

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

WILLIAM BAILEY

Plaintiff

v.

ANTRIM COUNTY

Defendant

SECRETARY OF STATE JOCELYN
BENSON

Intervenor-Defendant,

Supreme Court No. _____

COA Case No: 357838

LC Case No. 20-9238-CZ

APPLICATION FOR LEAVE TO APPEAL

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Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: June 2, 2022

/s/ Matthew S. DePerno
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 Attorney for Plaintiff-Appellant

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

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EXHIBITS 6

**PLAINTIFF'S MOTION AND BRIEF FOR RECONSIDERATION OR,
ALTERNATIVELY, REHEARING PURSUANT TO MCR 2.119(F)**

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: June 9, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

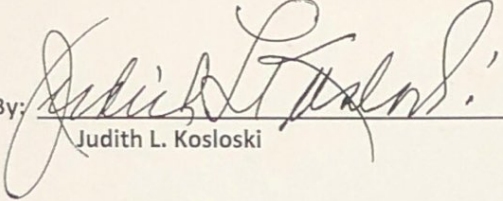
Attorney for Plaintiff

DECLARATION OF JUDITH L. KOSLOSKI

I, Judith L. Kosloski, declare as follows:

1. With respect to the 2020 Presidential Election, I served as Clerk of Central Lake Township, Michigan. I have personal knowledge of the contents of this Declaration and if called as a witness I could and would testify competently as to their truth. I have served as Township Clerk from 2006 to 2008, ran in 2012 and won and have been sitting as Clerk since that time.
2. My responsibility as Clerk is to guarantee and safe and legal election. While I could not be in the precinct during Election Day, as I was on the ballot, I was in my office to assist the election inspectors in any way I could.
3. On Election Night, we close the poll after all absentee ballots have been entered into the tabulator. We take our ISD cards out of the machine and take them, the security fob and the results of the Electronic Poll Book to the County Clerk's office that night.
4. I received my ISD cards when I went to the County Building and received my Precinct Kits from Connie Wing prior to the election and never received nor was made aware of an update as I did not need any updates.
5. On Thursday, November 5, 2020, I was contacted by Connie Wing, of the County Clerk's Office, and asked that I bring my tabulated, locked ballot container and tabulator to the Clerk's office for retabulation. Because of time constraints the retabulation did not occur and I was asked to return on Friday, November 6, 2020. I was given the ISD cards and security fob for the tabulator, we set it up and the retabulation began at 9 a.m. We finished at 8:55 p.m. The retabulation was done in the presence of the Antrim County Board of Canvassers, the Antrim County Sheriff along with my Deputy Clerk, Patricia Marshall. At the completion of retabulating all of the voted ballots from November 3, 2020, I asked if the Board of Canvassers was ready for me to close the poll and run the tally tape, which I did. It was at this time that I noticed that the number of votes cast on November 6, 2020, had changed from the tape of November 3, 2020. I stated to the Board that the numbers had changed. The Board did not respond to my comment. To this date, I still do not know why Central Lake Township was the only township that had to retabulate. Other Township Clerks asked me why I had to do this and I could not explain.
6. On November 26, 2020, I was contacted by a legal counsel and asked if I would let a cyber forensics team look at my tabulator and other election equipment and I agreed. I met with team members on Friday, November 27, 2020, at the Government Center, gave them access to the equipment and while a comparison was done with the tape from Election night and the second running of the voted ballots completed on Friday, November 6, 200, they showed me a discrepancy on the tape of 600+ votes on the Ellsworth School Board contest alone. Ellsworth Township had only six voters eligible to vote on that contest and three exercised their right to vote. Other races had discrepancies of one or two votes between the first and second tape.
7. The other noted change was in the Marijuana Proposal. The result went from a tie vote to winning by one.

8. Pursuant to 28 U.S.C., Section 1746, I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct to the best of my knowledge.

By: 
Judith L. Kosloski

Dated: November 27, 2020

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

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HON. KEVIN A. ELSENHEIMER

Defendant

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**PLAINTIFF'S MOTION AND BRIEF FOR RECONSIDERATION OR,
ALTERNATIVELY, REHEARING PURSUANT TO MCR 2.119(F)**

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: June 9, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)
Attorney for Plaintiff

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

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AFFIDAVIT OF BENJAMIN R. COTTON 8 JUNE 2021

I, Ben Cotton, being duly sworn, hereby depose and state as follows:

1) I am over the age of 18, and I understand and believe in the obligations of an oath. I make this affidavit of my own free will and based on first-hand information and my own personal observations.

2) I am the founder of CyFIR, LLC (CyFIR).

3) I have a master's degree in Information Technology Management from the University of Maryland University College. I have numerous technical certifications, including the Certified Information Systems Security Professional (CISSP), Microsoft Certified Professional (MCP), Network+, and Certified CyFIR Forensics and Incident Response Examiner.

4) I have over twenty-five (25) years of experience performing computer forensics and other digital systems analysis.

5) I have over eighteen (18) years of experience as an instructor of computer forensics and incident response. This experience includes thirteen (13) years of experience teaching students on the Guidance Software (now OpenText) EnCase Investigator and EnCase Enterprise software.

6) I have testified as an expert witness in state and federal courts and before the United States Congress.

7) I regularly lead engagements involving digital forensics for law firms, corporations, and government agencies.

8) In connection with this legal action I have had the opportunity to examine the following devices:

a) Antrim County Election Management Server Image. This image was acquired on 4 December 2020 by a firm named Sullivan and Strickler.

- b) Thirty-eight (38) forensic images of the compact flash cards used in Antrim County during the November 2020 elections that were imaged on 4 December 2020 by a firm named Sullivan and Strickler.
 - c) One (1) SID-15v-Z37-A1R, commonly known as the Image Cast X (ICX), that was used in the November 2020 elections.
 - d) Two (2) thumb drives that were configured for a precinct using the ES&S DS400 tabulator that were used during the November 2020 election.
 - e) One ES&S server that was used in the November 2020 election.
- 9) **Internet Communications with the Dominion ICX.** I examined the forensic image of a Dominion ICX system utilized in the November 2020 election and discovered evidence of internet communications to a number of public and private IP addresses. Of specific concern was the presence of the IP address 120.125.201.101 in the unallocated space of the 10th partition of the device. This IP address resolves back to the Ministry of Education Computer Center, 12F, No 106, Sec.2,Hoping E. Rd.,Taipei Taiwan 106. This IP address is contextually in close proximity to data that would indicate that it was part of the socket configuration and stream of an TCP/IP communication session. Located at physical sector 958273, cluster 106264, sector offset 256, file offset 54407424 of the storage drive, the unallocated nature of the artifact precludes the exact definition of the date and time that this data was created. Also located in close proximity to the Ministry of Education IP address is the IP address 62.146.7.79. This IP address resolves to a cloud provider in Germany.

communication can only occur if the cellular modems have access to the public internet. I did not have the entire communications infrastructure for the private network and given this lack of device production associated with the DS200, I cannot say which other devices may have connected to this private network nor the full extent of the communications of nor the remote accesses to the DS400 devices.

11) Contrary to published guidelines and best practices for computer security, a single password was shared for the EMSADMIN01, EMSADMIN, EMSUSER, ICCUSER01, ICCUSER02, and emsepsuser. These passwords were never changed from the time that they were created. There were two local administrative accounts that did not have a password. The security impacts of shared passwords and no passwords on computer security is well documented and dramatically increases the risk of unauthorized access. It is inconceivable that a system would have shared passwords or null passwords and still meet accreditation standards.

12) Contrary to published guidelines and best practices for sensitive systems, the hard disks on the Antrim EMS were not encrypted. This failure to follow best practices increases the vulnerability of the voter data and facilitates the easy of access to sensitive data for unauthorized users and should invalidate any accreditation of the system.

13) **Microsoft SQL Authentication was Set to Authenticate to Windows User Mode.** This is a significant breach of sound practice for accessing the Microsoft SQL server. Simply put if an unauthorized user gains access to the system, that unauthorized user would have complete access to the Microsoft SQL server at the level of the compromised user. Given that the administrative accounts for the Antrim EMS server either used a shared password or did not have a password, full access to the SQL server would have resulted, exposing the contents of the database and the election results to manipulation by an unauthorized user.

14) **Out of Date Security Updates and Virus Definitions.** An analysis of the operating system and antivirus settings on the servers and computers provided to me was conducted. It was immediately apparent that these systems were extremely vulnerable to unauthorized remote access and manipulation. For example, none of the operating systems had been patched nor the antivirus definition files updated for years. The Antrim EMS operating system was last updated on 04/10/2019. Furthermore when the operating system was updated on 4/10/2019 the user did not apply the most recent patches, instead used a the 10.9.1 patch which was already 15 patches behind at that point in time. It is important to understand that these patches are critical to fixing vulnerabilities and protecting the system from unauthorized access. The fact that the operating system was not fully patched increases the dependency on the endpoint antivirus to protect the system. In this case however, the antivirus definitions were even more outdated than the operating system. The Antrim EMS was leveraging Windows Defender as the antivirus. The Windows Defender antivirus definition files were last updated on 7/16/2016. Given that this date matches the operating system installation date, the Windows Defender antivirus definitions had NEVER been updated after the system was installed. The other systems were in a similar state. This lack of security updating and basic cyber security practices has left these systems in an extremely vulnerable state to remote manipulation and hacking. Since 2016 more than ninety seven (97) critical updates have been issued for the Windows 10 operating system to prevent unauthorized access and hacking and weekly updates have been issued for the Windows Defender antivirus program. The fact that these systems are in such a state of vulnerability, coupled with the obvious public and private internet access, calls the integrity of the voting systems into question and should have negated the system accreditation.

15) **The Antrim EMS Server was Remotely Logged Into by Anonymous Logon.** The Antrim EMS failed to maintain windows security event logs before 4 November 2020.

Consequently a full user logon activity analysis was not possible to perform. However, within the logs that were present on the system there were at least two successful logins to the EMS server by an Anonymous user. The first occurred on 11/5/2020 at 5:55:56 PM and the second occurred on 11/17/2020 at 5:16:49 PM EST. Both of these logons appeared to have escalated privileges at the time of logon. Given that this computer was supposed to be on a private network, this is very alarming. One would expect that any network logon, if authorized by the accreditation authority, would require specific usernames and passwords to be utilized, not anonymous users. Given the vulnerable state of the operating system and antivirus protections, this apparent unauthorized access is particularly alarming and certainly would not have been authorized on an accredited system.

16) **Opposing Counsel's Expert Validates the Weak Security Findings.** The Halderman report dated March 26, 2021 relating to this matter validates these findings. It also validates that the system is in a state such that an unauthorized user can easily bypass the passwords for the system and database to achieve unfettered access to the voting system in a matter of minutes.

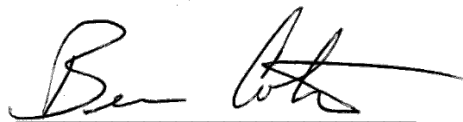
These manipulations and password bypass methodologies can be performed remotely if the unauthorized user gains access to the system through the private network or the public internet.

17) **Incomplete Compliance with the Subpoena for Digital Discovery.** Antrim County has apparently failed to produce all of the voting equipment for digital preservation and analysis. I examined the purchase documents produced by Antrim County with respect to the purchase of the Dominion Voting system and note that the following system components listed on the purchase documents were not produced:

- (a) ImageCast Listener Express Server
- (b) ImageCast Express Firewall
- (c) EMS Express Managed Switch
- (d) ICP Wireless Modems (17)
- (e) Image Cast Communications Manager Server
- (f) ImageCast Listener Express RAS (remote access server) System
- (g) ImageCast USB Modems (5)
- (h) Network Netflow Data
- (i) Router Configuration Data and Logs

Without these additional items and system components it will be impossible to determine the extent of public/private communications and the extent to which the proven anonymous remote access to the voting system components may have impacted the Antrim EMS databases and election results.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 8th DAY OF
June 2021.



Benjamin R. Cotton

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WILLIAM BAILEY

Plaintiff

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Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: June 9, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

Attorney for Plaintiff

Subject: Missing Evidence for Evaluation of Antrim County Election, Official Ballots are Easily Fabricated, and Official Ballot PDFs Flawed Making for Errors in Processing

Date: 6/9/2021

Analyst: Jeffrey Lenberg

Executive Summary

The following evidence is missing and is needed to make a complete evaluation of the Antrim County election of November 3, 2020 including, but not limited to:

- Forensic images of all election equipment from all precincts
- Physical ballots from all precincts
- Forensic images of all laptops, USB sticks, removable media, or other devices used by technicians that serviced Antrim County
- Detailed answers to questions regarding information technology configuration of Antrim County computer systems
- Detailed answers to questions regarding election processes prior to, during, and post-election

The ballots used in the Antrim County general election on November 3, 2020 have no serial numbers present on them. This means that the same ballots can be fed multiple times into the tabulators without any detection or warnings that they have already been processed once before and that they are duplicate. The lack of serial numbers also allows for the following additional techniques to create and run such ballots. The Lenberg expert report dated May 16, 2021 titled, "Summary of Security Deficiencies in the Antrim County Voting Systems" showed that the polls could easily be re-opened and more ballots fed into the tabular and then setting the time back to official poll closing; this technique and the fact that the ballots have no serial number makes ballot box stuffing very difficult to detect given routine canvassing procedures employed in Antrim County.

The paper used for the ballots is freely available on the open market and it can be acquired easily at office supply stores. In addition, a consumer grade inkjet printer, at the cost of \$280, is sufficient to create the ballots and use them in a tabulator. This means that, with a limited expenditure of funds, it is possible to fabricate ballots for fraudulent use in an election. If commercial printing equipment was made available, hundreds of thousands of ballots could be fabricated. The ballots can either be blank or pre-filled with vote choices based on the preference of the fraudulent actor. Mass scale fraud would likely use pre-filled ballots to expedite the process; otherwise, it would take a substantial amount of time to fill in the vote choices.

The ElectionSource whistleblower video referenced in the Penrose expert report dated May 2, 2021 indicates that the thumb drives carried by each ElectionSource

technician contain the ballot images for the jurisdictions that they serve. The whistleblower further asserts that it is simple to take those portable document format (PDF) ballot image files and print them out and use the real ballots for fraudulent purposes.

The Antrim County ballots found on the Antrim County Election Management System (EMS) contain several errors that put the ballots themselves outside of expected specifications and leads to reversals and processing errors based on the direction that ballots are fed into the tabulators. These issues are present in the PDFs themselves on the EMS, they are not an error of the printing company or whoever was responsible for making the ballot for use during the election.

Details

Ballots Lack Serial Number – Susceptible to Ballot Box Stuffing

The fact that ballots in Antrim County have no serial numbers makes it impossible to detect the re-running of any particular ballot. In other words, once a fraudulent actor has a stack of pre-populated ballots they can run the ballots in the tabulators an unlimited amount of times and the tabulator will not raise an error regarding the fraudulent activity.

The Lenberg expert report dated May 16, 2021 titled, “Summary of Security Deficiencies in the Antrim County Voting Systems” showed that ballot box “stuffing” is quite feasible given the ability for a poll worker to reopen the poll, scan additional stacks of ballots, and then reset the time back to the appropriate poll closure time.

An example of the financial cost for such a fraud activity follows:

- \$280 large format printer
- Heavy weight paper from local shops.
 - 500 sheets of 11x17 paper for \$50
- Cutting to ballot size costs an additional \$5

A motivated fraud actor could make many more ballots for a slightly higher cost:

- In a night could make 12 ballots per minute (double sided) * 60 minutes * 12 hours > 8600 ballots
- A cooperating printshop that has professional equipment could make tens of thousands over night during hours that the shop is normally closed

Indeed, the laboratory testing performed in support of this case was conducted using similar procedures to generate the ballots necessary for the testing procedures. The ballots produced in this fashion work in the tabulators as expected.

Accessibility of Ballot Images

The ballot images for every precinct and ballot type are stored on the EMS server. Antrim County is no exception, the EMS server does contain all of the ballot images for every variation of the ballots used in Antrim County. Figure 1 contains a partial list of the Antrim County ballots available on the EMS:

> Antrim November 2020 > Ballots > Official Ballots > PDF

































Name	Date modified	Type
 Acme Township, Precinct 1 (Grand Traverse County).pdf	10/23/2020 04:39 ...	PDF File
 Banks Township, Precinct 1CENT - Default - 1101.pdf	10/23/2020 04:39 ...	PDF File
 Banks Township, Precinct 1CHAR - Default - 1102.pdf	10/23/2020 04:39 ...	PDF File
 Banks Township, Precinct 1ELLS - Default - 1103.pdf	10/23/2020 04:39 ...	PDF File
 Banks Township, Precinct 1V - Default - 1104.pdf	10/23/2020 04:39 ...	PDF File
 Central Lake Township, Precinct 1CENT - Default -.pdf	10/23/2020 04:39 ...	PDF File
 Central Lake Township, Precinct 1ELLS - Default -.pdf	10/23/2020 04:39 ...	PDF File
 Central Lake Township, Precinct 1V - Default - 11.pdf	10/23/2020 04:39 ...	PDF File
 Chestonia Township, Precinct 1C7AL - Default - 11.pdf	10/23/2020 04:39 ...	PDF File
 Chestonia Township, Precinct 1C7MA - Default - 11.pdf	10/23/2020 04:39 ...	PDF File
 Chestonia Township, Precinct 1C9AL - Default - 11.pdf	10/23/2020 04:39 ...	PDF File
 Chestonia Township, Precinct 1C9MA - Default - 11.pdf	10/23/2020 04:39 ...	PDF File
 Clearwater Township, Precinct 1 (Kalkaska County).pdf	10/23/2020 04:39 ...	PDF File
 Cold Springs Township, Precinct 1 (Kalkaska Count.pdf	10/23/2020 04:39 ...	PDF File
 Custer Township, Precinct 1C5BE - Default - 1112.pdf	10/23/2020 04:39 ...	PDF File
 Custer Township, Precinct 1C5MA - Default - 1113.pdf	10/23/2020 04:39 ...	PDF File
 Custer Township, Precinct 1C6BE - Default - 1114.pdf	10/23/2020 04:39 ...	PDF File
 Custer Township, Precinct 1C6MA - Default - 1115.pdf	10/23/2020 04:39 ...	PDF File
 Echo Township, Precinct 1BEL - Default - 1116.pdf	10/23/2020 04:39 ...	PDF File
 Echo Township, Precinct 1CL - Default - 1117.pdf	10/23/2020 04:39 ...	PDF File
 Echo Township, Precinct 1EJ - Default - 1118.pdf	10/23/2020 04:39 ...	PDF File
 Elk Rapids Township, Precinct 1T - Default - 1119.pdf	10/23/2020 04:39 ...	PDF File
 Elk Rapids Township, Precinct 1V - Default - 1120.pdf	10/23/2020 04:39 ...	PDF File
 Forest Home Township, Precinct 1CC2 - Default - 1.pdf	10/23/2020 04:39 ...	PDF File
 Forest Home Township, Precinct 1CC6 - Default - 1.pdf	10/23/2020 04:39 ...	PDF File
 Forest Home Township, Precinct 1V - Default - 112.pdf	10/23/2020 04:39 ...	PDF File
 Helena Township, Precinct 1 - Default - 1124.pdf	10/23/2020 04:39 ...	PDF File
 Jordan Township, Precinct 1BC - Default - 1125.pdf	10/23/2020 04:39 ...	PDF File
 Jordan Township, Precinct 1CL - Default - 1126.pdf	10/23/2020 04:39 ...	PDF File
 Jordan Township, Precinct 1EJ - Default - 1127.pdf	10/23/2020 04:39 ...	PDF File
 Kearney Township, Precinct 1CL - Default - 1128.pdf	10/23/2020 04:39 ...	PDF File
 Kearney Township, Precinct 1T - Default - 1129.pdf	10/23/2020 04:39 ...	PDF File

Figure 1 Antrim County Partial Ballot List from EMS

The ElectionSource whistleblower video referenced in the Penrose expert report dated May 2, 2021 indicates that ElectionSource technicians have broad access to all the ballot images for the counties they serve. The whistleblower said all of the ballot image PDFs were on a thumb drive issued to the ElectionSource technicians and that there are no safeguards to prevent the copying of those PDF files to other media and using them to make printed copies of ballots. Given the lack of serial numbers as stated above along with no other duplicate ballot detection capability in the system, it is straightforward for a fraudulent actor to take advantage of access to PDF ballot images in order to fabricate ballots for ballot box stuffing activities.

During testing it was found to be straightforward to copy the ballot PDF files from the Antrim EMS to a USB stick to use on any external computer which facilitated the creation of the test ballots.

Abnormalities in the Ballots Provided to Antrim County

The ballots provided to Antrim County were included with the election project file from ElectionSource. As part of the provisioning process for the election project file the PDF images for each ballot are generated by the Dominion Voting Systems Democracy Suite 5.5.12.1.

The ballot images created for Antrim County contain inherent abnormalities in the specifications of the ballot PDFs. The outer markers along the top of the ballot are 15mm from the edge the paper, and on the bottom, there are only 5mm from the edge to the outer markers. Figure 2 illustrates the distances.

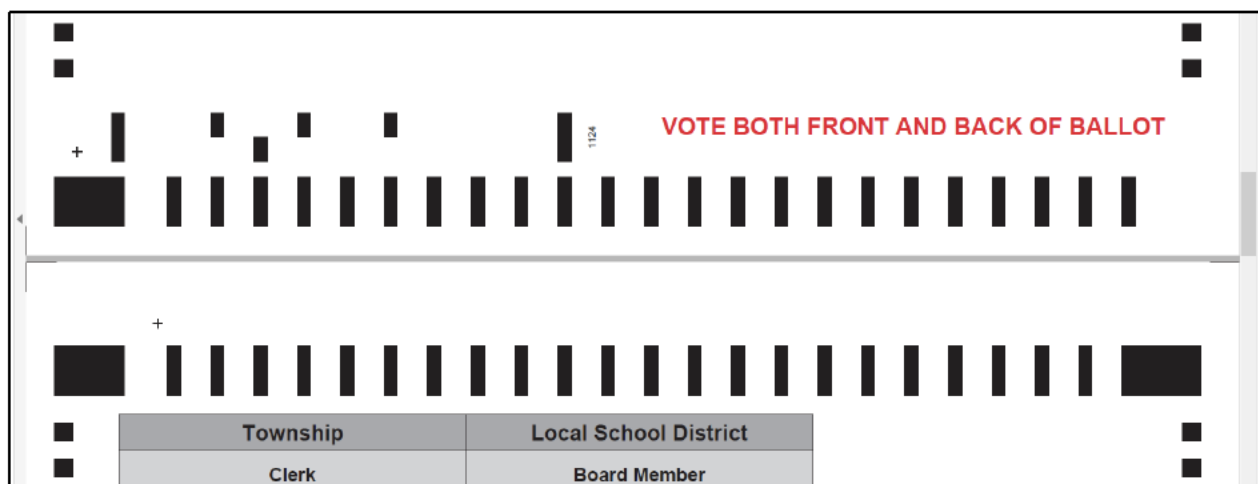


Figure 2 - Bottom of Ballot with 5mm Whitespace, Top of Ballot with 15mm Whitespace

Testing indicates that when ballots are fed with the top first into the tabulator there is a very low reversal rate, less than 1% (with high quality votes filled in). The same ballot fed into the tabulator with the bottom first, results in a substantially higher rate of reversals of approximately 20%.

The ballots' internal blocks where the contests are located are collectively shifted 1mm to the right (see Figure 3 & 4) and the external outer marker are shifted by 1mm left (see Figure 5) in all instances, including the calibration sheet (Figure 6). The overall vote choice bullet area is only 4mm in size, and the total 2mm shift accounts for a 50% offset from the proper target location to assess whether a vote is cast. This offset increases the likelihood of reversal and adjudication during an election.

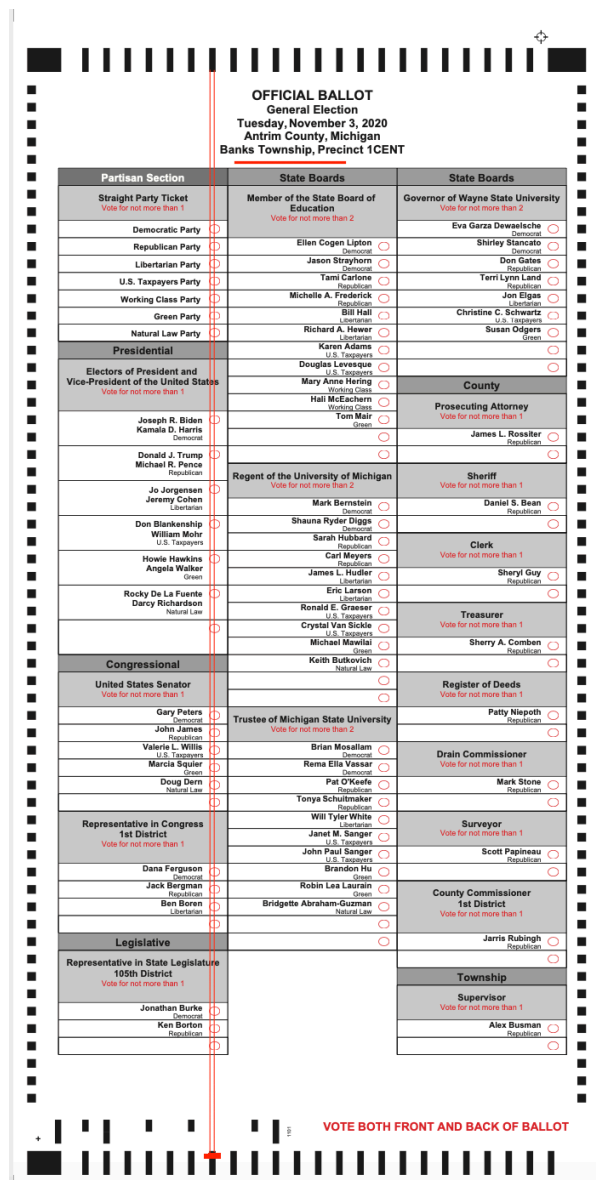


Figure 3 - 1mm Shift Right for Internal Contests Blocks on Ballot

Presidential	
Electors of President and Vice-President of the United States <i>Vote for not more than 1</i>	
Joseph R. Biden Kamala D. Harris Democrat	○
Donald J. Trump Michael R. Pence Republican	○
Jo Jorgensen Jeremy Cohen Libertarian	○
Don Blankenship William Mohr U.S. Taxpayers	○
Howie Hawkins Angela Walker Green	○
Rocky De La Fuente Darcy Richardson Natural Law	○

Figure 4 - Close-up of the 2mm Shift Impacting

The vertical red lines in Figure 4 show the specific center-point of the area that will be scanned by the tabulator to determine if a particular vote has been selected. The center of the vote box used for vote evaluation has been effectively moved to the left 2mm.

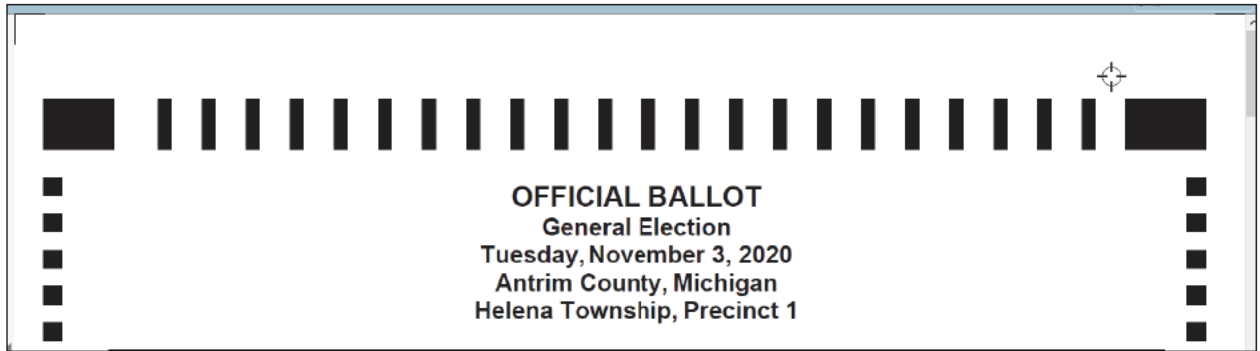


Figure 4 - Showing 1mm shifted left outer markers

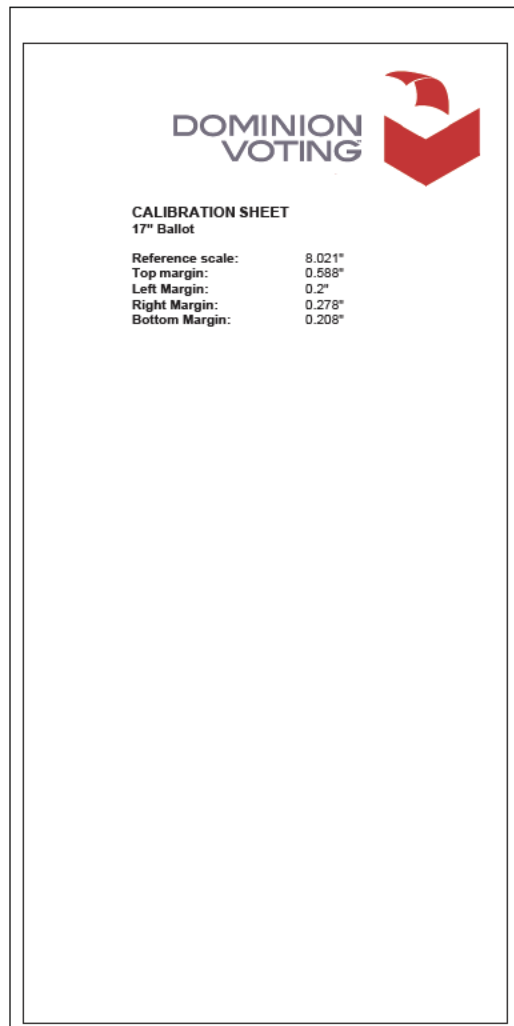
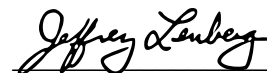


Figure 5 - Dominion Voting Systems Calibration Sheet

Figure 5 shows the Dominion Voting Systems calibration sheet. This calibration sheet does not include outer markers, internal contest blocks, and vote choice bullets. It does not provide any observable means for the tabulator to “calibrate” the scanner in preparation for an election.

Under the penalties of perjury, I declare that I have read the foregoing report and that facts stated in it are true.



Jeffrey Lenberg

Exhibit 9

Stay Order

September 3, 2021

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY,

Plaintiff,

v

File No. 2020009238CZ
HON. KEVIN A. ELSSENHEIMER

ANTRIM COUNTY,

Defendant,

and

SECRETARY OF STATE
JOCELYN BENSON

Intervening Defendant.

Matthew S. DePerno (P52622)
Attorney for Plaintiff

Haider A. Kazim
Attorney for Defendant Antrim County

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Attorneys for Defendant Secretary Benson

Frank Krycia (P35383)
Attorney for Non-Party Macomb County
Assistant Corporation Counsel

Allan C. Vander Laan (P33893)
Kristen L. Rewa (P73043)
Attorneys for Non-Party Palmer

Peter R. Wendling (P48784)
Attorney for Non-Party Townships

ORDER STAYING ALL MATTERS

The Court being otherwise fully advised on the premises, and pursuant to MCR 2.119(E)(3), it is ordered that all matters in the above captioned litigation are stayed pending the determination of any appeals of this Court's Order granting summary disposition. This is not a final order and does not resolve the last pending claim for this matter.

IT IS SO ORDERED.



09/03/2021
01:59PM

KEVIN A. ELSENHEIMER, CIRCUIT COURT JUDGE, P49293
PROXY SIGNED BY TGIRARDIN

HONORABLE KEVIN A. ELSENHEIMER
Circuit Court Judge

Exhibit 10

Date	Registered Voters	Total Votes Cast	Biden	Trump	Third Party	Write-In	TOTAL VOTES for President
Nov 3	22,082	16,047	7,769	4,509	145	14	12,423
Nov 5	22,082	18,059	7,289	9,783	255	20	17,327
Nov 21	22,082	16,044	5,960	9,748	241	23	15,949
Dec 17	22,082		5,959	9,759	244	20	15,962

Exhibit 11

OFFICE: President of the United States									
COUNTY:		Antrim							
Jurisdiction	Biden			Trump			Jorgenson		
	Democratic Party			Republican Party			Libertarian Party		
	NOV 3	DEC 17	Net	NOV 3	DEC 17	Net	NOV 3	DEC 17	Net
TOTAL VOTES	7769	5959	-1810	4509	9759	5250	93	190	97
TOTAL CHANGE			-1810			5250			97
Banks Township, Precinct 1	349	349	0	756	758	2	11	11	0
Central Lake Township, Precinct 1	549	549	0	908	906	-2	16	16	0
Chestonia Township, Precinct 1	197	93	-104	3	197	194	0	3	3
Custer Township, Precinct 1	523	240	-283	11	521	510	4	11	7
Echo Township, Precinct 1	392	198	-194	8	392	384	1	8	7
Elk Rapids Township, Precinct 1	1198	984	-214	625	1029	404	8	17	9
Forest Home Township, Precinct 1	755	610	-145	19	753	734	1	19	18
Helena Township, Precinct 1	432	306	-126	4	430	426	0	4	4
Jordan Township, Precinct 1	372	182	-190	13	369	356	1	14	13
Kearney Township, Precinct 1	744	470	-274	16	743	727	0	16	16
Mancelona Township, Precinct 1	276	277	1	835	835	0	20	20	0
Mancelona Township, Precinct 2	247	247	0	646	646	0	13	13	0
Milton Township, Precinct 1	686	767	81	484	1023	539	14	18	4
Star Township, Precinct 1	462	166	-296	10	468	458	0	10	10
Torch Lake Township, Precinct 1	527	461	-66	8	526	518	1	7	6
Warner Township, Precinct 1	60	60	0	163	163	0	3	3	0

Exhibit 12

Genetski v Benson

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STATE OF MICHIGAN
COURT OF CLAIMS

ROBERT GENETSKI, County of Allegan Clerk,
individually and in his official capacity, and
MICHIGAN REPUBLICAN PARTY,

Plaintiffs,

**OPINION AND ORDER GRANTING
SUMMARY DISPOSITION IN PART TO
PLAINTIFFS AND GRANTING
SUMMARY DISPOSITION IN PART TO
DEFENDANTS**

v

Case No. 20-000216-MM

JOCELYN BENSON, in her official capacity, and
JONATHAN BRATER, Director of Elections, in
his official capacity,

Hon. Christopher M. Murray

Defendants.
_____ /

Before the Court is defendants' January 20, 2021 motion for summary disposition filed pursuant to MCR 2.116(C)(4) and (C)(8), as well as plaintiffs' February 3, 2021 cross-motion for summary disposition filed pursuant to MCR 2.116(C)(8). Plaintiffs' cross-motion will be GRANTED in part with respect to Count II of the amended complaint because the challenged signature-matching standards were issued in violation of the Administrative Procedures Act. As a result of the grant of summary disposition in plaintiffs' favor on Count II, Count I of the amended complaint will be dismissed without prejudice. In addition, defendants' motion for summary disposition will be GRANTED in part with respect to Counts III and IV of the amended complaint.

I. BACKGROUND

The issues raised implicate signature-matching requirements for absent voter ballot applications and absent voter ballot return envelopes contained in this state's election law. MCL

168.759 and MCL 168.761 require voters to sign applications for absent voter ballots in order to receive a ballot. In addition, this state’s election laws require voters who choose to vote by absent voter ballot to sign their absent voter ballot return envelopes in order to have their ballots counted. MCL 168.764a. The signatures on the applications and the return envelopes are compared against signatures in the qualified voter file or those that appear on the “master registration card” in order to determine whether the signatures match. Signatures on applications or return envelopes that do not “agree sufficiently” with those on file are to be rejected. MCL 168.761(2). As of October 6, 2020, MCL 168.761(2)¹ was amended by 2020 PA 177 to give notice to voters’ whose signatures do not “agree sufficiently” with those on file that their absent voter ballot application has been rejected. The purpose of the notice is to give voters the opportunity to correct inaccuracies with absent voter ballot signatures. The same notice requirements also apply to rejected signatures for absent voter ballots. MCL 168.765a(6). There is no dispute that this state’s election law does not define what it means for signatures to “agree” or to “agree sufficiently” for purposes of comparing the signature on file with the signature on a received absent voter ballot application or absent voter ballot.

On the day PA 177 became effective, defendant Jocelyn Benson issued what defendants refer to as “guidance” for local clerks who are charged with inspecting signatures on absent voter ballot applications and ballots. The document, which was entitled “Absent Voter Ballot Processing: Signature Verification and Voter Notification Standards” largely mirrored guidance

¹ 2020 PA 302 further amended MCL 168.761 and other provisions of this state’s election law. Those amendments do not become effective until June 27, 2021. This opinion and order only examines those provisions of the statute that are currently in effect at this time. And no issues have been raised with respect to the yet-to-be-effective statutory requirements.

defendant Benson had previously issued. This guidance regarding signature verification forms the heart of the issues in the present case and it requires additional examination.

The stated purpose of the at-issue document was to “provide[] standards” for reviewing signatures, verifying signatures, and curing missing or mismatched signatures. Under a heading entitled “Procedures for Signature Verification,” the document stated that signature review “begins with the presumption that” the signature on an absent voter ballot application or envelope is valid. Further, the form instructs clerks to, if there are “any redeeming qualities in the [absent voter] application or return envelope signature as compared to the signature on file, treat the signature as valid.” (Emphasis in original). “Redeeming qualities” are described as including, but not being limited to, “similar distinctive flourishes,” and “more matching features than nonmatching features.” Signatures “should be considered questionable” the guidance explained, only if they differ “in multiple, significant and obvious respects from the signature on file.” (Emphasis in original). “[W]henever possible,” election officials were to resolve “[s]light dissimilarities” in favor of finding that the voter’s signature was valid.²

The section on signature-verification procedures goes on to repeat the notion that “clerks should presume that a voter’s [absent voter] application or envelope signature is his or her genuine signature, as there are several acceptable reasons that may cause an apparent mismatch.” (Emphasis omitted). Next, the guidance gave excuses or hypothetical explanations for why signatures on absent voter ballot applications and absent voter ballots might not be an exact match to those that are on file. Finally, the document again mentioned the presumption when, in

² The guidance included a chart with what were deemed to be acceptable and unacceptable “defects” in signatures.

conclusion, it stated that clerks “*must perform* their signature verification duties with the presumption that the voter’s [absent voter] application or envelope signature is his or her genuine signature.” (Emphasis added). By all accounts, the guidance set forth in that document was not limited to the then-upcoming November 2020 general election, nor has it been rescinded. Rather, it appears that the guidance remains in effect for local clerks with respect to upcoming elections.

II. PLAINTIFFS’ COMPLAINT

Plaintiff Robert Genetski is the Allegan County Clerk. He, along with plaintiff Michigan Republican Party, filed a complaint alleging that defendant Benson’s October 6, 2020 guidance is unlawful. The December 30, 2020 amended complaint alleges that the presumption in favor of finding valid signatures is unlawful, as is the directive to find “any redeeming qualities” for signatures. They contend that the presumption contained in the guidance issued by defendant Benson will allow invalid votes to be counted. Plaintiff Genetski has not, however, alleged that this guidance caused him to accept a signature that he believed was invalid.

The four-count amended complaint asks the Court to issue declaratory and injunctive relief with respect to future elections. Count I alleges that defendant Benson violated various provisions of this state’s election law by issuing the challenged guidance regarding signature-matching requirements which allegedly conflicts with this state’s election law. They ask the Court to issue injunctive relief to remedy the allegedly unlawful guidance. Additionally, they seek a declaratory ruling regarding the validity of defendant Benson’s guidance.

Count II of the amended complaint alleges that defendant Benson’s guidance was a “rule” as defined by the Administrative Procedures Act (APA) that was issued without compliance with the APA. Plaintiffs allege that the guidance is in fact a rule because it is generally applicable and

requires local election officials to apply a mandatory presumption of validity to signatures. Plaintiffs ask the Court to declare that the “rule” is invalid.

Count III alleges a violation of Const 1963, art 1, §§ 2 and 5, as defendant Benson’s guidance will result in the counting of invalid absent voter ballots which will ultimately result in the dilution of valid votes cast by this state’s electorate. They argue that defendant Benson’s guidance is so vague and imprecise that it cannot be applied uniformly throughout the state.³

Count IV alleges that plaintiff Genetski had a right to request an audit of his choosing under Const 1963, art 2, § 4(1)(h) as it relates to absent voter ballots. Plaintiffs acknowledge that defendants have announced and/or completed a state-wide audit of the November 2020 general election; however, according to plaintiffs, the audit does not address plaintiffs’ concerns because it did not review whether signatures on absent voter ballots were properly evaluated. Plaintiffs ask the Court to declare that the right to request an audit under art 2, § 4(1)(h) encompasses the type of absent-voter-ballot review requested in the amended complaint. Plaintiff also suggests the manner in which such an audit should be conducted.

III. ANALYSIS

A. MOOTNESS AND RIPENESS

Defendants argue that this Court should refrain from evaluating the merits of plaintiffs’ complaint because the issues are either moot or not ripe. With respect to mootness, there is no dispute that Count III, which raises an equal protection claim arising out of the November 2020

³ Plaintiffs’ briefing has conceded that this claim is now moot, with the November 2020 election having already come and gone. As a result, the Court will not address this claim in any additional detail.

general election, is moot and must be dismissed. However, the Court declines to find that plaintiffs' remaining challenges are either moot or not ripe. Those issues concern the validity of guidance that is still in effect (Counts I and II), or an audit (Count IV) that, according to the plain text of art 2, § 4(1)(h) and MCL 168.31a, may be requested after the election has occurred. Moreover, defendants have not advanced a specific mootness/ripeness argument with respect to the audit claim. As a result, the Court declines to find that the issues raised in Counts I, II, and IV of the amended complaint would have no practical effect on an existing controversy or that it would be impossible to render relief. Cf. *Garrett v Washington*, 314 Mich App 436, 449-450; 886 NW2d 762 (2016) (describing the mootness doctrine).

The Court also rejects defendants' contention that there is no actual controversy. As noted, plaintiffs seek declaratory relief. MCR 2.605(A)(1) requires that there be "a case of actual controversy" for the issuance of declaratory relief. "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Kelley*, 402 Mich 554, 588; 267 NW2d 72 (1978). Here, plaintiffs—particularly plaintiff Genetski, who is a local clerk subject to the guidance at issue—sought a declaration regarding whether he is and will continue to be subject to guidance that by all accounts remains in effect at this time. This clearly presents an actual controversy that is appropriate for declaratory relief. See *id.*

Defendants argue that no actual controversy exists because the Legislature could change the applicable law, or because defendant Benson could decide to revoke the guidance. That argument would seek to turn the requirements of declaratory relief on their head and would eviscerate the purpose of declaratory relief. If the Court were to adopt the view that no actual controversy exists because the law could change, there could be no limit to the number of cases

that could be dismissed as moot. Here, plaintiffs have sought a declaration as to their legal rights with respect to the validity of a currently existing directive issued by defendant Benson in advance of the next election. That the law could hypothetically change in the future is not a reason to avoid issuing a declaration of the parties' currently existing legal rights, as plaintiffs have sought here. Indeed, the ability to seek an advance declaration of legal rights on an existing policy is one of the very reasons why the declaratory judgment rule was adopted in the first instance. See *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012) (discussing the purposes of the declaratory judgment rule).

B. WHETHER DEFENDANT'S ACTIONS VIOLATED THE APA

The dispositive issue, as the Court see it, concerns the APA and whether defendant Benson was required to comply with the APA when she issued the "Signature Verification and Voter Notification Standards." The Secretary of State has authority, under MCL 168.31(1)(a), to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state." Under the APA, a "rule" is defined as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency."⁴ MCL 24.207. A "rule" not promulgated in accordance with the

⁴ There is no dispute that defendant Benson is subject to the APA, generally. See MCL 24.203(2) (defining "agency" in a way that includes the Secretary of State). The only dispute is whether this particular action is subject to the APA.

APA's procedures is invalid. MCL 24.243; MCL 24.245; *Pharris v Secretary of State*, 117 Mich App 202, 205; 323 NW2d 652 (1982).

An agency must utilize formal APA rulemaking procedures when establishing policies that “do not merely interpret or explain the statute or rules from which the agency derives its authority,” but rather “establish the substantive standards implementing the program.” *Faircloth v Family Indep Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1998). “[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of ‘rule’ is to be broadly construed, while the exceptions are to be narrowly construed.” *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). It is a question of law whether an agency policy is invalid because it was not promulgated as a rule under the APA. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002).

As for whether the guidance or directive at issue is a “rule” subject to the APA, the Court must look beyond the labels used by the agency and make an independent determination of whether the action taken by the agency was permissible or whether it was an impermissible rule that evaded the APA's requirements. *AFSCME*, 452 Mich at 9. In other words, the Court “must review the actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule.” *Id.* (citation and quotation marks omitted).

Examining the “Signature Verification and Voter Notification Standards” through that lens, the Court agrees with plaintiffs that the same constitutes a “rule” that should have been promulgated pursuant to the APA's procedures. The standards are generally applicable to all absent voter ballot applications and absent voter ballots, and it contains a mandatory statement from defendant, this state's chief election officer, see MCL 168.21, declaring that all local clerks

“*must perform* their signature verification duties” in accordance with the instructions. (Emphasis added). In addition, clerks must presume that signatures are valid. That this presumption is mandatory convinces the Court that it is not merely guidance, but instead is a generally applied standard that implements this state’s signature-matching laws. See MCL 24.207 (defining “rule”); *AFSCME*, 451 Mich at 8 (describing what constitutes a “rule” under the APA); *Spear v Mich Rehab Servs*, 202 Mich App 1, 5; 507 NW2d 761 (1993) (focusing on the mandatory nature of policies in support of the conclusion that the same constituted a “rule” under the APA).

Defendants cite three statutory exceptions to rulemaking—MCL 24.207(g), (h), and (j)—but the Court is not persuaded that the standards are saved by any of these exceptions. The first argument is that MCL 24.207(j), which is sometimes referred to as the “permissive power exception,” applies and exempts the standards from the APA’s rulemaking requirements. MCL 24.207(j) exempts from the APA’s definition of “rule,” a “decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected.” Here, defendant Benson points to MCL 168.31(1)(a) as the source of her “permissive statutory power.” That statute provides that the Secretary of State “shall” “issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state.” MCL 168.31(1)(a). According to defendant Benson, MCL 168.31(1)(a) allows her to eschew the rule-making process in order to issue “instructions” like the standards at issue.

The Court disagrees. First, the Court disagrees with defendants’ characterization of the standards at issue, for the reasons stated above. Second, the cited statutory authority requires defendant Benson to issue instructions that are “in accordance with the laws of this state.” MCL 168.31(1)(a). Here, it is not apparent that the mandatory presumption of signature validity is “in

accordance with the laws of this state.”⁵ To that end, nowhere in this state’s election law has the Legislature indicated that signatures are to be presumed valid, nor did the Legislature require that signatures are to be accepted so long as there are any redeeming qualities in the application or return envelope signature as compared with the signature on file. Policy determinations like the one at issue—which places a thumb on the scale in favor of a signature’s validity—should be made pursuant to properly promulgated rules under the APA or by the Legislature. See *AFSCME*, 452 Mich at 10.

Third, a review of the plain language of MCL 168.31(1) and of caselaw discussing the permissive-power exemption does not support defendants’ argument.⁶ The primary problem with defendant Benson’s argument is that the language in MCL 168.31(1) is too generic to support her positions. MCL 168.31(1)(a) simply states that the secretary shall “issue instructions and promulgate rules pursuant to the” APA “for the conduct of elections.” If that were sufficient to constitute an explicit or implicit grant of authority to be excepted from the APA rule-making process, then defendants would never have to issue APA-promulgated rules for any election-related matters. This view, where the exception would effectively swallow the rule, does not find support in caselaw. See, e.g., *AFSCME*, 452 Mich at 12. That is, while defendant has statutory discretion to decide whether to take certain actions, the implementation of her discretionary decisions—absent a more precise directive than is contained in the statutes at issue—

⁵ Given that the standards are invalid for being enacted without compliance with the APA, the Court declines, for now, to determine whether the mandatory presumption imposed is contrary to the law, as plaintiffs have alleged in Count I. Resolution of that issue becomes unnecessary in light of the decision to grant relief to plaintiffs on Count II of the complaint.

⁶ The Court incorporates and restates its reasoning and discussion of a similar issue from *Davis v Benson*, (Docket Nos. 20-000207-MZ & 20-000208-MM).

must still adhere to the APA if that implementation takes the form of a rule. See *id.* (recognizing that the Department of Mental Health did not need to take a certain action; however, once the Department exercised its discretion to act, the implementation of the decision “must be promulgated as a rule.”); *Spear*, 202 Mich App at 5 (holding that while the agency’s “decision to employ a needs test represents the discretionary exercise of statutory authority exempt from the definition of a rule under [MCL 24.207(j)], the test itself, which is developed by the agency, is not exempt from the definition of a rule and, therefore, must be promulgated as a rule in compliance with the Administrative Procedures Act.”). Thus, while defendant Benson undoubtedly has discretion under MCL 168.31 to issue guidance or to instruct local clerks regarding signature validity requirements, the implementation of her discretionary decision can still be subject to the APA’s requirements.

Furthermore, the caselaw relied on by defendants in arguing for a different conclusion is easily distinguishable, and, in some cases, even lends support for the Court’s conclusion. See e.g., *Detroit Base Coalition for Human Rights of Handicapped v Dep’t of Social Servs*, 431 Mich 172, 187-188; 428 NW2d 335 (1988); *Mich Trucking Ass’n v Mich Pub Serv Comm*, 225 Mich App 424, 430; 571 NW2d 734 (1997); *By Lo Oil Co v Dep’t of Treasury*, 267 Mich App 19, 47; 703 NW2d 822 (2005). In the cases cited above, the pertinent agency’s enabling statute expressly or impliedly authorized the specific action later taken by the administrative agency; additionally, and significantly, those statutes also permitted the specific action to be achieved either through rulemaking *or* other means. See *Detroit Base Coalition*, 428 Mich at 187-188 (“The situations in which courts have recognized decisions of [an agency] as being within the [MCL 24.207(j)] exception are those in which explicit or implicit authorization for the actions in question has been found.”). Here, MCL 168.31(1) provides generalized authority to defendant, and it lacks

specificity with respect to the action taken (implementation of a mandatory presumption of signature validity), making the statute distinguishable from the statutes at issue in cases such as *Detroit Base Coalition, Mich Trucking Ass'n, and By Lo Oil Co.*⁷

Defendants raise concerns that this Court's interpretation of MCL 168.31(1)(a) would leave the term "instructions" without any practical effect. According to defendants, this Court's view would raise questions regarding whether defendant Benson could do anything when advising and directing local election officials as to the proper methods of conducting elections. The Court disagrees with the premise of defendants' position because, regardless of what is permissible under MCL 168.31, it is apparent that that which occurred here is not permissible, absent compliance with the APA. Here, defendant issued a mandatory directive and required local election officials to apply a presumption of validity to all signatures on absent voter ballot applications and on absent voter ballots. The presumption is found nowhere in statute. The mandatory presumption goes beyond the realm of mere advice and direction, and instead is a substantive directive that adds to the pertinent signature-matching statutes. And for similar reasons, defendants' arguments about efficiency and the need for quick action do not change the Court's decision. That is, nothing about the Court's opinion should be read as limiting the Secretary of State's ability to take quick action when she so desires. However, when that action takes the form of a rule, then the APA and MCL 168.31 require that the APA be invoked. In other words, the statute gives the Secretary of State

⁷ Remarkably, defendants continue to place reliance on the conclusions of the majority in *Pyke v Dep't of Social Servs*, 182 Mich App 619; 453 NW2d 274 (1990). But as noted in prior opinions, Judge Shepard's dissent in *Pyke* was later adopted by the *Palozolo* Court, and as that Court noted, its decision was binding under what is now MCR 7.215(J)(1). *Palozolo v Dep't of Social Servs*, 189 Mich App 530, 533-534 & n 1; 473 NW2d 765 (1991). The *Pyke* Court's view on MCL 24.207(j) is irrelevant.

the authority and the ability to meet the needs of a situation. But when the action taken constitutes a “rule” under MCL 24.207, the appropriate procedures must be followed.

Defendants’ citation to the rule-making exceptions contained in MCL 24.207(g) and (h)—which are the primary exemptions cited in their reply briefing—are no more convincing. Turning first to MCL 24.207(g), this subsection is an exception to the APA’s rule-making requirements for an “intergovernmental, interagency, or intra-agency memorandum, directive, or communication that does not affect the rights of, or procedures and practices available to, the public.” This exception is inapplicable, however, because the at-issue standard involves a mandatory presumption that directly affects local election officials’ duties with respect to the determination of whether a voter’s signature on either an absent voter ballot or a returned ballot will be deemed to be valid. Cf. *Kent Co Aeronautics Bd v Dep’t of State Police*, 239 Mich App 563; 609 NW2d 593 (2000) (finding that a directive fit within the exception where it did not create any obligations or require compliance).

Nor is defendants’ citation to the exception contained in MCL 24.207(h) convincing. That exception applies to a “form with instructions, an interpretive statement, a guideline, an informational pamphlet, or other material that in itself does not have the force and effect of law but is merely explanatory.” MCL 24.207(h). This exception “must be narrowly construed and requires that the interpretive statement at issue be merely explanatory.” *Clonlara, Inc v State Bd of Ed*, 442 Mich 230, 248; 501 NW2d 88 (1993) (citation and quotation marks omitted). If the purported “interpretive” statement changes the requirements of the law it is alleged to have interpreted, the exception does not apply. *Id.* See also *Schinzel v Dep’t of Corrections*, 124 Mich App 217, 221; 333 NW2d 519 (1983). Here, because nothing in this state’s election law refers to a presumption of validity, let alone a mandatory presumption, the standards at issue cannot be

deemed to be merely explanatory. See *Clonlara*, 442 Mich at 248, 251. That is, rather than merely explaining existing obligations under the law, the standards have imposed new obligations that do not appear within the plain language of this state’s signature-matching statutes.

In sum, the standards issued by defendant Benson on October 6, 2020, with respect to signature-matching requirements amounted to a “rule” that should have been promulgated in accordance with the APA. And absent compliance with the APA, the “rule” is invalid. Whether defendant Benson had authority to implement that which she did not need not be decided at this time because it is apparent the APA applied to the type of action taken in this case. Accordingly, plaintiffs are entitled to summary disposition on Count II of the complaint, and the Court will dismiss Count I without prejudice as a result.

C. PLAINTIFFS’ AUDIT CLAIMS ARE WITHOUT MERIT

Finally, the Court examines Count IV of the complaint, which concerns plaintiffs’ request for an audit. Const 1963, art 2, § 4(1)(h), provides that a qualified Michigan voter has the right to have “*the results* of statewide elections audited” in a manner prescribed by law. (Emphasis added). MCL 168.31a, amended after adoption of the aforementioned audit language, provides as follows:

(1) In order to ensure compliance with the provisions of this act, after each election the secretary of state may audit election precincts.

(2) *The secretary of state shall prescribe the procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963. The secretary of state and county clerks shall conduct election audits, including statewide election audits, as set forth in the prescribed procedures.* The secretary of state shall train and certify county clerks and their staffs for the purpose of conducting election audits of precincts randomly selected by the secretary of state in their counties. *An election audit must include an audit of the results of at least 1 race in each precinct selected for an audit. A statewide election audit must include an audit of the results*

of at least 1 statewide race or statewide ballot question in a precinct selected for an audit. An audit conducted under this section is not a recount and does not change any certified election results. The secretary of state shall supervise each county clerk in the performance of election audits conducted under this section.

(3) Each county clerk who conducts an election audit under this section shall provide the results of the election audit to the secretary of state within 20 days after the election audit. [Emphasis added.]

Plaintiffs acknowledge that an audit of the November 2020 general election results was conducted. They argue that they have the right to request an audit with respect to the subject of their choosing—signatures on absent voter ballot applications and on absent voter ballots—and in the manner of their choosing. For at least two reasons this claim is not supported by art 2, § 4 or the implementing statute, MCL 168.31a. First, the constitution speaks of an audit of election *results*, not signature-matching procedures. Second, while the statute allows for an audit that includes “reviewing the documents, ballots, and procedures” used in the election, the statute plainly leaves it to the Secretary of State to “prescribe the procedures for election audits” and mandates that the Secretary of State shall conduct audits “as set forth in the prescribed procedures.” In other words, there is no support in the statute for plaintiffs to demand that an audit cover the subject of their choosing or to dictate the manner in which an audit is conducted. MCL 168.31a(2) leaves that to the Secretary of State. As a result, plaintiffs have failed to state a claim on which relief can be granted as it concerns Count IV, and this count will be dismissed with prejudice pursuant to MCR 2.116(C)(8).

IV. CONCLUSION

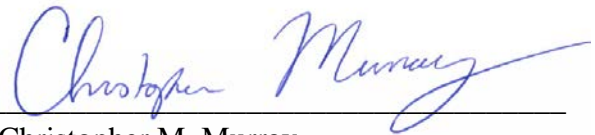
IT IS HEREBY ORDERED that pursuant to MCR 2.116(C)(10), plaintiffs’ cross-motion for summary disposition is GRANTED in part with respect to Count II of the amended complaint because the guidance issued by the Secretary of State on October 6, 2020, with respect to signature-matching standards was issued in violation of the Administrative Procedures Act.

IT IS FURTHER ORDERED that pursuant to MCR 2.116(C)(8) defendants' motion for summary disposition is GRANTED in part on Counts III and IV of the amended complaint.

IT IS FURTHER ORDERED that Count I of the amended complaint is dismissed without prejudice, for the reason that the at-issue standards are invalid under the Administrative Procedures Act.

This is a final order that resolves the last pending claim and closes the case.

Date: March 9, 2021



Christopher M. Murray
Judge, Court of Claims

Exhibit 13

Transcript, April 12, 2021

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STATE OF MICHIGAN
THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)
WILLIAM BAILEY,
Plaintiff,
Case No. 20-9238-CZ
v.
ANTRIM COUNTY,
Defendant,
SECRETARY OF STATE JOCELYN BENSON,
Intervenor-Defendant.

-----/

MOTIONS
(VIA ZOOM)

Before the Honorable KEVIN A. ELSSENHEIMER, Circuit Judge
Bellaire, Michigan - Monday, April 12th, 2021.

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(None)

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(None)

EXHIBITS:
(None)

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Bellaire, Michigan

Monday, April 12, 2021 - 10:59 AM.

(Court, counsel, and plaintiff present)

THE COURT: Okay. It appears that we have all of the parties here for Bailey versus Antrim County. This is file 20-9238-CZ. It's 11 a.m., and we have a gaggle of hearings to conduct today on a variety of issues. Let's go ahead and start by finding out who is here and who is appearing.

I would note that we have several parties here for the nonparty -- the nonparty motions to strike -- or quash, I should say, pardon me. Let's start with plaintiff.

Mr. Deperno, are you here, sir? Yes, you are.

MR. DEPERNO: I am here. Yes.

THE COURT: We also have Mr. Grill -- thank you. We also have Mr. Grill here on behalf of the Attorney General. Mr. Kazim here on behalf of the -- the county. And, of course, Mr. Grill is here on behalf of the Secretary of State, through the Attorney General's office.

Can I get the appearances of other counsel, please. Let's go in order of filing, and that would be first -- let's see. Barry County?

1 MR. VANDER LAAN: Allan Vander Laan on
2 behalf of Pamela Palmer. Barry County.

3 THE COURT: And good morning.
4 Macomb County?

5 MR. KRYCIA: Frank Krycia appearing on
6 behalf of the Macomb County Clerk.

7 THE COURT: All right. Good morning to you.
8 Grand Traverse County?

9 MR. THOLEN: Christopher Tholen P76948 on
10 behalf of Bonnie Scheele, the Grand Traverse County
11 Clerk.

12 THE COURT: Thank you.
13 And Livingston County?

14 MR. PERRONE: Timothy Perrone appearing on
15 behalf of Livingston County Clerk Elizabeth Hundley.

16 THE COURT: Do we have anyone else appearing
17 with regard to the motions relating to the subpoenas
18 to the clerk's offices throughout the state, that I
19 did not identify? All right.

20 And let's see. With us as well, we also
21 have, it appears, some of the county clerks. And
22 let's see, we have some joining us.

23 Is it Ms. Meingast?

24 MS. MEINGAST: Your Honor, I'm here with the
25 Attorney General's office, just observing today.

1 THE COURT: Thank you. All right.

2 And Ms. Hundley?

3 MS. HUNDLEY: Livingston County Clerk.

4 Mr. Tim Perrone is my legal counsel.

5 THE COURT: Okay. Thank you.

6 And is it Mr. Bridgman? Are you also with
7 Livingston County?

8 MR. BRIDGMAN: Yes, sir. Livingston County
9 Elections Coordinator.

10 THE COURT: All right.

11 And is there anyone else here with either of
12 the county clerk's offices that we should identify for
13 the record? Okay. I'd like to take up those motions
14 first. I have had a chance to review all of the
15 filings. They are essentially arguing the same
16 points. There are some differences between -- between
17 the briefs that were filed, but they're generally the
18 same.

19 So we're going to go ahead and take up those
20 matters as they were filed, and that will be in the
21 order that I identified attorneys. I would also note
22 for the record that clearly I am acquainted with our
23 county clerk here in Grand Traverse County, as she is
24 the clerk for the court. And also, I happen to know
25 the Macomb County Clerk, Mr. Forlini. He was the head

1 of -- or he was a member of the appropriations
2 committee when I was director and I think department
3 director in the Snyder administration for a particular
4 entity down there, so I dealt with him then. I've had
5 no other contact with him but for that. So with that
6 on the record, let's go ahead and argue this.

7 Now, as I've indicated, the briefs are
8 essentially nearly identical. There are some
9 differences, so my expectation would be that we won't
10 be covering territory that's already been trode.
11 Let's start with the motion that's been filed by Barry
12 County, and begin with Mr. Vander Laan.

13 MR. VANDER LAAN: Thank you, your Honor.

14 May it please the Court, I do agree with the
15 briefs that have been filed by Monroe County and
16 others, and I would adopt their arguments. Basically
17 there are no issues here involving Barry County. It's
18 my understanding that Barry County does use the
19 Dominion machines, but there were no problems with
20 those machines in the last election. It seems to me
21 that this is pretty much a fishing expedition, and
22 that there's nothing in Barry County that bears on any
23 issues that are in this lawsuit in Antrim County.

24 With that, your Honor, I'll just rely on the
25 brief and ask that the Court quash the subpoena.

1 THE COURT: All right.

2 MR. VANDER LAAN: Unless the Court has any
3 questions.

4 THE COURT: All right. Thank you. We'll
5 get back to you, if we do.

6 Let's go to Macomb County. Counsel, I'd be
7 glad to hear your arguments, please.

8 MR. KRYCIA: Good morning, your Honor.
9 Frank Krycia for Macomb County Clerk.

10 THE COURT: Could you spell that last name
11 for us, please?

12 MR. KRYCIA: K-R-Y-C-I-A.

13 Now --

14 THE COURT: All right.

15 MR. KRYCIA: -- your Honor, as you probably
16 know, these -- these machines were required to be used
17 by the county clerks by the State. During the Snyder
18 administration these machines were picked out. The
19 State Administrative Board picked them out in January
20 of 2017 and required the counties to select one of the
21 vendors. Our vendor selected was ES&S, which is not
22 the machine used in Antrim County.

23 Now, experts have looked at the issue in
24 Antrim County. If you look at the Halderman report
25 and if you look at the complaint, the issue in Antrim

1 County arose when the clerk -- well, when the ballots
2 were changed in October of the election. So the
3 machines were set to look for the dark ovals on an old
4 ballot and then the ballots were changed, which caused
5 an error in the preliminary results on election night,
6 or -- or shortly thereafter, which was then corrected.

7 And what happened in Macomb County -- as
8 noted by Dr. Halderman, this was unique to Antrim
9 County. So in Macomb County, we follow -- the state
10 law provides the ballots are approved by the election
11 commission. The election commission in Macomb County
12 met on September 4th, 2020.

13 The election commission then approved our
14 ballots. Our ballots were not changed after that
15 date. They were then sent to a vendor, printed, and
16 sent to the different municipalities that use them.
17 Macomb County doesn't actually conduct the election,
18 they kind of oversee it. So we -- we prepare the
19 ballots, we send them to the communities.

20 The machines were all set to the proper
21 ballots and there was no issue with our preliminary
22 tabulation. So -- and then we look at this report --
23 look at some of the reports you see, none of them
24 address issues regarding the systems that we used.
25 The plaintiff has issued -- or submitted a response,

1 or has asked for a response where they point out a --
2 an opinion from Douglas G. Frank. Now, when I first
3 talked to plaintiff's counsel, he said, well, as --
4 really didn't know much about the Macomb election,
5 didn't know anything wrong with it, he just wanted to
6 see if our computers were dirty.

7 Well, I went to look at our server and it
8 was pretty clean. I looked at our results. But then
9 I get a response late Friday from an opinion from this
10 Dr. Douglas G. Frank, who's a PhD in surface analytic
11 chemistry. And he claims he has a algorithm -- I
12 think a sixth polynomial order algorithm, which he
13 claims that after the election he predicted the number
14 of ballots that were used.

15 And based -- since the ballots used were
16 close to the -- very close in our county, he says a
17 hundred percent based on his post-election prediction,
18 that means that the State must have predetermined the
19 results of the election. And the way -- where I heard
20 him say that is, he has a statement on YouTube where
21 he says that. And I'm like, what -- now, I believe
22 that we're in court -- we're in court on the Antrim
23 County case. The question is, is the Court going to
24 allow a general theory to be advanced in that case
25 regarding statewide -- and not only Michigan, this

1 expert thinks that this happened in Ohio,
2 Pennsylvania, several other states. Is that where
3 this case is going?

4 Now, we have some concerns regarding our
5 machines. Our machines are ES&S. The software in it
6 is proprietary software from ES&S, and we're very
7 concerned that -- they're hardened systems. In other
8 words, if you release images of these systems, you can
9 show people how to break into them.

10 Now, I've looked at plaintiff's response and
11 he -- he gave this image from Antrim County to several
12 people, which is very concerning. Our vendor
13 indicates that our machines will be decertified if
14 they're looked at -- if the -- if the proposed
15 examination takes place. But the other thing I want
16 to point out is, even if -- based on this new theory
17 from Dr. Frank, what's in those machines wouldn't
18 affect it because he's saying that 66,000 new ballots
19 were created somewhere in Michigan.

20 Well, these machines don't create the
21 ballots. The ballots are paper -- Michigan has a
22 paper ballot system. And -- so the ballots are
23 printed, they're then sent in to the clerk or they're
24 voted on at the election time, and people actually
25 have to sign that they submitted the ballot or that

1 they are the person they are at the election. Which
2 basically, since we have paper ballots with that
3 system, this new theory is -- is basically conjecture,
4 speculation, is based on a failure to understand how
5 elections are conducted in Michigan. So nothing would
6 be gained by looking at our system.

7 If you want to determine the accuracy of the
8 election, you look at the paper ballots. It's simple
9 as that. And that happened in Antrim County, and it
10 was verified that the election results were accurate.
11 So our opinion is this is -- in addition to the --
12 what I stated in my brief and what we incorporate from
13 the other counties, this is pure conjuncture,
14 speculation.

15 It's a harass -- in my opinion, this is
16 almost harassment of us. It would create incredible
17 problems for us -- we have an election coming up in a
18 month and for this to occur and potentially
19 decertifying our -- our system, there's no remedy for
20 that. No protective order could protect us, no amount
21 of money could fix the problems this would cause.

22 So we're asking this Court to quash the
23 subpoena. It's completely irrelevant to the issues in
24 your case. It's a fishing expedition, and it would
25 create undue harm to the county.

1 THE COURT: All right. Thank you, sir.

2 Grand Traverse County, Mr. Tholen?

3 MR. THOLEN: Thank you very much, your
4 Honor.

5 Like Macomb County, Grand Traverse County
6 also uses ES&S voting instruments. I have not taken
7 an extensive amount of time to acquaint myself with
8 this case because I don't feel that would be a prudent
9 use of taxpayer dollars. This is an Antrim County
10 matter related to an election in Antrim County using
11 Dominion Voting Systems. But I also think for those
12 same reasons there is no legal relevance to the
13 defendants -- or the plaintiff's subpoena to Grand
14 Traverse County.

15 My understanding of this lawsuit is -- is
16 it's related to an election in Antrim County, using
17 Dominion voting instruments and software -- which
18 means that I don't know what would be gained by
19 accessing Grand Traverse County's ballots and voting
20 instruments. If it's not legally relevant, the court
21 rules say that the subpoena is invalid and not issued
22 in compliance. I did also cite in my brief I spoke
23 with the clerk, because I was wondering what kind of
24 work that's put into that endeavor, and it is actually
25 a rather extensive endeavor. It's not just Mr. Bailey

1 come in to the clerk's office and take a quick peek at
2 some things.

3 The precincts actually -- the townships
4 actually maintain their ballots; and in order to keep
5 those secure, they would have actually have to come
6 together at one location -- which due to coronavirus
7 protocols as well as other concerns, a county would
8 probably actually have to rent a facility, such as
9 maybe the Civic Center or some other large area, where
10 each of the township clerks could bring the ballots.
11 Then there's, of course, concerns about the security
12 of that. And I laid out several other matters that --
13 that concerned the clerk. But it's a rather extensive
14 endeavor for -- admittedly a minimal understanding of
15 your case in Antrim County, but I don't -- I can't
16 discern the relevance of the Grand Traverse County
17 results.

18 So for that -- those reasons, I would ask
19 the Court to quash the subpoena in Grand Traverse
20 County's Clerk.

21 THE COURT: All right. Thank you,
22 Mr. Tholen.

23 And Mr. Perrone?

24 MR. PERRONE: Thank you, your Honor.

25 THE COURT: Livingston.

1 MR. PERRONE: Yes. We also rely on our
2 brief, and I concur with the comments of other counsel
3 for the county clerks. This case isn't relevant at
4 all because Livingston County uses the Hart InterCivic
5 system rather than Dominion; and we don't see how this
6 would advance the claims that are made in Antrim
7 County or the relief that was requested. It does
8 appear to us that the actual relief that was
9 requested, being a review of the Antrim County system,
10 has already occurred. And -- so, therefore, any
11 further review would be moot.

12 In their response, they indicate that they
13 need to review the other county's systems to verify
14 the accuracy of the reported vote totals in Antrim
15 County. But it's unclear how that would actually
16 pertain, or whether the Antrim clerk acted
17 maliciously, or with gross negligence with regard to
18 the deletion of materials. There's no way that the --
19 the information requested from Livingston County
20 would -- would respond to those concerns that were
21 raised on pages 17 and 29 of the responsive brief.

22 I see that the State of Michigan Secretary
23 of State has filed a motion for summary disposition
24 and perhaps that may have been ripe for review in
25 December, after the forensic review was conducted in

1 Antrim County. It does indicate that complete relief
2 has already been given in this case, and that the
3 plaintiff lacks standing and has otherwise failed to
4 state a claim; and that only abstract questions might
5 remain at this point.

6 And -- so we would ask that the Court, of
7 course, grant our motion to quash, but if you're
8 inclined to deny the motion, perhaps that should wait
9 until after the determination has been made on the
10 motion for summary disposition in the case. Because
11 we can't permit access to the system, it would corrupt
12 the system and compromise security. I'm told that if
13 any type of thumb drive is placed into our system, we
14 can't use it after that. There's also an indication
15 that plaintiff wants to see the tabulators and the
16 ballots.

17 Well, we don't have any of the tabulators in
18 our possession and control, nor do we have any of the
19 ballots. We don't think that the plaintiff really has
20 standing for the discovery that he's asking for in
21 Livingston County. As has been mentioned, this truly
22 is a fishing expedition and we're asking that the
23 motion be granted quashing the subpoena.

24 Thank you.

25 THE COURT: All right. Thank you.

1 Let's go ahead and hear from the parties,
2 who also filed. We'll start with the State, and that
3 is -- did we lose him? No, he's still here.
4 Mr. Grimes, please.

5 MR. GRILL: Sorry, your Honor, were you
6 addressing -- you're addressing me?

7 THE COURT: Yes. I apologize. The Attorney
8 General's Office, please. Mr. Grill. I said Grimes.
9 Go ahead.

10 MR. GRILL: That's all right. I've been
11 called much worse.

12 Your Honor, we don't have much to add to the
13 arguments made by the counties. We did include, as
14 part of the joint motion from the defendants, our
15 motion for protective order by reference to the
16 subpoenas. We similarly agree that the subpoenas are
17 vastly overbroad and not connected to any issue that
18 should be -- you know, relevant in the case. So we
19 would concur in the relief asking for the subpoenas to
20 be quashed.

21 THE COURT: All right. Thank you.

22 Mr. Kazim?

23 MR. KAZIM: Thank you, your Honor.

24 As Mr. Grill noted, our joint motion for
25 protective -- protective order did include a request

1 to quash the subpoenas, but I think in addition, we
2 don't have anything to add in addition to what has
3 already been argued to this Court by counsel for the
4 respective counties.

5 THE COURT: All right.

6 Well, let's go to the plaintiff,
7 Mr. Deperno. Your position on -- on these position
8 motions collectively if you would, please.

9 MR. DEPERNO: Thank you, your Honor.

10 First, as an initial matter, I'll address a
11 couple comments made by attorney for Macomb County.
12 Plaintiff has no intention to release any images to
13 the public. We would agree to a protective order on
14 that. These machines would not be decertified in any
15 way because there's no harm or damage that would be
16 done to any of the systems.

17 As I explained in our brief, the -- the way
18 forensic images are conducted, is there's a baffle put
19 into the system through -- through the forensic
20 imaging system, where there's only a download
21 permitted. No uploads are permitted. Nothing goes
22 back into the system. The same has happened in Antrim
23 County. There was nothing done to the Antrim County
24 system that caused any harm.

25 And as another matter, the plaintiff has not

1 received all the relief he's requested. He's
2 requested an audit in the complaint of the Antrim
3 County election. We have not had any type of audit
4 yet. All we've done is collect a forensic image. But
5 we're still waiting to get the relief we've requested
6 regarding the audit.

7 Now, as a -- a general issue, I want to
8 address the relevance of the subpoenas, because we
9 believe they're very relevant to this case. First, we
10 have the issue of spoliation. And as a result of the
11 spoliation, as we briefed, plaintiff believes we have
12 the absolute right to look at other counties.

13 On November 4th, 2020, system files, log
14 files, Internet connection files were deleted from the
15 Antrim County server. On March 4, 2021, Sheryl Guy
16 admitted that she directed her staff to do this. The
17 significance of these deleted files cannot be
18 overstated. Plaintiff is certainly entitled to a
19 negative inference at trial, but he's also entitled to
20 discovery on what has been deleted and how those files
21 affected the election.

22 And -- and -- and, frankly, there's no
23 precedent to stop the plaintiff from reviewing the
24 information in other counties, based on the spoliation
25 issue. We fully briefed this, I'm not going to recite

1 everything in our brief. But the point is -- and I
2 believe it cannot be denied, that the deletion of
3 files gives us direct access to the other counties,
4 otherwise plaintiff would be substantially prejudiced.

5 We also briefed the issue of using the other
6 eight counties we subpoenaed as a control group. And
7 we picked those eight counties specifically. We
8 picked them based on geographics, population, and the
9 types of systems they use.

10 Barry County, Charlevoix, Kent County, and
11 Wayne County all use Dominion, which is the same as
12 Antrim County. Oakland County and Livingston County
13 use Hart. And Grand Traverse and Macomb County use
14 ES&S. We're fully aware of that, and that's why
15 they're part of our control group.

16 We cannot say that the election conducted in
17 Antrim County was fair or proper without samples from
18 other counties. And that is primarily because Sheryl
19 Guy deleted these files. And just like in any other
20 civil case, where information is requested -- for
21 example, where there's an issue with deleted phone
22 records, we would be entitled to subpoena both the
23 opposing party for phone records and the actual phone
24 company for phone records.

25 In this case we're looking to get files from

1 other servers across counties because Sheryl Guy
2 deleted these files. But this is also extremely
3 relevant to our case. Everything within the state of
4 Michigan, including in Antrim County, is network
5 based. And we had a study here done by Jim Penrose,
6 that we attached to our brief. He's a qualified
7 expert, 17-year veteran with the NSA.

8 Served as technical director of
9 counterterrorism, and mission manager in the NSA CSS
10 Threat Operations Center. Distinguished government
11 service under President Clinton, President Bush, and
12 President Obama. Received the Presidential Rank Award
13 from President Obama. Awarded DNI Achievement Medal
14 from James Clapper. Recognized with letter of a
15 appreciation from FBI Director Mueller.

16 So his qualifications, I would say, are
17 impeccable. Jim Penrose discovered that tabulators
18 and other central servers are networked together
19 across Michigan. This is significant -- this is a
20 significant finding when investigating the Antrim
21 County case. And when we combined this finding with
22 the work done by Dr. Frank and the Cyber Ninja report
23 we also attached, which reveals a module -- an
24 improper module installed through Microsoft SQL that
25 allows direct access into the data, we should be

1 entitled to access other counties to see how their
2 system works and to see how those systems communicated
3 with Antrim County.

4 The Dominion CEO, government officials, and
5 other voting companies have maintained that there's no
6 election machines on the Internet. But it is clear,
7 based on the findings by Jim Penrose, that they are
8 networked together. The Penrose report shows that
9 Antrim County received a quote from network
10 tabulators, along with the appropriate firewalls and
11 central servers to allow tabulator results to be
12 aggregated at the county or reporting to the Secretary
13 of State.

14 And I should point out that the Secretary of
15 State in Antrim County have so far not given us access
16 to these modems. The Penrose report also indicates
17 that there have been -- or there has been evidence of
18 prior Internet-based communications on a Dominion vote
19 device from outside Antrim County. Mr. Penrose also
20 finds that the ES&S system used in other jurisdictions
21 outside Antrim County also show a wireless orgy (ph)
22 modem installed inside the tabulators. So the voting
23 system companies indicate that these networks are
24 segmented and protected using virtual private networks
25 or access point technologies.

1 The reality is that these deployments of
2 network tabulators, central servers, and firewalls are
3 all cookie cutter in nature, which means they're
4 easily hackable. Or if misconfigured through the VPN
5 or EPN, could easily lead to Antrim County systems
6 being accessible from the other counties, such as
7 Wayne County, or Oakland County, or others. The
8 conclusions in Dr. Frank's report of an algorithm
9 being applied that is uniform across multiple counties
10 with various technical configurations, clearly tells
11 us that there is some issue related to network
12 connectivity between the counties and the Secretary of
13 State.

14 That means that these systems can
15 communicate with each other and with Antrim County.
16 And that is why the algorithm looks uniform across the
17 state. And Antrim County really is just one station
18 that is vulnerable and hackable. And this is why
19 Dr. Frank concludes that these decisions are being
20 decided at the state level. Someone is deciding that
21 this -- deciding this key or this algorithm before the
22 election, and then making every county fit into that
23 key.

24 And this is really what our discovery is
25 about in great respect. If you see in that report

1 that Dr. Frank produced, he defines an R level or a
2 correlation. He talks about that with the different
3 counties that we studied in this report. For
4 instance, Macomb County has an R level of 1. Other
5 counties are .997.

6 What that means in real world data, is that
7 it matches the function of the regression perfectly,
8 which should be impossible -- especially repeated
9 twice in the same election and in the same state. So
10 really I think the point I'm trying to emphasize here
11 is that this election was 100 percent curve-fitted to
12 the algorithm. We now see that, we understand what
13 the algorithm was. We understand that there was an
14 algorithm in place in this election, and we have nine
15 counties that we've tested so far.

16 Again, these machines have network
17 tabulators. The Penrose report, again, tells us that
18 these networks are not properly segmented, and that
19 counties are not protected from other counties using
20 the same deployment. This is the same cookie-cutter
21 deployment all over the country, all over the state of
22 Michigan. And this leads us to conclude that other
23 counties, such as Macomb or Livingston can talk to
24 Antrim and Antrim can talk to them and so on, because
25 it does not appear the proper controls exist within

1 the Antrim County system or the Secretary of State
2 system.

3 And, again, the defendants in this case have
4 refused to produce or answer discovery specifically on
5 these topics. The biggest vulnerability where you
6 have a dedicated network and remote tabulation with
7 the counties and state is the possibility of a bridge
8 to the Internet. The bridge takes the protections
9 afforded by a segmented network and destroys them, and
10 actually gives a path to the network.

11 So if the Antrim IP addresses were a bridge
12 to the Internet at one point, or the employees had
13 plugged something like a USB modem into those
14 tabulators -- and we have evidence now that Antrim
15 County purchased 17 modems. If that happened in
16 Macomb, or Kent, or other counties, it only takes one
17 system that has a 4G card and is connected to the
18 Internet to be a bridge. That's it. And this is the
19 information we're looking for within this study, with
20 going out to these other counties, is to understand
21 how these other counties communicated with Antrim
22 County and how Antrim County communicated with the
23 other counties.

24 Frankly, we should have been able to tell
25 that, if Sheryl Guy didn't delete files from the

1 system, but she did. Now we're entitled to go out and
2 find that information from the other systems across
3 the state, to see what those files really look like.
4 To see how data was actually transferred among the
5 counties. To see how Antrim County was actually
6 communicating with other counties through IPs and
7 VPNs.

8 Again, this wouldn't -- if she didn't delete
9 these files, this may not be the same issue.

10 THE COURT: Have you taken her deposition?

11 MR. DEPERNO: We have not yet.

12 So the question --

13 THE COURT: All right. Because it's
14 certainly possible that those files have nothing to do
15 with any communication with other counties or with the
16 state. You simply don't know. Is that right?

17 MR. DEPERNO: Well, we believe based on our
18 studies -- based on the Jim Rose -- Jim Penrose
19 study -- he's able to look at other Dominion machines
20 and ES&S machines and Hart machines, and he's
21 concluded that they do have crosstalk, cross
22 communication with the Secretary of State or other
23 counties. He's even found the onboard modem in the
24 ES&S system. That's what his report is all about, is
25 that cross connectivity between counties.

1 So we can reasonably believe that Antrim
2 County also communicated with the other counties. The
3 problem --

4 THE COURT: I understand that's your theory.
5 But you don't have any evidence, other than your
6 theory and the analysis done by your expert to support
7 your contention, that these deleted messages or these
8 deleted files had something to do with -- with these
9 inter -- well, let's call it Internet communications.

10 MR. DEPERNO: Well, they may not be Internet
11 communications, they may just be network
12 communications.

13 THE COURT: All right.

14 MR. DEPERNO: What we're saying is there is
15 a network that's -- that's involved. That's what the
16 Jim Penrose report is about. There is a network
17 between the Secretary of State and other counties.
18 The way they communicate is through a network. That
19 could be through a VPN or some other way.

20 Presumably they want us to believe that that
21 is somehow secure. What I'm telling you and what Jim
22 Penrose tells us, is that it is not secure if there is
23 one breach at one point anywhere in the network. And
24 if there is one computer that breaches that network
25 and has a computer connected to the Internet, then the

1 entire network is on the computer, all across the
2 state -- just through one breach. That's what --

3 THE COURT: But your doorway -- sir, hold
4 on. Hold on. Your doorway to analyze -- your theory
5 goes, that your doorway to analyze these particular
6 issues and other counties, is the fact that Sheryl
7 Guy, based on your representations, agreed to, or
8 asked for, or was responsible for the deletion of
9 certain files, and you conclude that those files must
10 have had something to do with these internetwork
11 communications?

12 MR. DEPERNO: That's -- that's the one
13 argument. The other -- we made two arguments. The
14 one argument is just straight up there's a control
15 group issue here that we want to examine. That's one
16 issue.

17 THE COURT: Okay.

18 MR. DEPERNO: I think the stronger argument
19 is the spoliation issue, which gives us access to
20 other counties because Sheryl Guy deleted information.
21 If we are not able to look at other counties to see
22 how their systems are set up, and to look at their
23 configuration files, to look at their connectivity
24 files and their system logs, we would have no idea
25 what she deleted or how they actually affected this

1 election.

2 And what I'm saying is based on the Jim
3 Penrose report, he's telling us his findings that he
4 has looked at Dominion machines in other parts of the
5 state and ES&S machines, and has concluded that there
6 is this interconnectivity between the Secretary of
7 State and other counties. And that makes it
8 reasonable to assume, based on his findings that
9 Antrim County has the same system set up. And she
10 deleted those files. And if we can conclude, as Jim
11 Penrose does, that there is this interconnectivity --
12 and I should point out that -- that the defendant's
13 expert, J. Alex Halderman, he has stated in his own
14 report that the system is inherently vulnerable and
15 that with access to the system, you would be able to
16 change the database, and, therefore, change the
17 results of the election.

18 So the question that we're unable to get
19 clarity on is whether or not there was proper
20 segmentation between Antrim County and these key
21 systems in other counties, that have been provisioned
22 in this sort of cookie-cutter fashion, that is set up
23 by the Secretary of State. So we believe that
24 without -- without doubt, because she deleted these
25 files -- I don't see any case law that says that we're

1 not entitled to look at other counties. We would be
2 certainly prejudiced if the Court determined that the
3 only remedy for deleting files is an adverse interest
4 or an adverse inference at trial. We believe we're
5 actually entitled to go out, do discovery, and look at
6 other counties in order to determine what files were
7 deleted, and as stated in the Jim Penrose report,
8 files that are on other systems in the state through
9 Dominion, or ES&S, or Hart, that provide for this
10 interconnectivity among counties and the Secretary of
11 State.

12 They are communicating. The only -- the
13 logical result is that Antrim County is also
14 communicating and Sheryl Guy deleted those files,
15 which really it -- this is a -- this is a big deal
16 deleting those files. There's a lot of information
17 that she deleted in terms of how the election was run.
18 And I'll just -- one more thing I want to point out.
19 We received -- I received a message from another one
20 of our experts, this morning, where he states that if
21 someone has access to the database, anytime after the
22 project file is built, then they could configure the
23 files to swap candidate votes, or shift candidate
24 votes pretty much for any race, individually, by the
25 tabulator -- the same way that we saw in this election

1 in Antrim County. And those are the files we're
2 looking for, those are the system files that would be
3 deleted.

4 And finally, in terms of any other
5 objections the counties have made, I believe that we
6 can overcome all of those objections, as we stated in
7 our brief. Plaintiff is willing to share the cost in
8 our discovery. Plaintiff is willing to set deadlines
9 with the other counties. Plaintiff has already
10 articulated the process in which equipment will be
11 inspected.

12 Plaintiff has provided the information on
13 the inspection team to show that they have the
14 requisite training. And plaintiff guarantees that his
15 inspection of election equipment will not alter,
16 damage, or compromise any county equipment. So I
17 think we've satisfied those objections -- which means
18 that they're -- these subpoenas are not overly
19 burdensome.

20 They're not overly broad, they're actually
21 quite tailored. And we've demonstrated the relevance
22 based on Sheryl Guys deleting the files and the
23 interconnectivity that we found between counties and
24 the Secretary of State, in transmitting information
25 across county lines.

1 Do you have any other questions?

2 THE COURT: Mr. Deperno -- I do. You -- I
3 think you indicated -- or maybe it was one of the
4 counties, that you actually submitted eight --
5 requests to eight counties, and we've heard from, I
6 think, four or five. Is that accurate?

7 MR. DEPERNO: Four. We've heard from four.

8 THE COURT: All right.

9 And the other four, have they complied with
10 your -- your request?

11 MR. DEPERNO: No, they have not.

12 THE COURT: Your subpoena?

13 MR. DEPERNO: The other four are Charlevoix
14 County, Kent County, Wayne County, and Oakland County.
15 And they have all elected to file motions to quash in
16 their respective counties, as opposed to filing in
17 this county. So we have --

18 THE COURT: Have there been any -- thank
19 you.

20 Have there been any determinations in those
21 counties with regard to those motions?

22 MR. DEPERNO: They have not. They're
23 scheduled for -- I believe one is scheduled for
24 later -- Friday this week and then others later in the
25 month.

1 THE COURT: All right. Thank you.

2 MR. DEPERNO: There's been no determination
3 on any of those.

4 THE COURT: Okay.

5 Mr. Kazim, let me go to you first. With
6 regard to Ms. Guy -- obviously she hasn't testified,
7 she hasn't been deposed yet in this case. Do you have
8 any information with regard to the substance and
9 nature of the files that were deleted, that you can --
10 you can give to us? And perhaps are you able to
11 answer whether or not those files related to
12 communications with either the network that
13 Mr. Deperno has discussed, or with the Secretary of
14 State?

15 MR. KAZIM: Thank you, your Honor.

16 I want to point out to the Court part of
17 Mr. Deperno's brief that he submitted on Friday, which
18 addresses -- where he raises this argument about
19 Ms. Guy's comment regarding deletion of files. And I
20 believe it's on page 24 of his brief.

21 And the keep -- he keeps referring to Sheryl
22 Guy deleting the files. But the reality, which he,
23 himself, has quoted in his brief, was, there was a
24 discussion at a March board of commissioners meeting,
25 in which one of the commissioners asked Ms. Guy the

1 question, "Did you direct or delete yourself any files
2 on the Dominion services? Did you direct anybody on
3 your staff to do so?"

4 And Ms. Guy's response should say it all.
5 She never said that she deleted any files. What she
6 said -- and I'm quoting this, "When you are saying who
7 went in and worked on those files -- whether they
8 deleted them, replaced them, changed them, or
9 corrected them, it was my office. I have never gone
10 onto that machine, but it was my staff and it was
11 because they were doing their job.

12 "We truly did not have correct training with
13 the ElectionSource new program because we didn't know
14 we had to pull all the cards back, not just the ones
15 we had fixed. So when you are talking about who did
16 it, I did it. My office did it. My office staff did
17 it under my authority to get those numbers right. It
18 wasn't fraud, it was doing my job, getting my numbers
19 certified."

20 Your Honor, this Court, by this time, knows
21 the arguments that have been made by the County to
22 explain the errors that occurred with the election
23 results. Okay? Now, plaintiff chooses not to believe
24 it. Plaintiff chooses to believe that it was not
25 human error, and that's an argument they have

1 forwarded.

2 But to suggest that Ms. Guy deleted any EMS
3 files is just a frivolous argument, because nowhere
4 has she admitted to deleting any EMS files. In fact,
5 what is more telling, is that while plaintiff keeps
6 repeating the words or phrase "Ms. Guy deleted files,"
7 he has not been able to say which files were deleted.
8 His team on December 6th went and took over eight
9 hours forensic images of everything that the County
10 has -- pursuant to this Court's order.

11 Based upon that forensic exam, plaintiff's
12 forensic team produced a result that this Court has
13 had a chance to review. In that report the only
14 issues regarding logs of files that were missing, were
15 their claim that adjudication logs were missing and
16 certain security system logs -- Microsoft Windows
17 security logs were missing. There was never any
18 report by his own forensic expert for all these months
19 about any files being deleted. It was common
20 knowledge and we have -- it has been included in all
21 the pleadings that have been filed before this Court,
22 as to the steps that the county clerk took to correct
23 the election results -- which was when they discovered
24 that the election results were incorrect based upon a
25 failure to reprogram those compact flash drive cards

1 properly or to update them. That the county clerk's
2 office went in and replaced that incorrect data, those
3 incorrect results by manually entering the results
4 from the tabulator tapes.

5 It has -- that's not a secret. The Court
6 knows it. Plaintiff knows it, the public knows it.
7 It's been reported widely as to the steps the county
8 clerk took in November to correct the election
9 results. So they want to now create this false
10 narrative about the clerk going in and deleting files,
11 when their own expert in his report does not make
12 reference to any files being deleted, other than the
13 adjudication files and the system logs.

14 And that was addressed in Mr. Halderman's
15 report. If you look at Mr. Halderman's report on --
16 beginning on page 45, which we have attached to a
17 different response to Ms. -- to -- in a motion that's
18 for hearing today. He talks about -- specifically
19 about the security logs and the adjudication logs, and
20 the reason why those logs are missing. With regards
21 to the adjudication logs, it's because we never had
22 that -- we never purchased the adjudication system.

23 Dominion machines come in -- comes with a
24 wide variety of packages -- just like any other
25 software. And you choose -- you choose and select

1 what you want to purchase. Antrim County never
2 purchased the adjudication software. And that is why
3 there are no adjudication logs.

4 Now, that could -- they can depose that
5 expert and figure that out, but that is what -- but
6 that has been explained. Same with the security logs.
7 Mr. Halderman explained the reason that there were no
8 security logs was because there was 194 megabyte fixed
9 limit -- fixed to the county's system, and he does
10 recommend that we should not have a fixed limit,
11 because once that -- it reaches that limit, it
12 automatically rewrites over.

13 With respect to connectivity, again, the
14 Dominion system -- and Mr. Halderman's report is clear
15 on it, and -- and -- which is -- that's the most
16 interesting part, is that Mr. Halderman looks at --
17 has reviewed the same data -- which is the forensic
18 images obtained on December 6th, that plaintiff's
19 forensic team has. The same information that has been
20 previously produced to plaintiff.

21 You know -- we produced purchase orders. We
22 produced -- all the things that we produced, there
23 were about 2500 pages of documents. That is why
24 plaintiff is able to argue -- made the argument. But
25 the fact of the matter is that the -- the Dominion

1 machines in Antrim County did not use any wireless
2 results transmission functionality. They did not have
3 them. We did not purchase them.

4 And it's noteworthy what counsel -- to --
5 that what counsel's comments are. His expert,
6 Penrose, looked at some Dominion machines, found
7 dysfunctionality, and then reaches this conclusion
8 that because some Dominion machines have this
9 functionality to communicate over a network, that
10 Antrim must have it too.

11 The problem with that, your Honor, is that
12 plaintiff's experts had full opportunity and full
13 access to the Dominion machines in Antrim County, and
14 nowhere in that report is there any discussion about
15 connection to any network, communication with any
16 other county machines or the Secretary of State
17 machines. So to come now in April, when they have had
18 this data since December 6th, produced a report on
19 December 11th, asked this Court to release that report
20 publicly, by arguing that it had critical information
21 regarding election integrity and security and had to
22 be released before the election results are certified,
23 and so on and so forth.

24 And now in -- on April 7th or April 8th, the
25 day after the discovery was closed, come up with this

1 report from another expert -- or two different
2 experts, now, and make all these claims, and then
3 remarkably argue that we need more discovery. They
4 have now produced three reports from three different
5 experts based upon data that they have in their
6 possession, yet they continue to argue they need more
7 discovery.

8 So in response to all that, the -- the --
9 the answer is in the facts of this case, your Honor.

10 THE COURT: All right. Thank you,
11 Mr. Kazim.

12 Mr. Grill, did you have anything in
13 response?

14 MR. GRILL: I'll echo Mr. Kazim's comments,
15 your Honor. And I would also point out I'm a little
16 perturbed by Mr. Deperno's reliance on this report
17 from Mr. Penrose, Dr. Frank, and Cyber Ninjas, mostly
18 because that was never disclosed to the defendants at
19 any point during discovery. Our first set of
20 interrogatories in this case issued back in
21 December -- December 13th, I think it was,
22 specifically asked for all reports or draft reports or
23 anything from all of the forensic team and any
24 experts.

25 These experts were never identified to us.

1 They weren't listed in any witness lists. There were
2 no reports produced. The day after discovery closed,
3 Mr. Deperno files his motion response, which includes
4 these additional expert reports, that we've never seen
5 before. Were never referred to at any point in the
6 prior proceedings in the case, and now we're told that
7 we need to do more discovery to look into them.

8 It feels like an ambush, your Honor. Beyond
9 that, I still struggle to find the relevance of any of
10 this, to the simple fact that the case before this
11 Court is what happened in Antrim County's elections?
12 That was supposedly the question that we began with
13 back in -- well, I guess it was November in this case
14 was, let's get to the bottom of what happened in the
15 County. And it appears that these subpoenas to
16 basically every county but Antrim County, is directed
17 toward a disturbing creep of soap of this case.

18 Beyond that, your Honor, I don't have much
19 else to add, unless the Court has any questions for
20 me.

21 THE COURT: All right. Thank you,
22 Mr. Grill.

23 Let's go ahead and hear quickly from any of
24 the attorneys for the parties making the motions --
25 the county clerks.

1 We'll start with Mr. Tholen. Any additional
2 comment?

3 MR. THOLEN: No thank you, your Honor.

4 THE COURT: All right. Mr. Perrone?

5 MR. PERRONE: Your Honor, we've heard that
6 there's really nothing supporting the claim of a
7 deletion of files, or the connectivity of the Antrim
8 system. And -- so, therefore, it would appear that
9 the subpoenas to Livingston County would be based on
10 speculation and conjuncture.

11 Thank you.

12 THE COURT: Krycia? I may have
13 mispronounced your name. My apologies. But I'm
14 looking for -- is it -- is it -- I thought it was
15 Mr. Krycia?

16 MR. KRYCIA: Oh, I got to unmute. Thank
17 you. Sorry about that.

18 THE COURT: All right.

19 MR. KRYCIA: No, we concur with the
20 statements made by the other defendants in the other
21 counties. And don't worry about my last name, it's --
22 you're fine.

23 THE COURT: Well, with a name like
24 Elsenheimer I'm used to that kind of thing.

25 All right. And lastly, Mr. Vander Laan?

1 MR. VANDER LAAN: No further comments, your
2 Honor. Thank you for your time.

3 THE COURT: All right. Thank you.

4 Okay. Folks, I'd like to take a few minutes
5 and review these issues. We have a series of other
6 motions that we need to -- we need to address, but I'm
7 going to go ahead and take some time and give my staff
8 a short lunch, which means we'll pick this matter back
9 up at one o'clock.

10 MR. VANDER LAAN: Thank you, your Honor.

11 MR. PERRONE: Thank you, your Honor.

12 THE COURT: Thank you.

13 MR. KRYCIA: Thank you.

14 MR. KAZIM: Thank you.

15 (At 11:53 AM. - 1:04 PM., Court's in recess)

16 THE COURT: Okay. Let's go back on the
17 record in Bailey versus Antrim County. Pardon me. I
18 just ran up the stairs, and I'm sorry that I was five
19 minutes late. I've listened to the arguments of the
20 parties, reviewed portions of the briefing, and I'm
21 ready to go ahead and give you a decision on these
22 motions.

23 The plaintiff issued subpoenas to eight
24 nonparty county clerks. Those clerks included Barry,
25 Livingston, Macomb, and Grand Traverse County; all of

1 those four filed motions to quash here in the 13th
2 Circuit Court. According to plaintiff, the other
3 county clerks have filed in their own counties. The
4 subpoenas that were filed by the plaintiff -- or
5 issued by the plaintiff, seek forensic review of
6 matters that relate to the November 3rd, 2020, general
7 election and include in Exhibit 1 all tapes, ballots,
8 logs, tally servers, election management servers,
9 election media, tallies, spreadsheets, and canvasser
10 notes.

11 The nonparties have been joined by Antrim
12 County and the Secretary of State to argue that the
13 subpoenas were flawed and should be quashed for a
14 variety of reasons. Most notably -- at least in the
15 Court's mind, is the issue of relevance. The
16 plaintiff argues that because the Antrim County
17 Clerk -- Clerk's office deleted certain adjudication
18 and security log files having to do with that
19 election, and there may have been network connectivity
20 with other courts -- pardon me, counties, and perhaps
21 the Secretary of State, that the plaintiff is entitled
22 to presume that the deleted files dealt with -- pardon
23 me, dealt with communications with other counties and
24 the Secretary of State; and, therefore, it pieced
25 together the deleted files, the plaintiffs should be

1 allowed to execute and enforce these subpoenas.

2 The plaintiff did not subpoena all 83
3 counties, but what it suggests is a representative
4 sampling of county sizes and systems. For example,
5 not all of the counties that were subpoenaed are on
6 the Dominion software system. The plaintiff has not
7 deposed the Antrim County Clerk Sheryl Guy or anyone
8 in her office, at least as far as the Court is aware,
9 regarding the deleted files or for any purpose, and
10 discovery in this matter is closed -- although, we do
11 have a motion to extend discovery on the agenda today.

12 Antrim County, through counsel, states that
13 in discussing the deleted files, the Antrim County
14 Clerk did make a statement to the Antrim County
15 Commission that -- where she claimed responsibility as
16 the county clerk for the files that were deleted on
17 her watch; and that her staff deleted certain files,
18 as they were attempting to secure an accurate vote
19 count following the initial disclosure of what
20 everyone agrees were inaccurate results.

21 Parties certainly may seek nonparty
22 discovery pursuant to our court rules, and the
23 specific court rule here is 2.305 per section
24 (A)(4)(a) of that rule, which allows a nonparty, of
25 course, to seek to quash a nonparty subpoena.

1 Discovery in general is controlled by 2.302(b)(1),
2 which holds that parties may obtain discovery of any
3 nonprivileged matter that is relevant to any party's
4 claims and defenses and proportional to the needs of
5 the case, et cetera.

6 This matter involves alleged improprieties
7 regarding Antrim County's November 3rd, 2020, general
8 election, where inaccurate results for several local,
9 state, and national elections were initially produced.
10 Attention is centered on the use of Dominion hardware
11 and software and/or human error -- same being admitted
12 by Clerk Guy, as to the cause of these inaccurate
13 results. The plaintiffs have alleged a cause of
14 action under the Michigan Constitution's purity of
15 elections clause. Also election fraud, common law
16 fraud, a writ of quo warranto, violation of equal
17 protection under the Constitution, as well as
18 violation of certain statutory provisions, including
19 168.765(5).

20 The plaintiff has also in its complaint made
21 several prayers for relief, all of which have
22 apparently been granted, except for what plaintiff
23 sees as a nonpartisan audit of the 11/20 election,
24 the -- the Attorney General's office -- the Secretary
25 of State, through the Attorney General's office,

1 believes that that provision has been met. So the
2 question before the Court is whether allowing the
3 plaintiff to forensically investigate the four
4 counties in questions -- in question, would lead to
5 having a tendency to make the existence of any fact of
6 consequence to the determination of this action more
7 or less probable pursuant to MRE 401.

8 The Court reviews discovery questions using
9 a preponderance standard, and I find in this case that
10 the info the plaintiff seeks is not likely to lead to
11 additional relevant information for the following
12 reasons: Number one, the plaintiff has failed to put
13 forth admissible evidence to show that there would be
14 even a possibility of such recovery. The "experts"
15 that have been identified to support its contentions
16 Frank, Cyber Ninja, and Penrose, while having
17 interesting theories, are not expert witnesses that
18 have, as of yet, been named within this Court's case
19 management order, and were produced in the waning
20 hours -- indeed, after discovery had closed in this
21 case. Their theories, therefore, have not been tested
22 with the crucible of truth that is our discovery
23 system.

24 Second -- further, the plaintiff has not
25 deposed the witnesses who, indeed, may know about the

1 deleted messages and put them under oath -- and that
2 would be the Antrim County Clerk and/or her staff.
3 And, again, discovery is closed. And, third, the
4 plaintiff must have more than mere conjecture -- more
5 than speculation to support its request to discover
6 information from these other counties. Without same,
7 the requiring of nonparties to comply with requests
8 like this would, indeed, be burdensome, would be
9 tantamount to a fishing expedition, and, as I said,
10 unnecessarily burdensome to the clerks.

11 Speculation is not enough. The plaintiff
12 has not connected the dots using admissible evidence.
13 Therefore, the nonparties motions are granted. I'd
14 like to direct Grand Traverse County to prepare a
15 single order to be circulated to all of the parties
16 that have filed motions in this case for approval and
17 to the parties in this case. Absent that, Grand
18 Traverse County should file a proposed order under the
19 Seven-Day Rule. All right.

20 Thank you to those of you who were here on
21 that matter. You're welcome to stay, but you
22 certainly are allowed to go at this point --

23 MR. KRYCIA: Thank you, your Honor.

24 THE COURT: -- we have several other matters
25 in this case that we need to deal with.

1 And to my staff, we're going to need,
2 obviously, to let the afternoon docket know that we
3 are behind and probably will be at least an hour --
4 maybe two hours behind.

5 Okay. Let's go ahead and proceed in the
6 order of filing with regard to the remaining Bailey
7 matters. And let's see. The first matter that I have
8 up on the docket is the defendants' joint motion for
9 protective order pursuant to 3.302(C), I am assuming
10 that that is the matter that we just dealt with.

11 Mr. Grill, am I right on that? Or is this
12 a -- one of the other motions?

13 MR. GRILL: Your Honor, it included the
14 motion to quash, but there were also the protective
15 order addressed plaintiff's second, third, fourth, and
16 more recently, the fifth sets of written discovery in
17 addition to his first set of requests to admit.

18 THE COURT: Let's go ahead and argue, then,
19 the motion -- the remaining aspects of the motion to
20 compel. If you'd like to go ahead and make your
21 argument, or will Mr. Kazim be handling this?

22 MR. GRILL: I believe Mr. Kazim will start
23 and then I will add any comments.

24 THE COURT: Mr. Kazim, if you'd like to go
25 ahead and begin.

1 MR. KAZIM: Thank you, your Honor.

2 Since February 26th of this year, plaintiff
3 has served 43 interrogatories and 98 -- 98 requests
4 for production of documents just on Antrim County. We
5 couldn't ask for a better example of the need for
6 protective order under MCR 2.302(C), than to stop the
7 abuse of the discovery process engaged in by the
8 plaintiff through this clearly excessive and vexatious
9 discovery requests. 43 interrogatories and 98
10 requests to produce documents in a case in which
11 relief -- the requested relief has already been
12 granted.

13 First, there was a request for an order that
14 sought forensic images of the tabulators, thumb
15 drives, media drives, and the Election Management
16 System terminal with Antrim County, which was
17 permitted by this Court on December 4th of 2020. And
18 plaintiff conducted a detail forensic examination and
19 took images of all this voting equipment on December
20 6th of 2020.

21 Second, there was a request for an order
22 preserving evidence, which this Court also, on
23 December 4th, of 2020, granted. And, third, there's a
24 request for partisan -- an -- or nonpartisan and
25 independent audit. Not only was there a statewide

1 audit done, but there was a hand count audit and tally
2 of the presidential votes done in Antrim County, which
3 confirmed the outcome of the presidential election, in
4 Antrim County.

5 THE COURT: Just out of curiosity,
6 Mr. Kazim, if I might ask you, obviously there were
7 several matters that were identified by the Court,
8 where we had differences in the initial tally versus
9 the -- the second tally presented by the clerk. Why
10 did we only do the hand count of the presidential
11 votes, rather than, for example, the votes in Central
12 Lake Township or Central Lake Village relating to the
13 marijuana question, or the Mancelona Township votes,
14 or the votes in Milton Township?

15 Why only the presidential hand tally in
16 Antrim County?

17 MR. KAZIM: Your Honor -- and maybe -- and I
18 think maybe the Secretary of State's attorneys might
19 be better able to answer that question, since that was
20 something that was done in conjunction with the
21 Secretary of State. Because I don't know if I'll be
22 able to provide a more accurate answer.

23 THE COURT: All right. I don't want to get
24 off-track, so we'll allow Mr. Grill to write that down
25 and he can inform me when he gets an opportunity.

1 I interrupted you, please continue,
2 Mr. Kazim.

3 MR. KAZIM: Thank you, your Honor.

4 So it begs the question as to what possibly
5 could be left for plaintiff to discover in this case.
6 And based upon the review of the second, third,
7 fourth, and fifth discovery requests, the answer is
8 nothing. The only purpose of these excessive
9 discovery requests is to harass and intimidate
10 defendants. Because what possible relevance could
11 there be to demand copies of the purchase order for
12 the Dominion Voting Systems? To demand copies of all
13 county board minutes authorizing the purchase of
14 Dominion Voting Systems. And for copies of checks
15 used to purchase Dominion Voting Systems.

16 What other motive could there be to request
17 copies of all -- all FOIA requests made to Antrim
18 County from November 3rd of 2020, to the present? And
19 copies of all responses to those FOIA requests? For
20 that similar time period, other than to harass
21 defendants, and to make this unduly burdensome for
22 them. Because in order to respond to each of these
23 requests, it takes hours of county employees' time and
24 it detracts them from performing their day-to-day
25 duties and responsibilities.

1 Your Honor, it would be unreasonable for us
2 to go through each of the 43 interrogatories and 98
3 requests for production of documents, and I certainly
4 have no intention of doing that. But we did attach
5 each of those discovery requests as exhibits to our
6 motion, so the Court has had an opportunity to review
7 them and the Court can see for itself that plaintiff's
8 requests, for example, demanding copies of all
9 communications between the county and the news
10 agencies, between the county and Facebook, Amazon,
11 Google, Apple, The Chan Zuckerberg Initiative, and the
12 Center for Technology and Civic Life have no relevance
13 on this case, and they're clearly not proportional to
14 the needs of this case.

15 Additionally, plaintiff has requested the IP
16 and MAC addresses for all -- all county computers.
17 There is -- there's just no plausible reason, your
18 Honor, for plaintiff to have this information --
19 which, if disclosed, would also compromise the
20 security of the county cyber systems. And plaintiff
21 has offered this argument that defendants' concern
22 regarding the security of their cyber system somehow
23 proves that these Dominion machines were connected to
24 the Internet. And, frankly, I don't even know how to
25 respond to this circular argument, other than what the

1 Court just stated in its decision on the motion to
2 quash, which is that mere conjecture doesn't form a
3 basis for discovery.

4 This Court on March 22nd, at a -- at
5 hearing, noted that this case is about how Dominion
6 machines tabulated votes in Antrim County.
7 Plaintiff -- and at the risk of repeating myself,
8 plaintiff has obtained all the information from the
9 Dominion machines when it took those forensic images.
10 It has produced now three different reports from three
11 different experts. One of those reports, which was
12 taken -- which was prepared directly from the data
13 obtained by his forensic team has already been
14 publicly disseminated. And -- and now -- so it is
15 clear that plaintiff has all the information in his
16 possession for the purposes of this lawsuit, because
17 he has now produced multiple expert reports based upon
18 that information.

19 Your Honor, we have filed this motion
20 because of the excessive number of discovery requests
21 that we have received from the plaintiff in this
22 case -- which have no bearing or relation to it. You
23 know, when plaintiff is submitting requests asking
24 about dismissal of this case by the Court -- which the
25 Court in its order noted was done by mistake, when

1 it's asking for personnel file of employees, including
2 the personnel file of the county clerk, Ms. Hocking,
3 asking for telephone records of county employees, it
4 is clear that the rationale behind these discovery
5 requests is not legitimate, but is instead to harass
6 and retaliate against certain individuals within
7 Antrim County. The -- the -- there are no claims
8 against any individual in this lawsuit, and the demand
9 for personnel files and telephone records and the
10 personal emails is entirely inappropriate and is
11 outside the permissible scope of this case.

12 Further, it's -- the number of
13 interrogatories is in violation of the court rules.
14 MCR 2.309(A)(2) only allows 20 interrogatories per
15 party. Plaintiff has now served 43 interrogatories on
16 Antrim County, and there is just no justification for
17 exceeding the number of interrogatories permitted
18 under the court rules.

19 It is true that Michigan permits broad and
20 open discovery and discovery rules are liberally
21 construed. But as the appellate court stated in
22 Augustine versus Allstate Insurance Company, which is
23 a case we cited in our brief, Michigan's commitment to
24 open and far reaching discovery does not encompass
25 fishing expeditions. In allowing discovery on the

1 basis of conjecture -- which is pretty much entirely
2 what these discovery requests are based upon, amounts
3 to an impermissible fishing expedition. So we request
4 that the Court grant our motion for protective order,
5 prohibiting the plaintiff from discovery against us;
6 and if the Court is inclined to deny this motion, then
7 we ask that the Court at least consider holding these
8 discovery requests in abeyance until our motion for
9 summary disposition that was filed on Friday is
10 decided.

11 And I'm happy to answer any questions that
12 the Court has.

13 THE COURT: How many -- how many responses
14 have you already given to interrogatories? The new
15 maximum is 20. Obviously there are more interrogatory
16 requests that have been made.

17 Do you have an idea how many are responded
18 to thus far?

19 MR. KAZIM: Yes. We have responded to, I
20 believe, three interrogatories and -- if the Court
21 would just indulge with me for just a brief moment, I
22 can tell you what -- how many requests we receive -
23 for production we have responded to.

24 We have responded to three interrogatories,
25 your Honor, and 18 requests for production of

1 documents. And we have provided --

2 THE COURT: All right. Thank you.

3 MR. KAZIM: -- 2500 pages.

4 Thank you.

5 THE COURT: Thank you, Mr. Kazim.

6 Mr. Grill, you joined in this motion?

7 MR. GRILL: Yes, your Honor, and I second
8 Mr. Kazim's points. I would add only a few brief
9 points in addition, regarding the Secretary of State.
10 The Secretary, for her part of this case, has received
11 30 interrogatories and 112 requests for the production
12 of documents, in addition to another 12 requests to
13 admit. So the volume here is definitely a concern for
14 us in terms of the -- the standard under the court
15 rule for protective order of annoyance -- annoyance,
16 embarrassment, oppression, and undue burden or
17 expense.

18 Essentially all of those situations are met
19 here. The reason I say that is, because you look at
20 these requests amongst the second, third, fourth, and
21 now the fifth set of written requests in the Secretary
22 of State, and their seventh matter appears to address
23 virtually anything other than the case at hand. We've
24 got a request in here for all FOIA requests received
25 by the state of Michigan and their responses. We got

1 another request asking for communications between the
2 Secretary of State and any news agency since the
3 election.

4 News agency is not defined. I'm not sure
5 how we're supposed to know what constitutes a news
6 agency. Plaintiff asked us in his third request for
7 over four -- basically 500,000 names either removed or
8 not removed from the qualified voter file since 2001.
9 He's asked for the location of ballot boxes throughout
10 the state of Michigan. And I think probably most
11 egregious in -- and the scope requests that most
12 identifies the abusive behavior on display here, is
13 his request to produce No. 9, the third written
14 requests all correspondence, communications, and
15 documents regarding the investigation of Ryan
16 Friedrichs.

17 And Mr. Friedrichs is the Secretary of
18 State's husband. And I cannot for the life of me
19 contemplate how that could possibly be relevant in the
20 case. So our concern fundamentally is the volume and
21 the irrelevance of the requests that the plaintiff has
22 propounded upon us. If we're -- in terms of the
23 remedy in this situation -- there is a limit of 20
24 interrogatories.

25 Mr. Deperno -- and we have answered three so

1 far, so that leaves the plaintiff with 17 more
2 interrogatories. But there -- as we said, there are
3 over 30 requests. We would ask the Court instruct the
4 plaintiff to pick which 17 he wants us to answer.
5 Concerning the requests to produce, we would similarly
6 ask that the Court instruct the plaintiff to pick --
7 pick a number -- his 20 requests to produce that he
8 actually wants us to respond to.

9 The ones that pertain most to this case and
10 contain the information he needs for purposes of this
11 litigation. Anything further than that, he would be
12 able to come to the Court and explain why some new
13 occurrence has later arisen that requires additional
14 discovery. I also think -- and this was something
15 that was brought up during the motions to quash, it is
16 worth considering whether it might be worth taking
17 this matter under advisement and holding off further
18 discovery until the Court has an opportunity to rule
19 on the pending dispositive motion challenging the
20 validity of the plaintiff's claims -- which at the
21 very minimum, either is going to dismiss this matter
22 entirely or would, I think, effectively limit the
23 claims left in this case and, thereby, limit the
24 discovery.

25 We would also ask that the Court consider

1 expressly limiting the Court -- the plaintiff's
2 discovery to matters specifically relating to Antrim
3 County's election and the election that occurred in
4 Antrim County on November 3rd. Beyond that, if the
5 Court has any additional questions, I'm happy to
6 answer them.

7 In regards to the Court's earlier inquiry
8 about why we did the presidential hand count for --
9 I'm sorry, for the presidential elections, I have been
10 informed that the reason for that was to safeguard the
11 public confidence in the election in light of a large
12 quantity of misinformation that was then circulating
13 about the presidential election results in Antrim
14 County, following the unofficial reporting error.
15 Every single recount -- every race that is hand
16 counted at that time -- for example, it took us a full
17 day just to do the one presidential race. We know
18 there is no reason to think the presidential results
19 were wrong. It was done for the purposes of
20 reinforcing or bolstering the public confidence in the
21 outcome of the election.

22 We also would note that no one -- none of
23 the parties involved actually requested a recount for
24 the -- for the ballot proposal in village -- Central
25 Lake village, which would have been the basis to hand

1 count any of those ballots.

2 THE COURT: All right. Thank you,
3 Mr. Grill.

4 Let's go ahead and hear from Mr. Deperno, in
5 response, please.

6 You're on mute, sir.

7 MR. DEPERNO: Thank you.

8 I will touch briefly on some of the issues
9 raised by opposing counsel. We asked the parties to
10 produce FOIA requests and communications with news
11 agencies because of a story written by the Detroit
12 News, in which the Detroit News sent in a FOIA request
13 and published emails regarding this election; and some
14 of those emails that were published, were not emails
15 that had been turned over to us pursuant to our
16 discovery requests. So it was clear that Antrim
17 County was turning over information to the news media,
18 that they were not producing to plaintiff.

19 I think certainly we'd be entitled to
20 Dominion manuals. They seem to have an objection to
21 that, and I don't understand that objection. We
22 requested cell phone records of certain people, and
23 that is because, simply, in the discovery requests
24 produced by Secretary of State, there is not one
25 single communication between the Secretary of State

1 and Antrim County, it appears. At least we haven't
2 found them in our search of the way they produced the
3 documents.

4 So it -- it is -- there must be
5 communications between the Secretary of State and
6 Antrim County. I can't imagine there isn't. If
7 they're not communicating by email, they're
8 communicating in some other way. They seem to have
9 objected to our requests for a list of names removed
10 from the qualified voter roll.

11 Frankly, that is information that should be
12 made to the public as a matter of course. But since
13 we have submitted our requests to the Secretary of
14 State, they have entirely modified their web page that
15 deals with the qualified voter roll and has removed
16 the ability for people to gain access to that.

17 THE COURT: Well, stop there.

18 How is that relevant to the claims that
19 you've made regarding the election in Antrim County?

20 MR. DEPERNO: Well, the qualified voter roll
21 is going to tell us which people in Antrim County are
22 registered for the election. When they were
23 registered for the election. And whether they
24 properly live in Antrim County. We would have the
25 names, addresses of those people in Antrim County, who

1 allegedly voted.

2 That is relevant to our case in terms of how
3 the county calculated the vote total, and -- and
4 our -- our request for an audit of the Antrim County
5 election. It goes directly to the issue.

6 THE COURT: All right. You still haven't
7 explained -- I can certainly understand how desiring
8 information regarding the qualified voter roll could
9 be relevant, but you haven't explained to me how
10 needing the statewide dump of names that have been
11 redacted from that roll is relevant to the claims that
12 you've brought in -- in this case.

13 MR. DEPERNO: Well, the statewide redacted
14 names would give us the information of who in Antrim
15 County was removed from the voter rolls right after
16 the election. What we -- I don't think there's any
17 way for the State to give us -- somehow segment out
18 just the Antrim County names. I don't think that --
19 my understanding is the database isn't built that way.
20 And it's actually quite difficult, as I explained in
21 our brief, as to how to access that data; and actually
22 takes a -- a third party piece of software to review
23 it.

24 My understanding is there's no piece of
25 software that allows the Secretary of State to carve

1 out data and turn it over. So that was the reason for
2 requesting the entire data dump, which I think is
3 available to any resident in the state of Michigan,
4 anyway, pursuant to a normal FOIA request. But the
5 problem is the Secretary of State no longer seems to
6 be allowing people to make FOIA requests of this --
7 this database.

8 The -- one very important thing in terms of
9 our discovery requests is, this is information,
10 mostly, that our expert witnesses have been requesting
11 since February. They would ask me for information as
12 they review these forensic images -- and these are
13 people that were listed our expert witness list, and I
14 would then -- they're going through these forensic
15 images and they ask me for additional information and
16 I put that on a request to produce and send it to the
17 opposing parties.

18 So, for instance, they ask me to ask for the
19 IP addresses that were used on the computers from
20 November 1st through November 10th. That doesn't seem
21 unreasonable to me. Identify the MAC addresses that
22 are used on the computers from November 1st to
23 November 10th. So I would simply convey those
24 requests to the other party.

25 THE COURT: And you're not looking for --

1 hold on. You're not looking for all computers used in
2 the county, rather only the computers that were used
3 in association with the election, is that what I'm
4 hearing?

5 MR. DEPERNO: No. Certainly we want
6 computers used in the election, but it's our
7 understanding that the way the Antrim County system is
8 set up, is on a network. So any access to one
9 computer gets you into the entire network. And we
10 have been told -- this was an issue Mr. Bailey brought
11 up early on in the case, is that there was a computer
12 left on in Antrim County on election night with an
13 open VPN port.

14 And whichever computer that was, that
15 will -- whichever person that was in Antrim County,
16 that allowed their computer to stay on overnight on
17 November 3rd, with an open VPN port, would provide
18 access to somebody into the network. So that's why we
19 asked for MAC addresses or IP addresses for the
20 county, because we --

21 THE COURT: All right.

22 MR. DEPERNO: -- we believe that they're all
23 connected in -- in one way or another, ultimately
24 connected to the election management server.

25 THE COURT: So a computer that's being used

1 in the prosecutor's office could be, by your mind or
2 by your analysis, could be somehow relevant to the
3 claims that you're making in this case, because it's
4 connected to that same network, is that what I'm
5 hearing?

6 MR. DEPERNO: Yes. If it's connected to the
7 network, then that is a way for someone to get in. No
8 one has to get in directly to an election server, if
9 they get into one computer within the network.

10 THE COURT: Okay.

11 MR. DEPERNO: And -- and -- so that's why we
12 asked for all the IP addresses for the county.

13 We asked them to produce all the election
14 tapes and output files for each Antrim County precinct
15 tabulator. That's incredibly important to our
16 analysis and study of the forensic images. These are
17 tapes that are printed out of each precinct tabulator
18 on election night, and they provide information as to
19 the output that is then input into the EMS. It seems
20 like we're absolutely entitled to -- to those rolls.

21 We shouldn't be running around trying to get
22 people to give us copies of those, when the county
23 should just turn them over to us. And this is a
24 real -- this is an easy issue, because when you look
25 at J. Halderman's report that they just put out a week

1 and a half ago, he makes specific reference to these
2 election tapes. He has them in his possession. The
3 way he writes his report you can tell -- at least we
4 can tell, our people can tell, that the vast majority
5 of our requests, which they are telling us they won't
6 give us, are being used by the Secretary of State's
7 own expert witness in order to write his report.

8 He clearly has access to the election tapes.
9 He clearly has access to the data extracted from the
10 EMS on election night. He clearly has a copy of data
11 uploaded from the EMS to the Secretary of State.
12 We've asked the -- them to turnover to us -- for
13 instance, produce the ballot specifications that were
14 delivered to Antrim County prior to October 23rd. The
15 whole case seems to turn on the issue of whether
16 Mancelona Township was properly updated. So we're
17 entitled to look at the ballot specifications prior to
18 October 23rd and after October 23rd.

19 J. Halderman is looking at this information,
20 and we don't have that information. That's why we
21 sent those requests to them. We've asked them to
22 specify or give us information on the XY coordinates,
23 the -- the programming of each specific ballot in --
24 in the county. They don't want to give us that.

25 We asked them to produce a functional

1 specification of how the tabulator computes and
2 reports results. We asked for functional
3 specification of the tables and feed aggregation
4 tables for ballot production. This is all relevant to
5 our case, because it goes directly to the issue of how
6 a mishap like this can occur in Antrim County, where
7 you have a direct flip of votes in 9 out of 16
8 precincts, from Jorgensen to Trump, Trump to Biden,
9 and -- and Joe Biden ballots get categorized as under
10 votes.

11 So we can look at -- you know, I'm just
12 looking at -- on my list, 45 specific requests for
13 production that deal specifically with data presented
14 in the J. Halderman report. I don't want to go
15 through every one of those, but that's how we
16 categorize the idea that they're not giving us
17 information that they've already produced to their own
18 expert witness. So --

19 THE COURT: Now, you, I'm sure -- and I
20 think I saw it, but you've got a request out
21 regarding -- regarding information used by their
22 expert to formulate his opinion.

23 So that would theoretically cover the
24 matters that you've just gone through with me;
25 correct?

1 MR. DEPERNO: I think on a broad scale, yes.
2 What I was trying to do -- just so everyone
3 understands, is these guys I deal with, these forensic
4 image experts, you know, they think different than I
5 think and they're giving me very specific items they
6 need, as opposed to broad sweeping items. So I was
7 giving the other side what I thought would be actually
8 helpful in terms of just specific items that we were
9 looking for.

10 And I understand that that then amounts to a
11 large number of requests for production, but to the
12 most part, they're actually quite specific, and -- in
13 terms of what information we're asking for. And it's
14 directly from our experts asking me for specific
15 items. That's why there's so many. It's not as the
16 other parties claim, which we're trying to somehow
17 harass them with -- with a large number of requests.

18 That doesn't mean I don't understand that
19 they have valid objections to some of the requests.
20 But for the most part, they're not overly burdensome
21 in the -- in the -- in the way that we've asked for
22 them in specific items and specific information.

23 THE COURT: Explain to me the relevance
24 of -- of acquiring Ryan Friedrichs' information,
25 correspondence from the Secretary of State husband?

1 MR. DEPERNO: Well, the -- the idea behind
2 that is that we were -- apparently there's this
3 investigation into him as a guy who was being
4 investigated for specifically deleting items on a
5 state or city computer network. Deleting emails,
6 deleting other information that was requested, as I
7 understand it, pursuant to Freedom of Information Act
8 requests.

9 And I think the relevance there would be
10 that certainly if he's willing to do that, and the --
11 and the Attorney General is not willing to investigate
12 him, or has stalled the investigation entirely, that
13 goes to the issue of credibility of the Secretary of
14 State herself, is the way we are looking at that.
15 If -- if her husband is willing to delete information,
16 and -- and the Attorney General's not willing to
17 investigate those claims.

18 THE COURT: All right. Continue on with
19 your argument, I interrupted you.

20 MR. DEPERNO: No. But certainly I
21 understand that they are a lot of requests. In some
22 respect, I don't have a problem reducing the number of
23 requests. If the parties had come to us and tried to
24 work that out before they filed this motion -- there
25 was no discussion from them, or even any request to

1 limit the number of interrogatories or requests to
2 produce.

3 But I can see their point, to some extent,
4 that they want the number of requests reduced.
5 Certainly everyone wants the number of requests to be
6 reduced. But as I've explained, I thought we were
7 actually being helpful in terms of tailoring them and
8 giving them very specific requests, as opposed to very
9 broad requests -- in which case I get an objection for
10 being overly broad. So -- but I'm willing to reduce
11 them. If we can pick a number and come up with a
12 number, I can -- I can do that.

13 THE COURT: Well, the Supreme Court actually
14 did that for us and the number is 20, so we're going
15 to go ahead and go with 20. Pick your best 20, which
16 means you get 17 more for each party that you can ask.
17 We can start going through some of these, but before
18 we do, I'll take any additional argument from
19 Mr. Kazim or Mr. Grill.

20 Mr. Kazim?

21 MR. KAZIM: Thank you, your Honor.

22 A few points to address. With respect to
23 the FOIA requests, the -- the reason being put forth
24 that it was because of a news article and plaintiff
25 claims that there were some emails produced to this --

1 to the Detroit News, that they claim were not produced
2 to them -- we were -- I mean, I think the -- the
3 reasonable thing to do would have been to identify
4 which emails plaintiff is claiming that they did not
5 receive. Like I stated earlier, with -- in response
6 to the first request, we produced over 2500 pages of
7 documents -- which included a number -- which were
8 all-encompassing requests that talked about all
9 emails, all communication between the Secretary of
10 State, between the Michigan Senate, Michigan
11 Legislature, and so on, as well as all communication
12 between Dominion and ElectionSource.

13 So those requests were all encompassing,
14 were broad, and we responded to them in their
15 totality. So if -- if plaintiff now claims that there
16 are some emails that he feels that were produced to
17 the reporter for the Detroit News, that they were not
18 produced to them, they -- I think the reasonable thing
19 to do would have been to say, okay, we didn't get
20 these requests -- emails, we would have checked with
21 them and gotten -- it's entirely possible we missed
22 one or two in our -- a transaction that's involving
23 2500 pages of documents.

24 With respect to Dominion manuals, I think we
25 are coming across the same issue that we did

1 initially. These manuals are -- are specifically
2 subject to -- to notice of nondisclosure and
3 confidentiality. They were provided to Antrim County
4 with specific notice of nondisclosure and proprietary
5 information that the County -- again, absent a -- an
6 order from this Court cannot disclose.

7 I think we, again, have to go back to the
8 relevance argument, which is predominant in this
9 motion. You know, how are these -- plaintiff says
10 that they're entitled to it, but that's not
11 sufficient. How -- how are these manuals and these
12 manuals are -- without identifying which manual they
13 are interested in, how are these manuals relevant to
14 the prayer for relief that's been requested in this
15 complaint?

16 THE COURT: I'm going to move this along,
17 Mr. Kazim -- I don't mean to interrupt you, but to my
18 mind, clearly the -- the plaintiff is entitled to
19 review the manuals detailing the operation of the
20 Dominion system, subject to a protective order that
21 limits distribution of that information outside the
22 scope of this lawsuit; and further, places that
23 information to the extent it comes into -- into the
24 Court file, places that information under seal.

25 I understand the need to protect it, for a

1 variety of reasons, but we can't -- it would be
2 counter to public policy to create contract provisions
3 that would limit the discoverability of documents.
4 These documents clearly are relevant to the claims
5 regarding the operation or lack thereof of the
6 Dominion -- the Dominion software, the Dominion
7 hardware. It's producible. So subject to those
8 restrictions, it does need to be produced.

9 MR. KAZIM: Fair enough, your Honor.

10 But going forward -- and I'll continue on.
11 The cell phone records. Apparently this request is,
12 again, based on mere conjuncture, because plaintiff
13 claims they did not find any record of a communication
14 between the county and the Secretary of State, in any
15 of the responses produced by the Secretary of State.
16 That in and of itself is not -- provides no basis,
17 factual or evidentiary, to request cell phone records
18 of county elected and appointed officials, because
19 they could not find any documentation, you know,
20 regarding communication in any of their responses
21 produced by the Secretary of State. And I'll let the
22 Secretary -- the AG's office address that further.

23 With respect to the IP addresses and -- and
24 MAC addresses, the -- it seems like based upon
25 counsel's argument, that the -- the claim is again

1 that these machines were -- were connected to the
2 Internet, and then I'm hearing for the first time that
3 apparently Mr. Bailey claims that one computer in the
4 county was left turned on overnight. There's no
5 factual or other evidence being produced to this Court
6 or certainly to the parties, as to what is the basis
7 of this claim. But what's important, is that the
8 Election Management System, the EMS terminal, has
9 never been connected to the Internet; and this was
10 information that has been disclosed to plaintiff's
11 forensic team.

12 They were there in the county. They got to
13 view it. They got to verify it. So there's simply no
14 other -- no evidence and no fact that is before this
15 Court that the EMS terminal was ever connected to the
16 Internet. And by -- by what -- by the theory that's
17 being forward -- put forward by plaintiff in -- in
18 support of this request, presumably, you know, all the
19 Court's computers in Antrim County could also be
20 subject to this request.

21 I -- we go back -- finally we go back to
22 this argument on documents that Mr. Halderman used.
23 We have -- it -- we have cited to the Court the
24 section of Mr. Halderman's report -- specifically
25 Section 1 of his report and 2.3, of his report, which

1 specifically lists materials examined for this report,
2 and he clearly states that the only materials relied
3 upon him were the forensic images that were obtained
4 by the forensic team -- plaintiff's forensic team.
5 Election tapes, your Honor, these aren't tapes that
6 were produced or printed out from the media drives,
7 the compact flash drives that plaintiff had access to
8 when it took forensic images. More -- and those were
9 in the possession of the county clerk.

10 They themselves used those tapes, your
11 Honor, in their reply or supplemental brief in their
12 support for motion for preliminary motion, for
13 preliminary injunction and temporary restraining
14 order. If the Court recalls, they submitted a
15 supplemental brief that had pictures of the
16 marijuana -- that's -- marijuana ballot initiative and
17 the school board, because that's the information that
18 the Court relied upon. So they have had those
19 election tapes. And to the extent that those -- they
20 want copies of those election tapes, the County
21 doesn't have them. Those are within the precinct.

22 But more importantly, the -- the basis for
23 printing those election tapes is the C -- compact
24 flash drives, and they have had the opportunity to
25 take forensic images of all those flash drives. You

1 know, finally, the -- the ballot specifications and --
2 and all -- again, it goes back to plaintiff's
3 continued -- repeated argument that Mr. Halderman
4 somehow had access to information that plaintiff did
5 not. And, again, all that information -- all the
6 information that Mr. Halderman relied upon are the
7 forensic images.

8 So I don't have any further argument and I'm
9 happy to answer any questions the Court has.

10 THE COURT: All right. Thank you,
11 Mr. Kazim.

12 Mr. Grill?

13 MR. GRILL: Thank you, your Honor.

14 I'll begin with a few comments about the
15 plaintiff's arguments regarding Mr. Halderman or
16 Professor Halderman's report. We're going a little
17 bit of out order here, but attached to our response to
18 the plaintiff's motion to extend discovery, we
19 attached a declaration from Mr. Halderman, in which he
20 reiterates exactly what he relied upon. And as
21 Mr. Kazim pointed out, it's chiefly the EMS images
22 that were collected by the plaintiff's forensic team.

23 The memory card data from Antrim County,
24 which was also available to the plaintiff's team. The
25 copies of the poll tapes, similar to those pictured in

1 the plaintiff's forensic report. Then the timeline of
2 events was presented by the Antrim County Clerk Sheryl
3 Guy in her testimony before the Michigan Senate
4 Oversight Committee on November 19th, which is
5 probably available on the committee's website.

6 He also specifically addresses the
7 allegations that Mr. Deperno raises here about what he
8 thinks Mr. -- Professor Halderman relied upon. Data
9 uploaded to the state of Michigan from Antrim County.
10 As he states in his declaration, he does not mention
11 or make any claim he --

12 THE COURT: You're dropping out just a
13 little bit there, sir.

14 MR. GRILL: Okay. I apologize.

15 THE COURT: He does not rely -- go ahead.

16 MR. GRILL: Does not rely on any -- does not
17 make any claims about data uploads in the state of
18 Michigan, only about the results published in Antrim
19 County.

20 Secondly, data extracted from the Antrim
21 County EMS. He used the image collected by
22 plaintiff's forensic team, was not provided any
23 additional passwords or encryption key. He used the
24 same data that was given -- that collected by the
25 plaintiff. Concerning the election tapes and the

1 output file. Antrim County provided him with copies
2 of the poll tapes; however, plaintiff's forensic
3 report includes photographs of at least some of those
4 tapes, and the only ones with significant differences
5 from the final results.

6 Assuming that the output file referred to in
7 the plaintiff's motion means the results data from
8 each tabulator, these were on the memory cards that
9 were collected by the plaintiff. Notably, also in
10 subsection -- I believe it is -- yes, here, Subsection
11 K of his declaration, regarding the installation
12 procedures. He doesn't rely on any information about
13 installation procedures to make his report, but
14 Dominion user manuals with installation instructions
15 are included in the EMS image collected by plaintiff's
16 team.

17 This represents one of the most disturbing
18 things about the arguments here, about what it is the
19 plaintiff is seeking, is he doesn't appear know what
20 he already has. That this information was collected
21 by the plaintiffs in December and it has been in their
22 possession this entire time. Concerning what he's
23 looking for and how this is only related to the
24 information his expert have requested. As the Court
25 pointed out, that doesn't address any of the

1 investigations regarding Ryan Friedrichs. Also
2 doesn't address ballot boxes throughout the state of
3 Michigan.

4 And most notably, in his fifth request here,
5 request to produce No. 8 telephone, records for 64
6 different state of Michigan officials, including the
7 governor's legal counsel, from August 1st, 2020, being
8 personal phones, as well as emails, and text
9 messages --

10 THE COURT: Did we lose you again?

11 I'm sorry, Ms. Jaynes. We did?

12 THE COURT REPORTER: Yes.

13 MR. GRILL: I'm sorry.

14 Where -- where did I drop off, your Honor?

15 THE COURT REPORTER: August 1st, 2020 --

16 MR. GRILL: Through the present.

17 And that includes a request, not just for
18 their -- their official state of Michigan phones, but
19 also for their personal phones. And the request
20 specifically also says, as well as emails and text
21 messages. I don't even know where to begin about how
22 overbroad that is, your Honor. But suffice to say,
23 I'm looking at this list of names, and I -- as an
24 attorney who works, you know, with a lot of election
25 issues, I don't know who most of these people are.

1 There are about maybe five or six people
2 that would have anything actually to do with this
3 case, we've already identified them to the plaintiff;
4 and the rest of this is so open-ended, it -- it's hard
5 not to think that this was just a page out of a
6 directory. So our -- in looking at the requests here,
7 out of the 112 requests to produce, the ones that we
8 object to and the ones that are most frequent, are the
9 ones that call for any and all documents,
10 correspondence, or communications with this host of
11 people, which has nothing to do with Antrim County's
12 election. News agencies, government officials,
13 governor's legal counsel, absolutely anybody but
14 anyone involved with the Antrim County election.

15 Furthermore, what we're looking for if --
16 not just -- again, it will be great to have -- we're
17 also looking to limit the scope of this to persons
18 involved with anything to do with the Antrim County
19 election, as opposed to kind of this open-ended review
20 of state government.

21 THE COURT: All right. Thank you.

22 Okay. The question before the Court is a
23 motion that's been filed by both defendants to place
24 some limitations upon -- upon the discovery requests
25 that have been filed. We've had a more detailed

1 discussion regarding discovery in general. The motion
2 was filed as a motion to -- for a protective order
3 under 2.302. It does appear to the Court, that the --
4 the state of discovery, as it stands now, from the
5 plaintiff has been broad, to the point of being
6 overbroad in certain areas.

7 The plaintiff is certainly entitled to
8 discover matters that pertain directly to the election
9 in Antrim County. The communications between Antrim
10 County officials involved in the election and state
11 officials, be that at the Secretary of State or
12 elsewhere. Certainly the plaintiff is entitled to --
13 the State is -- pardon me, the plaintiff is entitled
14 to have its 20 interrogatories. And as the Court has
15 already indicated, the interrogatories in their
16 current form will be struck and the plaintiff will
17 have an opportunity to file the remaining 17
18 interrogatories for each party, as each party -- each
19 defendant has already answered three.

20 The 20 interrogatories are a limitation
21 under the new rules relating to discovery. We're
22 going to go ahead and abide by those rules in this
23 instance. As a general rule, responses to any
24 questions and the questions themselves -- be they
25 matters pertaining to interrogatories, requests for

1 production, must pertain to Antrim County and not be
2 generalized to something larger like the state of
3 Michigan. One can't imagine the number of Freedom of
4 Information Act requests that come in on a daily basis
5 at the state of Michigan.

6 I know this because the FOIA coordinator for
7 LARA used to report to me at one point, and the number
8 was in the hundreds, if not the thousands every single
9 day. I believe it was hundreds. And I am assuming
10 that that is probably consistent with other areas of
11 state government, none of which would have any
12 relevance whatsoever to the election in Antrim County
13 and Dominion software -- hardware or software
14 elements, or any -- any action by the Antrim County
15 Clerk, with regard to that election.

16 Any issues regarding Mr. Friedrichs are
17 deemed irrelevant by the Court, absent some other
18 information from the plaintiff that results from
19 deposition. We're past the point of the end of
20 discovery. We'll talk about that in a moment. But
21 without more, that's a fishing expedition, we're not
22 going to get into -- into spouses.

23 I certainly don't visit upon the Secretary
24 of State any issues that are encountered by her
25 husband. And, of course, we have no idea whether or

1 not those issues, as identified by the plaintiff, are
2 factual or not. There simply isn't enough there, and
3 without more, I'm not going to order any information
4 from Mr. Friedrichs.

5 As far as the qualified voter file, I
6 understand now the plaintiff's interest in that -- in
7 that file. Rather than appearing to seek information
8 regarding the number and type of people that have been
9 removed from the file -- meaning dead or alive, he's
10 really seeking to understand the universe of people
11 associated with the -- the qualified voter file in
12 Antrim County. That information ought to be available
13 in a county-by-county manner. It ought to also be
14 available -- there should be some analysis of people
15 that have been removed and added to that file over a
16 period of time.

17 I'm going to leave the parties to work out a
18 solution with regard to Antrim County information. I
19 think going to other counties without more is
20 overbroad, and certainly would be burdensome,
21 expensive, and, again, I don't see relevant to this
22 case at this point. So without more, I will allow
23 information regarding the qualified voter file. I can
24 see the potential relevance to the plaintiff, but I'm
25 not going to allow it outside of Antrim County, and

1 I'm going to direct the parties work together to see
2 if they can secure that information.

3 As to items that may have been distributed
4 from Antrim County emails to the -- I think it was the
5 Detroit News, pursuant to a FOIA request that may not
6 have been turned over to the plaintiff for discovery
7 purposes. Those two statutes, of course -- or those
8 two operations of law, being FOIA and the court rules
9 are different, certainly, and oftentimes they overlap,
10 but I don't know what the language was relating to the
11 request specifically from the Detroit News, and as
12 plaintiff -- Antrim County's defense team indicated,
13 there's always the possibility that something was
14 missed.

15 I'm going to direct Antrim County to review
16 its emails responsive to the discovery requests from
17 the plaintiff, and determine whether or not there were
18 matters that were distributed pursuant to the Detroit
19 News freedom of information request that may be
20 responsive to the requests from Mr. Deperno. And if
21 they find those, they are to provide those in a timely
22 way to Mr. Deperno. We've already talked about the
23 Dominion manuals. I'm not going to go through that
24 again.

25 As to cell phone communication requests.

1 Before the Court will entertain a blanket disclosure
2 of cell phone requests -- pardon me, cell phone
3 contacts, which I do think is, by its nature, at least
4 initially overbroad, I think that more discovery needs
5 to be done. Specifically there should be a deposition
6 of the -- of the county clerk, I'm assuming that
7 deposition was requested and simply hasn't occurred.
8 I may be wrong, we'll talk about that. But it seems
9 to me that -- that that would provide the information
10 regarding how and if the -- the clerk and the clerk's
11 office was communicating with Lansing, at large, with
12 regard to the situation in Antrim County on the night
13 of the tabulation of the votes.

14 If those contacts were by phone, then it is
15 appropriate that the clerk and the clerk's staff
16 communications be identified. The way we'll go
17 about -- well, I'm going to leave it at that. And if
18 we find out that that information is necessary, as a
19 result of depositions, then we'll go ahead and have
20 more discussions, if the parties aren't able to agree
21 amongst themselves regarding how that information is
22 to be provided. I don't see that the information from
23 any other county official -- unless it relates
24 strictly to the election results that evening and the
25 issues with Dominion, to the extent there were issues

1 with Dominion, would be relevant for production.

2 As far as the IP addresses, the issue as I
3 understand it, is any -- any computer that was
4 connected to the county network, by the analysis
5 provided -- or the theory provided by the plaintiff,
6 may be a computer by which someone could access the
7 Internet -- pardon me, access the -- the election
8 system and connect that system to someone with
9 malicious intent, perhaps, on the Internet. And that
10 seems overbroad and unproven at this point. However,
11 I do think that the -- the IP addresses of the
12 computers that were used specifically by the clerk's
13 staff and any staff involved in the -- in the actual
14 collection of votes, tabulation of votes, use of
15 Dominion hardware or software, should be accessible to
16 the -- the plaintiff and will be provided.

17 As to the -- the tapes and the output files,
18 it appears that the -- it appears that the plaintiff,
19 at least by Mr. Grill's response, already has that
20 information.

21 Is that -- is that correct, Mr. Deperno? Do
22 you already have that information, based on your
23 forensic review?

24 You're muted, sir.

25 MR. DEPERNO: Absolutely not.

1 The first -- the tabulator tapes are not
2 collected in the forensic images, they were not there.
3 The only tape we had was the one from Central Lake
4 Township that was given to us by Judy Kosloski. And
5 I'll point specifically to J. Halderman's report,
6 where he says, "As a final confirmation, I have
7 manually compared the final certified results to
8 copies of the poll tapes provided by the county." So
9 he has them. We don't have them. We only had Central
10 Lake Township.

11 And I'll also state that the -- it appears
12 that the -- that Halderman had access to other
13 information -- even the source code, to be honest with
14 you, as well, since he knows how sequential IDs are
15 assigned within the system. That's not part of the
16 forensic images, he knows information, what I'm
17 telling you within the report, that we don't have.

18 But directly to our question of the
19 tabulator tapes, no, those are not part of the
20 forensic images; and we've asked for them and we don't
21 have them.

22 THE COURT: All right. Here's how we're
23 going to address that.

24 First, any matters that Mr. Halderman --
25 regarding the Halderman report, anything that he used

1 that would be responsive for purposes of 703 --
2 meaning would be items that he used in preparing his
3 report, to the extent they have not been provided by
4 Mr. Halderman to the plaintiff thus far, must be
5 provided. Mr. Halderman, despite his -- his
6 affidavit, is directed -- or counsel is directed to
7 bring to Mr. Halderman's attention the two points that
8 have just been raised by plaintiff. And if there is
9 additional response that is necessary, as a result,
10 specifically with regard to any poll tapes that were
11 provided to him from the County that were not part of
12 materials already provided by Mr. Halderman, or in the
13 possession of the plaintiff pursuant its forensic
14 imaging, those materials must be provided.

15 All right, we'll see how that does.

16 MR. GRILL: Your Honor, just a quick point
17 of clarification.

18 THE COURT: Yeah.

19 MR. GRILL: That doesn't require that we
20 produce the image back to plaintiff counsel; correct?
21 The -- because that was a rather large set of files
22 that took a long time to download and plaintiff
23 already has that. We don't need to send that again;
24 correct?

25 THE COURT: Well, I think you got it from

1 the plaintiff, if I remember correctly. Isn't that
2 accurate?

3 MR. GRILL: Correct. That is correct, your
4 Honor.

5 THE COURT: All right. Then the answer to
6 that is, no, it's already been provided by the
7 plaintiff to your expert. There's no reason to
8 provide it back. Obviously, I understand the parties
9 desire to be in technical compliance with the requests
10 and the rules, and that's obviously important, but in
11 the interest of time, and to make sure that this file
12 doesn't occupy too much electronic space, it makes
13 sense that where there can be accommodations on those
14 kinds of issues, there should be. And as I've told
15 the parties before, it's my expectation that they will
16 have communication regarding these issues before
17 bringing them to the Court.

18 All right. Let me continue to review my
19 notes.

20 Where would the ballot specifications be
21 held, Mr. Deperno? Who -- who has the specifications?
22 Is it the county clerk?

23 MR. DEPERNO: I believe it would have to be
24 the county clerk that would have that.

25 THE COURT: All right.

1 Mr. Kazim, is there an issue with regard to
2 production of the ballot specifications? That would
3 seem to me to be a fairly straightforward issue and
4 bears some relevance, given the -- the human error
5 issue that's been identified by the clerk.

6 Is that something that's producible?

7 MR. KAZIM: Your Honor, I am -- my -- and I
8 will confirm with the county clerk's office, but my
9 understanding was that that's information that we
10 don't have, that those ballot specifications are with
11 the individual township clerks. But it -- but --
12 to -- you know, based upon the Court's ruling so far,
13 we will -- we will -- if we have them, we will produce
14 them. We -- if we don't have them, I -- I'm not
15 sure if -- I don't know if the Court expects -- is
16 asking the County to then go and obtain documents that
17 are not already in its possession.

18 THE COURT: Well, that wouldn't be
19 appropriate, so, no, I'm not asking you to do that.

20 MR. KAZIM: Okay.

21 THE COURT: That's -- discovery is obviously
22 about producing information that you have. So that's
23 what you're requested to do. Thank you for agreeing
24 to do that. And -- and hopefully that will resolve
25 that issue; if not, it may be back before me.

1 All right.

2 MR. KAZIM: Thank you, your Honor.

3 THE COURT: Folks, that's the -- the issues
4 to compel that I see. I probably missed something, if
5 so and you'd like some more direction, let me know and
6 we'll deal with it right now. But going through my
7 notes, that's what I see.

8 MR. KAZIM: Your Honor, if I may, there's --
9 there were multiple requests for personnel files.

10 THE COURT: Ah. We didn't talk about that.
11 Why don't you go ahead and make your argument.

12 MR. KAZIM: Well, I think my argument is,
13 your Honor, that there were -- based upon the -- the
14 claims in plaintiff's complaint -- first of all, I
15 would note that we have -- to the extent that we
16 interpreted the -- we interpret plaintiff's complaint,
17 even though it's only against Antrim County, the
18 allegations in those complaint obviously involve
19 Ms. Guy in her capacity as a township clerk.

20 And we have previously produced Ms. Guy's
21 personnel file, which really had -- the only
22 information it had is -- are -- are health and -- and
23 medical information and payroll information. And I
24 believe the Court, in one of the earlier motions, has
25 already stated that -- that to the extent a personnel

1 file only has payroll, health, dental, that insurance
2 information, that that obviously is not -- doesn't
3 bear any relevance to the case. So -- but in
4 addition, now, Mr. -- the plaintiff has asked for
5 personnel files of the county administrator. The
6 county deputy administrator, who have had -- who have
7 had no role whatsoever in the supervision or
8 conducting of elections in Antrim County.

9 They have also asked for the personnel file
10 of the court clerk, Micki Hocking -- which I'm not
11 even -- and I can only presume that that is because
12 plaintiff somehow believes that there was some sort of
13 retaliation because the case was in -- was for a
14 little while dismissed for service of not -- for
15 nonservice of process. And then there is a request
16 for Ms. Wing's personnel file; who, again, is a
17 employee of the county clerk, and I've been advised
18 that the only information in Ms. Wing's personnel file
19 is again payroll, health insurance, dental insurance,
20 that type of information.

21 THE COURT: All right.

22 Let me hear from you, Mr. Deperno.

23 MR. DEPERNO: I think Connie Wing's file is
24 directly relevant. She's the assistant to Sheryl Guy.
25 Pete Garwood is the County Administrator. We

1 understand he's had direct contact with Dominion
2 Voting System. And those two are two people that we
3 would certainly request directly. The other people
4 that we requested -- including Ms. Hocking, we
5 understand all work within the county clerk's office
6 and work with Sheryl Guy directly.

7 And if that's -- if they have roles in
8 dealing with the election or processing the election,
9 I think their personnel files would be relevant.
10 Certainly we can -- obviously we'd have a protective
11 order, we're not going to release any data from that
12 regarding their health records or anything like that.
13 We'd probably even go so far as to agree that they
14 could carve out that information, that's medical
15 information. That's not the type of information we're
16 looking for.

17 THE COURT: Look at you guys being
18 reasonable all of a sudden. How about that? All
19 right.

20 Well, let's -- let's go to the county. Did
21 Ms. Hocking work on the election?

22 MR. KAZIM: To my knowledge, no. The only
23 people -- the only person -- and we have provided that
24 information to plaintiff earlier -- who had access to
25 the Election Management System terminal was Ms. Wing.

1 THE COURT: All right. Ms. Wing's personnel
2 file should be provided. Any materials relating to
3 personally identifying information or matters that
4 simply aren't relevant, pursuant to previous decisions
5 regarding personnel files of this Court, should be
6 redacted. But there is obviously precedent for
7 providing that information, it relates potentially to
8 bias. It's certainly, therefore, a matter of
9 relevance. It can relate to credibility, and it
10 should be provided.

11 As to the county administrator, the county
12 administrator is involved in every aspect of county
13 government. Unless there is something showing direct
14 involvement with the county administrator and the
15 election itself, or Dominion and the management of the
16 Dominion software relative to the election, I don't
17 see the relevance of the administrator's file.
18 Likewise, with the administrator's deputy.

19 As to Ms. Hocking, she, according to
20 counsel, was not involved in the election. The Court
21 knows that Ms. Hocking handles the county clerk's
22 court matters in -- in Antrim County. Ms. Hocking
23 certainly was involved in the decision by the county
24 clerk's office to dismiss this case based on a
25 misunderstanding of the service role, which this Court

1 corrected immediately. So I don't see any -- any
2 issue there. No reason to provide Ms. Hocking's file,
3 again, unless information is developed at some point
4 that -- that indicates she had more of a role than has
5 been expressed to me at this point.

6 All right. Mr. Kazim, did you have any
7 other issues? On this -- pardon me, on this
8 particular motion to compel -- or motion for
9 protective order?

10 MR. KAZIM: Your Honor, if -- just for
11 clarification, is the Court -- does the court order
12 now state that plaintiff is entitled to communication
13 between county and state officials?

14 THE COURT: As it relates to -- well, let
15 me -- let me back up. I understood that that request
16 has already been made for production of those
17 documents.

18 Is that -- is that correct?

19 MR. KAZIM: It has, and it was produced in
20 the first request, yes.

21 THE COURT: Okay. It's already been
22 produced. What I've asked is that -- I think in
23 association with the -- with the FOIA response issue,
24 that the clerk review any materials that might be
25 responsive to that request, that inadvertently may

1 have not been produced with the initial set of
2 responses.

3 But let me ask you, Mr. Kazim, if you've
4 already produced it, why are you concerned about it?
5 Is there something else out there that you're trying
6 to protect?

7 MR. KAZIM: No, I -- I -- I don't have
8 any -- I guess my concerns were not related
9 specifically to the state communication, but they have
10 also requested communication between Facebook, Google,
11 Amazon, Apple, and that was part of the discovery
12 request and I just want to make sure that the Court's
13 order doesn't expand into or bleed into those requests
14 as well.

15 THE COURT: It does not, but, remember that
16 I've said as an overarching rule, it's my expectation
17 that matters involving this election -- specifically
18 the election itself, its conduct, and the aftermath of
19 the election, those are the area that are, I think,
20 appropriate for discovery. Anything outside of that,
21 I think is inappropriate for discovery and not
22 relevant.

23 MR. KAZIM: Understood.

24 And finally, your Honor, is the time frame
25 to respond, is that the 28 days from today? From when

1 the order is signed? We just want to make sure we
2 don't come before you again.

3 THE COURT: Well, I like that idea very
4 much, Mr. Kazim, but we've already talked about the --
5 the modification of my initial order requiring an
6 aggressive response schedule. I agreed to allow and
7 ordered a 28-day response -- response, consistent with
8 the -- consistent with the court rules as they relate
9 to discovery. That's going to stay in place. So I'd
10 like those materials produced, just for time's sake,
11 within 28 days of today. I recognize the order may
12 take a few days to get through.

13 But if you would all write down on your
14 calendar and go out 28 days from today, that would be
15 appreciated.

16 MR. KAZIM: Thank you, your Honor. I have
17 no further questions or clarifications.

18 THE COURT: All right.

19 Mr. Grill, any clarifications for you, sir?

20 MR. GRILL: Yes, your Honor. Just very few.
21 Trying to keep this as brief as possible.

22 Similar to Mr. Kazim's concern on the
23 personnel files, the plaintiff has asked for the
24 personnel files of Director of Elections, Jonathan
25 Brater and the Secretary of State's spokesperson,

1 Tracy Wimmer. I might be willing to recognize at
2 least some -- some -- like the Court described, the
3 basis for -- for bias or something for the director of
4 elections, but the Secretary of State's spokesperson
5 seemed like it's a bit of a reach.

6 THE COURT: Mr. Deperno, as to the
7 spokesperson?

8 MR. DEPERNO: Yeah. Her name was on -- on
9 many correspondence that were produced, so we thought
10 she seemed to have direct relevance to the election
11 and her personnel file would be relevant.

12 THE COURT: Okay. When you say materials
13 that were produced -- and, of course, I haven't seen
14 those materials, are you talking about emails relating
15 to the election that night in Antrim County?

16 MR. KAZIM: The election in general.
17 There's -- there's very little, if anything, regarding
18 Antrim County that was produced to us. But in terms
19 of the election in general, she seemed to be the
20 person that had -- other than Jonathan Brater, the
21 most relevance or -- or information regarding how the
22 Secretary of State conducted the election.

23 THE COURT: All right.

24 Well, given the fact that she's the press
25 secretary or communications officer, she's merely

1 mimicking or providing information coming from her
2 superiors or her colleagues who are handling other
3 areas of the Secretary of State, like Mr. Brater, so I
4 don't see that her information is relevant. Again, if
5 you find something and -- and you need that
6 information based on what you find, you're welcome to
7 bring that issue back. But Mr. Brater's information
8 in his file would be relevant, absent the materials
9 that we've already discussed purging from those files
10 for privacy's sake.

11 Mr. Grill, your next issue?

12 MR. GRILL: Yes, your Honor.

13 Earlier on, the Court said that Mr. Deperno
14 is limited to an additional 17 interrogatories. Is
15 the Court putting a number on the number of requests
16 to produce?

17 THE COURT: Well, that's a trickier
18 question. I hate to -- I hate to impose a number
19 without -- without some guidance from the parties. I
20 think what I will do is this: Rather than impose a
21 strict number, what I will do is remind the parties
22 that it's my expectation -- it's my order, that any
23 issues regarding discovery from this point forward
24 relate to Antrim County, it's conduct of the election,
25 Dominion software, Dominion hardware, communications

1 between Antrim County and the state of Michigan,
2 matters that are focused in on the election in Antrim
3 County, rather than the more generalized broad kinds
4 of issues that we did see, certainly, from the
5 plaintiff's request.

6 And, look, the plaintiff has a right to ask
7 for whatever it can. I don't fault the plaintiff for
8 doing so. And for most of what they've aimed at, they
9 have had at least some colorable basis for the
10 request. However, we're at a point in the case where
11 we need to file down the case. Attorneys will work
12 files to death, and that's fine. But ultimately the
13 matter's got to be tried, and that means that the
14 parties need to start making decisions about what kind
15 of matters will be produced at trial -- assuming we
16 get to trial. Therefore, they need to whittle down
17 their discovery strategies, as well, to the matters
18 the Court feels are truly relevant to the issues at
19 hand here in Antrim County.

20 Does that make sense to the parties? Or do
21 I need to put a hard and fast number on the requests
22 for production?

23 MR. DEPERNO: That's fine by me.

24 MR. GRILL: From our standpoint, your Honor,
25 we -- we would like to have a hard and fast number,

1 just because we seem to have some repeated
2 disagreements on this point.

3 MR. KAZIM: I would agree, your Honor. It's
4 just -- just for the simple reason that I just foresee
5 that we may not be able to come to an agreement on the
6 scope of this Court's order, and we would be back here
7 arguing -- making similar arguments.

8 THE COURT: Mr. Deperno?

9 MR. DEPERNO: Well, I -- I think the Court
10 was probably clear on what it was asking for in terms
11 of what it just explained; the issues would be related
12 to Antrim County, et cetera, as you explained. I can
13 work within that. I can even agree to schedule a
14 conference with opposing counsel to discuss which --
15 which of those requests we have outstanding. I think
16 that's something we should be able to deal with.

17 THE COURT: You should be able to deal with
18 that, but you haven't been and I mean you, meaning all
19 of you, thus far, which is why we're here with seven
20 motions on this -- these kinds of issues.

21 But we will go ahead, then, and create an
22 artificial limit to 50 requests for production. My
23 understanding is that there are currently 112 out to
24 Mr. Grill. Perhaps a similar number to Mr. -- 98 to
25 Mr. Kazim. 18 have been responded to by Mr. Kazim.

1 I'm going to assume a similar number by Mr. Grill -- I
2 don't know that.

3 The bottom line is I'm going to put a limit
4 of 50 to each party. And to the extent that becomes
5 burdensome, or leaves out information that is
6 consistent with my direction regarding relevance,
7 then, plaintiff, you can come back and ask for more.

8 MR. DEPERNO: Thank you.

9 THE COURT: All right. You're welcome.

10 MR. KAZIM: Thank you, your Honor.

11 THE COURT: All right, Mr. Grill, back to
12 you?

13 MR. GRILL: Yes. The -- the only other
14 thing I was going to -- to bring up, your Honor, would
15 be -- again, with the idea that there is a dispositive
16 motion pending that might limit the scope or limit the
17 claims remaining, is there any desire or interest in
18 the Court in holding discovery until that motion is
19 decided?

20 THE COURT: I appreciate the request. I've
21 heard it from both you and Mr. Kazim, but, no, I think
22 discovery needs to continue at pace. I'm not making
23 any judgment, I have read the motion. I'm not making
24 any judgment on the motion by saying so, but there are
25 issues in this case that certainly deserve to be

1 fleshed out.

2 We are at the end of discovery. We're past
3 the deadline that was imposed by the Court. We're
4 going to talk about that in a few moments. And,
5 again, I think discovery needs to continue at pace
6 regardless of the interposition of a dispositive
7 motion.

8 All right. Mr. Grill, anything further on
9 the -- on the protective order issue?

10 MR. GRILL: Your Honor, I'm -- I'm
11 optimistic and I certainly hope with the Court's
12 instruction and the scope of discovery and the
13 limitations placed, that -- that should address it and
14 I guess we'll go from there.

15 THE COURT: All right.

16 Mr. Deperno, any issues on the -- the --
17 pardon me, I'm having troubles remembering what we're
18 talking about. There it is. Now I can see. The
19 protective order issue under 302?

20 MR. DEPERNO: Not from the plaintiff, your
21 Honor.

22 THE COURT: Okay.

23 In that case, I know that several of you
24 have taken good notes regarding this matter. Can I go
25 to the Attorney General's office and ask him to

1 prepare a proposed order? And you're certainly
2 welcome to work with your brother counsel to come up
3 with that order. I would expect that it would be
4 signed by all of you, hopefully. And if not, then it
5 can be submitted under the Seven-Day Rule.

6 MR. GRILL: Yes, your Honor.

7 THE COURT: Okay.

8 All right. Let's go to the next issue.
9 We're making some progress here. This is the motion
10 to strike expert witnesses, that's been filed by the
11 Secretary of State.

12 Mr. Grill, if you'd like to go ahead and
13 make your argument.

14 MR. GRILL: Certainly, your Honor.

15 I know the Court's read the brief and I -- I
16 don't know how much more I can say. I -- I would like
17 to say I'm not generally a hard person to get along
18 with. I think before this case I could count on one
19 hand the number of motions to compel I had filed in my
20 20-year career. This would be the third motion to
21 compel I filed in this case alone. So I am -- I am,
22 to some extent, a little exasperated that it's been
23 necessary.

24 The motion we filed details the efforts we
25 undertook to try to avoid a motion to compel. We've

1 been asking for dates since December. Repeatedly
2 being assured by Mr. Deperno that he was getting them.
3 You know, there would be delays, but he would give us
4 dates, before ultimately he told us, you know, you've
5 got your witness list, go ahead and, you know -- you
6 know, notice up whatever deposition you want. And
7 when we do that, he tells us he's not producing them.

8 I think that's -- I -- I'm something at a
9 loss, your Honor. And I'm specifically -- we
10 emphasized it in the brief, but I'll say it again, one
11 of those times we talked about the deposition dates in
12 this case was before this Court, where, you know, the
13 plaintiff's counsel assured the Court that he was
14 gathering dates, that he would get back to us shortly
15 afterwards. And that just simply never happened.

16 So -- and, again, we weren't looking for the
17 onerous, we thought. We were looking for the
18 deposition of the named plaintiff in this case,
19 Mr. Bailey, and the forensic team that took the image
20 in December, all of whom were identified by the
21 plaintiff. This really should have been pretty
22 straightforward.

23 And to the extent that Mr. Deperno is
24 looking to trap the witnesses because they haven't got
25 the information that they've asked for in discovery,

1 that argument fails for a variety of reasons. First
2 and foremost, they -- they made a report in this case
3 already. And it's hard for me to understand how they
4 can't answer questions about that report. Beyond
5 that, under the court rules, it specifically says
6 2302(d) states specifically that when a party is
7 conducting a discovery, whether by a deposition or
8 otherwise, does not operate to delay another party's
9 discovery.

10 So we -- at the general rule -- and I like
11 to wait for depositions at the end of the discovery
12 period because I like to get the written answers back
13 before I take depositions. But there's nothing that
14 says that we are obligated to wait for plaintiff to
15 get his answers before we can take the depositions of
16 his experts -- especially when they've already
17 produced a report in this case. A report that they --
18 earlier on in this case, I'm sure the Court recalls,
19 the plaintiff was rather insistent that report be read
20 by everybody -- he's factored into decisions and
21 matters related to whether or not people accepted the
22 election results.

23 So the fact that we're being told now, that,
24 no, they can't answer any questions about that until
25 they get more information, is somewhat exasperating.

1 In regards to the --

2 THE COURT: Thank you, Mr. Grill. Oh,
3 please continue.

4 MR. GRILL: With regards to the motion to
5 strike, your Honor, our -- our basis on that, again,
6 is it's simply -- as we are -- we've made the argument
7 in the brief and we think that's appropriate. And I
8 would just point out again that there was every chance
9 in the world to make these people available for their
10 deposition, and plaintiff not only didn't make them
11 available, but seems to actively obstruct us and made
12 repeated misrepresentations to us, and I think that
13 that calls for some level of sanction.

14 THE COURT: All right. Thank you.
15 Mr. Deperno?

16 MR. DEPERNO: Thank you, your Honor.

17 The -- the issue as we see it is, we have
18 expert witnesses who need to be fully informed in
19 terms of their opinion. What they've looked at is
20 forensic images that we've took, and as I've explained
21 earlier, have come back to me and asked me to submit
22 questions back to the Secretary of State and the
23 County regarding information they're looking at. They
24 need to be fully informed, as opposed to what
25 Mr. Grill is talking about, when he mentions the

1 preliminary report that was put out on December 14th.

2 But so that we're -- we're clear, in terms
3 of what the actual time frame is, we submitted second
4 discovery requests on February 26th. Third discovery
5 requests on March 5th. And our fourth discovery
6 request on March 11. All of those were submitted at a
7 time where the other parties had seven days to
8 respond.

9 They didn't respond on time to those
10 requests. In fact, as to the second discovery
11 request, they missed the deadline -- before ever
12 filing a motion for protective order at all. They
13 missed the deadline for the third discovery requests.
14 And then they finally filed -- filed a motion for
15 protective order, and then we served just the -- a day
16 later, the fourth discovery request.

17 But as I've explained, all of these issues
18 that we've asked for within our discovery are very
19 technical issues regarding the management of the
20 server, the identification of issues related to the
21 ballot. And we can't have expert witnesses testify
22 before they have their full opinion on the information
23 that we -- that they're reviewing. And -- so we don't
24 believe we can produce them for depositions -- no
25 different than a medical malpractice case or something

1 like that, where your experts have to be fully
2 informed in terms of the issues that they're
3 reviewing.

4 This is very technical information. And it
5 seems very clear to me that what defendants were
6 trying to do was, take depositions knowing full well
7 that they were not producing the information that we
8 were asking for. They were trying to squeeze those
9 depositions in, while at the same time delaying their
10 responses. And also at the same time, having their
11 expert witness Halderman produce a report, where he's
12 clearly relying on information that our guys don't
13 have.

14 And for that, we think there's no way we can
15 conduct depositions with our expert witnesses, or even
16 the plaintiff, under those circumstances. These
17 people have to be fully informed as to the issues.
18 The other issues that we've raised in terms of our
19 response to their motion is this issue regarding Zoom
20 depositions. And the -- the defendant's request to
21 issue deposition notices for Zoom depositions.

22 There's no procedure to conduct Zoom
23 depositions. They issued their notices of deposition
24 pursuant to MCR 2.306. It states on its face that
25 they're noticing the deposition under 2.306; and 2.306

1 deals with depositions by oral examination, not video
2 examination. But in their motion, the defendants
3 state and now raise the issue of MCR 2.315. That's
4 the court rule that deals with video depositions.

5 They claim that 2.315 permits video
6 depositions; however, they did not serve their notice
7 of deposition under 2.315. The defendants also argue
8 about Michigan Supreme Court Administrative Order
9 2020-6. That has nothing to do with depositions at
10 all, that simply deals with court administration.
11 There's no order in this case or by the Michigan
12 Supreme Court that would mandate Zoom depositions.

13 I'll also point out that under MCR 2.315,
14 that code section, or that court rule specifically
15 provides a procedure that must be followed in order to
16 do a video deposition. It states the first
17 requirement is that the notice of the taking of a
18 video deposition and a subpoena for attendance must
19 state that the deposition is to be visually recorded,
20 and their notice of deposition doesn't state that at
21 all. So it would be defective for those reasons.

22 I've also laid out in our response a number
23 of reasons, why we have concern with Zoom depositions
24 just in terms of control that -- that -- that you
25 don't have in that type of environment. Information

1 about who's watching, who's in the room with other
2 people. Things that you can't see. It's difficult or
3 nearly impossible to protect the integrity of
4 testimony.

5 Could be illegal recordings being made,
6 disclosure of confidential information. It's more
7 time-consuming and expensive. And it's just nearly
8 impossible to judge the demeanor of a witness in a
9 deposition like that; where you can't see their body,
10 you can't interact, in terms of them in the same room.
11 And for those reasons, we asked and filed a motion for
12 protective order -- I know I'm sort of going out of
13 line, but it's the same response we've made in the
14 motion for protective order --

15 THE COURT: Sure.

16 MR. DEPERNO: -- as to why we would not want
17 to do Zoom depositions at all, in this case.

18 THE COURT: All right. Thank you,
19 Mr. Deperno.

20 Let me give Mr. Grill an opportunity to
21 respond.

22 MR. GRILL: Well, I guess although -- I'll
23 break my response into about three parts. First,
24 concerning the timing, in our motion we identify the
25 first contact -- first official contact we had with

1 plaintiff's counsel seeking depositions was on January
2 4th -- which puts us well over two months before
3 plaintiff's second set of discovery. And at no point
4 during any of the subsequent contacts between January
5 4th and February 26th did plaintiff's counsel make any
6 reference to the need for further information.

7 Following February 26th, plaintiff's counsel
8 did not make any reference to his experts needing
9 additional information until after the depositions
10 were noticed. So I -- I -- it's difficult for me to
11 accept at face value that this was all a long-running
12 problem that the plaintiff had, with the depositions
13 being taken in sequence, to some -- to some
14 determination of needing more information. That seems
15 to be something of a -- of a reason that came up after
16 the refusal. Turning to the issue regarding --
17 regarding Zoom, we've laid this out in our response
18 both to the protective motion -- the plaintiff's
19 motion for protective order and also, your Honor, it
20 was part of -- I think that was where we truly dealt
21 with it, because we didn't have a chance to do a reply
22 brief to his response to our motion to compel.

23 But regarding Zoom, your Honor, lawyers have
24 been using Zoom for well over a year now. It's become
25 a very routine part of the practice of law. I,

1 myself, have used it in cases involving employment
2 discrimination, which involves much confidential
3 information, including personnel records, discipline,
4 that kind of thing. It's not particularly
5 complicated. It's not much different than the process
6 we're using this afternoon to conduct this hearing.

7 Beyond that -- I mean, even if we were to
8 take this out of the -- the situation of involving a
9 still existent global pandemic involving a highly
10 contagious viral infection, your Honor. And that --
11 frankly, your Honor, I've had some experience with and
12 it's not very fun.

13 So I -- I have no particular interest or
14 desire to expose myself to the contagion and run the
15 risk of my -- my wife being left a widow and my son
16 growing up without me because Mr. Deperno has concerns
17 about how to control a deposition, that he's not even
18 being asked to control. The depositions requested
19 were the ones we noticed up. If there should be any
20 party that has a concern about control of the
21 deposition or witnesses being coached, it would be me;
22 we're not raising that concern.

23 Lastly, as it concerns the notices
24 themselves and any deficiency there -- again, that was
25 not brought up to us at any point in time until after

1 the deposition notices went out, and the only issue
2 that Mr. Deperno raised about the deposition notice is
3 was he had not been given individual notices for each
4 deponent. It was only, again, after we filed the
5 motion to compel, where we were told Zoom was -- was
6 unacceptable, for reasons I'm not fully sure I
7 understand.

8 Getting back to the Zoom issue, I also do
9 want to emphasize the people that we're talking about
10 taking the depositions of here are plaintiff's
11 forensics team, who hail from Georgia, Texas, and
12 Colorado. So to say that it would be less expensive
13 to proceed in person, I think radically underestimates
14 the logistics involved of getting myself and Mr. Kazim
15 to various other states to meet the witnesses at their
16 convince.

17 To the -- if for whatever reason the Court
18 determinations that we cannot proceed with these
19 depositions via Zoom -- which, again, for all the
20 reasons we stated, we think that they should be. But
21 if they can't, then we would ask the depositions occur
22 in Antrim County, if the Court makes space available
23 at the courthouse -- I think that would be appropriate
24 under the circumstances, where we could be masked and
25 maintain social distance.

1 THE COURT: All right. Thank you.

2 The issue before the Court is two-fold.
3 First, it's the scheduling of depositions and the
4 timing of depositions that have been noticed by the
5 defense of the plaintiff in this case, Mr. Bailey, and
6 also the parties that were involved in the forensic
7 examination and have been identified as experts, on
8 behalf of the plaintiff. Those depositions --
9 depositions should go forward. It's entirely
10 appropriate that they do. The Court understands that
11 because of the issues related to discovery and
12 production issues in this case, that the plaintiff has
13 failed to provide an appropriate date for -- for those
14 depositions.

15 Again, I'm not going to delve into a
16 resolution of who's right and who's wrong as it
17 relates to those delays, we're simply going to move
18 forward in this case. Noting that the Court has
19 indicated that all issues related to today's discovery
20 motions need to be resolved and produced by the 3rd of
21 May -- that's 28 days from today, which means that --
22 I'm sorry, one, two, three, four -- the 10th of May,
23 which is 28 days from today, which means that the
24 depositions protecting the interests that the
25 plaintiff has talked about, certainly could be

1 conducted after May 10th.

2 What I'm going to do, gentlemen, is this:
3 I'm going to schedule those depositions to be
4 conducted Saturday, May 15th, knowing that you're
5 going to work together to come up with a better date
6 that works for all of you, okay? However, if you are
7 not able to come up with a date that works, you have a
8 date from me and that is Saturday, May 15. The first
9 to take place at nine o'clock and the second I'll
10 leave to -- pardon me, the first would be of
11 Mr. Bailey, that would take place at nine o'clock.

12 The second would be starting at one o'clock,
13 and then every hour and a half thereafter until
14 resolved. Again, if that timeline does not work for
15 you -- and I suspect it does not, then I'll encourage
16 you to come up with an agreement regarding a more
17 appropriate time, date, location, et cetera. If you
18 cannot do so, I've given you direction.

19 Now, let's talk about Zoom. The reality is
20 that Zoom is part of our lives as practitioners now.
21 I think that there is going to be, down the road, more
22 development regarding its use in court. It's going to
23 change the way that we do law -- either Zoom or other
24 programs like it.

25 I can tell you that I sentence people to

1 prison using Zoom, and it makes me a little
2 uncomfortable for the reasons that Mr. Deperno has
3 identified. I would prefer to be able to see in
4 someone's eyes if I'm going to take away their liberty
5 for a period of time -- and maybe we'll get back to
6 that point here soon. But for today's purposes, we
7 are not there, we are using that technology in place
8 of the courtroom.

9 It is mature, it's developed. It isn't
10 perfect, but it is, I think, at a point where it can
11 certainly accommodate the depositions that are being
12 sought. As such, I'm going to grant the request to
13 use Zoom. Deny the request for protective order
14 against its use, and the depositions that I set for
15 May 15th, may be used -- may be conducted by Zoom, as
16 may any additional depositions that need to be
17 conducted in this case.

18 All right. Again, Mr. Grill, can I get an
19 order from you on that point, please?

20 MR. GRILL: Yes, your Honor.

21 THE COURT: Let's go ahead and move to our
22 next set of issues. And the next thing that I have is
23 a protective -- let's -- well, hold on. Let's talk
24 about discovery. The motion to extend discovery.

25 This has been requested by the plaintiff,

1 obviously we are going to extend discovery to the
2 point that the Court has indicated with regard to the
3 matters that the Court has discussed, but, Mr.
4 Deperno, I imagine that you are looking for more than
5 that.

6 If you would like to go ahead and make your
7 argument, sir.

8 MR. DEPERNO: Yeah. We're -- we're asking
9 to extend discovery. We had proposed -- prior to the
10 end of discovery, I had requested from opposing
11 counsel the -- or expressed to them with a proposed
12 stipulation that we extend discovery. We need to
13 conduct depositions of some of their witnesses. You
14 know, J. Halderman, for instance, Sheryl Guy, Connie
15 Wing would be on our list. So we have a number of
16 witnesses, we also would like to depose, obviously,
17 and have not been able to do that yet.

18 So in our motion we had proposed an
19 extension of discovery through August 8 in order to
20 finish up with these discovery requests, and get these
21 depositions done.

22 THE COURT: All right.

23 In response, Mr. Grill?

24 MR. GRILL: Well, your Honor, we don't
25 really require any additional discovery, other than

1 the matters that are already pending -- the
2 depositions and the -- the written discovery from
3 the -- from the last hearing we were involved in. Our
4 position would be that there shouldn't be any new
5 discovery, we should just be left to finish up the
6 discovery that has already allowed. We note that
7 we've already had this discovery extended twice. The
8 original date the Court had set for us was February --
9 I believe February 4th, February 8th, which he was
10 then extended to April. We've blown past both of
11 those deadlines and now looming ahead into another
12 extension all right.

13 And honestly, your Honor, this case really
14 shouldn't be that complicated. It should be -- we
15 should be done with what we've got in front of the
16 Court right now.

17 THE COURT: And, Mr. Kazim?

18 MR. KAZIM: Thank you, your Honor.

19 In addition to adopting Mr. Grill's
20 arguments, you know, plaintiff -- this is the first
21 time in its motion that plaintiff has indicated that
22 they want to depose I think the plaintiff
23 identified -- or actually they didn't identify, they
24 indicated a number of 12 depositions. This is the
25 first we have heard about plaintiff wanting to depose

1 12 individuals. We -- they have not identified who
2 they were, other than for the first time counsel just
3 indicated that he wants to depose Ms. Guy and
4 Ms. Wing. Certainly they have had five months to
5 depose Ms. Guy and Ms. Wing. Through -- as the Court
6 noted, a lot of the discovery requests that were
7 propounded to the county could have been addressed via
8 a deposition.

9 But additionally, as -- as Mr. Grill noted,
10 what counsel is asking until August 8th, makes it into
11 an eight-month discovery phase. And, you know, I have
12 been practicing in the 13th Circuit for 17 years now,
13 and during that time frame I have handled death cases,
14 civil rights cases, complex employment cases -- some
15 with the Court as well, and I can remember a certain
16 instance where we have had more than six months of
17 discovery at maximum.

18 And -- and this case certainly is not
19 complicated. The issues are not complicated, and it
20 does not merit such an extensive discovery. So for
21 all those reasons, we are not in favor of extending
22 discovery beyond what the Court has already discussed
23 today, to allow the answers to some pending requests
24 and the depositions to take place.

25 Thank you, your Honor.

1 THE COURT: All right. Thank you,
2 Mr. Kazim.

3 Mr. Deperno, you have a response?

4 MR. DEPERNO: Well, I'm -- in response to
5 that, I'm -- I don't know what the procedures are of
6 the 13th Court, this is my first time with the Court,
7 so I don't know how long the Court generally would
8 hold out discovery. Certainly in other circuits I've
9 seen discovery go significantly longer than eight
10 months. But, you know, in response to Mr. Kazim, what
11 I'm -- I think we've -- we're already clear that we're
12 not sending out new discovery. We're now limited to
13 the number of requests that we could request and the
14 number of interrogatories, so that seems quite finite
15 and we just need time to conduct depositions of our
16 witnesses and their witnesses.

17 So if that's not August 8th and it's a
18 shorter deadline, I can live with that, if we can fit
19 these depositions in.

20 THE COURT: All right. Well, you're
21 certainly entitled to depositions and I think those
22 depositions would be useful to help the Court frame
23 the issues and understand each parties case. So I --
24 I think that what we will do here is this:

25 First, let me go back, Mr. Deperno. You can

1 have your revised interrogatories and requests for
2 production by one week from today; is that right?
3 That would be the 19th of -- I'm sorry, I'm wrong --
4 yes, that would be the 19th of April; is that right?

5 MR. DEPERNO: To produce them to the other
6 side?

7 THE COURT: Correct.

8 MR. DEPERNO: That's fine.

9 THE COURT: All right. That will be
10 ordered, and I'll give you four weeks to respond -- or
11 for response, which takes us to the 10th. I've
12 already indicated that -- I'm sorry, takes us to the
13 17th, which means I'm going to modify my earlier
14 order -- I'm sorry for doing this, but my earlier
15 order indicated that those depositions by order of the
16 Court were to take place on the 15th -- this is of
17 Mr. Bailey and the forensic imaging team. Now they
18 are to take place May 22nd. Again, I expect that date
19 to change. I'm also going to schedule the depositions
20 of Mr. Deperno's -- that Mr. Deperno is seeking.

21 Again, Mr. Deperno, I'm going to expect that
22 you'll file those notices by the 19th -- that's one
23 week from today. And any and all depositions will be
24 conducted on Saturday, May 22nd. Again, my
25 expectation is that you will move that date to a time

1 and location, et cetera, of your choosing and
2 agreement with the parties, but you're going to have
3 to work together to do it. If you don't, then you
4 have a date where you can conduct those depositions.
5 I understand you have several depositions you need to
6 conduct. So if we extend into Sunday the 23rd, so be
7 it.

8 All right. Are there any other issues with
9 regard to that matter that we need to address?

10 MR. DEPERNO: So are we -- is that -- are
11 you saying, yes, that we're extending discovery? Or,
12 no, we're not extending discovery?

13 THE COURT: I will allow discovery -- thank
14 you, I'll allow discovery to be extended for the
15 purposes of conducting the depositions and responding
16 to Mr. Deperno's examination questions -- his
17 interrogatories, pardon me, and his requests for
18 production. I'm not extending discovery beyond this.
19 We rarely extend discovery beyond six months in this
20 circuit; and, frankly, we are about there in this
21 case.

22 MR. KAZIM: Your Honor, if I may just make
23 sure that I'm -- so that there's no confusion. So we
24 are also changing the deadline for us to respond to
25 Mr. Deperno's revised requests from May 10th to May

1 17th, is that accurate? Because previously you had
2 said we had 28 days from today, which would be May
3 10th. And now Mr. Deperno has until April 19th to
4 file his revised request based upon the Court's
5 previous order.

6 THE COURT: You're correct, Mr. Kazim.
7 I'm -- I'm giving him an extra -- I'm giving him a
8 week to nail down his interrogatories and his requests
9 for production.

10 I'm giving him -- or I'm giving you folks 28
11 days to respond.

12 MR. KAZIM: Thank you.

13 THE COURT: So those are the purposes that
14 we've extended discovery for. If anyone wants
15 discovery to be extended beyond that, there are two
16 routes. One, you agree amongst yourselves. Two,
17 you'll come back and ask for a specific extension for
18 a specific purpose.

19 Does everybody understand?

20 MR. DEPERNO: Yes. Yes.

21 THE COURT: All right. Thank you.

22 Mr. Deperno, can I put that one on you,
23 since I'm asking -- unless Mr. Grill wants to take
24 this on and do the whole thing, perhaps?

25 MR. GRILL: I'm already making orders, your

1 Honor, I can do that one just as well.

2 THE COURT: Why -- why don't we do that.
3 Let's leave it in one person's hands, and I appreciate
4 Mr. Grill being willing to do it.

5 So, Mr. Grill, I'll ask you to go ahead and
6 prepare an order consistent with my decision as to the
7 extension of discovery.

8 MR. DEPERNO: And, your Honor --

9 THE COURT: All right, folks, we are now --
10 well, about three and a half or so hours into our
11 discussions today. What motions have we missed or
12 have we missed any motions in this matter today?

13 MR. GRILL: Not aware -- I think everything
14 that was noticed for today has been addressed, your
15 Honor. Unless somebody thinks I'm wrong.

16 MR. KAZIM: No, I agree.

17 THE COURT: Mr. Kazim?

18 Mr. Deperno, you agree?

19 MR. DEPERNO: I agree.

20 I do have one other issue I'd like to
21 discuss regarding discovery itself --

22 THE COURT: Please continue.

23 MR. DEPERNO: -- if that's okay?

24 We -- we recently filed a amended expert
25 witness list, where we added Jim Penrose. He is a new

1 expert witness. Dr. Frank is a new expert witness to
2 us, and so is Jeff Lenberg. These are people who
3 have -- who we only retained within the last week and
4 a half in this case to conduct additional information.
5 So we did file an amended expert witness list, and we
6 want to make sure that they are part of our team in
7 this case.

8 THE COURT: All right. You'll need to seek
9 amendment of the expert witness list. I'd like to get
10 that issued resolved, unless there's concurrence on
11 behalf of the defendants, and I suspect there will not
12 be, you'll have to raise that by motion.

13 MR. DEPERNO: Okay.

14 THE COURT: Okay?

15 Okay. Thank you, all. I appreciate your
16 work today. I'll look forward to an order coming from
17 Mr. Grill -- hopefully signed by all of you.
18 Otherwise submit it under the Seven-Day Rule.

19 MR. KAZIM: Thank you, your Honor.

20 MR. GRILL: Thank you, your Honor.

21 THE COURT: Okay.

22 (At 3:04 PM., proceedings concluded)

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1 State of Michigan)
2 County of Antrim)

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I, JESSICA L. JAYNES, certified Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that the foregoing proceedings, consisting of 126 pages, held before the Honorable KEVIN A. ELSENHEIMER, Circuit Court Judge, is a true and correct transcript of my stenotype notes with the assistance of computer-aided transcription, to the best of my ability, in the matter of WILLIAM BAILEY V ANTRIM COUNTY, ET AL. File No. 20-9238-CZ. Held Monday, April 12th, 2021.

Date: Sunday, April 18th, 2021

/s/Jessica L. Jaynes
Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
328 Washington Street
Suite 300
Traverse City, Michigan 49684
(231) 922-4576

Exhibit 14

Notice of Hearing

STATE OF MICHIGAN

IN THE 13TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF ANTRIM

File No. 20-9238-CZ
HON. KEVIN A. ELSENHEIMER

WILLIAM BAILEY,

Plaintiff,

v

ANTRIM COUNTY

Defendant.

MATTHEW S DEPERNO

P 52622 Attorney for Plaintiff

HAIDER A. KAZIM

P 66146 Attorney for Defendant

NOTICE OF MOTION

The above case is hereby set for

DEFENDANTS' JOINT MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(4) AND (8)

on May 10, 2021 AT 1:30 PM

in the Historic Courthouse

In BELLAIRE Via Zoom Meeting ID: 6276788320

Date of Mailing: April 13, 2021

IMPORTANT NOTE: Pursuant to the Michigan Supreme Court Administrative Order No. 2020-6, **ALL HEARINGS WILL BE CONDUCTED VIA ZOOM.** THERE ARE NO EXCEPTIONS. All courtrooms within the 13th Circuit Court are closed. If you have not previously done so, please call the 13th Circuit Court Administrator's Office at 231-922-4701 at least two days prior to your scheduled hearing to test Zoom and to confirm your personal appearance is not required should this Order be lifted prior to your court hearing. Please note that all court hearings are mandated by the Supreme Court to be live streamed on YouTube for public viewing.

13Th Judicial Circuit Court
328 Washington Street
Suite 300
Traverse City, MI 49684
Telephone: -(231) 922-4701

PLAINTIFF-APPELLANT's Appendix 000676

Exhibit 15

Motion to Adjourn Hearing

RECEIVED by MSC 6/2/2022 1:49:42 AM

FILED

Sheryl Guy

Antrim 13th Circuit Court
04/20/2021

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY

HON. KEVIN A. ELSENHEIMER

Defendant

SECRETARY OF STATE JOCELYN
BENSON

Intervenor-Defendant,

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**PLAINTIFF'S MOTION TO ADJOURN HEARING ON DEFENDANTS' MOTION FOR
SUMMARY DISPOSITION and CLARIFY SCHEDULING ORDER**

Plaintiff, WILLIAM BAILEY ("Plaintiff"), by and through his attorney, DePerno Law Office, PLLC, brings this motion to adjourn hearing on Defendants' motion for summary disposition.

1. At a hearing on April 12, 2021, this Court stated that Plaintiff would amend discovery requests to include no more than 20 interrogatories and 50 requests to produce by

April 19, 2021 and those responses would be due within 28 days of the date of the hearing. *Transcript*, 97:9-12 (April 12, 2021).

2. At the hearing the Court resolved a number of discovery issues. Among those issues was the scheduling of several crucial depositions, which the Court held would be conducted, in the absence of an agreement by the parties to a different date, on May 15 and 22-23, 2021. Exhibit 1, *Transcript*, 115-16, 121 (April 12, 2021).

3. Defendants' attorney requested that "the Court at least consider holding these discovery requests in abeyance until our motion for summary disposition that was filed on Friday is decided." *Id.* at 55:6-10 (April 12, 2021). Defendants' attorney repeated this request later in the hearing: ". . . is there any desire or interest in the Court in holding discovery until that motion is decided?" *Id.* at 102.

4. The Court declined this request. "I've heard it from both of you and Mr. Kazim, but, no, I think discovery needs to continue at pace. I'm not making any judgment, I have read the motion. I'm not making any judgment on the motion by saying so, but there are issues in this case that certainly deserve to be fleshed out." *Id.* at 102:20-103:1. Instead, the Court ordered that a large proportion of requests by Plaintiff be produced, modifying or limiting the scope of some requests as it deemed appropriate. *Id.* at 80-91). Thus, it does not appear that the Court deems it appropriate at this juncture to consider summary disposition prior to the substantial completion of discovery.

5. However, the next day, on April 13, 2021, the Court scheduled the motion for summary disposition on for May 10, 2021 at 1:30 pm [Exhibit 2].

6. Plaintiff's due date to respond to the motion for summary disposition is May 3, 2021, just two weeks from today and prior to the responses to discovery.

7. Defendants' due day for response to discovery is due May 10, 2021, the same day.

8. The scheduled date is prior to the dates for any scheduled depositions. Indeed, when Plaintiff's attorney requested dates for deposition, Defendant Benson's attorney responded with dates after the scheduled motion. Defendant Antrim County's attorney has not yet responded [Exhibit 3].

9. Plaintiff's attorney will remind this court that Plaintiff served discovery requests on Defendants on Defendants on February 26, 2021 (2nd requests), March 5, 2021 (3rd requests), and March 11, 2021 (4th requests) at a time when Defendants' time to respond was 7 days. Defendants missed the deadline for the 2nd and 3rd requests and then filed a motion for protective order on March 17, 2021.

10. It is now April 19, 2021, which is actually 52 days after the 2nd discovery requests were served.

11. It is the position of the Plaintiff that this matter is not ripe for summary disposition, and in any event, the testimony gathered by all parties at the depositions currently scheduled for May 15 and 22-23, 2021 will be indispensable to the Court in determining the appropriate resolution of Plaintiff's claims.

12. Accordingly, Plaintiff moves for a replacement scheduling order providing a date for the hearing that is after May 23, 2021.

13. MCR 2.503(B)(1) states that an adjournment must be based on good cause. Plaintiff has good cause in this case because it appears the Court scheduled the motion for summary disposition for the wrong date, contrary to its statements on the record. This is Plaintiff's first request for an adjournment of the motion for summary disposition.

WHEREFORE, Plaintiff respectfully requests that this Court enter a replacement scheduling order docketing a hearing on Defendants' motion for summary disposition for a date after depositions have taken place.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: April 15, 2021

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)
Attorney for Plaintiff

PROOF OF SERVICE

On the date set forth below, I caused a copy of the following documents to be served on all attorneys of record at the addresses listed above

1. Plaintiff's Motion to Adjourn Hearing on Defendants' Motion for Summary Disposition and Clarify Scheduling Order

Service was electronically using the MiFile system which will send notification of such filing of the foregoing document to all attorneys of record.

Dated: April 19, 2021

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)

FILED

Sheryl Guy

Antrim 13th Circuit Court
04/20/2021

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY

HON. KEVIN A. ELSENHEIMER

Defendant

SECRETARY OF STATE JOCELYN
BENSON

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EXHIBITS 1-3

**PLAINTIFF'S MOTION TO ADJOURN HEARING ON DEFENDANTS' MOTION FOR
SUMMARY DISPOSITION**

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: April 19, 2021

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)
Attorney for Plaintiff

Exhibit 1

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STATE OF MICHIGAN
THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)
WILLIAM BAILEY,
Plaintiff,
Case No. 20-9238-CZ
v.
ANTRIM COUNTY,
Defendant,
SECRETARY OF STATE JOCELYN BENSON,
Intervenor-Defendant.

-----/

MOTIONS
(VIA ZOOM)

Before the Honorable KEVIN A. ELSENHEIMER, Circuit Judge
Bellaire, Michigan - Monday, April 12th, 2021.

APPEARANCES:

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Official Court Reporter
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22 Mount Clemens, Michigan 48043
23 (586) 469-6346

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1 basis of conjecture -- which is pretty much entirely
2 what these discovery requests are based upon, amounts
3 to an impermissible fishing expedition. So we request
4 that the Court grant our motion for protective order,
5 prohibiting the plaintiff from discovery against us;
6 and if the Court is inclined to deny this motion, then
7 we ask that the Court at least consider holding these
8 discovery requests in abeyance until our motion for
9 summary disposition that was filed on Friday is
10 decided.

11 And I'm happy to answer any questions that
12 the Court has.

13 THE COURT: How many -- how many responses
14 have you already given to interrogatories? The new
15 maximum is 20. Obviously there are more interrogatory
16 requests that have been made.

17 Do you have an idea how many are responded
18 to thus far?

19 MR. KAZIM: Yes. We have responded to, I
20 believe, three interrogatories and -- if the Court
21 would just indulge with me for just a brief moment, I
22 can tell you what -- how many requests we receive -
23 for production we have responded to.

24 We have responded to three interrogatories,
25 your Honor, and 18 requests for production of

1 There are about maybe five or six people
2 that would have anything actually to do with this
3 case, we've already identified them to the plaintiff;
4 and the rest of this is so open-ended, it -- it's hard
5 not to think that this was just a page out of a
6 directory. So our -- in looking at the requests here,
7 out of the 112 requests to produce, the ones that we
8 object to and the ones that are most frequent, are the
9 ones that call for any and all documents,
10 correspondence, or communications with this host of
11 people, which has nothing to do with Antrim County's
12 election. News agencies, government officials,
13 governor's legal counsel, absolutely anybody but
14 anyone involved with the Antrim County election.

15 Furthermore, what we're looking for if --
16 not just -- again, it will be great to have -- we're
17 also looking to limit the scope of this to persons
18 involved with anything to do with the Antrim County
19 election, as opposed to kind of this open-ended review
20 of state government.

21 THE COURT: All right. Thank you.

22 Okay. The question before the Court is a
23 motion that's been filed by both defendants to place
24 some limitations upon -- upon the discovery requests
25 that have been filed. We've had a more detailed

1 discussion regarding discovery in general. The motion
2 was filed as a motion to -- for a protective order
3 under 2.302. It does appear to the Court, that the --
4 the state of discovery, as it stands now, from the
5 plaintiff has been broad, to the point of being
6 overbroad in certain areas.

7 The plaintiff is certainly entitled to
8 discover matters that pertain directly to the election
9 in Antrim County. The communications between Antrim
10 County officials involved in the election and state
11 officials, be that at the Secretary of State or
12 elsewhere. Certainly the plaintiff is entitled to --
13 the State is -- pardon me, the plaintiff is entitled
14 to have its 20 interrogatories. And as the Court has
15 already indicated, the interrogatories in their
16 current form will be struck and the plaintiff will
17 have an opportunity to file the remaining 17
18 interrogatories for each party, as each party -- each
19 defendant has already answered three.

20 The 20 interrogatories are a limitation
21 under the new rules relating to discovery. We're
22 going to go ahead and abide by those rules in this
23 instance. As a general rule, responses to any
24 questions and the questions themselves -- be they
25 matters pertaining to interrogatories, requests for

1 production, must pertain to Antrim County and not be
2 generalized to something larger like the state of
3 Michigan. One can't imagine the number of Freedom of
4 Information Act requests that come in on a daily basis
5 at the state of Michigan.

6 I know this because the FOIA coordinator for
7 LARA used to report to me at one point, and the number
8 was in the hundreds, if not the thousands every single
9 day. I believe it was hundreds. And I am assuming
10 that that is probably consistent with other areas of
11 state government, none of which would have any
12 relevance whatsoever to the election in Antrim County
13 and Dominion software -- hardware or software
14 elements, or any -- any action by the Antrim County
15 Clerk, with regard to that election.

16 Any issues regarding Mr. Friedrichs are
17 deemed irrelevant by the Court, absent some other
18 information from the plaintiff that results from
19 deposition. We're past the point of the end of
20 discovery. We'll talk about that in a moment. But
21 without more, that's a fishing expedition, we're not
22 going to get into -- into spouses.

23 I certainly don't visit upon the Secretary
24 of State any issues that are encountered by her
25 husband. And, of course, we have no idea whether or

1 not those issues, as identified by the plaintiff, are
2 factual or not. There simply isn't enough there, and
3 without more, I'm not going to order any information
4 from Mr. Friedrichs.

5 As far as the qualified voter file, I
6 understand now the plaintiff's interest in that -- in
7 that file. Rather than appearing to seek information
8 regarding the number and type of people that have been
9 removed from the file -- meaning dead or alive, he's
10 really seeking to understand the universe of people
11 associated with the -- the qualified voter file in
12 Antrim County. That information ought to be available
13 in a county-by-county manner. It ought to also be
14 available -- there should be some analysis of people
15 that have been removed and added to that file over a
16 period of time.

17 I'm going to leave the parties to work out a
18 solution with regard to Antrim County information. I
19 think going to other counties without more is
20 overbroad, and certainly would be burdensome,
21 expensive, and, again, I don't see relevant to this
22 case at this point. So without more, I will allow
23 information regarding the qualified voter file. I can
24 see the potential relevance to the plaintiff, but I'm
25 not going to allow it outside of Antrim County, and

1 I'm going to direct the parties work together to see
2 if they can secure that information.

3 As to items that may have been distributed
4 from Antrim County emails to the -- I think it was the
5 Detroit News, pursuant to a FOIA request that may not
6 have been turned over to the plaintiff for discovery
7 purposes. Those two statutes, of course -- or those
8 two operations of law, being FOIA and the court rules
9 are different, certainly, and oftentimes they overlap,
10 but I don't know what the language was relating to the
11 request specifically from the Detroit News, and as
12 plaintiff -- Antrim County's defense team indicated,
13 there's always the possibility that something was
14 missed.

15 I'm going to direct Antrim County to review
16 its emails responsive to the discovery requests from
17 the plaintiff, and determine whether or not there were
18 matters that were distributed pursuant to the Detroit
19 News freedom of information request that may be
20 responsive to the requests from Mr. Deperno. And if
21 they find those, they are to provide those in a timely
22 way to Mr. Deperno. We've already talked about the
23 Dominion manuals. I'm not going to go through that
24 again.

25 As to cell phone communication requests.

1 Before the Court will entertain a blanket disclosure
2 of cell phone requests -- pardon me, cell phone
3 contacts, which I do think is, by its nature, at least
4 initially overbroad, I think that more discovery needs
5 to be done. Specifically there should be a deposition
6 of the -- of the county clerk, I'm assuming that
7 deposition was requested and simply hasn't occurred.
8 I may be wrong, we'll talk about that. But it seems
9 to me that -- that that would provide the information
10 regarding how and if the -- the clerk and the clerk's
11 office was communicating with Lansing, at large, with
12 regard to the situation in Antrim County on the night
13 of the tabulation of the votes.

14 If those contacts were by phone, then it is
15 appropriate that the clerk and the clerk's staff
16 communications be identified. The way we'll go
17 about -- well, I'm going to leave it at that. And if
18 we find out that that information is necessary, as a
19 result of depositions, then we'll go ahead and have
20 more discussions, if the parties aren't able to agree
21 amongst themselves regarding how that information is
22 to be provided. I don't see that the information from
23 any other county official -- unless it relates
24 strictly to the election results that evening and the
25 issues with Dominion, to the extent there were issues

1 with Dominion, would be relevant for production.

2 As far as the IP addresses, the issue as I
3 understand it, is any -- any computer that was
4 connected to the county network, by the analysis
5 provided -- or the theory provided by the plaintiff,
6 may be a computer by which someone could access the
7 Internet -- pardon me, access the -- the election
8 system and connect that system to someone with
9 malicious intent, perhaps, on the Internet. And that
10 seems overbroad and unproven at this point. However,
11 I do think that the -- the IP addresses of the
12 computers that were used specifically by the clerk's
13 staff and any staff involved in the -- in the actual
14 collection of votes, tabulation of votes, use of
15 Dominion hardware or software, should be accessible to
16 the -- the plaintiff and will be provided.

17 As to the -- the tapes and the output files,
18 it appears that the -- it appears that the plaintiff,
19 at least by Mr. Grill's response, already has that
20 information.

21 Is that -- is that correct, Mr. Deperno? Do
22 you already have that information, based on your
23 forensic review?

24 You're muted, sir.

25 MR. DEPERNO: Absolutely not.

1 The first -- the tabulator tapes are not
2 collected in the forensic images, they were not there.
3 The only tape we had was the one from Central Lake
4 Township that was given to us by Judy Kosloski. And
5 I'll point specifically to J. Halderman's report,
6 where he says, "As a final confirmation, I have
7 manually compared the final certified results to
8 copies of the poll tapes provided by the county." So
9 he has them. We don't have them. We only had Central
10 Lake Township.

11 And I'll also state that the -- it appears
12 that the -- that Halderman had access to other
13 information -- even the source code, to be honest with
14 you, as well, since he knows how sequential IDs are
15 assigned within the system. That's not part of the
16 forensic images, he knows information, what I'm
17 telling you within the report, that we don't have.

18 But directly to our question of the
19 tabulator tapes, no, those are not part of the
20 forensic images; and we've asked for them and we don't
21 have them.

22 THE COURT: All right. Here's how we're
23 going to address that.

24 First, any matters that Mr. Halderman --
25 regarding the Halderman report, anything that he used

1 that would be responsive for purposes of 703 --
2 meaning would be items that he used in preparing his
3 report, to the extent they have not been provided by
4 Mr. Halderman to the plaintiff thus far, must be
5 provided. Mr. Halderman, despite his -- his
6 affidavit, is directed -- or counsel is directed to
7 bring to Mr. Halderman's attention the two points that
8 have just been raised by plaintiff. And if there is
9 additional response that is necessary, as a result,
10 specifically with regard to any poll tapes that were
11 provided to him from the County that were not part of
12 materials already provided by Mr. Halderman, or in the
13 possession of the plaintiff pursuant its forensic
14 imaging, those materials must be provided.

15 All right, we'll see how that does.

16 MR. GRILL: Your Honor, just a quick point
17 of clarification.

18 THE COURT: Yeah.

19 MR. GRILL: That doesn't require that we
20 produce the image back to plaintiff counsel; correct?
21 The -- because that was a rather large set of files
22 that took a long time to download and plaintiff
23 already has that. We don't need to send that again;
24 correct?

25 THE COURT: Well, I think you got it from

1 the plaintiff, if I remember correctly. Isn't that
2 accurate?

3 MR. GRILL: Correct. That is correct, your
4 Honor.

5 THE COURT: All right. Then the answer to
6 that is, no, it's already been provided by the
7 plaintiff to your expert. There's no reason to
8 provide it back. Obviously, I understand the parties
9 desire to be in technical compliance with the requests
10 and the rules, and that's obviously important, but in
11 the interest of time, and to make sure that this file
12 doesn't occupy too much electronic space, it makes
13 sense that where there can be accommodations on those
14 kinds of issues, there should be. And as I've told
15 the parties before, it's my expectation that they will
16 have communication regarding these issues before
17 bringing them to the Court.

18 All right. Let me continue to review my
19 notes.

20 Where would the ballot specifications be
21 held, Mr. Deperno? Who -- who has the specifications?
22 Is it the county clerk?

23 MR. DEPERNO: I believe it would have to be
24 the county clerk that would have that.

25 THE COURT: All right.

1 Mr. Kazim, is there an issue with regard to
2 production of the ballot specifications? That would
3 seem to me to be a fairly straightforward issue and
4 bears some relevance, given the -- the human error
5 issue that's been identified by the clerk.

6 Is that something that's producible?

7 MR. KAZIM: Your Honor, I am -- my -- and I
8 will confirm with the county clerk's office, but my
9 understanding was that that's information that we
10 don't have, that those ballot specifications are with
11 the individual township clerks. But it -- but --
12 to -- you know, based upon the Court's ruling so far,
13 we will -- we will -- if we have them, we will produce
14 them. We -- if we don't have them, I -- I'm not
15 sure if -- I don't know if the Court expects -- is
16 asking the County to then go and obtain documents that
17 are not already in its possession.

18 THE COURT: Well, that wouldn't be
19 appropriate, so, no, I'm not asking you to do that.

20 MR. KAZIM: Okay.

21 THE COURT: That's -- discovery is obviously
22 about producing information that you have. So that's
23 what you're requested to do. Thank you for agreeing
24 to do that. And -- and hopefully that will resolve
25 that issue; if not, it may be back before me.

1 All right.

2 MR. KAZIM: Thank you, your Honor.

3 THE COURT: Folks, that's the -- the issues
4 to compel that I see. I probably missed something, if
5 so and you'd like some more direction, let me know and
6 we'll deal with it right now. But going through my
7 notes, that's what I see.

8 MR. KAZIM: Your Honor, if I may, there's --
9 there were multiple requests for personnel files.

10 THE COURT: Ah. We didn't talk about that.
11 Why don't you go ahead and make your argument.

12 MR. KAZIM: Well, I think my argument is,
13 your Honor, that there were -- based upon the -- the
14 claims in plaintiff's complaint -- first of all, I
15 would note that we have -- to the extent that we
16 interpreted the -- we interpret plaintiff's complaint,
17 even though it's only against Antrim County, the
18 allegations in those complaint obviously involve
19 Ms. Guy in her capacity as a township clerk.

20 And we have previously produced Ms. Guy's
21 personnel file, which really had -- the only
22 information it had is -- are -- are health and -- and
23 medical information and payroll information. And I
24 believe the Court, in one of the earlier motions, has
25 already stated that -- that to the extent a personnel

1 I'm going to assume a similar number by Mr. Grill -- I
2 don't know that.

3 The bottom line is I'm going to put a limit
4 of 50 to each party. And to the extent that becomes
5 burdensome, or leaves out information that is
6 consistent with my direction regarding relevance,
7 then, plaintiff, you can come back and ask for more.

8 MR. DEPERNO: Thank you.

9 THE COURT: All right. You're welcome.

10 MR. KAZIM: Thank you, your Honor.

11 THE COURT: All right, Mr. Grill, back to
12 you?

13 MR. GRILL: Yes. The -- the only other
14 thing I was going to -- to bring up, your Honor, would
15 be -- again, with the idea that there is a dispositive
16 motion pending that might limit the scope or limit the
17 claims remaining, is there any desire or interest in
18 the Court in holding discovery until that motion is
19 decided?

20 THE COURT: I appreciate the request. I've
21 heard it from both you and Mr. Kazim, but, no, I think
22 discovery needs to continue at pace. I'm not making
23 any judgment, I have read the motion. I'm not making
24 any judgment on the motion by saying so, but there are
25 issues in this case that certainly deserve to be

1 THE COURT: All right. Thank you.

2 The issue before the Court is two-fold.
3 First, it's the scheduling of depositions and the
4 timing of depositions that have been noticed by the
5 defense of the plaintiff in this case, Mr. Bailey, and
6 also the parties that were involved in the forensic
7 examination and have been identified as experts, on
8 behalf of the plaintiff. Those depositions --
9 depositions should go forward. It's entirely
10 appropriate that they do. The Court understands that
11 because of the issues related to discovery and
12 production issues in this case, that the plaintiff has
13 failed to provide an appropriate date for -- for those
14 depositions.

15 Again, I'm not going to delve into a
16 resolution of who's right and who's wrong as it
17 relates to those delays, we're simply going to move
18 forward in this case. Noting that the Court has
19 indicated that all issues related to today's discovery
20 motions need to be resolved and produced by the 3rd of
21 May -- that's 28 days from today, which means that --
22 I'm sorry, one, two, three, four -- the 10th of May,
23 which is 28 days from today, which means that the
24 depositions protecting the interests that the
25 plaintiff has talked about, certainly could be

1 conducted after May 10th.

2 What I'm going to do, gentlemen, is this:
3 I'm going to schedule those depositions to be
4 conducted Saturday, May 15th, knowing that you're
5 going to work together to come up with a better date
6 that works for all of you, okay? However, if you are
7 not able to come up with a date that works, you have a
8 date from me and that is Saturday, May 15. The first
9 to take place at nine o'clock and the second I'll
10 leave to -- pardon me, the first would be of
11 Mr. Bailey, that would take place at nine o'clock.

12 The second would be starting at one o'clock,
13 and then every hour and a half thereafter until
14 resolved. Again, if that timeline does not work for
15 you -- and I suspect it does not, then I'll encourage
16 you to come up with an agreement regarding a more
17 appropriate time, date, location, et cetera. If you
18 cannot do so, I've given you direction.

19 Now, let's talk about Zoom. The reality is
20 that Zoom is part of our lives as practitioners now.
21 I think that there is going to be, down the road, more
22 development regarding its use in court. It's going to
23 change the way that we do law -- either Zoom or other
24 programs like it.

25 I can tell you that I sentence people to

1 THE COURT: All right. Thank you,
2 Mr. Kazim.

3 Mr. Deperno, you have a response?

4 MR. DEPERNO: Well, I'm -- in response to
5 that, I'm -- I don't know what the procedures are of
6 the 13th Court, this is my first time with the Court,
7 so I don't know how long the Court generally would
8 hold out discovery. Certainly in other circuits I've
9 seen discovery go significantly longer than eight
10 months. But, you know, in response to Mr. Kazim, what
11 I'm -- I think we've -- we're already clear that we're
12 not sending out new discovery. We're now limited to
13 the number of requests that we could request and the
14 number of interrogatories, so that seems quite finite
15 and we just need time to conduct depositions of our
16 witnesses and their witnesses.

17 So if that's not August 8th and it's a
18 shorter deadline, I can live with that, if we can fit
19 these depositions in.

20 THE COURT: All right. Well, you're
21 certainly entitled to depositions and I think those
22 depositions would be useful to help the Court frame
23 the issues and understand each parties case. So I --
24 I think that what we will do here is this:

25 First, let me go back, Mr. Deperno. You can

1 State of Michigan)

2 County of Antrim)

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I, JESSICA L. JAYNES, certified Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that the foregoing proceedings, consisting of 126 pages, held before the Honorable KEVIN A. ELSENHEIMER, Circuit Court Judge, is a true and correct transcript of my stenotype notes with the assistance of computer-aided transcription, to the best of my ability, in the matter of WILLIAM BAILEY V ANTRIM COUNTY, ET AL. File No. 20-9238-CZ. Held Monday, April 12th, 2021.

Date: Sunday, April 18th, 2021

/s/Jessica L. Jaynes
Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
328 Washington Street
Suite 300
Traverse City, Michigan 49684
(231) 922-4576

Exhibit 2

STATE OF MICHIGAN

IN THE 13TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF ANTRIM

File No. 20-9238-CZ
HON. KEVIN A. ELSENHEIMER

WILLIAM BAILEY,

Plaintiff,

v

ANTRIM COUNTY

Defendant.

MATTHEW S DEPERNO

P 52622 Attorney for Plaintiff

HAIDER A. KAZIM

P 66146 Attorney for Defendant

NOTICE OF MOTION

The above case is hereby set for

DEFENDANTS' JOINT MOTION FOR SUMMARY DISPOSITION
PURSUANT TO MCR 2.116(C)(4) AND (8)

on May 10, 2021 AT 1:30 PM

in the Historic Courthouse

In BELLAIRE Via Zoom Meeting ID: 6276788320

Date of Mailing: April 13, 2021

IMPORTANT NOTE: Pursuant to the Michigan Supreme Court Administrative Order No. 2020-6, **ALL HEARINGS WILL BE CONDUCTED VIA ZOOM.** THERE ARE NO EXCEPTIONS. All courtrooms within the 13th Circuit Court are closed. If you have not previously done so, please call the 13th Circuit Court Administrator's Office at 231-922-4701 at least two days prior to your scheduled hearing to test Zoom and to confirm your personal appearance is not required should this Order be lifted prior to your court hearing. Please note that all court hearings are mandated by the Supreme Court to be live streamed on YouTube for public viewing.

13Th Judicial Circuit Court
328 Washington Street
Suite 300
Traverse City, MI 49684
Telephone: -(231) 922-4701

PLAINTIFF-APPELLANT's Appendix 000706

Exhibit 3

RE: Bailey depositions

1 message

Grill, Erik (AG) <GrillE@michigan.gov>

Mon, Apr 19, 2021 at 5:08 PM

To: Matthew DePerno <matthew@depernolaw.com>

Cc: "Haider A. Kazim" <hkazim@cmda-law.com>, "Meingast, Heather (AG)" <MeingastH@michigan.gov>, "Albro, Lisa (AG)" <AlbroL@michigan.gov>

Professor Halderman is available on May 17, 18, 19, or 20th.

Director Brater and Lori Bourbonais are available May 17, 18, 19, 20, or 21.

We are working on getting a date for the Secretary for purposes of scheduling only, but it is our position that deposition is neither necessary nor appropriate. She was not directly involved in any of the events or issues concerning the Antrim election, and has no information to provide that cannot be obtained through her elections staff—Director Brater and Ms. Bourbonais. If you insist on noticing her deposition, we will file a motion for a protective order that the deposition not take place. However, if you insist on issuing a notice, we will provide a date for purposes of the notice pending the court's determination of our motion.

Ryan Macias is not a MDOS employee, and is not an expert retained by the Secretary of State.

Erik A. Grill

Assistant Attorney General

Civil Litigation, Elections, & Employment Division



From: Matthew DePerno <matthew@depernolaw.com>

Sent: Monday, April 19, 2021 3:21 PM

To: Grill, Erik (AG) <GrillE@michigan.gov>; Meingast, Heather (AG) <MeingastH@michigan.gov>; Haider A. Kazim <hkazim@cmda-law.com>

Subject: depositions

CAUTION: This is an External email. Please send suspicious emails to abuse@michigan.gov

Please give me some potential dates you are available in the next 2-4 weeks for depositions.

Initially, looking at the following related to your clients

Sheryl Guy

Connie Wing

Pete Garwood

Jeremy Scott

Jocelyn Benson

Jonathan Brater

Lori Bourbonais

J Alex Halderman

Ryan Macias

Matthew S. DePerno
DePERNO LAW OFFICE, PLLC

PO Box 1595
Portage, MI 49081

(269) 321-5064 (office)
(269) 491-0213 (cell)
(269) 353-2726 (fax)

matthew@depernolaw.com
www.depernolaw.com

Exhibit 16

Notice of Hearing

STATE OF MICHIGAN

IN THE 13TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF ANTRIM

File No. 20-9238-CZ
HON. KEVIN A. ELSENHEIMER

WILLIAM BAILEY

Plaintiff,

v

ANTRIM COUNTY

Defendant.

MATTHEW S DEPERNO

P 52622 Attorney for Plaintiff

HAIDER A. KAZIM

P 66146 Attorney for Defendant

NOTICE OF MOTION

The above case is hereby set for

PLAINTIFF'S MOTION TO ADJOURN HEARING ON
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION AND
CLARIFYING SCHEDULING ORDER

on April 26, 2021 AT 1:30 PM

in the Historic Courthouse
In BELLAIRE VIA ZOOM

Date of Mailing: April 20, 2021

Note: Notice requirement waived by Court.

Zoom Meeting ID: 6276788320

IMPORTANT NOTE: Pursuant to the Michigan Supreme Court Administrative Order No. 2020-6, **ALL HEARINGS WILL BE CONDUCTED VIA ZOOM.** THERE ARE NO EXCEPTIONS. All courtrooms within the 13th Circuit Court are closed. If you have not previously done so, please call the 13th Circuit Court Administrator's Office at 231-922-4701 at least two days prior to your scheduled hearing to test Zoom and to confirm your personal appearance is not required should this Order be lifted prior to your court hearing. Please note that all court hearings are mandated by the Supreme Court to be live streamed on YouTube for public viewing.

13Th Judicial Circuit Court
328 Washington Street
Suite 300
Traverse City, MI 49684
Telephone: -(231) 922-4701

PLAINTIFF-APPELLANT's Appendix 000711

Exhibit 17

Transcript, May 25, 2021

STATE OF MICHIGAN

THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)

WILLIAM BAILEY,
Plaintiff,

Case No. 20-9238-CZ

v.

ANTRIM COUNTY,
Defendant,

SECRETARY OF STATE JOCELYN BENSON
Intervenor-Defendant.

-----/

MOTIONS
(VIA ZOOM)

Before the Honorable KEVIN A. ELSENHEIMER, Circuit Judge
Bellaire, Michigan - Monday, April 26th, 2021.

APPEARANCES:

For the Plaintiff: MR. MATTHEW S. DEPERNO (P52622)
Deperno Law Office, PLLC
951 West Milham Avenue
P.O. Box 1595
Portage, Michigan 49081
(269) 321-5064

For the Defendant: MR. HAIDER A. KAZIM (P66146)
Cummings McClorey Davis & Acho PLC
310 West Front Street
Suite 221
Traverse City, Michigan 49684
(231) 922-1888

Reported By: Ms. Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
(231) 922-4576

APPEARANCES CONTINUED:

For Intervenor-Defendant: MR. ERIK A. GRILL (P64713)
Assistant Attorneys General
P.O. Box 30736
Lansing, Michigan 48909
(517) 335-7659

RECEIVED by MSC 6/2/2022 1:49:42 AM

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WITNESSES: PLAINTIFF
(None)

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WITNESSES: DEFENDANTS
(None)

EXHIBITS:
(None)

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Bellaire, Michigan

Monday, April 26, 2021 - 1:30 PM.

(Court, counsel, and plaintiff present)

THE COURT: All right. Let's go ahead and go on the record in the matter of Bailey versus Antrim County. This is file 20-9238-CZ. It is an Antrim County case. We have two motions filed by the plaintiff today to hear. The first is a motion for leave to amend an expert witness list. And, second, a motion to adjourn the upcoming hearing on defendants' motion for summary disposition.

Just a follow-up from last week, the 23rd, we had a series of objections that we argued -- the Court indicated that it would sign orders once it had a chance to review them. Those orders actually came through -- or proposed orders, I should say, actually came through this morning. So I have not had a chance to -- or had not had a chance to review them on Friday. I will review them once we're complete today, so those should be entered shortly.

With us today we have Mr. Deperno, for the plaintiff. We have Mr. Grill for the state defendants. We have Mr. Kazim for Antrim County. And Mr. Bailey is here as well.

I've had a chance to review the pleadings

1 that have been filed for today's arguments. I think
2 we can probably argue both of these at the same time.
3 Plaintiff, if you'd like to go ahead and begin. Just
4 a comment or two.

5 I'd like you to focus in on the arguments
6 that have been raised by the defense, in particular.
7 In their joint briefs, they discussed with regard to
8 the motion for summary disposition, that they are not
9 factual issues being -- for which summary disposition
10 is being claimed. The motions have been brought
11 pursuant to 2.116(C)(4) and (C)(8), and both of those
12 circumstances, as I recall, you are required to accept
13 the pleadings that have been filed as true in order to
14 make an analysis regarding (C)(4) and (C)(8), which
15 means factually there wouldn't appear to be an awful
16 lot of necessity to extend discovery.

17 So if you would address that argument raised
18 by the defendants in your argument for that motion, I
19 would appreciate it. You may go ahead and begin.

20 MR. DEPERNO: Thank you.

21 I'll start with the issue regarding the
22 amended witness list, if that's okay?

23 THE COURT: You may.

24 MR. DEPERNO: In terms of the amended
25 witness list, I -- I think what's -- what's most

1 important about this motion is that we were not
2 presented with the expert report from J. Alex
3 Halderman until March 26th, 2021. And then we had to
4 actually scramble on our side to find certain experts
5 who could discuss the issues raised by Mr. Halderman
6 in his report. And those people we've identified were
7 James Penrose, Ben Cotton, Jeffrey Lenberg, Seth
8 Keschel, and Dr. Douglas Frank, all dealing with
9 issues raised by J. Alex Halderman.

10 And the defendants have responded that
11 Mr. Halderman's report only relates to refuting the
12 statements made by the ASOG team, and that's just not
13 accurate. His report is much more substantial than
14 that. He makes many findings regarding the actual
15 election, how it was run and -- so his report expands
16 well beyond anything the initial report from ASOG
17 included that was put out on December 14th.

18 I'll also point out that we asked the
19 defendants in a discovery request on December 23rd, to
20 provide us with any information they had that might
21 refute the actual report we put out on December 14th.
22 And they responded that they anticipated that J. Alex
23 Halderman would provide an expert report, but they
24 never actually followed up on that after December
25 13th. We never got any updated discovery from them.

1 We didn't get anything from them until March -- as I
2 said, March 26th, 2024 [sic], so it took them three
3 months to actually produce that report and it came
4 right at the end of discovery, as you know.

5 And I would also point out that their
6 disclosures or lack of disclosures in this case, under
7 MCR 2.302, would have required that they provide us
8 with the anticipated subject areas of any expert
9 reports and we never received anything from them. So
10 I think it's perfectly reasonable that we would be
11 allowed to add these expert witnesses, as we've
12 requested, because they've actually done a significant
13 amount of work in -- in reviewing Mr. Halderman's
14 report and rebutting many facts that he lays out in
15 it, and much of his analysis is also rebutted by
16 these -- by these experts that we've proposed.

17 So I think in order for this Court to --

18 THE COURT: Mr. Deperno, if I may, the
19 defenses' brief indicates that the reports that you
20 did submit as -- as proposed exhibits to a motion or a
21 brief, pardon me, that those proposed reports must
22 have been prepared in advance of the submission of the
23 Halderman report.

24 Is that accurate? Or did those reports
25 come, as you're indicating to me right now, as a

1 result of the Halderman report?

2 MR. DEPERNO: Yeah, those reports did not
3 come prior to the Halderman report. Those reports
4 came after. Those reports came when we submitted our
5 response to a motion for protective order. So
6 that's -- that would not be accurate. Our -- those
7 reports were not prepared until after the Halderman
8 report came out.

9 THE COURT: Okay. I interrupted you, you
10 can continue, please.

11 MR. DEPERNO: That does raise another point.
12 The defendants seem to indicate that -- that those
13 reports are solely what the Court should focus on and
14 they are not. Our -- these people have done a lot of
15 work and -- in terms of refuting the statements made
16 by Mr. Halderman, his analysis, his conclusions, and
17 his actual methods of conducting his examination, all
18 of that is not in reports that they've even completed
19 yet, because it's so substantial in terms of how broad
20 Mr. Halderman's report was.

21 So these are experts that we need. They
22 have done substantial work, and they certainly would
23 enlighten the Court in terms of the information
24 Mr. Halderman has produced, and they are essential to
25 our case and that's why we ask that the Court allow us

1 to amend our expert witness list. And, again, really
2 focusing on the fact that the defendants had since
3 December 23rd to give us information. In their
4 response to discovery, they alluded to the fact that
5 Mr. Halderman would do a report, but didn't produce it
6 until three months later, till right at the end of
7 discovery, giving us very little time to refute the
8 allegations he uses and the testing methods that he
9 employed.

10 THE COURT: All right. If you would like to
11 go ahead and continue to argue the motion to
12 adjourn --

13 MR. DEPERNO: Yeah.

14 THE COURT: -- you can go right ahead and
15 proceed.

16 MR. DEPERNO: So the -- the motion to
17 adjourn -- I think the defendants -- I'll focus on the
18 issue you requested. I think the defendants are wrong
19 in their analysis of their own motion for summary
20 disposition. Although I agree with you, that a (C)(8)
21 motion would test the -- the -- the complaint itself
22 and that the Court would accept allegations as true,
23 their motion is actually quite expansive and -- and I
24 would say more of a disguised (C)(10) motion in the
25 way that they lay out their allegations and the facts

1 that they claim.

2 You know, for instance, they claim that
3 plaintiff's claims are moot in their first argument.
4 They claim that the Court's already granted the relief
5 plaintiff has requested. That's not true. There's
6 factual allegations actually in that argument
7 regarding what the Secretary of State has done
8 regarding her audits -- what she calls audits.

9 We dispute that what she's done is actual
10 audits. So there's significant factual allegations
11 just in that request alone. She -- they make
12 arguments regarding standing that are actually
13 fact-based. They argue -- they make claims about
14 damaged ballots during the election.

15 They make claims about certain types of
16 proposed -- or some of the proposals that were set
17 forth. But some of these arguments are fact-based as
18 well, in terms of what ballots were damaged in Central
19 Lake and what ballots were not, which ballots were
20 counted -- those are all factual-based arguments. In
21 their argument regarding Article II of the
22 Constitution, these are fact-based arguments that they
23 make regarding the voting machines and how they
24 operated -- and, again, I'm just taking their own
25 motion and their brief that they filed, but these are

1 the arguments they're citing in terms of the actual
2 way that the -- the ballots were -- were read, were
3 scanned, and how the -- the voting machines read those
4 ballots. Again, those are fact-based

5 They make an argument regarding the purity
6 of elections clause. And they talk about,
7 specifically, allegations of fraud and other
8 misconduct. And those are fact-based arguments,
9 specifically regarding the -- the misconduct that
10 we've alleged, and the misconduct that actually was --
11 that occurred in this case by Antrim County, Sheryl
12 Guy, for instance, those are fact-based arguments.
13 And then at -- moving forward, I've just written a
14 bunch of notes on their motion.

15 They -- they make claims regarding
16 MCL 600.4545 and MCL 168.861. Again, in that
17 argument, they talk about fraud. The -- the type of
18 fraud that would be alleged, and the fraud that might
19 affect the outcome of an election. Those are
20 fact-based arguments, as they've presented them.

21 They talk about the irregularities in the
22 conduct of an election. Those are fact-based
23 arguments. And they -- this -- their entire argument
24 in that section is all about fraud and facts related
25 to the fraud in this case. So in -- so -- so I think

1 just based on their own motion and brief, there's many
2 facts that they set forth in that motion that expand
3 beyond 2.116(C)(8), and I think that's important.

4 So -- but, you know, importantly, I think
5 also, the -- the timing is suspect in this, in terms
6 of why the Court scheduled a motion for summary
7 disposition on the very day the Court had also set for
8 the defendants to respond to discovery? Clearly --
9 that seems in my mind, that it was not what the Court
10 was intending when the Court stated or rejected the
11 defendants' request to delay discovery. Certainly
12 if -- if the idea was that we -- the Court was
13 rejecting that, why would the Court schedule the
14 motion on the very day that their responses to
15 discovery would be due?

16 And that would substantially prejudice the
17 plaintiff -- I mean, throughout the -- this case, the
18 entire history shows us that, you know, we sent
19 Interrogatories Nos 2, 3, and 4 to the defendants and
20 later Interrogatories 5, along with requests to
21 produce. With Interrogatories 2, they missed the
22 deadline -- the seven-day deadline. Interrogatories
23 3, they missed the seven-day deadline to respond.

24 They didn't file their motion for protective
25 order until after the deadline for those two discovery

1 requests. And -- and -- so the -- the entire -- in --
2 in many senses, the -- the -- our discovery has been
3 protracted by the fact that the defendants did not
4 respond to our discovery. They filed their motion for
5 protective order. And we -- we got to the end here
6 and we still didn't get responses to the 2, 3, 4, and
7 5 -- the discovery requests, we had to resubmit
8 discovery to them to limit them to a certain number;
9 50 requests for production, 20 interrogatories each.
10 And we did that, and now their responses wouldn't even
11 be due until the day of the hearing on the motion for
12 summary disposition -- which means if the Court were
13 to grant it, we'd never get this discovery that was
14 actually due, you know, back in -- in February.

15 So the -- the defendants, I would say, have
16 done a great job of delaying responses to discovery,
17 and they're certainly going to benefit from that, and
18 the fact that they have a motion for summary that --
19 that is, in our opinion, a disguised (C)(10) motion,
20 because in many respects it's fact based. So I -- I
21 just -- I have to believe that the Court -- something
22 went wrong in terms of the way the Court scheduled
23 this -- this motion, because the scheduling of the
24 motion on the same day as the hearing -- or the
25 scheduling the motion on the same day that their

1 discovery responses are due, simply seems to
2 contradict what the Court was intending the day it --
3 it -- it required us to resubmit discovery, and the
4 day it told the defendants they would have 28 days to
5 respond.

6 Scheduling the motion for 28 days just --
7 it -- I don't think it comports with what the Court
8 was intending or -- it doesn't make any sense to me
9 why the Court did that.

10 THE COURT: All right. Thank you,
11 Mr. Deperno.

12 MR. DEPERNO: And that's why -- okay. Thank
13 you.

14 THE COURT: I -- I interrupted you, again,
15 I'm sorry. It happens on Zoom sometimes.

16 Was there anything else that you wanted to
17 add?

18 MR. DEPERNO: No, I was just going to say if
19 the Court had any questions. Otherwise I was -- I
20 think I was finished with my argument.

21 THE COURT: All right. Thank you, sir.

22 I'd like to hear from the defense, and who's
23 going to argue first? Mr. Grill, I assume?

24 Mr. Grill, would -- would -- would you
25 please focus in on this concept or idea that's been

1 raised by Mr. Deperno with regard to your motion,
2 which was brought pursuant to (C)(4) and (C)(8), and
3 whether or not it's a disguised (C)(10) motion? He's
4 accurate when he talks about the -- the language -- I
5 have read the motion.

6 You do certainly discuss the factual
7 elements of the case, factual disputes of the case.
8 Are you attempting to have this matter decided as
9 essentially a (C)(10) motion?

10 MR. GRILL: I guess, your Honor, if I can --
11 I'll just start with the Court's inquiry, then, and
12 say no. Our motion is explicitly brought on (C)(4)
13 and (C)(8), addressing the Court's jurisdiction of the
14 matter and I believe that pertains to the -- the
15 arguments regarding standing and mootness that we've
16 raised.

17 The (C)(8) part of it, we went through each
18 individual legal claim, each of the causes of action
19 in the complaint and addressed the legal deficiencies
20 in them. To the extent facts are referenced in them,
21 those are facts that are alleged in the plaintiff's
22 complaint.

23 We went out of our way to -- I think there
24 was one point where we made reference to a request to
25 admit for the limited purpose of demonstrating that

1 Mr. Bailey -- to contest that he doesn't live in
2 Central Lake Village. But that was only after we
3 established in the complaint paragraph 1 that -- where
4 Mr. Bailey alleges his address. So that's not even an
5 additional fact, it was merely corroboration, and if
6 the Court chooses not to -- to exclude that from
7 consideration entirely, it can do that and still reach
8 the conclusion we urge in our motion.

9 So the -- the motion that we've raised is
10 categorically not a factual motion. And to the
11 plaintiff's point that if there were some part of our
12 argument where it went beyond the facts alleged in the
13 complaint, or talked about some fact we hoped to prove
14 in this case, that would be a basis for denying that
15 part of our motion. It would not be a basis for
16 adjourning our -- the hearing on our motion -- our --
17 a motion for summary disposition. Beyond that, I
18 wanted to address Mr. Deperno's -- and I'm kind of
19 moving backwards here, since I know he stated with the
20 expert claim and I'm starting with the MSD arguments,
21 so I'll just kind of do reverse bookend here.

22 Regarding the Court's hearing being 28 days
23 and the date that discovery is due -- that's not
24 accurate to my understanding. May 10th is not the
25 date -- May 10th is the date for the hearing on our

1 motion, that is not the date that the discovery would
2 be due. Twenty-eight days from April 19th would have
3 been May 17th. Mr. Deperno actually served his
4 discovery on us just before midnight on April the
5 16th. So 28 days from that would be May 14th, which
6 is still not May 10th. So I'm not quite sure I follow
7 his argument in that respect.

8 The arguments Mr. Deperno described in
9 his -- as being fact-based, those are legal questions.
10 Whether or not the Secretary of State has conducted an
11 audit within the meaning of the Constitution is a
12 legal question, and an interpretation of the
13 Constitution. That is not a factual argument that
14 requires additional discovery.

15 To the extent that -- if the Court even
16 reached that question, that would be a basis, then,
17 for them to say there's a question of fact and we'll
18 address that (C)(10) at the conclusion of discovery,
19 but it doesn't stop this Court from hearing the
20 arguments and deciding the question as the matter
21 under (C)(8).

22 And I think that -- I really don't -- the
23 Court has obviously read our motion. I don't really
24 want to restate the arguments, unless the Court has
25 additional questions for me on motion to adjourn.

1 THE COURT: I don't, Mr. Grill. Thank you.

2 MR. GRILL: Okay.

3 THE COURT: Let's go to Mr. Kazim.

4 Mr. Kazim, do you wish to argue --

5 MR. GRILL: I'm sorry, your Honor, I was
6 going to --

7 THE COURT: I'm sorry, Mr. Grill, do you
8 have more? Please.

9 MR. GRILL: Yes. I was going to turn to the
10 motion for the leave for the amending the experts.

11 THE COURT: I was just trying to move right
12 past you, Mr. Grill. I'm sorry about that.

13 Let's hear your argument.

14 MR. GRILL: Okay.

15 THE COURT: Please.

16 MR. GRILL: Regard -- regarding the motion
17 to amend the expert list, again, this is a matter
18 for -- where the plaintiff has to show good cause and
19 there just isn't any good cause here. There's no good
20 reason that these experts weren't sought to have been
21 added during the time provided for discovery.

22 I know that Mr. Deperno has referenced --
23 talked about Professor Halderman's report in this
24 matter. That argument doesn't really hold up under
25 scrutiny, however. Professor Halderman's report is,

1 indeed, a very thorough report, but it is based on the
2 same images and the same information that was provided
3 to the plaintiff during his forensic examination back
4 in December.

5 Moreover, to the extent that there's
6 anything in Professor Halderman's report -- Professor
7 Halderman's report is basically a response to the ASOG
8 report that was provided by the plaintiff very early
9 on in this case. And to the extent that there's
10 anything in there that -- that requires additional
11 commentary from the plaintiff, I see no reason why
12 plaintiff's existing experts -- you know,
13 Mr. Ramsland, Mr. Waldron, his -- he's already got six
14 people listed as experts in this case, there's no
15 reason why any of them would not be capable of
16 providing the kind of rebuttal to Professor
17 Halderman's report when, in fact, Professor
18 Halderman's report was itself a rebuttal to their
19 report.

20 THE COURT: So, Mr. Grill, let me stop you
21 for a moment. You don't disagree that the plaintiff's
22 should have the opportunity to rebut the Halderman
23 report?

24 MR. GRILL: No. But, I -- I don't, your
25 Honor. And obviously we would prefer to see that

1 sooner rather than later, given the time frames that
2 we're trying to -- we're moving under. But -- and,
3 just again, that the -- the ASOG people have already
4 provided a report in this case, in which they opine
5 this is what we've concluded. This is what were --
6 the conclusions we were able to reach, based on the
7 forensic examination -- which is exactly what
8 Professor Halderman has done. I see no reason why
9 they would not be capable of providing that type of
10 rebuttal.

11 I would also note that the experts
12 Mr. Deperno seeks to add don't really appear to be
13 much in the way of a response for Professor Halderman.
14 I've read Dr. Frank's paper that he attached to his
15 response for protective order. It doesn't seem to
16 really address anything Professor Halderman had to
17 say. Similarly, with Mr. Penrose, or the Cyber
18 Ninjas, Mr. Logan's affidavit, that doesn't seem to be
19 a rebuttal to Professor Halderman. It seems to be new
20 material they seek to talk about, instead of the ASOG
21 report and the Professor Halderman report.

22 That's not rebuttal. That's -- that's, you
23 know, moving -- that's moving the goal post. And that
24 leads me to my final point, your Honor, which is that
25 at this point the expert witness list essentially

1 amounts to an ambush. Discovery is closed, we're
2 going to have new experts -- at an absolute minimum,
3 if Mr. Deperno is going to add these new experts, we
4 would need new discovery of the experts. And that
5 would only be fair.

6 We would need to have experts of our own to
7 respond to these new reports that they're making. We
8 would need to conduct depositions and discovery of the
9 new experts. We would need to take depositions and
10 discovery of our new experts.

11 We would essentially be starting this case
12 all over again. And that's exactly -- that's why
13 courts establish case management orders. That's why
14 there are deadlines. And there's been no
15 demonstration in the plaintiff's motion -- which is
16 two pages long, as to why there is good cause to -- to
17 amend the expert witness list at this late date.

18 THE COURT: Well, if there is demonstration,
19 it is the late filing of the Halderman report -- now,
20 I say late, it wasn't filed inappropriately, it was
21 filed within the discovery period, but it was at the
22 end of the discovery period. I think you would agree
23 with that. And that report -- at least given
24 Mr. Deperno's indication today, that there may have
25 been discovery that you responded to, apparently, that

1 was due in December, reflecting the report itself or
2 reflecting an analysis of his experts' report, doesn't
3 that provide some support for prejudice in terms of
4 his ability to secure effective rebuttal to the
5 Halderman report?

6 MR. GRILL: Well, again, your Honor, based
7 on what Professor Halderman says, no. Professor
8 Halderman was a -- there's a good chunk of that report
9 that specifically says this is what's wrong with the
10 ASOG report. It didn't really add new theories to
11 most of anything.

12 The best way I think you could -- you could
13 characterize Professor Halderman's report in short is,
14 that it -- it corroborates what the defendants have
15 been saying from the start of this case, that this
16 wasn't some grand fraud conspiracy, this was human
17 error; and that's exactly what Professor Halderman
18 found. And Professor Halderman's report, I think, was
19 fairly evenhanded. It didn't, you know, seek to
20 tarnish the truth in any respect. He was rather
21 candid at some points about some of the things he
22 thought the defendants could do better -- which,
23 again, I think lends credibility to it.

24 But nothing here suggests that there's a new
25 theory that Professor Halderman propounded or added to

1 this case at the last minute. The best thing -- the
2 only thing he really has done here is explain and
3 provide -- you know, citations for everything the
4 defendant has been saying, and to respond in specific
5 order to the ASOG report. If Mr. Ramsland and
6 Mr. Waldron want to submit a rebuttal on the behalf of
7 ASOG to that, I could see a circumstance where that
8 would be appropriate. I think, again, timing being an
9 issue here, but, you know, I think with -- since the
10 Court -- we're already looking here into middle of May
11 to conclude the written discovery Mr. -- Mr. Deperno
12 has propounded, that doesn't -- it seems to me like
13 there could be a deadline for rebuttal well before
14 that, that would give Mr. Deperno and his team an
15 opportunity to respond to that with his existing
16 experts.

17 But adding new experts at this stage of the
18 game, I think just -- it sets us back to square one
19 because we -- what we would have to do in response to
20 that.

21 THE COURT: All right. Thank you,
22 Mr. Grill.

23 Anything further on either motion?

24 MR. GRILL: I don't believe so, your Honor.
25 I know there are some housekeeping matters we need to

1 breach at the end, once we've got through motions.

2 THE COURT: Very good. Let's go to
3 Mr. Kazim.

4 Mr. Kazim, do you have a response you would
5 like to add to either motion?

6 MR. KAZIM: Thank you, your Honor.

7 I echo, Mr. Grill's arguments on the MSD
8 motion, so I don't have anything new to add on that.
9 With respect to the motion to amend the expert witness
10 list, what I would just add is that under the Court's
11 civil scheduling order, the only date that was
12 established was of December 23rd, by which the parties
13 had to name their expert. So, admittedly, there was
14 no specific date provided to -- in the Court's
15 scheduling order regarding the submission of the
16 expert witness report. The Halderman report, like
17 Mr. Grill stated, I -- the issue is not about the
18 plaintiff's right to refute or to rebut the Halderman
19 report.

20 The issue is the addition of these
21 additional experts, presumably for the purpose of
22 forming a rebuttal. And that is where the
23 disagreement lies, because if you just look at the
24 Penrose report, it goes into a whole new theory about
25 some algorithm called sixth degree polynomial. I

1 would admit to the Court that nowhere in
2 Mr. Halderman's report is there a reference to any
3 such algorithm, or any such theory that is advanced by
4 Mr. Penrose.

5 So clearly that is -- that report is not a
6 rebuttal of Mr. Halderman's report. The -- the -- the
7 Halderman report, as Mr. Grill stated, is a direct --
8 is a direct response to the ASOG report, based on the
9 forensic images that were obtained. Mr. -- the
10 Penrose report, the Frank report, go well beyond --
11 well beyond the scope of the forensic images and the
12 Halderman report. And to the extent that plaintiff,
13 as the Court asked, has a right to rebut the Halderman
14 report, they already have named their experts, which
15 is the ASOG team that analyzed the images, that took
16 the images, and that prepared the report.

17 So that is the -- that is the avenue
18 available to the plaintiff by -- by using their
19 existing experts that they have named, who actually
20 prepared the report to which Halderman responded, to
21 rebut the Halderman report. Rather than identifying
22 new experts who have now gone well beyond the scope of
23 the Halderman report, or even the ASOG report, and are
24 now advancing new theories. So with that, I have
25 nothing further to add.

1 Thank you.

2 THE COURT: All right. Thank you,
3 Mr. Kazim.

4 Mr. Deperno, let's go back to you. I'd like
5 to hear your response, and I might have a couple of
6 questions for you. Please proceed.

7 MR. DEPERNO: In terms of the expert
8 witnesses, this idea that the Halderman report was
9 some kind of rebuttal to the ASOG report is just
10 factually incorrect. The ASOG report was essentially
11 a report that said that the Dominion Voting System is
12 designed to intentionally create errors in order to
13 influence an election, and then discussed some of the
14 security breaches that were discovered in analysis of
15 the Antrim County voting system.

16 The Halderman report goes well beyond
17 that -- that argument. He's talking about -- he's
18 actually making arguments to -- to support the
19 defendants' defenses. These weren't issues raised in
20 the ASOG report, but these are specifically new
21 issues -- the Halderman report is a report of the
22 defendants' defenses about human error and their
23 explanation of how the votes flipped on election night
24 from Jorgensen to Trump, to Trump to Biden, and how
25 Biden's votes went into an under vote category.

1 He goes through an entire analysis of how
2 that happened. He talks about the actual files within
3 the Election Management System and how it -- issues
4 were programed. How the compact flash drives were
5 programed. And -- so we went out and found experts to
6 rebut what he is actually saying.

7 We -- we're not stuck with and don't have to
8 stick with the ASOG team, who did a limited analysis
9 of the forensic images they looked at. We're now
10 talking about an entire report done by Halderman, that
11 goes well beyond what ASOG ever did, and tries to --
12 in a way, control the narrative of what the defendants
13 are saying, but support the Secretary of State's
14 argument that this was just human error, and the
15 safest election in the history of the country. These
16 new experts, Penrose, and Lenberg, and the others,
17 will rebut those allegations. They've actually gone
18 and looked into the forensics.

19 They've tracked through the Halderman report
20 paragraph by paragraph to rebut what he's actually
21 said. And we're entitled to bring those new experts
22 forth in order to rebut it -- particularly considering
23 that the Secretary of State didn't give us their
24 Halderman report until March 26th. They knew exactly
25 what they were doing in -- in -- regarding the timing

1 and when discovery was going to end. And -- and that
2 is supported by their responses to discovery from
3 December 23rd, when they specifically say that J. Alex
4 Halderman will, at some point, provide an expert
5 report.

6 We didn't get it till March 26th, and now we
7 get to test those theories that he sets forth. I
8 think that's perfectly reasonable for us to -- to do.

9 Do you have any questions on that issue?

10 THE COURT: Nope. I think you covered it.

11 MR. DEPERNO: And then in terms of the issue
12 on -- the summary disposition, just real briefly.
13 I -- I think the Court's read their motion for summary
14 disposition. I think it's pretty clear -- we know
15 that they're -- they're making fact-based arguments in
16 their motion. I have nothing to add on that.

17 Thank you.

18 THE COURT: All right. Thank you.

19 There are two motions that have been brought
20 before the Court. One is a motion to amend the
21 plaintiff's expert witness list to add a series of
22 additional experts that the plaintiff believes are
23 necessary in order to be able to appropriately rebut
24 the information contained in a report produced by the
25 defense. We've been calling it the Halderman report.

1 That report was produced at the end of the discovery
2 period.

3 And the report is in response -- at least
4 based on the arguments presented by the defense, in
5 response to the initial report produced last fall by
6 the plaintiff. We're calling that the ASOG report.
7 And the question is not whether the defense is --
8 pardon me, the plaintiff is entitled to rebut the
9 Halderman report -- clearly it is entitled to -- to
10 rebut same, but rather, whether the introduction of
11 experts to do so would create additional issues in
12 this case. The parties have had a long time to
13 research this case. They've gone through discovery.
14 They've gone through depositions. They should know
15 their case by now.

16 We shouldn't be getting into new issues at
17 this point. That's why we have case management orders
18 in place -- or civil scheduling orders in this
19 circuit. So the Court has discretion with regard to
20 scheduling issues, matters like this, the conduct of
21 trials, the conduct of discovery, and I use that
22 discretion in order to make sure that all parties have
23 access to the information that they need in order to
24 be able to effectively put forward or rebut, as
25 required, the claims that are made by either

1 themselves in their arguments in their initial
2 filings, their complaints, or answers that have been
3 provided to those complaints.

4 Here, it's my belief that given the -- the
5 fact that the Halderman report came as it did, at the
6 very end of discovery, the plaintiff should have an
7 opportunity to rebut. I don't find that the plaintiff
8 is required to limit himself to experts that he chose
9 to deal with the initial matters in his complaint.
10 The plaintiff should have the opportunity to choose
11 whatever experts are appropriate in order to deal with
12 the report from the defense as it comes in. And, of
13 course, there was no way to do that, but for an
14 amendment to the witness/exhibit list, assuming that
15 the plaintiff needed different experts.

16 Again, I'm not at the point in this case of
17 being able to discern, with any great detail, whether
18 or not the report that was produced by the defense
19 requires rebuttal, or what kind of rebuttal it does
20 require. That's not the job of the Court. That's the
21 job of the parties, and I am going to allow the
22 plaintiff to produce additional experts in order to
23 rebut and -- and, Mr. Deperno, please listen -- to
24 rebut the Halderman report. That does not mean that
25 we'll be going into new theories.

1 This is a point in the case where we are
2 testing the complaint. We are testing the theories
3 advanced by the complaint. And as a result, we -- or
4 I should say the motion for injunctive relief -- or
5 the complaint for injunctive relief, pardon me, as a
6 result, we're not going to be going into new areas at
7 this point. You may, of course, produce an expert to
8 rebut; however, the -- pardon me. You may produce
9 experts, as you've requested, in order to rebut the
10 Halderman report.

11 Now, that creates a timing issue. We are in
12 the midst of some extended discovery for very limited
13 purposes. And I'm going to go ahead and allow
14 extended discovery here -- meaning that, if there is
15 going to be a report issued by a rebuttal witness -- a
16 rebuttal expert, pardon me, that report needs to be
17 produced within 30 days of the date of the order in
18 this matter. The discovery of any report, any witness
19 identified, will need to be completed within 54
20 days -- pardon me, strike that. Will need to be
21 completed within 28 days of the production of any such
22 report.

23 And if we get to a point where the defense
24 believes, that for some reason, they need additional
25 experts, they're welcome to go ahead and ask the

1 Court, and we'll try to deal with them using the
2 same -- try to deal with those issues using the same
3 analysis that we have set forth today.

4 All right. So that motion is granted under
5 the terms that I've -- I've indicated.

6 And, Mr. Deperno, I'm going to allow you to
7 prepare the motion -- or the order on that.

8 Let's talk about the issue with regard to
9 summary disposition. The motion that has been brought
10 by the parties -- by the defense, is a (C)(8) motion
11 and it is also a (C)(4) motion. And I think it's
12 appropriate to review the standards associated with
13 each.

14 A motion brought pursuant to 2.116(C)(8) is
15 a motion that is essentially saying that the action
16 which started the case fails to state a claim upon
17 which relief can be granted, as a legal matter. It's
18 a test of legal sufficiency. And that's the case of
19 Spiek versus Department of Transportation, 456 331,
20 from 1998. And there are a series of other cases that
21 have, obviously, analyzed that, because we see an
22 awful lot of (C)(8) motions. Commonly, we see those
23 motions at the beginning of an action.

24 Here, that motion was brought later in
25 the -- in the case -- or in the course of discovery.

1 And no doubt, given the desire of the parties to
2 present their discovery and present their factual
3 witnesses to the Court and to the Court writ large,
4 meaning the public, it would be an easy thing to want
5 to move past the question of legal sufficiency.

6 But the fact is that the Court has an
7 obligation to review legal sufficiency issues when
8 they are raised; which is why, as I said, we do take
9 up (C)(8) motions throughout the entirety, frankly,
10 of -- of factual development of the discovery period
11 of the case itself. So as a result, and given that in
12 order to review a (C)(8) motion, I've got to accept
13 that the allegations made in the complaint are true, I
14 do believe that a (C)(8) motion should be heard when
15 it is brought. Similarly, with a (C)(4) motion, which
16 is a second basis that the motion for summary
17 disposition is brought -- the question of jurisdiction
18 is always a question of law. It's not a question of
19 fact.

20 And that's Eaton County Board of Road
21 Commissioners versus Schultz, 205 Mich. App. 371
22 (1994). And there are a series of other cases that
23 discuss the same point. So, again, I'm looking
24 squarely at the pleadings in looking at a (C)(4)
25 motion. So I do believe that I've got the ability to

1 go ahead and review that motion, regardless of the
2 progress of discovery.

3 And if they are cloaked (C)(10) motions,
4 then I may not have the ability to decide those
5 matters when we actually get to decisions on the
6 motions. So the motion to adjourn the motion for
7 summary disposition is denied.

8 Mr. Grill, if I can get an order from you on
9 that point, please. So I'll expect orders to come in
10 from both of you.

11 All right. Mr. Grill, you indicated that
12 there was a -- some issues that we needed to address
13 that might have come up at some other point?

14 MR. GRILL: Mostly for scheduling, your
15 Honor.

16 In light of some recent motions --

17 THE COURT: All right.

18 MR. GRILL: -- and I think we had a brief
19 discussion about this last Friday, with the -- we're
20 running into some conflicts with the current
21 scheduling order. For example, right now trial
22 documents are due May 4th. There's a settlement
23 conference May 11th, and the trial is currently
24 scheduled for June 7th.

25 Similarly, there's a dead -- we're going to

1 need a new deadline for motions for summary
2 disposition under (C)(10), once all of this remaining
3 discovery and whatever else with the experts is
4 completed, so that all of that may be included in the
5 motions. So that's -- that's what I wanted to bring
6 to the Court's attention, is just we -- we need some
7 updated scheduling.

8 THE COURT: All right.

9 Mr. Deperno, anything you'd like to add with
10 regard to the timing issue?

11 You're muted, sir.

12 MR. DEPERNO: Sorry. I said I would agree
13 with Mr. Grill, that we need some amendment on those
14 dates.

15 THE COURT: Well, here's the good news,
16 because you gentlemen are in agreement, I'm going to
17 leave it to both of you, along with Mr. Kazim's wisdom
18 and input, to come up with some proposed extensions.
19 I will agree to them. So what I'd like from you both
20 is a stipulated order or stipulated motion, pardon me,
21 and order that would provide some additional time for
22 a rescheduling of the settlement conference, the
23 trial, and a deadline for the motion for summary
24 dispositions under (C)(10).

25 And I'll go ahead and review it and if it

1 makes sense, I will sign it. And our office will set
2 some new dates. It's important for those of you who
3 don't practice in the 13th to -- commonly, to make
4 sure that you let our office know if you have vacation
5 schedules going into late summer and fall that might
6 interfere with dates that we would select. Mr. Kazim
7 already knows that, so.

8 All right. Is there anything else that we
9 need to address today?

10 MR. DEPERNO: Not from plaintiff.

11 MR. KAZIM: Not from Antrim County.

12 THE COURT: Defense?

13 MR. KAZIM: Thank you, your Honor.

14 MR. GRILL: I don't -- I don't have anything
15 additional, your Honor.

16 THE COURT: All right. Thank you, all.
17 We'll see you soon.

18 MR. DEPERNO: Bye.

19 MR. KAZIM: Thank you.

20 (At 2:17 PM, proceedings concluded)

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I, JESSICA L. JAYNES, certified Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that the foregoing proceedings, consisting of 36 pages, held before the Honorable KEVIN A. ELSSENHEIMER, Circuit Court Judge, is a true and correct transcript of my stenotype notes with the assistance of computer-aided transcription, to the best of my ability, in the matter of WILLIAM BAILEY V ANTRIM COUNTY, ET AL. File No. 20-9238-CZ. Held Monday, April 26th, 2021.

Date: Monday, May 3rd, 2021

/s/Jessica L. Jaynes
Jessica L. Jaynes, CSR 7597, RPR
Official Court Reporter
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Exhibit 18

Motion to Amend Complaint

May 3, 2021

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FILED

Sheryl Guy

Antrim 13th Circuit Court
05/04/2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY, SECRETARY OF
STATE JOCELYN BENSON, in her official
and individual capacity, JONATHAN
BRATER, in his official and individual
capacity, SHERYL GUY, in her official and
individual capacity, and MILLER
CONSULTATIONS & ELECTIONS, INC.,
d/b/a ELECTION SOURCE, a Michigan
corporation

HON. KEVIN A. ELSENHEIMER

Defendants.

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PLAINTIFF'S MOTION TO AMEND COMPLAINT

1. On November 22, 2020, Plaintiff filed his complaint, alleging that Defendant Antrim County violated Michigan law while conducting the November 3, 2020 election and engaged in fraud, statutory violation and misconduct.

2. During discovery, Plaintiff learned that in the opinion of defense expert witness, J. Alex Halderman, harm which Plaintiff attributed to the acts and/or omissions of the Defendant was in actuality contributed by the acts of a third-party vendor and agent of Defendant, Election Source, and Defendant Sheryl Guy. Plaintiff does not concede the truth or accuracy of J. Alex Halderman's opinion, but his statements opened the door for Plaintiff to uncover new evidence.

3. The expert report of J. Alex Halderman led Plaintiff to investigate Election Source's role and conduct in the events which are the subject of the original complaint, which in turn uncovered new evidence forming the basis of the amendments in the proffered Amended Complaint attached hereto.

4. Further, Defendants have filed a motion for summary disposition. The amended complaint corrects any alleged defects raised in Defendants' motion.

5. MCR 2.118(a)(2) provides that where a party requests leave to amend, such "[l]eave shall be freely given when justice so requires." Plaintiff asserts that in the context of this case, justice requires that leave to amend his complaint be granted.

6. "A motion to amend ordinarily should be granted in the absence of any apparent or declared reason, such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of amendment." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9-10, 614 NW2d 169, 174 (2000) (citing *Ben P. Pyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656, 213 NW2d 134 (1973)). None of the bases for denial of Plaintiff's motion exist under the facts of this case.

7. As to undue delay, Plaintiff only learned of Election Source's alleged role in the Defendant's conduct of the 2020 general election on March 26, 2021. Since that time, Plaintiff

has diligently investigated the matters raised by J. Alex Halderman's disclosure. Plaintiff could not have presented this amended petition any earlier than now.

8. As to bad faith, Plaintiff asserts that this amendment is proffered in good faith, for the purpose of ensuring the just and full disposition of the underlying issues giving rise to Plaintiff's action against Defendant.

9. The requested amendment is not being sought with any dilatory motive. To the contrary, Plaintiff desires to secure ultimate disposition of his action as rapidly as justice may permit, to prevent the potential for the errors and misconduct of the 2020 general election to be repeated in future elections.

10. Plaintiff has not previously sought leave to amend his petition, and is not aware of any deficiencies which are left unabated by this proffered amendment.

11. Amendment will not unduly prejudice the Defendant. "Prejudice to a defendant that will justify denial of leave to amend arises when the amendment would prevent the defendant from having a fair trial. . . . The prejudice must stem from the fact that the new allegations are offered late and not from the fact that they might cause the defendant to lose on the merits. *Knauff v Oscoda Co Drain Com'r*, 240 Mich App 485, 493; 618 NW2d 1, 6 (2000) (citing *Ben F Pyke & Sons*, 390 Mich at 657-58). It was Defendant's expert witness who raised the issues addressed by this amendment, in an attempt to exculpate Defendant from responsibility from the manifold deficiencies in Defendant's conduct of the election. Plaintiff has not delayed in seeking to amend his complaint to account for the revelations triggered by Defendant's expert witness. In order to ensure the full and just disposition of the issues raised by this action, it is necessary to allow Plaintiff to include the proffered amendments to his complaint, to enable the Court to rule with all the facts and evidence before it.

12. Amendment in this case would not be futile. "An amendment would be futile if it is legally insufficient on its face, and the addition of allegations that merely restate those allegations already made is futile." *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8–9; 772 NW2d 827, 832 (2009) (citing *P T Today, Inc v Comm'r of Financial & Ins Services Office*, 270 Mich App 110, 143, 715 NW2d 398 (2006)). The allegations included in Plaintiff's proffered amended complaint contains genuinely new allegations which are legally sufficient, once proven, to justify relief. Accordingly, futility is not implicated in this case.

WHEREFORE, Plaintiff respectfully requests that this Court grant it leave to amend his complaint by substituting the attached Amended Complaint for his original complaint.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 3, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

Attorney for Plaintiff

PROOF OF SERVICE

On the date set forth below, I caused a copy of the following documents to be served on all attorneys of record at the addresses listed above

1. Plaintiff's Motion for Leave to Amend Complaint

Service was electronically using the MiFile system which will send notification of such filing of the foregoing document to all attorneys of record.

Dated: May 3, 2021

/s/ Matthew S. DePerno
Matthew S. DePerno (P52622)

FILED

Sheryl Guy

Antrim 13th Circuit Court
05/04/2021

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY

HON. KEVIN A. ELSENHEIMER

Defendant

SECRETARY OF STATE JOCELYN
BENSON

Intervenor-Defendant,

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Lansing, MI 48909
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EXHIBIT 1, part 1

PLAINTIFF'S MOTION TO AMEND COMPLAINT

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 3, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)
Attorney for Plaintiff

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY, SECRETARY OF STATE JOCELYN BENSON, in her official and individual capacity, JONATHAN BRATER, in his official and individual capacity, SHERYL GUY, in her official and individual capacity, and MILLER CONSULTATIONS & ELECTIONS, INC., d/b/a ELECTION SOURCE, a Michigan corporation

HON. KEVIN A. ELSENHEIMER

Defendants.

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Attorney for Plaintiff
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Erik A. Grill (P64713)
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Attorneys for Defendant Benson
PO Box 30736
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(517) 335-7659

AMENDED VERIFIED COMPLAINT

NOW COMES Plaintiff, WILLIAM BAILEY, by and through his attorney, DePERNO LAW OFFICE, PLLC and for his Amended Complaint against ANTRIM COUNTY, SECRETARY OF STATE JOCELYN BENSON, in her official and individual capacity, JONATHAN BRATER, in his official and individual capacity, SHERYL GUY, in her official

and individual capacity, and MILLER CONSULTATIONS & ELECTIONS, INC., d/b/a ELECTIONSOURCE, a Michigan corporation, states the following:

JURISDICTION and VENUE

1. Plaintiff WILLIAM BAILEY ("Plaintiff") is an individual residing at 1592 N. Intermediate Lake Road, Central Lake, Michigan 49622, Antrim County, Michigan. Plaintiff is a registered voter and Antrim County, Michigan. On November 3, 2020 Plaintiff voted in person in the 2020 presidential election at the polling location in Central Lake Township, Antrim County.

2. Defendant ANTRIM COUNTY ("Defendant Antrim County") is a public agency with its registered office located at 203 E. Cayuga St., Bellaire, MI 49615.

3. Defendant Antrim County is tasked with the obligation to hold all elections in Antrim County in a fair and legal manner. Antrim County is made up of 15 precincts.

4. Defendant SECRETARY OF STATE JOCELYN BENSON ("Defendant Benson") is the Secretary of State in Michigan and is charged with administering election laws, election training workers throughout the state, and maintaining the qualified voter registration list ("QVR"). MCL 168.21 ("The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act."); 168.31(1)(a) (the "Secretary of State shall . . . issue instructions and promulgate rules . . . for the conduct of elections and registrations in accordance with the laws of this state"). Defendant Benson is the public official with authority and responsibility for the conduct of elections in the State of Michigan. In this capacity, Defendant BENSON had both legal and actual responsibility for the conduct of the November 3, 2020 election in the State of Michigan and Antrim County.

5. Michigan law provides that Secretary Benson "[a]dvice and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b). *See also Hare v. Berrien Co Bd. of Election*, 129 N.W.2d 864 (Mich. 1964); *Davis v. Secretary of State*, 2020 Mich. App. LEXIS 6128, at *9 (Mich. Ct. App. Sep. 16, 2020).

6. Secretary Benson is responsible for assuring Michigan's local election officials conduct elections in a fair, just, and lawful manner. *See* MCL 168.21; 168.31; 168.32. *See also League of Women Voters of Michigan v. Secretary of State*, 2020 Mich. App. LEXIS 709, *3 (Mich. Ct. App. Jan. 27, 2020); *Citizens Protecting Michigan's Constitution v. Secretary of State*, 922 N.W.2d 404 (Mich. Ct. App. 2018), *aff'd* 921 N.W.2d 247 (Mich. 2018); *Fitzpatrick v. Secretary of State*, 440 N.W.2d 45 (Mich. Ct App. 1989).

7. Defendant JONATHAN BRATER ("Defendant Brater") is Michigan's Director of Elections and is being sued in his official capacity

8. Defendant SHERYL GUY ("Defendant Guy") is the Clerk of Antrim County and is charged with administering all elections and training election workers within Antrim County. Defendant GUY is the public official with authority and responsibility for the conduct of elections in Antrim County. In this capacity, Defendant GUY had both legal and actual responsibility for the conduct of the November 3, 2020 election in Antrim County.

9. Defendant MILLER CONSULTATIONS & ELECTIONS, INC. ("Defendant Election Source") is a domestic profit corporation incorporated in Michigan with a principal address of 2615 Danvers Drive SE, Grand Rapids, MI 49512, and doing business under the registered fictitious name "ElectionSource."

10. Defendant Election Source is a subcontractor of Dominion Voting Systems, Inc. or one of its affiliates (collectively "Dominion").

11. Election Source is a governmental actor. As a result of its contract with Dominion and government entities, Election Source is delegated responsibility to administer public elections; a core governmental function. By contracting to provide comprehensive voting solutions for public elections, including the election of individuals to serve in constitutionally prescribed offices, Election Source is a governmental actor.

12. Election Source's involvement in running the presidential election amounts to state action. Election Source willfully participates in joint activity with the state during voting, including by supplying its products and services coextensively with election officials to carry out the election. There is pervasive entwinement between Election Source and the state.

13. In its capacity as – and using its authority as – a governmental actor, Election Source allowed manipulation or changing of votes in the 2020 election. As a result of systemic and widespread vulnerabilities in Dominion's software and hardware, and Election Source's negligence and fraud in programming elections and mapping ballots, votes can be altered in elections.

14. Defendant Antrim County contracted with Defendant Election Source for services related to the conduct of the November 3, 2020 election, including but not limited to: the creation of the Antrim County November 3, 2020 project file compact flash card configuration; ballot design; programming for the Antrim County ICP, ICX, and ICC; the conducting of logic and accuracy tests; the performance of database changes; and the provision of thumb drives with election material.

15. Defendant Election Source provided election services for Antrim County related to this election, including ballot changes on October 5 and 7, 2020.

16. The transactions that give rise to this cause of action occurred in Antrim County, State of Michigan.

17. Plaintiff respectfully requests that this Honorable Court grant injunction relief, for all the reasons stated in his complaint, motion for temporary restraining order, supporting affidavit, exhibits, and accompanying brief, which are all incorporated herein by reference.

18. Pursuant to MCL 600.4545(1), "[a]n action may be brought in the circuit court of any county of this state whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof."

19. Michigan's Constitution declares that "[n]o person shall be denied the equal protection of the laws" Mich. Const. 1963, art 1, §2.

20. The Michigan Constitution's "purity of elections" clause states that "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting." Mich. Const. 1963, art 2, §4(2).

21. Plaintiff requests relief as recognized in *Shoemaker v City of Southgate*, 24 Mich App 676; 180 NW2d 815 (1970).

22. This action is properly filed in Antrim County Circuit Court pursuant to MCR 3.306(A)(2), Mich. Const. art. 1, §2 and art. 2, §4, MCL 600.4545, and MCL 600.605.

23. Plaintiff requests this Court order "a speedy hearing" of this action and "advance it on the calendar" as provided by MCR 2.605(D).

24. Venue is proper pursuant to MCR 3.306(D).

COMMON ALLEGATIONS

25. The general election was held on Tuesday, November 3, 2020.

26. Antrim County uses the Dominion Voting Systems election management system and voting machines (tabulators). These tabulators were shown to miscount votes cast for President Donald Trump and instead count them for Presidential Candidate Joe Biden.

27. Antrim County is just one of 47 counties in Michigan that uses the Dominion voting system to process ballots. As noted in the letter attached hereto from Senate President Pro Tempore Aric Nesbitt [Exhibit 1], "[t]his is particularly concerning when at least one other secretary of state, specifically in Texas, refused to certify Dominion Voting Systems for use because the examiner could not verify that the system was 'safe from fraudulent or unauthorized manipulation.'" This letter is signed by 40 Michigan State Senators and Representatives.

28. The letter references that the allegations are "backed up by sworn affidavits of over 100 Michigan citizens, real people, willing to face legal consequences to their lives and livelihoods to stand by their assertions.

29. In addition, the letter attached hereto from 22nd District Representative Lana Theis [Exhibit 2] expresses similar concerns about the issue in Antrim County with Dominion voting systems.

30. At 9:30 am on Wednesday, November 4, 2020, unofficial results posted by the Antrim County Clerk showed that 16,047 voters had cast a ballot in the presidential election.

Presidential Candidate Joe Biden received 7,769 votes in the county and President Donald Trump received 4,509 [Exhibit 3].¹

31. Antrim County voted 62% in favor of President Trump in 2016.

32. Democratic candidates Gary Peters and Dana Ferguson also outperformed their Republican opponents in the county.

33. On Wednesday morning, November 4, 2020, Plaintiff turned on the television to watch the local news and was shocked to see an election map showing Antrim County in bright blue – meaning that the majority of voters in Antrim County had voted Democrat. Plaintiff immediately contacted Jim Gurr (who worked for Helena Township (Antrim County) election. Upon information and belief, Jim Gurr then contacted Defendant Guy's office and asked her office to review the results, which appeared skewed and incorrect.

34. On November 5, 2020, Defendant Guy released amended results which showed that 18,059 residents had cast a ballot in the election [Exhibit 4].² Of those, Presidential Candidate Joe Biden received 7,289 votes in the county and President Donald Trump received 9,783; resulting in President Donald Trump receiving 54%, still significantly less than 2016.

35. On November 21, 2020, Defendant Guy released second amended results³ which now show 16,044 residents had cast a ballot in the election [Exhibit 5].⁴ Of those, Presidential Candidate Joe Biden received 5,960 votes in the county and President Donald Trump received

¹ Only including pages 1-14 (results for President, Senator, Congress 1st District, State Legislature 105th District

² Only including pages 3-14. Pages 1-2 not available on Antrim County website.

³ <http://www.antrimcounty.org/elections.asp>

⁴ Only including pages 1-14.

9,748; resulting in President Donald Trump receiving 60.75%, which was more in line and consistent with 2016.

36. Of serious concern is why Presidential Candidate Joe Biden had more than 7,700 votes on election night.

37. Of equal concern is why Presidential Candidate Joe Biden had 7,289 votes on November 5, 2020.

38. Of equal concern is why Presidential Candidate Joe Biden's vote count dropped to 5,960 votes on November 21, 2020. What happened to the mysterious 1,740+ overvotes registered on election night?

39. Of equal concern is why Defendant Antrim County's vote count for registered voters dropped from 18,059 on November 5, 2020 to 16,044 on November 21, 2020. That is a startling 11.2% reducing in total voters.

40. It is an obvious fact that Presidential Candidate Joe Biden received more votes than actually cast for him, including an extra 2,015 "phantom votes." But for Plaintiff contacting Jim Gurr, who contacted Defendant Guy's office, this mistake would not have been corrected.

41. There are many other questions that remain unanswered, including but not limited to (1) whether the Dominion tabulators in Antrim County were tampered with, (2) whether they have the capacity to connect to the internet, (3) whether they had any open VPN ports during the election, (4) if connected to the internet, was the connection secure, (5) whether the machines were accessed via the use of removable media to transfer voting information, (6) whether the ballot images were preserved in every precinct per federal and state election law, (7) whether the audit logs were preserved and synchronized, (8) whether the audit logs were altered or edited by any person operating the system, (9) whether Dominion pre-loaded any algorithms and

configurations on the machines that alter the results, and if so, what algorithms and configurations were pre-loaded, and (10) whether the "purge option" that is built into Dominion utilized to cancel, switch, or manipulate votes, in the same way it has historically been utilized in Venezuela and Cuba.

42. Michigan's Constitution guarantees all Michigan citizens the right of equal protection, due process, and "the purity of elections." Const. 1963, art 1, §2; art. II, §4(2) (reprinted in Appendix). Every Michigan citizens who is an "elector . . . qualified to vote in any election" is guaranteed the right to cast a ballot. *Id.*

43. Plaintiff and others seek to learn the answers to these questions, including why Defendant initially registered "phantom voters" for Presidential Candidate Joe Biden and why the Dominion machines altered and switched votes for him.

44. Defendant Benson released a statement blaming the county clerk for not updating certain "media drives," but her statement failed to provide any coherent explanation of how the Dominion Voting Systems software and vote tabulators produced such a massive miscount.⁵

45. Defendant Benson continued: "After discovering the error in reporting the unofficial results, the clerk worked diligently to report correct unofficial results by reviewing the printed totals tape on each tabulator and hand-entering the results for each race, for each precinct in the county." *Id.*

46. What Defendant Benson fails to address is what would have happened if no one "discover[ed] the error." Indeed, when Defendant Guy testified before Michigan's Joint

⁵ https://www.michigan.gov/documents/sos/Antrim_Fact_Check_707197_7.pdf

(emphasis in original).

Oversight Committee on November 19, 2020, she failed to and was unable to answer this question.

47. Tabulator errors related to Dominion occurred elsewhere in Michigan on election night. For instance, Wayne County used the same Dominion voting system tabulators as did Antrim County.

48. These vote tabulator failures are a mechanical malfunction that, under MCL 168.831-168.839, requires a "special election" in the precincts affected.

49. Michigan's Election Code, MCL 168.831-168.839, provides the board of canvassers shall order a special election as governed by those precincts affected by the defect or mechanical malfunction. The board of county canvassers "is responsible for resolving any claims that malfunctioning voting equipment or defective ballots may have affected the outcome of a vote on an office appearing on the ballot." Michigan Manual for Boards of County Canvassers.

50. In the aftermath of the election failures, Defendant Guy deleted or directed her staff to delete certain system files from electronic election equipment used in the November 3, 2020 election.

51. On March 3, 2021, Defendant Guy dismissed or directed her staff to dismiss this instant case, *William Bailey v. Antrim County*, case no. 2020-9238-CZ. It was later determined by this Honorable Court that Defendant Guy had improperly dismissed *William Bailey v. Antrim County*, and the case was reinstated by this Honorable Court.

52. The log files in the election management system ("EMS") used by Antrim County confirm that Defendant Election Source's personnel performed updates to the ballot designs used in the election, made appropriate database changes, and performed follow-up procedures for the November 3, 2020 election.

53. The EMS reflects that technicians employed by Defendant Election Source made alterations to the ballot definitions and related project files. The Election Source Antrim County Project File was configured to allow Antrim County personnel to change the technician password. Election Source provided weak passwords that were identical at all precincts. Defendant Election Source produced project files with hardcoded passwords of 123456 to open or rezero the poll, and utilized the same password for all election officials. This resulted in significant security vulnerability in Antrim County's EMS on election day.

54. Defendant Election Source failed to use good development practices and configuration control processes. The Configuration Version Number corresponding to different iterations of the ICPs, ICXs, and ICCs remained identical or went unverified. Additionally, Defendant Election Source failed to identify that the election files and ballot files were incompatible due to providing incorrect compact flash card election files.

55. Defendant Election Source moreover introduced substantive election file errors caused by incompatible election files, and failed to address the notifications and/or warnings indicated in the EMS log files which would have been visible to Election Source technicians upon Antrim project file updates. Rather than remediate the errors, Election Source ignored notifications and/or warnings and proceeded to update the Antrim project file for tabulators with the system errors and associated misconfigurations unchanged.

56. Defendant Election Source failed to employ appropriate version control practices, resulting in a mismatch in configurations deployed to Antrim County precincts versus the central configuration of the Antrim County EMS. Lack of version of control makes it impossible to for local precincts to determine whether their compact flash cards have a proper configuration. Defendant Election Source then gave Defendant Guy exclusive possession of the Antrim project

file and compact flash card configuration along with the central EMS, and she failed to properly deploy updated compact flash cards to all precincts in Antrim County.

57. Defendant Election Source utilized thumb drives to carry ballot designs and ballots, which produced a significant security vulnerability which could be exploited by a single attacker given the same level of access as an ordinary poll worker. Such an attack could involve using the ballot and ballot design contained on a thumb drive to produce additional ballots which could then be cast for the attacker's preferred candidate. Upon information and belief, Defendant Election Source knew of this vulnerability and did not act to cure it. An Election Source whistleblower identified this practice as a major risk for fraud in the November 3, 2020 election because this Election Source practice and procedure made it incredibly easy to stuff the ballot box as a result of the easily accessible thumb drives.

58. Additionally, Defendant Election Source, and Defendant Guy failed to reprogram all CF cards providing ICPs and ICXs for all the precincts and townships served by Antrim County following a programming update. Specifically, the user information log pertaining to these systems shows no activity between September 25 to October 5, 2020, after Defendant Election Source delivered the update on October 22, 2020.

59. Defendant Election Source failed to use good development practices and configuration control processes. The Configuration Version Number corresponding to different iterations of the ICPs, ICXs, and ICCs remained identical or went unverified. Additionally, Defendant Election Source failed to identify that the election files and ballot files were incompatible due to providing incorrect compact flash card election files.

60. Following its provision of ballot changes to the Antrim County project file on October 5 and 7, 2020, Defendant Election Source waited two weeks to provide the Project File

to Antrim County. This delay limited Antrim County from having significant time to perform appropriate LAT activity before the election. No log entries were created between October 7 and 13; the Project File was archived on October 13. No further log entries were created until October 22, when four scripts were run by unknown individuals. No details regarding the scripts' function or functions appears in the log files.

61. Defendant Election Source turned off ballot saving images settings to preserve the ballots for an accurate audit.

62. The Dominion EMS that sits in the office of Antrim County includes a multitude of problems found within the system that amount to gross error by Defendants. One of the most important discoveries is detailed on page 15 of the Cyber Ninja's report [Exhibit 6]. Here, Cyber Ninjas discovered a Microsoft SQL Server Management Studio implant on the system. This piece of software is not approved by the Election Assistance Commission ("EAC") and allows a user to actually circumvent security protocol and make "direct[]" edit entries within the database" which "could potentially be utilized to change vote values." Perhaps most importantly, this software is a "separate install." In other words, it should not be on the system. It is, by its very definition, a hacking tool.

63. Benjamin Cotton has also prepared an affidavit after review of the Antrim County system [Exhibit 7]. He states that he reviewed the forensic image of the Dominion system "utilized in the November 2020 election and discovered evidence of internet communications to a number of public and private IP addresses." One connection in particular traced back to "the Ministry of Education Computer Center, 12F, No 106, Sec 2, Hoping E. Rd., Taipei Taiwan 106." Further, "[t]his IP address resolves to a cloud provider in Germany." Mr. Cotton's findings show that the Antrim County system was connected to the internet. Of course, Sheryl Guy

deleted system files that would allow further review. For this reason, review of other systems in other counties is critical.

64. James Penrose also explains internet connectivity on both Dominion and ES&S machines [Exhibit 8]. The Dominion Voting Systems proposal for Antrim County shows a quote for procurement of wireless transmission capabilities. Dominion representatives also confirmed performance issues with wireless transmission of vote totals and even went as far as disabling the saving of ballot images without explicit authorization during the 2020 primary. In addition, a forensic examination of a Dominion ICX machine has shown the existence of Taiwan and Germany-based IP addresses in unallocated space, implying there were international communications via the Internet. In addition, ES&S DS200 machines in Michigan utilized wireless 4G network adapters for vote transmission over the commercial Verizon network. The company that manufactures the 4G wireless modems is named Telit. Telit has recently taken investment from a major Chinese firm and according to press reporting the UK government is monitoring the situation with concern that the Chinese government is in a position to exercise influence over Telit.

65. The ASOG report [Exhibit 9] issued on December 14, 2020 also details multiple instances of negligence, fraud, and bad faith:

I. SERVER OVERVIEW AND SUMMARY

1. Our initial audit on the computer running the Democracy Suite Software showed that standard computer security best practices were not applied. These minimum-security standards are outlined the 2002 HAVA, and FEC Voting System Standards – it did not even meet the minimum standards required of a government desktop computer.
2. The election data software package USB drives (November 2020 election, and November 2020 election updated) are secured with bitlocker encryption software, but they were not stored securely on-site. At the time of our forensic examination, the election data package files were already

moved to an unsecure desktop computer and were residing on an unencrypted hard drive. This demonstrated a significant and fatal error in security and election integrity. Key Findings on Desktop and Server Configuration: - There were multiple Microsoft security updates as well as Microsoft SQL Server updates which should have been deployed, however there is no evidence that these security patches were ever installed. As described below, many of the software packages were out of date and vulnerable to various methods of attack.

- a) Computer initial configuration on 10/03/2018 13:08:11:911
 - b) Computer final configuration of server software on 4/10/2019
 - c) Hard Drive not Encrypted at Rest
 - d) Microsoft SQL Server Database not protected with password.
 - e) Democracy Suite Admin Passwords are reused and share passwords.
 - f) Antivirus is 4.5 years outdated
 - g) Windows updates are 3.86 years out of date.
 - h) When computer was last configured on 04/10/2019 the windows updates were 2.11 years out of date.
 - i) User of computer uses a Super User Account.
3. The hard drive was not encrypted at rest – which means that if hard drives are removed or initially booted off an external USB drive the files are susceptible to manipulation directly. An attacker is able to mount the hard drive because it is unencrypted, allowing for the manipulation and replacement of any file on the system.
 4. The Microsoft SQL Server database files were not properly secured to allow modifications of the database files.
 5. The Democracy Suite Software user account logins and passwords are stored in the unsecured database tables and the multiple Election System Administrator accounts share the same password, which means that there are no audit trails for vote changes, deletions, blank ballot voting, or batch vote alterations or adjudication.
 6. Antivirus definition is 1666 days old on 12/11/2020. Antrim County updates its system with USB drives. USB drives are the most common vectors for injecting malware into computer systems. The failure to

properly update the antivirus definition drastically increases the harm cause by malware from other machines being transmitted to the voting system.

7. Windows Server Update Services (WSUS) Offline Update is used to enable updates the computer – which is a package of files normally downloaded from the internet but compiled into a program to put on a USB drive to manually update server systems.
8. Failure to properly update the voting system demonstrates a significant and fatal error in security and election integrity.
9. There are 15 additional updates that should have been installed on the server to adhere to Microsoft Standards to fix known vulnerabilities. For the 4/10/2019 install, the most updated version of the update files would have been 03/13/2019 which is 11.6.1 which is 15 updates newer than 10.9.1

This means the updates installed were 2 years, 1 month, 13 days behind the most current update at the time. This includes security updates and fixes. This demonstrated a significant and fatal error in security and election integrity.

- Wed 04/10/2019 10:34:33.14 - Info: Starting WSUS Offline Update (v. 10.9.1)
- Wed 04/10/2019 10:34:33.14 - Info: Used path "D:\WSUSOFFLINE1091_2012R2_W10\cmd\" on EMSSERVER (user: EMSADMIN)
- Wed 04/10/2019 10:34:35.55 - Info: Medium build date: 03/10/2019
- Found on c:\Windows\wsusofflineupdate.txt
- *WSUS Offline Update (v.10.9.1) was created on 01/29/2017

*WSUS information found here <https://download.wsusoffline.net/>

10. Super User Administrator account is the primary account used to operate the **Dominion Election Management System** which is a major security risk. The user logged in has the ability to make major changes to the system and install software which means that there is no oversight to ensure appropriate management controls – i.e. anyone who has access to the shared administrator user names and passwords can make significant changes to the entire voting system. The shared usernames and passwords mean that these changes can be made in an anonymous fashion with no tracking or attribution

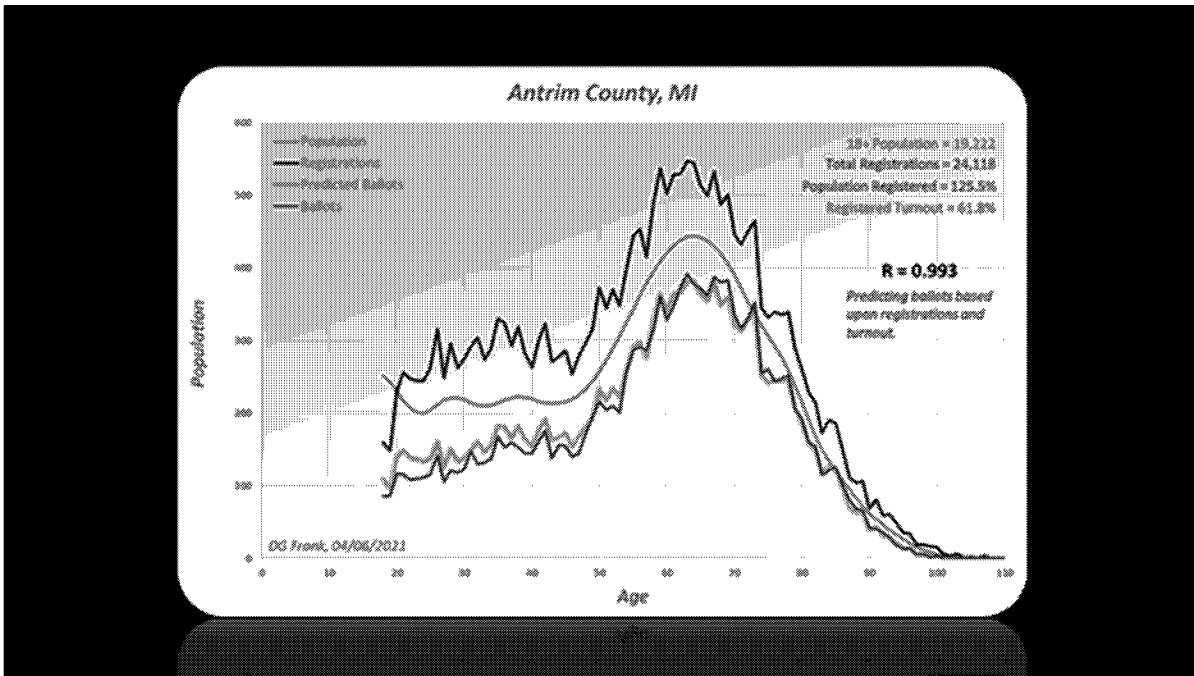
66. Douglas G. Frank, PhD, has conducted a study to show an algorithm at work in Michigan [Exhibit 10]. Dr. Frank concludes the following:

- Voter registration is consistently near, or exceeding county population demographics.
- **There are over 66,000 ballots recorded that are not associated with a registered voter.**
- The ability to predict ballot demographics with such remarkable precision (average correlation coefficient of **R = 0.997**) demonstrates the activity of a regulating algorithm.
- **This confirms, as seen in several other states, that ballots are being harvested at the precinct level, regulated at the county level, and determined at the state level.**
- The degree of precision observed confirms that algorithms had access to voting databases and voting activity before, during, and following the November 3, 2020 election.

	Wayne County	Oakland County	Macomb County	Kent County	Livingston County	Grand Traverse County	Barry County	Charlevoi x County	Antrim County
<i>Total Population</i>	1,749,284	1,257,532	873,922	656,900	191,938	93,030	61,489	26,089	23,266
<i>Total 18+ Population</i>	1,339,405	999,630	694,156	500,078	152,390	74,536	48,094	21,337	19,222
<i>Current Registered (4/6/2021)</i>	1,383,669	1,016,125	685,385	492,643	159,774	79,954	49,724	23,576	21,935
<i>Total Registrations (October Database)</i>	1,365,392	1,011,669	670,592	489,234	157,667	79,537	48,628	23,279	24,118
<i>Total Ballots in Database</i>	840,810	750,232	477,718	348,880	123,642	57,888	34,913	16,574	14,901
<i>Ballots not found in October Database</i>	20,124	17,551	13,596	8,782	3,240	1,295	914	380	312

67. Dr. Frank further concluded that there were 312 ballots in Antrim County not found in the October database of the Qualified Voter File.

68. Dr. Frank further concluded that there were more registered voters in Antrim County than eligible voters, demonstrating negligence and a failure to properly maintain the QVF.



69. Jim Penrose and Jim Lenberg each issued additional reports on May 2, 2021.

These reports collectively reveal the direct ability to manipulate the election by Defendants.

70. Jim Penrose [Exhibit 11] reveals the following fraudulent conduct on behalf of Defendants:

- ElectionSource technicians responsible for the creation and deployment of project files have supreme power in creating configurations that can be used to modify the votes in the EMS and the output of the tabulator paper tapes. Upon review of the Lenberg report dated May 2nd, 2021, ElectionSource technicians create project files for their clients and as a result can access, control, and modify any election they support.
- ElectionSource configured and deployed Antrim County's project files that resulted in the modification of the votes during the general election. The Lenberg report indicates that vote modification in Antrim County was consistent with technical manipulation of the project file. This project file was generated and deployed by ElectionSource for the November 3rd, 2020 general election.

- In order to research and investigate the Antrim County vote modification it is necessary to perform a full forensic examination and testing of all equipment utilized during the election. Michigan clerks take an oath to faithfully discharge the duties of a clerk including to hold fair and accurate elections. ElectionSource has issued a threat to Michigan clerks interested in conducting independent forensic examinations and testing of election equipment. See Exhibit A.
- ElectionSource has the responsibility to review the log files on the Dominion Voting Systems, Election Management System (EMS), the log files are typically viewed by trained technicians with the appropriate experience to properly interpret the software prompts/warnings. During the preparation for the general election their were prompts/warnings ignored by ElectionSource.
- ElectionSource failed to utilize version control. Version control is defined as the task of keeping a software system consisting of many versions and configurations well organized. Failure to utilize version control can lead to incorrect vote tally during an election. The lack of policy, procedures, and technical implementation on the part of ElectionSource led to a situation where an inaccurate tally could occur.
- An ElectionSource whistleblower has also publicly spoke out about his concerns of fraud over technicians having access to a broad array of ballots from across the State of Michigan via ElectionSource thumb drives. The evidence of what occurred in Antrim County along with the statements of an ElectionSource whistleblower illustrate the multiple avenues for fraud.
- ElectionSource performed a number of functions on behalf of Antrim County in order to prepare for and conduct the November 3, 2020 general election. When examining the historic steps taken by the ElectionSource configuring the Antrim County EMS one of the actions taken was to set the default technician passcode for the entirety of Antrim County to a weak

passcode. The weak passcode was "123456" set by ElectionSource as found in the configuration files used for the election. Moreover, the UserLog file on the EMS also indicated that the election password to open and close the polls was set to "1234678" for more than 19 months prior to the election at which time it was updated to a similarly weak and guessable passcode "11032020", the date of the general election. These passcodes work to give access to the tabulators to open/close, reopen, and rezero the tabulators.

- A malicious actor seeking to commit fraud would need to know these passcodes to gain access to the tabulators and enable their operations. ElectionSource provisioned passcodes that were easily guessable and simple trial and error would reveal the correct passcodes with a tractable number of attempts, even done manually by hand by an attacker.
- On January 8, 2019 the default passcode to open/close the polls was set by ElectionSource to be "12345678". This default passcode remained the same until August 3, 2020 when it was changed to "11032020" which was the passcode used during the Antrim County general election in November of 2020.
- ElectionSource also hardcoded into the election project files for Antrim County the passcode of "123456" as the "technician passcode." The technician passcode allows for the polls to be re-opened and the tabulators to be re-zeroed. This weak passcode was set by ElectionSource.
- ElectionSource set the "DCF File Version Number" associated with the Antrim County election to the same value, "50401," regardless of the updates that were being deployed to the Antrim County Election Project Files and ballot definitions. There was no distinction made between the ICX, ICP, and ICC configurations that were deployed. This lack of version control resulted in ElectionSource's failure to track that incompatible

election configurations and ballot definitions were being deployed in Antrim County on election day.

- The original election/ballot configuration provisioned by ElectionSource on September 29th, 2020 for use in Antrim County for their ICPs. Figure 3 shows the final, corrected revision from October 23, 2020, of the election/ballot configuration for use in Antrim County ICPs. There is no evidence of a versioning process either technical or manual applied by ElectionSource to ensure that the proper version of the configuration would be deployed throughout the entirety of Antrim County. ElectionSource's failure to employ version control led to vote manipulation during the November 3rd, 2020 election.
- ElectionSource made substantive modifications to the election and ballot definitions that triggered the EMS to provide a number of "prompt" notifications that were acknowledged by the ElectionSource technician performing the updates. The technician failed or elected not to take action on the notification messages and request a wholesale redeployment of all compact flash cards for all precincts that would be required to proceed with a fully updated election package. Table 2 below shows the notification messages that were generated from the EMS when the technician updated the configuration. The specific message directed to the technician states, "All previously created and deployed election files will be unusable." The technician is then presented with an option to click OK or Cancel based on whether or not they wish to proceed. The last record of this prompt in the log was on October 5, 2020 when the technician selected, "OK" acknowledging that new election files, provisioned on compact flash cards, would need to be deployed as the previously deployed versions will be unusable. ElectionSource failed to address the aforementioned prompts resulting in a modified vote tally.

- The final update to the election files prior to the general election was performed by ElectionSource on October 22nd, however, to truly complete the deployment of all the new election files to all precincts, completely new compact flash cards would need to be provisioned containing the new election files. From October 24th to November 2nd there were no entries in the UserInfo log file, indicating that there were no attempts made by either ElectionSource to complete this compact flash card update process during the crucial weeks ahead of the general election.
- The Lenberg report indicates that manipulation of the project files can circumvent the canvassing process. ElectionSource technicians responsible for the creation and deployment of project files have supreme power in creating configurations that can be used to modify the votes in the EMS and the output of the tabulator paper tapes. ElectionSource technicians create project files for their clients and as a result can access, control, and modify any election they support.
- ElectionSource configured and deployed Antrim County's project files that resulted in the modification of the votes during the general election. The Lenberg report indicates that vote modification in Antrim County was consistent with technical manipulation of the project file.

71. Jeff Lenberg [Exhibit 12] reveals the following fraudulent conduct on behalf of

Defendants:

Testing of Antrim County project files indicates that modification of the project files can replicate the election inaccuracies observed in the November 3, 2020 election. In addition, further testing revealed that selective modification of the project files resulted in tailored manipulation of the votes tallied. The manipulation can be tailored to modify a specific

county, precinct, or race. The steps used to manipulate the vote tally are listed below:

- Modify the specific precinct election files
 - Edit the VIF_BALLOT_INSTANCE.DVD
 - Note: Technical access to ElectionSource corporate resources would allow for these types of manipulations to the elections.
- Burn Compact Flash cards with the configurations for the tabulators
- Run the Election (Process the Ballots through the Tabulator)

The results of the modifications to the project file will show vote totals changed on the tabulator's printed tape as well as modified vote totals in the Results Tally Reporting (RTR) system.

In order to validate these findings; two test cases were run:

1. The swap of Trump and Jorgenson vote totals on both the paper tape and the RTR results
2. The swap of Biden and Trump (Presidential Race) and Ferguson and Bergman (Congressional) while leaving the Senate race unmodified on both the paper tape and the RTR results

Exhibit A contains photos of all the ballots that were run for test case number 2 as well as the paper tapes and RTR tallies showing the manipulations.

Both test cases were successful in that the modifications were made without any alerts or error messages being generated by the EMS or the tabulator. The test cases would not have been detected during the canvassing process because both the paper tapes and the RTR results matched.

COUNT 1
CONSTITUTIONAL RIGHT TO ACCURACY AND INTEGRITY OF ELECTIONS

Michigan Constitution – Article 2, Section 4, Paragraph 1(h)

(in-person ballots)

(as to all Defendants)

72. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

73. Plaintiff's constitutional rights have been violated. Plaintiff brings this action to vindicate his constitutional right to a free and fair election ensuring the accuracy and integrity of the process pursuant to the Michigan Constitution, art. 2, sec. 4, par. 1(h), which states all Michigan citizens have:

"The right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections."

74. The Mich. Const., art. 2, sec. 4, further states, "All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes."

75. Michigan's Constitution gives its citizens "[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art II, § 4(1)(g).

76. Although the Election Law directs the Secretary of State to prescribe the procedures for election audits, the Post-Election Audit Procedures prescribed by the Secretary of State entirely fail to provide for the review of absentee ballot signatures. Thus, the audits announced by the Secretary of State will not review whether the signatures on absentee ballots

were properly reviewed or whether ballots were properly accepted, even though the Secretary of State acknowledges the outsized role absentee ballots played in the 2020 Presidential Election and the limited time election officials had to process those ballots.

77. Based upon all the allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

78. The audit must permit a review of all election tapes from the November 3, 2020, election; all paper ballots for the November 3, 2020 election; all system logs for the November 3, 2020 election; any vote tabulators and modems in Antrim County; all election media, including but not limited to, all compact flash cards and poll books and USB drives used in the November 3, 2020 election; all election reports and tallies, .pdf files, and spreadsheets used in the November 3, 2020 election; and all canvasser paperwork and notes used in the November 3, 2020 election.

79. As discussed in the Lenberg and Penrose reports, the Dominion voting system is designed in a way that allows Election Source or any county employee to modify the project files and manipulate or switch the votes at the tabulator and EMS.

80. By performing an election using a system with these inherent vulnerabilities, the Defendants engaged in fraud and compromised the accuracy and integrity of the November 3, 2020 general election.

81. By failing to properly investigate the cause of the inaccurate results on November 3, 2020, but instead falsely telling the voters of Antrim County and citizens of the State of Michigan that the election was the secure and the safest in this country's history, or by failing to correct such statements, Defendants engaged in fraud and compromised the accuracy and integrity of the November 3, 2020 general election.

COUNT 2
CONSTITUTIONAL RIGHT TO ACCURACY AND INTEGRITY OF ELECTIONS

Michigan Constitution – Article 2, Section 4, Paragraph 1(h)

(mail-in and absentee ballots)

(as to all Defendants)

82. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

83. During the past election cycle, Michigan's voters cast an unprecedented 3.3 million absentee ballots in the 2020 general election.⁶

84. The absentee voting process, however, lacks many of the traditional safeguards that protect against voter fraud.

85. For example, in-person voting allows for poll challengers to "[c]hallenge the voting rights of a person who the challenger has good reason to believe is not a registered elector," MCL 168.733(1)(c), and to "[e]xamine without handling each ballot as it is being counted," MCL 168.733(1)(g). Likewise, election inspectors "shall challenge an applicant" when

⁶ See Mich Dep't of State, *Rejected ballot data from Nov. 3 election demonstrates integrity of election* (Dec. 2, 2020), available at <https://www.michigan.gov/sos/0,4670,7-127--546413--,00.html>; Rejected Ballots by Jurisdiction, Microsoft Excel Spreadsheet, available at same under "A breakdown by jurisdiction can be found here." [Collectively referred to hereinafter as "*Rejected Ballot Data*"].

"the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct." MCL 168.727(1).

86. With absentee voting, there is no opportunity to inspect or challenge ballots at the time they are cast. Instead, local clerks and election officials can only examine the ballots after the fact. Without this added layer of protection, the statutory safeguards that do exist to prevent voter fraud become all the more important.

87. In addition to the right to vote by absent voter ballots, the same section of Michigan's Constitution gives voters "[t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections." Const 1963, art II, § 4(1)(h).

88. The Election Law also directs Defendant Benson to "prescribe procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963" and requires Defendant Benson and county clerks to "conduct election audits . . . as set forth in the prescribed procedures." MCL 168.31a(2).

89. Because the right to audit election results under Article II, Section 4 was added to Michigan's Constitution in 2018, there is no precedent regarding a voter's ability to exercise this right or the nature and scope of this right. Nonetheless, in a November 23, 2020 decision by the Michigan Supreme Court, Justice Viviano analyzed the right to audit election results under art II, § 4(1)(h) and concluded "that no such showing is required" for a voter to obtain an audit because "neither the constitutional text nor MCL 168.31a expressly provide for it[,] none of the neighboring rights listed in Article 2, § 4, such as the right to vote by absentee ballot, requires citizens to present any proof of entitlement for the right to be exercised," and the constitutional

provision is "self-executing." *Constantino v City of Detroit*, ___ Mich ___; ___ NW2d ___; 2020 Mich LEXIS 2013, at *8-9 (Nov. 23, 2020) (Viviano, J., dissenting). Justice Viviano also noted that Michigan courts have yet to determine "the nature and scope of the audit provided for in Article 2, § 4" nor have they "considered whether MCL 168.31a accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right." *Id.* at *9, *15.

90. Given the limited traditional safeguards applicable to the absentee voting process, Defendant Benson's inconsistent guidance, and the unprecedented number of absentee ballots cast during the 2020 Presidential election, an audit of the absentee ballots cast during the 2020 Presidential election is imperative to ensure the accuracy and integrity of that election and future elections.

91. In October 2019, Priorities USA sued Defendant Benson to prevent the State from enforcing its "signature matching laws," which Priorities USA acknowledged were "mandated by outdated Michigan election laws." *Priorities USA v Benson*, Case No 3:19-cv-13188 (ED Mich).

92. Before obtaining an absentee ballot, these "outdated" laws required city or township clerks to compare a voter's signature on the absentee ballot application with their signature that was previously on file. The clerk was required to ensure that "the signature on the application agrees with the signature for the person contained in the qualified voter file or on the [voter's] registration card," and to "determine the genuineness of a signature on an application for an absent voter ballot." See 2018 PA 129.

93. If the signature on the application was determined to be genuine, an absentee ballot would be delivered to the voter. When the voter returned the ballot, the signature "on the absent voter ballot return envelope" would again be compared with the signature on record.

94. If the local clerk was satisfied, then the ballot would be forwarded to the State board of election inspectors to "verify the legality of the vote" by "[e]xamining the digitized signature for the absent voter included in the qualified voter file . . . to see that . . . the signature on the statement agrees with the signature on the registration record." MCL 168.766(1)(a).

95. Priorities USA alleged that under this framework, "Michiganders who attempt to vote absentee can be denied the franchise outright based solely on an election official's determination, during any one of the several stages of signature review, that a voter's signature on the ballot envelope does not sufficiently resemble a signature that she provided to election officials at some point in the past."

96. Priorities USA took issue with the lack of direction given to clerks, alleging that "no one really knows how Michigan officials decide whether a signature on an absentee ballot or ballot application is sufficiently similar to the previously designated signature to withstand scrutiny. Here, election officials have unfettered discretion." Further, it noted that Michigan "law provides no mechanism by which voters whose ballots are wrongfully discarded for alleged signature mismatches may challenge that determination or cure their rejected ballots . . . Michigan law does not even require election officials to notify voters that their ballots or absentee ballot applications have been rejected for an alleged signature mismatch."

97. Rather than defend the law Michigan's Legislature enacted, the Secretary of State first moved to dismiss the complaint on procedural grounds.

98. When that failed, the Defendant Benson again declined to defend State law. Instead, as Priorities USA's Motion to Voluntarily Dismiss its case explained, just two days after Priorities USA moved for a preliminary injunction, "the Secretary issued guidance to city and township officials that largely tracks the relief requested" by Priorities USA.

99. As relevant here, this guidance introduced "new signature review guidelines." These Guidelines – untethered to the Election Law or Constitution – provided provided as follows:

Signature Review

Signature review begins with the presumption that the voter's AV application or envelope signature is his or her genuine signature.

1. If there are any redeeming qualities in the AV application or return envelope signature as compared to the signature on file, treat the signature as valid. Redeeming qualities may include but are not limited to similar distinctive flourishes, more matching features than nonmatching features, and Examples 1-5 in the chart below.

2. A voter's signature should be considered questionable only if it differs in multiple, significant, and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter whenever possible.

100. The guidance was promulgated without any formal rulemaking or process. Instead, it just appeared on the Bureau of Elections website, and for two months, not even Priorities USA was made aware of this shift in signature review guidelines.

101. By filing its complaint, even Priorities USA acknowledged that the existing "signature review guidelines" were "mandated by" the Michigan Election Law, and could therefore only be overturned through a finding that certain provisions in the Election Law were unconstitutional.

102. Without any court intervention, however, Defendant Bensonupended this framework, creating presumptions out of thin air, and instructing local clerks to count signatures if "there are any redeeming qualities."

103. What's worse, Defendant Benson did so without any process at all. There is no indication of who drafted this new guidance, or the considerations that went into this new

guidance. See generally Josh Blackman, *Government by Blog Post*, 111 FIU L. Rev. 389, 416 (2016) (taking issue with similar informal processes and explaining that "ad hoc, random" amendments made in online posts authored by unknown persons in administrative agencies "should not be afforded the same presumption of constitutionality as other laws, duly enacted by Congress, and faithfully executed by the Chief Executive").

104. Months later, the law was changed the right way. On October 6, 2020, Governor Whitmer signed Senate Bill 757.

105. Similar to its predecessor, under this Bill, "[t]he qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file." MCL 168.761(1).

106. As we have learned in this litigation, Defendant Benson and Defendant Guy have been entirely negligent in how they maintain their voting record and the QVF. See *Dr. Frank Report*, generally.

107. However, the Legislature added safeguards to protect against voter disenfranchisement. The law now provides that:

If before 8 p.m. on the day before election day the clerk of a city or township rejects an absent voter ballot application because the signature on the absent voter application does not agree sufficiently with the signature on the master card or the digitized signature contained in the qualified voter file so as to identify the elector or because the elector failed to sign the absent voter ballot application, the city or township clerk shall as soon as practicable, but in no event later than 48 hours after determining the signatures do not agree sufficiently or that the signature is missing, or by 8 p.m. on the day before election day, whichever occurs first, notify the elector of the rejection by mail, telephone, or electronic mail.

MCL 168.761(2).

108. The same notice requirements apply to returned absent voter envelopes:

FILED

Sheryl Guy

Antrim 13th Circuit Court
05/04/2021

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY

HON. KEVIN A. ELSENHEIMER

Defendant

SECRETARY OF STATE JOCELYN
BENSON

Intervenor-Defendant,

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EXHIBIT 1, part 2

PLAINTIFF'S MOTION TO AMEND COMPLAINT

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 3, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)
Attorney for Plaintiff

If before 8 p.m. on the day before election day the clerk of a city or township rejects an absent voter ballot return envelope because the signature on the absent voter ballot return envelope does not agree sufficiently with the signature on the master card or the digitized signature contained in the qualified voter file so as to identify the elector or because the elector failed to sign the absent voter ballot return envelope, the city or township clerk shall as soon as practicable, but in no event later than 48 hours after determining the signatures do not agree sufficiently or that the signature is missing, or by 8 p.m. on the day before election day, whichever occurs first, notify the elector of the rejection by mail, telephone, or electronic mail. The clerk shall also comply with section 765(5).

MCL 168.765a(6).

109. Given the unprecedented number of absentee ballots cast during the 2020 Presidential election, which represent 60% of all voters,⁷ and the Defendant Benson's improper guidance to election officials regarding review of signatures, a post-election audit that fails to review whether absentee ballots were properly reviewed and rejected pursuant to MCL 168.761(2), MCL 168.765a(6), and MCL 168.766 cannot possibly ensure the accuracy and integrity of the election and violates Plaintiff's constitutional right to audit the results of the election.

110. An audit in Antrim County should collect all absentee ballots cast during the 2020 Presidential election and compare the signatures on those ballots with the signatures on file. This is essentially the same method employed by the Bureau of Elections when checking the validity of signatures on statewide petitions pursuant to other section of the Election Law (see, e.g., MCL 168.476 (requirement to canvass signatures on an initiative petition)).

111. Second, the audit should review the number of people with the same home address who were registered to vote absentee via third-party voter registration drives. This information is necessary to identify and further investigate situations where a person may have

⁷ See David Eggert, *Record 5.5M voted in Michigan; highest percentage in decades*, AP NEWS (Nov. 5, 2020), <https://apnews.com/article/record-votes-michigan-highest-turnout-1f7802d2a2e67966ba8ccb02e3d1cbcd>.

illegally signed on behalf of voter such that the signature on the voter's ballot would not match the signature on file.

112. Finally, under the Michigan Election Law, absentee voters must now be informed if their signature is called into question, and they will have the opportunity to verify or remedy their signatures and make sure their votes are counted.⁸ The concern in *Priorities USA* that the Secretary of State sought to remedy through her signature verification guidance therefore no longer exists.

COUNT 3
VIOLATION OF "PURITY OF ELECTIONS" CLAUSE

Michigan Constitution – Article 2, Section 4, Paragraph 2

(as to all Defendants)

113. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

114. The Michigan Constitution's "purity of elections" clause states, "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of ballot, to guard against abuses of elective franchise, and to provide for a system of voter registration and absentee voting. Const. 1963, art 2, §4(2).

115. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 676; 854 NW2d 489 (2014).

⁸ See Bob Campbell, *Signature errors ruin thousands of Michigan ballots. Don't be that voter*, BRIDGE MICHIGAN (Oct. 6, 2020), available at <https://www.bridgemi.com/michigan-government/signature-errors-ruin-thousands-michigan-ballots-dont-be-voter> (explaining that a "bipartisan measure signed into law Tuesday aims to give voters a better chance at correcting such mistakes in November," and that "state policymakers hope the signature measure signed Tuesday reduces the number of disqualified ballots").

116. The purity of elections clause has been successfully raised in cases, like this one, where state officials favor one group of voters. *See Fleming v. Macomb Cty. Clerk*, 2008 Mich. App. LEXIS 1325, at *21-24 (Mich. Ct. App. June 26, 2008) ("the purity of elections has been violated in this case because the mailing of absent voter ballot applications to only a select group of eligible absent voters undermines the fairness and evenhandedness of the application of election laws in this state.").

117. Plaintiff, a resident of Antrim County, does not have the benefit of private funding paid by CTCL, but instead relies on the state and local budgets providing taxpayer funds to pay for the cost of conducting the election. Defendant Benson allocates funds based on her own will, and as we have learned in this case, Defendant Benson has actually failed to utilize taxpayer funds to train election workers in Antrim County.

118. By allowing selected predominantly urban and Democrat election jurisdictions to receive and spend millions of dollars of private money to conduct the election while Michigan voters in jurisdictions that are rural and suburban and are not predominantly Democrat do not receive the benefit of these additional recourses, Defendant Benson has diminished the voting rights of one disfavored group of citizens (Michigan voters living in election jurisdictions that are rural and are not predominantly Democrat) and enhanced the access to the ballot for another favored group of voters (those in urban, progressive, and heavily-Democrat jurisdictions). The purity of elections clause forbids Defendant Benson from conducting the election in this manner. Doing so violates Michigan voters' right to equal protection. *See also Bush v. Gore*, 531 U.S. 98, 104 (2000); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).

119. Defendant Benson is a Democrat and would prefer to see Joe Biden elected President instead of Donald Trump. But Defendant Benson has a higher calling – that of assuring

that Michigan's general election is conducted according to the provisions of the Michigan Constitution and Michigan law. Absent this, public confidence in the integrity of the election and the legitimacy of the general election is undermined. *See Carter-Baker Commission Report, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* (September 2005).⁹

120. To be fair and just, Michigan elections must be conducted according to uniform laws and rules that apply equally to all eligible voters and to all election officials, both those from urban and predominantly Democrat jurisdictions as well as to those voters in rural and suburban jurisdictions that are not predominantly Democrat. Defendant Benson is charged with the responsibility of assuring Michigan elections are administered equally throughout Michigan. And, when she does not do so, it is the task of this Court to affirm this principle and enjoin conduct of an election that is contrary to the Michigan Constitution and law.

121. Elections are to be paid for with public funds appropriated through the budget process. Elections are not to be paid for with private funds paid by an ideologically-oriented special interest group that, in exchange for paying money to local election jurisdictions, dictates how the money is spent and how the local election officials conduct the election.

122. Michigan statutes also protect the purity of elections by allowing one person to cast one vote and not permitting manipulation of votes through mechanical means or otherwise.

123. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and

⁹ Available at: <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>.

conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

124. Despite this legislative fix, the Secretary of State issued new guidance on October 6, 2020 to local clerks that in large part remains the same: when determining whether a signature is valid, there is a presumption in favor of validity, and so long as there "are any redeeming qualities in the AV application or return envelope signature as compared to the signature on file," the signature must be treated as valid. (See Oct. 6 Guidance, [Ex 3].)

125. The combination of the Election Law's new notice requirements and the Secretary of State's guidance means that absentee voters must be notified if their signature is found to be invalid, and that they will have an opportunity to correct any alleged errors.

126. There will, however, be plenty of instances where local clerks – following the Secretary of State's unlawful guidance – strain to find "any redeeming qualities" in the application and, applying a presumption in favor of validity, allow an invalid vote to be counted.

127. In fact, the raw data released to date by the Secretary of State regarding the 2020 Presidential election indicates that local clerks and elections officials continue to diverge substantially when applying the Election Law.

128. While the data indicates that 1,400 absentee ballots were rejected in Michigan out of approximately 3.3 million absentee ballots cast—for a the rejection rate of 0.04%—the number of absent voter ballots rejected and the rejection rate vary enormously depending on the jurisdiction that processed the ballots. A particularly poignant example is Lansing, one of

Michigan's largest cities by population, which, despite receiving more than 38,000 absentee ballots, rejected not a single one of them due to signature mismatch.¹⁰

129. Further, as learned on December 17, 2020, Antrim County also had no ballot rejections based on signature mismatch.

130. Following the 2020 Presidential election, the Secretary of State announced that the Michigan Bureau of Election will conduct "the most comprehensive post-election audits of any election in state history."⁵ The audits will be "a statewide risk-limiting audit, a complete zero- margin risk-limiting audit in Antrim County, and procedural audits in more than 200 jurisdictions statewide." The statewide risk-limiting audit is limited to "confirm[ing] the accuracy of ballot tabulation machines," which "entails hand-counting thousands of randomly selected ballots statewide."

131. However, the Secretary of State's statements on the matter make no mention, nor provide any assurance, that any of the three audits will involve a review of absentee ballots to determine whether local clerks and election officials properly rejected ballots where the signature did not match the voter's signature on file.

132. Moreover, the Secretary of State's manual and material for post-election audits contain scant mention of absentee ballots and altogether fail to provide for any review of absentee ballot signatures.¹¹

¹⁰ See City of Lansing, November 3, 2020 Election Results, available at <https://ingham.box.com/shared/static/icj9frqxgiybwm1s596y6ridcdfy0fp7.pdf>; City of Ann Arbor, November 3, 2020 Election Results, available at <https://electionresults.ewashtenaw.org/electionreporting/nov2020/index.jsp>; *Rejected Ballot Data*, *supra*. This is more unusual given the number of ballots rejected for signature mismatch in comparably-sized jurisdictions, such as Sterling Heights (125), Dearborn (71), and Saginaw (39). *See id.*

¹¹ See MICH DEPT OF STATE, POST-ELECTION AUDIT MANUAL (updated Jan. 15, 2020), https://www.michigan.gov/documents/sos/Post_Election_Audit_Manual_418482_7.pdf; MICH DEPT OF STATE, POST-ELECTION AUDIT PRINTABLE WORKSHEET (updated Jan. 15, 2020),

133. That no audit of absentee ballots will be conducted is both surprising and troubling given the Secretary of State's assertion that the 2020 Presidential election saw "more than double the absentee ballots ever before cast in our state," and the Secretary of State's criticism that local clerks and election officials were allowed only "10 hours for pre-processing of absentee ballots."

134. Defendants failure to properly conduct the election resulted in illegitimate and phantom votes being counted. *In re Request*, 479 Mich at 20 (recognizing the "Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise, *including ensuring that lawful voters not have their votes diluted*").

COUNT 4
VIOLATION OF MCL 168.761(2); MCL 168.765a(6); MCL 168.766

(as to all Defendants)

135. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

136. Under the Michigan Election Law, local clerks and state election official must reject absentee ballot applications and absentee ballot return envelopes when the signatures on those items do not "agree sufficiently" with the "signature on the master card or the digitized signature contained in the qualified voter file."

137. Defendant Benson's guidance conflicts with these statutory requirements. The guidance instructs local clerks to apply a presumption that the signature is valid, and to approve the signature so long as there "are any redeeming qualities in the AV application or return envelope signature as compared to the signature on file."

https://www.michigan.gov/documents/sos/Post_Election_Audit_Checklist_418481_7.pdf [collectively referred to hereinafter as "Post-Election Audit Procedures."]

138. Based on the guidance issued by the Defendant Benson, Defendants Antrim County and Benson failed to properly review and reject absentee ballots. This undoubtedly resulted in invalid ballots being counted.

139. Plaintiff is entitled to a proper review and audit of the 2020 general election results to ensure invalid ballots did not dilute the election and his constitutional right to have his vote counted.

140. Pursuant to MCR 168.761, any voter who votes by absentee ballot will be notified of any potential issue with the validity of their signatures.

COUNT 5
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

(as to Defendants Benson and Brater)

141. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

142. Under MCL 168.31, Defendants Benson and Bater are required to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state."). Indeed, Defendants Benson and Bater, under the powers conferred to them by Michigan's Administrative Procedure Act ("APA"), have promulgated rules in the past. And, as this Court recently held, Defendants Benson and Bater just weeks ago issued a rule in violation of the APA. See *Davis v Benson*, Opinion of the Court of Claims, issued October 27, 2020 (Case No. 20-000207-MZ).

143. Defendants Benson and Bater also wrongly exercised their legislatively delegated authority when they issued a rule and ordered election officials to presume that a signature on a absent voter ballot is genuine.

144. Defendants Benson's act of imputing a presumption of genuineness into the process by which a absent voter ballot signature is reviewed fits within the definition of a "rule" because it is an instruction of general applicability, imposing a requirement on all local election officials to implement the procedure of validating signatures. See MCL 24.207.

145. Defendants Benson and Bater issued this rule without following the procedures required under the Administrative Procedures Act. In fact, it is unclear whether Defendants followed any procedures at all.

146. The Court of Claims has already ruled that Defendant Benson violated the APA when issuing guidance requiring local election officials to presume the signature on an absent voter ballot is genuine. See *Genetski v Benson et al*, Opinion of the Court of Claims, issued March 9, 2021 (Case No. 20-000216-MM).

147. Therefore, this Court must require that the text of the Election Law be enforced and order a mandatory review of all absentee ballots in Antrim County.

COUNT 6
ELECTION FRAUD; VIOLATION OF MCL 168.24j

(as to all Defendants)

148. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

149. Michigan does not allow private individuals or interest groups (no matter their partisan affiliation) to fund the cost of conducting an election. Rather, the cost of conducting an election in Michigan is to be paid with public funds allocated to local election jurisdictions as provided by Michigan law. This includes the cost of printing ballots, buying ballot containers and other election expenses. *See, e.g.*, MCL 168.666, 168.669 (reprinted in Appendix).

150. Michigan's Constitution and Michigan election law make no provision allowing private partisan or ideologically-oriented organizations to fund or direct the conduct of a Michigan election.

151. Michigan elections are not for sale. That is why Michigan law specifies that the funding and conduct of Michigan elections is governed by the provisions of the Michigan Constitution and Michigan election law and that the cost of conducting an election is to be paid with public funds appropriated according to Michigan law.

152. Defendant Benson violated the Michigan Constitution and Michigan election law (and thereby violated these Michigan voters' constitutional rights) by allowing a private outside special-interest organization to pay millions of dollars to predominantly Democrat election jurisdictions to influence the conduct of the 2020 general election and, as a condition of accepting these funds, allowed a private organization to direct how the election jurisdiction spends those funds and conducts the election.

153. By allowing an outside organization with a declared political agenda to selectively and privately fund how election authorities in predominantly Democrat precincts conduct the election, Defendant Benson has diminished the voting rights of one group of Michigan voters (those who live in rural and suburban precincts not receiving private outside funding) and has enhanced the voting rights of another group of Michigan voters (those in urban, progressive, and predominantly Democrat precincts where outside groups pay the election jurisdiction private funds to conduct the election).

154. A private group paying millions of dollars to local election jurisdictions in only predominantly Democrat precincts and directing how those jurisdictions will use these funds to conduct the election (essentially a partisan get-out-the-vote campaign) and directing what the

election authorities must do as a consequence of receiving these private funds undermines the integrity and honesty of Michigan elections and undermines public confidence in the fairness and outcome of Michigan elections.

155. The Center for Tech and Civic Life (CTCL) is an entity headquartered at 233 North Michigan Avenue in Chicago, Illinois. CTCL told the Internal Revenue Service in 2018 that the Center had only about a half-million dollars in assets. *See* [Exhibit 13] (CTCL's 2018 Form 990). In 2018 CTCL told the Internal Revenue Service that it had "contributions and grants" of about a half-million dollars and paid "Salaries, other compensation" of almost \$900,000. *See id.*

156. The Obama Foundation quoted CTCL director Tiana Epps-Johnson in 2016 as stating, "CTCL provides technology and data to boost voter turnout" [Exhibit 14].

157. CTCL is the successor to the partisan Democrat organization, the New Organizing Institute (NOI). At the time NOI disbanded and CTCL was formed, NOI issued a press release announcing that CTCL was being formed to continue the work of NOI. *See* [Exhibit 15] (*Announcing the Center for Technology and Civic Life*, April 8, 2015).¹² All three of CTCL's "founders" previously served in leadership roles at NOI, including Tiana Epps-Johnson, the Executive Director of CTCL, who served as the head of NOI's "election administration department." *See* CTCL website at: <https://www.techandciviclelife.org/our-team/>. The *Washington Post* described NOI as "the left's think tank for campaign know-how." [Exhibit 16] (Brian Fung, *Inside the Democratic Party's Hogwarts for Digital Wizardry*, *The Washington Post*, July 8,

¹² Available at: <http://neworganizing.wellstone.org/2015/04/announcing-the-center-for-technology-and-civic-life/>.

2014).¹³ Infamous among NOI's projects was NOI's annual "boot camp" for Democrat campaign operatives, which focused on training in "[d]igital strategy, or the use of data, new media and randomized controlled experiments to enhance a campaign's performance." *Id.*

158. When NOI ended operations in 2015, NOI announced:

Following their 2014 successes delivering civic information to millions of voters and connecting hundreds of election officials across the country, *NOI's Election Administration team is transitioning into its own organization, The Center for Technology and Civic Life. ...*

CTCL will continue a number of programs focused on supporting institutions and developing infrastructure for civic participation. *Current NOI programs that are moving to the Center include: The Governance Project ... The Ballot Information Project, [and] . . . ELECTricity.*

[Ex 15] (emphasis added). NOI also announced:

The Center for Technology and Civic Life is headed by Executive Director Tiana Epps-Johnson, formerly the head of NOI's Election Administration department. Also joining from NOI are co-founders Whitney May, who leads the ELECTricity project, and Donny Bridges, who heads CTCL's civic data programs.

Id.

159. CTCL's founders, Epps-Johnson, Bridges, and May, were all employees of, or worked for, NOI as department or project leaders. NOI was a center dedicated to training progressive groups and Democratic campaigns in digital campaign strategies. See [Ex 16]. NOI's executive director, Ethan Roeder, led the data departments for the Obama presidential campaigns of 2008 and 2012.

160. Funders of CTCL include progressive groups such as the Skoll Foundation, the Democracy Fund, the John S. and James L. Knight Foundation, and the Rockefeller Brothers Foundation. CTCL is also associated with Rock the Vote, which despite its non-partisan claims,

¹³ Available at: <https://www.washingtonpost.com/news/the-switch/wp/2014/07/08/inside-the-democratic-partys-hogwarts-for-digital-wizardry/?arc404=true/>

has regularly featured progressive policies in its efforts to turn out pro-Democrat voters.¹⁴ Along with Rock the Vote and The Skoll Foundation, CTCL also lists Facebook as a partner in its efforts. *See id.*

161. CTCL is not a "nonpartisan" organization interested in enhancing voter participation. Rather CTCL is an activist organization seeking to promote the election of Democrat candidates, including Joe Biden and Kamala Harris, and CTCL is managed and operated by former Democrat party operatives who are using the funds to further a Democrat "get-out-the-vote" effort in Democrat precincts.

162. In September CTCL announced that Mark Zuckerberg and his wife, Pricilla Chan, paid \$300 million to CTCL and the affiliated Center for Election Innovation and Research, including "\$250 million to CTCL ... which will regrant funds to local election jurisdictions." *See [Exhibit 17]* (CTCL September 1, 2020 press release).

163. CTCL then used these funds to pay local election authorities in predominantly Democrat election jurisdictions to increase the votes cast in urban, historically Democrat jurisdictions.

164. CTCL has paid, and continues to pay, millions of dollars to Michigan election authorities which have a predominantly-Democrat electorate. The funds CTCL has paid to these election officials have been selectively distributed to only election jurisdictions in Democratic precincts. In other words, CTCL selectively pays money to only those Michigan election jurisdictions with a documented history of casting ballots for Democrat candidates. CTCL paid millions of dollars to election officials in Wayne County-Detroit and the cities of Flint, Ann

¹⁴ *See* CTCL website at: <https://www.techandciviclelife.org/key-funders-and-partners>.

Arbor, Lansing, East Lansing, Kalamazoo, Muskegon, and Saginaw.¹⁵ *See, infra*, ¶35. All of these are historically Democrat precincts that voted between sixty and ninety percent in favor of Hillary Clinton in the 2016 presidential election. The votes cast in these jurisdictions in the 2016 presidential election are summarized on [Exhibit 18] (table of 2016 presidential election results for CTCL Michigan grant recipients).

165. CTCL says "[e]lection offices [to whom CTCL pays money] can use the funds to cover certain expenses incurred between June 15, 2020 and December 31, 2020." [Exhibit 19] (CTCL "grant" application instructions).¹⁶

166. CTCL requires the election officials to whom it gives money to spend that money on specified election activities, including activities to "Expand Voter Education & Outreach Efforts" and "Support Early In-Person Voting and Vote by Mail." *See* [Ex 19]. CTCL requires the local election officials CTCL pays to "submit a report that indicates how you spent the grant funds." *Id.* Thus, a local election authority must now report to, and follow, CTCL's directions as opposed to the Secretary of State's directions and Michigan Constitution and law.

167. CTCL says that, in exchange for this money, these election jurisdictions must pay for media campaigns to encourage voters to mail in their ballots, buy and distribute additional ballot drop boxes, and adopt a drive-thru voting program.

168. CTCL seeks to increase unsecured mail-in voting and unverified absentee voting by having local election officials establish illegal ballot drop boxes.

¹⁵ Michigan law provides that elections are conducted by counties, cities, villages, and townships under the supervision of the Michigan Secretary of State. *See* MCL 168.21, 168.31.

¹⁶ Available at: <https://www.techandciviclelife.org/our-work/election-officials/grants/>.

169. gain, the election jurisdictions CTCL has funded have one thing in common: they are all jurisdictions where the voters have historically cast ballots for Democrat candidates. *See* [Ex 16].

170. CTCL's payment of millions in cash to election jurisdictions in predominantly Democrat precincts is not authorized by federal or state law. CTCL has paid at least \$3,512,000 to Wayne County-Detroit, \$467,625 to the City of Flint, \$417,000 to the City of Ann Arbor, \$443,000 to the City of Lansing, \$433,580 to the City of Muskegon, \$402,878 to the City of Saginaw, \$218,869 to the City of Kalamazoo, and \$8,500 to the City of East Lansing, for a total of at least \$5,903,452.

171. Michigan (like other states) has a profound interest in protecting the integrity of Michigan elections and securing Michigan citizens' ballots. MCL 168.24j provides very specific requirements for a "ballot container" and requires that ballots only be deposited into these approved containers that are sealed and under the supervision of election officials.¹⁷ The

¹⁷ MCL 168.24j, requires:

- (1) A ballot container includes a ballot box, transfer case, or other container used to secure ballots, including optical scan ballots and electronic voting systems and data.
- (2) A manufacturer or distributor of ballot containers shall submit a nonmetal ballot container to the secretary of state for approval under the requirements of subsection (3) before the ballot container is sold to a county, city, township, village, or school district for use at an election.
- (3) A ballot container shall not be approved unless it meets both of the following requirements:
 - (a) It is made of metal, plastic, fiberglass, or other material, that provides resistance to tampering.
 - (b) It is capable of being sealed with a metal seal.
- (4) Before June 1 of 2002, and every fourth year after 2002, a county board of canvassers shall examine each ballot container to be used in any election conducted under this act. The board shall designate on the ballot container that the ballot container does or does not meet the requirements under

Secretary of State's Manual for Boards of County Canvassers provides an entire chapter governing the requirements for ballot containers. *See* Appendix.

172. [Exhibit 20] is a photograph of a Ballot Drop Box located in Lansing and a photograph of another Drop Box located at 1150 Giddings Avenue in Grand Rapids.¹⁸ These Ballot Drop Boxes do not comply with Michigan law and could result in lawfully cast ballots by Michigan voters being rejected or result in ballots being cast by individuals or organizations not legally entitled to cast a ballot.

173. Upon information and belief, similar drop boxes were strategically placed in select counties in northern Michigan, at select locations, including Torch Lake township in Antrim County.

174. Election officials may not put privately funded ballot drop-boxes on street corners when these ballot drop-boxes do not comply with the requirements of Michigan law requiring "ballot containers" to be secured and sealed.

175. As noted below, it is improper and illegal for election officials to accept private funds from an organization seeking to influence the election outcome to achieve a partisan agenda and it is improper for Defendant Benson to oversee an election in which a private,

subsection (3). A ballot container that has not been approved by the board shall not be used to store voted ballots.

- (5) A city, village, or township clerk may procure ballot containers as provided in section 669 and as approved under this section.
- (6) A clerk who uses or permits the use of a ballot container that has not been approved under this section is guilty of a misdemeanor.

¹⁸ See (Sarah Lehr, *Lansing, East Lansing Clerks Mail Absentee Ballot Applications to All Registered Voters*, *Lansing State Journal*, September 11, 2020), available at: <https://www.lansingstatejournal.com/story/news/2020/09/11/some-local-clerks-mailing-av-ballot-applications-all-voters/3458749001>.

See also Drop Boxes for Absentee Ballots Placed Around City of Grand Rapids, FOX17 News, available at: <https://www.fox17online.com/news/election-2020/drop-boxes-for-absentee-ballots-placed-around-city-of-grand-rapids>.

partisan, special-interest organization pays private funds to local election officials to conduct the election in a manner the private, partisan organization favors.

176. MCL 168.666 provides, "At each federal, state, district, or county primary or election, the secretary of state shall furnish to each county clerk *at state expense* ... [the following election supplies]." (emphasis added). And, MCL 166.669 requires that "[f]or a federal, state, district, or county primary or election, a city or township board of election commissioners shall provide, *at the expense of the respective city or township*, each of the following (a) For each election precinct, *a ballot container approved under section 24j* to be utilized in the precinct." (emphasis added).

177. The State of Michigan and local election jurisdictions adopted a budget to fund the 2020 general election. CTCL's private funds paid to select predominantly Democrat election jurisdictions circumvent and violate Michigan law.

178. There is no provision in federal law or Michigan law allowing a private organization with a stated partisan purpose (advancing progressive ideology) to pay private funds to local election authorities and direct how the local election officials will conduct the election.

179. Local election jurisdictions are spending private funds paid to them by CTCL to (among other activities) buy and establish ballot drop boxes (colloquially called "Zuckerberg Boxes") to collect absentee and mail-in ballots placed in Democrat- majority jurisdictions.

180. These "Zuckerberg Boxes" do not comply with Michigan law. Michigan strictly regulates the requirement of a "ballot container" to prevent the tampering with ballots and to protect the integrity of every ballot lawfully cast by a Michigan voter. *See, supra*, ¶¶36-42.

181. These Zuckerberg ballot drop-boxes do not satisfy the requirements Michigan law demands for a secure ballot container. *See* Secretary of State's Manual for Boards of County Canvassers chapter VI.

182. The "Zuckerberg Boxes" acquired with private funds cannot possibly meet the requirements of MCL 168.24j and, even if they did satisfy the requirements of MCL for a legal "ballot container," they are being disproportionately placed in Democrat precincts and not made equally available throughout the state.

183. Additionally, the City of Lansing and the City of East Lansing used CTCL money to mail applications for absent voter ballots even when the voter did not request an absentee ballot and despite the fact that the City of Lansing and the City of East Lansing have no legal authority to mail unsolicited absentee ballot applications to voters who have not requested such an application. *See* [Exhibit 21] (Sarah Lehr, *Lansing, East Lansing Clerks Mail Absentee Ballot Applications to All Registered Voters*, *Lansing State Journal*, September 11, 2020).¹⁹ Local election officials may not send out mass absent voter applications. *See Young*, 122 A.3d at 858.

184. Secretary Benson's actions and her failure to act have undermined the constitutional right of all Michigan voters to participate in fair and lawful elections. These Michigan citizens' constitutional rights have been violated by Secretary Benson's failure to prevent an out-of-state special interest organization from selectively paying local election authorities and directing how local election authorities will conduct the 2020 general election.

185. Plaintiff's vote has been diluted as a result of these policies.

186. Plaintiff asks this Court to order Defendant Benson to either (a) order all local election jurisdictions that have received these private funds to return the money or (b) pay the

¹⁹ Available at: <https://www.lansingstatejournal.com/story/news/2020/09/11/some-local-clerks-mailing-av-ballot-applications-all-voters/3458749001>.

funds to Secretary of State Benson and order Secretary Benson to equally distribute the funds to *all* Michigan election jurisdictions on a *pro rata* basis based upon the number of registered voters in each election jurisdiction.

COUNT 7
ELECTION FRAUD; MCL 600.4545(2); MCL 158.861

(as to all Defendants)

187. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

188. MCL 600.4545(1) permits an "[a]n action may be brought in the circuit court of any county of this state whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof."

189. Such action may be brought to remedy fraudulent or illegal voting or tampering with ballots or ballot boxes before a recount pursuant to MCL 168.861, which states,

"For fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing."

190. Defendants had notice of significant misconduct and other legal irregularities committed by election officials during the election conducted on November 3, 2020. Defendants neither investigated nor prevented violations of the Michigan Elections Code that occurred during the general election. Specifically:

a. that a county computer was left on during the November 3, 2020 general election with an open VPN port;

- b. that the results of the Antrim County election were patently inaccurate and that after repeated attempts, they Antrim County election officials were unable to reconcile reported anomalies in the vote counts found during the election efforts;
- c. That Defendants Guy and Benson demanded certification of these patently inaccurate results from county officials and canvas boards, notwithstanding notice that there were anomalies that could not initially be reconciled;
- d. that, as a result, the numbers certified in the November 3 general election lack credibility and therefore place in doubt the resulting vote totals certified for Antrim County.

191. Defendants conducted the primary elections on March 10, 2020 and August 4, 2020 and general election on November 3, 2020 on electronic voting equipment whose use they knew, had notice or should have known, had been rejected or questioned by other states and experts for reasons of security and verifiability , and did not assure that such issues had been satisfactorily resolved in Michigan, specifically:

- a. The State of Texas rejected for security reasons a Dominion Democracy Suite system similar to that which was used in Michigan. [Exhibit 22]; and that evidence will show security breaches during the March, August, and November elections was sufficient "sufficient to . . . place in doubt the result;"
- b. The Dominion Democracy Suite 5.5.12.1 system used in Michigan accumulates votes that are unverifiable to the voter because they are hidden in a QR code that is unreadable by a voter and that the State of Colorado banned the use of the similar Dominion Democracy Ballot Marking Device (BMD) used in Michigan because of disqualifying verifiability and security concerns.

192. The creator of the Risk Limiting audit procedure used in Michigan for the Dominion voting machines has written to officials in other states (Georgia) explaining that widespread use of BMD's with the Dominion voting machines undermines election integrity and that the audit procedure cannot be used to meaningfully audit BMD systems. Defendants participated in or ratified actions that violate Michigan election law, specifically:

- a. Compact Flash cards were not properly programmed prior to the November 3, 2020 election.
- b. Test ballots were not properly secured as required during Antrim County ballot testing on live ballot stock for the November 3, 2020 election.
- c. Several tabulators in Antrim County did not have the proper security seals, making them uncertified for the elections [Exhibit 23].
- d. Defendants Guy and Benson then made misleading statements to the public and media, claiming this was the safest election in history.

193. Under Michigan law, including MCL 168.861, the Defendants had a duty to investigate all credible reports of misconduct, fraud, or irregularity by any primary or election official or officials in order to eliminate the possibility that such misconduct, fraud or irregularity would be sufficient to change or place in doubt the result. Defendants were informed , both formally and informally, of misconduct , irregularities , and potential fraud, but failed to investigat, specifically:

- a. Dr. Navid Keshavarz-Nia signed an affidavit disclosing significant problems with Dominion Voting Systems [Exhibit 24].
- b.. The Secretary of State signed a contract for voting machines and support services with Dominion knowing that it contained a provision preventing State officials from discharging their lawful required duties and preventing voters from their lawful right to a full forensic audit, including their right to have audited the software in the machine in order to determine whether the machine "accurately and securely" tabulates ballots, among other issues.
- c. On November 11, 2020, Attorney General Dana Nessel gave an interview with the Washington Post wherein she threatened legislators with who she disagreed with criminal prosecution.²⁰ She tweeted it out and gave an interview that those legislators who might not agree with certifying the election could be investigated criminally by the chief law enforcement officer of the State of Michigan. The corresponding and referenced tweet by Dana Nessel has since been deleted from the official government account.

²⁰ https://www.washingtonpost.com/politics/michigan-attorney-general-canvassing-board-lawmakers/2020/11/20/87d19ce6-2b65-11eb-8fa2-06e7cbb145c0_story.html

- d. As observed during the "hand recount" on December 17, 2020, there were (i) a substantial (but determinative) number of ballots included the same handwriting for the same write-in candidate, casting doubt on whether they were marked by a qualified Michigan elector; (ii) a substantial (but determinative) number of counterfeit or absentee ballots without the proper crease; and (iii) different stock of paper used, casting doubt on whether they were "official ballots" produced and distributed in accordance with Michigan law.

194. The Defendants knew, or should have known, that other states had raised questions concerning the reliability and security of the voting system, and that its performance in the 2020 elections casts sufficient doubt on the reliability of the vote tallies it reports that county officials have publicly questioned not only the credibility of the numbers, but also their own ability to reconcile the anomalies produced in an effort to audit them.

195. Notwithstanding credible reports of both inaccuracies and security breaches, the Defendants have failed to exercise their duty to ensure that Michigan elections are fairly conducted and that the votes tallied reflect the intent of only qualified Michigan electors.

196. Based upon the allegations contained herein, material fraud or error occurred in this election so that the outcome of the election was affected.

197. Further, there were two ballot proposals in the 2020 general election: First, Proposal 20-1 regarding money from oil and gas mining. Second, Proposal 20-2 regarding search warrants to access a person's electronic data or electronic communications. Based on the evidence discovered that shows the unquestionable ability to manipulate the vote across Antrim County and the State of Michigan. Based on the fraud and corruption uncovered, Plaintiff challenges the results of the Proposals 20-1 and 20-2.

198. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the forensic image of the 17 precinct tabulators thumb drives, related software, and the Clerk's "master

tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

COUNT 8
COMMON LAW ELECTION FRAUD

(as to all Defendants)

199. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

200. MCR 3.306(B)(2) permits an action to request the issuance of a writ of quo warranto. An application to proceed by quo warranto must disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry.

201. Quo warranto is warranted whenever it appears that material fraud or error has been committed at any election. This type of action is brought to challenge the validity of the election itself. *Barrow v Detroit Mayor*, 290 Mich App 530, 543; 820 NW2d 658 (2010). For all the reasons stated herein material fraud or error was committed during the election as it relates to the Dominion voting systems used in Antrim County's 22 precincts.

202. This quo warranto claim is brought to remedy fraudulent or illegal voting or tampering with ballots via Dominion. Based upon the allegations contained herein, material fraud or error occurred in this election so that the outcome of the election was affected.

203. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and

conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

COUNT 9
EQUAL PROTECTION VIOLATION

Mich Const, art 1, § 2

(as to all Defendants)

204. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

205. The Equal Protection Clause of the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights." Mich Const, art I, § 2.

206. This clause is coextensive with the United States Constitution's Equal Protection Clause. *Harville v State Plumbing & Heating*, 218 Mich App 302, 305-306; 553 NW2d 377 (1996). See also *Bush v Gore*, 531 US 98, 104 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Harper v Virginia Bd. of Elections*, 383 US 663, 665 (1966) ("Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.")²¹

207. *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 858 (Del. Chan. Ct. 2015), demonstrates the dangers of a government scheme to target get-out-the-vote efforts on a favored demographic group. The school district wanted its referendum to pass; so, it targeted parents of

²¹ Most United States Supreme Court rulings concerning the right to vote frame the issue in terms of the Equal Protection Clause. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* §18.31(a) (2012 & Supp. 2015).

school children and adult students for a get-out-to-vote campaign. In *Young*, the court identified the school district's scheme to get-out-the- vote of the parents and adult students as also violating election law. The court held that the school district's improper influence upon a demographic group interfered with the "full, fair, and free expression of the popular will" *Id.* The court stated that the government conducting the election in a manner that favored one group of voters was equivalent to the government disfavoring another group of voters.

Historically, the law has focused on forms of "improper influence" that have interfered with the voting rights of disfavored demographic groups by dissuading or preventing them from voting through blatant means like fraud, violence, and intimidation.

A government certainly violates the Elections Clause if it skews the outcome of an election in this manner. Parity of reasoning suggests that a government can violate the Elections Clause if it skews the outcome of an election by encouraging and facilitating voting by favored demographic groups. In both situations, the government has diminished the voting rights of one portion of the electorate and enhanced the voting rights of another portion of the electorate. In neither case is the election "free and equal."

Id.

208. The conduct of the election and the allocation of funds necessary to fairly and equally conduct an election must be "apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Michigan's allocation of funds necessary to conduct the 2020 general election (as governed and overseen by Secretary Benson) is (similar to the apportionment of legislative districts) subject to the federal Equal Protection Clause. *See id.* *See also Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016). The United States Constitution and Michigan's Constitution forbid the Secretary of State and local election officials from selectively benefitting one group of Michigan voters (urban voters in predominantly Democrat jurisdictions) over another group of Michigan voters (suburban and rural voters in non-Democrat precincts).

209. When 3 votes were destroyed in Central Lake Township, the government Defendants, as state actors, along with other co-conspirators, including Election Source, acted arbitrarily or irrationally, and treated Plaintiff less favorably than those similarly situated.

210. The government Defendants and their co-conspirators (including Election Source) acted maliciously, recklessly, intentionally, or by reason of gross negligence or violation of the law in arbitrarily destroying some ballots or otherwise violating Michigan election laws.

211. Plaintiff seeks declaratory and injunctive relief requiring Defendant Benson to prevent local election jurisdictions from accepting millions of dollars paid by CTCL to tilt the playing field to advance a get-out-the-vote effort in only predominantly Democrat jurisdictions. Alternatively, Plaintiff asks this Court to order Defendant Benson to direct the local election officials who have received these private funds to remit those funds to Defendant Benson and order Defendant Benson to equally distribute the funds to all Michigan election jurisdictions on a *pro rata* basis according to the number of registered voters in each election jurisdiction.

212. The right to vote is a fundamental civil right and a political right. The Equal Protection Clause forbids election officials granting the right to vote on equal terms but later devaluing a person's vote through failing to use specific standards and uniform rules.

213. Every Michigan voter enjoys an equal right to participate in the 2020 general election. By allowing a privately-funded organization with an announced partisan agenda to fund public election authorities in get-out-the-vote efforts in only predominantly Democrat precincts, Secretary Benson has violated the Michigan Constitution and Michigan election law. Secretary Benson has diminished the voting rights of one group of Michigan citizens (those who are registered to vote in rural and non-Democrat jurisdictions) and enhanced the voting rights of another group of Michigan voters (those living in urban, progressive, and historically Democrat

jurisdictions). This unequal treatment of Michigan voters violates the Michigan Constitution's guarantee of equal protection.

214. Only specific standards and uniform rules provide sufficient guarantees of equal treatment. Every person has the right to vote, with their vote counted as one vote, and not have his or her vote diluted and voided out by the counting of an illegal vote.

215. Defendant's handling of the election, as described herein, establishes how rampant and systemic fraud devalued and diluted Plaintiff's civil and political rights.

216. The illegal procedures, illegal standards, and illegal treatment of the ballots and the counting of ballots in Antrim County unconstitutionally burden the fundamental right to vote.

217. Defendant Benson has no legitimate interest in counting illegal and improper ballots, counting ballots more than once, improperly handling the collection and counting of ballots, or using the Dominion voting system to do the same in a way that dilutes and cancels out rightfully and properly cast votes.

218. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

219. Secretary Benson's failure to lawfully oversee this election and specifically allowing an ideologically-driven organization to pay private funds to only election jurisdictions in predominantly Democrat precincts cannot be sustained under any applicable level of scrutiny

from this Court. This scheme that Secretary Benson has allowed severely burdens these Michigan citizens' right to participate in a fair and honest election.

COUNT 10
STATUTORY ELECTION LAW VIOLATIONS

MCL 168.765(5)

(as to all Defendants)

220. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

221. Michigan election law, MCL 168.765(5), requires Defendants to post the following absentee voting information anytime an election is conducted which involves a state or federal office:

a. The clerk must post before 8:00 a.m. on Election Day: 1) the number of absent voter ballots distributed to absent voters 2) the number of absent voter ballots returned before Election Day and 3) the number of absent voter ballots delivered for processing.

b. The clerk must post before 9:00 p.m. on Election Day: 1) the number of absent voter ballots returned on Election Day 2) the number of absent voter ballots returned on Election Day which were delivered for processing 3) the total number of absent voter ballots returned both before and on Election Day and 4) the total number of absent voter ballots returned both before and on Election Day which were delivered for processing.

c. The clerk must post immediately after all precinct returns are complete: 1) the total number of absent voter ballots returned by voters and 2) the total number of absent voter ballots received for processing.

222. Defendants Antrim County, Guy, Benson, and Brater failed to post by 8:00 a.m. on Election Day the number of absentee ballots distributed to absent voters and failed to post before 9:00 p.m. the number of absent voters returned before on Election Day. Indeed, none of that information is available on the government Defendant's website.

223. Per Michigan Election law, all absentee voter ballots must be returned to the clerk before polls close at 8:00 pm. MCL 168.764a. Any absentee voter ballots received by the clerk after the close of the polls on election day will not be counted.

224. Upon information and belief, if Defendant received additional absentee ballots in the early morning hours after election day and after the counting of the absentee ballots had concluded, without proper oversight, then Defendant failed to follow proper election protocol.

225. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

COUNT 11
ABUSE OF PROCESS

(as to Defendant Guy and Antrim County)

226. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

227. When Defendant Guy dismissed this case she did so with an ulterior purpose. Her intention was to prevent the truth from being exposed to the public and the world regarding her fraud and knowledge of the fraudulent election.

228. This conduct was improper in the regular prosecution of a civil complaint. As the elected Antrim County Clerk, Defendant Guy had to know her actions were improper. She must have known that by filing pleadings, the Defendants were not required to be served.

229. Further, within minutes after filing the notices of dismissal, the Traverse City Eagle was notified and published a story stating "A motion to dismiss filed in 13th Circuit Court after officials said Bill Bailey's attorney, Matthew DePerno, missed a filing deadline."²²

230. Defendant Guy and her staff were so excited to dismiss the case (without proper cause) that they immediately notified their media partners in an attempt to quickly spread the word.

231. The process of dismissing the civil litigation and then immediately contacting the media demonstrates that Defendant Guy misused her position within the court system for a purpose other than that which it was designed to accomplish. Defendant Guy (either on her own or by directing her staff) used the civil litigation process to cause Plaintiff to lose his right to proceed with his constitutional claims. This is an irregular act in the use of the process.

232. Defendant Guy and her staff harbored bad motives which then manifested in the dismissal of this lawsuit.

233. The tactics and procedure of Defendant Guy demonstrates and was driven by a bad and improper motive to protect her own personal interest and the interest of Defendant Antrim County by trying to gain an advantage in this litigation and force Plaintiff to lose his constitutional rights.

COUNT 12
2018 Public Act 123 UNCONSTITUTIONAL

(as to all Defendants)

234. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

²² https://www.record-eagle.com/dismissal-lack-of-filing-proof-of-service-pdf/pdf_46fe7b52-7d23-11eb-9979-5bac026c25fd.html

235. The Michigan Constitution's "purity of elections" clause states, "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of ballot, to guard against abuses of elective franchise, and to provide for a system of voter registration and absentee voting. Const. 1963, art 2, §4(2).

236. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 676; 854 NW2d 489 (2014).

237. Taken together, the preliminary findings of Plaintiff's experts discussed above confirm what has long been an open secret in election administration circles: each of the three broadly commercially available electronic voting systems is vulnerable to a host of methods of attack and/or abuse.

238. By enacting 2018 Public Act 123, the legislature overhauled the Michigan Election Code to require use of electronic voting machines, effectively forcing Michigan localities to use deeply flawed electronic voting machines which are capable of election-determinative attack and/or manipulation which leaves no trace.

239. The safeguards intended to prevent abuse of these machines are all wholly ineffective for a number of reasons. Broadly, the execution of most remedies for election misconduct are entrusted to political officers with broad discretion to decline pursuing the remedy in question or to do so in a manner that rigs the outcome of the inquiry.

240. Plaintiff asserts that the host of issues which have been uncovered following the 2020 general election demonstrate that the legislature has, by enacting 2018 Public Act 123, forced Michigan electors to vote using machines in which no confidence can be placed to

accurately and securely reflect the tally of the ballots entrusted to that system. Plaintiff further asserts that this action by the legislature constitutes a violation of the Michigan Constitution's purity of elections clause, by enacting a voting scheme which is capable of use to the benefit of one candidate over the other in any given election. Plaintiff further asserts that as applied to the election in question in this action, the legislature's enactment of 2018 Public Act 123 rendered the litany of confidence-undermining issues with the 2020 general election were in great measure exacerbated by the legislature's act of requiring the use of these deeply flawed systems and machines.

241. In view of the foregoing, Plaintiff asserts that 2018 Public Act 123 is unconstitutional, to the extent it requires the use of Dominion, Hart Intercivic, or ES&S voting machines, as applied to Michigan elections, due to the inherent vulnerabilities of the available electronic voting machines, and that the purity of elections clause requires that localities be allowed to use non-electronic means of tabulating votes.

242. Plaintiff requests that this Court enter an order holding that 2018 Public Act 123 is unconstitutional and unenforceable to the extent it requires use of electronic voting machines.

COUNT 13
CONSPIRACY and/or CONCERT OF ACTIONS

(as to all Defendants)

243. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this Amended Complaint.

244. On information and belief, each of the individual Defendants have engaged in concerted action to defraud the voter, manipulate the election, and dilute Plaintiff's vote, , and to cause Plaintiff harm.

245. At all times, several or all of the Defendants have engaged in concerted activities described in the preceding paragraphs by express or implied agreement.

246. This concerted action was intended to, among other things, defame Plaintiffs, embarrass Plaintiffs, cast Plaintiffs in a false and misleading light, interfere with Plaintiffs' business relationships and contracts, invade Plaintiffs' privacy and intrude upon Plaintiffs' seclusion or solitude, convert Plaintiffs' property, and cause Plaintiffs harm and damages.

247. The conspiracy involved all or some of the Defendants who acted in concert. Plaintiffs may not be able to identify all of the activities of Defendants due to the generic similarity of such activities as produced and promoted by these Defendants.

248. The Defendants actions were intended to accomplish an unlawful purpose or a lawful purpose by unlawful means; to wit: defame Plaintiffs, embarrass Plaintiffs, cast Plaintiffs in a false and misleading light, interfere with Plaintiffs' business relationships and contracts, invade Plaintiffs' privacy and intrude upon Plaintiffs' seclusion or solitude, convert Plaintiffs' property, and cause Plaintiffs harm and damages.

249. As a direct and proximate result of Defendants' concerted activities, Plaintiffs have sustained and will continue to sustain severe damages and irreparable harm and loss as more specifically alleged in the preceding paragraphs.

250. Due to the concert of action among all of the various Defendants, each are jointly and severally Plaintiffs for all of their injuries and damages even if there was no direct relation to the activity conducted by that particular Defendant.

251. The conduct of the Defendants was "despicable" and "outrageous" within the meaning of the laws of the State of Michigan and malicious with the meaning of those laws, thus entitling Plaintiffs to exemplary and punitive damages from the Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief:

A. Issue an order requiring allowing Plaintiff to continue to collect the forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images.

B. Issue an order allowing Plaintiff to conduct an independent and non-partisan audit to determine the accuracy and integrity of the November 3, 2020 election;

C. Issue an order that allows Plaintiff and his representatives immediate access to all paper ballots (mail-in, absentee, and in-person) from the November 3, 2020 General Election for visual inspection;

D. Issue an order requiring the Defendants to produce the existing Dominion ballot images and election reports from the November 3, 2020 general election for technical inspection and validation;

E. Continue the protective order entered by this Court on December 4, 2020;

F. As to COUNTS 1, 2, and 9, determine that Plaintiff's constitutional rights were violated consistent with allegations in the Amended Complaint.

G. As to COUNT 3, determined that Defendants violated the "Purity of Elections" Clause consistent with allegations in the Amended Complaint.

H. As to COUNT 4, determined that Defendants violated MCL 168.761(2), MCL 168.765a(6), and MCL 168.766 consistent with allegations in the Amended Complaint.

I. As to COUNT 5, determined that Defendants Benson and Brater violated the Administrative Procedures Act consistent with allegations in the Amended Complaint.

J. As to COUNTS 6, 7 and 8, determined that Defendants committed fraud, consistent with allegations in the Amended Complaint.

K. As to COUNTS10, determine that Defendants violated MCL 168.765(5) consistent with allegations in the Amended Complaint.

L. As to COUNT 11 enter judgment against Defendants Guy and Antrim County, jointly and severally, for damages in an amount of no less than \$25,000.00 for the injuries sustained plus additional damages as may be proven to compensate Plaintiff for losses and damages, plus exemplary and punitive damages, together with interest, costs, and actual attorney's fees incurred in maintaining this matter, and for such further relief as the Court deems appropriate.

M. As to COUNT 12, determined that 2018 Public Act 123 is unconstitutional on its face consistent with allegations in the Amended Complaint.

N. As to COUNT 13, determine that Defendants engaged in a conspiracy consistent with allegations in the Amended Complaint.

O. Grant such other and further relief as is equitable and just and grant him costs, expenses and attorney fees incurred in having to bring this action.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 3, 2021

Matthew S. DePerno (P52622)

VERIFICATION

I, WILLIAM BAILEY, hereby state and affirm that I have read the foregoing Complaint and that it is true and accurate to the best of my information, knowledge, and belief.

DATED: May 3, 2021

William Bailey

Exhibit 19

Supplement to Motion to Amend Complaint

May 17, 2021

RECEIVED by MSC 6/2/2022 1:49:42 AM

FILED

Sheryl Guy

Antrim 13th Circuit Court
05/17/2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY, SECRETARY OF
STATE JOCELYN BENSON, in her official
and individual capacity, JONATHAN
BRATER, in his official and individual
capacity, SHERYL GUY, in her official and
individual capacity, and MILLER
CONSULTATIONS & ELECTIONS, INC.,
d/b/a ELECTION SOURCE, a Michigan
corporation

HON. KEVIN A. ELSENHEIMER

Defendants.

Matthew S. DePerno (P52622)
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Assistant Attorneys General
Attorneys for Defendant Benson
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SUPPLEMENT TO PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff, WILLIAM BAILEY ("Plaintiff"), by and through his attorney, DePerno Law
Office, PLLC, files this Supplement to Motion to Amend Complaint.

1. Plaintiff's expert witnesses have continued to review the forensic images of the Antrim County EMS in order to refute the report of J. Alex Halderman. With each report, they continue to debunk his findings. As a result, a revised First Amended Complaint is attached hereto at [Exhibit A] with 32 additional exhibits attached.

2. The results of these additional tests demonstrate the following:

(a) We are only 6 months into this case. The information reveals that the Dominion Voting System is complex and layered with fraud and ways to subvert the election.

(b) We have demonstrated that votes can be flipped from one candidate to another at the tabulator level with the erroneous results printed on the tabulator tape and then transferred to the EMS.

(c) A review of the Antrim County results file indicates duplicate matching ballot indexes, which is evidence of ballot stuffing and fraud.

(d) The most recent report by Jeff Lenberg [Exhibit 17] reveals that any election can be subverted by changing the date and time at the tabulator, reopening the election, and adding new ballots without any surface trace.

3. On May 10, 2020, Jeff Lenberg [Exhibit 12] revealed the following fraudulent conduct on behalf of Defendants:

Testing of Antrim County project files indicates that modification of the project files can replicate the election inaccuracies observed in the November 3, 2020 election. In addition, further testing revealed that selective modification of the project files resulted in tailored manipulation of the votes tallied. The manipulation can be tailored to modify a specific county, precinct, or race. The steps used to manipulate the vote tally are listed below:

- Modify the specific precinct election files
 - Edit the VIF_BALLOT_INSTANCE.DVD

- o Note: Technical access to ElectionSource corporate resources would allow for these types of manipulations to the elections.
- Burn Compact Flash cards with the configurations for the tabulators
- Run the Election (Process the Ballots through the Tabulator)

The results of the modifications to the project file will show vote totals changed on the tabulator's printed tape as well as modified vote totals in the Results Tally Reporting (RTR) system.

In order to validate these findings; two test cases were run:

1. The swap of Trump and Jorgenson vote totals on both the paper tape and the RTR results
2. The swap of Biden and Trump (Presidential Race) and Ferguson and Bergman (Congressional) while leaving the Senate race unmodified on both the paper tape and the RTR results

Exhibit A contains photos of all the ballots that were run for test case number 2 as well as the paper tapes and RTR tallies showing the manipulations.

Both test cases were successful in that the modifications were made without any alerts or error messages being generated by the EMS or the tabulator. The test cases would not have been detected during the canvassing process because both the paper tapes and the RTR results matched.

3. Jeff Lenberg later conducted a test that demonstrated the vote flip in Antrim County was not "human error" and the general election was not "the safest election in history." Rather, the test confirmed that the vote tally errors observed in Antrim County on November 3, 2020 were most likely the result of technical manipulation of the election project file; not human

error and not a computer glitch. By conducting a series of tests, Plaintiff's experts were able to replicate the vote tally errors through a method wholly contrary to the "human error" narrative proposed by Alex Halderman. The video can be viewed here:

<https://www.depernolaw.com/dominion.html>

This video demonstrates fraud in the election process and vote tabulation process.

4. On May 9, 2021, Jeff Lenberg [Exhibit 14] revealed that the Antrim County election was fraudulent and critical errors were subverted.

5. On May 15, 2021, Jeff Lenberg [Exhibit 15] revealed additional facts that show Barry County's November 3, 2020 election was also subverted.

6. On May 15, 2021, James Penrose [Exhibit 16] revealed that the "specific incident in Antrim County is related to the features and the functionality outland in the Dominion patent US8,876.002B2. "The patent also indicates that a vote simulation script is used to produce votes and enable counting of votes for [pre-election Logic and Accuracy testing (Pre-LAT)] purposes." This also demonstrates the ability to subvert an election.

7. On May 16, 2021, Jeff Lenberg [Exhibit 17] revealed that further testing shows that any election can be subverted by changing the date and time at the tabulator, reopening the election, and adding new ballots without any surface trace. The significance of this report is the following:

- a. Election Source conducts thousands of elections across the country, including Antrim County, but there are only 6 accounts names: Ben/Smythe, John/Smith, Ryan/Smoth, MRO/M01, Return Office/Admin, MRESuper/Admin.
- b. Election workers have the ability to "reopen" an election at any time after the election, add ballots, and set the time on a tabulator to any time in order to print paper tapes that show the appropriate date/time stamp. The process is straightforward and is performed by traversing the menus on the tabulator itself.

- c. An election worker can follow the same process of injecting fraudulent votes and maintaining the exact same date and time for the poll opening, closing, and printout to the minute.
- d. Any user with access to the EMS using the EMS Admin username and password to log into the Dominion Democracy Suite Election Event Designer (EED) application will appear to be "Ben Smythe" in the log files.
- e. The EED application is used to design the entire election, it is used to program the election files on to the compact flash cards, and it is used to program the security key fobs that are required to open, close, reopen, or rezero the polls.
- f. This permits obfuscation of the true user.
- g. The RTRAdmin username and password can be accessed by anyone and they will appear in the logs as "Ryan Smoth." The RTR application is the one used to import, reject, validate, publish, and unpublish results contained on the compact flash cards. Thus "Ryan Smoth" can enter whatever numbers he would like while ignoring the original values on the encrypted compact flash cards and printed tapes. Mr. Smoth can then go back the next day or any day up until the day the canvass is performed and quietly reopen the polls, add a matching number of votes as he manipulated on election night, change the time to match the original paper tape, and print the results. When the canvass is performed the modified paper tape will match the modified manually entered results.

8. This work supports Dr. Frank's initial conclusions from May 7, 2021 when he stated that (a) there was a near 100% turnout in the age groups 65-80, (b) 20.3% of mail in ballots were sent to PO Boxes, and (c) there were approximately 1,061 "phantom ballots" counted in the Antrim County general election on November 3, 2020. This number is derived from the 15,962 ballots counted on December 17, 2020 less the 14,901 ballots in Defendant Benson's official database.

9. This additional information has been added to the proposed First Amended Complaint.

10. Defendants contend that a hand recount conducted on December 17, 2020 will catch fraud. However, this has been proved to be false. Indeed, we have now presented significant direct and circumstantial evidence that the election in Antrim County on November 3, 2020 was fraudulent, our elected officials knew or should have known it was fraudulent, the election was subverted intentionally through the voting machines, and that ballot stuffing likely occurred.

11. Plaintiff has a constitutional right to vote and have his vote counted **as he intended**. In 2018, the Michigan Constitution was amended by the people of Michigan. As amended, Const 1963, art 2, §4(1)(h) now provides, in pertinent part:

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(h) The right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections. [Emphasis added.]

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes. Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.

(emphasis added).

12. This provision was amended effective December 22, 2018. According to the Michigan Constitution, there is no threshold requirement that must first be met in order for a citizen to request an audit of an election. This right is self-executing. Const 1963, art 2, § 4. Indeed, the Michigan Constitution requires that the "results" of the election be audited in order to ensure the "accuracy and integrity" of the election.

13. The amendment states clearly that the legislature is permitted to "expand[] voters' rights." There is nothing that states the legislature is permitted to narrow voters' rights. Therefore, the amendment must be permitted.

14. If Defendants are correct and the December 17, 2020 hand recount definitely proved that the general election was the safest and fairest in this country's history, then they should have no problem permitting the audit contemplated by the Const 1963, art 2, § 4. As it stands, Plaintiff has presented enough evidence to show that the election was fraudulent, thereby violating his constitutional rights.

15. The notion that this amendment would open up the state to thousands of lawsuits is not realistic. The amendment was passed in 2018 and there have not been thousands of lawsuits. Even if there were, it is still the same statewide audit, so the number of lawsuits would be irrelevant.

16. Defendants' argument that MCL 168.31a(2) limit the rights granted by the Const 1963, art 2, § 4 are without merit and actually render MCL 168.31a unconstitutional on its face, unconstitutionally applied, or unconstitutional in its effect, to the extent it limits the rights granted to Plaintiff pursuant to Const 1963, art 2, § 4.

WHEREFORE, Plaintiff respectfully requests that this Court grant it leave to amend his complaint by substituting the attached Amended Complaint for his original complaint.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 17, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

Attorney for Plaintiff

PROOF OF SERVICE

On the date set forth below, I caused a copy of the following documents to be served on all attorneys of record at the addresses listed above

1. Supplement to Plaintiff's Motion for Leave to Amend Complaint

Service was electronically using the MiFile system which will send notification of such filing of the foregoing document to all attorneys of record.

Dated: May 17, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY

HON. KEVIN A. ELSENHEIMER

Defendant

SECRETARY OF STATE JOCELYN
BENSON

Intervenor-Defendant,

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EXHIBIT A

SUPPLEMENT TO MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 17, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)
Attorney for Plaintiff

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY, SECRETARY OF STATE JOCELYN BENSON, in her official and individual capacity, JONATHAN BRATER, in his official and individual capacity, SHERYL GUY, in her official and individual capacity, MILLER CONSULTATIONS & ELECTIONS, INC., d/b/a ELECTION SOURCE, a Michigan corporation, and CENTRAL LAKE TOWNSHIP, a civil township

HON. KEVIN A. ELSSENHEIMER

Defendants.

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Erik A. Grill (P64713)
Assistant Attorneys General
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FIRST AMENDED COMPLAINT

NOW COMES Plaintiff, WILLIAM BAILEY, by and through his attorney, DePERNO LAW OFFICE, PLLC and for his First Amended Complaint against ANTRIM COUNTY, SECRETARY OF STATE JOCELYN BENSON, in her official and individual capacity,

JONATHAN BRATER, in his official and individual capacity, SHERYL GUY, in her official and individual capacity, and MILLER CONSULTATIONS & ELECTIONS, INC., d/b/a ELECTIONSOURCE, a Michigan corporation, states the following:

JURISDICTION and VENUE

1. Plaintiff WILLIAM BAILEY ("Plaintiff") is an individual residing at 1592 N. Intermediate Lake Road, Central Lake, Michigan 49622, Antrim County, Michigan. Plaintiff is a registered voter and Antrim County, Michigan. On November 3, 2020 Plaintiff voted in person in the 2020 presidential election at the polling location in Central Lake Township, Antrim County.

2. Defendant ANTRIM COUNTY ("Defendant Antrim County") is a public agency with its registered office located at 203 E. Cayuga St., Bellaire, MI 49615.

3. Defendant Antrim County is tasked with the obligation to hold all elections in Antrim County in a constitutionally fair and legal manner.

4. Antrim County is made up of 15 precincts.

5. Defendant SECRETARY OF STATE JOCELYN BENSON ("Defendant Benson") is the Secretary of State in Michigan and is charged with administering election laws, election training workers throughout the state, and maintaining the qualified voter registration list ("QVR"). MCL 168.21 ("The secretary of state shall be the chief election officer of the state and shall have supervisory control over local election officials in the performance of their duties under the provisions of this act."); 168.31(1)(a) (the "Secretary of State shall . . . issue instructions and promulgate rules . . . for the conduct of elections and registrations in accordance with the laws of this state").

6. Defendant Benson is the public official with authority and responsibility for the conduct of elections in the State of Michigan. In this capacity, Defendant BENSON had both legal

and actual responsibility for the conduct of the November 3, 2020 election in the State of Michigan and Antrim County.

7. Michigan law provides that Secretary Benson "[a]dvice and direct local election officials as to the proper methods of conducting elections." MCL 168.31(1)(b). *See also Hare v. Berrien Co Bd. of Election*, 129 N.W.2d 864 (Mich. 1964); *Davis v. Secretary of State*, 2020 Mich. App. LEXIS 6128, at *9 (Mich. Ct. App. Sep. 16, 2020).

8. Secretary Benson is responsible for assuring Michigan's local election officials conduct elections in a fair, just, and lawful manner. *See* MCL 168.21; 168.31; 168.32. *See also League of Women Voters of Michigan v. Secretary of State*, 2020 Mich. App. LEXIS 709, *3 (Mich. Ct. App. Jan. 27, 2020); *Citizens Protecting Michigan's Constitution v. Secretary of State*, 922 N.W.2d 404 (Mich. Ct. App. 2018), *aff'd* 921 N.W.2d 247 (Mich. 2018); *Fitzpatrick v. Secretary of State*, 440 N.W.2d 45 (Mich. Ct App. 1989).

9. Defendant JONATHAN BRATER ("Defendant Brater") is Michigan's Director of Elections and is being sued in his official capacity

10. Defendant SHERYL GUY ("Defendant Guy") is the Clerk of Antrim County, a constitutional officer under Mich. Const. 1963, art. 7, § 4, and is charged with certain non-delegable duties, including, but not limited to, administering all elections and training election workers within Antrim County.

11. Defendant Guy is the public official with a non-delegable duty, authority and responsibility for the conduct of elections in Antrim County. In this capacity, Defendant Guy had both legal and actual responsibility for the conduct of the November 3, 2020 election in Antrim County, including maintaining absolute integrity, custody and control of, inter alia, all voting

machines, data, hardware, software, passwords, keys, paper ballots, electronic images of ballots, used in and concerning the November 3 election.

12. Defendant MILLER CONSULTATIONS & ELECTIONS, INC. ("Defendant Election Source") is a domestic profit corporation incorporated in Michigan with a principal address of 2615 Danvers Drive SE, Grand Rapids, MI 49512, and doing business under the registered fictitious name "ElectionSource."

13. Defendant Election Source is a subcontractor of Dominion Voting Systems, Inc. or one of its affiliates (collectively "Dominion").

14. Election Source is a governmental actor. As a result of its contract with Dominion and government entities, Election Source is delegated responsibility to administer public elections; a core governmental function. By contracting with the state of Michigan to provide comprehensive voting solutions for public elections, including the election of individuals to serve in constitutionally prescribed offices, Election Source is a governmental actor.

15. Election Source's involvement in running the November 3, 2020 election amounts to state action. Election Source willfully participates in joint activity with the state during voting, including by supplying its products and services coextensively with election officials to carry out the election. There is pervasive entwinement between Election Source and the state.

16. In its capacity as – and using its authority as – a governmental actor, Election Source allowed manipulation or changing of votes in the 2020 election. As a result of systemic and widespread vulnerabilities in Dominion's software and hardware, and Election Source's fraud and/or recklessness and/or gross negligence in programming elections and mapping ballots, votes can be altered in elections.

17. Defendant Antrim County contracted with Defendant Election Source for services related to the conduct of the November 3, 2020 election, including but not limited to: the creation of the Antrim County November 3, 2020 project file compact flash card configuration; ballot design; programming for the Antrim County ICP, ICX, and ICC; the conducting of logic and accuracy tests; the performance of database changes; and the provision of thumb drives with election material.

18. Defendant Election Source provided election services for Antrim County related to this election, including ballot changes on October 5 and 7, 2020.

19. Defendant CENTRAL LAKE TOWNSHIP is a civil township of Antrim County located at 1622 North M-88, Central Lake, MI 49622. Central Lake Township is charged with conducting elections within Antrim County.

20. On or about November 5, 2020, three ballots were destroyed during the canvas process and were not subsequently added to the vote total, meaning at least three voters (including Plaintiff) lost their constitutional right to vote.

21. The transactions that give rise to this cause of action occurred in Antrim County, State of Michigan.

22. Pursuant to MCL 600.4545(1), "[a]n action may be brought in the circuit court of any county of this state whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof."

23. Both the state and federal constitutions anchor the fundamental rights of the people to govern themselves upon this prima facie assumption that the means by which the people choose their representatives is of ultimate and primary importance.

24. "The maxim which lies at the foundation of our government is, that all political power originates with the people. But since the organization of government, it cannot be claimed that either the legislative, executive, or judicial powers, either wholly or in part, can be exercised by them. By the institution of government, the people surrender the exercise of all these sovereign functions of government to agents chosen by themselves, who at least theoretically represent the supreme will of their constituents. Thus, all power possessed by the people themselves is given and centred in their chosen representatives." Cooley, *Treatise on the Constitutional Limitations* (2d ed 1871), p 598. Justice Cooley would also state: "[I]f *any action* was required of the public authorities preliminary to the election, and that which was taken was not such as to give all the electors the opportunity to participate, and no mode was open to the electors by which the officers might be compelled to act, it would seem that such neglect, constituting as it would the disenfranchisement of the excluded electors *pro hac vice*, must on general principles render the whole election nugatory; for that cannot be alled an election or the expression of the popular sentiment where a part only of the electors have been allowed to be heard, and the others, without being guilty of fraud or negligence, have been excluded. *Id.* at 615-616.

25. The Michigan Constitution of 1963 first and foremost declares that "[a]ll political power is inherent in the people" and that "Government is instituted for their *equal* benefit, security and protection." Const 1963, art I, § 1 (emphasis added).

26. Michigan's Constitution next declares that "[n]o person shall be denied the equal protection of the laws" Const 1963, art 1, §2.

27. The Michigan Constitution's "purity of elections" clause states that "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective

franchise, and to provide for a system of voter registration and absentee voting." Const 1963, art 2, §4(2).

28. "These provisions have been a part of our constitution for almost as long as Michigan has been a state. The purpose of a law enacted pursuant to these constitutional directives is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. *It is for the purpose of preventing fraudulent voting.* Under the Legislature's authority to preserve the purity of elections and to guard against abuses of the elective franchise, the Legislature may regulate, but cannot *destroy*, the enjoyment of the elective franchise. *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16-18; 740 NW2d 444 (2007) (emphasis in original) (cleaned up).

29. "The right to vote is not expressly enumerated in either our state or the federal constitution. Rather, it has been held that the right to vote is an implicit fundamental political right that is preservative of all rights. As the United States Supreme Court noted, a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 16-18; 740 NW2d 444 (2007) (cleaned up).

30. These state constitutional guarantees are underpinned by the inalienable "right of qualified voters within a state to cast their ballots and have them counted" and so broad is this right "secured by the Constitution" and held by every citizen that the United States Supreme Court has stated "since the constitutional command is without restriction or limitation, the right, *unlike those guaranteed by the Fourteenth and Fifteenth Amendments*, is secured against the action of individuals as well as of states." *United States v Classic*, 313 US 299, 314; 61 S Ct 1031; 85 L Ed

1368 (1941) (emphasis added), citing, inter alia, *Ex Parte Yarbrough*, 110 US 651, 662; 4 S Ct 152; 28 L Ed 274 (1884).

31. In the latter case the Court confirmed the standing of every citizen to petition the government to protect his right to cast a vote and to have that vote properly counted – it is a standing that does not depend on the status of the complainant but in these circumstances where fraud and corruption are charged in the conducting of election the power of the court "arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States." *Ex Parte Yarbrough*, 110 US at 662.

32. The Court stated further regarding the duty of the government to protect the citizen's rights in this regard: "[I]t is the duty of... government to see that he may exercise this right freely.... This duty *does not arise solely from the interest of the party concerned*, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." (emphasis added).

33. The standing of every citizen and the duty of the government to protect the right to vote extends directly to ensuring that no fraud or corruption occurs in the counting, tabulation and return of votes. In *Classic, supra*, the Court stated "[t]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place." 313 US at 315. The Court has also recognized the Constitution guarantees that "free and *uncorrupted* choice" shall be afforded to all in the decision of who should lead them. *Id.* (emphasis added).

34. While the First Amendment guarantees the right of every citizen to cast a vote and to have that vote counted, and this right includes the right not to have one's vote diluted or canceled out by the tabulation of fraudulent votes or ballots, the Supreme Court of the United States has given the right to vote primacy over all other rights. See, e.g., *Reynolds v Sims*, 377 US 533, 560-563; 84 S Ct 1362; 12 L Ed 2d 506 (1964). Thus, the Court has recognized the "political franchise" of voting as a "fundamental political right, because preservative of all rights." *Yick Wo v Hopkins*, 118 US 356, 371; 6 S Ct 1064; 30 L Ed 220 (1886). "[T]he right...is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise *in a free and unimpaired manner* is preservative of other basic civil and political rights." *Harper v. Va State Bd of Elections*, 383 U.S. 663, 667 (1966) (emphasis added). Thus, "*any* alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* It is a right protected not only by the First Amendment, but one of those non-enumerated fundamental rights reserved to the People by the Ninth. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. All other rights, even the most basic, are illusory if the right to vote is undermined." *Reynolds v Sims*, 377 US 533, 560; 84 S Ct 1362; 12 L Ed 2d 506 (1964).

35. A corollary to the right of citizens to vindicate a violation of their right to vote as against state and individual actors, the judicial branch has the authority to directly address state failures in the conducting of a national election. Of necessity, they must. While states might have authority to regulate a national election under Article I, § 2 of the Constitution, this is in no way a delegation to them (or their administrators and executives) to restrict, limit or violate the fundamental right, whether through their negligence or incompetence in running the election, or

in unconstitutionally delegating that authority to others. *Classic, supra* at 315-316. See also *Wesberry v. Sanders*, 376 US 1, 7-8; 84 S Ct 526; 11 L Ed 2d 481 (1964).

36. Plaintiff respectfully requests that this Honorable Court grant injunction relief, for all the reasons stated in his complaint, motion for temporary restraining order, supporting affidavit, exhibits, and accompanying brief, which are all incorporated herein by reference. Plaintiff requests relief as recognized in *Shoemaker v City of Southgate*, 24 Mich App 676; 180 NW2d 815 (1970).

37. This action is properly filed in Antrim County Circuit Court pursuant to MCR 3.306(A)(2), Mich. Const. art. 1, §2 and art. 2, §4, MCL 600.4545, and MCL 600.605.

38. Plaintiff requests this Court order "a speedy hearing" of this action and "advance it on the calendar" as provided by MCR 2.605(D).

39. Venue is proper pursuant to MCR 3.306(D).

COMMON ALLEGATIONS

40. The general election was held on Tuesday, November 3, 2020.

41. Antrim County uses the Dominion Voting Systems election management system and voting machines (tabulators). These tabulators were shown to have miscounted votes cast for President Donald Trump and instead count them for Presidential Candidate Joe Biden.

42. Antrim County is just one of 47 counties in Michigan that uses the Dominion Voting Systems to process ballots. As noted in the letter attached hereto from Senate President Pro Tempore Aric Nesbitt [Exhibit 1], "[t]his is particularly concerning when at least one other secretary of state, specifically in Texas, refused to certify Dominion Voting Systems for use because the examiner could not verify that the system was 'safe from fraudulent or unauthorized manipulation.'" This letter is signed by 40 Michigan State Senators and Representatives.

43. The letter references that the allegations are "backed up by sworn affidavits of over 100 Michigan citizens, real people, willing to face legal consequences to their lives and livelihoods to stand by their assertions."

44. In addition, the letter attached hereto from 22nd District Representative Lana Theis [Exhibit 2] expresses similar concerns about the issue in Antrim County with Dominion Voting Systems

45. At 9:30 am on Wednesday, November 4, 2020, unofficial results posted by the Antrim County Clerk showed that 16,047 voters had cast a ballot in the presidential election. Presidential Candidate Joe Biden received 7,769 votes in the county and President Donald Trump received 4,509 [Exhibit 3].¹

46. Antrim County voted 62% in favor of President Trump in 2016.

47. Democratic candidates Gary Peters and Dana Ferguson also outperformed their Republican opponents in the county.

48. On Wednesday morning, November 4, 2020, Plaintiff turned on the television to watch the local news and was shocked to see an election map showing Antrim County in bright blue – meaning that the majority of voters in Antrim County had voted Democrat. Plaintiff immediately contacted Jim Gurr (who worked for Helena Township (Antrim County) election. Upon information and belief, Jim Gurr then contacted Defendant Guy's office and asked her office to review the results, which appeared skewed and incorrect.

¹ Only including pages 1-14 (results for President, Senator, Congress 1st District, State Legislature 105th District

49. On November 5, 2020, Defendant Guy released amended results which showed that 18,059 residents had cast a ballot in the election [Exhibit 4].² Of those, Presidential Candidate Joe Biden received 7,289 votes in the county and President Donald Trump received 9,783; resulting in President Donald Trump receiving 54%, still significantly less than 2016.

50. On November 21, 2020, Defendant Guy released second amended results³ which now show 16,044 residents had cast a ballot in the election [Exhibit 5].⁴ Of those, Presidential Candidate Joe Biden received 5,960 votes in the county and President Donald Trump received 9,748; resulting in President Donald Trump receiving 60.75%, which was more in line and consistent with 2016.

51. Of serious concern is why Presidential Candidate Joe Biden had more than 7,700 votes on election night.

52. Of equal concern is why Presidential Candidate Joe Biden had 7,289 votes on November 5, 2020.

53. Of equal concern is why Presidential Candidate Joe Biden's vote count dropped to 5,960 votes on November 21, 2020. What happened to the mysterious 1,740+ overvotes registered on election night?

54. Of equal concern is why Defendant Antrim County's vote count for registered voters dropped from 18,059 on November 5, 2020 to 16,044 on November 21, 2020. That is a startling 11.2% reducing in total voters.

² Only including pages 3-14. Pages 1-2 not available on Antrim County website.

³ <http://www.antrimcounty.org/elections.asp>

⁴ Only including pages 1-14.

55. It is an obvious fact that Presidential Candidate Joe Biden received more votes than actually cast for him, including an extra 2,015 "phantom votes." But for Plaintiff contacting Jim Gurr, who contacted Defendant Guy's office, this mistake would not have been corrected.

56. There are many other questions that remain unanswered, including but not limited to (1) whether the Dominion tabulators in Antrim County were tampered with, (2) whether they have the capacity to connect to the internet, (3) whether they had any open VPN ports during the election, (4) if connected to the internet, was the connection secure, (5) whether the machines were accessed via the use of removable media to transfer voting information, (6) whether the ballot images were preserved and maintained in every precinct per federal and state election law, (7) whether the audit logs were preserved and synchronized, (8) whether the audit logs were altered or edited by any person operating the system, (9) whether Dominion pre-loaded any algorithms and configurations on the machines that alter the results, and if so, what algorithms and configurations were pre-loaded, and (10) whether the "purge option" that is built into Dominion utilized to cancel, switch, or manipulate votes, in the same way it has historically been utilized in Venezuela and Cuba was used here.

57. Michigan's Constitution guarantees all Michigan citizens the right of equal protection, due process, and "the purity of elections." Const. 1963, art 1, §2; art. II, §4(2) (reprinted in Appendix). Every Michigan citizens who is an "elector . . . qualified to vote in any election" is guaranteed the right to cast a ballot. *Id.*

58. The right to cast a ballot and to vote is coequal with the right *not* to have one's vote diluted, adulterated, deleted, canceled out or nullified by the casting and/or counting of a fraudulent vote. As the Supreme Court of the United States has stated: "[T]he right...can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting

the free exercise of the franchise." *South v. Peters*, 339 U.S. 276, 279; 70 S Ct 641; 94 L Ed 834 (1950). Adulterated ballots, phony ballots, fraudulent ballots, inexplicable vote switches, vote losses, vote adding, phantom votes, and a host of other issues occurred in Antrim County during the November 3 election.

59. Plaintiff and others seek to learn the answers to these questions, including why Defendant initially registered "phantom voters" for Presidential Candidate Joe Biden and why the Dominion machines altered and switched votes for him.

60. Defendant Benson released a statement blaming the county clerk for not updating certain "media drives," but her statement failed to provide any coherent explanation of how the Dominion Voting Systems software and vote tabulators produced such a massive miscount.⁵

61. Defendant Benson continued: "After discovering the error in reporting the unofficial results, the clerk worked diligently to report correct unofficial results by reviewing the printed totals tape on each tabulator and hand-entering the results for each race, for each precinct in the county." *Id.*

62. What Defendant Benson fails to address is what would have happened if no one "discover[ed] the error." Indeed, when Defendant Guy testified before Michigan's Joint Oversight Committee on November 19, 2020, she failed to and was unable to answer this question.

63. Tabulator errors related to Dominion occurred elsewhere in Michigan on election night. For instance, Wayne County used the same Dominion voting system tabulators as did Antrim County.

⁵ https://www.michigan.gov/documents/sos/Antrim_Fact_Check_707197_7.pdf
(emphasis in original).

64. These vote tabulator failures are a mechanical malfunction that, under MCL 168.831-168.839, requires a "special election" in the precincts affected.

65. Michigan's Election Code, MCL 168.831-168.839, provides the board of canvassers shall order a special election as governed by those precincts affected by the defect or mechanical malfunction. The board of county canvassers "is responsible for resolving any claims that malfunctioning voting equipment or defective ballots may have affected the outcome of a vote on an office appearing on the ballot." Michigan Manual for Boards of County Canvassers.

66. MCL 168.795 governs the requirements for electronic voting machines in Michigan. Among the requirements, voting machines must:

- a. Prevent an elector from voting for the same person more than once for the same office;
- b. Reject a ballot on which no valid vote is cast. Electronic tabulating equipment must be programmed to reject a ballot on which no valid vote is cast.
- c. Be suitably designed for the purpose used; be durably constructed; and be designed to provide for safety, accuracy, and efficiency.
- d. Record correctly and count accurately each vote properly cast.
- e. Provide an audit trail.

67. In the aftermath of the election failures, Defendant Guy deleted or directed her staff to delete certain system files from electronic election equipment used in the November 3, 2020 election.

68. On March 3, 2021, Defendant Guy dismissed or directed her staff to dismiss this instant case, *William Bailey v. Antrim County*, case no. 2020-9238-CZ. It was later determined by this Honorable Court that Defendant Guy had improperly dismissed *William Bailey v. Antrim County*, and the case was reinstated by this Honorable Court.

69. The log files in the election management system ("EMS") used by Antrim County confirm that Defendant Election Source's personnel performed updates to the ballot designs used in the election, made inappropriate database changes, and performed follow-up procedures for the November 3, 2020 election.

70. The EMS reflects that technicians employed by Defendant Election Source made alterations to the ballot definitions and related project files. The Election Source Antrim County Project File was configured to allow Antrim County personnel to change the technician password. Election Source provided weak passwords that were identical at all precincts. Defendant Election Source produced project files with hardcoded passwords of 123456 to open or rezero the poll, and utilized the same password for all election officials. This resulted in significant security vulnerability in Antrim County's EMS on election day.

71. Defendant Election Source failed to use good development practices and configuration control processes. The Configuration Version Number corresponding to different iterations of the ICPs, ICXs, and ICCs remained identical or went unverified. Additionally, Defendant Election Source failed to identify that the election files and ballot files were incompatible due to providing incorrect compact flash card election files.

72. Defendant Election Source moreover introduced substantive election file errors caused by incompatible election files, and failed to address the notifications and/or warnings indicated in the EMS log files which would have been visible to Election Source technicians upon Antrim project file updates. Rather than remediate the errors, Election Source ignored notifications and/or warnings and proceeded to update the Antrim project file for tabulators with the system errors and associated misconfigurations unchanged.

73. Defendant Election Source failed to employ appropriate version control practices, resulting in a mismatch in configurations deployed to Antrim County precincts versus the central configuration of the Antrim County EMS. Lack of version of control makes it impossible to for local precincts to determine whether their compact flash cards have a proper configuration. Defendant Election Source then gave Defendant Guy exclusive possession of the Antrim project file and compact flash card configuration along with the central EMS, and she failed to properly deploy updated compact flash cards to all precincts in Antrim County.

74. Defendant Election Source utilized thumb drives to carry ballot designs and ballots, which produced a significant security vulnerability which could be exploited by a single attacker given the same level of access as an ordinary poll worker. Such an attack could involve using the ballot and ballot design contained on a thumb drive to produce additional ballots which could then be cast for the attacker's preferred candidate. Upon information and belief, Defendant Election Source knew of this vulnerability and did not act to cure it. An Election Source whistleblower identified this practice as a major risk for fraud in the November 3, 2020 election because this Election Source practice and procedure made it incredibly easy to stuff the ballot box as a result of the easily accessible thumb drives.

75. Additionally, Defendant Election Source, and Defendant Guy failed to reprogram all CF cards providing ICPs and ICXs for all the precincts and townships served by Antrim County following a programming update. Specifically, the user information log pertaining to these systems shows no activity between September 25 to October 5, 2020, after Defendant Election Source delivered the update on October 22, 2020.

76. Defendant Election Source failed to use good development practices and configuration control processes. The Configuration Version Number corresponding to different

iterations of the ICPs, ICXs, and ICCs remained identical or went unverified. Additionally, Defendant Election Source failed to identify that the election files and ballot files were incompatible due to providing incorrect compact flash card election files.

77. Following its provision of ballot changes to the Antrim County project file on October 5 and 7, 2020, Defendant Election Source waited two weeks to provide the Project File to Antrim County. This delay limited Antrim County from having significant time to perform appropriate LAT activity before the election. No log entries were created between October 7 and 13; the Project File was archived on October 13. No further log entries were created until October 22, when four scripts were run by unknown individuals. No details regarding the scripts' function or functions appears in the log files.

78. Defendant Election Source turned off ballot saving images settings to preserve the ballots for an accurate audit.

79. The Dominion EMS that sits in the office of Antrim County includes a multitude of problems found within the system that amount to gross error by Defendants. One of the most important discoveries is detailed on page 15 of the Cyber Ninja's report [Exhibit 6]. Here, Cyber Ninjas discovered a Microsoft SQL Server Management Studio implant on the system. This piece of software is not approved by the Election Assistance Commission ("EAC") and allows a user to actually circumvent security protocol and make "direct[] edit entries within the database" which "could potentially be utilized to change vote values." Perhaps most importantly, this software is a "separate install." In other words, it should not be on the system. It is, by its very definition, a hacking tool.

80. Benjamin Cotton has also prepared an affidavit after review of the Antrim County system [Exhibit 7]. He states that he reviewed the forensic image of the Dominion system "utilized

in the November 2020 election and discovered evidence of internet communications to a number of public and private IP addresses." One connection in particular traced back to "the Ministry of Education Computer Center, 12F, No 106, Sec 2, Hoping E. Rd., Taipei Taiwan 106." Further, "[t]his IP address resolves to a cloud provider in Germany." Mr. Cotton's findings show that the Antrim County system was connected to the internet. Of course, Sheryl Guy deleted system files that would allow further review. For this reason, review of other systems in other counties is critical.

81. James Penrose also explains internet connectivity on both Dominion and ES&S machines [Exhibit 8]. The Dominion Voting Systems proposal for Antrim County shows a quote for procurement of wireless transmission capabilities. Dominion representatives also confirmed performance issues with wireless transmission of vote totals and even went as far as disabling the saving of ballot images without explicit authorization during the 2020 primary. In addition, a forensic examination of a Dominion ICX machine has shown the existence of Taiwan and Germany-based IP addresses in unallocated space, implying there were international communications via the Internet. In addition, ES&S DS200 machines in Michigan utilized wireless 4G network adapters for vote transmission over the commercial Verizon network. The company that manufactures the 4G wireless modems is named Telit. Telit has recently taken investment from a major Chinese firm and according to press reporting the UK government is monitoring the situation with concern that the Chinese government is in a position to exercise influence over Telit.

82. The ASOG report [Exhibit 9] issued on December 14, 2020 also details multiple instances of negligence, fraud, and bad faith:

I. SERVER OVERVIEW AND SUMMARY

1. Our initial audit on the computer running the Democracy Suite Software showed that standard computer security best practices were not applied.

These minimum-security standards are outlined the 2002 HAVA, and FEC Voting System Standards – it did not even meet the minimum standards required of a government desktop computer.

2. The election data software package USB drives (November 2020 election, and November 2020 election updated) are secured with bitlocker encryption software, but they were not stored securely on-site. At the time of our forensic examination, the election data package files were already moved to an unsecure desktop computer and were residing on an unencrypted hard drive. This demonstrated a significant and fatal error in security and election integrity. Key Findings on Desktop and Server Configuration: - There were multiple Microsoft security updates as well as Microsoft SQL Server updates which should have been deployed, however there is no evidence that these security patches were ever installed. As described below, many of the software packages were out of date and vulnerable to various methods of attack.
 - a) Computer initial configuration on 10/03/2018 13:08:11:911
 - b) Computer final configuration of server software on 4/10/2019
 - c) Hard Drive not Encrypted at Rest
 - d) Microsoft SQL Server Database not protected with password.
 - e) Democracy Suite Admin Passwords are reused and share passwords.
 - f) Antivirus is 4.5 years outdated
 - g) Windows updates are 3.86 years out of date.
 - h) When computer was last configured on 04/10/2019 the windows updates were 11 years out of date.
 - i) User of computer uses a Super User Account.
3. The hard drive was not encrypted at rest – which means that if hard drives are removed or initially booted off an external USB drive the files are susceptible to manipulation directly. An attacker is able to mount the hard drive because it is unencrypted, allowing for the manipulation and replacement of any file on the system.
4. The Microsoft SQL Server database files were not properly secured to allow modifications of the database files.

5. The Democracy Suite Software user account logins and passwords are stored in the unsecured database tables and the multiple Election System Administrator accounts share the same password, which means that there are no audit trails for vote changes, deletions, blank ballot voting, or batch vote alterations or adjudication.
6. Antivirus definition is 1666 days old on 12/11/2020. Antrim County updates its system with USB drives. USB drives are the most common vectors for injecting malware into computer systems. The failure to properly update the antivirus definition drastically increases the harm cause by malware from other machines being transmitted to the voting system.
7. Windows Server Update Services (WSUS) Offline Update is used to enable updates the computer – which is a package of files normally downloaded from the internet but compiled into a program to put on a USB drive to manually update server systems.
8. Failure to properly update the voting system demonstrates a significant and fatal error in security and election integrity.
9. There are 15 additional updates that should have been installed on the server to adhere to Microsoft Standards to fix known vulnerabilities. For the 4/10/2019 install, the most updated version of the update files would have been 03/13/2019 which is 11.6.1 which is 15 updates newer than 10.9.1

This means the updates installed were 2 years, 1 month, 13 days behind the most current update at the time. This includes security updates and fixes. This demonstrated a significant and fatal error in security and election integrity.

- Wed 04/10/2019 10:34:33.14 - Info: Starting WSUS Offline Update (v. 10.9.1)
- Wed 04/10/2019 10:34:33.14 - Info: Used path "D:\WSUSOFFLINE1091_2012R2_W10\cmd\" on EMSSERVER (user: EMSADMIN)
- Wed 04/10/2019 10:34:35.55 - Info: Medium build date: 03/10/2019
- Found on c:\Windows\wsusofflineupdate.txt
- *WSUS Offline Update (v.10.9.1) was created on 01/29/2017

*WSUS information found here <https://download.wsusoffline.net/>

10. Super User Administrator account is the primary account used to operate the **Dominion Election Management System** which is a major security

risk. The user logged in has the ability to make major changes to the system and install software which means that there is no oversight to ensure appropriate management controls – i.e. anyone who has access to the shared administrator user names and passwords can make significant changes to the entire voting system. The shared usernames and passwords mean that these changes can be made in an anonymous fashion with no tracking or attribution

83. The ASOC Report also details that the following instances of negligence, fraud, and bad faith occurred in Central Lake Township:

D. CENTRAL LAKE TOWNSHIP

1. On November 27, 2020, part of our forensics team visited the Central Lake Township in Michigan to inspect the **Dominion ImageCast Precinct** for possible hardware issues on behalf of a local lawsuit filed by Michigan attorney Matthew DePerno on behalf of William Bailey. In our conversations with the clerk of **Central Lake Township** Ms. Judith L. Kosloski, she presented to us "two separate paper totals tape" from Tabulator ID 2.
 - One dated "Poll Opened Nov. 03/2020 06:38:48" (Roll 1);
 - Another dated "Poll Opened Nov. 06/2020 09:21:58" (Roll 2).
2. We were then told by Ms. Kosloski that on November 5, 2020, Ms. Kosloski was notified by Connie Wing of the County Clerk's Office and asked to bring the tabulator and ballots to the County Clerk's office for re-tabulation. They ran the ballots and printed "Roll 2". She noticed a difference in the votes and brought it up to the clerk, but canvassing still occurred, and her objections were not addressed.
3. Our team analyzed both rolls and compared the results. Roll 1 had **1,494** total votes and Roll 2 had **1,491** votes (Roll 2 had 3 less ballots because 3 ballots were damaged in the process.)
4. "Statement of Votes Cast from Antrim" shows that only **1,491** votes were counted, and the **3** ballots that were damaged were not entered into final results.
5. Ms. Kosloski stated that she and her assistant manually refilled out the three ballots, curing them, and ran them through the ballot counting system - but the final numbers do not reflect the inclusion of those **3** damaged ballots.
6. This is the most preliminary report of serious election fraud indicators. In comparing the numbers on both rolls, *we estimate **1,474** votes changed across the two rolls, between the first and the second time the exact same ballots were run through the County Clerk's vote counting machine - which is almost the same number of voters that voted in total.*

- **742 votes were added to School Board Member for Central Lake Schools (3)**
 - **657 votes were removed from School Board Member for Ellsworth Schools (2)**
 - **7 votes were added to the total for State Proposal 20-1 (1) and out of those there were 611 votes moved between the Yes and No Categories.**
7. There were incremental changes throughout the rolls with some significant adjustments between the 2 rolls that were reviewed. This demonstrates conclusively that votes can be and were changed during the second machine count after the software update. That should be impossible especially at such a high percentage to total votes cast.
8. For the **School Board Member for Central Lake Schools (3)** [Image 1] there were **742 votes** added to this vote total. Since multiple people were elected, this did not change the result of both candidates being elected, but one does see a change in who had most votes. If it were a single-person election this would have changed the outcome and demonstrates conclusively that votes can be and were changed during the second machine counting. That should be impossible.

[Image 1]:

School Board Member for Central Lake Schools (3)		School Board Member for Central Lake Schools (3)	
Melanie Eckhardt:	852	Melanie Eckhardt:	519
Keith Shafer:	846	Keith Shafer:	525
Write-in:	112	Write-in:	24
Total Votes:	1810	Total Votes:	1068

Recount 11/6 **Election 11/3**

9. For the **School Board Member for Ellsworth Schools (2)** [Image 2]
- Shows **657 votes being removed** from this election.
 - In this case, only **3** people who were eligible to vote actually voted. Since there were **2** votes allowed for each voter to cast.
 - The recount correctly shows **6** votes.

But on election night, there was a major calculation issue:

[Image 2]:

School Board Member for Ellsworth Schools (2)	
Mark Edward Groenink:	3
Christopher Wallace:	3
Write-in:	0
Total Votes:	6

School Board Member for Ellsworth Schools (2)	
Mark Edward Groenink:	333
Christopher Wallace:	320
Write-in:	10
Total Votes:	663

10. In **State Proposal 20-1 (1)**, [Image 3] there is a major change in votes in this category.
- There were **774 votes for YES** during the election, to **1,083 votes for YES** on the recount a change of **309 votes**.
 - **7** votes were added to the total for **State Proposal 20-1 (1)** out of those there were **611** votes moved between the Yes and No Categories.

[Image 3]:

State Proposal 20-1 (1)	
Yes:	1083
No:	206
Total Votes:	1289

State Proposal 20-1 (1)	
Yes:	774
No:	508
Total Votes:	1282

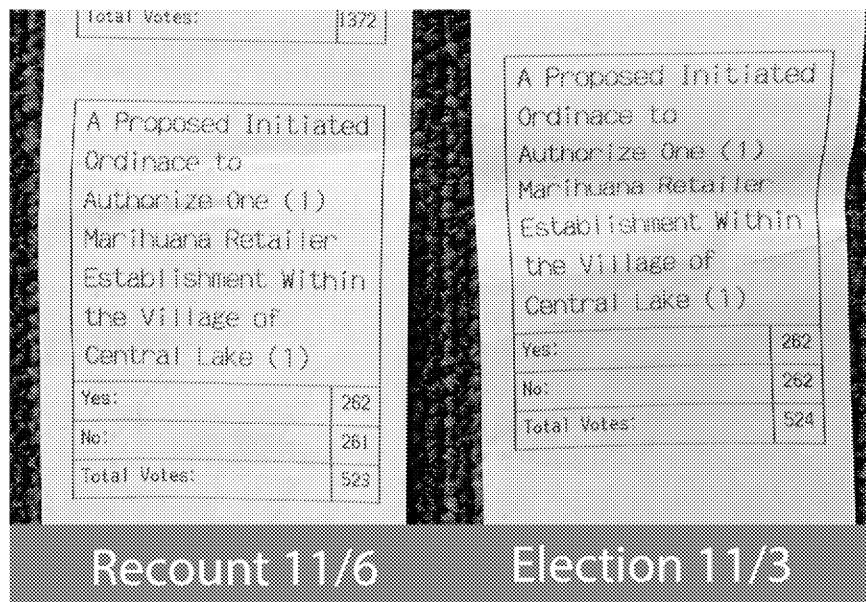
11. **State Proposal 20-1 (1)** is a fairly technical and complicated proposed amendment to the Michigan Constitution to change the disposition and allowable uses of future revenue generated from oil and gas bonuses, rentals and royalties from state-owned land. Information about the proposal: <https://crcmich.org/publications/statewide-ballot-proposal-20-1-michigan-natural-resources-trust-fund>

12. A Proposed Initiated Ordinance to Authorize One (1) Marihuana (sic) Retailer Establishment Within the Village of Central Lake (1). [Image 4]

- On election night, it was a tie vote.
- Then, on the rerun of ballots 3 ballots were destroyed, but only one vote changed on the totals to allow the proposal to pass.

When **3 ballots were not counted** and **programming change on the tabulator was installed** the proposal **passed with 1 vote being removed from the No vote.**

[Image 4]:



84. Douglas G. Frank, PhD, conducted a study to show an algorithm at work in Michigan [Exhibit 10]. Dr. Frank concluded the following:

- Voter registration was consistently near, or exceeding county population demographics.
- **There are over 66,000 ballots recorded that are not associated with a registered voter.**
- The ability to predict ballot demographics with such remarkable precision (average correlation coefficient of $R = 0.997$) demonstrates the activity of a regulating algorithm.
- **This confirms, as seen in several other states, that ballots are being harvested at the precinct level, regulated at the county level, and**

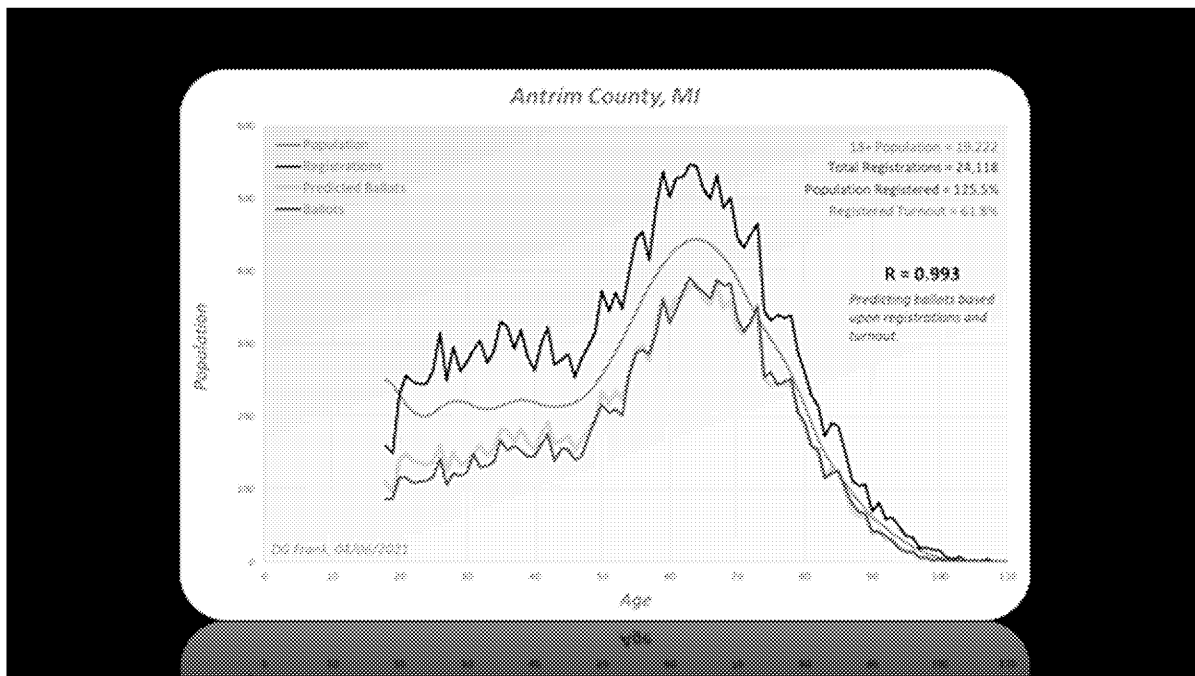
determined at the state level.

- The degree of precision observed confirms that algorithms had access to voting databases and voting activity before, during, and following the November 3, 2020 election.

	Wayne County	Oakland County	Macomb County	Kent County	Livingston County	Grand Traverse County	Barry County	Charlevoix County	Antrim County
Total Population	1,749,284	1,257,532	873,922	656,900	191,938	93,030	61,489	26,089	23,266
Total 18+ Population	1,339,405	999,630	694,156	500,078	152,390	74,536	48,094	21,337	19,222
Current Registered (4/6/2021)	1,383,669	1,016,125	685,385	492,643	159,774	79,954	49,724	23,576	21,935
Total Registrations (October Database)	1,365,392	1,011,669	670,592	489,234	157,667	79,537	48,628	23,279	24,118
Total Ballots in Database	840,810	750,232	477,718	348,880	123,642	57,888	34,913	16,574	14,901
Ballots not found in October Database	20,124	17,551	13,596	8,782	3,240	1,295	914	380	312

85. Dr. Frank further concluded that there were 312 ballots in Antrim County not found in the October database of the Qualified Voter File.

86. Dr. Frank further concluded that there were more registered voters in Antrim County than eligible voters, demonstrating negligence and a failure to properly maintain the QVF.



87. Jim Penrose and Jim Lenberg each issued additional reports on May 2, 2021. These reports collectively reveal the direct ability to manipulate the election by Defendants.

88. Jim Penrose [Exhibit 11] revealed the following fraudulent conduct on behalf of Defendants:

- ElectionSource technicians responsible for the creation and deployment of project files have supreme power in creating configurations that can be used to modify the votes in the EMS and the output of the tabulator paper tapes. Upon review of the Lenberg report dated May 2nd, 2021, ElectionSource technicians create project files for their clients and as a result can access, control, and modify any election they support.
- ElectionSource configured and deployed Antrim County's project files that resulted in the modification of the votes during the general election. The Lenberg report indicates that vote modification in Antrim County was consistent with technical manipulation of the project file. This project file was generated and deployed by ElectionSource for the November 3rd, 2020 general election.
- In order to research and investigate the Antrim County vote modification it is necessary to perform a full forensic examination and testing of all equipment utilized during the election. Michigan clerks take an oath to faithfully discharge the duties of a clerk including to hold fair and accurate elections. ElectionSource has issued a threat to Michigan clerks interested in conducting independent forensic examinations and testing of election equipment. See Exhibit A.
- ElectionSource has the responsibility to review the log files on the Dominion Voting Systems, Election Management System (EMS), the log files are typically viewed by trained technicians with the appropriate experience to properly interpret the software prompts/warnings. During the preparation for the general election their were prompts/warnings ignored by ElectionSource.

- ElectionSource failed to utilize version control. Version control is defined as the task of keeping a software system consisting of many versions and configurations well organized. Failure to utilize version control can lead to incorrect vote tally during an election. The lack of policy, procedures, and technical implementation on the part of ElectionSource led to a situation where an inaccurate tally could occur.
- An ElectionSource whistleblower has also publicly spoke out about his concerns of fraud over technicians having access to a broad array of ballots from across the State of Michigan via ElectionSource thumb drives. The evidence of what occurred in Antrim County along with the statements of an ElectionSource whistleblower illustrate the multiple avenues for fraud.
- ElectionSource performed a number of functions on behalf of Antrim County in order to prepare for and conduct the November 3, 2020 general election. When examining the historic steps taken by the ElectionSource configuring the Antrim County EMS one of the actions taken was to set the default technician passcode for the entirety of Antrim County to a weak passcode. The weak passcode was "123456" set by ElectionSource as found in the configuration files used for the election. Moreover, the UserLog file on the EMS also indicated that the election password to open and close the polls was set to "1234678" for more than 19 months prior to the election at which time it was updated to a similarly weak and guessable passcode "11032020", the date of the general election. These passcodes work to give access to the tabulators to open/close, reopen, and rezero the tabulators.
- A malicious actor seeking to commit fraud would need to know these passcodes to gain access to the tabulators and enable their operations. ElectionSource provisioned passcodes that were easily guessable and simple trial and error would reveal the correct passcodes with a tractable number of attempts, even done manually by hand by an attacker.

- On January 8, 2019 the default passcode to open/close the polls was set by ElectionSource to be "12345678". This default passcode remained the same until August 3, 2020 when it was changed to "11032020" which was the passcode used during the Antrim County general election in November of 2020.
- ElectionSource also hardcoded into the election project files for Antrim County the passcode of "123456" as the "technician passcode." The technician passcode allows for the polls to be re-opened and the tabulators to be re-zeroed. This weak passcode was set by ElectionSource.
- ElectionSource set the "DCF File Version Number" associated with the Antrim County election to the same value, "50401," regardless of the updates that were being deployed to the Antrim County Election Project Files and ballot definitions. There was no distinction made between the ICX, ICP, and ICC configurations that were deployed. This lack of version control resulted in ElectionSource's failure to track that incompatible election configurations and ballot definitions were being deployed in Antrim County on election day.
- The original election/ballot configuration provisioned by ElectionSource on September 29th, 2020 for use in Antrim County for their ICPs. Figure 3 shows the final, corrected revision from October 23, 2020, of the election/ballot configuration for use in Antrim County ICPs. There is no evidence of a versioning process either technical or manual applied by ElectionSource to ensure that the proper version of the configuration would be deployed throughout the entirety of Antrim County. ElectionSource's failure to employ version control led to vote manipulation during the November 3rd, 2020 election.
- ElectionSource made substantive modifications to the election and ballot definitions that triggered the EMS to provide a number of "prompt" notifications that were acknowledged by the ElectionSource technician performing

the updates. The technician failed or elected not to take action on the notification messages and request a wholesale redeployment of all compact flash cards for all precincts that would be required to proceed with a fully updated election package. Table 2 below shows the notification messages that were generated from the EMS when the technician updated the configuration. The specific message directed to the technician states, "All previously created and deployed election files will be unusable." The technician is then presented with an option to click OK or Cancel based on whether or not they wish to proceed. The last record of this prompt in the log was on October 5, 2020 when the technician selected, "OK" acknowledging that new election files, provisioned on compact flash cards, would need to be deployed as the previously deployed versions will be unusable. ElectionSource failed to address the aforementioned prompts resulting in a modified vote tally.

- The final update to the election files prior to the general election was performed by ElectionSource on October 22nd, however, to truly complete the deployment of all the new election files to all precincts, completely new compact flash cards would need to be provisioned containing the new election files. From October 24th to November 2nd there were no entries in the UserInfo log file, indicating that there were no attempts made by either ElectionSource to complete this compact flash card update process during the crucial weeks ahead of the general election.
- The Lenberg report indicates that manipulation of the project files can circumvent the canvassing process. ElectionSource technicians responsible for the creation and deployment of project files have supreme power in creating configurations that can be used to modify the votes in the EMS and the output of the tabulator paper tapes. ElectionSource technicians create project files for their clients and as a result can access, control, and modify any election they support.

- ElectionSource configured and deployed Antrim County's project files that resulted in the modification of the votes during the general election. The Lenberg report indicates that vote modification in Antrim County was consistent with technical manipulation of the project file.

89. Jeff Lenberg [Exhibit 12] revealed the following fraudulent conduct on behalf of

Defendants:

Testing of Antrim County project files indicates that modification of the project files can replicate the election inaccuracies observed in the November 3, 2020 election. In addition, further testing revealed that selective modification of the project files resulted in tailored manipulation of the votes tallied. The manipulation can be tailored to modify a specific county, precinct, or race. The steps used to manipulate the vote tally are listed below:

- Modify the specific precinct election files
 - Edit the VIF_BALLOT_INSTANCE.DVD
 - Note: Technical access to ElectionSource corporate resources would allow for these types of manipulations to the elections.
- Burn Compact Flash cards with the configurations for the tabulators
- Run the Election (Process the Ballots through the Tabulator)

The results of the modifications to the project file will show vote totals changed on the tabulator's printed tape as well as modified vote totals in the Results Tally Reporting (RTR) system.

In order to validate these findings; two test cases were run:

1. The swap of Trump and Jorgenson vote totals on both the paper tape and the RTR results
2. The swap of Biden and Trump (Presidential Race) and Ferguson and Bergman (Congressional) while leaving the Senate race unmodified on both the paper tape and the RTR results

Exhibit A contains photos of all the ballots that were run for test case number 2 as well as the paper tapes and RTR tallies showing the manipulations.

Both test cases were successful in that the modifications were made without any alerts or error messages being generated by the EMS or the tabulator. The test cases would not have been detected during the canvassing process because both the paper tapes and the RTR results matched.

90. Jeff Lenberg later conducted a test that demonstrated the vote flip in Antrim County was not "human error" and the general election was not "the safest election in history." Rather, the test confirmed that the vote tally errors observed in Antrim County on November 3, 2020 were most likely the result of technical manipulation of the election project file; not human error and not a computer glitch. By conducting a series of tests, Plaintiff's experts were able to replicate the vote tally errors through a method wholly contrary to the "human error" narrative proposed by Alex Halderman. The video can be viewed here:

<https://www.depernelaw.com/dominion.html>

This video demonstrates fraud in the election process and vote tabulation process.

91. On April 26, 2021, Dr. Frank conducted further testing at the precinct level and concluded that there was a near perfect turnout consistently between the ages of 65 to 80⁶ [Exhibit 13].

⁶ Except Forest Home and Mancelona.

92. On May 9, 2021, Jeff Lenberg [Exhibit 14] revealed that the Antrim County election was fraudulent and critical errors were subverted.

93. On May 15, 2021, Jeff Lenberg [Exhibit 15] revealed additional facts that show Barry County's November 3, 2020 election was also subverted.

94. On May 15, 2021, James Penrose [Exhibit 16] revealed that the "specific incident in Antrim County is related to the features and the functionality outland in the Dominion patent US8,876.002B2. "The patent also indicates that a vote simulation script is used to produce votes and enable counting of votes for [pre-election Logic and Accuracy testing (Pre-LAT)] purposes." This also demonstrates the ability to subvert an election.

95. On May 16, 2021, Jeff Lenberg [Exhibit 17] revealed that further testing shows that any election can be subverted by changing the date and time, reopening the election, and adding new ballots without any surface trace. The significance of this report is the following:

- a. Election Source conducts thousands of elections across the country, including Antrim County, but there are only 6 accounts names: Ben/Smythe, John/Smith, Ryan/Smoth, MRO/M01, Return Office/Admin, MRESuper/Admin.
- b. Election workers have the ability to "reopen" an election at any time after the election, add ballots, and set the time on a tabulator to any time in order to print paper tapes that show the appropriate date/time stamp. The process is straightforward and is performed by traversing the menus on the tabulator itself.
- c. An election worker can follow the same process of injecting fraudulent votes and maintaining the exact same date and time for the poll opening, closing, and printout to the minute.
- d. Any user with access to the EMS using the EMS Admin username and password to log into the Dominion Democracy Suite Election Event Designer (EED) application will appear to be "Ben Smythe" in the log files.
- e. The EED application is used to design the entire election, it is used to program the election files on to the compact flash cards, and it is used to

program the security key fobs that are required to open, close, reopen, or rezero the polls.

- f. This permits obfuscation of the true user.
- g. The RTRAdmin username and password can be accessed by anyone and they will appear in the logs as "Ryan Smoth." The RTR application is the one used to import, reject, validate, publish, and unpublish results contained on the compact flash cards. Thus "Ryan Smoth" can enter whatever numbers he would like while ignoring the original values on the encrypted compact flash cards and printed tapes. Mr. Smoth can then go back the next day or any day up until the day the canvass is performed and quietly reopen the polls, add a matching number of votes as he manipulated on election night, change the time to match the original paper tape, and print the results. When the canvass is performed the modified paper tape will match the modified manually entered results.

96. This work supports Dr. Frank's initial conclusions from May 7, 2021 when he stated that (a) there was a near 100% turnout in the age groups 65-80, (b) 20.3% of mail in ballots were sent to PO Boxes, and (c) there were approximately 1,061 "phantom ballots" counted in the Antrim County general election on November 3, 2020. This number is derived from the 15,962 ballots counted on December 17, 2020 less the 14,901 ballots in Defendant Benson's official database.

97. Plaintiff's experts have also reviewed the results file on the Antrim County EMS which indicates a number of duplicate matching ballot indexes. This creates a strong presumption of ballot stuffing (same ballot run through multiple times). This evidence is also supported by the affidavits of Judy Koslowski, Robert Marsh, and Kenneth Sprague [Exhibits 30-32].

COUNT 1
CONSTITUTIONAL RIGHT TO ACCURACY AND INTEGRITY OF ELECTIONS

Michigan Constitution – Article 2, Section 4, Paragraph 1(h)

(in-person ballots)

(as to all Defendants)

98. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

99. Plaintiff's constitutional rights have been violated. Plaintiff brings this action to vindicate his constitutional right to a free and fair election ensuring the accuracy and integrity of the process pursuant to the Michigan Constitution, art. 2, sec. 4, par. 1(h), which states all Michigan citizens have:

"The right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections."

100. The Mich. Const., art. 2, sec. 4, further states, "All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes."

101. Michigan's Constitution gives its citizens "[t]he right, once registered, to vote an absent voter ballot without giving a reason, during the forty (40) days before an election, and the right to choose whether the absent voter ballot is applied for, received and submitted in person or by mail." Const 1963, art II, § 4(1)(g).

102. The constitutional protections afforded the right to vote does not depend on the status of the complainant but in these circumstances where fraud and corruption are charged in the conducting of election the power of the court "arises out of the circumstance that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States." *Ex Parte Yarbrough*, 110 US 651, 662; 4 S Ct 152; 28 L Ed 274 (1884).

103. The United States Supreme Court stated further regarding the duty of the government to protect the citizen's rights in this regard: "[I]t is the duty of...government to see that he may exercise this right freely This duty *does not arise solely from the interest of the party concerned*, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practiced on its agents, and that the votes by which its

members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice." (emphasis added).

104. The standing of every citizen and the duty of the government to protect the right to vote extends directly to ensuring that no fraud or corruption occurs in the counting, tabulation and return of votes. In *United States v Classic*, 313 US 299, 314; 61 S Ct 1031; 85 L Ed 1368 (1941), the Court stated "[t]o refuse to count and return the vote as cast [is] as much an infringement of that personal right as to exclude the voter from the polling place." 313 US at 315. The Court has also recognized the Constitution guarantees that "free and *uncorrupted* choice" shall be afforded to all in the decision of who should lead them. *Id.* (emphasis added).

105. Plaintiff has standing and a right to seek redress for a violation of his fundamental right to vote, not only under the explicit provisions of the Michigan and Federal constitutions, see, inter alia, Const 1963, art 1, § 2 (equal protection); Const 1963, art 2 § 4(2) (purity of elections), US Const, Am I, US Const, Am IX, US Const Am XIV, US Const Am XV, but it is a right directly "secured by the Constitution" and held by every citizen and "since the constitutional command is without restriction or limitation, the right, *unlike those guaranteed by the Fourteenth and Fifteenth Amendments*, is secured against the action of individuals as well as of states." *United States v Classic*, 313 US 299, 314; 61 S Ct 1031; 85 L Ed 1368 (1941) (emphasis added), citing, inter alia, *Ex Parte Yarbrough*, 110 US 651, 662; 4 S Ct 152; 28 L Ed 274 (1884).

106. Although the Election Law directs the Secretary of State to prescribe the procedures for election audits, the Post-Election Audit Procedures prescribed by the Secretary of State entirely fail to provide for the review of absentee ballot signatures. Thus, the audits announced by the Secretary of State will not review whether the signatures on absentee ballots were properly

reviewed or whether ballots were properly accepted, even though the Secretary of State acknowledges the outsized role absentee ballots played in the 2020 Presidential Election and the limited time election officials had to process those ballots.

107. Based upon all the allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

108. The audit must permit a review of all election tapes from the November 3, 2020, election; all paper ballots for the November 3, 2020 election; all system logs for the November 3, 2020 election; any vote tabulators and modems in Antrim County; all election media, including but not limited to, all compact flash cards and poll books and USB drives used in the November 3, 2020 election; all election reports and tallies, .pdf files, and spreadsheets used in the November 3, 2020 election; and all canvasser paperwork and notes used in the November 3, 2020 election.

109. As discussed in the Lenberg and Penrose reports, the Dominion voting system is designed in a way that allows Election Source or any county employee to modify the project files and manipulate or switch the votes at the tabulator and EMS.

110. By performing an election using a system with these inherent vulnerabilities, the Defendants engaged in fraud and compromised the accuracy and integrity of the November 3, 2020 general election.

111. By failing to properly investigate the cause of the inaccurate results on November 3, 2020, but instead falsely telling the voters of Antrim County and citizens of the State of

Michigan that the election was the secure and the safest in this country's history, or by failing to correct such statements, Defendants engaged in fraud and compromised the accuracy and integrity of the November 3, 2020 general election.

COUNT 2
CONSTITUTIONAL RIGHT TO ACCURACY AND INTEGRITY OF ELECTIONS

Michigan Constitution – Article 2, Section 4, Paragraph 1(h)

(mail-in and absentee ballots)

(as to all Defendants)

112. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

113. During the past election cycle, Michigan's voters cast an unprecedented 3.3 million absentee ballots in the 2020 general election.⁷

114. The absentee voting process, however, lacks many of the traditional safeguards that protect against voter fraud.

115. For example, in-person voting allows for poll challengers to "[c]hallenge the voting rights of a person who the challenger has good reason to believe is not a registered elector," MCL 168.733(1)(c), and to "[e]xamine without handling each ballot as it is being counted," MCL

⁷ See Mich Dep't of State, *Rejected ballot data from Nov. 3 election demonstrates integrity of election* (Dec. 2, 2020), available at <https://www.michigan.gov/sos/0,4670,7-127--546413--,00.html>; Rejected Ballots by Jurisdiction, Microsoft Excel Spreadsheet, available at same under "A breakdown by jurisdiction can be found here." [Collectively referred to hereinafter as "*Rejected Ballot Data*"].

168.733(1)(g). Likewise, election inspectors "shall challenge an applicant" when "the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct." MCL 168.727(1).

116. With absentee voting, there is no opportunity to inspect or challenge ballots at the time they are cast. Instead, local clerks and election officials can only examine the ballots after the fact. Without this added layer of protection, the statutory safeguards that do exist to prevent voter fraud become all the more important.

117. In addition to the right to vote by absent voter ballots, the same section of Michigan's Constitution gives voters "[t]he right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections." Const 1963, art II, § 4(1)(h).

118. The Election Law also directs Defendant Benson to "prescribe procedures for election audits that include reviewing the documents, ballots, and procedures used during an election as required in section 4 of article II of the state constitution of 1963" and requires Defendant Benson and county clerks to "conduct election audits . . . as set forth in the prescribed procedures." MCL 168.31a(2).

119. Because the right to audit election results under Article II, Section 4 was added to Michigan's Constitution in 2018, there is no precedent regarding a voter's ability to exercise this right or the nature and scope of this right. Nonetheless, in a November 23, 2020 decision by the Michigan Supreme Court, Justice Viviano analyzed the right to audit election results under art II, § 4(1)(h) and concluded "that no such showing is required" for a voter to obtain an audit because "neither the constitutional text nor MCL 168.31a expressly provide for it[,] none of the neighboring rights listed in Article 2, § 4, such as the right to vote by absentee ballot, requires citizens to present

any proof of entitlement for the right to be exercised," and the constitutional provision is "self-executing." *Constantino v City of Detroit*, ___ Mich ___; ___ NW2d ___; 2020 Mich LEXIS 2013, at *8-9 (Nov. 23, 2020) (Viviano, J., dissenting). Justice Viviano also noted that Michigan courts have yet to determine "the nature and scope of the audit provided for in Article 2, § 4" nor have they "considered whether MCL 168.31a accommodates the full sweep of the Article 2, § 4 right to an audit or whether it imposes improper limitations on that right." *Id.* at *9, *15.

120. Given the limited traditional safeguards applicable to the absentee voting process, Defendant Benson's inconsistent guidance, and the unprecedented number of absentee ballots cast during the 2020 Presidential election, an audit of the absentee ballots cast during the 2020 Presidential election is imperative to ensure the accuracy and integrity of that election and future elections.

121. In October 2019, Priorities USA sued Defendant Benson to prevent the State from enforcing its "signature matching laws," which Priorities USA acknowledged were "mandated by outdated Michigan election laws." *Priorities USA v Benson*, Case No 3:19-cv-13188 (ED Mich).

122. Before obtaining an absentee ballot, these "outdated" laws required city or township clerks to compare a voter's signature on the absentee ballot application with their signature that was previously on file. The clerk was required to ensure that "the signature on the application agrees with the signature for the person contained in the qualified voter file or on the [voter's] registration card," and to "determine the genuineness of a signature on an application for an absent voter ballot." See 2018 PA 129.

123. If the signature on the application was determined to be genuine, an absentee ballot would be delivered to the voter. When the voter returned the ballot, the signature "on the absent voter ballot return envelope" would again be compared with the signature on record.

124. If the local clerk was satisfied, then the ballot would be forwarded to the State board of election inspectors to "verify the legality of the vote" by "[e]xamining the digitized signature for the absent voter included in the qualified voter file . . . to see that . . . the signature on the statement agrees with the signature on the registration record." MCL 168.766(1)(a).

125. Priorities USA alleged that under this framework, "Michiganders who attempt to vote absentee can be denied the franchise outright based solely on an election official's determination, during any one of the several stages of signature review, that a voter's signature on the ballot envelope does not sufficiently resemble a signature that she provided to election officials at some point in the past."

126. Priorities USA took issue with the lack of direction given to clerks, alleging that "no one really knows how Michigan officials decide whether a signature on an absentee ballot or ballot application is sufficiently similar to the previously designated signature to withstand scrutiny. Here, election officials have unfettered discretion." Further, it noted that Michigan "law provides no mechanism by which voters whose ballots are wrongfully discarded for alleged signature mismatches may challenge that determination or cure their rejected ballots . . . Michigan law does not even require election officials to notify voters that their ballots or absentee ballot applications have been rejected for an alleged signature mismatch."

127. Rather than defend the law Michigan's Legislature enacted, the Secretary of State first moved to dismiss the complaint on procedural grounds.

128. When that failed, the Defendant Benson again declined to defend State law. Instead, as Priorities USA's Motion to Voluntarily Dismiss its case explained, just two days after Priorities USA moved for a preliminary injunction, "the Secretary issued guidance to city and township officials that largely tracks the relief requested" by Priorities USA.

129. As relevant here, this guidance introduced "new signature review guidelines."

These Guidelines – untethered to the Election Law or Constitution – provided as follows:

Signature Review

Signature review begins with the presumption that the voter's AV application or envelope signature is his or her genuine signature.

1. If there are any redeeming qualities in the AV application or return envelope signature as compared to the signature on file, treat the signature as valid. Redeeming qualities may include but are not limited to similar distinctive flourishes, more matching features than nonmatching features, and Examples 1-5 in the chart below.

2. A voter's signature should be considered questionable only if it differs in multiple, significant, and obvious respects from the signature on file. Slight dissimilarities should be resolved in favor of the voter whenever possible.

130. The guidance was promulgated without any formal rulemaking or process. Instead, it just appeared on the Bureau of Elections website, and for two months, not even Priorities USA was made aware of this shift in signature review guidelines.

131. By filing its complaint, even Priorities USA acknowledged that the existing "signature review guidelines" were "mandated by" the Michigan Election Law, and could therefore only be overturned through a finding that certain provisions in the Election Law were unconstitutional.

132. Without any court intervention, however, Defendant Benson suspended this framework, creating presumptions out of thin air, and instructing local clerks to count signatures if "there are any redeeming qualities."

133. What's worse, Defendant Benson did so without any process at all. There is no indication of who drafted this new guidance, or the considerations that went into this new guidance. See generally Josh Blackman, *Government by Blog Post*, 111 FIU L. Rev. 389, 416 (2016) (taking

issue with similar informal processes and explaining that "ad hoc, random" amendments made in online posts authored by unknown persons in administrative agencies "should not be afforded the same presumption of constitutionality as other laws, duly enacted by Congress, and faithfully executed by the Chief Executive").

134. Months later, the law was changed the right way. On October 6, 2020, Governor Whitmer signed Senate Bill 757.

135. Similar to its predecessor, under this Bill, "[t]he qualified voter file must be used to determine the genuineness of a signature on an application for an absent voter ballot. Signature comparisons must be made with the digitized signature in the qualified voter file." MCL 168.761(1).

136. As we have learned in this litigation, Defendant Benson and Defendant Guy have been entirely negligent in how they maintain their voting record and the QVF. See *Dr. Frank Report*, generally.

137. However, the Legislature added safeguards to protect against voter disenfranchisement. The law now provides that:

If before 8 p.m. on the day before election day the clerk of a city or township rejects an absent voter ballot application because the signature on the absent voter application does not agree sufficiently with the signature on the master card or the digitized signature contained in the qualified voter file so as to identify the elector or because the elector failed to sign the absent voter ballot application, the city or township clerk shall as soon as practicable, but in no event later than 48 hours after determining the signatures do not agree sufficiently or that the signature is missing, or by 8 p.m. on the day before election day, whichever occurs first, notify the elector of the rejection by mail, telephone, or electronic mail.

MCL 168.761(2).

138. The same notice requirements apply to returned absent voter envelopes:

If before 8 p.m. on the day before election day the clerk of a city or township rejects an absent voter ballot return envelope because the signature on the absent voter

ballot return envelope does not agree sufficiently with the signature on the master card or the digitized signature contained in the qualified voter file so as to identify the elector or because the elector failed to sign the absent voter ballot return envelope, the city or township clerk shall as soon as practicable, but in no event later than 48 hours after determining the signatures do not agree sufficiently or that the signature is missing, or by 8 p.m. on the day before election day, whichever occurs first, notify the elector of the rejection by mail, telephone, or electronic mail. The clerk shall also comply with section 765(5).

MCL 168.765a(6).

139. Given the unprecedented number of absentee ballots cast during the 2020 Presidential election, which represent 60% of all voters,⁸ and the Defendant Benson's improper guidance to election officials regarding review of signatures, a post-election audit that fails to review whether absentee ballots were properly reviewed and rejected pursuant to MCL 168.761(2), MCL 168.765a(6), and MCL 168.766 cannot possibly ensure the accuracy and integrity of the election and violates Plaintiff's constitutional right to audit the results of the election.

140. An audit in Antrim County should collect all absentee ballots cast during the 2020 Presidential election and compare the signatures on those ballots with the signatures on file. This is essentially the same method employed by the Bureau of Elections when checking the validity of signatures on statewide petitions pursuant to other section of the Election Law (see, e.g., MCL 168.476 (requirement to canvass signatures on an initiative petition)).

141. Second, the audit should review the number of people with the same home address who were registered to vote absentee via third-party voter registration drives. This information is necessary to identify and further investigate situations where a person may have illegally signed

⁸ See David Eggert, *Record 5.5M voted in Michigan; highest percentage in decades*, AP NEWS (Nov. 5, 2020), <https://apnews.com/article/record-votes-michigan-highest-turnout-1f7802d2a2e67966ba8ccb02e3d1cbcd>.

on behalf of voter such that the signature on the voter's ballot would not match the signature on file.

142. Finally, under the Michigan Election Law, absentee voters must now be informed if their signature is called into question, and they will have the opportunity to verify or remedy their signatures and make sure their votes are counted.⁹ The concern in *Priorities USA* that the Secretary of State sought to remedy through her signature verification guidance therefore no longer exists.

COUNT 3
VIOLATION OF "PURITY OF ELECTIONS" CLAUSE

Michigan Constitution – Article 2, Section 4, Paragraph 2

(as to all Defendants)

143. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

144. The Michigan Constitution's "purity of elections" clause states, "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of ballot, to guard against abuses of elective franchise, and to provide for a system of voter registration and absentee voting. Const. 1963, art 2, §4(2).

⁹ See Bob Campbell, *Signature errors ruin thousands of Michigan ballots. Don't be that voter*, BRIDGE MICHIGAN (Oct. 6, 2020), available at <https://www.bridgemi.com/michigan-government/signature-errors-ruin-thousands-michigan-ballots-dont-be-voter> (explaining that a "bipartisan measure signed into law Tuesday aims to give voters a better chance at correcting such mistakes in November," and that "state policymakers hope the signature measure signed Tuesday reduces the number of disqualified ballots").

145. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 676; 854 NW2d 489 (2014).

146. The purity of elections clause has been successfully raised in cases, like this one, where state officials favor one group of voters. *See Fleming v. Macomb Cty. Clerk*, 2008 Mich. App. LEXIS 1325, at *21-24 (Mich. Ct. App. June 26, 2008) ("the purity of elections has been violated in this case because the mailing of absent voter ballot applications to only a select group of eligible absent voters undermines the fairness and evenhandedness of the application of election laws in this state.").

147. Plaintiff, a resident of Antrim County, does not have the benefit of private funding paid by The Center for Tech and Civic Life ("CTCL"), but instead relies on the state and local budgets providing taxpayer funds to pay for the cost of conducting the election. Defendant Benson allocates funds based on her own will, and as we have learned in this case, Defendant Benson has actually failed to utilize taxpayer funds to train election workers in Antrim County.

148. By allowing selected predominantly urban and Democrat election jurisdictions to receive and spend millions of dollars of private money to conduct the election while Michigan voters in jurisdictions that are rural and suburban and are not predominantly Democrat do not receive the benefit of these additional recourses, Defendant Benson has diminished the voting rights of one disfavored group of citizens (Michigan voters living in election jurisdictions that are rural and are not predominantly Democrat) and enhanced the access to the ballot for another favored group of voters (those in urban, progressive, and heavily-Democrat jurisdictions). The purity of elections clause forbids Defendant Benson from conducting the election in this manner.

Doing so violates Michigan voters' right to equal protection. *See also Bush v. Gore*, 531 U.S. 98, 104 (2000); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966).

149. Defendant Benson is a Democrat and would prefer to see Joe Biden elected President instead of Donald Trump. But as an elected official whose duty is to ensure the integrity, accuracy and conducting of elections, Defendant Benson has a higher calling – that of assuring that Michigan's general election is conducted according to the provisions of the Michigan Constitution and Michigan law. Absent this, public confidence in the integrity of the election and the legitimacy of the general election is undermined. *See Carter-Baker Commission Report, Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* (September 2005).¹⁰

150. To be fair and just, Michigan elections must be conducted according to uniform laws and rules that apply equally to all eligible voters and to all election officials, both those from urban and predominantly Democrat jurisdictions as well as to those voters in rural and suburban jurisdictions that are not predominantly Democrat. Defendant Benson is charged with the responsibility of assuring Michigan elections are administered equally throughout Michigan. And, when she does not do so, it is the task of this Court to affirm this principle and enjoin conduct of an election that is contrary to the Michigan Constitution and law.

151. Elections are to be paid for with public funds appropriated through the budget process. Elections are not to be paid for with private funds paid by an ideologically-oriented special interest group that, in exchange for paying money to local election jurisdictions, dictates how the money is spent and how the local election officials conduct the election.

¹⁰ Available at: <https://www.legislationline.org/download/id/1472/file/3b50795b2d0374cbef5c29766256.pdf>.

152. Michigan statutes also protect the purity of elections by allowing one person to cast one vote and not permitting manipulation of votes through mechanical means or otherwise.

153. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

154. Despite this legislative fix, the Secretary of State issued new guidance on October 6, 2020 to local clerks that in large part remains the same: when determining whether a signature is valid, there is a presumption in favor of validity, and so long as there "are any redeeming qualities in the AV application or return envelope signature as compared to the signature on file," the signature must be treated as valid. (See Oct. 6 Guidance, [Ex 3].)

155. The combination of the Election Law's new notice requirements and the Secretary of State's guidance means that absentee voters must be notified if their signature is found to be invalid, and that they will have an opportunity to correct any alleged errors.

156. There will, however, be plenty of instances where local clerks – following the Secretary of State's unlawful guidance – strain to find "any redeeming qualities" in the application and, applying a presumption in favor of validity, allow an invalid vote to be counted.

157. In fact, the raw data released to date by the Secretary of State regarding the 2020 Presidential election indicates that local clerks and elections officials continue to diverge substantially when applying the Election Law.

158. While the data indicates that 1,400 absentee ballots were rejected in Michigan out of approximately 3.3 million absentee ballots cast—for a the rejection rate of 0.04%—the number of absent voter ballots rejected and the rejection rate vary enormously depending on the jurisdiction that processed the ballots. A particularly poignant example is Lansing, one of Michigan's largest cities by population, which, despite receiving more than 38,000 absentee ballots, rejected not a single one of them due to signature mismatch.¹¹

159. Further, as learned on December 17, 2020, Antrim County also had no ballot rejections based on signature mismatch.

160. Following the 2020 Presidential election, the Secretary of State announced that the Michigan Bureau of Election will conduct "the most comprehensive post-election audits of any election in state history."⁵ The audits will be "a statewide risk-limiting audit, a complete zero-margin risk-limiting audit in Antrim County, and procedural audits in more than 200 jurisdictions statewide." The statewide risk-limiting audit is limited to "confirm[ing] the accuracy of ballot tabulation machines," which "entails hand-counting thousands of randomly selected ballots statewide."

161. However, the Secretary of State's statements on the matter make no mention, nor provide any assurance, that any of the three audits will involve a review of absentee ballots to determine whether local clerks and election officials properly rejected ballots where the signature did not match the voter's signature on file.

¹¹ See City of Lansing, November 3, 2020 Election Results, available at <https://ingham.box.com/shared/static/icj9frqxgiybwm1s596y6ridcdfy0fp7.pdf>; City of Ann Arbor, November 3, 2020 Election Results, available at <https://electionresults.ewashtenaw.org/electionreporting/nov2020/index.jsp>; *Rejected Ballot Data*, *supra*. This is more unusual given the number of ballots rejected for signature mismatch in comparably-sized jurisdictions, such as Sterling Heights (125), Dearborn (71), and Saginaw (39). *See id.*

162. Moreover, the Secretary of State's manual and material for post-election audits contain scant mention of absentee ballots and altogether fail to provide for any review of absentee ballot signatures.¹²

163. That no audit of absentee ballots will be conducted is both surprising and troubling given the Secretary of State's assertion that the 2020 Presidential election saw "more than double the absentee ballots ever before cast in our state," and the Secretary of State's criticism that local clerks and election officials were allowed only "10 hours for pre-processing of absentee ballots."

164. Defendants' failure to properly conduct the election resulted in illegitimate and phantom votes being counted. *In re Request*, 479 Mich at 20 (recognizing the "Legislature's constitutional obligation to preserve the purity of elections and to guard against abuses of the elective franchise, *including ensuring that lawful voters not have their votes diluted*").

COUNT 4
VIOLATION OF MCL 168.761(2); MCL 168.765a(6); MCL 168.766

(as to all Defendants)

165. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

166. Under the Michigan Election Law, local clerks and state election official must reject absentee ballot applications and absentee ballot return envelopes when the signatures on those items do not "agree sufficiently" with the "signature on the master card or the digitized signature contained in the qualified voter file."

¹² See MICH DEP'T OF STATE, POST-ELECTION AUDIT MANUAL (updated Jan. 15, 2020), https://www.michigan.gov/documents/sos/Post_Election_Audit_Manual_418482_7.pdf; MICH DEP'T OF STATE, POST-ELECTION AUDIT PRINTABLE WORKSHEET (updated Jan. 15, 2020), https://www.michigan.gov/documents/sos/Post_Election_Audit_Checklist_418481_7.pdf [collectively referred to hereinafter as "Post-Election Audit Procedures."]

167. Defendant Benson's guidance conflicts with these statutory requirements. The guidance instructs local clerks to apply a presumption that the signature is valid, and to approve the signature so long as there "are any redeeming qualities in the AV application or return envelope signature as compared to the signature on file."

168. Based on the guidance issued by the Defendant Benson, Defendants Antrim County and Benson failed to properly review and reject absentee ballots. This undoubtedly resulted in invalid ballots being counted.

169. Plaintiff is entitled to a proper review and audit of the 2020 general election results to ensure invalid ballots did not dilute the election and his constitutional right to have his vote counted.

170. Pursuant to MCR 168.761, any voter who votes by absentee ballot will be notified of any potential issue with the validity of their signatures.

COUNT 5
VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT

(as to Defendants Benson and Brater)

171. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

172. Under MCL 168.31, Defendants Benson and Bater are required to "issue instructions and promulgate rules pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, for the conduct of elections and registrations in accordance with the laws of this state."). Indeed, Defendants Benson and Bater, under the powers conferred to them by Michigan's Administrative Procedure Act ("APA"), have promulgated rules in the past. And, as this Court recently held, Defendants Benson and Bater just weeks ago issued a rule in violation

of the APA. See *Davis v Benson*, Opinion of the Court of Claims, issued October 27, 2020 (Case No. 20-000207-MZ).

173. Defendants Benson and Bater also wrongly exercised their legislatively delegated authority when they issued a rule and ordered election officials to presume that a signature on a absent voter ballot is genuine.

174. Defendants Benson's act of imputing a presumption of genuineness into the process by which a absent voter ballot signature is reviewed fits within the definition of a "rule" because it is an instruction of general applicability, imposing a requirement on all local election officials to implement the procedure of validating signatures. See MCL 24.207.

175. Defendants Benson and Bater issued this rule without following the procedures required under the Administrative Procedures Act. In fact, it is unclear whether Defendants followed any procedures at all.

176. The Court of Claims has already ruled that Defendant Benson violated the APA when issuing guidance requiring local election officials to presume the signature on an absent voter ballot is genuine. See *Genetski v Benson et al*, Opinion of the Court of Claims, issued March 9, 2021 (Case No. 20-000216-MM).

177. Therefore, this Court must require that the text of the Election Law be enforced and order a mandatory review of all absentee ballots in Antrim County.

COUNT 6
ELECTION FRAUD; VIOLATION OF MCL 168.24j

(as to all Defendants)

178. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

179. Michigan does not allow private individuals or interest groups (no matter their partisan affiliation) to fund the cost of conducting an election. Rather, the cost of conducting an election in Michigan is to be paid with public funds allocated to local election jurisdictions as provided by Michigan law. This includes the cost of printing ballots, buying ballot containers and other election expenses. *See, e.g.*, MCL 168.666, 168.669 (reprinted in Appendix).

180. Michigan's Constitution and Michigan election law make no provision allowing private partisan or ideologically-oriented organizations to fund or direct the conduct of a Michigan election.

181. Michigan elections are not for sale. That is why Michigan law specifies that the funding and conduct of Michigan elections is governed by the provisions of the Michigan Constitution and Michigan election law and that the cost of conducting an election is to be paid with public funds appropriated according to Michigan law.

182. Defendant Benson violated the Michigan Constitution and Michigan election law (and thereby violated these Michigan voters' constitutional rights) by allowing a private outside special-interest organization to pay millions of dollars to predominantly Democrat election jurisdictions to influence the conduct of the 2020 general election and, as a condition of accepting these funds, allowed a private organization to direct how the election jurisdiction spends those funds and conducts the election.

183. By allowing an outside organization with a declared political agenda to selectively and privately fund how election authorities in predominantly Democrat precincts conduct the election, Defendant Benson has diminished the voting rights of one group of Michigan voters (those who live in rural and suburban precincts not receiving private outside funding) and has enhanced the voting rights of another group of Michigan voters (those in urban, progressive, and

predominantly Democrat precincts where outside groups pay the election jurisdiction private funds to conduct the election).

184. A private group paying millions of dollars to local election jurisdictions in only predominantly Democrat precincts and directing how those jurisdictions will use these funds to conduct the election (essentially a partisan get-out-the-vote campaign) and directing what the election authorities must do as a consequence of receiving these private funds undermines the integrity and honesty of Michigan elections and undermines public confidence in the fairness and outcome of Michigan elections.

185. CTCL is an entity headquartered at 233 North Michigan Avenue in Chicago, Illinois. CTCL told the Internal Revenue Service in 2018 that the Center had only about a half-million dollars in assets. *See* [Exhibit 18] (CTCL's 2018 Form 990). In 2018 CTCL told the Internal Revenue Service that it had "contributions and grants" of about a half-million dollars and paid "Salaries, other compensation" of almost \$900,000. *See id.*

186. The Obama Foundation quoted CTCL director Tiana Epps-Johnson in 2016 as stating, "CTCL provides technology and data to boost voter turnout" [Exhibit 19].

187. CTCL is the successor to the partisan Democrat organization, the New Organizing Institute (NOI). At the time NOI disbanded and CTCL was formed, NOI issued a press release announcing that CTCL was being formed to continue the work of NOI. *See* [Exhibit 20] (*Announcing the Center for Technology and Civic Life*, April 8, 2015).¹³ All three of CTCL's "founders" previously served in leadership roles at NOI, including Tiana Epps-Johnson, the Executive Director of CTCL, who served as the head of NOI's "election administration

¹³ Available at: <http://neworganizing.wellstone.org/2015/04/announcing-the-center-for-technology-and-civic-life/>.

department." See CTCL website at: <https://www.techandciviclelife.org/our-team/>. The *Washington Post* described NOI as "the left's think tank for campaign know-how." [Exhibit 21] (Brian Fung, *Inside the Democratic Party's Hogwarts for Digital Wizardry*, *The Washington Post*, July 8, 2014).¹⁴ Infamous among NOI's projects was NOI's annual "boot camp" for Democrat campaign operatives, which focused on training in "[d]igital strategy, or the use of data, new media and randomized controlled experiments to enhance a campaign's performance." *Id.*

188. When NOI ended operations in 2015, NOI announced:

Following their 2014 successes delivering civic information to millions of voters and connecting hundreds of election officials across the country, *NOI's Election Administration team is transitioning into its own organization, The Center for Technology and Civic Life. ...*

CTCL will continue a number of programs focused on supporting institutions and developing infrastructure for civic participation. *Current NOI programs that are moving to the Center include: The Governance Project ... The Ballot Information Project, [and] . . . ELECTricity.*

[Ex 20] (emphasis added). NOI also announced:

The Center for Technology and Civic Life is headed by Executive Director Tiana Epps-Johnson, formerly the head of NOI's Election Administration department. Also joining from NOI are co-founders Whitney May, who leads the ELECTricity project, and Donny Bridges, who heads CTCL's civic data programs.

Id.

189. CTCL's founders, Epps-Johnson, Bridges, and May, were all employees of, or worked for, NOI as department or project leaders. NOI was a center dedicated to training progressive groups and Democratic campaigns in digital campaign strategies. See [Ex 20]. NOI's executive director, Ethan Roeder, led the data departments for the Obama presidential campaigns of 2008 and 2012.

¹⁴ Available at: <https://www.washingtonpost.com/news/the-switch/wp/2014/07/08/inside-the-democratic-partys-hogwarts-for-digital-wizardry/?arc404=true/>

190. Funders of CTCL include progressive groups such as the Skoll Foundation, the Democracy Fund, the John S. and James L. Knight Foundation, and the Rockefeller Brothers Foundation. CTCL is also associated with Rock the Vote, which despite its non-partisan claims, has regularly featured progressive policies in its efforts to turn out pro-Democrat voters.¹⁵ Along with Rock the Vote and The Skoll Foundation, CTCL also lists Facebook as a partner in its efforts. *See id.*

191. CTCL is not a "nonpartisan" organization interested in enhancing voter participation. Rather CTCL is an activist organization seeking to promote the election of Democrat candidates, including Joe Biden and Kamala Harris, and CTCL is managed and operated by former Democrat party operatives who are using the funds to further a Democrat "get-out-the-vote" effort in Democrat precincts.

192. In September CTCL announced that Mark Zuckerberg and his wife, Pricilla Chan, paid \$300 million to CTCL and the affiliated Center for Election Innovation and Research, including "\$250 million to CTCL ... which will regrant funds to local election jurisdictions." *See* [Exhibit 22] (CTCL September 1, 2020 press release).

193. CTCL then used these funds to pay local election authorities in predominantly Democrat election jurisdictions to increase the votes cast in urban, historically Democrat jurisdictions.

194. CTCL has paid, and continues to pay, millions of dollars to Michigan election authorities which have a predominantly-Democrat electorate. The funds CTCL has paid to these election officials have been selectively distributed to only election jurisdictions in Democratic precincts. In other words, CTCL selectively pays money to only those Michigan election

¹⁵ *See* CTCL website at: <https://www.techandciviclifef.org/key-funders-and-partners>.

jurisdictions with a documented history of casting ballots for Democrat candidates. CTCL paid millions of dollars to election officials in Wayne County-Detroit and the cities of Flint, Ann Arbor, Lansing, East Lansing, Kalamazoo, Muskegon, and Saginaw.¹⁶ *See, infra*, ¶35. All of these are historically Democrat precincts that voted between sixty and ninety percent in favor of Hillary Clinton in the 2016 presidential election. The votes cast in these jurisdictions in the 2016 presidential election are summarized on [Exhibit 23] (table of 2016 presidential election results for CTCL Michigan grant recipients).

195. CTCL says "[e]lection offices [to whom CTCL pays money] can use the funds to cover certain expenses incurred between June 15, 2020 and December 31, 2020." [Exhibit 24] (CTCL "grant" application instructions).¹⁷

196. CTCL requires the election officials to whom it gives money to spend that money on specified election activities, including activities to "Expand Voter Education & Outreach Efforts" and "Support Early In-Person Voting and Vote by Mail." *See* [Ex 24]. CTCL requires the local election officials CTCL pays to "submit a report that indicates how you spent the grant funds." *Id.* Thus, a local election authority must now report to, and follow, CTCL's directions as opposed to the Secretary of State's directions and Michigan Constitution and law.

197. CTCL says that, in exchange for this money, these election jurisdictions must pay for media campaigns to encourage voters to mail in their ballots, buy and distribute additional ballot drop boxes, and adopt a drive-thru voting program.

¹⁶ Michigan law provides that elections are conducted by counties, cities, villages, and townships under the supervision of the Michigan Secretary of State. *See* MCL 168.21, 168.31.

¹⁷ Available at: <https://www.techandciviclelife.org/our-work/election-officials/grants/>.

198. CTCL seeks to increase unsecured mail-in voting and unverified absentee voting by having local election officials establish illegal ballot drop boxes.

199. Again, the election jurisdictions CTCL has funded have one thing in common: they are all jurisdictions where the voters have historically cast ballots for Democrat candidates. *See* [Ex 21].

200. CTCL's payment of millions in cash to election jurisdictions in predominantly Democrat precincts is not authorized by federal or state law. CTCL has paid at least \$3,512,000 to Wayne County-Detroit, \$467,625 to the City of Flint, \$417,000 to the City of Ann Arbor, \$443,000 to the City of Lansing, \$433,580 to the City of Muskegon, \$402,878 to the City of Saginaw, \$218,869 to the City of Kalamazoo, and \$8,500 to the City of East Lansing, for a total of at least \$5,903,452.

201. Michigan (like other states) has a profound interest in protecting the integrity of Michigan elections and securing Michigan citizens' ballots. MCL 168.24j provides very specific requirements for a "ballot container" and requires that ballots only be deposited into these approved containers that are sealed and under the supervision of election officials.¹⁸ The Secretary of State's

¹⁸ MCL 168.24j, requires:

- (1) A ballot container includes a ballot box, transfer case, or other container used to secure ballots, including optical scan ballots and electronic voting systems and data.
- (2) A manufacturer or distributor of ballot containers shall submit a nonmetal ballot container to the secretary of state for approval under the requirements of subsection (3) before the ballot container is sold to a county, city, township, village, or school district for use at an election.
- (3) A ballot container shall not be approved unless it meets both of the following requirements:
 - (a) It is made of metal, plastic, fiberglass, or other material, that provides resistance to tampering.
 - (b) It is capable of being sealed with a metal seal.

Manual for Boards of County Canvassers provides an entire chapter governing the requirements for ballot containers. *See* Appendix.

202. [Exhibit 25] is a photograph of a Ballot Drop Box located in Lansing and a photograph of another Drop Box located at 1150 Giddings Avenue in Grand Rapids.¹⁹ These Ballot Drop Boxes do not comply with Michigan law and could result in lawfully cast ballots by Michigan voters being rejected or result in ballots being cast by individuals or organizations not legally entitled to cast a ballot.

203. Upon information and belief, similar drop boxes were strategically placed in select counties in northern Michigan, at select locations, including Torch Lake township in Antrim County.

204. Election officials may not put privately funded ballot drop-boxes on street corners when these ballot drop-boxes do not comply with the requirements of Michigan law requiring "ballot containers" to be secured and sealed.

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- (4) Before June 1 of 2002, and every fourth year after 2002, a county board of canvassers shall examine each ballot container to be used in any election conducted under this act. The board shall designate on the ballot container that the ballot container does or does not meet the requirements under subsection (3). A ballot container that has not been approved by the board shall not be used to store voted ballots.
 - (5) A city, village, or township clerk may procure ballot containers as provided in section 669 and as approved under this section.
 - (6) A clerk who uses or permits the use of a ballot container that has not been approved under this section is guilty of a misdemeanor.

¹⁹ See (Sarah Lehr, *Lansing, East Lansing Clerks Mail Absentee Ballot Applications to All Registered Voters*, *Lansing State Journal*, September 11, 2020), available at: <https://www.lansingstatejournal.com/story/news/2020/09/11/some-local-clerks-mailing-av-ballot-applications-all-voters/3458749001>.

See also Drop Boxes for Absentee Ballots Placed Around City of Grand Rapids, FOX17 News, available at: <https://www.fox17online.com/news/election-2020/drop-boxes-for-absentee-ballots-placed-around-city-of-grand-rapids>.

205. As noted below, it is improper and illegal for election officials to accept private funds from an organization seeking to influence the election outcome to achieve a partisan agenda and it is improper for Defendant Benson to oversee an election in which a private, partisan, special-interest organization pays private funds to local election officials to conduct the election in a manner the private, partisan organization favors.

206. MCL 168.666 provides, "At each federal, state, district, or county primary or election, the secretary of state shall furnish to each county clerk *at state expense* ... [the following election supplies]." (emphasis added). And, MCL 166.669 requires that "[f]or a federal, state, district, or county primary or election, a city or township board of election commissioners shall provide, *at the expense of the respective city or township*, each of the following (a) For each election precinct, *a ballot container approved under section 24j* to be utilized in the precinct." (emphasis added).

207. The State of Michigan and local election jurisdictions adopted a budget to fund the 2020 general election. CTCL's private funds paid to select predominantly Democrat election jurisdictions circumvent and violate Michigan law.

208. There is no provision in federal law or Michigan law allowing a private organization with a stated partisan purpose (advancing progressive ideology) to pay private funds to local election authorities and direct how the local election officials will conduct the election.

209. Local election jurisdictions are spending private funds paid to them by CTCL to (among other activities) buy and establish ballot drop boxes (colloquially called "Zuckerberg Boxes") to collect absentee and mail-in ballots placed in Democrat- majority jurisdictions.

210. These "Zuckerberg Boxes" do not comply with Michigan law. Michigan strictly regulates the requirement of a "ballot container" to prevent the tampering with ballots and to protect the integrity of every ballot lawfully cast by a Michigan voter. *See, supra*, ¶¶36-42.

211. These Zuckerberg ballot drop-boxes do not satisfy the requirements Michigan law demands for a secure ballot container. *See* Secretary of State's Manual for Boards of County Canvassers chapter VI.

212. The "Zuckerberg Boxes" acquired with private funds cannot possibly meet the requirements of MCL 168.24j and, even if they did satisfy the requirements of MCL for a legal "ballot container," they are being disproportionately placed in Democrat precincts and not made equally available throughout the state.

213. Additionally, the City of Lansing and the City of East Lansing used CTCL money to mail applications for absent voter ballots even when the voter did not request an absentee ballot and despite the fact that the City of Lansing and the City of East Lansing have no legal authority to mail unsolicited absentee ballot applications to voters who have not requested such an application. *See* [Exhibit 26] (Sarah Lehr, *Lansing, East Lansing Clerks Mail Absentee Ballot Applications to All Registered Voters, Lansing State Journal*, September 11, 2020).²⁰ Local election officials may not send out mass absent voter applications. *See Young*, 122 A.3d at 858.

214. Secretary Benson's actions and her failure to act have undermined the constitutional right of all Michigan voters to participate in fair and lawful elections. These Michigan citizens' constitutional rights have been violated by Secretary Benson's failure to prevent an out-of-state

²⁰ Available at: <https://www.lansingstatejournal.com/story/news/2020/09/11/some-local-clerks-mailing-av-ballot-applications-all-voters/3458749001>.

special interest organization from selectively paying local election authorities and directing how local election authorities will conduct the 2020 general election.

215. Plaintiff's vote has been diluted as a result of these policies.

216. Plaintiff asks this Court to order Defendant Benson to either (a) order all local election jurisdictions that have received these private funds to return the money or (b) pay the funds to Secretary of State Benson and order Secretary Benson to equally distribute the funds to *all* Michigan election jurisdictions on a *pro rata* basis based upon the number of registered voters in each election jurisdiction.

COUNT 7
ELECTION FRAUD; MCL 600.4545(2); MCL 158.861

(as to all Defendants)

217. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

218. MCL 600.4545(1) permits an "[a]n action may be brought in the circuit court of any county of this state whenever it appears that material fraud or error has been committed at any election in such county at which there has been submitted any constitutional amendment, question, or proposition to the electors of the state or any county, township, or municipality thereof."

219. Such action may be brought to remedy fraudulent or illegal voting or tampering with ballots or ballot boxes before a recount pursuant to MCL 168.861, which states,

"For fraudulent or illegal voting, or tampering with the ballots or ballot boxes before a recount by the board of county canvassers, the remedy by quo warranto shall remain in full force, together with any other remedies now existing."

220. Defendants had notice of significant misconduct and other legal irregularities committed by election officials during the election conducted on November 3, 2020. Defendants

neither investigated nor prevented violations of the Michigan Elections Code that occurred during the general election. Specifically:

- a. that a county computer was left on during the November 3, 2020 general election with an open VPN port;
- b. that the results of the Antrim County election were patently inaccurate and that after repeated attempts, they Antrim County election officials were unable to reconcile reported anomalies in the vote counts found during the election efforts;
- c. That Defendants Guy and Benson demanded certification of these patently inaccurate results from county officials and canvas boards, notwithstanding notice that there were anomalies that could not initially be reconciled;
- d. that, as a result, the numbers certified in the November 3 general election lack credibility and therefore place in doubt the resulting vote totals certified for Antrim County.

221. Defendants conducted the primary elections on March 10, 2020 and August 4, 2020 and general election on November 3, 2020 on electronic voting equipment whose use they knew, had notice or should have known, had been rejected or questioned by other states and experts for reasons of security and verifiability , and did not assure that such issues had been satisfactorily resolved in Michigan, specifically:

- a. The State of Texas rejected for security reasons a Dominion Democracy Suite system similar to that which was used in Michigan. [Exhibit 27]; and that evidence will show security breaches during the March, August, and November elections was sufficient "sufficient to . . . place in doubt the result;"
- b. The Dominion Democracy Suite 5.5.12.1 system used in Michigan accumulates votes that are unverifiable to the voter because they are hidden in a QR code that is unreadable by a voter and that the State of Colorado banned the use of the similar Dominion Democracy Ballot Marking Device (BMD) used in Michigan because of disqualifying verifiability and security concerns.

222. The creator of the Risk Limiting audit procedure used in Michigan for the Dominion voting machines has written to officials in other states (Georgia) explaining that

widespread use of BMD's with the Dominion voting machines undermines election integrity and that the audit procedure cannot be used to meaningfully audit BMD systems. Defendants participated in or ratified actions that violate Michigan election law, specifically:

- a. Compact Flash cards were not properly programmed prior to the November 3, 2020 election.
- b. Test ballots were not properly secured as required during Antrim County ballot testing on live ballot stock for the November 3, 2020 election.
- c. Several tabulators in Antrim County did not have the proper security seals, making them uncertified for the elections [Exhibit 28].
- d. Defendants Guy and Benson then made misleading statements to the public and media, claiming this was the safest election in history.

223. Under Michigan law, including MCL 168.861, the Defendants had a duty to investigate all credible reports of misconduct, fraud, or irregularity by any primary or election official or officials in order to eliminate the possibility that such misconduct, fraud or irregularity would be sufficient to change or place in doubt the result. Defendants were informed, both formally and informally, of misconduct, irregularities, and potential fraud, but failed to investigate, specifically:

- a. Dr. Navid Keshavarz-Nia signed an affidavit disclosing significant problems with Dominion Voting Systems [Exhibit 29].
- b.. The Secretary of State signed a contract for voting machines and support services with Dominion knowing that it contained a provision preventing State officials from discharging their lawful required duties and preventing voters from their lawful right to a full forensic audit, including their right to have audited the software in the machine in order to determine whether the machine "accurately and securely" tabulates ballots, among other issues.
- c. On November 11, 2020, Attorney General Dana Nessel gave an interview with the Washington Post wherein she threatened legislators with who she disagreed with criminal prosecution.²¹ She tweeted it out and gave an

²¹ https://www.washingtonpost.com/politics/michigan-attorney-general-canvassing-board-lawmakers/2020/11/20/87d19ce6-2b65-11eb-8fa2-06e7cbb145c0_story.html

interview that those legislators who might not agree with certifying the election could be investigated criminally by the chief law enforcement officer of the State of Michigan. The corresponding and referenced tweet by Dana Nessel has since been deleted from the official government account.

- d. As observed during the "hand recount" on December 17, 2020, there were (i) a substantial (but determinative) number of ballots included the same handwriting for the same write-in candidate, casting doubt on whether they were marked by a qualified Michigan elector; (ii) a substantial (but determinative) number of counterfeit or absentee ballots without the proper crease; and (iii) different stock of paper used, casting doubt on whether they were "official ballots" produced and distributed in accordance with Michigan law.

224. Based on these reports and the additional expert reports that have been presented thus far, the Defendants knew, or should have known, that the Dominion voting machines did not comply with MCL 168.795 in that they did not:

- a. Prevent electors from voting for the same person more than once for the same office;
- b. Did not or could not reject a ballot on which no valid vote is cast or were misprogrammed to misinterpret ballots;
- c. Were not "suitably designed for the purpose used...to provide for safety, accuracy, and efficiency";
- d. Did not record correctly and count accurately each vote property cast;
- e. Did not or could not provide an accurate audit trail or allowed said trail to be adulterated.

225. The Defendants knew, or should have known, that other states had raised questions concerning the reliability and security of the voting system, and that its performance in the 2020 elections casts sufficient doubt on the reliability of the vote tallies it reports that county officials have publicly questioned not only the credibility of the numbers, but also their own ability to reconcile the anomalies produced in an effort to audit them.

226. Notwithstanding credible reports of both inaccuracies and security breaches, the Defendants have failed to exercise their duty to ensure that Michigan elections are fairly conducted and that the votes tallied reflect the intent of only qualified Michigan electors.

227. Based upon the allegations contained herein, material fraud or error occurred in this election so that the outcome of the election was affected.

228. Further, there were two ballot proposals in the 2020 general election: First, Proposal 20-1 regarding money from oil and gas mining. Second, Proposal 20-2 regarding search warrants to access a person's electronic data or electronic communications. Based on the evidence discovered that shows the unquestionable ability to manipulate the vote across Antrim County and the State of Michigan. Based on the fraud and corruption uncovered, Plaintiff challenges the results of the Proposals 20-1 and 20-2.

229. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the forensic image of the 17 precinct tabulators thumb drives, related software, and the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

COUNT 8
COMMON LAW ELECTION FRAUD

(as to all Defendants)

230. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

231. MCR 3.306(B)(2) permits an action to request the issuance of a writ of quo warranto. An application to proceed by quo warranto must disclose sufficient facts and grounds and sufficient apparent merit to justify further inquiry.

232. Quo warranto is warranted whenever it appears that material fraud or error has been committed at any election. This type of action is brought to challenge the validity of the election itself. *Barrow v Detroit Mayor*, 290 Mich App 530, 543; 820 NW2d 658 (2010). For all the reasons stated herein material fraud or error was committed during the election as it relates to the Dominion voting systems used in Antrim County's 22 precincts.

233. This quo warranto claim is brought to remedy fraudulent or illegal voting or tampering with ballots via Dominion. Based upon the allegations contained herein, material fraud or error occurred in this election so that the outcome of the election was affected.

234. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

COUNT 9
EQUAL PROTECTION VIOLATION

Mich Const, art 1, § 2

(as to all Defendants)

235. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

236. The Equal Protection Clause of the Michigan Constitution provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights." Mich Const, art I, § 2.

237. This clause is coextensive with the United States Constitution's Equal Protection Clause. *Harville v State Plumbing & Heating*, 218 Mich App 302, 305-306; 553 NW2d 377 (1996). See also *Bush v Gore*, 531 US 98, 104 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."); *Harper v Virginia Bd. of Elections*, 383 US 663, 665 (1966) ("Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.")²²

238. The Constitutional guarantee protects not only "the act of voting, the place where it is done, and the man who votes, from personal violence or intimidation" but also "*the election itself* from corruption and fraud." *Ex Parte Yarbrough*, 110 US 651, 661; 4 S Ct 152; 28 L Ed 274 (1884).

239. *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 858 (Del. Chan. Ct. 2015), demonstrates the dangers of a government scheme to target get-out-the-vote efforts on a favored demographic group. The school district wanted its referendum to pass; so, it targeted parents of school children and adult students for a get-out-to-vote campaign. In *Young*, the court identified the school district's scheme to get-out-the-vote of the parents and adult students as also violating election law. The court held that the school district's improper influence upon a demographic group interfered with the "full, fair, and free expression of the popular will" *Id.* The court stated that

²² Most United States Supreme Court rulings concerning the right to vote frame the issue in terms of the Equal Protection Clause. Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance & Procedure* §18.31(a) (2012 & Supp. 2015).

the government conducting the election in a manner that favored one group of voters was equivalent to the government disfavoring another group of voters.

Historically, the law has focused on forms of "improper influence" that have interfered with the voting rights of disfavored demographic groups by dissuading or preventing them from voting through blatant means like fraud, violence, and intimidation.

A government certainly violates the Elections Clause if it skews the outcome of an election in this manner. Parity of reasoning suggests that a government can violate the Elections Clause if it skews the outcome of an election by encouraging and facilitating voting by favored demographic groups. In both situations, the government has diminished the voting rights of one portion of the electorate and enhanced the voting rights of another portion of the electorate. In neither case is the election "free and equal."

Id.

240. The conduct of the election and the allocation of funds necessary to fairly and equally conduct an election must be "apportioned on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Michigan's allocation of funds necessary to conduct the 2020 general election (as governed and overseen by Secretary Benson) is (similar to the apportionment of legislative districts) subject to the federal Equal Protection Clause. *See id.* *See also Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Evenwel v. Abbott*, 136 S.Ct. 1120 (2016). The United States Constitution and Michigan's Constitution forbid the Secretary of State and local election officials from selectively benefitting one group of Michigan voters (urban voters in predominantly Democrat jurisdictions) over another group of Michigan voters (suburban and rural voters in non-Democrat precincts).

241. When 3 votes were destroyed in Central Lake Township, the government Defendants, as state actors, along with other co-conspirators, including Election Source, acted arbitrarily or irrationally, and treated Plaintiff less favorably than those similarly situated.

242. The government Defendants and their co-conspirators (including Election Source) acted maliciously, recklessly, intentionally, or by reason of gross negligence or violation of the law in arbitrarily destroying some ballots or otherwise violating Michigan election laws.

243. Plaintiff seeks declaratory and injunctive relief requiring Defendant Benson to prevent local election jurisdictions from accepting millions of dollars paid by CTCL to tilt the playing field to advance a get-out-the-vote effort in only predominantly Democrat jurisdictions. Alternatively, Plaintiff asks this Court to order Defendant Benson to direct the local election officials who have received these private funds to remit those funds to Defendant Benson and order Defendant Benson to equally distribute the funds to all Michigan election jurisdictions on a *pro rata* basis according to the number of registered voters in each election jurisdiction.

244. The right to vote is a fundamental civil right and a political right. The Equal Protection Clause forbids election officials granting the right to vote on equal terms but later devaluing a person's vote through failing to use specific standards and uniform rules.

245. Every Michigan voter enjoys an equal right to participate in the 2020 general election. By allowing a privately-funded organization with an announced partisan agenda to fund public election authorities in get-out-the-vote efforts in only predominantly Democrat precincts, Secretary Benson has violated the Michigan Constitution and Michigan election law. Secretary Benson has diminished the voting rights of one group of Michigan citizens (those who are registered to vote in rural and non-Democrat jurisdictions) and enhanced the voting rights of another group of Michigan voters (those living in urban, progressive, and historically Democrat jurisdictions). This unequal treatment of Michigan voters violates the Michigan Constitution's guarantee of equal protection.

246. Only specific standards and uniform rules provide sufficient guarantees of equal treatment. Every person has the right to vote, with their vote counted as one vote, and not have his or her vote diluted and voided out by the counting of an illegal vote.

247. Defendant's handling of the election, as described herein, establishes how rampant and systemic fraud devalued and diluted Plaintiff's civil and political rights.

248. The illegal procedures, illegal standards, and illegal treatment of the ballots and the counting of ballots in Antrim County unconstitutionally burden the fundamental right to vote.

249. Defendant Benson has no legitimate interest in counting illegal and improper ballots, counting ballots more than once, improperly handling the collection and counting of ballots, or using the Dominion voting system to do the same in a way that dilutes and cancels out rightfully and properly cast votes.

250. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

251. Secretary Benson's failure to lawfully oversee this election and specifically allowing an ideologically-driven organization to pay private funds to only election jurisdictions in predominantly Democrat precincts cannot be sustained under any applicable level of scrutiny from this Court. This scheme that Secretary Benson has allowed severely burdens these Michigan citizens' right to participate in a fair and honest election.

COUNT 10
STATUTORY ELECTION LAW VIOLATIONS

MCL 168.765(5)

(as to all Defendants)

252. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

253. Michigan election law, MCL 168.765(5), requires Defendants to post the following absentee voting information anytime an election is conducted which involves a state or federal office:

a. The clerk must post before 8:00 a.m. on Election Day: 1) the number of absent voter ballots distributed to absent voters 2) the number of absent voter ballots returned before Election Day and 3) the number of absent voter ballots delivered for processing.

b. The clerk must post before 9:00 p.m. on Election Day: 1) the number of absent voter ballots returned on Election Day 2) the number of absent voter ballots returned on Election Day which were delivered for processing 3) the total number of absent voter ballots returned both before and on Election Day and 4) the total number of absent voter ballots returned both before and on Election Day which were delivered for processing.

c. The clerk must post immediately after all precinct returns are complete: 1) the total number of absent voter ballots returned by voters and 2) the total number of absent voter ballots received for processing.

254. Defendants Antrim County, Guy, Benson, and Brater failed to post by 8:00 a.m. on Election Day the number of absentee ballots distributed to absent voters and failed to post before 9:00 p.m. the number of absent voters returned before on Election Day. Indeed, none of that information is available on the government Defendant's website.

255. Per Michigan Election law, all absentee voter ballots must be returned to the clerk before polls close at 8:00 pm. MCL 168.764a. Any absentee voter ballots received by the clerk after the close of the polls on election day will not be counted.

256. Upon information and belief, if Defendant received additional absentee ballots in the early morning hours after election day and after the counting of the absentee ballots had concluded, without proper oversight, then Defendant failed to follow proper election protocol.

257. Based upon the above allegations of fraud, statutory violations, and other misconduct, as stated herein, it is necessary to permit Plaintiff to continue to collect the a forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images, after which a manual recount of the election results and an independent audit of the November 3, 2020 election may be ordered to ensure the accuracy and integrity of the election.

COUNT 11
ABUSE OF PROCESS

(as to Defendant Guy and Antrim County)

258. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

259. When Defendant Guy dismissed this case she did so with an ulterior purpose. Her intention was to prevent the truth from being exposed to the public and the world regarding her fraud and knowledge of the fraudulent election.

260. This conduct was improper in the regular prosecution of a civil complaint. As the elected Antrim County Clerk, Defendant Guy had to know her actions were improper. She must have known that by filing pleadings, the Defendants were not required to be served.

261. Further, within minutes after filing the notices of dismissal, the Traverse City Eagle was notified and published a story stating "A motion to dismiss filed in 13th Circuit Court after officials said Bill Bailey's attorney, Matthew DePerno, missed a filing deadline."²³

262. Defendant Guy and her staff were so excited to dismiss the case (without proper cause) that they immediately notified their media partners in an attempt to quickly spread the word.

263. The process of dismissing the civil litigation and then immediately contacting the media demonstrates that Defendant Guy misused her position within the court system for a purpose other than that which it was designed to accomplish. Defendant Guy (either on her own or by directing her staff) used the civil litigation process to cause Plaintiff to lose his right to proceed with his constitutional claims. This is an irregular act in the use of the process.

264. Defendant Guy and her staff harbored bad motives which then manifested in the dismissal of this lawsuit.

265. The tactics and procedure of Defendant Guy demonstrates and was driven by a bad and improper motive to protect her own personal interest and the interest of Defendant Antrim County by trying to gain an advantage in this litigation and force Plaintiff to lose his constitutional rights.

COUNT 12
2018 Public Act 123 UNCONSTITUTIONAL

(as to all Defendants)

266. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

²³ https://www.record-eagle.com/dismissal-lack-of-filing-proof-of-service-pdf/pdf_46fe7b52-7d23-11eb-9979-5bac026c25fd.html

267. The Michigan Constitution's "purity of elections" clause states, "the legislature shall enact laws to regulate the time, place and manner of all nominations and elections, to preserve the purity of elections, to preserve the secrecy of ballot, to guard against abuses of elective franchise, and to provide for a system of voter registration and absentee voting. Const. 1963, art 2, §4(2).

268. "The phrase 'purity of elections' does not have a single precise meaning. But it unmistakably requires fairness and evenhandedness in the election laws of this state." *Barrow v Detroit Election Comm'n*, 305 Mich App 649, 676; 854 NW2d 489 (2014).

269. Taken together, the preliminary findings of Plaintiff's experts discussed above confirm what has long been an open secret in election administration circles: each of the three broadly commercially available electronic voting systems is vulnerable to a host of methods of attack and/or abuse.

270. By enacting 2018 Public Act 123, the legislature overhauled the Michigan Election Code to require use of electronic voting machines, effectively forcing Michigan localities to use deeply flawed electronic voting machines which are capable of election-determinative attack and/or manipulation which leaves no trace.

271. The safeguards intended to prevent abuse of these machines are all wholly ineffective for a number of reasons. Broadly, the execution of most remedies for election misconduct are entrusted to political officers with broad discretion to decline pursuing the remedy in question or to do so in a manner that rigs the outcome of the inquiry.

272. Plaintiff asserts that the host of issues which have been uncovered following the 2020 general election demonstrate that the legislature has, by enacting 2018 Public Act 123, forced Michigan electors to vote using machines in which no confidence can be placed to accurately and

securely reflect the tally of the ballots entrusted to that system. Plaintiff further asserts that this action by the legislature constitutes a violation of the Michigan Constitution's purity of elections clause, by enacting a voting scheme which is capable of use to the benefit of one candidate over the other in any given election. Plaintiff further asserts that as applied to the election in question in this action, the legislature's enactment of 2018 Public Act 123 rendered the litany of confidence-undermining issues with the 2020 general election were in great measure exacerbated by the legislature's act of requiring the use of these deeply flawed systems and machines.

273. In view of the foregoing, Plaintiff asserts that 2018 Public Act 123 is unconstitutional on its face, unconstitutionally applied, or unconstitutional in its effect, to the extent it requires the use of Dominion, Hart Intercivic, or ES&S voting machines, as applied to Michigan elections, due to the inherent vulnerabilities of the available electronic voting machines, and that the purity of elections clause requires that localities be allowed to use non-electronic means of tabulating votes.

274.

275. Plaintiff requests that this Court enter an order holding that 2018 Public Act 123 is unconstitutional and unenforceable to the extent it requires use of electronic voting machines.

COUNT 12
MCL 168.31a UNCONSTITUTIONAL

(as to all Defendants)

276. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

277. Plaintiff has a constitutional right to vote and have his vote counted **as he intended**. In 2018, the Michigan Constitution was amended by the people of Michigan. As amended, Const 1963, art 2, §4(1)(h) now provides, in pertinent part:

(1) Every citizen of the United States who is an elector qualified to vote in Michigan shall have the following rights:

(h) The right to have the results of statewide elections audited, in such a manner as prescribed by law, to ensure the accuracy and integrity of elections. [Emphasis added.]

All rights set forth in this subsection shall be self-executing. This subsection shall be liberally construed in favor of voters' rights in order to effectuate its purposes. Nothing contained in this subsection shall prevent the legislature from expanding voters' rights beyond what is provided herein. This subsection and any portion hereof shall be severable. If any portion of this subsection is held invalid or unenforceable as to any person or circumstance, that invalidity or unenforceability shall not affect the validity, enforceability, or application of any other portion of this subsection.

278. This provision was amended effective December 22, 2018. According to the Michigan Constitution, there is no threshold requirement that must first be met in order for a citizen to request an audit of an election. This right is self-executing. Const 1963, art 2, § 4. Indeed, the Michigan Constitution requires that the "results" of the election be audited in order to ensure the "accuracy and integrity" of the election.

279. The amendment states clearly that the legislature is permitted to "expand[] voters' rights." There is nothing that states the legislature is permitted to narrow voters' rights. Therefore, the amendment must be permitted.

280. MCL 168.31a attempts to limit the rights granted by the Const 1963, art 2, § 4.

281. In view of the foregoing, Plaintiff asserts that MCL 168.31a is unconstitutional on its face, unconstitutionally applied, or unconstitutional in its effect, to the extent it limits the rights granted to Plaintiff pursuant to Const 1963, art 2, § 4.

282. Plaintiff requests that this Court enter an order holding that MCL 168.31a is unconstitutional and unenforceable to the extent it requires use of electronic voting machines.

COUNT 14
CONSPIRACY and/or CONCERT OF ACTIONS

(as to all Defendants)

283. Plaintiff restates and incorporates as if set forth fully herein all preceding allegations contained in this First Amended Complaint.

284. On information and belief, each of the individual Defendants have engaged in concerted action to defraud the voter, manipulate the election, and dilute Plaintiff's vote, and to cause Plaintiff harm.

285. At all times, several or all of the Defendants have engaged in concerted activities described in the preceding paragraphs by express or implied agreement.

286. This concerted action was intended to, among other things, defame Plaintiffs, embarrass Plaintiffs, cast Plaintiffs in a false and misleading light, interfere with Plaintiffs' business relationships and contracts, invade Plaintiffs' privacy and intrude upon Plaintiffs' seclusion or solitude, convert Plaintiffs' property, and cause Plaintiffs harm and damages.

287. The conspiracy involved all or some of the Defendants who acted in concert. Plaintiffs may not be able to identify all of the activities of Defendants due to the generic similarity of such activities as produced and promoted by these Defendants.

288. The Defendants actions were intended to accomplish an unlawful purpose or a lawful purpose by unlawful means; to wit: defame Plaintiffs, embarrass Plaintiffs, cast Plaintiffs in a false and misleading light, interfere with Plaintiffs' business relationships and contracts, invade Plaintiffs' privacy and intrude upon Plaintiffs' seclusion or solitude, convert Plaintiffs' property, and cause Plaintiffs harm and damages.

289. As a direct and proximate result of Defendants' concerted activities, Plaintiffs have sustained and will continue to sustain severe damages and irreparable harm and loss as more specifically alleged in the preceding paragraphs.

290. Due to the concert of action among all of the various Defendants, each are jointly and severally Plaintiffs for all of their injuries and damages even if there was no direct relation to the activity conducted by that particular Defendant.

291. The conduct of the Defendants was "despicable" and "outrageous" within the meaning of the laws of the State of Michigan and malicious with the meaning of those laws, thus entitling Plaintiffs to exemplary and punitive damages from the Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Honorable Court grant the following relief:

A. Issue an order allowing Plaintiff to continue to collect the forensic images of the 17 precinct tabulators, thumb drives, related software, the Clerk's "master tabulator," other equipment and computers used in the November 3, 2020 general election, and conduct an investigation of those images.

B. Issue an order allowing Plaintiff to conduct an independent and non-partisan forensic audit to determine the accuracy and integrity of the November 3, 2020 election;

C. Issue an order that allows Plaintiff and his representatives immediate access to all paper ballots (mail-in, absentee, and in-person) from the November 3, 2020 General Election for visual inspection;

D. Issue an order requiring the Defendants to produce the existing Dominion ballot images and election reports from the November 3, 2020 general election for technical inspection and validation;

E. Continue the protective order entered by this Court on December 4, 2020;

F. Continue the injunction relief, for all the reasons stated in his complaint, previously granted by this Court.

G. As to COUNTS 1, 2, and 9, determine that Plaintiff's constitutional rights were violated consistent with allegations in the First Amended Complaint.

H. As to COUNT 3, determined that Defendants violated the "Purity of Elections" Clause consistent with allegations in the First Amended Complaint.

I. As to COUNT 4, determined that Defendants violated MCL 168.761(2), MCL 168.765a(6), and MCL 168.766 consistent with allegations in the First Amended Complaint.

J. As to COUNT 5, determined that Defendants Benson and Brater violated the Administrative Procedures Act consistent with allegations in the First Amended Complaint.

K. As to COUNTS 6, 7 and 8, determined that Defendants committed fraud, consistent with allegations in the First Amended Complaint.

L. As to COUNTS 10, determine that Defendants violated MCL 168.765(5) consistent with allegations in the First Amended Complaint.

M. As to COUNT 11 enter judgment against Defendants Guy and Antrim County, jointly and severally, for damages in an amount of no less than \$25,000.00 for the injuries sustained plus additional damages as may be proven to compensate Plaintiff for losses and damages, plus exemplary and punitive damages, together with interest, costs, and actual attorney's fees incurred in maintaining this matter, and for such further relief as the Court deems appropriate.

N. As to COUNT 12, determined that 2018 Public Act 123 is unconstitutional on its face consistent with allegations in the First Amended Complaint.

O. As to COUNT 13, determined that MCL 168.31a is unconstitutional on its face consistent with allegations in the First Amended Complaint

P. As to COUNT 14, determine that Defendants engaged in a conspiracy consistent with allegations in the First Amended Complaint.

Q. Grant such other and further relief as is equitable and just and grant him costs, expenses and attorney fees incurred in having to bring this action.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 17, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

Attorney for Plaintiff

Exhibit 20

Second Supplement to Motion to Amend Complaint

May 18, 2021

RECEIVED by MSC 6/2/2022 1:49:42 AM

FILED

Sheryl Guy

Antrim 13th Circuit Court
05/18/2021

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY, SECRETARY OF
STATE JOCELYN BENSON, in her official
and individual capacity, JONATHAN
BRATER, in his official and individual
capacity, SHERYL GUY, in her official and
individual capacity, and MILLER
CONSULTATIONS & ELECTIONS, INC.,
d/b/a ELECTION SOURCE, a Michigan
corporation

HON. KEVIN A. ELSENHEIMER

Defendants.

Matthew S. DePerno (P52622)
DEPERNO LAW OFFICE, PLLC
Attorney for Plaintiff
951 W. Milham Avenue
PO Box 1595
Portage, MI 49081
(269) 321-5064

Haider A. Kazim (P66146)
Allan C. Vander Laan (P33893)
CUMMINGS, McCLOREY, DAVIS & ACHO, PLC
Attorney for Defendant Antrim County
319 West Front Street
Suite 221
Traverse City, MI 49684
(231) 922-1888

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendant Benson
PO Box 30736
Lansing, MI 48909
(517) 335-7659

SECOND SUPPLEMENT TO PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiff, WILLIAM BAILEY ("Plaintiff"), by and through his attorney, DePerno Law
Office, PLLC, files this Second Supplement to Motion to Amend Complaint.

A fraud perpetrated a fraud on the Court, the people of Antrim County, and the people of Michigan. Newly discovered information reveals that the results files in Antrim County have been manipulated. There has been a reduction in the overall vote county results. These files have been manipulated. This destroys Defendants' argument that a "hand recount" on December 17, 2020 is sufficient to satisfy the requirements of an "audit" pursuant to Const 1963, art 2, §4(1)(h). The hand recount is not accurate. All of the races were not counted.

WHEREFORE, Plaintiff respectfully requests that this Court grant it leave to amend his complaint by substituting the attached Amended Complaint for his original complaint.

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 18, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

Attorney for Plaintiff

PROOF OF SERVICE

On the date set forth below, I caused a copy of the following documents to be served on all attorneys of record at the addresses listed above

1. Second Supplement to Plaintiff's Motion for Leave to Amend Complaint

Service was electronically using the MiFile system which will send notification of such filing of the foregoing document to all attorneys of record.

Dated: May 18, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)

FILED

Sheryl Guy

Antrim 13th Circuit Court
05/18/2021

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM**

WILLIAM BAILEY

Plaintiff

Case No. 20-9238-CZ

v.

ANTRIM COUNTY

HON. KEVIN A. ELSENHEIMER

Defendant

SECRETARY OF STATE JOCELYN
BENSON

Intervenor-Defendant,

Matthew S. DePerno (P52622)
DEPERNO LAW OFFICE, PLLC
Attorney for Plaintiff
951 W. Milham Avenue
PO Box 1595
Portage, MI 49081
(269) 321-5064

Haider A. Kazim (P66146)
Allan C. Vander Laan (P33893)
CUMMINGS, McCLOREY, DAVIS & ACHO, PLC
Attorney for Defendant
319 West Front Street
Suite 221
Traverse City, MI 49684
(231) 922-1888

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Intervenor-Defendant Benson
PO Box 30736
Lansing, MI 48909
(517) 335-7659

EXHIBITS 1

SECOND SUPPLEMENT TO PLAINTIFF'S MOTION TO AMEND COMPLAINT

Respectfully submitted

DePERNO LAW OFFICE, PLLC

Dated: May 18, 2021

/s/ Matthew S. DePerno

Matthew S. DePerno (P52622)
Attorney for Plaintiff

Date: 5/18/2021
 Analyst: Jeff Lenberg

Preliminary - Just Discovered This Morning Tue 18 MAY 2021
19.3% of the votes cast in Helena Township appear to Be Not Reported on the EMS Dated 21 NOV 2020



After decrypting and decoding the actual results file contained on the compact flash cards from Helena Township. We are able to filter out any effects due to the internalMachineID being renumbered between 9/29 and 10/23 Project files (the shift that occurred during the election). The following discoveries have been made:

Page: 3 of 185

11/21/2020 3:33:21 PM

Straight Party Ticket (Vote for 1)

Precinct	Times Cast	Registered Voter
County		
Antrim County		
Banks Township, Precinct 1	1,126	1,417
Central Lake Township, Precinct 1	1,491	2,101
Chestonia Township, Precinct 1	296	450
Custer Township, Precinct 1	776	1,127
Echo Township, Precinct 1	602	812
Elk Rapids Township, Precinct 1	2,057	2,492
Forest Home Township, Precinct 1	1,390	1,729
Helena Township, Precinct 1	746	976
Jordan Township, Precinct 1	573	767
Kearney Township, Precinct 1	1,240	1,743
Mancelona Township, Precinct 1	1,138	2,282
Mancelona Township,	913	1,478

Precinct	Democratic Party (D)	Republican Party (R)
County		
Antrim County		
Banks Township, Precinct 1	134	500
Central Lake Township, Precinct 1	227	536
Chestonia Township, Precinct 1	45	134
Custer Township, Precinct 1	108	354
Echo Township, Precinct 1	100	230
Elk Rapids Township, Precinct 1	408	677
Forest Home Township, Precinct 1	249	497
Helena Township, Precinct 1	136	255
Jordan Township, Precinct 1	75	252
Kearney Township, Precinct 1	187	496
Mancelona Township, Precinct 1	120	551
Mancelona Township,	107	399

Figure 1 - Official Totals Reported from Antrim County on 21 NOV 2021

* Note that the Republican Total is 255, which must have been found during canvassing as it includes 1 additional vote than the totals from the compact flash cards that were 254*

President and Vice President of the United States (Vote for 1)

Precinct	Trump (R)	Biden (D)	Joseph R. Biden / Kamala D. Harris (DB)	Donald J. Trump / Michael R. Pence (RP)
County				
Antrim County				
Baris Township, Precinct 1	1,129	1,417	349	756
Central Lake Township, Precinct 1	1,491	2,101	549	905
Chestonia Township, Precinct 1	296	450	93	157
Custer Township, Precinct 1	776	1,127	240	521
Echo Township, Precinct 1	602	812	186	382
Elk Rapids Township, Precinct 1	2,057	2,492	885	1,023
Forest Home Township, Precinct 1	1,350	1,729	616	753
Helena Township, Precinct 1	746	976	396	431
Jordan Township, Precinct 1	573	757	163	371
Kearney Township, Precinct 1	1,240	1,743	471	743

Figure 2 - Official Antrim County Presidential Vote Totals 21 NOV 2021

Contest Counts:

Straight Party Contest

3009	254	Republican
3008	136	Democrat
3010	1	Libertarian
3011	0	
3012	2	
3013	2	
3014	0	

Presidential Contest

Choice	Marks	
3016	306	Trump
3015	217	Biden
3017	3	Jorgensen
3018	0	
3019	1	
3020	1	
3021	0	

Figure 3 - Output from Decrypting/Decoding of Compact Flash Result File from Helena Township from Original Forensics Image

Straight Party ticket vote: Biden 136, Trump 254

Presidential vote chosen specifically: Biden 217, Trump 306

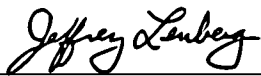
Therefore, totals when the Straight Party ticket vote is added with the direct Presidential vote are: Biden 353, Trump 560

There were 913 votes cast in the Presidential contest according to the Helena compact flash result file when properly decoded using the Sept 29 project file (with the original internalMachineID numbering before the shift occurred).



Biden vote count was reduced by 47 and Trump vote count was reduced by 129 from what they were anticipated to be based on forensic analysis of the Helena Township compact flash cards. This indicates that the vote totals were incorrect, and it indicates a manipulation of the vote count.

Under the penalties of perjury, I declare that I have read the foregoing report and that facts stated in it are true.



Jeffrey Lenberg

MICHIGAN NOTARY ACKNOWLEDGEMENT

State of Michigan
County of Oakland

The foregoing instrument was acknowledged before me on this 18th day of May, 2021 by Jeffrey Lenberg.

Notary Public Signature:

Notary Printed Name: Ann M. Howard
Acting in the County of: Oakland
My Commission Expires: 2/24/2023

Exhibit 21

Notice of Hearing

STATE OF MICHIGAN
IN THE 13TH JUDICIAL CIRCUIT COURT FOR THE COUNTY OF ANTRIM

File No. 20-9238-CZ
HON. KEVIN A. ELSENHEIMER

WILLIAM BAILEY

Plaintiff,

v

ANTRIM COUNTY

Defendant.

MATTHEW S DEPERNO

P 52622 Attorney for Plaintiff

HAIDER A. KAZIM

P 66146 Attorney for Defendant

NOTICE OF MOTION

The above case is hereby set for

PLAINTIFF'S MOTION TO AMEND COMPLAINT

on May 18, 2021 AT 1:30 PM

in the Historic Courthouse
In BELLAIRE VIA ZOOM

Date of Mailing: May 5, 2021

Zoom Meeting ID: 6276788320

IMPORTANT NOTE: Pursuant to the Michigan Supreme Court Administrative Order No. 2020-6, **ALL HEARINGS WILL BE CONDUCTED VIA ZOOM.** THERE ARE NO EXCEPTIONS. All courtrooms within the 13th Circuit Court are closed. If you have not previously done so, please call the 13th Circuit Court Administrator's Office at 231-922-4701 at least two days prior to your scheduled hearing to test Zoom and to confirm your personal appearance is not required should this Order be lifted prior to your court hearing. Please note that all court hearings are mandated by the Supreme Court to be live streamed on YouTube for public viewing.

13Th Judicial Circuit Court
328 Washington Street
Suite 300
Traverse City, MI 49684
Telephone: -(231) 922-4701

PLAINTIFF-APPELLANT's Appendix 000924

Exhibit 22

Transcript, April 23, 2021

RECEIVED by MSC 6/2/2022 1:49:42 AM

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

WILLIAM BAILEY,

Plaintiff

v.

Case No. 20-9238-CZ

ANTRIM COUNTY,

Defendant.

_____ /

MOTION

Before The Honorable Kevin A. Elsenheimer
Bellaire, Michigan - Friday, April 23, 2021
(Via Zoom)

APPEARANCES:

For the Plaintiff:

MR. MATTHEW DEPERNO (P52622)
951 W. Milham Ave.
Portage, Michigan 49024
269-321-5064

For the AG:

MR. ERIK GRILL (P64713)
525 W. Ottawa St.
Lansing, Michigan 48933
517-335-7659

For the County:

MR. HAIDER KAZIM (P66146)
310 W. Front St.
Traverse City, Michigan 49684
231-922-1888

REPORTED BY:

Karen M. Copeland
CSR-6054, RPR
(231) 922-2773

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I N D E X

WITNESSES

None

EXHIBITS

None

1 Bellaire, Michigan

2 Friday, April 23rd, 2021 - at 9:06 a.m.

3 (Court, counsel and plaintiff present)

4 THE COURT: Bailey versus Antrim County.

5 This is an Antrim County case, it is on the
6 docket this morning because we have three objections that
7 have been filed with regard to proposed orders. The
8 objections have been filed by the plaintiff, and the
9 orders were prepared by the intervening defendant. This
10 is File 20-9238-CZ.

11 The Court's had a chance to review the
12 objections, as well as the response that came in from the
13 intervening defendant on each, and also the joinder by
14 the defendant, Antrim County, with regard to the
15 intervening defendant's objection -- or, pardon me,
16 intervening defendant's support in opposition to the
17 objection.

18 Let's go ahead and begin with appearances. We
19 have Mr. Bailey here, his attorney is Mr. DePerno, whose
20 here. We have Mr. Kazim here for Antrim County. And,
21 Mr. Grill is here for the intervening defendant.

22 All right. Mr. DePerno, these are your
23 objections, so let's go ahead and go through them. We'll
24 start with the proposed order granting the joint motion
25 to codify Court ordered discovery procedures.

1 MR. DEPERNO: Okay.

2 Yeah, this was I think rather simple in our
3 objection. The proposed order had stated that the April
4 8th discovery deadline remained in place, and based on
5 the transcript that's not what the Court ordered. So, we
6 objected to that language.

7 And, we objected to the language that said the
8 future discovery time limits will be provided by Michigan
9 Court Rules, I think the Court specifically said 28 days.

10 So those were our objections as to that one.

11 THE COURT: All right.

12 Mr. Grill.

13 MR. GRILL: Your Honor, I don't have too much
14 to add other than what was in our response. I think we
15 provided the relevant portion from the transcript saying
16 what the Court actually said, I think it's pretty clear,
17 that the Court ruled both that their -- the current
18 discovery deadline would remain in place and that if Mr.
19 DePerno wanted to file a motion for -- to extend
20 discovery he could do so and the Court would decide that
21 potential motion at the time.

22 And, then as far as the Court Rules versus 28
23 days, again, I think I have said what I need to say on
24 that, unless the Court has any questions for me.

25 THE COURT: I don't.

1 Mr. DePerno, any response?

2 MR. DEPERNO: No, other than what we've written
3 in our objection.

4 THE COURT: All right.

5 Let me pull up the proposed order, just a
6 moment.

7 I've reviewed the proposed order, I think it is
8 consistent with the decision that I made on the record.
9 I think it does comply -- pardon me, it does accurately
10 reflect the decision. The only issue at all, I think, is
11 with regard to the April 8th discovery deadline, but that
12 was what I intended, I think that is set forth in the
13 transcript. So, as a result the objection is overruled
14 with regard to that proposed order.

15 I will go ahead and execute that document, and
16 we've already got the seven day rule applied here. So,
17 again, I will go ahead and execute the proposed order.
18 Just one moment, make a note.

19 Let's go ahead and go to the next issue, and
20 this is the joint motion to compel discovery. The order
21 was filed on the 5th of -- let's see, the 5th of April,
22 there was an objection filed on the 6th.

23 Let's go to you, Mr. DePerno.

24 MR. DEPERNO: So, I think there were a number
25 of problems with this order. I mean, first, the -- I

1 think the order said that the motion was denied; I
2 believe it was granted in part and denied in part, I
3 tried to correct that.

4 Interrogatory 2, the Court did not state
5 anything not provided by plaintiff will not be admitted
6 into evidence in this case, that language is incorrect.
7 The Court only limited its ruling to the fraud
8 allegation. The Court stated any matter that is not
9 provided in response to Interrogatory 2 will not be
10 admitted into evidence relating to the material fraud
11 allegation. So, the order proposed was more broad
12 sweeping. And, then the Court later stated that any
13 requirement to supplement would be subject to being
14 analyzed for admission as evidence.

15 And then Interrogatory 3 stated that plaintiff
16 -- the ruling on Interrogatory 3, the Court stated that
17 plaintiff should provide all responsive discovery with
18 regard to its defense of human error, I think that was
19 incorrect as we have stated in the objection.

20 As to Interrogatory 8, the Court stated that
21 the plaintiff should supplement its response with regard
22 to Interrogatory 8 with a one or two sentence explanation
23 as to the experience each expert has or perhaps does not
24 have with regard to election technology, so I just tried
25 to correct that language.

1 And, then, we pointed out that the order had
2 not provided a timeframe as to the response, and we think
3 there should be a timeframe in there for plaintiff to
4 respond to Interrogatories 1, 2, 4, 7, 9, and request to
5 produce 1 and 3 through 8.

6 So we think our proposed order is more accurate
7 than what the defendants proposed.

8 THE COURT: All right. Let's go ahead and hear
9 from you, Mr. Grill.

10 MR. GRILL: Your Honor, again, we've done -- I
11 think said about everything we could say in our response.
12 When I drafted the order I was using my notes not the --
13 and, I didn't refer to the transcript, although since
14 looking at the transcript I think I did a pretty good job
15 for 2, 3 -- for Interrogatories 2 and 3.

16 In response to Interrogatory Number 2 as far
17 as --

18 THE COURT: We're losing you, Mr. Grill.

19 MR. GRILL: I apologize.

20 THE COURT: Mr. Grill, we're losing you a
21 little bit.

22 MR. GRILL: Okay.

23 THE COURT: That's all right.

24 Go right ahead.

25 MR. GRILL: In regards to Interrogatories 2, 3

1 and request to produce Number 2, I thought we did a
2 pretty good job looking at the transcript, I think that's
3 pretty much what the Court ruled.

4 I will acknowledge that we missed Interrogatory
5 Number 8 that amended and included into the order -- as
6 far as why there wasn't a time to respond included, it's
7 because the Court didn't say anything about that, I would
8 have happily added something on the basis of a
9 stipulation if Mr. DePerno would have contacted me, but
10 that's not what happened.

11 So, other than that --

12 THE COURT: All right.

13 Do we have an agreement with regard to a
14 period? Can we add something to the order so that we
15 don't have to come back and argue with regard to the time
16 period for plaintiff to respond?

17 MR. GRILL: I think if I understand him, I
18 think the Court's -- when we last were in front of the
19 Court on Mr. DePerno's motion to compel the Court gave us
20 28 days, I am happy to allow the same time period. I
21 think there is some housekeeping matters we need to do
22 with dates with the rest of the order, so.

23 THE COURT: All right. Mr. DePerno, I'm
24 assuming you wouldn't object to 28 days?

25 MR. DEPERNO: No.

1 THE COURT: All right. Well, the Court will
2 modify the proposed order to indicate that by agreement
3 of the parties we will require responses pursuant to the
4 order within 28 days.

5 As to the remaining issues, it looks like we in
6 the proposed order we missed the discussion regarding
7 Number 8, I will go ahead and review that language. And,
8 I also want to review Number 2 again.

9 Mr. DePerno, you've sent a proposed order on
10 this particular issue, is that correct?

11 MR. DEPERNO: I did as to each objection I
12 included our proposed order. In this situation, Exhibit
13 2, as required by the Court Rule we have our own
14 alternate proposed order now.

15 THE COURT: All right. I recognize that.
16 what I'll do is review both orders and I will
17 sign or modify one, and that will be taken care of today.

18 Mr. Kazim, I've been ignoring you, I'm assuming
19 if you have any issues you will pipe up, sir.

20 But, I know that you filed obviously an
21 agreement with the position of the intervening
22 defendants.

23 MR. KAZIM: Thank you, yes.

24 THE COURT: Go ahead, sir.

25 MR. KAZIM: I have nothing to add, thank you.

1 THE COURT: All right, thank you.

2 Let's move to the third issue, which is the
3 objection that was filed with regard to the protective
4 order regarding discovery documents.

5 Let's go ahead and start with you, Mr. DePerno.

6 MR. DEPERNO: Thank you.

7 This was a motion that on its face requested a
8 protective order as to certain documents which were
9 described in the motion as a small number of documents
10 concerning physical security at the polls and incident
11 reporting procedures that they were withholding, and that
12 was the limited issue as to the motion for protective
13 order. The order that has been proposed by the
14 defendants is much more wide range and broadly
15 encompassing what appears to be every document that the
16 defendants may possibly produce in this case. And, so,
17 we have a situation where their order does not comport
18 with the motion filed, as I say, it was a limited issue
19 in their motion and now we have suddenly a protective
20 order that covers everything that they could possibly
21 produce. And, I think the order should be limited to the
22 relief requested in the motion.

23 THE COURT: All right.

24 Let's go ahead and hear from you, Mr. Grill.

25 MR. GRILL: Thank you, your Honor.

1 We had attached to our motion the proposed
2 stipulated order that we offered to Mr. DePerno. And,
3 then, when the Court ruled on the motion, reading from
4 Page 63 of the transcript, the Court ruled, so the motion
5 is granted, a protective order is issued --

6 THE COURT: We lost you again.

7 MR. GRILL: -- I've had a chance to review the
8 proposal, it appears appropriate. If you can just submit
9 that under the actual electronic filing service, the
10 Court will go ahead and execute that.

11 That's what we did, we took the order that we
12 had attached to the motion and we submitted it to the
13 Court, making a minor adjustment so it no longer
14 identified itself as a stipulated order and instead
15 referred to the hearing and motion that we had. I also
16 note in the language of the order the words gives us a
17 mechanism to address future issues if we need to come
18 back to the Court for a new protective order in the event
19 that something requires confidentiality or personally
20 identifiable information of some subject. So, I don't
21 really understand what the issue would be even if the
22 Court had not already told us to enter this order.

23 THE COURT: Mr. Kazim, anything?

24 MR. KAZIM: Thank you, yes.

25 Your Honor, I just want to add that it's not

1 unusual, as the Court is aware, in civil cases for a
2 protective order to be entered to protect the
3 confidentiality of certain documents. And, certainly at
4 the last hearing that we were here on discovery issues
5 before the Court on April 12th, at least on one instance,
6 regarding Dominion manuals, the Court ordered disclosure
7 subject to a protective order. And, I think the
8 protective order that was submitted with the proposed
9 order obviates the need for coming to this Court at a
10 future occasion for entry of another protective order.
11 This protective order, unlike Mr. DePerno's
12 representation, does not cover every document but instead
13 is limited to documents that specifically begin to
14 comprise the security of elections in the State of
15 Michigan.

16 So, I think it's an appropriate order and it's
17 not at all unusual on the type of orders that are entered
18 in civil cases.

19 Thank you.

20 THE COURT: All right.

21 Mr. DePerno, response?

22 MR. DEPERNO: The issue is not whether it's
23 simple or it's not unusual or it's standard or anything
24 like that, the issue is simple. Defendants seem to do
25 this in this case, they file a motion, the motion is

1 limited to a specific issue, we argue the specific issue,
2 and then their orders are much more broad ranging. They
3 try to entice the Court during hearings to talk about
4 other things or try to incorporate dicta into orders and
5 then we end up with orders that are more broad ranging
6 than what is actually argued in the motion. And, I
7 think, just procedurally, we have to have orders that
8 stick to the issues raised in the motion and not try to
9 expand our orders as we see fit afterwards.

10 Thank you.

11 THE COURT: All right, thank you.

12 I will reviewed the proposed orders that have
13 been submitted by Mr. DePerno, and of course the order
14 submitted by Mr. Grill, with regard to this motion, I'll
15 execute or modify one of them and enter it today.

16 Okay. Gentlemen, is there anything else we can
17 address since we're all together today?

18 Mr. DePerno.

19 MR. DEPERNO: Not from plaintiff's perspective.

20 THE COURT: All right.

21 Mr. Grill.

22 MR. GRILL: Your Honor, I just want to bring to
23 the Court's attention, since the last hearing we've
24 looked at the calendar and realized there is some
25 upcoming dates that kind of -- that are going to become

1 -- that are going to be coming soon. Under the Court
2 case management order there is trial documents are due on
3 May 4th, there is a settlement conference on May 11th,
4 and the trial date is set for June 7th. Of course with
5 the Court's recent orders on finishing up discovery with
6 Mr. DePerno's discovery and with depositions those dates
7 seem to kind of conflict now. And, so, we would just
8 bring to the Court's attention and suggest those dates be
9 adjusted accordingly.

10 THE COURT: All right.

11 As to adjustment of the dates, Mr. DePerno, can
12 I hear from you?

13 MR. DEPERNO: I would agree with that, that we
14 do need adjustments to the dates. You know, for
15 instance, we have a motion on Monday to adjust the day
16 for the summary disposition issue, which also seems to
17 conflict with the idea of conducting discovery and doing
18 the depositions. I'm not trying to argue that now,
19 that's for Monday, but I agree that dates need to be
20 moved and perhaps we should think about it over the
21 weekend and have this discussion Monday morning.

22 THE COURT: Mr. Kazim, do you have a position?

23 MR. KAZIM: I do tend to agree with respect to
24 the settlement conference date and the trial documents
25 date, your Honor, as well as the trial date considering

1 that we have a bunch of depositions that are still in the
2 process of being scheduled. And, it appears that we will
3 not be ready to submit the Courts with trial documents or
4 even have a productive settlement conference on May 11th.

5 THE COURT: All right.

6 well, it isn't unreasonable given the rulings
7 that we've made with regard to discovery to consider
8 these things. I've been very clear with the parties that
9 I wanted this resolved as soon as possible, we have a
10 six-month deadline that the Court Rules impose on
11 injunctive matters. But, we certainly have the ability
12 with the agreement of parties or by order of the Court to
13 venture from that a little bit based on the complexity of
14 the case. This is a relatively complex matter so I'm not
15 opposed necessarily to some adjustment of those dates.

16 Let's go ahead and have a more fulsome
17 discussion of this Monday when we talk about the motion
18 to adjourn, the motion for summary disposition, and we
19 can bring all those issues together and draft one of
20 those large orders that covers multiple subjects.

21 Mr. DePerno, all right?

22 MR. DEPERNO: Appreciate it.

23 THE COURT: We will see everyone Monday and
24 we'll go through that particular issue along with the
25 other matters that are on the docket.

1 MR. DEPERNO: Take care.
2 THE COURT: Anything else for today, Mr.
3 Kazim?
4 MR. KAZIM: None for me, your Honor, thank you.
5 THE COURT: Mr. Grill.
6 MR. GRILL: Nothing for me, your Honor.
7 THE COURT: And, Mr. DePerno.
8 MR. DEPERNO: Nothing.
9 But, have a nice weekend everyone.
10 THE COURT: You too.
11 And you'll have orders from me by the end of
12 the day.
13 Take care everyone.
14 (9:27 a.m. - proceedings concluded)

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CERTIFICATE OF OFFICIAL COURT REPORTER

STATE OF MICHIGAN
COUNTY OF ANTRIM

I, Karen M. Copeland, Official Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that this is a true and correct transcript of my stenotype notes with the assistance of Computer-Assisted Transcription to the best of my ability of the proceedings held via Zoom before the Honorable Kevin A. Elsenheimer, Circuit Court Judge in the matter of BAILEY v. ANTRIM COUNTY, File No. 20-9238-CZ, on Friday, April 23, 2020.

S/: Karen M. Copeland
Karen M. Copeland, CSR-6054, RPR
Official Court Reporter

Dated: This 5th day of August, 2021

Exhibit 23

Transcript, April 26, 2021

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STATE OF MICHIGAN

THIRTEENTH CIRCUIT COURT (ANTRIM COUNTY)

WILLIAM BAILEY,
Plaintiff,

Case No. 20-9238-CZ

v.

ANTRIM COUNTY,
Defendant,

SECRETARY OF STATE JOCELYN BENSON
Intervenor-Defendant.

-----/

MOTIONS
(VIA ZOOM)

Before the Honorable KEVIN A. ELSENHEIMER, Circuit Judge
Bellaire, Michigan - Monday, April 26th, 2021.

APPEARANCES:

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WITNESSES: PLAINTIFF
(None)

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WITNESSES: DEFENDANTS
(None)

EXHIBITS:
(None)

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Bellaire, Michigan

Monday, April 26, 2021 - 1:30 PM.

(Court, counsel, and plaintiff present)

THE COURT: All right. Let's go ahead and go on the record in the matter of Bailey versus Antrim County. This is file 20-9238-CZ. It is an Antrim County case. We have two motions filed by the plaintiff today to hear. The first is a motion for leave to amend an expert witness list. And, second, a motion to adjourn the upcoming hearing on defendants' motion for summary disposition.

Just a follow-up from last week, the 23rd, we had a series of objections that we argued -- the Court indicated that it would sign orders once it had a chance to review them. Those orders actually came through -- or proposed orders, I should say, actually came through this morning. So I have not had a chance to -- or had not had a chance to review them on Friday. I will review them once we're complete today, so those should be entered shortly.

With us today we have Mr. Deperno, for the plaintiff. We have Mr. Grill for the state defendants. We have Mr. Kazim for Antrim County. And Mr. Bailey is here as well.

I've had a chance to review the pleadings

1 that have been filed for today's arguments. I think
2 we can probably argue both of these at the same time.
3 Plaintiff, if you'd like to go ahead and begin. Just
4 a comment or two.

5 I'd like you to focus in on the arguments
6 that have been raised by the defense, in particular.
7 In their joint briefs, they discussed with regard to
8 the motion for summary disposition, that they are not
9 factual issues being -- for which summary disposition
10 is being claimed. The motions have been brought
11 pursuant to 2.116(C)(4) and (C)(8), and both of those
12 circumstances, as I recall, you are required to accept
13 the pleadings that have been filed as true in order to
14 make an analysis regarding (C)(4) and (C)(8), which
15 means factually there wouldn't appear to be an awful
16 lot of necessity to extend discovery.

17 So if you would address that argument raised
18 by the defendants in your argument for that motion, I
19 would appreciate it. You may go ahead and begin.

20 MR. DEPERNO: Thank you.

21 I'll start with the issue regarding the
22 amended witness list, if that's okay?

23 THE COURT: You may.

24 MR. DEPERNO: In terms of the amended
25 witness list, I -- I think what's -- what's most

1 important about this motion is that we were not
2 presented with the expert report from J. Alex
3 Halderman until March 26th, 2021. And then we had to
4 actually scramble on our side to find certain experts
5 who could discuss the issues raised by Mr. Halderman
6 in his report. And those people we've identified were
7 James Penrose, Ben Cotton, Jeffrey Lenberg, Seth
8 Keschel, and Dr. Douglas Frank, all dealing with
9 issues raised by J. Alex Halderman.

10 And the defendants have responded that
11 Mr. Halderman's report only relates to refuting the
12 statements made by the ASOG team, and that's just not
13 accurate. His report is much more substantial than
14 that. He makes many findings regarding the actual
15 election, how it was run and -- so his report expands
16 well beyond anything the initial report from ASOG
17 included that was put out on December 14th.

18 I'll also point out that we asked the
19 defendants in a discovery request on December 23rd, to
20 provide us with any information they had that might
21 refute the actual report we put out on December 14th.
22 And they responded that they anticipated that J. Alex
23 Halderman would provide an expert report, but they
24 never actually followed up on that after December
25 13th. We never got any updated discovery from them.

1 We didn't get anything from them until March -- as I
2 said, March 26th, 2024 [sic], so it took them three
3 months to actually produce that report and it came
4 right at the end of discovery, as you know.

5 And I would also point out that their
6 disclosures or lack of disclosures in this case, under
7 MCR 2.302, would have required that they provide us
8 with the anticipated subject areas of any expert
9 reports and we never received anything from them. So
10 I think it's perfectly reasonable that we would be
11 allowed to add these expert witnesses, as we've
12 requested, because they've actually done a significant
13 amount of work in -- in reviewing Mr. Halderman's
14 report and rebutting many facts that he lays out in
15 it, and much of his analysis is also rebutted by
16 these -- by these experts that we've proposed.

17 So I think in order for this Court to --

18 THE COURT: Mr. Deperno, if I may, the
19 defenses' brief indicates that the reports that you
20 did submit as -- as proposed exhibits to a motion or a
21 brief, pardon me, that those proposed reports must
22 have been prepared in advance of the submission of the
23 Halderman report.

24 Is that accurate? Or did those reports
25 come, as you're indicating to me right now, as a

1 result of the Halderman report?

2 MR. DEPERNO: Yeah, those reports did not
3 come prior to the Halderman report. Those reports
4 came after. Those reports came when we submitted our
5 response to a motion for protective order. So
6 that's -- that would not be accurate. Our -- those
7 reports were not prepared until after the Halderman
8 report came out.

9 THE COURT: Okay. I interrupted you, you
10 can continue, please.

11 MR. DEPERNO: That does raise another point.
12 The defendants seem to indicate that -- that those
13 reports are solely what the Court should focus on and
14 they are not. Our -- these people have done a lot of
15 work and -- in terms of refuting the statements made
16 by Mr. Halderman, his analysis, his conclusions, and
17 his actual methods of conducting his examination, all
18 of that is not in reports that they've even completed
19 yet, because it's so substantial in terms of how broad
20 Mr. Halderman's report was.

21 So these are experts that we need. They
22 have done substantial work, and they certainly would
23 enlighten the Court in terms of the information
24 Mr. Halderman has produced, and they are essential to
25 our case and that's why we ask that the Court allow us

1 to amend our expert witness list. And, again, really
2 focusing on the fact that the defendants had since
3 December 23rd to give us information. In their
4 response to discovery, they alluded to the fact that
5 Mr. Halderman would do a report, but didn't produce it
6 until three months later, till right at the end of
7 discovery, giving us very little time to refute the
8 allegations he uses and the testing methods that he
9 employed.

10 THE COURT: All right. If you would like to
11 go ahead and continue to argue the motion to
12 adjourn --

13 MR. DEPERNO: Yeah.

14 THE COURT: -- you can go right ahead and
15 proceed.

16 MR. DEPERNO: So the -- the motion to
17 adjourn -- I think the defendants -- I'll focus on the
18 issue you requested. I think the defendants are wrong
19 in their analysis of their own motion for summary
20 disposition. Although I agree with you, that a (C)(8)
21 motion would test the -- the -- the complaint itself
22 and that the Court would accept allegations as true,
23 their motion is actually quite expansive and -- and I
24 would say more of a disguised (C)(10) motion in the
25 way that they lay out their allegations and the facts

1 that they claim.

2 You know, for instance, they claim that
3 plaintiff's claims are moot in their first argument.
4 They claim that the Court's already granted the relief
5 plaintiff has requested. That's not true. There's
6 factual allegations actually in that argument
7 regarding what the Secretary of State has done
8 regarding her audits -- what she calls audits.

9 We dispute that what she's done is actual
10 audits. So there's significant factual allegations
11 just in that request alone. She -- they make
12 arguments regarding standing that are actually
13 fact-based. They argue -- they make claims about
14 damaged ballots during the election.

15 They make claims about certain types of
16 proposed -- or some of the proposals that were set
17 forth. But some of these arguments are fact-based as
18 well, in terms of what ballots were damaged in Central
19 Lake and what ballots were not, which ballots were
20 counted -- those are all factual-based arguments. In
21 their argument regarding Article II of the
22 Constitution, these are fact-based arguments that they
23 make regarding the voting machines and how they
24 operated -- and, again, I'm just taking their own
25 motion and their brief that they filed, but these are

1 the arguments they're citing in terms of the actual
2 way that the -- the ballots were -- were read, were
3 scanned, and how the -- the voting machines read those
4 ballots. Again, those are fact-based

5 They make an argument regarding the purity
6 of elections clause. And they talk about,
7 specifically, allegations of fraud and other
8 misconduct. And those are fact-based arguments,
9 specifically regarding the -- the misconduct that
10 we've alleged, and the misconduct that actually was --
11 that occurred in this case by Antrim County, Sheryl
12 Guy, for instance, those are fact-based arguments.
13 And then at -- moving forward, I've just written a
14 bunch of notes on their motion.

15 They -- they make claims regarding
16 MCL 600.4545 and MCL 168.861. Again, in that
17 argument, they talk about fraud. The -- the type of
18 fraud that would be alleged, and the fraud that might
19 affect the outcome of an election. Those are
20 fact-based arguments, as they've presented them.

21 They talk about the irregularities in the
22 conduct of an election. Those are fact-based
23 arguments. And they -- this -- their entire argument
24 in that section is all about fraud and facts related
25 to the fraud in this case. So in -- so -- so I think

1 just based on their own motion and brief, there's many
2 facts that they set forth in that motion that expand
3 beyond 2.116(C)(8), and I think that's important.

4 So -- but, you know, importantly, I think
5 also, the -- the timing is suspect in this, in terms
6 of why the Court scheduled a motion for summary
7 disposition on the very day the Court had also set for
8 the defendants to respond to discovery? Clearly --
9 that seems in my mind, that it was not what the Court
10 was intending when the Court stated or rejected the
11 defendants' request to delay discovery. Certainly
12 if -- if the idea was that we -- the Court was
13 rejecting that, why would the Court schedule the
14 motion on the very day that their responses to
15 discovery would be due?

16 And that would substantially prejudice the
17 plaintiff -- I mean, throughout the -- this case, the
18 entire history shows us that, you know, we sent
19 Interrogatories Nos 2, 3, and 4 to the defendants and
20 later Interrogatories 5, along with requests to
21 produce. With Interrogatories 2, they missed the
22 deadline -- the seven-day deadline. Interrogatories
23 3, they missed the seven-day deadline to respond.

24 They didn't file their motion for protective
25 order until after the deadline for those two discovery

1 requests. And -- and -- so the -- the entire -- in --
2 in many senses, the -- the -- our discovery has been
3 protracted by the fact that the defendants did not
4 respond to our discovery. They filed their motion for
5 protective order. And we -- we got to the end here
6 and we still didn't get responses to the 2, 3, 4, and
7 5 -- the discovery requests, we had to resubmit
8 discovery to them to limit them to a certain number;
9 50 requests for production, 20 interrogatories each.
10 And we did that, and now their responses wouldn't even
11 be due until the day of the hearing on the motion for
12 summary disposition -- which means if the Court were
13 to grant it, we'd never get this discovery that was
14 actually due, you know, back in -- in February.

15 So the -- the defendants, I would say, have
16 done a great job of delaying responses to discovery,
17 and they're certainly going to benefit from that, and
18 the fact that they have a motion for summary that --
19 that is, in our opinion, a disguised (C)(10) motion,
20 because in many respects it's fact based. So I -- I
21 just -- I have to believe that the Court -- something
22 went wrong in terms of the way the Court scheduled
23 this -- this motion, because the scheduling of the
24 motion on the same day as the hearing -- or the
25 scheduling the motion on the same day that their

1 discovery responses are due, simply seems to
2 contradict what the Court was intending the day it --
3 it -- it required us to resubmit discovery, and the
4 day it told the defendants they would have 28 days to
5 respond.

6 Scheduling the motion for 28 days just --
7 it -- I don't think it comports with what the Court
8 was intending or -- it doesn't make any sense to me
9 why the Court did that.

10 THE COURT: All right. Thank you,
11 Mr. Deperno.

12 MR. DEPERNO: And that's why -- okay. Thank
13 you.

14 THE COURT: I -- I interrupted you, again,
15 I'm sorry. It happens on Zoom sometimes.

16 Was there anything else that you wanted to
17 add?

18 MR. DEPERNO: No, I was just going to say if
19 the Court had any questions. Otherwise I was -- I
20 think I was finished with my argument.

21 THE COURT: All right. Thank you, sir.

22 I'd like to hear from the defense, and who's
23 going to argue first? Mr. Grill, I assume?

24 Mr. Grill, would -- would -- would you
25 please focus in on this concept or idea that's been

1 raised by Mr. Deperno with regard to your motion,
2 which was brought pursuant to (C)(4) and (C)(8), and
3 whether or not it's a disguised (C)(10) motion? He's
4 accurate when he talks about the -- the language -- I
5 have read the motion.

6 You do certainly discuss the factual
7 elements of the case, factual disputes of the case.
8 Are you attempting to have this matter decided as
9 essentially a (C)(10) motion?

10 MR. GRILL: I guess, your Honor, if I can --
11 I'll just start with the Court's inquiry, then, and
12 say no. Our motion is explicitly brought on (C)(4)
13 and (C)(8), addressing the Court's jurisdiction of the
14 matter and I believe that pertains to the -- the
15 arguments regarding standing and mootness that we've
16 raised.

17 The (C)(8) part of it, we went through each
18 individual legal claim, each of the causes of action
19 in the complaint and addressed the legal deficiencies
20 in them. To the extent facts are referenced in them,
21 those are facts that are alleged in the plaintiff's
22 complaint.

23 We went out of our way to -- I think there
24 was one point where we made reference to a request to
25 admit for the limited purpose of demonstrating that

1 Mr. Bailey -- to contest that he doesn't live in
2 Central Lake Village. But that was only after we
3 established in the complaint paragraph 1 that -- where
4 Mr. Bailey alleges his address. So that's not even an
5 additional fact, it was merely corroboration, and if
6 the Court chooses not to -- to exclude that from
7 consideration entirely, it can do that and still reach
8 the conclusion we urge in our motion.

9 So the -- the motion that we've raised is
10 categorically not a factual motion. And to the
11 plaintiff's point that if there were some part of our
12 argument where it went beyond the facts alleged in the
13 complaint, or talked about some fact we hoped to prove
14 in this case, that would be a basis for denying that
15 part of our motion. It would not be a basis for
16 adjourning our -- the hearing on our motion -- our --
17 a motion for summary disposition. Beyond that, I
18 wanted to address Mr. Deperno's -- and I'm kind of
19 moving backwards here, since I know he stated with the
20 expert claim and I'm starting with the MSD arguments,
21 so I'll just kind of do reverse bookend here.

22 Regarding the Court's hearing being 28 days
23 and the date that discovery is due -- that's not
24 accurate to my understanding. May 10th is not the
25 date -- May 10th is the date for the hearing on our

1 motion, that is not the date that the discovery would
2 be due. Twenty-eight days from April 19th would have
3 been May 17th. Mr. Deperno actually served his
4 discovery on us just before midnight on April the
5 16th. So 28 days from that would be May 14th, which
6 is still not May 10th. So I'm not quite sure I follow
7 his argument in that respect.

8 The arguments Mr. Deperno described in
9 his -- as being fact-based, those are legal questions.
10 Whether or not the Secretary of State has conducted an
11 audit within the meaning of the Constitution is a
12 legal question, and an interpretation of the
13 Constitution. That is not a factual argument that
14 requires additional discovery.

15 To the extent that -- if the Court even
16 reached that question, that would be a basis, then,
17 for them to say there's a question of fact and we'll
18 address that (C)(10) at the conclusion of discovery,
19 but it doesn't stop this Court from hearing the
20 arguments and deciding the question as the matter
21 under (C)(8).

22 And I think that -- I really don't -- the
23 Court has obviously read our motion. I don't really
24 want to restate the arguments, unless the Court has
25 additional questions for me on motion to adjourn.

1 THE COURT: I don't, Mr. Grill. Thank you.

2 MR. GRILL: Okay.

3 THE COURT: Let's go to Mr. Kazim.

4 Mr. Kazim, do you wish to argue --

5 MR. GRILL: I'm sorry, your Honor, I was
6 going to --

7 THE COURT: I'm sorry, Mr. Grill, do you
8 have more? Please.

9 MR. GRILL: Yes. I was going to turn to the
10 motion for the leave for the amending the experts.

11 THE COURT: I was just trying to move right
12 past you, Mr. Grill. I'm sorry about that.

13 Let's hear your argument.

14 MR. GRILL: Okay.

15 THE COURT: Please.

16 MR. GRILL: Regard -- regarding the motion
17 to amend the expert list, again, this is a matter
18 for -- where the plaintiff has to show good cause and
19 there just isn't any good cause here. There's no good
20 reason that these experts weren't sought to have been
21 added during the time provided for discovery.

22 I know that Mr. Deperno has referenced --
23 talked about Professor Halderman's report in this
24 matter. That argument doesn't really hold up under
25 scrutiny, however. Professor Halderman's report is,

1 indeed, a very thorough report, but it is based on the
2 same images and the same information that was provided
3 to the plaintiff during his forensic examination back
4 in December.

5 Moreover, to the extent that there's
6 anything in Professor Halderman's report -- Professor
7 Halderman's report is basically a response to the ASOG
8 report that was provided by the plaintiff very early
9 on in this case. And to the extent that there's
10 anything in there that -- that requires additional
11 commentary from the plaintiff, I see no reason why
12 plaintiff's existing experts -- you know,
13 Mr. Ramsland, Mr. Waldron, his -- he's already got six
14 people listed as experts in this case, there's no
15 reason why any of them would not be capable of
16 providing the kind of rebuttal to Professor
17 Halderman's report when, in fact, Professor
18 Halderman's report was itself a rebuttal to their
19 report.

20 THE COURT: So, Mr. Grill, let me stop you
21 for a moment. You don't disagree that the plaintiff's
22 should have the opportunity to rebut the Halderman
23 report?

24 MR. GRILL: No. But, I -- I don't, your
25 Honor. And obviously we would prefer to see that

1 sooner rather than later, given the time frames that
2 we're trying to -- we're moving under. But -- and,
3 just again, that the -- the ASOG people have already
4 provided a report in this case, in which they opine
5 this is what we've concluded. This is what were --
6 the conclusions we were able to reach, based on the
7 forensic examination -- which is exactly what
8 Professor Halderman has done. I see no reason why
9 they would not be capable of providing that type of
10 rebuttal.

11 I would also note that the experts
12 Mr. Deperno seeks to add don't really appear to be
13 much in the way of a response for Professor Halderman.
14 I've read Dr. Frank's paper that he attached to his
15 response for protective order. It doesn't seem to
16 really address anything Professor Halderman had to
17 say. Similarly, with Mr. Penrose, or the Cyber
18 Ninjas, Mr. Logan's affidavit, that doesn't seem to be
19 a rebuttal to Professor Halderman. It seems to be new
20 material they seek to talk about, instead of the ASOG
21 report and the Professor Halderman report.

22 That's not rebuttal. That's -- that's, you
23 know, moving -- that's moving the goal post. And that
24 leads me to my final point, your Honor, which is that
25 at this point the expert witness list essentially

1 amounts to an ambush. Discovery is closed, we're
2 going to have new experts -- at an absolute minimum,
3 if Mr. Deperno is going to add these new experts, we
4 would need new discovery of the experts. And that
5 would only be fair.

6 We would need to have experts of our own to
7 respond to these new reports that they're making. We
8 would need to conduct depositions and discovery of the
9 new experts. We would need to take depositions and
10 discovery of our new experts.

11 We would essentially be starting this case
12 all over again. And that's exactly -- that's why
13 courts establish case management orders. That's why
14 there are deadlines. And there's been no
15 demonstration in the plaintiff's motion -- which is
16 two pages long, as to why there is good cause to -- to
17 amend the expert witness list at this late date.

18 THE COURT: Well, if there is demonstration,
19 it is the late filing of the Halderman report -- now,
20 I say late, it wasn't filed inappropriately, it was
21 filed within the discovery period, but it was at the
22 end of the discovery period. I think you would agree
23 with that. And that report -- at least given
24 Mr. Deperno's indication today, that there may have
25 been discovery that you responded to, apparently, that

1 was due in December, reflecting the report itself or
2 reflecting an analysis of his experts' report, doesn't
3 that provide some support for prejudice in terms of
4 his ability to secure effective rebuttal to the
5 Halderman report?

6 MR. GRILL: Well, again, your Honor, based
7 on what Professor Halderman says, no. Professor
8 Halderman was a -- there's a good chunk of that report
9 that specifically says this is what's wrong with the
10 ASOG report. It didn't really add new theories to
11 most of anything.

12 The best way I think you could -- you could
13 characterize Professor Halderman's report in short is,
14 that it -- it corroborates what the defendants have
15 been saying from the start of this case, that this
16 wasn't some grand fraud conspiracy, this was human
17 error; and that's exactly what Professor Halderman
18 found. And Professor Halderman's report, I think, was
19 fairly evenhanded. It didn't, you know, seek to
20 tarnish the truth in any respect. He was rather
21 candid at some points about some of the things he
22 thought the defendants could do better -- which,
23 again, I think lends credibility to it.

24 But nothing here suggests that there's a new
25 theory that Professor Halderman propounded or added to

1 this case at the last minute. The best thing -- the
2 only thing he really has done here is explain and
3 provide -- you know, citations for everything the
4 defendant has been saying, and to respond in specific
5 order to the ASOG report. If Mr. Ramsland and
6 Mr. Waldron want to submit a rebuttal on the behalf of
7 ASOG to that, I could see a circumstance where that
8 would be appropriate. I think, again, timing being an
9 issue here, but, you know, I think with -- since the
10 Court -- we're already looking here into middle of May
11 to conclude the written discovery Mr. -- Mr. Deperno
12 has propounded, that doesn't -- it seems to me like
13 there could be a deadline for rebuttal well before
14 that, that would give Mr. Deperno and his team an
15 opportunity to respond to that with his existing
16 experts.

17 But adding new experts at this stage of the
18 game, I think just -- it sets us back to square one
19 because we -- what we would have to do in response to
20 that.

21 THE COURT: All right. Thank you,
22 Mr. Grill.

23 Anything further on either motion?

24 MR. GRILL: I don't believe so, your Honor.
25 I know there are some housekeeping matters we need to

1 breach at the end, once we've got through motions.

2 THE COURT: Very good. Let's go to
3 Mr. Kazim.

4 Mr. Kazim, do you have a response you would
5 like to add to either motion?

6 MR. KAZIM: Thank you, your Honor.

7 I echo, Mr. Grill's arguments on the MSD
8 motion, so I don't have anything new to add on that.
9 With respect to the motion to amend the expert witness
10 list, what I would just add is that under the Court's
11 civil scheduling order, the only date that was
12 established was of December 23rd, by which the parties
13 had to name their expert. So, admittedly, there was
14 no specific date provided to -- in the Court's
15 scheduling order regarding the submission of the
16 expert witness report. The Halderman report, like
17 Mr. Grill stated, I -- the issue is not about the
18 plaintiff's right to refute or to rebut the Halderman
19 report.

20 The issue is the addition of these
21 additional experts, presumably for the purpose of
22 forming a rebuttal. And that is where the
23 disagreement lies, because if you just look at the
24 Penrose report, it goes into a whole new theory about
25 some algorithm called sixth degree polynomial. I

1 would admit to the Court that nowhere in
2 Mr. Halderman's report is there a reference to any
3 such algorithm, or any such theory that is advanced by
4 Mr. Penrose.

5 So clearly that is -- that report is not a
6 rebuttal of Mr. Halderman's report. The -- the -- the
7 Halderman report, as Mr. Grill stated, is a direct --
8 is a direct response to the ASOG report, based on the
9 forensic images that were obtained. Mr. -- the
10 Penrose report, the Frank report, go well beyond --
11 well beyond the scope of the forensic images and the
12 Halderman report. And to the extent that plaintiff,
13 as the Court asked, has a right to rebut the Halderman
14 report, they already have named their experts, which
15 is the ASOG team that analyzed the images, that took
16 the images, and that prepared the report.

17 So that is the -- that is the avenue
18 available to the plaintiff by -- by using their
19 existing experts that they have named, who actually
20 prepared the report to which Halderman responded, to
21 rebut the Halderman report. Rather than identifying
22 new experts who have now gone well beyond the scope of
23 the Halderman report, or even the ASOG report, and are
24 now advancing new theories. So with that, I have
25 nothing further to add.

1 Thank you.

2 THE COURT: All right. Thank you,
3 Mr. Kazim.

4 Mr. Deperno, let's go back to you. I'd like
5 to hear your response, and I might have a couple of
6 questions for you. Please proceed.

7 MR. DEPERNO: In terms of the expert
8 witnesses, this idea that the Halderman report was
9 some kind of rebuttal to the ASOG report is just
10 factually incorrect. The ASOG report was essentially
11 a report that said that the Dominion Voting System is
12 designed to intentionally create errors in order to
13 influence an election, and then discussed some of the
14 security breaches that were discovered in analysis of
15 the Antrim County voting system.

16 The Halderman report goes well beyond
17 that -- that argument. He's talking about -- he's
18 actually making arguments to -- to support the
19 defendants' defenses. These weren't issues raised in
20 the ASOG report, but these are specifically new
21 issues -- the Halderman report is a report of the
22 defendants' defenses about human error and their
23 explanation of how the votes flipped on election night
24 from Jorgensen to Trump, to Trump to Biden, and how
25 Biden's votes went into an under vote category.

1 He goes through an entire analysis of how
2 that happened. He talks about the actual files within
3 the Election Management System and how it -- issues
4 were programed. How the compact flash drives were
5 programed. And -- so we went out and found experts to
6 rebut what he is actually saying.

7 We -- we're not stuck with and don't have to
8 stick with the ASOG team, who did a limited analysis
9 of the forensic images they looked at. We're now
10 talking about an entire report done by Halderman, that
11 goes well beyond what ASOG ever did, and tries to --
12 in a way, control the narrative of what the defendants
13 are saying, but support the Secretary of State's
14 argument that this was just human error, and the
15 safest election in the history of the country. These
16 new experts, Penrose, and Lenberg, and the others,
17 will rebut those allegations. They've actually gone
18 and looked into the forensics.

19 They've tracked through the Halderman report
20 paragraph by paragraph to rebut what he's actually
21 said. And we're entitled to bring those new experts
22 forth in order to rebut it -- particularly considering
23 that the Secretary of State didn't give us their
24 Halderman report until March 26th. They knew exactly
25 what they were doing in -- in -- regarding the timing

1 and when discovery was going to end. And -- and that
2 is supported by their responses to discovery from
3 December 23rd, when they specifically say that J. Alex
4 Halderman will, at some point, provide an expert
5 report.

6 We didn't get it till March 26th, and now we
7 get to test those theories that he sets forth. I
8 think that's perfectly reasonable for us to -- to do.

9 Do you have any questions on that issue?

10 THE COURT: Nope. I think you covered it.

11 MR. DEPERNO: And then in terms of the issue
12 on -- the summary disposition, just real briefly.
13 I -- I think the Court's read their motion for summary
14 disposition. I think it's pretty clear -- we know
15 that they're -- they're making fact-based arguments in
16 their motion. I have nothing to add on that.

17 Thank you.

18 THE COURT: All right. Thank you.

19 There are two motions that have been brought
20 before the Court. One is a motion to amend the
21 plaintiff's expert witness list to add a series of
22 additional experts that the plaintiff believes are
23 necessary in order to be able to appropriately rebut
24 the information contained in a report produced by the
25 defense. We've been calling it the Halderman report.

1 That report was produced at the end of the discovery
2 period.

3 And the report is in response -- at least
4 based on the arguments presented by the defense, in
5 response to the initial report produced last fall by
6 the plaintiff. We're calling that the ASOG report.
7 And the question is not whether the defense is --
8 pardon me, the plaintiff is entitled to rebut the
9 Halderman report -- clearly it is entitled to -- to
10 rebut same, but rather, whether the introduction of
11 experts to do so would create additional issues in
12 this case. The parties have had a long time to
13 research this case. They've gone through discovery.
14 They've gone through depositions. They should know
15 their case by now.

16 We shouldn't be getting into new issues at
17 this point. That's why we have case management orders
18 in place -- or civil scheduling orders in this
19 circuit. So the Court has discretion with regard to
20 scheduling issues, matters like this, the conduct of
21 trials, the conduct of discovery, and I use that
22 discretion in order to make sure that all parties have
23 access to the information that they need in order to
24 be able to effectively put forward or rebut, as
25 required, the claims that are made by either

1 themselves in their arguments in their initial
2 filings, their complaints, or answers that have been
3 provided to those complaints.

4 Here, it's my belief that given the -- the
5 fact that the Halderman report came as it did, at the
6 very end of discovery, the plaintiff should have an
7 opportunity to rebut. I don't find that the plaintiff
8 is required to limit himself to experts that he chose
9 to deal with the initial matters in his complaint.
10 The plaintiff should have the opportunity to choose
11 whatever experts are appropriate in order to deal with
12 the report from the defense as it comes in. And, of
13 course, there was no way to do that, but for an
14 amendment to the witness/exhibit list, assuming that
15 the plaintiff needed different experts.

16 Again, I'm not at the point in this case of
17 being able to discern, with any great detail, whether
18 or not the report that was produced by the defense
19 requires rebuttal, or what kind of rebuttal it does
20 require. That's not the job of the Court. That's the
21 job of the parties, and I am going to allow the
22 plaintiff to produce additional experts in order to
23 rebut and -- and, Mr. Deperno, please listen -- to
24 rebut the Halderman report. That does not mean that
25 we'll be going into new theories.

1 This is a point in the case where we are
2 testing the complaint. We are testing the theories
3 advanced by the complaint. And as a result, we -- or
4 I should say the motion for injunctive relief -- or
5 the complaint for injunctive relief, pardon me, as a
6 result, we're not going to be going into new areas at
7 this point. You may, of course, produce an expert to
8 rebut; however, the -- pardon me. You may produce
9 experts, as you've requested, in order to rebut the
10 Halderman report.

11 Now, that creates a timing issue. We are in
12 the midst of some extended discovery for very limited
13 purposes. And I'm going to go ahead and allow
14 extended discovery here -- meaning that, if there is
15 going to be a report issued by a rebuttal witness -- a
16 rebuttal expert, pardon me, that report needs to be
17 produced within 30 days of the date of the order in
18 this matter. The discovery of any report, any witness
19 identified, will need to be completed within 54
20 days -- pardon me, strike that. Will need to be
21 completed within 28 days of the production of any such
22 report.

23 And if we get to a point where the defense
24 believes, that for some reason, they need additional
25 experts, they're welcome to go ahead and ask the

1 Court, and we'll try to deal with them using the
2 same -- try to deal with those issues using the same
3 analysis that we have set forth today.

4 All right. So that motion is granted under
5 the terms that I've -- I've indicated.

6 And, Mr. Deperno, I'm going to allow you to
7 prepare the motion -- or the order on that.

8 Let's talk about the issue with regard to
9 summary disposition. The motion that has been brought
10 by the parties -- by the defense, is a (C)(8) motion
11 and it is also a (C)(4) motion. And I think it's
12 appropriate to review the standards associated with
13 each.

14 A motion brought pursuant to 2.116(C)(8) is
15 a motion that is essentially saying that the action
16 which started the case fails to state a claim upon
17 which relief can be granted, as a legal matter. It's
18 a test of legal sufficiency. And that's the case of
19 Spiek versus Department of Transportation, 456 331,
20 from 1998. And there are a series of other cases that
21 have, obviously, analyzed that, because we see an
22 awful lot of (C)(8) motions. Commonly, we see those
23 motions at the beginning of an action.

24 Here, that motion was brought later in
25 the -- in the case -- or in the course of discovery.

1 And no doubt, given the desire of the parties to
2 present their discovery and present their factual
3 witnesses to the Court and to the Court writ large,
4 meaning the public, it would be an easy thing to want
5 to move past the question of legal sufficiency.

6 But the fact is that the Court has an
7 obligation to review legal sufficiency issues when
8 they are raised; which is why, as I said, we do take
9 up (C)(8) motions throughout the entirety, frankly,
10 of -- of factual development of the discovery period
11 of the case itself. So as a result, and given that in
12 order to review a (C)(8) motion, I've got to accept
13 that the allegations made in the complaint are true, I
14 do believe that a (C)(8) motion should be heard when
15 it is brought. Similarly, with a (C)(4) motion, which
16 is a second basis that the motion for summary
17 disposition is brought -- the question of jurisdiction
18 is always a question of law. It's not a question of
19 fact.

20 And that's Eaton County Board of Road
21 Commissioners versus Schultz, 205 Mich. App. 371
22 (1994). And there are a series of other cases that
23 discuss the same point. So, again, I'm looking
24 squarely at the pleadings in looking at a (C)(4)
25 motion. So I do believe that I've got the ability to

1 go ahead and review that motion, regardless of the
2 progress of discovery.

3 And if they are cloaked (C)(10) motions,
4 then I may not have the ability to decide those
5 matters when we actually get to decisions on the
6 motions. So the motion to adjourn the motion for
7 summary disposition is denied.

8 Mr. Grill, if I can get an order from you on
9 that point, please. So I'll expect orders to come in
10 from both of you.

11 All right. Mr. Grill, you indicated that
12 there was a -- some issues that we needed to address
13 that might have come up at some other point?

14 MR. GRILL: Mostly for scheduling, your
15 Honor.

16 In light of some recent motions --

17 THE COURT: All right.

18 MR. GRILL: -- and I think we had a brief
19 discussion about this last Friday, with the -- we're
20 running into some conflicts with the current
21 scheduling order. For example, right now trial
22 documents are due May 4th. There's a settlement
23 conference May 11th, and the trial is currently
24 scheduled for June 7th.

25 Similarly, there's a dead -- we're going to

1 need a new deadline for motions for summary
2 disposition under (C)(10), once all of this remaining
3 discovery and whatever else with the experts is
4 completed, so that all of that may be included in the
5 motions. So that's -- that's what I wanted to bring
6 to the Court's attention, is just we -- we need some
7 updated scheduling.

8 THE COURT: All right.

9 Mr. Deperno, anything you'd like to add with
10 regard to the timing issue?

11 You're muted, sir.

12 MR. DEPERNO: Sorry. I said I would agree
13 with Mr. Grill, that we need some amendment on those
14 dates.

15 THE COURT: Well, here's the good news,
16 because you gentlemen are in agreement, I'm going to
17 leave it to both of you, along with Mr. Kazim's wisdom
18 and input, to come up with some proposed extensions.
19 I will agree to them. So what I'd like from you both
20 is a stipulated order or stipulated motion, pardon me,
21 and order that would provide some additional time for
22 a rescheduling of the settlement conference, the
23 trial, and a deadline for the motion for summary
24 dispositions under (C)(10).

25 And I'll go ahead and review it and if it

1 makes sense, I will sign it. And our office will set
2 some new dates. It's important for those of you who
3 don't practice in the 13th to -- commonly, to make
4 sure that you let our office know if you have vacation
5 schedules going into late summer and fall that might
6 interfere with dates that we would select. Mr. Kazim
7 already knows that, so.

8 All right. Is there anything else that we
9 need to address today?

10 MR. DEPERNO: Not from plaintiff.

11 MR. KAZIM: Not from Antrim County.

12 THE COURT: Defense?

13 MR. KAZIM: Thank you, your Honor.

14 MR. GRILL: I don't -- I don't have anything
15 additional, your Honor.

16 THE COURT: All right. Thank you, all.
17 We'll see you soon.

18 MR. DEPERNO: Bye.

19 MR. KAZIM: Thank you.

20 (At 2:17 PM, proceedings concluded)

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1 State of Michigan)

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I, JESSICA L. JAYNES, certified Court Reporter in and for the County of Antrim, State of Michigan, do hereby certify that the foregoing proceedings, consisting of 36 pages, held before the Honorable KEVIN A. ELSSENHEIMER, Circuit Court Judge, is a true and correct transcript of my stenotype notes with the assistance of computer-aided transcription, to the best of my ability, in the matter of WILLIAM BAILEY V ANTRIM COUNTY, ET AL. File No. 20-9238-CZ. Held Monday, April 26th, 2021.

Date: Monday, May 3rd, 2021

/s/Jessica L. Jaynes
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