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COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

- - -

CITY OF MADEIRA,                    )  
  )  
                  Plaintiff,            )  
  )  
vs.                                    ) Case No. A1802415  
  )  
PHILIP OPPENHEIMER,                )  
  )  
  )  
                  Defendant.         )

- - -

TRANSCRIPT OF PROCEEDINGS

- - -

APPEARANCES:  
  
Steven P. Goodin, Esq.  
Brian W. Fox, Esq.,  
Kellie A. Kulka, Esq.,  
                  On behalf of the Plaintiff.  
  
Curt C. Hartman, Esq.,  
                  On behalf of the Defendant.

BE IT REMEMBERED that upon the hearing of  
this cause, on July 2nd, 2019, before the Honorable  
Megan E. Shanahan, a said judge of the said court,  
the following proceedings were had, to wit:

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P-R-O-C-E-E-D-I-N-G-S

July 2nd, 2019

THE COURT: All right. City of Madeira versus Oppenheimer, A1802415.

We're here on seven pending motions; six of which are filed by the defense and one by the plaintiff.

I'm going to ask that we handle defense's three motions for imposition of sanctions and the motion for joinder sort of all at once. And then we can go back and forth, then, on the summary judgment and the discovery. We can handle those together and then the motion to dismiss. It just logically makes sense to address it that way.

So, Mr. Hartman, go ahead.

MR. HARTMAN: No problem.

Curt Hartman on behalf of the defendant, Mr. Oppenheimer.

The Court wants to proceed in that particular order, but I think there's more -- the most logical order, really, the initial question is the legal authority to even bring this lawsuit to

1 start with, which is the basis of the  
2 motion to dismiss.

3 And so, if I may, I'd like to  
4 address that first.

5 THE COURT: That's fine.

6 MR. HARTMAN: The cases are brought  
7 by and in the name of the City of  
8 Madeira, which is a municipal corporation  
9 under state law. And the challenge that  
10 Mr. Oppenheimer makes is that the  
11 Madeira City Council never authorized the  
12 filing of this lawsuit.

13 And I was hopeful that plaintiff  
14 would say, no, here is the -- here is who  
15 gave the authority, when they gave the  
16 authority; yet, we don't get any of that.

17 And so there's really nothing in  
18 the record that the plaintiffs have  
19 offered as to who authorized and when  
20 that person authorized the filing of this  
21 lawsuit.

22 I know we've got some members of  
23 Council and the mayor here. I would like  
24 to call the mayor to testify, to say when  
25 did the City of Madeira authorize the

1 filing of this lawsuit, because I think  
2 that needs to be put in the record.

3 so if it please the Court, I would  
4 call the mayor, Traci Theis, to the stand  
5 to --

6 MR. FOX: Objection.

7 MR. HARTMAN: -- at least to find  
8 that testimony on that.

9 THE COURT: The objection is  
10 sustained. I'm not going to allow that.

11 MR. HARTMAN: But I want to reserve  
12 and make -- because I think the  
13 obligation is upon the party invoking the  
14 jurisdiction of the Court and the  
15 authority.

16 So who authorized this filing of  
17 this lawsuit? In their brief of  
18 opposition -- again, they never state  
19 specifically who did, but they clearly  
20 indicate the Madeira City Council never  
21 authorized the filing of this lawsuit.

22 All we've got from this Madeira  
23 City Council is proclamation declaring  
24 their intention to direct the Law  
25 Director to explore the filing of a civil

1 action for vexatious litigation.

2 Intention to direct and to explore, and  
3 the next thing you know, we have a  
4 lawsuit being filed.

5 Under state law, the authority to  
6 act on behalf of a municipal corporation  
7 to sue and to be sued under 715.01 is in  
8 the legislative authority, which is the  
9 City Council.

10 City Council never authorized it.  
11 It was brought without authority. It's  
12 ultra vires, and, therefore, should be  
13 dismissed for no other reason than that.

14 In trying to justify the filing of  
15 this lawsuit without authority, opposing  
16 counsel files a memorandum suggesting --  
17 again, never identifying that the Law  
18 Director had the sole legal authority to  
19 bring the lawsuit by and in the name of  
20 the municipal cooperation. It does not.

21 He cites the vexatious litigation  
22 statute, 2323.52. And that simply  
23 declares that a law director, attorney  
24 general, prosecuting attorney can  
25 themselves bring the lawsuit in their own

1 names.

2 So if Mr. Fox had filed --

3 THE COURT: Isn't that a little bit  
4 illogical? Why would Brian Fox file a  
5 lawsuit, except in his capacity as the  
6 Law Director?

7 MR. HARTMAN: Well, you'd have  
8 to -- well, if you look at the reply that  
9 we filed -- why would he do it? Because,  
10 one, the statute gives him the authority  
11 to do it in his own name.

12 Secondly, if you look, you know, to  
13 posit the question -- and in our reply  
14 brief, at Page 4 and Page 5 of our reply  
15 brief there are cases, Dewine versus  
16 Morgan, 2017 Ohio 5600, where the Ohio  
17 Attorney General brought a vexatious  
18 litigation claim in his own name. Why?  
19 Because the statute said to do it that  
20 way.

21 Actions are brought in the name of  
22 the party plaintiff. In this case, the  
23 party plaintiff is the municipal  
24 corporation. Who authorized an action by  
25 and in the name of the municipal

1 corporation? No one.

2 And there's other cases I would  
3 cite where the Attorney General or  
4 Franklin County Prosecutor brought such  
5 an action in his own name. That's the  
6 way you do it.

7 Under Rule 10, a claim -- and  
8 Rule 17, it's got to be brought in the  
9 name of the party itself. They elected  
10 the party plaintiff to be the municipal  
11 corporation. There has to be legal  
12 authority, and there is none.

13 They next suggest -- again,  
14 suggest -- they don't offer any assertion  
15 of fact. I think they're trying to let  
16 the Court say, well, if this one is  
17 authorized, or this person authorized it,  
18 it's okay. And then they'll say, oh,  
19 yeah, that's the person who authorized  
20 it.

21 They suggest here, alternatively,  
22 maybe the City Manager did it because he  
23 is responsible for the enforcement of the  
24 laws and the ordinances of the City. But  
25 there's no ordinance to be enforced here.

1           It's not like that Marysville case  
2           that they relied upon where it was simply  
3           a zoning enforcement action with  
4           already an existing ordinance to be  
5           enforced.

6           This is a special proceeding  
7           brought by a municipal corporation. How  
8           do corporations act? They act by  
9           authority, state law. And Chapter 715  
10          requires it to be by the City Council.

11          I finally suggested -- and they  
12          kind of suggest that the final  
13          opposing -- their philosophy that, well,  
14          you know, this would be absurd because  
15          Cincinnati City Council would have to  
16          meet all the time and approve all these  
17          lawsuits.

18          City Council -- we cite to the  
19          Court in sum -- I'm on Page 9 of our  
20          reply memo -- where the Cincinnati City  
21          Council expressly and already by  
22          ordinance authorized the City Solicitor  
23          to bring various lawsuits, to bring  
24          collections actions, to bring enforcement  
25          actions for the building code and zoning



1 code.

2 By ordinance, the Cincinnati City  
3 Council has already done so. In this  
4 case, the Madeira City Council did not do  
5 so.

6 THE COURT: What about the charter  
7 portion? We're back to square one that  
8 provides the Law Director shall represent  
9 the municipality on all litigation to  
10 which it may be a party.

11 MR. HARTMAN: That imposes a legal  
12 duty to represent the municipal  
13 corporation. It does not give them the  
14 authority to sue or to be sued on behalf  
15 of the municipal corporation. When the  
16 municipal corporation says we want this  
17 lawsuit brought, then he has the legal  
18 duty to do so. It's not a grant of a  
19 power to bring the lawsuit; it's a grant  
20 of duty to represent.

21 THE COURT: Okay.

22 MR. HARTMAN: So that's the issue  
23 there. They have not established the  
24 legal authority.

25 I would ask the Court when Mr. Fox

1 or Mr. Goodin gets up to put clearly on  
2 the record unequivocally at the outset  
3 who authorized the filing of this lawsuit  
4 and when.

5 In terms of the summary judgment  
6 motion we have tendered, in support of  
7 our summary judgment, discovery cutoff  
8 was at the end of January.

9 Following and consistent with the  
10 original scheduling order, we tendered  
11 our motion for summary judgment. We  
12 supported it with certified copies of  
13 various filings from the Clerk of Courts.  
14 We have supported our motion.

15 City of Madeira has offered no  
16 evidence in contradiction. They make  
17 argument, they make speculation.  
18 Arguments of counsel are not evidence.

19 We set forth quite clearly a nice  
20 analysis of the statute -- of the  
21 vexatious litigation statute and all of  
22 the elements that must be established;  
23 you know, that a person engaged in  
24 vexatious conduct, and did so habitually,  
25 persistently, and without reasonable

1 grounds.

2 So, thus, first, you need a person  
3 to have engaged in something. And what  
4 that person has to have engaged in was  
5 vexatious conduct; not only conduct, but  
6 vexatious conduct. And by engaging in  
7 vexatious conduct, they habitually  
8 engaged in vexatious conduct, and they  
9 persistently engaged in vexatious  
10 conduct, and they did -- engaged in  
11 vexatious conduct without reasonable  
12 grounds. All of them are separate  
13 elements.

14 And we have made argument, we have  
15 submitted evidence in terms of support of  
16 most of those elements. The City offers  
17 no evidence. Instead, they simply stand  
18 on their pleadings.

19 And under Rule 56, a party cannot  
20 simply stand on their pleadings but must  
21 submit evidence in opposition to a motion  
22 for summary judgment.

23 The other thing I would point out  
24 before we get to the elements further is  
25 the legal standard under *New York Times v*

1 Sullivan that has to be met.

2 This is an action by the Government  
3 going to First Amendment rights in terms  
4 of challenging governmental action; be it  
5 in court or otherwise.

6 Under New York Times v Sullivan,  
7 there is an actual malice requirement  
8 that must be established. Granted, New  
9 York Times dealt with the libel.

10 And City of Madeira, in opposition,  
11 tried to say, well, that was only a libel  
12 case. But it's the Supreme Court itself.  
13 The US Supreme Court clearly indicated  
14 that the question before it was simply  
15 whether a rule of liability that was  
16 being imposed by state law in an action  
17 brought by government officials  
18 implicating First Amendment can just go  
19 under regular standard or is there a  
20 higher standard. And the Court said  
21 there's a higher standard.

22 The Supreme Court says the label  
23 that state law ascribes to does not  
24 matter. Libel, abuse of process, et  
25 cetera, those labels do not control New

1 York Times v Sullivan. And, similarly,  
2 vexatious litigator does not control.

3 New York Times v Sullivan is  
4 applicable; they have not offered any  
5 evidence to show actual malice.

6 But going back to the elements  
7 under the statute itself, what does the  
8 City -- the only thing that the City  
9 offers -- and I'm quoting from Page 11 of  
10 their memo in opposition to summary  
11 judgment. They say at the end of the day  
12 the Court should keep in mind the most  
13 salient fact, quote, All of these cases,  
14 three matters, were dismissed.

15 That is the only argument, that is  
16 the only thing that they are offering to  
17 say Mr. Oppenheimer engaged in vexatious  
18 litigation. And, therefore, the extreme  
19 measure of finding him to be a vexatious  
20 litigator should be imposed.

21 I point out on Page 20 of 21 of our  
22 Motion for Summary Judgment, the Ohio  
23 Supreme Court, in addressing a vexatious  
24 litigation claim, in State ex rel.  
25 Bunting v Styer, 147 Ohio St.3d 462, 2016

1 Ohio 5781.

2 In that case, they were asked to  
3 impose a vexatious litigation against an  
4 individual, who, in the description of  
5 the Court, he had filed numerous cases,  
6 including six in this Court that were all  
7 unsuccessful and readily deemed to be  
8 frivolous. That's what the Supreme Court  
9 was facing. And they said that's not  
10 enough to find him a vexatious litigator.  
11 Quote: simply filing a losing case or  
12 appeal is not automatically frivolous.

13 But that is the essence of their  
14 entire case. Three cases, they were all  
15 found -- they were all dismissed for  
16 various reasons, and, therefore, the  
17 extreme measures should happen.

18 One of those cases is an  
19 administrative appeal, which by statutory  
20 definition cannot be a foundation for  
21 vexatious litigation. In order to be  
22 found a vexatious litigator, it has to be  
23 vexatious conduct. Conduct is a defined  
24 term by the statute.

25 It references 2323.51. It gives

1 two options for conduct. First, it's  
2 either the filing of a civil action or  
3 taking a position in a civil action, or  
4 it's the filing of a civil action or an  
5 appeal from a governmental decision.

6 An administrative appeal is an  
7 appeal from a governmental decision. But  
8 when the definition of conduct is set  
9 forth in the statute, that only deals  
10 with actions or appeals brought by an  
11 inmate.

12 So the filing of a civil action is  
13 separate and distinct from pursuing an  
14 appeal of a governmental action.

15 With respect to the claim against  
16 Mr. Oppenheimer, it has to be the filing  
17 of a civil action. An administrative  
18 appeal is not a civil action. For that  
19 reason, that one case -- one matter  
20 should go by the wayside.

21 In terms of the other two cases,  
22 the first case, *City of Madeira ex rel.*  
23 *Oppenheimer versus City of Madeira* was  
24 what I characterize as lawsuit number  
25 one, where Mr. Oppenheimer was actually

1 represented by me in a case before  
2 Judge Dinkelacker. Mr. Goodin was on the  
3 other side for the City of Madeira.

4 In that case, it dealt with a  
5 dispute about the meaning of a city  
6 charter. Now they say, oh, the argument  
7 and your thought was -- your argument was  
8 wrong.

9 At the end of the day, what the  
10 Court did, he found the case was moot and  
11 dismissed it. That's not an adjudication  
12 on the merits.

13 But, even so, the undisputed  
14 summary judgment evidence demonstrates  
15 that the City of Madeira itself filed a  
16 counterclaim in that lawsuit. The City  
17 of Madeira filed a lawsuit for  
18 declaratory judgment in that same  
19 lawsuit, declaring in that counterclaim,  
20 a real and justiciable dispute exists  
21 between the parties regarding the right  
22 statute and other legal relationship  
23 arising from that city charter.

24 when that -- defending against a  
25 motion to dismiss, the City of Madeira



1 doubled down and declared there is a  
2 justiciable controversy between the  
3 parties.

4 So what they're arguing now before  
5 this court is filing the complaint for  
6 declaratory judgment and injunction  
7 relative to meet the city charter was so  
8 far out of left field that it was  
9 frivolous and it should be a basis for  
10 vexatious conduct. Yet, the City of  
11 Madeira itself filed its own  
12 counterclaim, had opposed the dismissal  
13 of it, saying there is a real dispute.  
14 We want to know what is going on.

15 And even then, Mr. Goodin -- we got  
16 the transcript, and the arguments to the  
17 court set forth again that there is a  
18 controversy here because this is  
19 something that is capable of repetition  
20 because the case had become moot.

21 He argued there is a controversy  
22 here. There is a controversy as to the  
23 meaning of the charter and what the City  
24 could or could not do with property  
25 there.

1                   There was no existing Court  
2                   pronouncement about this charter  
3                   provision. If the Court had clearly  
4                   delineated what the provision was of the  
5                   city charter and someone came in and  
6                   said, I'm still suing you, I'm not making  
7                   a good faith argument for the reasonable  
8                   extension or modification of law, if I  
9                   just did it, then you might have  
10                  something, but when there's no court case  
11                  that they can cite to, that's not  
12                  vexatious conduct.

13                  I go at length as to what  
14                  Mr. Goodin said to the Court. I could  
15                  talk about the counterclaim, as that is  
16                  the undisputed summary judgment evidence.  
17                  That cannot be a basis for vexatious  
18                  conduct.

19                  The second lawsuit dealt with an  
20                  appeal or a challenge -- not an appeal,  
21                  because there is no appeal -- but in a  
22                  challenge of that action of the Hamilton  
23                  County Board of Elections. And that  
24                  ended up being dismissed, granted.

25                  But there is no administrative

1 appeal from the Board of Elections. So,  
2 therefore, the proper remedy in State ex  
3 rel. Holwadel versus Hamilton County  
4 Board of Elections establishes you can  
5 still proceed through judicial review,  
6 but just not through Chapter 2506.

7 You know, Mr. Oppenheimer  
8 previously, back in 1981, had filed a  
9 similar lawsuit and was successful. It's  
10 not vexatious. It's not the extreme  
11 measure of being vexatious. It simply  
12 sought judicial review.

13 Finally, I'll talk about the  
14 administrative appeal. Again, I've  
15 already talked briefly that that is not  
16 conduct by statutory definition. Cannot  
17 be a basis. It is not proper evidence  
18 whatsoever.

19 But it was a prematurely filed  
20 administrative appeal. And their  
21 argument was it was prematurely filed and  
22 that's why the Court dismissed it.

23 Not only was an appeal filed by  
24 Mr. Oppenheimer, but also on behalf of  
25 other parties as well. Assuming you even

1 can consider that, i.e., that it's still  
2 within the ambient of conduct, there is  
3 no prohibition against filing a premature  
4 administrative appeal. It's just a  
5 question of when does the decision of the  
6 administrative body become final, that it  
7 is subject to judicial review.

8 The other things to look about  
9 it -- and to go back to the elements of  
10 vexatious conduct, the other thing to  
11 consider is it seeks that the person  
12 engaged in vexatious conduct.

13 Most vexatious conduct actions  
14 arise from pro se litigants. And it  
15 seeks to hold those pro se litigants for  
16 the vexatious conduct. With respect to  
17 all three cases that the City of Madeira  
18 cites to as supporting its claim, all  
19 three of them, Mr. Oppenheimer was  
20 represented by legal counsel.

21 who is the person that engaged in  
22 vexatious conduct and frivolous conduct?  
23 There are cases -- and we cite to them in  
24 our motion -- where to be in a position  
25 of sanctions under 2323.51 have been

1 reversed when they were imposed against  
2 their client because the Court said, no,  
3 this is an attorney responsibility, not  
4 that the client should be held  
5 responsible.

6 None of these cases did  
7 Mr. Oppenheimer pursue on his own as a  
8 pro se litigant. Yet, legal counsel in  
9 all three -- all three legal -- if they  
10 had an issue with them being brought,  
11 they should have sought sanctions under  
12 2323.51 in those individual actions.  
13 They did not because there was no basis  
14 for it.

15 Like I said, though, at the end of  
16 the day, the only thing they point to,  
17 the only argument they make is that all  
18 three of the matters, all three -- the  
19 two cases and the administrative appeal  
20 were dismissed; two of them without  
21 prejudice, which is not an adjudication  
22 even on the merits.

23 That is not enough. They've  
24 offered no evidence to rebut the  
25 evidence -- the summary judgment evidence

1           that is before the Court.

2                   Jumping over onto the motions for  
3           sanctions, I've got three separate  
4           motions for sanctions. I kept them  
5           separate because there was distinct  
6           issues.

7                   The second one -- I'm going to  
8           take it a little bit easier -- deals with  
9           that administrative appeal. As a matter  
10          of law, there is no basis to claim an  
11          administrative appeal can serve as a  
12          foundation for vexatious conduct when  
13          it's an action -- it was not brought by  
14          an inmate. An administrative appeal  
15          brought by an inmate can be a basis for  
16          vexatious conduct. If you're not an  
17          inmate, by statutory definition, there is  
18          no basis. That's, simply stated, the  
19          basis for the second motion for  
20          sanctions.

21                  Probably the most serious motion  
22          for sanctions, though, is the first  
23          motion for sanctions. Essentially, this  
24          is a SLAPP lawsuit. I'm not going into  
25          length for the Court on what SLAPP

1           lawsuits are. They are strategic  
2           lawsuits against public participation.

3           If you look at the complaint, and  
4           I -- for the record, we had talked  
5           previously that normally we could have an  
6           evidentiary hearing on 2323.51 sanctions.  
7           We indicated that we're going to do  
8           argument to see if there was a prima  
9           facie basis and a need for a hearing down  
10          the road on evidence.

11          You look at the complaint, it is  
12          replete with bemoaning, with attacks upon  
13          Mr. Oppenheimer's speech and criticism of  
14          the City Council members and the City  
15          Manager. That is absolute First  
16          Amendment protection. We go -- you look  
17          at -- and we go through that on Page 4 of  
18          5 of the motion. You have references to  
19          Mr. Oppenheimer's personal website and  
20          social media activities, First Amendment  
21          protection.

22          Paragraph 8, they talk about the  
23          defamatory nature of his writings.  
24          Writings are First Amendment protected.  
25          If there's defamation, there's remedy in

1 the Court. There is no defamation.

2 If you look -- paragraph 9, 13  
3 different categories of his public and  
4 published allegations against City  
5 officials. Paragraph 10, you know, when  
6 he complains that the City of Madeira has  
7 been the subject -- they complain that  
8 they've been the subject of  
9 Mr. Oppenheimer's harassment and vicious  
10 attacks. Paragraph 11, he's lobbying  
11 concerning certain matters. They take  
12 issue with his public characterization.

13 They then attach to that complaint  
14 all these various postings that he does  
15 on his website and on the Internet.  
16 That's First Amendment. That is what's  
17 driving this lawsuit. At least there's  
18 sufficient prima facie indication that  
19 that is what is driving it, that we need  
20 in evidence.

21 And we need whoever authorized this  
22 lawsuit in to explain the authority  
23 granted in the bringing of this action.  
24 They have to defend going after a person  
25 who has criticized them.



1           You know, the Sixth Circuit has  
2           said public officials have to have thick  
3           skin and you get sliced. Public  
4           officials, you get slings and arrows  
5           thrown against you. It's part of the  
6           job.

7           But when they take and use  
8           government resources to go after a  
9           critic, that is a Strategic Lawsuit  
10          Against Public Participation.

11          Now, some states have anti-SLAPP  
12          statutes. We do not. But under 2323.51,  
13          even a claim that has a basis in fact in  
14          the law, if it is brought for an improper  
15          purpose can be a basis for sanctions.

16          We think if you look at the  
17          complaint, that shows an improper  
18          purpose. But then we go beyond that.  
19          You look at the discovery requests that  
20          they submit. We've attached those. We  
21          go through a litany of all the various  
22          requests that they want that have nothing  
23          to do with this.

24          It's interesting, one request, they  
25          ask for copies of Mr. Oppenheimer's --

1 produce copies of the tax bills that you  
2 have received from Madeira. That has  
3 nothing to do with any of the underlying  
4 lawsuits, with vexatious conduct. What  
5 does it have to do with? They left their  
6 comments in as to why they put that in  
7 there. And here's what the attorneys for  
8 the City of Madeira said: My thought  
9 with this one is that he has filed a  
10 number of taxpayer lawsuits and he barely  
11 pays them. That shows this action was  
12 for harassment.

13 They want to know all contacts he's  
14 had with the news media, First Amendment  
15 protected speech; all people he's talked  
16 to about the City of Madeira, First  
17 Amendment protected speech; the other  
18 people who might have sued the City who  
19 you have talked to.

20 You look at those discovery  
21 requests as a whole. Together with the  
22 complaint, that's what's driving this is  
23 vindictiveness and public officials who  
24 want to silence somebody.

25 Because at least for the prima

1 facie indication of that, an evidentiary  
2 hearing needs to be held to flesh those  
3 facts out.

4 Finally, with respect to the third  
5 motion for sanction, it goes to that  
6 first lawsuit, the one that I referenced  
7 earlier before Judge Dinkelacker.

8 When you look at all the actions  
9 and the positions that the City of  
10 Madeira took in that case; filing a  
11 counterclaim, saying there is a  
12 justiciable controversy, we want to know  
13 what authority we have under our city  
14 charter. That's what the City of Madeira  
15 did.

16 When you look at the statements of  
17 Mr. Goodin before the Court that shows  
18 that there was at least a good faith  
19 basis and that both sides wanted  
20 clarification of the city charter, that  
21 was it. That cannot be a basis, by any  
22 stretch -- by any reasonable stretch of  
23 the imagination to be frivolous conduct  
24 and a foundation for vexatious -- a  
25 finding of vexatious conduct.

1           I got it down -- I think the only  
2 other thing I have left is the motion to  
3 join the City Council members as party  
4 defendants.

5           The entire premise of that motion  
6 is, firstly, that, yes, the City Council  
7 is the one who has to authorize this  
8 lawsuit. They're going to now say that  
9 the City Council did not authorize this  
10 lawsuit, either in public or in a private  
11 executive session.

12           Then that issue -- then there would  
13 be no issue there to bring them in.  
14 Because right now, they're hiding behind  
15 the corporate shield. The cooperation  
16 can hide and take whatever slings, and  
17 all that, and force Mr. Oppenheimer to  
18 spend money defending himself on this.

19           Again, we believe that under state  
20 law, that the City Council had to bring  
21 this action, had to authorize the  
22 bringing of this special action; not  
23 simply an action to enforce zoning codes  
24 or building codes.

25           special proceeding to sue or be

1 sued, Chapter 715.03, clearly indicates  
2 it's the legislative authority that has  
3 to exercise that power. They have not  
4 done so. If they did not -- have not  
5 done so, then there's no reason to join  
6 them, but they would be the basis to  
7 dismiss the case because it's ultra  
8 vires.

9 I think I've got everything for  
10 now. I know they've got their motions.  
11 I'll address that in rebuttal and reply  
12 as well.

13 So if the Court doesn't have any  
14 further questions --

15 THE COURT: Not at this point.

16 Thank you.

17 MR. HARTMAN: Good. Thank you,  
18 Your Honor.

19 THE COURT: Mr. Fox, Mr. Goodin?

20 MR. GOODIN: Your Honor, if I may,  
21 Steve Goodin on behalf of the City of  
22 Madeira and behalf of the Madeira Council  
23 members.

24 Your Honor, if I may, I would like  
25 to go ahead and briefly talk about some

1 of the issues raised. In regards to the  
2 summary judgment motion, but I think Mr.  
3 Fox wanted to talk about some of the  
4 separate motions with regards to the  
5 motion to dismiss, the ultra vires  
6 argument, so forth and so on.

7 But, Judge, I will be relatively  
8 brief. Just bluntly put, there is no  
9 sanctionable conduct here.

10 This is an effort -- and has been  
11 an effort from the beginning -- to  
12 conduct politics at the courthouse, not  
13 through the political process.

14 There is absolutely nothing wrong  
15 with how this lawsuit was filed.  
16 Municipalities file these kinds of  
17 lawsuits all the time. They have every  
18 right to.

19 In fact, public officials,  
20 particularly in smaller municipalities  
21 with elected officials who do not get,  
22 really, any remuneration for their time  
23 as elected officials, they deserve some  
24 ability to protect themselves when they  
25 are slandered and libeled in these public

1 forums and when their judgment is called  
2 into question in the courthouse with  
3 bogus lawsuit after bogus lawsuit.

4 So going right to the MSJ, Judge,  
5 it's fairly straightforward in our view.  
6 There was absolutely no effort to chill  
7 Mr. Oppenheimer's First Amendment rights.  
8 Absolutely none. He has every right to  
9 come and petition Madeira City Council  
10 whenever he chooses.

11 In fact, he's there almost every  
12 month and speaks at length. He has every  
13 right to run for election there. He once  
14 did run for election, and I think the  
15 citizens saw fit to return him to private  
16 life.

17 And he has every right to continue  
18 to publish daily, almost, critiques of  
19 the Madeira City Council members and  
20 other folks on his Madeira Message  
21 website. He has been peddling numerous  
22 conspiracy theories -- many of them very  
23 distasteful -- about individual Council  
24 members, alleging criminal conduct and  
25 all sorts of things, without basis, for

1 many years.

2 These are public officials. We're  
3 not seeking to enjoin that in any way.  
4 He has every right to do so.

5 we did include examples -- salient  
6 examples of some of those insults and  
7 defamatory -- or, what would be, had they  
8 not been public officials -- otherwise  
9 defamatory conduct to provide context for  
10 why these three actions were so uniquely  
11 frivolous and meritless because they do  
12 go to his motivation for filing them.

13 His motivation, which I think any  
14 reasonable person who takes a look at the  
15 evidence that we have proffered just in  
16 our complaint, is to basically gum up the  
17 works of any kind of development activity  
18 in the City of Madeira, to the extent  
19 that he thinks he legally can, whether he  
20 washes these through a rotating cast of  
21 counsel or not. But it is what it is.

22 And if he has a real problem with  
23 direction of Council, he can either run  
24 for office, would be his remedy, or seek  
25 other folks who are like-minded.



1           And, again, we want to note here,  
2           you're not asked to decide the entire  
3           case today. This is whether or not we  
4           can move forward and actually conduct  
5           some discovery and try to figure out  
6           what's going on here.

7           But, again, his First Amendment  
8           right is not being proscribed one iota.  
9           Even if the Court were to grant our  
10          motion in its entirety -- or, actually, I  
11          guess in this case, it would be a jury  
12          would ultimately decide if he is a  
13          vexatious litigator -- even that means he  
14          could still file a lawsuit; it would just  
15          be with Court approval.

16          And I think the Sixth Circuit said  
17          this best in Hall versus Callahan. It's  
18          a 2013 US ap. 14520. If I'm quoting case  
19          law, it's a weird day.

20          But their quote was when looking at  
21          Ohio vexatious litigator statute, quote,  
22          vexatious conduct is not protected by the  
23          First Amendment. Furthermore,  
24          constitutionally protected speech is not  
25          banned by the statute because it does not

1 prevent vexatious litigators from filing  
2 future lawsuits, as long as they have  
3 merit, end quote.

4 I mean, so -- I mean, this statute  
5 in this context has been upheld. And,  
6 again, we would note that he has every  
7 right to continue to petition Council,  
8 run for Council, blast Council on his  
9 website.

10 I rather enjoy the website. I  
11 mean, I've been on the website quite a  
12 few times. I think my ex-wife-to-be  
13 actually joins in his perturbation.

14 Mr. Hartman, you can pass that  
15 along. You got one fan, I think.

16 He scored some good points. But, I  
17 mean, that's just what it is. And we're  
18 not in any way, shape, or form saying he  
19 can't mouth off about Council, if that's  
20 what he wants to do. He just can't keep  
21 suing us and dragging us to court with  
22 these kinds of outlandish theories.

23 Now, in terms of actual malice,  
24 Judge, I would respectfully disagree with  
25 Mr. Hartman regarding the New York Times

1           versus Sullivan. We could not find a  
2           single Ohio court that has read that  
3           standard into the vexatious litigator  
4           statute.

5                     It's a novel theory. It's an  
6           interesting theory. It's kind of a law  
7           review sort of theory. But this Court  
8           would be making new law if they required  
9           us to show actual malice.

10                    But even if they were, Judge, we  
11           actually could have anticipated this  
12           argument. And that's why we included in  
13           our pleadings and in our complaint all  
14           this evidence from the website, which, if  
15           that doesn't show malice and actual  
16           malice toward individual council members  
17           and towards the City Manager, I don't  
18           know what would.

19                    So it's been like a rotating series  
20           of, I don't know, Watergate-style  
21           conspiracy theories that have been thrown  
22           at the elected officials in Madeira on  
23           that website. And I think it's pretty  
24           clearly into actual malice territory.

25                    So, as a matter of law, Judge, he's

1 simply not entitled to summary judgment  
2 at this point. Most of the legal  
3 arguments for summary judgment, as I  
4 understand them, somehow rest upon this  
5 kind of First Amendment concept. And  
6 it's just simply not there.

7 We're not trying to proscribe his  
8 First Amendment rights. We're just  
9 trying to stop his ability to conduct  
10 politics through these bogus lawsuits.

11 Now, in terms of evidence, Judge --  
12 and I will be brief here -- Mr. Hartman  
13 is correct; there are three lawsuits that  
14 are at issue. But, more than that, it's  
15 the serial nature of his conduct and the  
16 fact that these lawsuits were filed in  
17 close proximity -- they're always either  
18 dismissed for mootness or lack of  
19 standing or because they're premature.

20 And each time, the requirement --  
21 it's an actual response; in some cases, a  
22 lengthy preliminary injunction hearing  
23 where there's no "there there" at the end  
24 of the day. They've all been absolute  
25 false starts, all of them an absolute

1 waste of money from the taxpayers. And  
2 in some cases these are lawsuits where he  
3 didn't have a right to be in court.

4 Also, just to kind of, I guess,  
5 clean up the record in regards to the  
6 case that was referenced about the zoning  
7 code and the historic preservation code  
8 with Judge Dinkelacker, indeed, Madeira  
9 filed a counterclaim. The sole reason we  
10 filed a counterclaim and the sole reason  
11 we argued that this  
12 justiciable controversy -- and the legal  
13 term was if one looks at the record  
14 completely -- and I was there, and I  
15 said it, we were afraid that if  
16 Judge Dinkelacker threw the case out as  
17 moot, which he ultimately did, that  
18 Mr. Oppenheimer would just turn around  
19 and sue us again.

20 We were trying to get a decision on  
21 the merits to avoid yet another runaround  
22 over whether or not -- what the  
23 definition of land was in the historic  
24 preservation code, which was, again, not  
25 exactly a weighty Constitutional matter

1 as it stood.

2 In terms of also the administrative  
3 appeal which Mr. Hartman notes, yes, by  
4 itself that cannot be a form of vexatious  
5 conduct. But noting that he appealed  
6 something that was not even a final  
7 order, that he didn't have standing to  
8 appeal in the first instance is, when  
9 taken in context with the others, a  
10 classic vexatious act and a complete  
11 waste of taxpayer money. And  
12 certainly on both sides.

13 It's also, I think, worth noting  
14 that we have filed a Rule 56M motion in  
15 this case for additional discovery. We  
16 have not -- we, the City of Madeira, have  
17 not been able to undertake a single piece  
18 of offensive discovery, meaningful  
19 discovery from Mr. Oppenheimer.

20 There's not been a single document  
21 produced by Mr. Oppenheimer. There's not  
22 been a deposition. The responses we  
23 received back to the interrogatories were  
24 largely objections. We've received no  
25 discovery back.

1           And, indeed, we did request his tax  
2           returns, as it is, whether or not he has  
3           actually paid taxes in the City of  
4           Madeira, as Mr. Hartman knows, would  
5           affect his standing to bring some of  
6           these claims into legitimate question.  
7           And it may seem intrusive, but it is a  
8           legitimate question.

9           Seeking his comments to other  
10          individuals would be to show some sort of  
11          malice toward the individual Council  
12          members. It's absolutely relevant and  
13          germane to what happens here. So we  
14          would note that this kind of evidence  
15          question is sort of a red herring.

16          We would also note that the City of  
17          Madeira has produced thousands of e-mails  
18          and other documents in response to his  
19          requests.

20          So we have yet to conduct even a  
21          real shred of discovery. So even if the  
22          Court were inclined to consider sort of  
23          some of these First Amendment legal  
24          arguments for summary judgment, it's  
25          simply not ripe from a practical

1           standpoint.

2                   And there's certainly evidence,  
3           from our point of view, genuine questions  
4           of material fact abound, particularly as  
5           to his motivation, who he worked with,  
6           and how these lawsuits came to be,  
7           because we have some suspicion that  
8           there's a lot more to it than it seems.

9                   So, Judge, in closing, on our  
10          point, we would just note that this  
11          continues to be an unfortunate episode in  
12          Madeira history. There's a lot of  
13          gamesmanship here, all along and all  
14          around. I would ask the Court, I guess,  
15          to note that the approach to this  
16          litigation, these voluminous filings and  
17          repetitive motions, and so forth, does  
18          speak to the sort of vexatious nature of  
19          Mr. Oppenheimer's dealings with the  
20          community to date.

21                   We would note -- I mean, it's  
22          something that the City has not taken  
23          lightly. It is very much aware that it  
24          is suing one of its own citizens and,  
25          punitively, one of its taxpayers. But



1 in the interest of the greater good,  
2 someone had to make this move, and we  
3 feel absolutely compelled to do so.

4 So with that, Judge, unless there  
5 are questions, I would turn over the  
6 lectern to Mr. Fox who is going to  
7 address this ultra vires question.

8 THE COURT: I don't have any  
9 questions at this point; on that anyway.

10 MR. FOX: Thank you, Your Honor.  
11 Brian Fox on behalf of the City of  
12 Madeira.

13 So for the Court's, I guess,  
14 understanding as it parses through all  
15 these, I'll go through the four motions  
16 related to sanctions, and then I will  
17 finish with the motion to dismiss for  
18 ultra vires.

19 THE COURT: Finish what, I'm sorry?

20 MR. FOX: The motion to dismiss for  
21 ultra vires.

22 THE COURT: Very good.

23 MR. FOX: So in the first motion  
24 for sanctions, Mr. Oppenheimer claims  
25 that this is a SLAPP suit. And it's --

1 the record is very clear, the law in Ohio  
2 is very clear that there is no anti-SLAPP  
3 statute.

4 And what the defendant uses as  
5 authority to argue and advocate, I guess,  
6 for this Court to legislate from the  
7 bench is an ACLU pamphlet that outlines  
8 what a SLAPP suit or an anti-SLAPP  
9 statute would look like.

10 But there are no cases in Ohio that  
11 apply any sort of anti-SLAPP statute  
12 because the General Assembly has not seen  
13 fit to enact one.

14 The sanctions standard that  
15 Mr. Oppenheimer relies upon is found in  
16 Revised Code 2323.51. And his argument  
17 is effectively that the lawsuit is not  
18 warranted under existing law.

19 But when you look at Revised Code  
20 2323.52, literally the next section, it  
21 expressly authorizes the filing of  
22 vexatious litigator lawsuits in a context  
23 where a political subdivision is making  
24 the filing.

25 while I -- you will find fewer who

1 more ardently support and defend the  
2 First Amendment than me -- I love the  
3 First Amendment. But the First Amendment  
4 is not what's at stake in this case.

5 Access to courts is fundamental.  
6 But the filing of lawsuits is not --  
7 filing frivolous lawsuits is not. And  
8 there is a distinction, a critical  
9 distinction between making statements and  
10 filing lawsuits.

11 To posture as though  
12 Mr. Oppenheimer would be  
13 unconstitutionally restrained if the City  
14 were to have -- if the Court were to  
15 grant -- designate him as a vexatious  
16 litigator would be a strange decision  
17 because if you look at the First  
18 Amendment, is Mr. Oppenheimer's right to  
19 free speech going to be restricted here?  
20 No. Is his right to petition for redress  
21 of the government? No. Is his right to  
22 assemble in any way going to be hampered  
23 or encumbered upon? No. Is his right  
24 to do any of the First Amendment  
25 protections that might be covered in an

1 anti-SLAPP context? No.

2 This lawsuit is really seeking for  
3 him to be designated as a vexatious  
4 litigator. And in so designating him as  
5 a vexatious litigator, it just adds a  
6 procedural precondition prior to him  
7 running to the courthouse to make a  
8 filing.

9 And so if you look at the claims  
10 related to the first motion, there is a  
11 ton of weight given by the defendant to  
12 allegations in the complaint relating to  
13 things that he said. But  
14 those statements are not foundational.  
15 What is foundational is Mr. Oppenheimer's  
16 desire to avail himself of the courts to  
17 litigate his policy preferences.

18 If he wants to advocate for policy  
19 prescriptions, if he wants to work within  
20 the political process, fine. If he wants  
21 to speak, if he wants to be, you know, a  
22 journalist in trying to operate this  
23 website, that's fine.

24 There is no desire on the City's  
25 behalf to shut that down, to enjoin that.

1           We're not even seeking tort damages for  
2           anything defamatory. The request is that  
3           he be designated as a vexatious  
4           litigator, which is authorized by  
5           statute.

6           Turning to the second motion for  
7           sanctions, I think my esteemed co-counsel  
8           said it well when he said that just  
9           because this one act may not be the -- if  
10          this were the one act that we would be  
11          relying upon to demonstrate that  
12          Mr. Oppenheimer is engaged in conduct  
13          that was vexatious, well, then maybe the  
14          argument that he's entitled to sanctions  
15          might hold water. But it doesn't. It's  
16          an amalgamation of the three different  
17          cases and his acts that acted -- or that  
18          took place in concert with those filings  
19          that serve as the substance of a  
20          complaint.

21          So to highlight or to accentuate  
22          one and to act as though that one act or  
23          that one administrative appeal fails,  
24          and, therefore, the entire case fails,  
25          and, therefore, no reasonable lawyer

1 would have brought this action, which is  
2 the standard in the context of sanctions,  
3 is entirely without merit.

4 So the second motion for sanctions  
5 is -- is it maybe the fodder for a motion  
6 in limine down the road, to try to maybe  
7 prevent this evidence from being  
8 introduced to a jury? Maybe. My  
9 argument, of course, because it's just  
10 one leg in the school of this entire  
11 case, that it ought to be introduced to  
12 the jury? Yes.

13 But, nevertheless, a motion for  
14 sanctions is completely not warranted  
15 under these circumstances.

16 Turning to the third motion for  
17 sanctions -- and I think this is, you  
18 know, maybe one of the strangest  
19 articulations of reasons for pursuing  
20 sanctions against the City -- is that  
21 because Mr. Goodin made statements at a  
22 hearing, those statements which were  
23 referring to terms of art like  
24 "justiciability" and the other terms of  
25 art that are referred to there. It's

1 very clear that the defendant confuses  
2 mootness for merit.

3 Not every litigation strategy is an  
4 appraisal of the merits of the case. And  
5 I would submit, even more to that point,  
6 in this circumstance the City was fending  
7 off a vexatious litigator.

8 So if the City were to fall on its  
9 proverbial sword and just accept that the  
10 case was moot, what would have  
11 effectively happened is the City would  
12 have had to move forward knowing that the  
13 moment that it tried to transact any sort  
14 of business with reference to the  
15 question of property, it would do so in  
16 the context of knowing that  
17 Mr. Oppenheimer was going to file a  
18 lawsuit against them.

19 Again, so just because a litigator  
20 is making a comment about the  
21 justiciability of a controversy or that  
22 something is capable of repetition does  
23 not mean that he's saying that there's  
24 any merit to that underlying claim.

25 So with respect to the third motion

1 for sanctions, there is just a gross  
2 confusion on behalf of opposing counsel  
3 with respect to whether we're talking  
4 about mootness, or whether we're talking  
5 about merit in that context.

6 So the motion to join individual  
7 council members is also itself -- you  
8 know, it's just a byproduct of the other  
9 three motions and its derivative.

10 Revised Code Section 2744.03 might  
11 extend to provide sovereign immunity in a  
12 circumstance like this. The motion for  
13 joinder is really just derivative of the  
14 three motions for sanctions. And the  
15 three motions for sanctions really have  
16 no strong foundation in Ohio law or in  
17 fact.

18 So turning now to the motion to  
19 dismiss, three points that I want to  
20 make: First, the City of Madeira  
21 indisputably has the right to file a  
22 vexatious litigator lawsuit, pursuant to  
23 Revised Code Section 2323.52(B). And  
24 that statute expressly provides that the  
25 Law Director has the authority to do so.



1           Second, Madeira is a chartered home  
2 rule municipality. It's chartered, thus,  
3 in the Law Director the authority to file  
4 the suit. The language that  
5 Mr. Oppenheimer relies upon, Revised Code  
6 Section 715.03, simply does not apply.

7           Three, Mr. Oppenheimer's  
8 interpretation -- if you were to follow  
9 the logic of his argument, it simply  
10 makes no logical sense. By his logic,  
11 all litigation that the City engaged in  
12 must be preempted by some sort of  
13 particular legislative enactment.

14           So if the City is having a problem  
15 with a vendor, now the City has to pass  
16 some sort of resolution or some sort of  
17 legislative ordinance in order to file  
18 that lawsuit? That's crazy. That  
19 leads -- an interpretation like that  
20 leads to an absurd result.

21           And I would say even more to that,  
22 if you look at the case law that we cited  
23 in our brief, you'll see that there are a  
24 number of cases which are vexatious  
25 litigant lawsuits that are brought in the

1           municipality's name on behalf of the  
2           municipality.

3                   His desire to invade  
4           attorney/client privilege to try to even  
5           cross-examine members of Council in order  
6           to arrive at who authorized this, this --  
7           it's a silly endeavor. And the Court  
8           should not entertain his claims.

9                   Under the plain language of the  
10          charter, the City Manager does have  
11          authority to engage in the administrative  
12          tasks.

13                   If you look at the City of Madeira  
14          conceptually, you have City Council,  
15          which is the legislative body, and then  
16          you have the City Manager. It's a, I  
17          guess, bicameral structure inasmuch as,  
18          you know, the City Council is the  
19          legislative authority, and the City  
20          Manager also, under the charter, is the  
21          executive branch. And so as those two  
22          branches coincide or interact there are  
23          different roles.

24                   But under no circumstance is there  
25          anything within the charter that requires

1           some sort of specific pronouncement or  
2           enactment or ordinance or resolution that  
3           would authorize the filing of a lawsuit.

4           And, in fact, if you look at the  
5           canons of statutory construction,  
6           expressio unius, there are specific  
7           actions that if they're not authorized by  
8           City Council under the charter, then  
9           those things would be maybe considered  
10          ultra vires.

11          The filing of a lawsuit isn't among  
12          those, nor can the defendant point to any  
13          case law or legal authority beyond his  
14          own self-serving arguments to support  
15          this contention.

16          So Ohio Courts -- and in the case  
17          of City of Green versus Helms and in the  
18          City of -- and then Marysville versus  
19          Boerger, in both of those cases we're  
20          dealing with similar language in the  
21          charter, similar authority.

22          Like in the City of Green case, the  
23          charter language reads: The director of  
24          law shall be the legal adviser on all  
25          legal matters coming before the City and

1 shall represent or direct the  
2 representation of the City in all  
3 litigation. So you're talking about a  
4 very similar provision.

5 If you listen to the defendant's  
6 construction of the Law Director's  
7 authority under the charter, it would  
8 sound as though the Law Director can only  
9 represent the City if the City is a  
10 defendant in a case or being sued.

11 Well, surely, that is not a  
12 reasonable interpretation of "represent  
13 the City in all matters."

14 So extending beyond that, if you  
15 look at his desire that a legislative  
16 enactment serve as a precursor to the  
17 filing of any lawsuit, legislative  
18 enactments under the City of Madeira's  
19 charter have the force and effect of law.  
20 Under the charter, if something has a  
21 force and effect of law, then that action  
22 can be subject to referendum.

23 So if you were to draw or rely upon  
24 defendant's interpretation of that  
25 authority as only being capable of being

1 exercised in the context of a legislative  
2 precursor authorization, then every  
3 lawsuit would then -- the decision to  
4 file a lawsuit would be subject to  
5 referendum, and, thus, potentially  
6 violative of the Ohio Civil Rules of  
7 Procedure and maybe even statute of  
8 limitations. So surely that  
9 interpretation does not make the best  
10 sense.

11 I mean, when you really look at the  
12 two options before the Court today, with  
13 respect to this motion to dismiss, you  
14 have the defendant's view of the world.  
15 And under the defendant's view of the  
16 world, you have Revised Code 715.03. But  
17 as you get -- in order to arrive at his  
18 conclusion, you have to climb up  
19 different rungs of the ladder of  
20 abstraction.

21 So you have to suppose that the  
22 legislative authority referenced in that  
23 statute is only delegated in a very  
24 specific context of a resolution or  
25 ordinance.

1           Then in order to get to the next  
2           rung, to climb up even more of the ladder  
3           of abstraction, you have to rely upon an  
4           Ohio Attorney General opinion from 1978  
5           that pertained to a sick leave policy  
6           that a city enacted.

7           You know, whereas the City of  
8           Madeira, its argument is the statute  
9           expressly authorizes it; you have Revised  
10          Code 2323.52. Then you have the case law  
11          that's included and cited in the omnibus  
12          response to the various motions for  
13          sanctions that he filed, but that are  
14          also included in response to the motion  
15          for summary judgment and the motion to  
16          dismiss.

17          You know, a few of them worth  
18          referencing, Wallace versus City of Rocky  
19          River, Verhovec versus the City of  
20          Trotwood, and State ex rel.  
21          Litwinowicz -- L-i-t-w-i-n-o-w-i-c-z --  
22          versus Cuyahoga County Board of  
23          Elections, all brought on behalf of  
24          municipalities and not needing to bring  
25          it in the very specific and precise way,

1 in the name of the Law Director, who have  
2 you, that the defendant is abdicating  
3 for.

4 In closing, I'll say this. The  
5 city filed this after years of the  
6 defendant's pointless lawsuits, constant  
7 threats of more litigation, all of which  
8 were evidently aimed at strong-arming the  
9 City's decision-making process to suit  
10 his whims and through the defendant's  
11 rumormongering and harassment of the  
12 City's public servants.

13 My clients -- and I can say this  
14 comfortably -- they ran for City Council  
15 to make a difference. They ran for  
16 higher office because they wanted to make  
17 Madeira residents' lives better. And  
18 it's not fair to taxpayers that one  
19 person can monopolize the City's  
20 priorities and resources with a barrage  
21 of lawsuits and threats for more.

22 Three trial courts and the First  
23 District, time and again, dismissed and  
24 upheld the dismissals in the City's  
25 favor.

1                   This case is not about the past.  
2                   This case is about fighting for Madeira's  
3                   future. It's about the City taking  
4                   decisive action in trying to do whatever  
5                   it can so that the City's elected and  
6                   appointed leaders can lead and its public  
7                   servants can serve the community without  
8                   fearing senseless litigation. Thank you.

9                   THE COURT: I have a question on  
10                  this issue.

11                  Do you agree that it was an option  
12                  to bring this suit in your name -- the  
13                  Law Director's name? Or in this  
14                  situation -- I'm just curious as to your  
15                  position on Mr. Hartman saying it has to  
16                  be that way. And you say, no, it does  
17                  not have to be done that way.

18                  Is it an optional situation where  
19                  it could have been brought in the name of  
20                  the City of Madeira or in the name of  
21                  Brian Fox, or --

22                  MR. FOX: I think there are  
23                  circumstances where it might be one or  
24                  the other. I was -- I have not located  
25                  any case law that for purposes of Revised



1 Code 2323.52, if the Law Director or City  
2 solicitor is bringing it, they have to  
3 bring it in their individual name versus  
4 bringing it in the name of the City. I  
5 have not seen that.

6 THE COURT: There's no requirement  
7 of that, it --

8 MR. FOX: Correct.

9 THE COURT: It obviously has been  
10 done other places. There's clearly --  
11 there's cases. I was just curious as to  
12 your -- that there's no requirement that  
13 it be done one way or the other --

14 MR. FOX: No.

15 THE COURT: -- is your position.

16 And, again, this is more of a  
17 big-picture thing, and if you don't want  
18 to put this in the record, you can  
19 explain to me why.

20 There was this request of you to  
21 look into the viability of the filing in  
22 this suit, correct?

23 MR. FOX: Yeah. The word was  
24 "explore."

25 THE COURT: Explore?

1 MR. FOX: Sure.

2 THE COURT: Okay. And then the  
3 suit was filed.

4 MR. FOX: So I would say the  
5 proclamation -- well, go ahead and finish  
6 your question. I don't want to preach.

7 THE COURT: Go ahead. No, you go  
8 ahead.

9 MR. FOX: Okay. All right. So the  
10 proclamation itself -- and I said this in  
11 the memo in opp. The proclamation has no  
12 real legislative effect whatsoever. It's  
13 no different than it being declared --  
14 you know, July 3rd being declared Arby's  
15 Day, or what have you, to designate.

16 So Council's desire to issue a  
17 proclamation explaining to the City or to  
18 voters, you know, what they did in that  
19 proclamation, which speaks for itself,  
20 that is -- that, to me, is a red herring.  
21 It has nothing to do with this case,  
22 because -- I mean, it has something to do  
23 with the case, it's relevant, but it's  
24 not germane to a determination as to  
25 whether the City had authority to file

1 the lawsuit.

2 THE COURT: Okay. That answers my  
3 question. All right. Very good. Thank  
4 you.

5 Mr. Hartman?

6 MR. HARTMAN: May it please the  
7 Court.

8 Let me address the last point  
9 firstly. In terms of who could have  
10 brought the lawsuit, the statute, 2323.52  
11 simply does allow a person to bring a  
12 vexatious litigation, which, in this  
13 case, is what happened.

14 The City of Madeira is the person.  
15 By definition, "person" under Revised  
16 Code includes corporations. This is the  
17 municipal corporation that brought it.

18 Could Mr. Fox have brought a  
19 similar action in his own name? Yes. He  
20 didn't. He brought it under the City's  
21 name.

22 It's interesting he talked about  
23 red herrings. He very much creates one  
24 here today when he talks about, well, the  
25 City had to -- Council had to approve

1 this, any lawsuit, that would be subject  
2 to referendum, et cetera, et cetera.

3 It really shows, with all due  
4 respect, a lack of appreciation that not  
5 every action by city council is  
6 legislative in nature. Referendum -- and  
7 there's case law on this. I didn't  
8 know -- since he didn't put it in his  
9 briefs, I didn't know it was raised.

10 But the case law is that what is  
11 subject to referendum are legislative  
12 actions. Certain actions by city  
13 councils or village councils are not  
14 legislative in nature.

15 For example, employment decisions,  
16 hiring -- when a city council votes to  
17 hire somebody or not hire someone, Courts  
18 have said that is not a legislative  
19 action. Legislative actions generally  
20 apply to the entire community as a whole  
21 and affect and set standards for the  
22 community as a whole. That is what is  
23 legislation.

24 So I would encourage the Court --  
25 and I can give supplement citations to

1 the Court, if need be -- as to what is or  
2 is not legislative action.

3 So when Mr. Fox stands here and  
4 says that the City Council had to vote to  
5 approve this lawsuit or would be subject  
6 to referendum, that is absolutely false.  
7 It would not be subject to referendum  
8 because it's not legislative in nature.

9 He also says -- let me see. He  
10 also then proceeds to confuse the duty of  
11 the Law Director to represent the City  
12 and defend the City and prosecute on  
13 behalf of the City versus the legal  
14 authority to act on behalf of the  
15 municipal cooperation to sue or to be  
16 sued.

17 He says that it's nowhere in the  
18 City charter. I agree with that.  
19 Therefore, it is state law. It is  
20 Revised Code 715.01 and 715.03 that  
21 controls, that says the ability to sue  
22 and be sued is in the City Council. And,  
23 concedingly, City Council has not  
24 authorized this lawsuit.

25 It's interesting. I asked, I

1            begged for them to stand up here and say  
2            here is who authorized this lawsuit and  
3            here is when it occurred. They've not  
4            done so yet. That's a simple question.

5            Mr. Fox can say, I, and I as Law  
6            Director, authorized and brought this  
7            lawsuit on behalf of the municipal  
8            corporation. He didn't do that.

9            THE COURT: Back up a minute.

10          MR. HARTMAN: Sure.

11          THE COURT: You're saying that  
12          doing all this isn't a legislative  
13          action, but isn't that completely counter  
14          to what your argument is?

15          MR. HARTMAN: No, no, no. I  
16          understand -- the legislative -- the  
17          section, 715.03 of the Revised Code  
18          specifies that the legislative authority  
19          of a municipal cooperation is permitted  
20          by Revised Code 715.03 to exercise and  
21          enforce the powers of a municipality.

22          THE COURT: Right.

23          MR. HARTMAN: So it's the  
24          legislative authority that has the power  
25          to sue and be sued on behalf of the

1           municipal cooperation. When they do so,  
2           though, it is not a legislative action  
3           subject to referendum. The City --  
4           again, the City Council can hire and fire  
5           personnel.

6                   THE COURT: Okay.

7                   MR. HARTMAN: And then the City  
8           Manager may have most hiring power. But  
9           the City -- I believe, under this  
10          charter, but, generally speaking,  
11          employment decisions by City Council are  
12          not legislative in nature; though that  
13          authority to exercise that is given to  
14          the legislative authority.

15                   Do you understand the distinction?

16                   THE COURT: I understand.

17                   MR. HARTMAN: And so then his  
18          argument that everything the City Council  
19          does is subject to referendum, that is  
20          not the law in Ohio. Only legislative  
21          actions -- actions of the City Council  
22          that are legislative in nature are  
23          subject to referendum.

24                   Deciding to sue or -- to sue is not  
25          legislative in nature, but it is a power

1 that must be exercised by the legislative  
2 authority under Revised Code 715.01 and  
3 715.03.

4 In terms of the sanctions motions,  
5 you know, again, Mr. Fox misunderstands  
6 the SLAPP legislation. SLAPP  
7 legislation -- anti, actually. It's  
8 anti-SLAPP legislation allows for almost  
9 the immediate dismissal of a retaliatory  
10 First Amendment lawsuit.

11 We don't have that in Ohio,  
12 granted. But we do have 2323.51, which  
13 authorizes the bringing of sanctions for  
14 when the actions are brought with an  
15 improper purpose.

16 And that is the basis for the first  
17 motion for sanctions. The improper  
18 purpose is retaliation on First  
19 Amendment. It's not an anti-SLAPP  
20 question. But what this is, is a  
21 strategic lawsuit against public  
22 participation.

23 It was interesting, Mr. Goodin, if  
24 I understood him correctly, conceded  
25 during his argument that an



1 administrative appeal cannot be the basis  
2 for vexatious litigation. But because we  
3 have all these other things you have to  
4 consider, you cannot, under the  
5 statute -- statutory definition,  
6 administrative appeals are not conduct.  
7 They have conceded that here today.

8 THE COURT: Well, I think --  
9 correct me if I'm wrong -- but isn't it a  
10 kind of a totality of the circumstances,  
11 the whole big picture, so this should be  
12 a factor that should be considered?  
13 You're saying I shouldn't even consider  
14 that administrative --

15 MR. HARTMAN: Correct.

16 THE COURT: Not even consider in  
17 the totality --

18 MR. HARTMAN: Not that you  
19 shouldn't, you cannot. Because what you  
20 can consider is whether there was  
21 vexatious conduct or not.

22 THE COURT: Uh-huh.

23 MR. HARTMAN: "Conduct" is a  
24 defined statutory term. So you've got to  
25 consider was there vexatious conduct.

1 The conduct of an administrative appeal  
2 does not apply in this case because it's  
3 not an appeal against the government  
4 brought by an inmate. By statutory  
5 definition, it cannot be a basis; yet,  
6 they allege it is in their complaint.

7 And that's the basis for the second  
8 motion for sanctions.

9 You know, Mr. Fox argued, well,  
10 that's not going to resolve the entirety  
11 of this case. But under 2323.51, it  
12 doesn't have to. 2323.51(A)(2)(ii)  
13 allows for frivolous conduct to be  
14 asserting a position in connection with a  
15 civil action that is not warranted under  
16 existing law.

17 And so when they argue that the  
18 bringing of an administrative appeal was  
19 vexatious conduct, as a matter of law, it  
20 could not because of the statutory  
21 definitions. They ignored the statutory  
22 definitions.

23 That is sufficient -- it's not a  
24 win-all-or-nothing thing in terms of  
25 frivolous conduct. They've taken a

1 position that is not warranted under  
2 existing law. And the existing law is  
3 the statutory definitions.

4 He then says, well, Mr. Goodin --  
5 we filed a third motion for sanctions,  
6 and, well, Mr. Goodin can't be held to  
7 what he said and what they represented  
8 before Judge Dinkelacker.

9 Interestingly, Mr. Fox not once  
10 addressed the counterclaim that the City  
11 of Madeira filed where they themselves  
12 said we want a declaratory judgment about  
13 the city charter.

14 THE COURT: No. I think Mr. Goodin  
15 addressed it.

16 MR. HARTMAN: Mr. Goodin addressed  
17 it. But in terms of the sanctions,  
18 they knew -- they took the position, yes,  
19 Judge Dinkelacker, tell us what the  
20 charter means. They actually argued to  
21 Judge Dinkelacker, you have three  
22 options: You can grant the declaratory  
23 judgment in favor of Mr. Oppenheimer;  
24 second, you can say the case is moot and  
25 get rid of it; or, third, you can give

1           our -- give us the declaratory judgment  
2           and say we can do this with these  
3           properties.

4                     That's legitimate justiciable  
5           dispute that calls for a Court to  
6           adjudicate.

7                     At the end of the day,  
8           Judge Dinkelacker said it was moot, I'm  
9           dismissing the case. But even if he had  
10          ruled for them and said, yes, the city  
11          charter allows you to do X, that doesn't  
12          make it frivolous. That just means  
13          there's a bona fide dispute.

14                    Their whole argument -- and they  
15          keep repeating it -- is on the merits.  
16          Mr. Oppenheimer lost. He didn't win on  
17          the merits; therefore, it's vexatious.

18                    The Supreme Court in that Bunting  
19          case clearly established that it's more  
20          than simply losing a case before you do  
21          the extreme measure of finding somebody  
22          to be a vexatious litigator.

23                    In terms of the motion for summary  
24          judgment, yes, we are calling for the  
25          court to decide the case today.

1           There is a motion for summary  
2 judgment pending. Evidence has been  
3 submitted in support of that motion for  
4 summary judgment.

5           The City of Madeira has offered no  
6 evidence in contrast. Instead, all we  
7 get is argument by counsel. But the law  
8 is clear that argument of counsel is not  
9 evidence.

10           They cannot even rely upon their  
11 pleadings alone. Rule 56 evidence must  
12 be submitted in opposition. They have  
13 not done so.

14           In terms of the New York Times  
15 versus Sullivan, yes, I would say  
16 vexatious conduct is not protected by the  
17 First Amendment. Similarly, libel is not  
18 protected by the First Amendment. Yet,  
19 New York Times v Sullivan still applies  
20 to libel claims when the Government tries  
21 to retaliate against citizens who dare to  
22 challenge them.

23           Finally, in terms of the Rule 56F  
24 motion that they filed, they have not  
25 established, really, a foundation and a

1 basis to say we need more time, more  
2 discovery, et cetera. Recognize, this  
3 case was filed April of last year.

4 THE COURT: Do you agree, though,  
5 that absolutely no meaningful discovery  
6 has been provided by the defendant to the  
7 plaintiff? Or do you disagree?

8 MR. HARTMAN: Well, you know, it's  
9 their obligation to do the discovery.  
10 Okay. Here is what they did. Did we  
11 provide any documents? No.

12 Do you know why? Because they  
13 didn't ask for anything that was relevant  
14 or reasonably calculated to the  
15 admissibility --

16 THE COURT: Well, that's your  
17 opinion, though. But is this the method  
18 in which to address whether or not you  
19 believe the discovery that is being  
20 requested is relevant or pertains to  
21 this?

22 MR. HARTMAN: It's their obligation  
23 to pursue it.

24 Here's what happened in this case.  
25 This case was filed in April of last

1 year. For nine months, they sat on their  
2 hands and did absolutely nothing in terms  
3 of discovery. Nothing. Nine months.

4 Then, quick approach of the  
5 discovery cutoff at end of January, oh,  
6 shoot, we got to get discovery out.

7 So what did they do? They throw  
8 all this stuff out. Tell us who all is  
9 giving you money for your website. Tell  
10 us this. Tell us all the contact you've  
11 had with the news media.

12 So the answers were due after the  
13 cutoff of discovery. We still provided  
14 answers. We provided objections. We  
15 did what we were obligated to do under  
16 Rule 33, 34, and 36.

17 What did they do? I get one e-mail  
18 from Mr. Fox, I've looked at your  
19 discovery -- and it's in one of the  
20 pleadings -- I've looked at your  
21 discovery, is that all you're going to  
22 do?

23 I sent back, Brian, if you've got  
24 issue with a particular objection or with  
25 a request that you think -- I'd welcome

1 review it. He goes on, well, we've  
2 provided all these records and these  
3 records. That doesn't matter. What  
4 matters is whether the requests were  
5 relevant or reasonably calculated,  
6 whether or not -- or whether they were  
7 seeking privileged information.

8 We objected on those grounds.  
9 Absolutely. Why the heck do they need to  
10 know who is giving money to  
11 Mr. Oppenheimer to run his webpage? Has  
12 nothing to do with this case. Why do  
13 they need to know all his communications  
14 with the news media? Doesn't have  
15 anything to do with this case. And it  
16 impedes his First Amendment rights and  
17 the First Amendment rights of the press.

18 We objected. Did they come back  
19 and say, you know, Curt, here, we think  
20 these are legitimate requests, we don't  
21 think this is a legitimate objection?  
22 No. That's what you do. That's what  
23 Rule 37 requires, extrajudicial efforts.

24 They engaged in none of that. They  
25 simply said, well, we've given you all



1           these records. We can't believe you're  
2           objecting and not giving us anything.  
3           That was it. They did no effort to try  
4           to work through and say, here's what we  
5           really need.

6                     Give us all the public records  
7           requests that you've ever submitted to  
8           the City of Madeira. For one, they've  
9           got those records just as well as we  
10          might have those records still.

11                    And, I mean, I can go through the  
12          litany of the requests that they sought  
13          through discovery, most of which had  
14          nothing to do with this case, with  
15          whether or not Mr. Oppenheimer should  
16          be -- have the extreme measure of being  
17          declared a vexatious litigator.

18                    They waited and sat on their hands  
19          for nine months. Two weeks before the  
20          cutoff of discovery, they throw out this  
21          whole rash of things; you know, give us  
22          your tax returns so we can see if you  
23          paid your taxes, ha-ha-ha. It had  
24          nothing to do with whether he had  
25          standing.

1           Firstly, if they had a problem with  
2           the standing, the time to bring that is  
3           in the underlying lawsuit; otherwise,  
4           it's waived. If they didn't raise it  
5           below in the other cases, it's waived.

6           Second of all, Mr. Oppenheimer  
7           undisputably lives in the City of  
8           Madeira. He is a taxpayer. So I think  
9           it is absurd to even suggest it had  
10          anything to do with standing. It -- that  
11          was nothing but to harass.

12          So then we wait nine-and-a-half  
13          months. We get these last-minute  
14          requests. We attempt to provide some  
15          information, we object to others  
16          legitimately.

17          We get a single e-mail back saying,  
18          are you -- we gave you all this stuff.  
19          Yeah, we are, unless you can tell me  
20          which requests you think are legitimate.  
21          What do we hear? Nothing.

22          We get their motion in opposition  
23          to the Rule 56F motion filed. We're  
24          going to file a motion to compel. They  
25          never filed a motion to compel.

1            Couple months, months, months, two  
2            to three months ago we met with Your  
3            Honor in chambers. Mr. Fox at that time,  
4            Judge, we're going to be filing our  
5            motion to compel, granted, four or five  
6            months after the cutoff of discovery. To  
7            this date, they haven't. Now, suddenly  
8            we want -- give them more discovery? The  
9            discovery cutoff had -- they had nine  
10           months, did nothing.

11           When objections were tendered, they  
12           did -- they were not diligent in trying  
13           to work through them. No extrajudicial  
14           efforts.

15           This is a 56F. It's a backdoor  
16           effort to try to say we need more  
17           discovery. But look at Mr. Fox's  
18           affidavit and look at the law as to what  
19           has to be met to grant additional time to  
20           respond to a motion for summary judgment.

21           Granted, most of the case law I  
22           cite to is out of the federal courts.  
23           That's because we don't publish trial  
24           court decisions in Ohio. And so these  
25           type motions that come up at the trial

1 court level are really few and far  
2 between.

3 But I would point out, you have to  
4 be more specific than, we think we might  
5 get information, we hope there might be  
6 some information out there. They've got  
7 to be specific. What type of evidence  
8 they think they have -- can identify has  
9 not been obtained, and how it is going to  
10 affect the motion for summary judgment.

11 Go back through the motion for  
12 summary judgment. And you got to look at  
13 the 56F in that context. We have  
14 established all the elements that have to  
15 be established to be -- to take the  
16 extreme measure of declaring somebody a  
17 vexatious litigator.

18 We put forth evidence refuting  
19 that, raising that issue. They have not  
20 identified a single piece of evidence  
21 that they would be able to knock down at  
22 least -- and create a genuine issue of  
23 material fact on all the elements that we  
24 raised.

25 They can't present evidence. All

1           they say is we hope, we think, we  
2           suspect, we speculate there may be  
3           evidence out there that would help us.  
4           The law under Rule 56F says that is not  
5           enough. We cite the case law.

6                     They had nine months to do  
7           discovery. They waited until the last  
8           minute and then were just trying to  
9           shotgun anything and everything,  
10          harassment left and right, to evade First  
11          Amendment privilege, to evade  
12          attorney/client privilege.

13                    Here we are now, nearly six months  
14          later -- five months later. The case  
15          needs to come to an end. They don't have  
16          the evidence. The evidence itself  
17          clearly establishes Mr. Oppenheimer is  
18          not a vexatious litigator. Maybe a pain  
19          in the butt. I'll concede that,  
20          probably.

21                    But when you look at the extreme  
22          measure and the criteria that have to be  
23          met -- forget New York Times versus  
24          Sullivan -- all the elements that have to  
25          be met, persistently, habitually, without

1 reasonable grounds -- each one has a  
2 separate thing -- engaged in vexatious  
3 conduct, with "conduct" being defined.

4 When you look at what you have to  
5 consider in terms of conduct, when you  
6 look at what they did in terms of  
7 counterclaims and argument to the Court,  
8 there's no issue to take to a jury.

9 The undisputed summary judgment  
10 evidence is there. They've not  
11 established a need for any additional  
12 evidence that will actually make a  
13 difference.

14 Therefore, we would ask, first and  
15 foremost, the Court dismiss in terms of  
16 finding the filing was ultra vires.

17 Barring that, we'd ask the Court to  
18 grant the summary judgment motion, deny  
19 their Rule 56F motion, and proceed in  
20 terms of scheduling hearing on some or  
21 all of the motions for sanctions. I  
22 think we made at least a prima facie  
23 indication of a basis for evidentiary  
24 hearing, which is required under 2323.51.

25 That's really all we're arguing

1 here today, the prima facie on the  
2 motions for sanctions.

3 I thank the Court for its patience  
4 and time.

5 THE COURT: Absolutely. Thank you.

6 MR. FOX: Briefly?

7 THE COURT: Yes.

8 MR. FOX: Mr. Hartman claims that  
9 the City sat idle for nine months and  
10 didn't engage in any discovery. What he  
11 left out is that the City provided to  
12 prior counsel 3,097 documents in response  
13 to prior counsel's request for discovery.

14 He also left out the fact that  
15 during that time I was engaged in a civil  
16 dialogue with prior counsel about  
17 resolving the matter without needing to  
18 resort to further litigation. But as  
19 soon as Mr. Hartman involved himself and  
20 was retained by the defendant, everything  
21 changed. The tenor of everything  
22 changed. And I think his angry gesturing  
23 at our table is, itself, telling.

24 If you look at the discovery  
25 responses, we served seven Requests for

1 Admissions. Zero of seven were actually  
2 responded to substantively.

3 We served 25 Interrogatories.  
4 Three of those 25 were actually responded  
5 to in some way, shape, or form.

6 And we served 17 Requests for  
7 Production of Documents. And we don't  
8 have a document to this day.

9 So, you know, so far he has filed  
10 six different motions. Our motion was  
11 only -- our 56F motion was only a  
12 response to that.

13 Why did we not file a motion to  
14 compel? Because that's a waste of  
15 taxpayer money. We don't want to  
16 continue to have to fight with opposing  
17 counsel about getting documents that the  
18 Ohio Civil Rules require that he provide.

19 I'm not sure why opposing counsel  
20 is so convinced that I have to litigate  
21 with him over the phone or through e-mail  
22 in order to get documents that  
23 nine-times-out-of-ten, with other  
24 counsel, it wouldn't be a problem and it  
25 wouldn't be an issue. But here, it's



1 almost impossible.

2 And I would say that the six  
3 motions that are before the Court right  
4 now, the three motions for sanctions, the  
5 motion for joinder, the motion to  
6 dismiss, even the motion for summary  
7 judgment, it's -- they are not founded on  
8 great law. They are not founded on good  
9 facts.

10 So our request is simple; that  
11 this Court dismiss the motions for  
12 sanctions and the accompanying motion for  
13 joinder, that this Court dismiss the  
14 motion to dismiss for ultra vires, that  
15 this Court dismiss the motion for summary  
16 judgment, that this Court allow us to  
17 conduct discovery with this defendant.

18 And let's proceed to trial. That's  
19 what the City wants. The City wants an  
20 opportunity to have its day in court in  
21 light of the defendant's conduct here.

22 And, again, we're not trying to  
23 stop him from speaking, we're not trying  
24 to stop him from typing or writing or  
25 posting on Facebook or online. We're

1 simply asking that he not sprint to the  
2 courthouse whenever he's not getting his  
3 way.

4 We ask that this Court dismiss all  
5 of these actions and grant our 56F  
6 motion. Thank you.

7 THE COURT: Thank you.

8 First, I want to thank counsel on  
9 both sides. This is always -- while this  
10 was thoroughly briefed and very well  
11 briefed by both sides, oral argument is  
12 always exceptionally helpful to the  
13 Court. It really is, to have this give  
14 and take, to have some things just  
15 discussed here in open court.

16 Sort of working out of order,  
17 because I think we all have been all over  
18 the place with the various motions and  
19 what order they would be addressed.

20 I'm going to take the motion to  
21 dismiss under advisement. It's something  
22 that I want to look at a lot more  
23 thoroughly, despite the fact that it has  
24 been well briefed and argued here today.  
25 I'll issue a ruling by August 5th on

1           that, on the motion to dismiss.

2                       Regarding the motion for summary  
3 judgment, the defendant in this situation  
4 has every right -- nobody is saying, I  
5 don't think, that the defendant doesn't  
6 have a right to say whatever he wants,  
7 wherever he wants, whenever he wants.  
8 That is his First Amendment right.

9                       But that's not what this case is  
10 about, whatsoever. It's about vexatious  
11 litigation and the question whether  
12 frivolous lawsuits are being filed and  
13 have risen to that level, that high level  
14 of having the defendant declared a  
15 vexatious litigator.

16                      And, at this juncture, the Court  
17 cannot find that the defendant is  
18 entitled to judgment as a matter of law  
19 and no genuine issue of material fact  
20 exists. The motion for summary judgment  
21 is denied.

22                      I am going to grant the plaintiff's  
23 Rule 56F motion for additional time for  
24 discovery to be exchanged. You need to  
25 work towards getting this case to court.

1           so before you all leave, you'll  
2           select a new scheduling order with my law  
3           clerk in that regard.

4           The other remaining motions, the  
5           motion for the imposition of sanctions,  
6           those three motions and the issue of  
7           joinder: Madeira's filing of vexatious  
8           litigation suit is authorized by law and  
9           not frivolous conduct. The City is not  
10          violating a law by filing this underlying  
11          suit whatsoever.

12          whether or not the City's position  
13          can be supported by the evidence will be  
14          determined at the trial.

15          city council members and the other  
16          public officials that are perhaps out  
17          there are unquestionably immune from  
18          being personally sued under these facts  
19          and the allegations.

20          The motions for sanctions, all  
21          three motions, and the motion for joinder  
22          of the individual Council members or  
23          other public officials is denied.

24          The plaintiff's counsel is to  
25          prepare the entries consistent with the

1 Court's findings on all of these motions,  
2 with the exception of the motion to  
3 dismiss, which you'll receive my decision  
4 on by August 5th.

5 Everyone is aware?

6 MR. HARTMAN: Can I get some  
7 clarification on one or two things?

8 THE COURT: Sure.

9 MR. HARTMAN: In terms of granting  
10 the 56F motion, if I may, because until I  
11 know exactly what they think is or is not  
12 pertinent in terms of discovery and try  
13 to be efficient and try to kind of borrow  
14 from federal court, either I come in and  
15 I sit down and go through with the Court  
16 what should or should not be discoverable  
17 or not discoverable --

18 We believe we have a First  
19 Amendment privilege on a lot of what of  
20 they're seeking. We think a lot of it is  
21 irrelevant.

22 If the Court ultimately says  
23 something is relevant that leads to  
24 discovery of admissible evidence, fine.

25 But I think instead of going

1 through the motions of extrajudicial  
2 efforts to try to do this, efficiency  
3 would say you come in sometime and go  
4 through them.

5 And I'm not sure if they still want  
6 everything they've asked for; tax bills,  
7 public records requests. They may be  
8 able to narrow it down a little bit too.

9 But I'm just thinking in terms of  
10 efficiency there, it might be a lot more  
11 efficient along that line.

12 Second of all, does that also  
13 grant, then, plaintiff additional time  
14 for discovery?

15 THE COURT: Yes.

16 MR. HARTMAN: Okay.

17 THE COURT: What were you going to  
18 ask?

19 MR. GOODIN: Your Honor, also, I  
20 guess, borrowing one from federal court,  
21 perhaps we should just meet and confer  
22 and --

23 MR. HARTMAN: I'm not sure if we're  
24 going to be able to resolve. I'm going  
25 to stand by most of the First Amendment

1 privilege questions.

2 MR. GOODIN: Well, we'll take  
3 another look at our requests. I don't  
4 know that we necessarily need --

5 THE COURT: I am ordering you  
6 both --

7 I know exactly where you're going,  
8 Mr. Goodin.

9 I am ordering you both to make  
10 efforts to deal with this situation  
11 without the Court's involvement. We are  
12 not now scheduling a time for me to  
13 already be involved when it sounds like  
14 there has kind of been a stalemate  
15 between everybody as far as where this  
16 discovery issue is going to be.

17 You have my decision on selecting  
18 an additional date. Pick reasonable  
19 times. You all are reasonable people.  
20 Pick a reasonable time frame for which  
21 the discovery should be extended. If you  
22 can't agree with that, I'll decide it.

23 MR. HARTMAN: Got you there.

24 THE COURT: And then if at that  
25 point you all are still at loggerheads,

1           that's when we'll talk about sitting down  
2           on the record and deciding on what is  
3           coming in and what isn't, what's  
4           discoverable.

5           MR. HARTMAN: Can we just -- if we  
6           can't come to loggerheads -- I'm not  
7           going -- we're going to -- would it be  
8           more efficient to just call the Court and  
9           say, hey, we have a couple issues, can we  
10          come in and talk?

11          THE COURT: Absolutely. And I have  
12          an open-door policy. Absolutely. If you  
13          need my involvement, you all should  
14          involve me. I'm not saying I'm not  
15          available. I'm just saying at this point  
16          I would implore you all to try to work  
17          through this, as you should --

18          MR. HARTMAN: One final  
19          clarification.

20          THE COURT: -- being members of the  
21          bar.

22          MR. HARTMAN: One final  
23          clarification. If I heard the Court  
24          correctly, you ruled that the members of  
25          the city council are personally immune



1 from under -- from being liable under  
2 2323.51?

3 THE COURT: The joinder of the  
4 individual Council members or other  
5 public officials, that motion -- the  
6 motion to join them --

7 MR. HARTMAN: Is denied. I  
8 understand that.

9 THE COURT: Correct.

10 MR. HARTMAN: But you -- that they  
11 were immune from personal liability?

12 THE COURT: At this point in this  
13 situation, to be added as individuals in  
14 this lawsuit? Yes.

15 MR. HARTMAN: Okay. I'm just --  
16 Judge, I'm not trying -- I mean, when you  
17 said personal immunity, I'm thinking  
18 Chapter 2744, political subdivision  
19 toward immunity. Is that what -- just so  
20 we're clear in terms of the entry.

21 MR. GOODIN: We'll exchange entries  
22 and so forth. I don't believe, with all  
23 due respect, that that is what the Court  
24 is saying, but --

25 MR. HARTMAN: That's why I asked

1 for clarification.

2 MR. GOODIN: We'll submit an entry.  
3 You can --

4 MR. HARTMAN: I just want to make  
5 sure, because I need to preserve an  
6 issue, then, if that is the case in terms  
7 of equal protection; that if public  
8 officials get immunity and the regular  
9 public does not, then that creates --

10 THE COURT: No. That's not what  
11 I'm saying. I guess I'm not  
12 understanding what your question is.  
13 That's not what I'm saying at all.

14 MR. GOODIN: It's --

15 MR. FOX: The motion for joinder is  
16 being denied.

17 MR. HARTMAN: I understand that.  
18 But I was just trying to clarify. You  
19 said that they are not personally -- that  
20 they have personal immunity.

21 THE COURT: If I said that, strike  
22 it from the record.

23 MR. HARTMAN: Okay.

24 THE COURT: How is that?

25 MR. HARTMAN: Okay.

1 THE COURT: Good?

2 MR. GOODIN: Yes, Your Honor.

3 Thank you.

4 MR. HARTMAN: Thank you.

5 MR. FOX: Do you want us to submit  
6 an agreed scheduling order?

7 THE COURT: No. You should do it  
8 now while you all are here.

9 (The proceedings concluded.)

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CERTIFICATE

I, Andrea Hodapp, the undersigned,  
a Registered Professional Reporter for  
the Hamilton County Court of Common  
Pleas, do hereby certify that at the same  
time and place stated herein, I recorded  
in stenotype and thereafter transcribed  
the within 91 pages, and that the  
foregoing Transcript of Proceedings is a  
true, complete, and accurate transcript  
of my said stenotype notes.

IN WITNESS WHEREOF, I hereunto set  
my hand this 9th day of August, 2019.

---

ANDREA HODAPP  
Registered Professional Reporter  
Court of Common Pleas  
Hamilton County, Ohio