge

Stafford Circuit Court



The Honorable Randall G. Johnson, Jr.
Judge

Henrico Circuit Court

Signatures Waived Pursuant to Rule 1:13

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