



this action violates the standards applicable to any officer of the Court and indicates this case was brought for an improper purpose and has been litigated in an unfair manner.<sup>1</sup>

Because the Special Counsel's Petition fails to meet the minimum standards set forth in Wis. Stat. § 802.05(2) and pursuant to this Court's inherent authority, Mayor Genrich respectfully requests that this Court sanction the Special Counsel and issue an order:

1. Requiring that the Special Counsel publish in the *Milwaukee Journal Sentinel*, the *Wisconsin State Journal*, and the *Green Bay Press-Gazette* full-page advertisements acknowledging, using language agreed among the parties and approved by this Court, the inaccuracy of his statements to the Assembly Committee on Campaigns and Elections that Mayor Genrich had violated a lawful obligation to provide testimony, which statements were widely reported, in those publications and elsewhere;
2. Requiring that the Special Counsel publicly assert, the next time he appears before the Assembly Committee on Campaigns and Elections that his prior testimony to the effect that Mayor Genrich had violated a lawful obligation to provide testimony was inaccurate;
3. Requiring the Special Counsel pay a penalty to the Court in an amount, to be determined by the Court, sufficient to deter future repetition of the conduct leading to the imposition of sanctions in this matter;
4. Requiring that, within 30 days of the Court's order, the Special Counsel facilitate for himself and all attorneys in the Office of Special Counsel at least 3 hours of continuing legal education regarding ethical conduct in the practice of law, above and beyond the requirements imposed by SCR 31.02; and
5. Mandating that the Special Counsel, and any person working with or on behalf of the Special Counsel, cease and desist from communicating or attempting to communicate with any represented party, including officials and employees of the City of Green Bay.

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<sup>1</sup> Mayor Genrich notes that the Petition was filed as a verified pleading, sworn to by the Special Counsel. It is beyond the scope of this Motion to determine whether there are additional penalties under Wis. Stat. § 946.32(1)(a) that follow from the misstatements in and material omissions from the Petition.

## FACTS

### I. Background

Wisconsin's 2020 General Election was safe, secure, fair, and transparent. Every court to review the matter has affirmed that Wisconsin administered the 2020 General Election in accordance with state and federal law.<sup>2</sup>

Nonetheless, Wisconsin State Assembly Resolution 15 directed the Assembly Committee on Campaigns and Elections (the "Committee"), "to investigate the administration of elections in Wisconsin, focusing in particular on elections conducted after January 1, 2019." [Dkt. No. 7, pp. 2-3]. The Committee thereafter authorized the Speaker of the Assembly, Robin Vos, to hire a special counsel to conduct its investigation. [Dkt. No. 7, pp. 4-5]. Speaker Vos, on behalf of the Wisconsin Assembly, entered into a Coordinating Attorney Independent Contractor Agreement with Consultare, LLC. [Dkt. No. 7, pp. 6-9]. The contract provided in part that Consultare would "Coordinate the day to day investigatory work relating to potential irregularities and/or illegalities connected to the 2020 November election in Wisconsin." [Dkt. No. 7, p. 6]. The term of the agreement was to expire on October 31, 2021, unless the parties agreed otherwise. [Dkt. No. 7, p. 6]. Speaker Vos and Consultare entered into a First Amendment to Agreement on August 20, 2021, which in relevant part established a budget and established an Office of the Special Counsel. [Dkt. No. 7, pp. 10-13].

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<sup>2</sup> See, e.g., *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis.), *aff'd*, 983 F.3d 919 (7th Cir. 2020), *cert. denied*, 141 S.Ct. 1516 (U.S. 2021); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596 (E.D. Wis. 2020), *petitions for extraordinary relief denied*, No. 20-859 (U.S. Mar. 1, 2021), *vacated on remand after appeal dismissed as moot*, No. 20-cv-1771-PP, ECF No. 95 (E.D. Wis. Mar. 16, 2021); *Wis. Voters Alliance v. Pence*, 514 F. Supp. 3d 117 (D.D.C. 2021); *Trump v. Biden*, 2020 WI 91, 394 Wis. 2d 629; *Wis. Voters Alliance v. Wis. Elections Comm'n*, No. 2020AP1930-OA (Wis. Dec. 4, 2020); *Trump v. Evers*, No. 2020AP1971-OA (Wis. Dec. 3, 2020).

## II. The Legislative Subpoenas

On October 4, 2021, Speaker Vos and Edward A. Blazel, Chief Clerk of the Wisconsin State Assembly, signed a subpoena pursuant to Wis. Stat. § 13.31 directed to Mayor Genrich (the “Subpoena”). [Dkt. No. 6]. The Subpoena purportedly required Mayor Genrich or his designee to appear in person before the Special Counsel or his designees and, “give evidence and testimony including, *but not limited to*, potential irregularities and/or illegalities related to the [November 2020 General] Election” on October 22, 2021 at 9:00 am at 200 South Executive Drive, Suite 101, Brookfield, WI 53005. [Dkt. No. 6, p. 1 (emphasis original)]. It also purportedly required Mayor Genrich or his designee to bring “all documents contained in your files and/or in your custody, possession, or control, pertaining to the [November 2020 General] Election.” [Dkt. No. 6, p. 1]. The Subpoena stated:

**FAILURE TO COMPLY WITH THIS SUBPOENA MAY CONSTITUTE CONTEMPT OF THE LEGISLATURE, PURSUANT TO WIS. STAT. § 13.26(1)(C) AND IS SUBJECT TO PUNISHMENT, INCLUDING IMPRISONMENT, PURSUANT TO WIS. STAT. § 13.27.**

[Dkt. No. 6, p. 1 (emphasis original)].

Speaker Vos and Mr. Blazel also signed subpoenas directed to the City Clerk of the City of Green Bay<sup>3</sup> as well as to the City itself. [Mandell Aff., ¶ 2, Exhs. A & B]. The subpoena to the City of Green Bay is also dated October 4 and purportedly compels the testimony of, “the person most knowledgeable in regard to the November 2020 General Election in Wisconsin.” [Mandell Aff., ¶ 2, Exh. B].

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<sup>3</sup> Additional subpoenas were directed to officials in the cities of Madison, Milwaukee, Kenosha, and Racine.

### III. City of Green Bay

The City of Green Bay (the “City” or “Green Bay”) is a municipal corporation, organized under the laws of the State of Wisconsin, and located in Brown County, Wisconsin. *See, e.g., Heffernen v. City of Green Bay*, 266 Wis. 534, 535, 64 N.W.2d 216 (1954). Mayor Genrich is the chief executive officer of the City. Green Bay, Wis., Municipal Code § 2-107; Wis. Stat. § 62.09(8) [Chavez Aff., ¶ 2]. On October 5, 2021, the City of Green Bay Common Council voted to retain Law Forward, Stafford Rosenbaum LLP, and States United Democracy Center<sup>4</sup> as outside counsel to the City regarding investigations into the 2020 General Election. [Mandell Aff., ¶ 3].

### IV. Communication with the Office of Special Counsel

Shortly after Green Bay retained Outside Counsel, Attorney Jeffrey A. Mandell contacted Andrew Kloster, an attorney in the Office of the Special Counsel, to discuss the various subpoenas issued to the City, the City Clerk, and Mayor Genrich. [Mandell Aff., ¶ 4]. Mr. Mandell agreed that the City would voluntarily produce to the Special Counsel all documents that had been produced in response to open records requests regarding the November 2020 General Election, as well as additional public documents regarding the City’s administration of the 2020 election, including all City filings in litigation related to the election. [Mandell Aff., ¶ 5]. In exchange, Mr. Kloster agreed that none of the legislative subpoenas directed to the City or its officials would be enforced. [Mandell Aff., ¶ 6]. This agreement expressly included an understanding that no one from the City would be produced to provide testimony until the Special Counsel had reviewed the documents produced and identified specific topics on which further inquiry was necessary. [Mandell Aff., ¶ 7].

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<sup>4</sup> Except where necessary to identify specific attorneys or firms, these firms are referred to collectively as “Outside Counsel.”

As agreed, on October 14, 2021, Outside Counsel sent a flash drive to the Special Counsel, which contained nearly 20,000 pages of documents, along with a cover letter that read in relevant part:

Per our discussions, Green Bay understands that neither further document production nor witness attendance is necessary at this time in response to the Special Counsel's inquiries of September 30 and October 6. In the event that the Special Counsel at a later date seeks any additional documents from Green Bay or any witness testimony on behalf of Green Bay or any of its officials, such a request should include information regarding specific topics on which information is sought, the timeframe to be covered in any testimony, and the venue and timing in which any testimony is requested.

The City of Green Bay and its officials reserve all potential objections related to further requests for testimony or documents as well as all potential objections related to the Special Counsel's authority under governing law.

[Mandell Aff., ¶ 8, Exh. C]. The cover letter requested that the Special Counsel contact an attorney at Law Forward directly with any questions regarding the City's response. [Mandell Aff., ¶ 8, Exh. C].

The request that the Special Counsel communicate with the City's Outside Counsel was not a new one. On October 5, the Special Counsel attended the public meeting of the Green Bay Common Council. [Chavez Aff., ¶ 3]. Prior to that meeting, Vanessa Chavez, then the City Attorney of the City of Green Bay<sup>5</sup>, introduced herself. [Chavez Aff., ¶ 3]. At that meeting, and in the presence of the Special Counsel, the City appointed Outside Counsel. [Chavez Aff., ¶ 4]. Attorney Chavez had no further contact with the Special Counsel or his staff. [Chavez Aff., ¶ 7]. Ms. Chavez believed the Special Counsel was aware that the City had retained Outside Counsel. [Chavez Aff., ¶¶ 6-7]. In conversations with Mr. Kloster to negotiate the City's provision of documents, Attorney Mandell reiterated the same. [Mandell Aff., ¶ 9].

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<sup>5</sup> Ms. Chavez resigned her position effective November 19, 2021. [Chavez Aff., ¶ 13].

Nonetheless, the Special Counsel and his staff continued to attempt to communicate directly with Green Bay officials and staff. On October 20, 2021, “Carol M.”<sup>6</sup> sent an email to Ms. Chavez, which reads:

From: 3 <[3@wispecialcounsel.org](mailto:3@wispecialcounsel.org)>  
Sent: Wednesday, October 20, 2021 11:57 AM  
To: Vanessa Chavez <[Vanessa.Chavez@greenbaywi.gov](mailto:Vanessa.Chavez@greenbaywi.gov)>  
Subject: Subpoenas from Wisconsin Special Counsel

Ms. Chavez: I am writing to follow up on the depositions scheduled for this Friday, October 22, 2021. I understand you been in discussions with someone in our office to reschedule. We are looking to reschedule the PMK for Mayor’s office and Clerk’s office during the week of Nov. 15. Please contact me to discuss at your earliest convenience.

Thank you,  
Carol M.

[Chavez Aff., ¶ 10]. The next day, the Special Counsel sent an email to Ms. Chavez:

From: Coms <[Coms@wispecialcounsel.org](mailto:Coms@wispecialcounsel.org)>  
Sent: Thursday, October 21, 2021 11:38 AM  
To: Vanessa Chavez <[Vanessa.Chavez@greenbaywi.gov](mailto:Vanessa.Chavez@greenbaywi.gov)>  
Subject: Subpoena of Parties

Dear Ms. Chavez,

We have been trying to work with you in order to schedule the deposition of the person most knowledgeable as described in the Wisconsin State Assembly’s subpoena of October 4, 2021 as well as to coordinate your client’s compliance with the Assembly’s subpoena duces tecum of that same date.

This office is currently reviewing the documents produced by the City of Green Bay last Friday, October 15.

In order to provide our office more time to review materials produced last week, as well as to give both parties additional time to reach an understanding of the scope and nature of the topics to be addressed in the deposition, we are continuing the return date from Friday, October 22, 2021 to Wednesday, November 17, 2021 at 9:30 a.m.

Thank you,  
Mike Gableman  
Office of the Special Counsel  
Tel. (262) 202-8722

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<sup>6</sup> This email was presumably sent by Carol Matheis, a lawyer subsequently revealed to be working for the Special Counsel. But the Office of Special Counsel has been using nondistinct email addresses and at the time declined to identify any of its staff. See Patrick Marley, *The Identity Of Michael Gableman’s ‘Carol M.’ Is A Mystery No Longer, But The Names Of Others Helping Him Remain Secret*, Milwaukee Journal Sentinel (Nov. 2, 2021), available at <https://www.jsonline.com/story/news/politics/2021/11/02/identity-michael-gablemans-carol-m-mystery-no-longer/6252935001/> (last visited Dec. 9, 2021).

[Chavez Aff., ¶ 11]. Both emails went directly into Ms. Chavez's spam folder. [Chavez Aff., ¶ 12]. The Special Counsel sent neither email to Outside Counsel. [Mandell Aff., ¶ 10].

As part of her transition from City Attorney, Ms. Chavez discovered the emails, along with one other from the Special Counsel.<sup>7</sup> [Chavez Aff., ¶ 9]. On November 23, Outside Counsel sent another letter to the Special Counsel, informing him of the fact of the emails caught in the spam filter, requesting again that he communicate with Outside Counsel and not a represented party. [Lenz Aff. ¶ 3 & Exh. B]. Outside Counsel also voluntarily supplemented Green Bay's document production. [Lenz Aff. ¶ 3 & Exh. B].

Remarkably, neither the Special Counsel nor any member of his staff communicated with Outside Counsel between the initial conversations between Attorneys Mandell and Kloster in early October and December 9, when an attorney transmitted a letter and proposed motion for sanctions to Attorney Mandell. [Mandell Aff., ¶ 11] Other than the emails discussed below, at no point did the Special Counsel provide additional details about how, when, or where it expected to take testimony, or the topics it sought to discuss.<sup>8</sup> [Mandell Aff., ¶¶ 11-12] [Lenz Aff. ¶¶ 4-5].

## V. Public Comments by the Special Counsel

The Special Counsel did, however, communicate with the press. Almost immediately after issuing his subpoenas, the Special Counsel publicly backed off his request that city officials

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<sup>7</sup> Ms. Chavez's departure from her position in Green Bay was publicly reported. See Marissa Payne, *Cedar Rapids City Council to appoint Vanessa Chavez as city attorney*, The Gazette (Oct. 19, 2021), available at <https://www.thegazette.com/local-government/cedar-rapids-city-council-to-appoint-vanessa-chavez-as-city-attorney/> (last visited Dec. 11, 2021); Heather Graves, *Green Bay city attorney leaving for Iowa*, The Press Times (Oct 25, 2021), available at <https://gopresstimes.com/2021/10/25/green-bay-city-attorney-leaving-for-iowa/> (last visted Dec. 11, 2021).

<sup>8</sup> The Special Counsel did not, however, stop trying to contact Green Bay staff directly. On December 3, 2021, two individuals identifying themselves as investigators with the Office of Special Counsel called an employee in the City Clerk's office. [Fuge Aff., ¶¶ 2-3]. In response, the City's Outside Counsel requested, again, that the Special Counsel cease this behavior. [Lenz Aff. ¶ 2, Exh. A].

testify.<sup>9</sup> On October 15, 2021, in an interview with WISN 12, the Special Counsel appeared to agree that the subpoena had been complied with: “We are grateful that all the cities so far, the Wisconsin Elections Commission and Josh Kaul have all voluntarily complied with our subpoenas as we have worked closely with each of them to try to make this as efficient and convenient as possible for everyone concerned.”<sup>10</sup> This was the day after Green Bay’s Outside Counsel provided its document production. During the same interview, the Special Counsel indicated that any testimony would be scheduled after his office finished its review: “One of the things we’re going to do is review all of the records we received today and are receiving today in voluntary compliance. So after we review those documents, we’ll see.” He also said that any testimony would be scheduled, “at a time mutually convenient and mutually efficient for everybody...”

The Special Counsel issued an interim report<sup>11</sup> and testified at length before the Committee on November 10. [Mandell Aff., ¶ 13]. Neither the testimony nor the Interim Report referenced imminent depositions by any City official. [Mandell Aff., ¶ 13]. The Special Counsel did, however, acknowledge that Green Bay had hired outside attorneys.<sup>12</sup>

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<sup>9</sup> Emilee Fannon, *Gableman Puts Elections Subpoenas on Hold, Cancels Interviews with Clerks and Mayors*, WDJT-Milwaukee (Oct. 7, 2021), available at <https://www.cbs58.com/news/gableman-puts-election-subpoenas-on-hold-cancels-interviews-with-clerks-and-mayors> (last visited Dec. 6, 2021); A.J. Bayatpour, *Gableman Backs Off Request For Testimony From City Officials*, wkow.com (Oct. 7, 2021) available at [https://www.wkow.com/news/gableman-backs-off-request-for-testimony-from-city-officials/article\\_e249c854-27ba-11ec-82c5-7b5f2c67ef13.html](https://www.wkow.com/news/gableman-backs-off-request-for-testimony-from-city-officials/article_e249c854-27ba-11ec-82c5-7b5f2c67ef13.html) (last visited Dec. 2, 2021).

<sup>10</sup> Matt Smith, *GOP Election Attorney Signals Eventual Testimony, Possible Subpoenas For Voting Machines*, wisn.com (Oct. 15, 2021), available at <https://www.wisn.com/article/gableman-signals-eventual-testimony-possible-subpoenas-for-election-machines-in-12-news-interview/37973875#> (last visited Dec. 2, 2021).

<sup>11</sup> Available at <https://www.wifraud.com/Content/files/InterimReportFINALSubmitt.pdf>.

<sup>12</sup> See Patrick Marley & Molly Beck, *Michael Gableman Reveals One More Staffer For His Election Review In Testimony Before Lawmakers*, Milwaukee Journal Sentinel (Nov. 10, 2021), available at <https://www.jsonline.com/story/news/politics/2021/11/10/michael-gableman-reveals-another-staffers-name-election-review/6371829001/> (last visited Dec. 9, 2021); Anthony Dabruzzi, *Gableman Testifies On GOP Election Probe But Gives Lawmakers Few Specifics*, Spectrum News 1 (Nov. 11, 2021), available at

## VI. *Wisconsin Elections Commission v. Wisconsin State Assembly*

The final layer of essential context, also unacknowledged by the Special Counsel's filing, is ongoing litigation in Dane County. In response to two subpoenas issued to the Wisconsin Elections Commission and its Administrator Meagan Wolfe (collectively, the "WEC Parties"), the Department of Justice sued the Assembly, Speaker Vos, the Special Counsel, the Committee and its chairperson, asking that Court to enjoin enforcement of those subpoenas. Dane County Circuit Case No. 2021-cv-2552 (filed October 21, 2021). But for the names, the subpoenas at issue in the Dane County case mirror those at issue here. [Summons & Complaint, Dane County Circuit Case No. 2021-cv-2552]<sup>13</sup>.

The WEC Parties argued: (1) that the deposition-like procedure described in the subpoenas is not authorized by law; (2) the subpoenas and Assembly Resolution 15 violate separation of powers and constitute law enforcement (as opposed to legislative) activity; (3) the subpoenas are so vague and broad as to violate due process; and (4) the subpoenas are otherwise too overbroad and vague to be enforced pursuant to normal rules of civil procedure. [Pl. Br. In Support of Motion for Temporary Restraining Order and Preliminary Injunction, October 21, 2021, Dane County Circuit Case No. 2021-cv-2552].

The Dane County Circuit Court chose not to adjudicate a request for a temporary restraining order in part because the Special Counsel had backed away from imminently seeking

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<https://spectrumnews1.com/wi/madison/politics/2021/11/11/gableman-gives-testimony-on-gop-election-probe> (last visited Dec. 6, 2021) ("[W]e have the City of Green Bay hiring the three law firms, so I don't even know who I am allowed to talk with there.")

<sup>13</sup> Mayor Genrich's counsel is happy to provide copies of these pleadings to the Court upon request.

testimony.<sup>14</sup> The matter has now been briefed, and an injunction hearing is scheduled for Thursday, December 23 at 1:30 PM.

### PROCEDURAL POSTURE

The Special Counsel filed his “Petition for a Writ of Attachment of the Person,” against Mayor Genrich on November 29, 2021, along with a proposed order. [Dkt Nos. 6-10]. This Court issued a Notice of Hearing, setting a hearing on December 22. The Notice of Hearing required the Special Counsel to inform Mayor Genrich of the hearing. [Dkt. No. 11]. To date, the Special Counsel has not complied. [Mandell Aff., ¶ 14]. Mayor Genrich and Outside Counsel first learned of this proceeding when the Special Counsel alluded to his filing in testimony before the Committee on December 1, 2021. [Mandell Aff., ¶ 15]. Outside Counsel received a partial copy of the Special Counsel’s pleadings from a journalist seeking comment later that evening. [Mandell Aff., ¶ 16].

On December 2, Outside Counsel, on behalf of the City, wrote a letter to this Court, requesting that the Petition be dismissed or, in the alternative, this Court either consolidate this action with the case pending in Dane County or schedule the matter for full briefing and hearing. [Dkt. No. 13]. The Court thereafter set a scheduling conference.

On December 10, Respondent Mayor Genrich and the City of Green Bay, by their attorneys, served a copy of this motion and supporting papers on the Special Counsel and his attorney pursuant to Wis. Stat. § 802.05. [Mandell Aff., ¶ 17].

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<sup>14</sup> Patrick Marley, *The Attorney Tasked With Reviewing The 2020 Election Has Hired A Lawyer At Taxpayer Expense To Try To Keep The Effort Alive*, Milwaukee Journal Sentinel (Oct. 25, 2021), available at <https://www.jsonline.com/story/news/politics/2021/10/25/michael-gableman-hires-attorney-try-keep-wisconsin-election-review-alive/6172449001/> (last visited Dec. 9, 2021).

## STANDARD OF REVIEW

### I. Sanctions Pursuant to Wis. Stat. §§ 802.05.

“Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney’s individual name, or, if the party is not represented by an attorney, shall be signed by the party.” Wis. Stat. § 802.05(1). By signing and filing a pleading, an attorney certifies that: (1) It is not being presented for an improper purpose, “such as to harass;” (2) the claims are warranted by existing law or a nonfrivolous legal argument; and (3) the allegations and factual contentions or denials either have or are likely to have evidentiary support. Wis. Stat. § 802.05(2)(a-d). “[A] claim cannot be made reasonably or in good faith, even though possible in law, if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed.” *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 244, 517 N.W.2d 658 (1994).

A party or attorney who violates this rule is subject to mandatory sanctions. Wis. Stat. § 802.05(3). Wis. Stat. § 802.05 imposes an affirmative obligation on attorneys and parties to perform a “reasonable inquiry before proceeding with a claim or filing any paper.” *Riley v. Isaacson*, 156 Wis. 2d 249, 259, 456 N.W.2d 619 (Ct. App. 1990). The extent of the inquiry required depends on the “particular issue involved and the stakes of the case.” *Id.* (citing *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 933 (7th Cir. 1989)).<sup>15</sup> “Section 802.05 requires that the claim be well grounded in both facts and law.” *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 227 Wis. 2d 531, 550, 597 N.W.2d 744 (1999).

Applying the objective standard when determining whether an attorney made a reasonable inquiry into the facts of a case, the circuit court should consider: whether the signer of the documents had sufficient time for investigation; the extent to which the attorney had to rely on his or her client for the factual foundation underlying the pleading, motion, or other

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<sup>15</sup> Because Wis. Stat. § 802.05 tracks part of Federal Rule of Procedure 11, Wisconsin courts follow the interpretation given to that Rule in the federal courts. *Riley*, 156 Wis. 2d at 261.

paper; whether the case was accepted from another attorney; the complexity of the facts and the attorney's ability to do a sufficient pre-filing investigation; and whether discovery would have been beneficial to the development of the underlying facts.

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And in determining whether the attorney made a reasonable inquiry into the law, consideration should include the amount of time the attorney had to prepare the document and research the relevant law; whether the document contained a plausible view of the law; the complexity of the legal questions involved; and whether the document was a good faith effort to extend or modify the law.

*Id.*, at 549-51. Both affirmative misstatements of facts and material omissions are sanctionable. *Bell v. Vacuforce, LLC*, 908 F.3d 1075, 1081 (7th Cir. 2018); *In re Ronco, Inc.*, 838 F.2d 212, 218 (7th Cir. 1988); *See also State v. Bons*, 2007 WI App 124, ¶23, 301 Wis. 2d 227, 731 N.W.2d 367 (sanctioning attorney for certifying compliance with Wis. Stat. § 809.19(2)(a) when he omitted essential documents and finding such conduct violated SCR 20:3.3(a)).

## II. This Court's Inherent Authority

In addition to statutory authority, this Court also has inherent authority to sanction parties for conduct that damages the dignity of the court. *Lee v. GEICO Indem. Co.*, 2009 WI App 168, ¶23, 321 Wis. 2d 698, 776 N.W.2d 622. "Circuit courts are bestowed with those powers necessary to maintain their dignity, transact their business, and accomplish the purposes of their existence." *Schultz v. Sykes*, 2001 WI App 255, ¶2, 248 Wis. 2d 746, 638 N.W.2d 604. Circuit courts use this authority to ensure the "orderly administration of justice." *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964). To that end, courts may exercise their inherent authority to sanction attorney misconduct, such as making inappropriate comments during trial, failure to obey court orders, or altering exhibits. *See, e.g., State ex rel. Godfrey & Kahn, S.C. v. Cir. Ct. for Milwaukee Cnty.*, 2012 WI App 120, ¶43, 344 Wis. 2d 610, 823 N.W.2d 816 (listing cases). This Court's inherent authority is a necessary adjunct to its central function — "ensuring the truthful disclosure of facts." *Schultz v. Sykes*, 2001 WI App 255, ¶2 ("Because ensuring the truthful

disclosure of facts is so central to both the court’s dignity and the purpose of its existence, circuit courts must have the power to sanction parties if they attempt to suborn perjury from witnesses.”).

## ARGUMENT

### I. Sanctions Are Appropriate Pursuant to Wis. Stat. § 802.05.

#### a. *The Petition Contains Sanctionable Misstatements of Fact.*

Although it is very short—containing just five sentences—the Petition manages to contain several material misstatements of fact, which the Special Counsel knew or should have known were not supported by evidence.<sup>16</sup> Wis. Stat. §§ 802.05(2)(c), (3). Specifically, the following sentence is belied by the Special Counsel’s own documents and the facts presented above:

- “Whereas, the time and place certain was unilaterally continued by the Special Counsel during a period of negotiations with the City attorney, to November 15, 2021<sup>17</sup> at 9:00am in Waukesha County.”

It is clear from the documents attached to the Petition and the record that this sentence contains several assertions that are, at best, misrepresentations.

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<sup>16</sup> The Petition also contains several more statements that Mayor Genrich disputes, including that the Subpoena was lawfully issued and that it provided for delivery of documents and testimony. [Dkt. No. 6, p. 1]. As this Court is aware, the legitimacy of the Special Counsel’s subpoenas and whether they were sufficient to compel testimony are issues currently being litigated in Dane County.

<sup>17</sup> The Petition also asserts that “Eric Genrich did fail to appear on November 15, 2021 without justification.” [Dkt. No. 6, p. 1]. Exhibit B, the inappropriate and undelivered email upon which the Special Counsel relies, refers only to November 17. [Dkt No. 7, p. 9]. Giving the Special Counsel the benefit of the doubt, however, this appears to be an unintentional error. *See, e.g., MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 935 F.3d 573, 584 (7th Cir. 2019) (unintentional errors not appropriate for sanction). Similarly, the Petition identifies the Subpoena as being dated October 22, 2021. It was not. [Dkt. No. 7]. It was served on October 6. And the email to City Attorney Chavez was dated October 21, 2021. [Dkt. No. 7, p. 9].

For the reasons stated below, however, the language in the petition stating that the Special Counsel or his office “unilaterally continued” a return date for testimony, and that Mayor Genrich failed to appear and testify “without justification,” are not mere typos. They are both material to the outcome of this proceeding and fundamentally untrue, and the Special Counsel knew or should have known they were untrue when he signed the Petition.

*First*, Mayor Genrich’s testimony, even if it could be lawfully compelled by the Subpoena, was not “unilaterally continued.” Rather, the parties agreed that Green Bay would produce almost 20,000 pages of documents *in lieu of testimony or other document production*. That decision was not made unilaterally but was the outcome of negotiations between the Office of Special Counsel and Outside Counsel for Green Bay. That agreement was memorialized in writing and sent to the Special Counsel. In the same letter, Green Bay described its expectations *if* the Special Counsel was to seek testimony in the future:

Per our discussions, Green Bay understands that neither further document production nor witness attendance is necessary at this time in response to the Special Counsel’s inquiries of September 30 and October 6. In the event that the Special Counsel at a later date seeks any additional documents from Green Bay or any witness testimony on behalf of Green Bay or any of its officials, such a request should include information regarding specific topics on which information is sought, the timeframe to be covered in any testimony, and the venue and timing in which any testimony is requested.

[Mandell Aff., ¶ 8, Exh. C]. Any scheduled time for testimony, even it had been enforceable, was not continued but adjourned completely.

The Special Counsel did not respond to Outside Counsel, nor did he ever attempt to follow up on these communications. He certainly made no effort to re-issue a subpoena or take the normal steps one expects from an attorney seeking testimony—including contacting a witness’s attorney to confirm attendance, discuss the production of documents, or arrange for a court reporter. To the contrary, in public statements, he made clear that he did not expect to take testimony from City officials.

*Second*, if the Special Counsel is relying on his October 21, 2021 email to Ms. Chavez, he misrepresents its contents. [Dkt. No. 7]. The email, the only document attached to the Petition containing “November 17,” does not “continue” Mayor Genrich’s testimony to a time and date certain. The email makes no mention of Mayor Genrich, nor does it specify to which subpoena it refers. At the time, there were three subpoenas involving Green Bay. It says, “your client” which

would have been the City generally. Wis. Stat. §§ 62.09 (authority of the city attorney); *accord* Green Bay, Wis., Municipal Code § 2-112. This email was sent to the City Attorney, an officer of the City with whom the Special Counsel should not have been communicating. SCR 20:4.2<sup>18</sup>; *In re Disciplinary Proc. against Gende*, 2012 WI 107, ¶14, 344 Wis. 2d 1, 821 N.W.2d 393 (per curiam).<sup>19</sup> It was not delivered but got caught up in the City’s spam filter. The Special Counsel was made aware of this fact on November 23—six days *before* he filed the Petition.<sup>20</sup> He nonetheless ignored this fact and affirmatively represented to this Court, in a sworn pleading verified under penalty of perjury, that he had continued the date for testimony (and that the Mayor had failed to appear “without justification”).

*Third*, none of this occurred “during a period of negotiations with the City attorney.” The City has been represented by Outside Counsel since October 5. The Special Counsel knew this—his office had multiple discussions regarding the subpoenas with Attorney Mandell in early October. He was informed again verbally and in writing on October 14 and then once more on November 23. He had referred to the City hiring attorneys in his public testimony on November 10. All of this preceded his filing the Petition. Following the conversation between Attorneys

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<sup>18</sup> Wisconsin Ethics Opinion E-07-01 discusses the applicability of SCR 20:4.2 to in-house counsel. Wisconsin Ethics Opinion E-07-01 (Effective July 1, 2007). Importantly, here, the City Attorney is an appointed official of the City, and therefore has the normal authority to bind or obligate the City. *See* Green Bay, Wis., Municipal Code § 2-112. She is therefore entitled to the protection SCR 20:4.2 affords to represented parties. SCR 20:4.2 n.7. In addition, Outside Counsel directed the Special Counsel to communicate only with Outside Counsel regarding this investigation. [Mandell Aff., ¶ 9]. The Special Counsel is not at liberty to disregard those directives.

<sup>19</sup> At the time of this decision, the Special Counsel was a Justice on the Wisconsin Supreme Court.

<sup>20</sup> This was not the first time the Special Counsel’s emails had been caught by a city’s spam filters. In September, he sent county clerks emails from a gmail account purporting to be a preservation of evidence notice. It was widely reported that it had not been delivered to multiple clerks. *See* Casey Torres, *Wisconsin county clerks confused with suspicious 2020 election probe email*, wbay.com (Sept. 15, 2021), available at <https://www.wbay.com/2021/09/15/wisconsin-county-clerks-confused-with-suspicious-2020-election-probe-email/> (last visited Dec. 10, 2021).

Mandell and Kloster, and contrary to the Special Counsel's statement in the Petition, he and his staff ceased communicating directly about the Subpoena. There were certainly no ongoing "negotiations" as of late October. An undelivered, inappropriate, and vague email does not constitute negotiating, and the Special Counsel's attempt to frame his conduct as reasonable should not go without mention or sanction.

*b. The Petition Contains Sanctionable, Material Omissions of Fact.*

More disturbing than the Special Counsel's affirmative misrepresentations are his staggering omissions of material facts. "[F]alse and misleading statements in briefs filed in court contravene not only Rule 802.05(1)(a) but also SCR 20:3.3, which requires candor toward tribunals." *Wisconsin Nat. Gas Co. v. Gabe's Constr. Co.*, 220 Wis. 2d 14, 19, 582 N.W.2d 118 (Ct. App. 1998).

*i. The Petition Omits Any Mention of the Negotiated Agreement between the City and the Special Counsel.*

The omission of any mention of the negotiated agreement between the City and the Special Counsel is brazen. The Special Counsel certainly knew about this arrangement—his office actively participated, and the City memorialized the terms of the agreement in a written communication sent to him on October 14. He knew or should have known that, pursuant to that letter, neither Mayor Genrich nor anyone else at the City would have expected to produce any testimony or information on November 17. To the contrary, it was their stated expectation that no such testimony would *ever* occur absent further negotiations between the City and the Office of Special Counsel.

The Special Counsel nonetheless averred that Mayor Genrich failed to appear, "without justification" and on that basis, asks this Court to issue a "writ" pursuant to Wis. Stat. § 885.12. To ask this Court to initiate a process that could result in the confinement of the mayor of a

Wisconsin city by the sheriff in a distant county without providing this Court with any of the material facts it would need to analyze such a request is an extraordinary attempt to mislead the Court and invites sanction. “This tactic of ignoring existing, and potentially dispositive, precedent, as well as the numerous attempts to mislead this Court through bold misrepresentations of fact and law, disserve the parties, opposing counsel, and this Court.” *Tomczyk v. Blue Cross & Blue Shield United of Wis.*, 951 F.2d 771, 778 (7th Cir. 1991). Here, the Special Counsel violated his duty of candor by presenting his request without providing the Court with any other information. The truth is that almost immediately after the Special Counsel sent his subpoenas, his office agreed that no testimony would be required. The Special Counsel also began indicating publicly that he did not expect any imminent testimony and believed Green Bay had fulfilled its obligations. Between October 14 (the day Green Bay indicated it believed there would be no testimony) and November 29 (the date of the Petition), the Special Counsel took no steps to indicate he expected Mayor Genrich to testify in some unauthorized, quasi-deposition proceeding.

*ii. The Special Counsel Failed to Disclose His Own Public Statements.*

The Special Counsel also failed to note that he had made repeated public statements indicating that he did not expect city officials, which would include Mayor Genrich, to testify. The Special Counsel’s investigation has been characterized throughout by inconsistent statements and reversals, particularly regarding whether and how the Special Counsel expects to receive additional information. As it pertains to the City:

- On October 5, the Special Counsel appeared at a City Council meeting, and announced he had served subpoenas that day on Mayor Genrich and at least one

other official<sup>21</sup>; when Mayor Genrich noted he had not received a subpoena, the Special Counsel blithely stated it would be served the next day. [Chavez Aff., ¶ 5].

- On October 7, according to media reports, acting on behalf of the Special Counsel, Mr. Kloster contacted attorneys in the cities of Madison, Milwaukee, Green Bay, Racine, and Kenosha and told them that the Special Counsel was no longer planning to take testimony on October 15 or 22. Mr. Kloster said the Special Counsel was focusing on reviewing documents produced in response to open records requests.<sup>22</sup>
- On October 14, the Special Counsel released a YouTube video entitled “Wisconsin Special Counsel explains subpoena process.”<sup>23</sup> He said: “in order to facilitate faster responses and address concerns that the terms of those subpoenas were too burdensome, we offered the customary opportunity to proceed informally...” He also referred to an understanding, “that additional information would be provided on a mutually agreeable timeline” so long as officials were willing to work with his office and referenced potential future efforts to enforce subpoenas if necessary. The Special Counsel did not refer to Mayor Genrich or any other specific official.
- Also on October 14, the press reported that the Special Counsel had reached an agreement with the Attorney General’s office that no one from the WEC would testify on October 15.<sup>24</sup>
- On November 10, the Special Counsel appeared before the Committee to deliver prepared remarks and answer questions.<sup>25</sup> The Special Counsel made no reference to upcoming testimony on November 17.
- Also on November 10, the Special Counsel submitted a “First Interim Report” to the Assembly.<sup>26</sup> This report does not reference Mayor Genrich or expected testimony on November 17. It does discuss the subpoenas, noting that the Special

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<sup>21</sup> *Watch: Gableman Speaks At City Council Meeting*, wbay.com (Oct. 6, 2021), available at <https://www.wbay.com/video/2021/10/06/watch-gableman-speaks-city-council-meeting/> (last visited Dec. 8, 2021).

<sup>22</sup> A.J. Bayatpour, *Gableman Backs Off Request For Testimony From City Officials*, wkow.com, (Oct. 7, 2021), available at [https://www.wkow.com/news/gableman-backs-off-request-for-testimony-from-city-officials/article\\_e249c854-27ba-11ec-82c5-7b5f2c67ef13.html](https://www.wkow.com/news/gableman-backs-off-request-for-testimony-from-city-officials/article_e249c854-27ba-11ec-82c5-7b5f2c67ef13.html) (last visited Dec. 2, 2021).

<sup>23</sup> Available at <https://www.youtube.com/watch?v=AD9G9Aq2a0I&t=4s> (last visited Dec. 8, 2021).

<sup>24</sup> Emilee Fannon, *Gableman Puts Elections Subpoenas on Hold, Cancels Interviews with Clerks and Mayors*, WDJT-Milwaukee (Oct. 7, 2021), available at <https://www.cbs58.com/news/gableman-puts-election-subpoenas-on-hold-cancels-interviews-with-clerks-and-mayors> (last visited Dec. 6, 2021).

<sup>25</sup> Available at <https://wiseeye.org/2021/11/10/assembly-committee-on-campaigns-and-elections-21/> (beginning at 2:06:30) (subscription required) (last visited Dec. 8, 2021).

<sup>26</sup> Available at <https://www.wifraud.com/Content/files/InterimReportFINALSubmitt.pdf>.

Counsel had received some “voluntary” compliance and that the subpoenas were subject to pending litigation.

In short, public statements from the Special Counsel gave every impression that, at least as of November 10, he did not expect to take testimony imminently. These statements, combined with the Special Counsel’s ongoing failure to communicate with Outside Counsel and the uncertainty resulting from pending litigation, resulted in confusion about what the Special Counsel is doing. Representing to the Court that Mayor Genrich failed to appear “without justification,” while not even acknowledging that the Special Counsel denied any testimony would take place, cannot be understood as anything other than a deliberate attempt to mislead the Court. Making such a representation in an *ex parte* filing that is not even served upon the Respondent or his counsel is more egregious still.

iii. *The Special Counsel Failed to Inform the Court of Related Litigation in Dane County.*

Finally, the Special Counsel made no mention in his submissions that there is ongoing, related litigation in Dane County. That litigation is directly related to, and may prove dispositive of, the issues of whether and how the Special Counsel can compel the production of documents and the provision of testimony pursuant to a legislative subpoena issued under the authority of Wis. Stat. § 13.31. [Summons & Complaint, Dane County Circuit Case No. 2021-cv-2552]. The Department of Justice, acting on behalf of the WEC Parties, has raised serious issues, deserving of full hearing and decision, regarding these subpoenas. The Special Counsel disagrees with these arguments, as does the Assembly. But as the Special Counsel appears to admit in his interim report to the Committee, the existence of that litigation calls into question the enforceability of the subpoenas and, therefore, whether any witness could *ever* be required to appear. The Special Counsel failed to notify this Court that this litigation even exists. He also failed to mention that the matter was fully briefed and set for hearing.

All of this information was material to this Court’s consideration of the Special Counsel’s extraordinary request. While the Special Counsel is not obliged to make the Respondents’ arguments for them, his basic duties as an attorney require him to present a, “fair and accurate” statement of the facts and law. *Fuery v. City of Chicago*, 900 F.3d 450, 454 (7th Cir. 2018) (“But these incremental abuses chip away at the fair administration of justice and frustrate a trial judge’s faith that she can rely upon the lawyers before her—officers of the court—to set forth a fair and accurate presentation of the facts and law.”). These basic duties are particularly important where, as here, an attorney asks the Court to issue an order on an *ex parte* basis and there is a possibility that the subject of the matter will not have an opportunity, much less a full opportunity, to be heard.

The Special Counsel’s failure to present a full and accurate set of facts in his Petition also violates this Court’s local rules on motion practice.<sup>27</sup> Waukesha County Civil Court Division, Local Court Rule 2.3 (“The moving party and the responding party shall include a statement describing the nature of the case, *relevant facts*, procedural status, and a short conclusion stating the specific relief requested.”) (emphasis added). In this case, the relevant facts, all of which were available to the Special Counsel, defenestrate his conclusory statement that Mayor Genrich acted unreasonably or “without justification.” But the Special Counsel omitted all of this information from his Petition.

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<sup>27</sup> The Special Counsel titled the document, “Petition for a Writ of Attachment of the Person.” [Dkt. No. 6]. This is not a permissible pleading in Wisconsin. Wis. Stat. § 802.01 (1). Since the Petition requests an order in the form of a “Writ of Attachment,” it can best be construed as a motion. Wis. Stat. § 802.01 (2). A “writ of attachment” has nothing to do with this matter and does not authorize the relief sought here. *See* Wis. Stat. ch. 811. Writs of attachment are relevant in civil disputes between private parties for money damages, and they cannot be issued until after a summons and complaint have been filed, nor can they be used against a municipality (or a municipal officer in his official capacity). *See* Wis. Stat. §§ 811.01, 811.02. This all underscores how little inquiry the Special Counsel apparently did prior to filing this frivolous proceeding.

*b. The Special Counsel's Legal Positions are Not Grounded in Law.*

The Special Counsel has attempted to use an entirely inappropriate—and legally incorrect—procedure to enforce a legislative subpoena. In so doing, he has invited this Court to order another official to exceed their lawful authority. These legal infirmities require sanction.

*i. The Special Counsel Failed to Follow the Mandatory Procedure to Enforce a Legislative Subpoena.*

The Special Counsel failed to use the proper method to enforce compliance with a legislative subpoena. “Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members” in certain circumstances, including where a person “refus[es] to attend or be examined as a witness[.]” Wis. Stat. § 13.26. Wisconsin law provides a “summary process to compel the attendance” of any person that fails to testify pursuant to a legislative subpoena. Wis. Stat. § 13.32. There are several detailed steps that the Legislature must take to compel compliance with a legislative subpoena. For instance, the chairperson of the committee that issued the subpoena must file with the presiding officer a certificate certifying that the witness failed to comply. Wis. Stat. § 13.32(1). Additionally, “[s]uch summary process shall be signed by the presiding officer and chief clerk of the house which issued the subpoena and shall be directed to the sergeant at arms thereof commanding the sergeant at arms” to arrest the witness. Wis. Stat. § 13.32(2).

Here, no certificate was filed with the presiding officer, and no summary process was directed to the sergeant at arms. Rather, the Special Counsel entirely ignored and attempted to circumvent the detailed statutory process for compelling enforcement of legislative subpoenas. Rather than utilize the correct procedure, the Petition relies upon Wis. Stat. § 885.12, a statutory provision relating to punishment for contempt as an aid to hearings and proceedings conducted by various governmental departments, such as administrative agencies and boards, and not by the

Wisconsin State Assembly. The statute provides for the attachment of a person who fails to testify as lawfully required “before any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee, or other officer or person authorized to take testimony[.]” Wis. Stat. § 885.12.

The Supreme Court of Wisconsin has historically construed the statute as applicable only with respect to administrative agencies and similar governmental bodies. *See State v. Balistrieri*, 55 Wis. 2d 513, 519-520, 201 N.W.2d 18 (1972) (finding statute applicable where respondent refused to comply with subpoena from “an administrative agency”); *see also State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 393, 4 N.W. 390 (1880) (finding that the original version of the statute “relate[s] exclusively to witnesses and testimony in proceedings before municipal boards or bodies”). And, even if Wis. Stat. § 885.12 could be broadly construed, allowing the Special Counsel to rely on it instead of the detailed process for enforcing legislative subpoenas, *see* Wis. Stat. § 13.32, would “be contrary to the principle of statutory construction that, where two statutes applying to the same subject conflict, the more specific statute is controlling.” *In re Doe Petition*, 310 Wis. 2d 342, 361, 750 N.W.2d 873 (2008) (finding that general statute governing subpoenas inapplicable where “there is a more specific statute controlling subpoenas within the context of John Doe proceedings”), *opinion modified on denial of reconsideration*, 314 Wis.2d 67, 756 N.W.2d 34 (2008) (per curiam).

The Special Counsel’s decision to proceed under Wis. Stat. § 885.12 is not “well grounded” in Wisconsin law. *Jardnt*, 227 Wis. 2d at 550. The only apparent authority linking legislative sanctions and Wis. Stat. § 885.12 is a single sentence contained in an Attorney General opinion from 90 years ago. 20 Wis. Op. Atty. Gen. 765 (1931). This is the sole authority upon which the

Legislative Reference Bureau<sup>28</sup> relied in its August 5, 2021 memo, which the Special Counsel attached to the Petition. [Dkt. No. 9, p. 6]. To the extent that this particular Attorney General opinion was ever persuasive authority, it was abrogated by the Court's decision in *In re Doe Petition*.

The Special Counsel neglected to provide any legal argument to support the notion that the order he seeks is appropriate under Wisconsin law. He made no attempt to explain how this approach is grounded, in any way, in statute or caselaw. Proceeding under Wis. Stat. § 885.12 following the Court's decision in *In Re Doe*, is frivolous and requires sanction.

*ii. The Special Counsel's Legal Position Would Lead to a Bizarre Outcome.*

The haphazard nature of the Special Counsel's legal position is underscored by the bizarre outcome he proposes. The proposed "Writ of Attachment of the Person" attached to the Petition apparently would require Respondent to produce documents and testimony within 45 days. But the statute under which the Special Counsel is trying to proceed provides that this Court, "may commit the person to close confinement in the county jail until the person shall so testify or do such act, or be discharged according to law," with the sheriff of that county executing that attachment. Wis. Stat. § 885.12. This is the sole remedy afforded under Wis. Stat. § 885.12.

The Special Counsel is urging this Court down a path that would end in the Court ordering the sheriff of Waukesha County to detain the mayor of Green Bay, a separate municipality organized under the laws of Wisconsin and located several counties away. To do so would exceed the authority of the sheriff, which is inextricably tied to the authority of the county he serves. *Abraham v. Piechowski*, 13 F. Supp. 2d 870, 878 (E.D. Wis. 1998) ("Together, the repeal of the

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<sup>28</sup> It is unclear why the Legislative Reference Bureau was tasked to write this opinion in the first place. It is the function of the Legislative Council staff to provide policy and legal opinions to the committees of the Legislature. Wis. Stat. § 13.91 (1).

liability limitation in Article VI, section 4 [of the Wisconsin Constitution] and the enactment of 1983 Wisconsin Act 6 indicate Wisconsin's decision—by its citizens and legislators—that even if sheriffs at common law may have been otherwise, today they are county actors.”). It would also exceed the territorial authority of the sheriff. Wis. Stat. § 59.28; *State v. Zivcic*, 229 Wis. 2d 119, 127, 598 N.W.2d 565 (Ct. App. 1999). By asking this Court to accept his proposition that Wis. Stat. § 885.12 applies here, the Special Counsel is inviting activity that contravenes Wisconsin law and the basic structure of our state government. This is yet another indication that the Special Counsel's legal theory is frivolous.

*c. This Court Should Sanction the Special Counsel Pursuant to Wis. Stat. § 802.05.*

The misrepresentations, material omissions, and frivolous legal positions described herein all require sanction under Wis. Stat. § 802.05. The Special Counsel has actual knowledge of the facts that would preclude the relief he sought—including that Mayor Genrich and the City have acted reasonably and with justification in response to his subpoenas, which are of questionable validity. He knew or should have known that the statute on which he apparently relied, Wis. Stat. § 885.12, did not and could not afford him the relief sought. Instead, it would require *ultra vires* conduct by Waukesha County officials. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d at 244.

There is no reason the Special Counsel could not have performed a sufficient inquiry into whether the facts or law supported his Petition. *Riley*, 156 Wis. 2d at 259. He knew the facts, and the law was readily available. *Jardnt*, 227 Wis. 2d at 549-51. The Special Counsel certainly had sufficient time to make further inquiry. There was no statute of limitation or other deadline he needed to meet. *Id.* A reasonable attorney in that position would have made sure that, given the stakes in this matter, their legal position was well-grounded and, to the extent it was an attempt to extend or change the law, would have presented some legal argument in support of their position.

*Stern*, 185 Wis. 2d at 241 (citing *Sommer v. Carr*, 99 Wis. 2d 789, 799, 299 N.W.2d 856 (1981)). Instead, what the Special Counsel presented was underdeveloped, haphazard, unsupported by the facts, and contrary to Wisconsin law.

By failing to make a proper inquiry prior to signing and submitting pleadings to this Court, and by making misrepresentations and material omissions that would have deprived this Court of the facts it needed to rule on the Petition, the Special Counsel violated Wis. Stat. § 802.05(2). This Court should impose appropriate sanctions. Wis. Stat. § 802.05(3).

## **II. This Court Should Exercise Its Inherent Authority to Sanction the Special Counsel.**

In the alternative, Mayor Genrich respectfully requests that this Court exercise its inherent authority to sanction the Special Counsel for his conduct, which has and continues to impair the administration of justice before this Court. The Special Counsel invoked this Court's jurisdiction on November 29, 2021. *Godfrey & Kahn*, 2012 WI App 120, ¶45. In the short time since then, the Special Counsel has managed to willfully attempt to mislead the court, ignored a court order, and continually violated the applicable rules governing the conduct of attorneys in Wisconsin.

*First*, by filing the Petition that contained misrepresentations, omitted essential facts, and was not warranted by Wisconsin law, the Special Counsel engaged in conduct that is sanctionable pursuant to this Court's inherent authority. *See, e.g., Chevron Chem. Co. v. Deloitte & Touche*, 176 Wis. 2d 935, 949, 501 N.W.2d 15 (1993). This conduct impairs the operation of the courts and the effectiveness of the judicial system. *Latham*, 23 Wis. 2d at 314; *Chevron*, 176 Wis. 2d at 946. These arguments are developed more fully in Section I of this brief, which is incorporated herein by reference.

*Second*, the Special Counsel disobeyed this Court's order, contained in its Notice of Hearing, to inform Respondents of the hearing scheduled for December 22, 2021. [Dkt. No. 11].

The Special Counsel made no apparent effort to comply with this order. Instead, he disclosed the existence of the Petition for the first time on December 1, 2021, in testimony to the Committee. As of the date this motion was drafted, the Special Counsel has not contacted Mayor Genrich or Outside Counsel to inform them of any upcoming hearings, nor has the Special Counsel served Mayor Genrich or Outside Counsel with this Petition. *Cf.* Wis. Stat. § 801.014 (every order, pleading and motion “shall be served upon each of the parties”). “[A] circuit court has inherent authority to enforce its own orders by constructing remedies that promote compliance.” *In re Att’y Fees in Yu v. Zhang*, 2001 WI App 267, ¶14, 248 Wis. 2d 913, 637 N.W.2d 754.

*Third*, both prior to and after invoking this Court’s jurisdiction,<sup>29</sup> the Special Counsel has continued to violate basic rules governing attorneys, particularly the prohibition against contacting represented parties. SCR 20:4.2. Courts have inherent authority to, “regulate the bench and bar.” *State v. Henley*, 2010 WI 97, ¶73, 328 Wis. 2d 544, 787 N.W.2d 350 (Gableman, J.). To that end, courts may exercise their inherent authority in response to violations of the rules regulating attorneys, or to uphold the “civility, candor, and professionalism” of the legal community. *Chevron*, 176 Wis. 2d at 945.

As described above, the Special Counsel has a history of failing to properly communicate with Outside Counsel. On December 3, despite numerous requests that the Office of Special Counsel cease contacting City Employees directly, two investigators from that office contacted a city employee on her personal cellphone and left messages. [Fuge Aff., ¶¶ 2-3]. To the extent that the Special Counsel employs non-attorneys, he is responsible for making sure they comport with

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<sup>29</sup> It is an unresolved question whether a trial court may sanction an attorney for pre-litigation conduct in order to “regulate the bench and bar.” *Godfrey & Kahn*, 2012 WI App 120, ¶45. Since the Special Counsel continued this conduct after filing the Petition, however, the Court need not rely on pre-litigation conduct.

the relevant ethical rules. SCR 20:5.3 (“[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”). Unfortunately, this is consistent with the Special Counsel’s pattern and practice of contacting City employees directly. This conduct prejudices the City, impairs the proper operation of the courts, and violates the City’s right to be represented by counsel of its choice in a proceeding. Each of these behaviors, independently and in combination, should result in sanctions against the Special Counsel pursuant to this Court’s inherent authority.

### **III. The Requested Sanctions Are Appropriate**

The requested sanctions are appropriate and proportionate. Sanctions are “designed to deter ... misconduct.” *DR Distribs., LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 864 (N.D. Ill. 2021). Here, sanctions should aim “to make [Mayor Genrich] whole for the injury [the Special Counsel] caused” and should therefore be “proportionally tailored to [the Special Counsel’s] actions and inactions.” *Id. City of W. Allis v. Wisconsin Elec. Power Co.*, 2001 WI App 226, ¶ 51, 248 Wis. 2d 10, 635 N.W.2d 873 (it is an abuse of discretion for a court to render a sanction that is not tailored to the severity of the party’s conduct). *Trinity Petroleum, Inc. v. Scott Oil Co.*, 2007 WI 88, ¶ 47, 302 Wis. 2d 299, 735 N.W.2d 1 (Wis. Stat. § 802.05 “is primarily designed to deter baseless filings in court and unnecessary or improper litigation” and former § 814.025 must be enforced “for the purpose of maintaining the integrity of the judicial system and the legal profession”) (internal citation and quotation marks omitted). *Ebmeyer v. Brock*, 11 F.4th 537, 547 (7th Cir. 2021) (“[S]anctions ... must be proportionate to the circumstances”) (citing *Donelson v. Hardy*, 931 F.3d 565, 569 (7th Cir. 2019))

As outlined above, the misconduct embodied by the Special Counsel’s Petition is egregious. The injury to Mayor Genrich is significant—and difficult to precisely quantify. As Mark

Twain famously observed, “A lie can travel halfway around the world while the truth is lacing up its boots.” That is what happened here. The Special Counsel not only misrepresented matters in his Petition to this Court, but by failing to serve that Petition on Mayor Genrich and then announcing the filing in public testimony before the Committee, the Special Counsel generated surprise, outrage, and extensive media coverage for his trumped up allegations. When Mayor Genrich prevails on the merits, that story will not undo the harm caused by the Special Counsel’s bombshell of mistruths. The best way to mitigate that is to require the Special Counsel himself to publicly proclaim the fundamental truth here: Mayor Genrich violated no law or duty in not providing testimony last month to the Special Counsel. To help the truth lace up its boots, the Special Counsel should be required to make this proclamation both in the state’s largest newspapers and in the same forum he initially misled the public, in testimony before the Committee.

The additional sanctions sought seek to ensure that this situation does not recur. To accomplish that end, this Court can and should order continuing legal education, impose a deterrent fine, and issue an order making clear that the Office of Special Counsel is to communicate only with lawyers chosen by represented parties. *First*, ordering continuing legal education is an appropriate sanction, especially here where the Special Counsel has violated several basic ethical rules, some repeatedly. Given that some of the lawyers on the Special Counsel’s staff may be practicing law in Wisconsin although they are not members of the state’s bar , requiring some ethical education approved by the Wisconsin Bar is a small step to ensure the Office of Special Counsel meets the ethical obligations and expectations of lawyers engaged in Wisconsin practice. *Second*, imposing a deterrent fine, in an amount set by the Court, will underscore the seriousness with which the Court takes the offenses here. *Third and finally*, issuing an order mandating that

the Special Counsel and all individuals working under his supervision immediately cease the improper practice of directly contacting parties they know to be represented by counsel appears, unfortunately, to be necessary. This itself is not a sanction so much as a prophylactic step to avoid further motion practice before the Court.

### CONCLUSION

For the reasons stated herein, the Respondent Eric Genrich respectfully request that this Honorable Court GRANT the Motion for Sanctions.

Dated January 4, 2022

Respectfully submitted,

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