UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TIMOTHY KING, *et al.*,
Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of the State of Michigan, *et al.*,
Defendants,

and

ROBERT DAVIS,
Intervenor Defendant.

Case No. 20-cv-13134
District Judge Linda V. Parker
Magistrate Judge R. Steven Whalen

PLAINTIFFS' OPPOSITION TO INTERVENOR DEFENDANT ROBERT DAVIS' MOTION FOR SANCTIONS TO BE ASSESSED AGAINST PLAINTIFFS AND PLAINTIFFS' COUNSEL PURSUANT TO THE COURT'S INHERENT AUTHORITY AND 28 U.S.C. §1927

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PLAINTIFFS' OPPOSITION TO INTERVENOR DEFENDANT ROBERT DAVIS' MOTION FOR SANCTIONS TO BE ASSESSED AGAINST PLAINTIFFS AND PLAINTIFFS' COUNSEL PURSUANT TO THE COURT'S INHERENT AUTHORITY AND 28 U.S.C. §1927

Robert Davis' Motion for Sanctions to be Assessed Against Plaintiffs and Plaintiffs' Counsel Pursuant to the Court's Inherent Authority and 28 U.S.C. §1927 (Dkt. 69) is wholly meritless. Plaintiffs have previously filed an opposition to other §1927 sanctions motions filed by other parties. Dkt. 85. For the reasons explained in that Brief and for the reasons stated more fully in the Brief that follows, the motion for sanctions should be denied.

BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO INTERVENOR DEFENDANT ROBERT DAVIS' MOTION FOR SANCTIONS TO BE ASSESSED AGAINST PLAINTIFFS AND PLAINTIFFS' COUNSEL PURSUANT TO THE COURT'S INHERENT AUTHORITY AND 28 U.S.C. §1927

I. Whether Plaintiffs' counsel may be sanctioned under 28 U.S.C. §1927?

II. Whether Plaintiffs' counsel may be sanctioned pursuant to this Court's inherent authority?

Controlling Authority

Cases

Beverly v. Sherman, No. 2:19-CV-11473, WL 2556674, at *1 (E.D. Mich. May 20, 2020)

Carmack v. City of Detroit, No. 18-CV-11018, 2019 WL 4670363, at *9 (E.D. Mich. Sept. 25, 2019)

Holmes v. City of Massillon, 78 F.3d 1041, 1049 (6th Cir. 1996)

Jones v. Cont'l Corp., 789 F.2d 1225, 1232 (6th Cir. 1986)

Metz v. Unizan Bank, 655 F.3d 485, 489 (6th Cir. 2011)

Mys v. Michigan Dep't of State Police, 736 F. App'x 116, 117 (6th Cir. 2018)

Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984)

Statutes

28 U.S.C. §1927

BRIEF IN SUPPORT

INTRODUCTION

Sanctions are appropriate under 28 U.S.C. §1927 only when an attorney "unreasonably and vexatiously" multiplies the proceedings. Here, it is Intervenor Davis who has continued to multiply the proceedings through obstruction and frivolity, not counsel for Plaintiffs. Indeed, Plaintiffs have noted and sought dismissal of this matter, as the relief requested has become moot. Yet, Davis continues a campaign of obstruction by contesting the dismissal of the case as to him, even though the litigation remains in the early stages and the parties have yet to begin discovery. While this obstruction is unfortunate, it is hardly surprising: local courts are quite familiar with frivolous filings from Davis and his counsel.

For the reasons that follow, Intervenor Davis' motion for sanctions should be denied.

BACKGROUND

A. The cyber war on our election system is a bipartisan concern, not a Republican phantasm.

The allegations which form the basis of Plaintiffs' requests for injunctive and declaratory relief in this case arise out of well-documented, bipartisan concerns about the security of our electronic voting systems in America. Politicians and industry experts alike have sounded the alarm about our systems' sweeping vulnerabilities.

As University of Pennsylvania Security Researcher Sandy Clark warned in a recent HBO documentary,

> I feel like we are in terrible danger of losing what it means to be a democracy. If elections can be altered subtly, they can be altered in a way that is undetectable, how does one trust the results of their election? And democracy functions on trust. Without that trust, things descend into chaos and anarchy. Those of us who know how vulnerable … the voting systems are in these elections are terribly afraid right now.

Kill Chain: The Cyber War on America's Elections (HBO 2020).[1] Among the cybersecurity experts who have spoken out about this country's dangerously "hackable" electronic voting system is University of Michigan's own Professor J. Alex Halderman. Following allegations of Russian interference in the 2016 U.S. Presidential election, Professor Halderman testified about election security before the U.S. Senate's Intelligence Committee. During an exchange with Intelligence Committee Chair Senator Richard Burr (R-NC), Professor Halderman described how easy it is to hack into an electronic voting machine whilst remaining undetected. When asked by Senator Burr whether he was caught when he and his colleagues hacked election systems, Dr. Halderman responded:

> The one instance when I was invited to hack a real voting system while people were watching was in Washington, D.C., in 2010, and in that instance, it took less than 48 hours for us to change all the votes, and we were not caught.

[1] For the Court's reference, Ms. Clark's comments appear at 56:03.

Kill Chain: The Cyber War on America's Elections (HBO 2020).[2] In a similar vein, Clark explained to a room full of hackers at DEFCON, the world's largest hacking convention, how one could easily corrupt a voting machine by simply plugging an infected memory stick into the machine:

> 'Cause one of the things that you can do with these machines is install malware on whatever the memory media is. That will go back and infect the back end, vote tabulating, and next year's ballot design systems for years to come because the software doesn't get upgraded. Your malware could stay there forever and no one would know it was there.

Kill Chain: The Cyber War on America's Elections (HBO 2020).[3] These real vulnerabilities—not Plaintiffs' lawsuit seeking to expose and to remedy these vulnerabilities—have undermined American confidence in our country's democracy.

Democratic Senators Elizabeth Warren (D-MA) and Amy Klobuchar (D-MN) have been particularly notable voices in the effort to expose electronic voting system vulnerabilities and to improve voting security. Indeed, on March 27, 2019, Senators Klobuchar, Mark Warner (D-VA), Jack Reed (D-RI), and our own Gary Peters (D-MI) penned a letter to the Chief Executive Officers of the three largest election equipment vendors—including Dominion Voting Systems—expressing their concerns about voting machine vulnerabilities:

> The integrity of our elections remains under serious threat. Our nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020 elections as they did the 2016 and 2018 elections.

[2] For the Court's reference, this exchange appears at 1:13:00 of the documentary.
[3] For the Court's reference, Ms. Clark's comments appear at 52:20 of the documentary.

> ….
> Despite the progress that has been made, election security experts and federal and state government officials continue to warn that more must be done to fortify our election systems. Of particular concern is the fact that many of the machines that Americans use to vote have not been meaningfully updated in nearly two decades. Although each of your companies has a combination of older legacy machines and newer systems, vulnerabilities in each present a problem for the security of our democracy and they must be addressed.
> ….
> The integrity of our elections is directly tied to the machines we vote on – the products that you make. Despite shouldering such a massive responsibility, there has been a lack of meaningful innovation in the election vendor industry and our democracy is paying the price.

See Exhibit 1, Letter to CEOs of Hart InterCivic, Inc., Election Systems & Software, LLC, and Dominion Voting Systems, pp. 3, 4. Likewise, on December 6, 2019, Senators Warren, Klobuchar, and Ron Wyden (D-OR), and Representative Mark Pocan (D-WI) authored a letter in which they expressed their concerns about a highly concentrated voting machine market plagued with security problems:

> In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana. In addition, researchers recently uncovered previously "undisclosed vulnerabilities in nearly three dozen backend election systems in 10 states." And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem." These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

Exhibit 2, Letter to Co-CEOs of H.I.G. Capital, LLC, p. 3.

Ultimately, contrary to Davis' assertions in his Motion for Sanctions, election security is not a right-wing issue or a left-wing issue. These prominent Democratic voices were not seeking "to undermine the People's confidence in our country's democracy" when they voiced their concerns about the security of our electronic voting systems. *See* Dkt. 69, p. 5. In filing this lawsuit and in compiling hundreds of affidavits from both fact and expert witnesses that support the truth contained therein, Plaintiffs' aim was not to disenfranchise a single legal voter but to protect the franchise of every American from manipulation by bad actors seeking to subvert the voters' will. Plaintiffs are simply fighting for every eligible American's right to exactly one vote, no more, no less.

B. Davis' intervention in this lawsuit and the instant Motion for Sanctions reflect a common pattern of "serial litigation" and "vexatious and frivolous filings."

Robert Davis is a serial litigator. As of three and a half years ago, he had filed "more than 100 lawsuits, going after public officials both obscure and well-known as part of his self-proclaimed quest for transparent honest government." *See* Exhibit 3, Joe Guillen, *A felon's crusade: Robert Davis vs. everybody*, Detroit Free Press, Aug. 11, 2017, p. 1.[4] However, in the midst of a "flurry of litigation" that Davis claims was aimed at "exposing the unethical conduct" of certain Highland Park School Board members,

[4] This article is also available online at https://www.freep.com/story/news/local/michigan/wayne/2017/08/11/felons-crusade-robert-davis-vs-everybody/512097001/ (last visited Jan. 4. 2021, 4:09 PM).

Davis embezzled nearly $200,000 of taxpayer money from the Highland Park School District:

> According to federal prosecutors, between 2006 and 2010, Davis used his influence as a school board member to arrange deals with three companies run by his friends. The companies would submit phony invoices to the school district, and large portions of the payments ended up in Davis' hands. He spent the stolen funds on restaurants, bars, travel and clothing. During its surveillance of Davis, the FBI would see him driving a silver Mercedes registered to him, according to court records.
>
> He pleaded guilty in September 2014 to stealing $197,983 from the district and for filing a false federal income tax return….
>
> The government said some of Davis' lawsuits were designed as a cover. He filed a flurry of litigation from 2008 to 2012 that were "intended to intimidate the (school) board and conceal Davis' embezzlement by distracting, dividing and manipulating the board," according to a memorandum prosecutors wrote to support their recommendation that he be sentenced to 18 to 24 months in prison.

Id. at 6-7. In the late 2000s, Davis was filing nearly a lawsuit every month against his fellow board members. *Id.* at 9.

Davis is represented on this Motion and in this matter by his long-time attorney, Andrew Paterson. This duo is well-known in Michigan state and federal courts. As the Sixth Circuit noted in a recent opinion, "Plaintiff Robert Davis and his attorney, Andrew Paterson, have a prolific history litigating cases in Michigan state courts and federal courts. Their filings could be defined, in many instances, as repetitive, vexatious, and frivolous." *Davis v. Johnson*, 664 F. App'x 446, 450 (6th Cir. 2016). Paterson is no stranger to sanctions disputes.

In a recent Report and Recommendation authored by Magistrate Judge Sally Berens of the Western District of Michigan, the court referred Paterson to Chief Judge Robert Jonker for discipline, providing a detailed history of the inappropriate litigation conduct that resulted in the courts of this state imposing sanctions on him. *See Blackwell v. Simon*, No. 1:18-CV-1261, 2020 WL 5351022, at *19-20 (W.D. Mich. Mar. 20, 2020), report and recommendation adopted, No. 1:18-CV-1261, 2020 WL 2553146 (W.D. Mich. May 20, 2020).[5] Although Chief Judge Jonker declined to discipline Paterson, he noted that "[t]he common theme of all the referenced cases [in Magistrate Judge Berens' Referral for Discipline] … is a pattern of activity involving vexatious and

[5] *See, e.g., Davis v. Detroit Downtown Dev. Auth.*, 782 F. App'x 455, 456 (6th Cir. 2019) (affirming sanctions in the amount of $13,506 awarded under 28 U.S.C. §1927, finding that Paterson "went too far" when he "pursued two frivolous claims and one frivolous motion, necessitating unnecessary legal fees for defendants...."); *Williams v. Detroit Downtown Dev. Auth.*, 2018 WL 4901158, at *6 (E.D. Mich. Oct. 9, 2018) (dismissing an action filed by Paterson as a sanction for Paterson's conduct, noting that Paterson had "violated three of the [c]ourt's discovery orders, ignored the Federal Rules of Civil Procedure, and had been less than honest in...representations to the [c]ourt," holding that Paterson had engaged in "contumacious" conduct, and observing that Paterson's accusations that the defendants' allegations were "misleading and false" were, themselves, misleading and false); *Carmack v. City of Detroit*, 2019 WL 4670363, at*1, 8 (E.D. Mich. Sept. 25, 2019) (sanctioning Paterson under the court's inherent authority "because Paterson's conduct fell far outside the realm of what could be considered permissible zealous advocacy, including filing two complaints containing allegations he ultimately admitted he did not know whether he could support, for refusing to concur in defendants' requests that he dismiss certain baseless claims, for violating a court order "prohibiting him from taking discovery," and for twice attempting to mislead the court on material matters); *Lotus Indus v. City of Detroit*, 2018 WL 4005608, at *4 (E.D. Mich. Aug. 22, 2018) (denying Paterson's motion on behalf of plaintiffs for leave to amend their complaint because "[p]laintiffs have flagrantly disregarded a court order by relying on [a] deposition in crafting their amended complaint," where a court order in a different case prohibited the use of that deposition for anything other than that litigation"); *Lotus Indus., LLC v. Archer*, No. 2:17-CV-13482, 2019 WL 4126558, at *1 (E.D. Mich. Aug. 30, 2019) (sanctioning Paterson for seeking financial documents from a nonparty which he "plainly did not have a good faith basis to request" and for withdrawing his request for the remaining documents listed at a hearing after counsel for the nonparty was forced to go through the time and expense of objecting to the request, responding to Paterson's motion to compel, and preparing to address those requests at the hearing); *Richards v. Wayne Cty. Airport Auth.*, 2014 WL 2600550, at *2 (Mich. Ct. App. June 10, 2014) (affirming sanctions against Patterson for filing a claim barred by *res judicata*, noting that the trial court found the complaint's primary purpose was "to harass, embarrass, and injure the prevailing party").

frivolous filings, outright misrepresentations of fact and other conduct far outside the normal bounds of zealous advocacy." *See* Exhibit 4, *In re: Andrew A. Paterson, Jr.*, Administrative Order No. AD-053 (W.D. Mich. Jul. 30, 2020).

In the instant matter, this Court permitted Davis to intervene under Fed. R. Civ. P. 24(b), even as the Court recognized that Defendants (Governor Gretchen Whitmer, Secretary of State Jocelyn Benson, and the Michigan Board of State Canvassers) and Defendant Intervenors (the City of Detroit and the Democratic Nation Committee/Michigan Democratic Party) "aim to protect the same interests on behalf of all Wayne County voters, including Davis." Dkt. 69, p. 3. Both Plaintiffs and Defendants opposed Davis' intervention. *See* Dkt. 25 (Plaintiffs' Response in Opposition to Motion to Intervene) and Dkt. 12, p. 2 (where Davis admits that Defendants denied his request to intervene).

After interposing himself in this matter, Davis now obtusely seeks sanctions against Plaintiffs under this Court's inherent authority and against Plaintiffs' counsel for "multipl[ying] the proceedings ... unreasonably and vexatiously." 28 U.S.C. § 1927. Given that his participation in this matter added absolutely nothing and only served to multiply the pleadings and to hinder the speedy disposition of this litigation, Davis' audacity is astounding.

Although it is troubling that a party would enter a case solely for the purpose of obtaining an award of attorney fees, it is allegedly the only way Paterson receives compensation for his representation of Davis. *See* Exhibit 3, Joe Guillen, *A felon's crusade:*

Robert Davis vs. everybody, Detroit Free Press, Aug. 11, 2017, p. 9 ("Generally, Paterson testified during a deposition, the only income he receives from representing Davis comes from any fees he is awarded for prevailing in court.").[6]

In keeping with the pattern and practice that Paterson has espoused in other cases, Paterson does not show *why* sanctions are warranted in this case. Instead, he relies on conclusions and misrepresentations. *See Davis v. Detroit Downtown Dev. Auth.*, 782 F. App'x 455, 457 (6th Cir. 2019) ("Here, Paterson does not give us reasons; he gives us conclusions. For example, he says that 'the claims as pl[eaded] were not frivolous' and that '[t]he district court's finding that certain claims were frivolous [wa]s simply misplaced.' Yet he never tells us why that's so.").

No grounds exist to sanction Plaintiffs and Plaintiffs' counsel. Davis' frivolous Motion for Sanctions should be denied.

ARGUMENT

I. No grounds exist to sanction Plaintiffs' counsel under 28 U.S.C. §1927.

As an initial matter, an award of sanctions against a losing plaintiff in a civil rights action is "an extreme sanction" and "must be limited to truly egregious cases of misconduct." *Jones v. Cont'l Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986). Sanctions are appropriate under § 1927 "when an attorney has engaged in some sort of conduct that, from an objective standpoint, 'falls short of the obligations owed by a member of the

[6] *See supra* note 1.

bar to the court and which, as a result, causes additional expense to the opposing party.'" *Mys v. Michigan Dep't of State Police*, 736 F. App'x 116, 117 (6th Cir. 2018) (quoting *Holmes v. City of Massillon*, 78 F.3d 1041, 1049 (6th Cir. 1996)). This Court has held an attorney's act in *initiating* an action, regardless of merit, falls outside the ambit of Section 1927's plain language. *See Beverly v. Sherman*, No. 2:19-CV-11473, WL 2556674, at *1 (E.D. Mich. May 20, 2020) (applying the "plain language" of Section 1927 to hold that the commencement of an action, or the filing of initial pleadings, cannot "multiply" proceedings, an interpretation affirmed in "an unbroken band of cases across the courts of appeals" (citing *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 65 (1st Cir. 2008)). Further, Davis has not alleged any specific "unreasonabl[e] and vexatious[]" or dilatory conduct by Plaintiffs' counsel to prolong or "multiply" proceedings, nor has he provided any evidence that could support a finding that Plaintiffs' counsel acted recklessly, in subjective bad faith, or with an improper intent in commencing this proceeding.

Given that this case was litigated before this Court in less than two weeks, it is difficult to conceive of how Plaintiffs' could have engaged in any dilatory practices over such a short period of time. In all events, Davis does not point to what excess costs he incurred as a result of any unreasonable or vexatious conduct on the part of Plaintiffs. *See Schmitzer v. Cty. of Riverside*, 26 F. App'x 701, 702 (9th Cir. 2002) ("The plain language of § 1927 provides for sanctions only if an attorney "multiplies the proceedings ... unreasonably and vexatiously."); *United States v. Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342, 1347–48 (9th Cir. 1985) ("Section 1927 authorizes the taxing of only excess

costs incurred because of an attorney's unreasonable conduct; it does not authorize imposition of sanctions to reimburse a party for the ordinary costs of trial.").

Instead, Davis grounds his Motion for Sanctions in the repeated assertion that "Plaintiffs' lawsuit was clearly frivolous from its initial filing." Dkt. 69, p. 4. He does not show why Plaintiffs' claims were frivolous. He does not explain why this Honorable Court spilled thirty-six pages of ink to address Plaintiffs' claims. He does not note that a Petition for Certiorari seeking review of this Court's ruling is currently pending before the United States Supreme Court. *See* King v. Whitmer, Docket No. 20-815. The closest Davis comes to making a particularized, fully formed argument relates to his assertion that Plaintiffs filed a "false affidavit" with the Court. Dkt. 69, p. 6. Pointing to a news article[7] that dismisses one paragraph out of a fourteen paragraph affidavit authored by expert Russell James Ramsland, Jr., Davis argues "that the information contained in Russell James Ramsland Jr.'s affidavit (ECF No. 1-14) and Expert Report (49-3) was FALSE because the numbers and data cited in his affidavit (ECF No. 1-14) and Expert Report (ECF No. 49-3) 'do not match the official statement of votes cast in all but one jurisdiction, and many inflate the numbers significantly.'" Dkt. 69, p. 6.

Facts are determined through hearings and evidentiary submissions not through blind adherence to media reporting. The news article Davis cites acknowledges that Mr.

[7] *See* Clara Hendrickson, *Affidavit in Michigan lawsuit makes wildly inaccurate claims about voter turnout in state,"* DETROIT FREE PRESS, available at https://www.freep.com/story/news/local/michigan/detroit/2020/12/04/michigan-lawsuit-makes-wild-claims-voter-turnout/3829654001/.

Ramsland filed a second affidavit in this case, *see* ECF No. 49-3, in which Mr. Ramsland explained the alleged discrepancy that the news article noted and updated his table with new data published by the State of Michigan. Dkt. 49-3, p. 13 ("Dr. Rodden was correct in his noting of excessive turnout figures listed in my affidavit for some precincts in MI based on new data from Michigan."). That figures would change, as available data changed, is to be expected. Mr. Ramsland updated the figures when new data became available. Davis has simply no basis for asserting that Mr. Ramsland's affidavit was "false" or that he executed his original affidavit with a fraudulent purpose. Any suggestion to the contrary is misleading.

Rather than providing reasons for his assertions that Plaintiffs' claims are "frivolous," Davis simply summarizes this Court's holdings and adds the adverb "clearly": "Plaintiffs' claims were clearly barred by Sovereign Immunity under the Eleventh Amendment of the U.S. Constitution, laches, mootness, and moreover, Plaintiffs lack standing to bring the claims." Dkt. 69, p. 5. While this Court has up until this point taken a view of the law and of the facts that is different than that of Plaintiffs, Plaintiffs claims are certainly colorable. Given the unprecedented nature of the factual allegations Plaintiffs made in their Complaint, Plaintiffs in many respects are operating in novel, uncharted constitutional territory.

Plaintiffs' extensive and heavily documented claims regarding election fraud were not, and are not, objectively unreasonable, within the meaning of Section 1927 or otherwise. Counsels' representation of Plaintiffs who disagree with Davis does not

constitute bad faith, even if the Court strongly agrees with the City. Rather, it reflects an incompatible view of mutually exclusive assertions. This is not sanctionable.

A. The Eleventh Amendment.

The Supreme Court has held that "[i]t is clear … that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984). However, "[w]hen the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself." *Id.* at 101.

This Court determined that Plaintiffs' claims against Governor Whitmer and Secretary of State Benson were "suit[s] against state officials when 'the state is the real, substantial party in interest.'" Dkt. 62, pp. 8-9. Plaintiffs respectfully disagree with that conclusion. Their Complaint alleges *ultra vires* executive conduct in violation of state law. Plaintiffs' cause of action is premised on the fact that Defendants Whitmer and Benson have acted inconsistently with state and federal law. Accordingly, in Plaintiffs' view, the state is not the real party in interest. Ultimately, the point is that the resolution of this issue is fact-intensive, not "clear."

B. Laches.

Laches is an equitable doctrine that is necessarily fact-dependent. After a diligent search, Plaintiffs have been unable to locate any analogous case in which a court

imposed sanctions on a plaintiff for bringing a claim that the court subsequently deemed barred by laches.

In the instant case, most of Defendants conduct did not become apparent until Election Day. Thereafter, Plaintiffs diligently collected dozens of affidavits and drafted a seventy-five page complaint detailing each of its claims. Plaintiffs filed their Complaint a mere two days after the Michigan Board of State Canvassers certified the election results. Plaintiffs had a reasonable argument for the roughly twenty-one day delay between Election Day and the filing of this Complaint. As such, sanctions would be grossly inappropriate on this basis; especially in a civil rights case such as this. Indeed, an award of sanctions on the basis of laches, or any other basis imagined by Davis, would have a dangerous chilling effect on future plaintiffs who wish to adjudicate voting rights disputes. Such Plaintiffs should not be dissuaded from moving to protect their constitutional rights by a fear that an unpersuaded judge will sanction them just for bringing the lawsuit.

C. Mootness.

Plaintiffs and this Court disagreed on the question of whether or not the relief Plaintiffs sought was moot. The Court essentially concluded that it did not have the power to "decertify" election results once those results had been certified by the Governor. In delivering its reasons, the Court did not cite any controlling case law in support because this is a novel area. *See Torres v. City of Madera*, 2006 WL 3257491, at *4 (E.D. Cal. Nov. 9, 2006) ("Where no previous court has considered a particular or novel

issue, sanctions under § 1927 generally are disfavored."). Accordingly, Plaintiffs' reasonable arguments in support of their entitlement to relief cannot be sanctionable on this basis.

D. Standing.

As Presidential Electors, Plaintiffs, citing *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), alleged that they had standing to raise post-election challenges concerning the manner in which votes are tabulated and counted for their election to the Constitutional public office of Elector. This is a novel issue that has not yet been directly addressed by the Supreme Court or by the Sixth Circuit. As such, Plaintiffs' claim was neither frivolous nor sanctionable.

Davis presents no argument and makes no showing as to why Plaintiffs' counsel should have known that Plaintiffs' claims were frivolous. Given the significant and *res nova* questions of law implicated here, it would be wholly inappropriate for this Court to punish Plaintiffs' counsel for making reasonable and novel legal arguments in support of their clients' claims.

II. No grounds exist to sanction Plaintiffs under this Court's inherent authority.

Davis has an even steeper hill to climb in order to obtain attorney fees pursuant to this Court's inherent authority. A court may assess attorney's fees under its inherent powers "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive

reasons," or when the conduct is "tantamount to bad faith." *Metz v. Unizan Bank*, 655 F.3d 485, 489 (6th Cir. 2011) (internal citations omitted).

The Sixth Circuit applies a three-part test to determine whether the imposition of sanctions under this elevated bad faith standard is proper. This test requires the district court to find "[1] that 'the claims advanced were meritless, [2] that counsel knew or should have known this, and [3] that the motive for filing the suit was for an improper purpose such as harassment.'" *Id.* The mere fact that an action is without merit does not amount to bad faith. *Id.* Rather, "the court must find something more than that a party knowingly pursued a meritless claim or action at any stage of the proceedings." *Id.* Examples of "something more" include: a finding that the plaintiff filed the suit "for purposes of harassment or delay, or for other improper reasons," a finding that the plaintiff filed "a meritless lawsuit and [withheld] material evidence in support of a claim," or a finding that a party was "delaying or disrupting the litigation" or "hampering enforcement of a court order." *Id.* (internal citations omitted).

Davis essentially argues that Plaintiffs' claims are sanctionable because they are meritless and, as such, must have been brought for an improper purpose. Davis' conclusory assertions provide no support for the sanctions he seeks. Plaintiffs' claims were based on well-documented evidence of electronic voting machine vulnerabilities and statistical impossibilities supported by dozens of affidavits executed by both fact and expert witnesses. Plaintiffs' only aim in bringing this action was the protection of

the fundamental right to vote secured in our Constitution but threatened by a voting system that leaves the faithful execution of this right open to attack.

Because Davis failed to make any showing of bad faith, Davis' Motion for Sanctions under this Court's inherent authority must be denied.

CONCLUSION

Davis makes no effort to demonstrate that Plaintiffs' counsel knew or reasonably should have known that Plaintiffs' claims were frivolous. He does nothing more than assert that Plaintiffs brought their claims in bad faith. In the history of our Republic, Plaintiffs' factual claims are unparalleled and the legal territory for these claims uncharted. *See Carmack v. City of Detroit*, No. 18-CV-11018, 2019 WL 4670363, at *9 (E.D. Mich. Sept. 25, 2019) ("[S]erious public interest lawyers certainly need some leeway to file legitimate and/or novel claims against state actors."). An order sanctioning the Plaintiffs or their counsel in this case would have a severe chilling effect on voting rights challenges and set a dangerous precedent that would undoubtedly compromise the political neutrality of the judiciary. Moreover, such an award would implicate Plaintiffs' and their counsel's First Amendment right of access to the courts, their Fifth and Fourteenth Amendment rights to due process, and their Fourteenth Amendment equal protection rights. This Court should resist Davis' frivolous invitation to go down this constitutionally problematic path and should deny Davis' utterly meritless Motion for Sanctions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2020, a true and genuine copy of the foregoing was served via electronic mail by the Court's CM/ECF system to all counsel of record, including:

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Amy Klobuchar
U.S. Senator for Minnesota

Ranking Members Klobuchar, Warner, Reed, and Peters Press Election Equipment Manufacturers on Security

March 27, 2019

Intelligence Agencies have confirmed that our election systems are a target for foreign adversaries, yet election vendors continue to sell equipment with known vulnerabilities

The Ranking Members of the Senate Rules, Intelligence, Armed Services, and Homeland Security Committees are requesting information about the security of voting systems

WASHINGTON – U.S. Senator Amy Klobuchar (D-MN), Ranking Member of the Senate Rules Committee with oversight jurisdiction over federal elections, sent a letter to the country's three largest election system vendors with questions to help inform the best way to move forward to strengthen the security of our voting machines. In the U.S., the three largest election equipment vendors—Election Systems & Software, LLC; Dominion Voting Systems, Inc.; and Hart InterCivic, Inc.—provide the voting machines and software used by ninety-two percent of the eligible voting population. However, voting and cybersecurity experts have begun to call attention to the lack of competition in the election vendor marketplace and the need for scrutiny by regulators as these vendors continue to produce poor technology, like machines that lack paper ballots or auditability.

Klobuchar was joined on the letter by Senator Mark Warner (D-VA), Vice Chairman of the Senate Intelligence Committee, Senator Jack Reed (D-RI), Ranking Member of the Senate Armed Services Committee, and Senator Gary Peters (D-MI), Ranking Member of the Senate Homeland Security Committee.

"The integrity of our elections remains under serious threat. Our nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020

elections as they did the 2016 and 2018 elections," the senators wrote. **"The integrity of our elections is directly tied to the machines we vote on – the products that you make. Despite shouldering such a massive responsibility, there has been a lack of meaningful innovation in the election vendor industry and our democracy is paying the price."**

The full text of the letter is below:

March 26, 2019

Mr. Phillip Braithwaite

President and Chief Executive Officer

Hart InterCivic, Inc.

Mr. Tom Burt

President and Chief Executive Officer

Election Systems & Software, LLC

Mr. John Poulos

President and Chief Executive Officer

Dominion Voting Systems

Dear Mr. Braithwaite, Mr. Burt, and Mr. Poulos:

We write to request information about the security of the voting systems your companies manufacture and service.

The integrity of our elections remains under serious threat. Our nation's intelligence agencies continue to raise the alarm that foreign adversaries are actively trying to undermine our system of democracy, and will target the 2020 elections as they did the 2016 and 2018 elections. Following the attack on our election systems in 2016, the Department of Homeland Security (DHS) designated election infrastructure as critical infrastructure in order to protect our democracy from future attacks and we have taken important steps to prioritize election security. We appreciate the work that your companies have done in helping to set up the Sector Coordinating Council (SCC) for the Election Infrastructure Subsector.

Despite the progress that has been made, election security experts and federal and state government officials continue to warn that more must be done to fortify our election systems. Of particular concern is the fact that many of the machines that Americans use to vote have not been meaningfully updated in nearly two decades. Although each of your companies has a combination of older legacy machines and newer systems, vulnerabilities in each present a problem for the security of our democracy and they must be addressed.

On February 15, the Election Assistance Commission's (EAC) Commissioners unanimously voted to publish the proposed Voluntary Voting System Guidelines 2.0 (VVSG) Principles and Guidelines in the Federal Register for a 90 day public comment period. As you know, this begins the long-awaited process of updating the Principles and Guidelines that inform testing and certification associated with functionality, accessibility, accuracy, auditability, and security. The VVSG have not been comprehensively updated since 2005 – before the iPhone was invented – and unfortunately, experts predict that updated guidelines will not be completed in time to have an impact on the 2020 elections. While the timeline for completing VVSG 2.0 is frustrating, these guidelines are voluntary and they establish a baseline – not a ceiling – for voting equipment. Furthermore, VVSG 1.1 has been available for testing since 2015.

In other words, the fact that VVSG 2.0 remains a work in progress is not an excuse for the fact that our voting equipment has not kept pace both with technological innovation and mounting cyber threats. There is a consensus among cybersecurity experts regarding the fact that voter-verifiable paper ballots and the ability to conduct a reliable audit are basic necessities for a reliable voting system. Despite this, each of your companies continues to produce some machines without paper ballots. The fact that you continue to manufacture

and sell outdated products is a sign that the marketplace for election equipment is broken. These issues combined with the technical vulnerabilities facing our election machines explain why the Department of Defense's Defense Advanced Research Projects Agency (DARPA) is reportedly working to develop an open source voting machine that would be secure and allow people to ensure their votes were tallied correctly.

As the three largest election equipment vendors, your companies provide voting machines and software used by 92 percent of the eligible voting population in the U.S. This market concentration is one factor among many that could be contributing to the lack of innovation in election equipment. The integrity of our elections is directly tied to the machines we vote on – the products that you make. Despite shouldering such a massive responsibility, there has been a lack of meaningful innovation in the election vendor industry and our democracy is paying the price.

In order to help improve our understanding of your businesses and the integrity of our election systems, we respectfully request answers to the following questions by April 9, 2019:

1. What specific steps are you taking to strengthen election security ahead of 2020? How can Congress and the federal government support these actions?
2. What additional information is necessary regarding VVSG 2.0 in order for your companies to begin developing systems that comply with the new guidelines?
3. Do you anticipate producing systems that will be tested for compliance with VVSG 1.1? Why or why not?
4. What steps, if any, are you taking to enhance the security of your oldest legacy systems in the field, many of which have not been meaningfully updated (if at all) in over a decade?
5. How do EAC certification requirements and the certification process affect your ability to create new election systems and to regularly update your election systems?
6. Do you support federal efforts to require the use of hand-marked paper ballots for most voters in federal elections? Why or why not?
7. How are you working to ensure that your voting systems are compatible with the

EAC's ballot design guidelines (i.e. "*Effective Designs for the Administration of Federal Elections*")?

8. Experts have raised significant concerns about the risks of ballot marking machines that store voter choice information in non-transparent forms that cannot be reviewed by voters (i.e. such as barcodes or QR codes), noting that errors in the printed vote record could potentially evade detection by voters. Do you currently sell any machines whose paper records do not permit voters to review the same information that the voting system uses for tabulation? If so, do you believe this practice is secure enough to be used in the 2020 election cycle?

9. Do you make voting systems with Cast Vote Records (CVRs) that can be reliably connected to specific unique ballots, while also maintaining voter privacy? If not, why not? Does your company make voting systems that allow for a machine-readable data export of these CVRs in a format that is presentation-agnostic (such as JSON) and can be reliably parsed without substantial technical effort? If not, why not?

10. Would you support federal legislation requiring expanded use of routine post-election audits, such as risk-limiting audits, in federal elections? Why or why not?

11. What portion of your revenue is invested into research and development to produce better and more cost effective voting equipment?

12. Congress is currently working on legislation to establish information sharing procedures for vendors regarding security threats. How does your company currently define a reportable cyber-incident and what protocols are in place to report incidents to government officials?

13. What steps are you taking to improve supply chain security? To the extent your machines operate using custom, non-commodity hardware, what measures are you taking to ensure that the supply chains for your custom hardware components are monitored and secure?

14. Do you employ a full-time cybersecurity expert whose role is fully dedicated to improving the security of your systems? If so, how long have they been on staff, and what title and authority do they have within your company? Do you conduct background checks on potential employees who would be involved in building and

servicing election systems?

15. Does your company operate, or plan to operate, a vulnerability disclosure program that authorizes good-faith security research and testing of your systems, and provides a clear reporting mechanism when vulnerabilities are discovered? If not, what makes it difficult for your company to do so, and how can Congress and the federal government help make it less difficult?

16. How will DARPA's work impact how your company develops and manufactures voting machines?

We look forward to your answers to these questions, and thank you for your efforts to work with us and with state election officials around the country to improve the security of our nation's elections.

Sincerely,

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Congress of the United States

Washington, DC 20510

December 6, 2019

Sami Mnaymneh
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
1450 Brickell Avenue 31st Floor
Miami, FL 33131

Tony Tamer
Founder and Co-Chief Executive Officer
H.I.G. Capital, LLC
1450 Brickell Avenue 31st Floor
Miami, FL 33131

Dear Messrs. Mnaymneh and Tamer:

We are writing to request information regarding H.I.G. Capital's (H.I.G.) investment in Hart InterCivic Inc. (Hart InterCivic) one of three election technology vendors responsible for developing, manufacturing and maintaining the vast majority of voting machines and software in the United States, and to request information about your firm's structure and finances as it relates to this company.

Some private equity funds operate under a model where they purchase controlling interests in companies and implement drastic cost-cutting measures at the expense of consumers, workers, communities, and taxpayers. Recent examples include Toys "R" Us and Shopko.[1] For that reason, we have concerns about the spread and effect of private equity investment in many sectors of the economy, including the election technology industry—an integral part of our nation's democratic process. We are particularly concerned that secretive and "trouble-plagued companies,"[2] owned by private equity firms and responsible for manufacturing and maintaining voting machines and other election administration equipment, "have long skimped on security in favor of convenience," leaving voting systems across the country "prone to security problems."[3] In light of these concerns, we request that you provide information about your firm, the portfolio

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[1] Atlantic, "The Demise of Toys 'R' Us Is a Warning," Bryce Covert, July/August 2018 issue, https://www.theatlantic.com/magazine/archive/2018/07/toys-r-us-bankruptcy-private-equity/561758/; Axios, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," Dan Primack, "How workers suffered from Shopko's bankruptcy while Sun Capital made money," June 11, 2019, https://www.axios.com/shopko-bankruptcy-sun-capital-547b97ba-901c-4201-92cc-6d3168357fa3.html.

[2] ProPublica, "The Market for Voting Machines Is Broken. This Company Has Thrived in It.," Jessica Huseman, October 28, 2019, https://www.propublica.org/article/the-market-for-voting-machines-is-broken-this-company-has-thrived-in-it.

[3] Associated Press News, "US Election Integrity Depends on Security-Challenged Firms," Frank Bajak, October 28, 2019, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c.

companies in which it has invested, the performance of those investments, and the ownership and financial structure of your funds.

Over the last two decades, the election technology industry has become highly concentrated, with a handful of consolidated vendors controlling the vast majority of the market. In the early 2000s, almost twenty vendors competed in the election technology market.[4] Today, three large vendors—Election Systems & Software, Dominion Voting Systems, and Hart InterCivic—collectively provide voting machines and software that facilitate voting for over 90% of all eligible voters in the United States.[5] Private equity firms reportedly own or control each of these vendors, with very limited "information available in the public domain about their operations and financial performance."[6] While experts estimate that the total revenue for election technology vendors is about $300 million, there is no publicly available information on how much those vendors dedicate to research and development, maintenance of voting systems, or profits and executive compensation.[7]

Concentration in the election technology market and the fact that vendors are often "more seasoned in voting machine and technical services contract negotiations" than local election officials, give these companies incredible power in their negotiations with local and state governments. As a result, jurisdictions are often caught in expensive agreements in which the same vendor both sells or leases, and repairs and maintains voting systems–leaving local officials dependent on the vendor, and the vendor with little incentive to substantially overhaul and improve its products.[8] In fact, the Election Assistance Commission (EAC), the primary federal body responsible for developing voluntary guidance on voting technology standards, advises state and local officials to consider "the cost to purchase or lease, operate, and maintain a voting system over its life span … [and to] know how the vendor(s) plan to be profitable" when signing contracts, because vendors typically make their profits by ensuring "that they will be around to maintain it after the sale." The EAC has warned election officials that "[i]f you do not manage the vendors, they will manage you."[9]

Election security experts have noted for years that our nation's election systems and infrastructure are under serious threat. In January 2017, the U.S. Department of Homeland Security designated the United States' election infrastructure as "critical infrastructure" in order to prioritize the protection of our elections and to more effectively assist state and local election

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[4] Bloomberg, "Private Equity Controls the Gatekeepers of American Democracy," Anders Melin and Reade Pickert, November 3, 2018, https://www.bloomberg.com/news/articles/2018-11-03/private-equity-controls-the-gatekeepers-of-american-democracy.

[5] Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[6] Id.

[7] Id.

[8] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[9] U.S. Election Assistance Commission, "Ten Things to Know About Selecting a Voting System," October 14, 2017, https://www.eac.gov/documents/2017/10/14/ten-things-to-know-about-selecting-a-voting-system-cybersecurity-voting-systems-voting-technology/.

officials in addressing these risks.[10] However, voting machines are reportedly falling apart across the country, as vendors neglect to innovate and improve important voting systems, putting our elections at avoidable and increased risk.[11] In 2015, election officials in at least 31 states, representing approximately 40 million registered voters, reported that their voting machines needed to be updated, with almost every state "using some machines that are no longer manufactured."[12] Moreover, even when state and local officials work on replacing antiquated machines, many continue to "run on old software that will soon be outdated and more vulnerable to hackers."[13]

In 2018 alone "voters in South Carolina [were] reporting machines that switched their votes after they'd inputted them, scanners [were] rejecting paper ballots in Missouri, and busted machines [were] causing long lines in Indiana."[14] In addition, researchers recently uncovered previously undisclosed vulnerabilities in "nearly three dozen backend election systems in 10 states."[15] And, just this year, after the Democratic candidate's electronic tally showed he received an improbable 164 votes out of 55,000 cast in a Pennsylvania state judicial election in 2019, the county's Republican Chairwoman said, "[n]othing went right on Election Day. Everything went wrong. That's a problem."[16] These problems threaten the integrity of our elections and demonstrate the importance of election systems that are strong, durable, and not vulnerable to attack.

H.I.G. reportedly owns or has had investments in Hart InterCivic, a major election technology vendor. In order to help us understand your firm's role in this sector, we ask that you provide answers to the following questions no later than December 20, 2019.

1. Please provide the disclosure documents and information enumerated in Sections 501 and 503 of the *Stop Wall Street Looting Act*.[17]

2. Which election technology companies, including all affiliates or related entities, does H.I.G. have a stake in or own? Please provide the name of and a brief description of the services each company provides.

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[10] Department of Homeland Security, "Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector," January 6, 2017, https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical.

[11] AP News, "US election integrity depends on security-challenged firms," Frank Bajak, October 29, 2018, https://apnews.com/f6876669cb6b4e4c9850844f8e015b4c; Penn Wharton Public Policy Initiative, "The Business of Voting," July 2018, https://publicpolicy.wharton.upenn.edu/live/files/270-the-business-of-voting.

[12] Brennan Center for Justice, "America's Voting Machines at Risk," Lawrence Norden and Christopher Famighetti, 2015, https://www.brennancenter.org/sites/default/files/publications/Americas_Voting_Machines_At_Risk.pdf.

[13] Associated Press, "AP Exclusive: New election systems use vulnerable software," Tami Abdollah, July 13, 2019, https://apnews.com/e5e070c31f3c497fa9e6875f426ccde1.

[14] Vice, "Here's Why All the Voting Machines Are Broken and the Lines Are Extremely Long," Jason Koebler and Matthew Gault, November 6, 2018, https://www.vice.com/en_us/article/59vzgn/heres-why-all-the-voting-machines-are-broken-and-the-lines-are-extremely-long.

[15] Vice, "Exclusive: Critical U.S. Election Systems Have Been Left Exposed Online Despite Official Denials," Kim Zetter, August 8, 2019, https://www.vice.com/en_us/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials.

[16] New York Times, "A Pennsylvania Country's Election Day Nightmare Underscores Voting Machine Concerns," Nick Corasaniti, November 30, 2019, https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.

[17] Stop Wall Street Looting Act, S.2155, https://www.congress.gov/bill/116th-congress/senate-bill/2155.

a. Which election technology companies, including all affiliates or related entities, has H.I.G. had a stake in or owned in the past twenty years? Please provide the name of and a brief description of the services each company provides or provided.

b. For each election technology company H.I.G. had a stake in or owned in the past twenty years, including all affiliates or related entities, please provide the following information for each year that the firm has had a stake in or owned this company and the five years preceding the firm's investment.
   i. The name of the company
   ii. Ownership stake
   iii. Total revenue
   iv. Net income
   v. Percentage of revenue dedicated to research and development
   vi. Total number of employees
   vii. A list of all state and local jurisdictions with which the company has a contract to provide election related products or services
   viii. Other private-equity firms that own a stake in the company

3. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with the EAC's Voluntary Voting System Guidelines? If so, please provide a copy of each EAC noncompliance notice received by the company and a description of what steps the company took to resolve each issue.

4. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have been in noncompliance with any state or local voting system guidelines or practices? If so, please provide a list of all such instances and a description of what steps the company took to resolve each issue.

5. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, been found to have violated any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such violations.

6. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the last twenty years, reached a settlement with any federal or state law enforcement entity related to a potential violation of any federal or state laws or regulations? If so, please provide a complete list, including the date and description, of all such settlements.

7. Has any election technology company, including all affiliates or related entities, in which H.I.G. has an ownership stake or has had an ownership stake in the past twenty years, reached a settlement with any state or local jurisdiction related to a potential violation of or breach of contract? If so, please provide a complete list, including the date and description, of all such settlements.

Thank you for your attention to this matter.

Sincerely,

Elizabeth Warren
United States Senator

Amy Klobuchar
United States Senator

Ron Wyden
United States Senator

Mark Pocan
Member of Congress

Detroit Free Press

WAYNE

A felon's crusade: Robert Davis vs. everybody

Joe Guillen Detroit Free Press
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Robert Davis strode into federal court 20 minutes late, just in time to hear the opposing lawyer's tirade casting him as a glory hound who stole from Highland Park schoolchildren.

"This court does not have to turn away from the knowledge Mr. Davis was convicted," attorney David Fink told U.S. District Judge Mark Goldsmith during Davis' challenge in late June to public funding for the Detroit Pistons' move into Little Caesars Arena.

"He's back at it. He's trying to be a political star on the rise, at great cost to the public," Fink said.

In local political circles and government offices, Davis has become synonymous with litigation. Over the last decade, he has filed more than 100 lawsuits, going after public officials both obscure and well-known as part of his self-proclaimed quest for transparent, honest government.

More: Detroit Land Bank Authority was formed illegally, activist says

Davis has targeted Gov. Rick Snyder, Detroit Mayor Mike Duggan, the Detroit City Council, Highland Park school board members, the University of Michigan Board of Regents, the Wayne County Airport Authority, the Detroit Land Bank Authority, the Troy City Council and Hamtramck election officials, among others, oftentimes alleging violations of the Open Meetings Act, the Freedom of Information Act or elections laws.

His opponents often dismiss him as reckless, and did so even before he pleaded guilty in 2014 to embezzling money.

But Davis' track record includes meaningful wins.

In 2013, Davis' challenge alongside former mayoral candidate Tom Barrow forced Duggan

to run as a write-in candidate because Duggan didn't meet residency requirements. In 2011, Davis' lawsuit against the Wayne County Airport Authority proved the board blatantly violated the state's Open Meetings Act when it hired Turkia Mullin as Metro Airport CEO. When Detroit was on the verge of bankruptcy in 2012, his lawsuits forced state-appointed officials discussing the city's fate to meet in public, and his efforts later uncovered e-mails revealing conversations about the secretive process to appoint emergency manager Kevyn Orr.

More: Robert Davis gets 18 months for embezzling from schools

Many of Davis' lawsuits against Gov. Snyder stemmed from the state's handling of Detroit's financial crisis and the constitutionality of the emergency manager law, which allows the state to temporarily take over local governments in financial crisis.

Ingham County Circuit Judge William Collette, who handled several of Davis' cases against Snyder, said some of them "were really justified and needed." Collette also credited Davis with having the gumption to take on the Republican power base in Lansing.

"He's about the only one that I could see that stands up to this bunch," Collette said.

Less than two hours after the June court hearing where Fink attacked his character, Davis sat down for an interview with the Free Press on the patio of Rosie O'Grady's in Ferndale.

Dressed in the same 10-year-old navy pinstripe suit he had worn to court, Davis vented about how his past trails him, whether he's questioning the use of tax money for the new downtown arena or pushing for the release of public records through his nonprofit he dubbed A Felon's Crusade for Equality, Honesty and Truth.

"It's unfortunate that individuals, even opposing counsel at times, always want to bring up my conviction," Davis, 37, said. "In spite of my past and people want to continue to bring that up, I'm not going to be silent. And I think ethical people look past that. My conviction has absolutely nothing to do with the issues that are being raised. And individuals have to learn to separate the two."

But like many topics he covered in several interviews with the Free Press since spring — including his days on the Highland Park school board, his work as a cunning political operative, how his civil lawyer of the last seven years gets paid — the reality of the situation is grayer than the black-and-white view from Davis' eyes.

A good student

Davis is the youngest of Earnestine Davis' five children. His father died when Davis was a boy, before they were able to develop a memorable relationship. His mother was left to raise her children alone. She worked several jobs to provide them with a stable home environment.

Davis spent time as a youth playing in Police Athletic League sports, a program he grew to revere.

He was a good student, graduating from Detroit Renaissance High in 1997 with a 3.7 GPA. He earned all A's and B's — except in science, where he received 2 C's and a D.

After graduation, he spent his summer days like a typical teenager, playing basketball and hanging out with friends. But in the evenings, he was trying to recall Highland Park's then-Mayor Linsey Porter.

There was a simple reason. Coaches for Davis' PAL teams had played an instrumental role in his upbringing, and Porter eliminated the program.

"The decisions he was making as mayor really hurt the city and is hurting the city to this day," Davis said.

Although he was a teenager, Davis had gotten to know judges, lawyers and politicians through his visits to Detroit's old downtown YMCA. He said it was there that he settled on the idea to recall Porter.

"You gotta understand the downtown Y... You'd come down there and they had a round table, cats would just come down and sit around the round table because of the guys that were there. It's not every day that you'd bump into a federal judge willing to engage in open conversation with you about life. Or the deputy mayor, or judges or prominent lawyers," Davis said.

At 17, Davis was too young to vote or circulate recall petitions. So he walked the streets with seven adult residents, discussing the recall campaign door-to-door with other Highland Parkers, gathering petition signatures.

His legal training essentially began at that YMCA. That's where he met criminal defense attorneys Robert Kinney and Otis Culpepper, who invited him to work in their law offices

in the summers after his junior and senior years of high school. Davis said he was an office gopher of sorts, delivering documents and reading and editing some legal briefs.

The recall campaign ultimately failed, falling nine signatures short to earn a place on the ballot. Porter remained in office, but Davis' campaign left a mark.

Two years later, when Davis garnered more headlines as he ran unsuccessfully for Highland Park City Council, Porter was not in a mood to praise the 19-year-old's ambition.

"This young man has cost the city close to $100,000 in legal costs in the last two and a half years," Porter told the Free Press in 1999. "People thought he was cute in the beginning, but it's not cute anymore."

Basketball star

Davis began his college education in 1997 at Wayne State University, where he studied journalism. He ended it as a seasoned political activist and record-setting college basketball player.

After his first two years at Wayne State, Davis transferred to the University of Michigan-Dearborn, where his former high school basketball coach had taken a job. He convinced Davis to join the team.

He was a rebounding machine at power forward, despite being somewhat undersized at 6-feet-4. He still holds program records for rebounds in a season (381) and rebounds in a single game (22).

Davis said he beat taller opponents to the ball by studying his teammates' shooting tendencies, looking for patterns in how their missed shots caromed off the rim.

"I'm just smart, very smart. I calculate everything," he said. "This is what I try to teach my son, is that, learn your teammates' spots and how they shoot. So if Joe, whenever he shoots from the right, it's always going to come off long. Or if he shoots from the center, it's going to come off short. So I studied my teammates and how they shot so I could judge how the ball came off."

College meant politics, also, for Davis. He said he helped Martha Scott as she ran for the state Legislature, and later conducted opposition research that benefited Gil Hill's failed run for Detroit mayor in 2001.

Davis' interest in studying law flourished in college. He worked as an intern for former Michigan Supreme Court Chief Justice Robert Young in the summers after his junior and senior years.

Young said Davis, as an undergrad, was far more advanced than even a typical first-year law school student would be.

“He had mad legal skills,” Young said. “He had a real unexpected facility with law as a college kid.”

Young wrote a letter in 2003 supporting Davis’ application to Cooley Law School, Oakland University. Davis attended but said he dropped out sometime after his son was born in 2004. He said the reasons included focusing on fatherhood and full-time work with the American Federation of State, County and Municipal Employees (AFSCME) Council 25, Detroit's largest public employees union. But he also made a vague reference to “immaturity” and an issue with a professor.

Not completing law school is among Davis’ biggest regrets.

He was elected to the Highland Park school board in the summer of 2002, weeks after graduating from college with a degree in political science. He was confrontational from the start, questioning other board members about nepotism and government waste.

His relationships with fellow board members were so toxic by 2009 that Davis stopped regularly attending school board meetings. That year, it was estimated Davis’ lawsuits had cost the school board more than $105,000 in legal fees.

Davis filed nearly two dozen lawsuits against the Highland Park school board and its members in 2008-09. By the next year, when his term was up and he was deciding whether to run again, some in the community hoped he would decide against it.

"I would love to see him go away," Viola Sears, president of the Highland Park schools clerical bargaining unit, said at the time. "I wish I could pack his bags myself.”

Davis ran for re-election but lost, placing third behind prevailing candidates Debra Humphrey and Clifford Chatman.

But he sued them both to keep them from serving. Humphrey improperly circulated her nominating petitions, Davis alleged. And he claimed the Highland Park house in which Chatman said he lived was vacant and abandoned. Davis prevailed in the case against

Chatman and he regained his school board seat.

The lawsuit against Humphrey was thornier, and it still lingers for Davis.

In dismissing Davis' complaint against Humphrey, former Wayne County Circuit Judge Amy Hathaway ordered that Davis post a $1,000 bond before filing any other action in the Wayne County Circuit Court.

"I must've been frustrated," Hathaway said in a recent interview. "At that time there were a lot of frivolous lawsuits."

Certain circuit court judges still require Davis to post the bond before proceeding with a case, even though Hathaway said that was not her intention.

The school district was crumbling during Davis' last term. Its deficit climbed and enrollment declined, from 3,179 in 2006 to 989 in January 2012. The district's first emergency manager was appointed in February 2012. Davis was indicted for embezzlement two months later.

Not shy

Davis has a reserved nature, but he's not shy. He generally enjoys talking about his upbringing, his political career and his court battles.

He's far less comfortable discussing his crimes, often using vague terms to describe the act of stealing money from the school district for his personal use. He cut off multiple questions about the details of what he did and how things came to that point.

"I can't describe it; it just happened," Davis said. "I am not going to litigate, or re-litigate, anything that occurred in those criminal proceedings. ... I crossed a line. I pled guilty to a particular crime and I paid my debt to society for it, and in learning from that situation, I would tell any politician just, you know, relationships with certain contractors and vendors are dangerous sometimes."

According to federal prosecutors, between 2006 and 2010, Davis used his influence as a school board member to arrange deals with three companies run by his friends. The companies would submit phony invoices to the school district, and large portions of the payments ended up in Davis' hands. He spent the stolen funds on restaurants, bars, travel and clothing. During its surveillance of Davis, the FBI would see him driving a silver

Mercedes registered to him, according to court records.

He pleaded guilty in September 2014 to stealing $197,983 from the district and for filing a false federal income tax return. In court and to this day, Davis said he accepts responsibility for what he did.

Davis' conviction struck his political allies in different ways.

Scott, whom Davis helped campaign for the Legislature, said she has known him since he was a boy.

"There are people that have done so many more things and they didn't get any time. He went after the governor, OK? And it's not easy for a black man to go after and do what he does, without this, OK?" said Scott, who is now a Wayne County Commissioner. "I see the president doing all these things and nothing has happened to him, OK? It's a white man's world."

Former school board member John Holloway said Davis was intelligent, charismatic and quick to learn.

"I was surprised. He wanted everybody else to walk the straight and narrow and then he wasn't walking the straight and narrow," Holloway said. "I know why he did it. Same reason as all the rest of them do it — greed."

The government said some of Davis' lawsuits were designed as a cover. He filed a flurry of litigation from 2008 to 2012 that were "intended to intimidate the (school) board and conceal Davis' embezzlement by distracting, dividing and manipulating the board," according to a memorandum prosecutors wrote to support their recommendation that he be sentenced to 18 to 24 months in prison.

That characterization is absurd, Davis said. "The lawsuits were intended to expose the unethical conduct of certain board members, which it did," he said.

Davis resists simple greed as an explanation for his theft.

"I was living a regular life, period. I went to the bar, period," paying with his union salary, Davis said, adding he paid for the Mercedes with a car allowance provided to him through his employment with AFSCME.

U.S. District Judge Arthur Tarnow sentenced Davis to 18 months in prison and ordered

him to repay the nearly $200,000 he was convicted of stealing.

On March 13, 2015, Davis took a commercial flight he paid for to Alabama, self-reporting to FPC Montgomery, a minimum security institution on Maxwell Air Force Base. It was listed among “The Best Places to Go to Prison” in a 2012 feature posted on cnbc.com, noting how inmates had access to a music room, pool tables and work opportunities outside the military base's prison camp.

“Where I was there are no cells. There are no bars, there are no gates, there are no guns,” Davis said, adding that the lack of grueling prison conditions did not make it easier to be away from his family.

Less than a year after he went to prison, Davis was released on Feb. 3, 2016. He flew home, spent a week in a halfway house, then lived under home confinement in Highland Park until July 1, 2016.

Government watchdog

During his incarceration, Davis said his motivation grew to be a government watchdog. He said he heard from people that city leaders were going unchallenged.

In himself, Davis sees a fearless crusader against hypocrisy, incompetence, corruption and backdoor deals in local government. He is not a lawyer, yet he has supreme confidence in his intellect to spot public officials’ deception and outmaneuver the lawyers they hire to mount a defense.

"Just because someone has a P number and a law degree does not make them smart," Davis said, referring to the identification number the State Bar of Michigan issues to practicing lawyers.

Davis does a lot of his own legal work, but he has help — from an admittedly unlikely character.

“Not every day that a white guy from Ann Arbor would take a controversial case dealing with the inner city,” Davis said.

Andrew Paterson, who has practiced law in Michigan since 1969, has represented Davis on many of his civil suits since 2010. They met about a decade before that, when Davis was a student at U-M Dearborn. Davis was helping a client of Paterson’s who was trying to bring

a women's professional football team to Highland Park, Davis said.

Paterson has worked about 20 hours a week on his cases for the last year, Davis estimated. Davis said he does not pay him.

"Back when I was working and gainfully employed, of course I was compensating him. Currently, I'm not," Davis said.

Judge Collette, who handled several of Davis' cases against Gov. Snyder, said he has always wondered how Paterson gets paid.

"It's coming out of another pocket somewhere. No question," Collette said.

Davis said there is no secret benefactor, and Paterson did not return messages seeking comment. Davis said questions about Paterson's compensation are silly.

"Oftentimes, people say there has to be a ghost in the background," Davis said. "That's what's sad about this society. They always think somebody's doing something because somebody behind the scenes is asking them to do it.

"No, we're dispensing justice, period."

Generally, Paterson testified during a deposition, the only income he receives from representing Davis comes from any fees he is awarded for prevailing in court. Under Michigan's Open Meetings Act, public bodies can face financial penalties for breaking the law. The Detroit Downtown Development Authority, for example, wrote Paterson a $5,000 check in February as part of a settlement with Davis after he sued the DDA for holding secret finance committee meetings about the Pistons move downtown.

The DDA also agreed to open all future finance committee meetings to the public, breaking a 20-year policy of holding them behind closed doors.

People underestimate Davis, said Kevin Smith, the Highland Park School District's emergency manager. Smith got to know Davis in the late-2000s when Smith was the school district's general counsel and Davis was on the school board and filing nearly a lawsuit a month against his fellow board members.

Though he has spent his time opposing Davis in court, Smith confessed a certain respect for him.

"He's not somebody that's just throwing something in the wind. He reads the law," Smith

said. “He’s reading all the Open Meetings Act provisions and he’s going through the meeting minutes. ...

“People take shortcuts and Robert doesn’t.”

Found work

Until recently, Davis was unemployed since his release from prison, saying he was able to make ends meet "by the grace of God" and with help from "great family and friends who have supported me through this journey." In late July, he said, he found work. But he won't say what it entails. "My activism has jeopardized my job too many times. My job and where I work is immaterial."

Davis said he rents the same house in Highland Park he's been in for several years. He's divorced with a 12-year-old son, but those relationships he considers private, and he prefers not to talk about them.

For someone so guarded about his personal life, who harbors genuine animosity toward political foes, Davis can be affable. At a handful of interviews at restaurants with the Free Press, he randomly encountered friendly acquaintances who struck up conversations, including former Detroit News columnist Terry Foster and another man with whom Davis played basketball.

Davis said he wants to go back to law school and focus on mentoring African-American youths to keep them out of the criminal justice system.

For many lawyers and politicians who have interacted with him, Davis remains mysterious.

Dennis Pollard, a Troy lawyer who represented the Highland Park school system in a contentious case in which Pollard pursued an examination of Davis’ financials, said he is curious about him.

“I just don’t understand what his end game is with all of this,” Pollard said. “I just don’t know what makes him tick."

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: ANDREW A. PATERSON, JR.

_____/

Administrative Order
No. 20-AD-053

The Magistrate Judge has referred Attorney Andrew A. Paterson, Jr. to the undersigned under L.Gen.R. 2.3(d) for consideration of possible discipline or disciplinary proceedings. The referral comes in a Report and Recommendation on a series of discovery and sanctions motions in *Blackwell v. Simon*, Case No. 1:18-cv-1261, ECF No. 234, at PageID.3027 (March 20, 2020). The District Judge assigned to the case rejected objections to the Report and Recommendation, and adopted it as her own. ECF No. 314 (May 20, 2020). Attorney Paterson is no longer counsel of record on the case, or on any other matter in this District.

The referral in the Report and Recommendation includes a detailed and carefully documented history of litigation conduct warranting sanctions in the *Blackwell* case itself. It also provides citation to and analysis of several other state and federal cases in which Attorney Paterson has incurred some form of sanction for, or other negative judicial commentary on, his performance as an attorney in the case. ECF No. 234, at PageID.3026-3029.[1] The common theme of all the referenced cases, including this one, is a pattern of activity involving vexatious and frivolous filings, outright misrepresentations of fact and other conduct far outside the normal bounds of zealous advocacy.

No Court or litigant is obligated to tolerate the kind of inappropriate litigation conduct detailed in these cases. But the Court is satisfied on the present record that the sanctions imposed

1 A number of the other cases all appear to arise out of a contentious and long running dispute involving redevelopment of Centre Park Beer in Detroit. *See, e.g.*, *Lotus Indus. v. City of Detroit*, No. 17-13482, 2018 WL 4005608 , at *1 (E.D. Mich. Aug. 22, 2018).

by each respective Court, including this one, in the cited cases fully vindicates the disciplinary interests at stake. In this case, for example, Attorney Paterson was removed as counsel in the case. He incurred monetary penalties. And at least some of the claims he asserted were dismissed as part of the overall sanction imposed. The other reported cases included similar targeted, but significant, sanctions tied to particular litigation conduct in the particular case at issue.

The case specific sanctions are, in the view of the undersigned, the best way of vindicating the disciplinary interests involved when the wrongful conduct involves the particulars of the individual case. The record of the case in this Court fully supports the sanctions recommended and imposed by the assigned Judicial Officers in the case. They vindicate the Court's interest in enforcing the rules and orders of the Court, and the standards of ethical conduct for an advocate. They also provide appropriate and balanced redress for the most directly affected litigants. True, they do not prevent Attorney Paterson from engaging in another unwarranted course of inappropriate behavior in some other case. However, there is nothing of record that suggests he misbehaves in every case, or even in most of his cases. And in the cases where he does, each tribunal has demonstrated its ability to respond with appropriate sanctions. Moreover, Attorney Paterson practices in an area fraught with potential for political conflict. *See, e.g.*, *Carmack v. City of Detroit*, No. 18-cv-11018, 2019 WL 4670363, at *9 (E.D. Mich. Sept. 25, 2019). This is no excuse for violating the rules that put the limits on the bounds of zealous advocacy. *Id.* But it does reinforce the undersigned's preference to address sanctions, when needed, in a case specific context rather than an ancillary administrative proceeding addressing possible suspension, disbarment, or other more generalized discipline.

The undersigned does not believe consideration of possible additional sanctions, such as suspension or disbarment from the bar of this Court, is warranted at this time. Attorney Paterson is not currently counsel of record on any matter in this District. If and when he appears on another matter, if he repeats his misbehavior, appropriate sanctions will no doubt be imposed within the

case. Another referral for more general discipline, including suspension or disbarment, may then be warranted. *See*, *e.g.*, *In re Moncier*, 550 F. Supp. 2d 768 (E.D. Tenn. 2008). But for now, the undersigned is satisfied that no additional discipline or disciplinary proceedings are necessary.

Dated: July 30, 2020

ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE