United States District Court
Eastern District of Michigan
Southern Division

The PUBLIC INTEREST LEGAL FOUNDATION *Plaintiff*, *v.* **JANICE M. WINFREY, in her official capacity as Detroit City Clerk, and GEORGE AZZOUZ, in his official capacity as Director of Elections for the City of Detroit,** *Defendants*.	No. 2:19-13638 Hon. David M. Lawson Mag. Judge Michael J. Hluchaniuk

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Public Interest Legal Foundation herein responds to Defendants' motion for judgment on the pleadings.

The Foundation's Complaint states a plausible claim for relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Defendants' motion and memorandum contests facts and their motion should be denied under Federal Rule of Civil Procedure Rule 12(c).

For the reasons contained in the accompanying brief in support of Plaintiff's response, Defendants' motion should be denied.

Respectfully submitted,

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Dated: April 3, 2020

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PLAINTIFF'S BRIEF IN SUPPORT OF ITS RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

STATEMENT OF ISSUES PRESENTED

1) Whether Plaintiff's Complaint states a claim on which relief can be granted.

Plaintiff's Response: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(c)

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INTRODUCTION

Defendants' motion would render the list maintenance provisions of the National Voter Registration Act ("NVRA") meaningless. The Public Interest Legal Foundation (the "Foundation") has sufficiently pled a violation of the NVRA. The Defendants' systemic failures to remove deceased registrants is precisely the type of harm that Congress sought to fix through Section 8 of the NVRA. Granting Defendants' motion for judgment on the pleadings would mean that alleging that a defendant has a list maintenance program that fails to remove thousands of deceased registrations, many who have been deceased for over a decade, cannot, under any set of facts, plausibly violate a statute that was drafted to explicitly prevent deceased registrants from remaining on the rolls. Such a finding would effectively nullify an act of Congress and the motion should be denied.

The Foundation pled that thousands of deceased citizens were active on the Defendants' voter rolls, some for over a decade after dying. The Foundation pled that even after these circumstances were brought to the Defendants' attention, no action was taken. Taking the Foundation's allegations as true and drawing all reasonable inferences in the Foundation's favor, the Foundation's Complaint states a plausible claim for relief. Defendants' motion should be denied.

CONCISE STATEMENT OF FACTS

Section 8 of NVRA requires election officials to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of – (A) the death of the registrant; or (B) a change in the residence of the registrant[.]" 52 U.S.C. § 20507(a)(4). (R. 1, PageID.3.)

The Foundation is a non-partisan, nonprofit, public interest organization that seeks to promote the integrity of elections nationwide. (R. 1, PageID.2.) Defendants are Janice M. Winfrey, the City Clerk for the City of Detroit, and George Azzouz, the Director of Elections for the City of Detroit. (R. 1, PageID.2-3.) Defendants are responsible for maintaining the City of Detroit voter rolls. (R. 1, PageID.5.) The NVRA and Michigan law governs how Defendants are to maintain the City of Detroit's voter rolls. (R. 1, PageID.6-8.)

As part of its mission, the Foundation reviews and disseminates information about election officials' compliance with state and federal laws. (R. 1, PageID.5.) The Foundation first requested documents from the Defendants in October of 2017. (R. 1, PageID.9-10.)

The Foundation obtained the State of Michigan's official voter registration list as of April 1, 2019. (R. 1, PageID.10.) From that list, the Foundation identified registrants where the listed date of birth indicated they were at least 105 years old.

(R. 1, PageID.10.) The Foundation identified one active registrant with a birth year of 1823, before Michigan was even admitted to the Union. (R. 1, PageID.10.) The Foundation's analysis also yielded apparent duplicate and triplicate registrations for the same person. (R. 1, PageID.11.)

On May 23, 2019, the Foundation sent a letter to Defendant Winfrey pursuant to 52 U.S.C. § 20510(b). (R. 1, PageID.11.) In this communication, the Foundation notified Defendant Winfrey of its review of the City of Detroit's voter rolls and that the City of Detroit was not in compliance with the NVRA. (R. 1, PageID.11-12.) The letter also requested to inspect list maintenance records pursuant to the NVRA. (R. 1, PageID.12.) On July 8, 2019, the Foundation sent Defendant Winfrey another letter reiterating that there was an ongoing violation of the NVRA and that the Foundation intended to visit her office. (R. 1, PageID.12-13.)

Representatives of the Foundation met with Defendant Azzouz and a member of his staff on July 30, 2019. (R. 1, PageID.13.) During that meeting, Defendant Azzouz admitted that the registrant the Foundation identified with a birth year of 1823 was still registered to vote in the City of Detroit. (R. 1, PageID.13.)

The Foundation purchased access to verifiable death record data. (R. 1, PageID.13.) In order to conserve fiscal resources, the Foundation narrowed the

City of Detroit's voter roll to only those individuals over 85 years old and then compared that list against those verifiable death record data. (R. 1, PageID.13-14.) The Foundation then compiled its research into spreadsheets that included relevant identifying information for each registrant that was likely deceased. (R. 1, PageID.14.) The Foundation sent its research to the Defendants on September 13, 2019. (R. 1, PageID.14.)

The Foundation's limited research yielded a list of 2,503 registrants who are likely deceased. (R. 1, PageID.14.) The Foundation alleged that the majority of those registrants, or 1,629 individuals, have been deceased for more than 10 years. (R. 1, PageID.15.) Further, the Foundation alleged that 898 have been deceased for more than 15 years, 324 have been deceased for more than 20 years, and 13 have been deceased for more than 25 years. (R. 1, PageID.15.) The Foundation alleges that the total number of deceased registrants is higher. (R. 1, PageID.16.) The Foundation alleges that this is evidence of systematic list maintenance failures by the Defendants. (R. 1, PageID.10-11.)

As for the Foundation's research into likely duplicate or triplicate registrations, the Foundation identified a list of 2,384 entries that are likely duplicated or triplicated. (R. 1, PageID.16.) The Foundation also provided this data to the Defendants. (R. 1, PageID.14.)

On November 15, 2019, representatives of the Foundation again drove to Detroit to meet with Defendants. (R. 1, PageID.17.) Following the meeting, on November 22, 2019, the Foundation sent one final letter to Defendants requesting a remedial plan to address the Foundation's data and underlying concerns. (R. 1, PageID.18.) Defendants did not respond to the Foundation's letter.

The Foundation filed this action on December 10, 2019 alleging, in part, that "the City of Detroit's voter rolls contain thousands of ineligible deceased registrants, some who have been dead for extraordinary amounts of time, and the Defendants do not have a reasonable list maintenance program to detect and remove deceased registrants from the rolls." (R. 1, PageID.4.)

The Foundation's Complaint also alleges independently that the City of Detroit has inflated registration rates that indicate that Detroit's voter rolls contain obsolete and inaccurate registrations. (R. 1, PageID.8-9.) In support of this allegation, the Foundation compared publicly available registration numbers for Detroit with publicly available U.S. Census Bureau information. (R. 1, PageID.8-9.) *See also*, R. 1, PageID.25 (referring to registration rate from 2012).

Defendants filed an Answer to the Foundation's Complaint on January 20, 2020. (R. 11, PageID.235.) On February 10, 2020, Defendants filed an Amended Answer, (R. 17, PageID.316), which included four exhibits not found in the original Answer, (R. 17-1, PageID.339). One new exhibit was a 25-paragraph

declaration from Defendant Azzouz that included ten attachments. (R. 17-12, PageID.382-408.)

The Court held a case management conference on February 12, 2020. Following the conference, the Court issued a schedule which stated that "Defendants must file their motion for judgment on the pleadings on or before **February 28. 2020**." (R. 23, PageID.472). Defendants filed the present motion on February 28, 2020. (R. 27, PageID.548.)

ARGUMENT

The question before the Court is simple: does the Foundation's Complaint state a plausible claim? The Foundation's Complaint alleges a systemic breakdown of list maintenance obligations in the City of Detroit. The Foundation presented a non-exhaustive list of thousands of lingering deceased registrants to support the allegation that Defendants have failed to reasonably maintain their voter rolls. The overwhelming weight of authority on this very question establishes that the Foundation has stated a plausible claim and the Defendants' motion should be denied. *See Voter Integrity Project NC, Inc. v. Wake Cty. Bd. of Elections*, 301 F. Supp. 3d 612 (E.D.N.C. 2017); *Bellitto v. Snipes*, 221 F. Supp. 3d 1354 (S.D. Fla. 2016); *American Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779 (W.D. Tex. 2015); and *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012).

Defendants ask this Court to accept their version of the facts. Rule 12(c) does not allow that. Instead, the allegations in the Complaint must be accepted as true. *See Paskvan v. Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991). Indeed, if contested facts are required to support Defendants' motion, then the Defendants motion should be treated as one for summary judgment. In that circumstance, such a motion should not be considered prior to discovery.

Defendants misapply the proper standard of review for a motion for judgment on the pleadings. Because the Foundation has stated a plausible claim, Defendants' motion should be denied.

Standard of Review

"A motion for judgment on the pleadings by a defendant pursuant to Rule 12(c) of the Federal Rules of Civil Procedure is equivalent to a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted." *Bergeron v. Fischer*, No. 02-CV-10298-BC, 2004 WL 350577, at *3 (E.D. Mich. February 19, 2004). "In considering such a motion, the court must accept all the factual allegations of the complaint as true." *Paskvan v. Cleveland Civil Serv. Comm'n*, 946 F.2d at 1235 (citing *Beal v. Missouri Pac. R.R.*, 312 U.S. 45, 51 (1941)). Under the controlling standard, Defendants "implicitly concede[] the truth of the pleaded facts for the purpose of the motion" and "all reasonable inferences

are drawn in favor of the plaintiff." *K.S. v. Detroit Pub. Schs*, No. 14-12214, 2015 WL 4459340 at *5 (E.D. Mich. July 21, 2015).

While a complaint need not contain detailed factual allegations, it must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "Plausibility requires showing more than the 'sheer possibility' of relief but less than a 'probab[le]' entitlement to relief." *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 280 (6th Cir. 2010) (quoting *Iqbal*, 556 U.S. at 678).

I. Defendants' Motion Relies on Factual Disputes and Should be Denied.

When considering a Rule 12(c) motion, "'all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false.'" *Lowden v. Cnty. of Clare*, 709 F. Supp. 2d 540, 545-46 (E.D. Mich. 2010) (citing 5C Wright & Miller, Federal Practice & Procedure § 1368.) The Sixth Circuit has held that it constitutes reversible error under Rule 12(b)(6) to "credit[] the defendant's, rather than the plaintiff's version of facts." *Mediacom Se. LLC v. BellSouth Telcoms., Inc.*, 672 F.3d 396, 400 (6th Cir. 2012). Doing so "unduly raises the pleading standard

beyond" what is required. *Id*. The same is true here and Defendants' factual disagreements have no role in contrast to the Foundation's well-pleaded allegations which are to be taken as true.

Defendants' motion relies on disputed facts. Defendants devote 16 pages, more than half of their memorandum, to a "concise" recitation of their version of "facts." (R. 27, PageID.562-577.) Defendants also offer opinions from Internet articles to dispute whether the Foundation, a section 501(c)(3) organization, is nonpartisan, something wholly irrelevant to a cause of action under the statute and particularly to a Rule 12(c) motion. (R. 27, PageID.562.) Defendants offer misplaced and irrelevant commentary not at issue in this case without citations to the record as required under this Court's rules. (*See* R. 27, PageID.565-567 (entitled "The Illusory Voter Fraud Problem").) Defendants conjure claims the Foundation has not made. (*See* R. 27, PageID.575 ("Plaintiff suggests that the City took no voter list maintenance actions prior to the commencement of this litigation").)

Defendants are really offering this Court a premature and meritless mootness argument instead of a properly pled Rule 12(c) motion. For example, they claim that a portion of the Foundation's specific concerns have now been addressed. (*See* R. 27, PageID.561.) Defendants assert that at least 94% of the Foundation's research as to duplicate registrations was accurate and allegedly resulted in the

correction of those duplicate entries. (*See* R. 27, PageID.573-74.) Even if true, this would not entitle the Defendants to a dismissal under Rule 12(c). That is a factual dispute, not a basis for a Rule 12(c) dismissal.

"[T]he burden of demonstrating mootness 'is a heavy one.'" *Merritt v. Int'l Ass'n of Machinists & Aero. Workers*, No. 2:06-CV-14342, 2008 WL 5784439, at *19 (E.D. Mich. Sep. 22, 2008) (citations omitted). Defendants have not addressed the burden much less carried it.

Further, the Foundation's claims are not limited to the 4,887 specific examples of unreasonable list maintenance provided to the Defendants. The Foundation alleges something more substantial—a longstanding and systematic breakdown of list maintenance activities by the Defendants. (*See*, *e.g.*, R. 1, PageID.4-5, 8-9.) These are well pled allegations of violations of Section 8 of the NVRA. The examples provided are additional supporting *evidence* of those underlying and unresolved problems.

Even if Defendants were to claim that the Foundation's claims are moot, the Foundation would be entitled to respond to that argument at an appropriate time. That time is not now. It is nonetheless worth noting that if indeed Defendants have made a claim of mootness under the guise of a Rule 12(c) motion, that effort is fatally flawed. For example, Defendants have not even addressed the question of whether their alleged violations of the NVRA are capable of repetition yet evading

review due to the "reasonable expectation that the same complaining party would be subject to the same action again." *A.A. v. Walled Lake Consol. Schs*, Civil Action No. 16-14214, 2017 WL 2591906, at *7 (E.D. Mich. June 15, 2017). Even if Defendants claimed that *all* their unlawful conduct has ceased, the case would still be ripe unless Defendants demonstrate "there is no reasonable expectation that the alleged violation will recur, and interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) (emphasis added) (citations and quotations omitted). In any event, anything touching on mootness are factual questions not properly resolved under Rule 12(c).

II. The Foundation's Complaint States a Plausible Claim that Defendants Are Failing to Reasonably Maintain Their Voter Rolls.

Defendants ask for the dismissal under Rule 12(c) of a complaint that alleges that thousands of deceased registrants were left on the voter rolls undetected for five, ten and even fifteen years after they died. Such a finding would nullify an act of Congress that specifically exists in order to correct that very failure. Defendants turn the relevant 12(c) standard on its head, asking the Court to reject the factual allegations in the Foundation's Complaint and resolve any dispute in *their* favor.

A. The NVRA Requires Election Officials to Accurately Maintain Their Voter Rolls.

Every one of the four legislative purposes of the NVRA support the Foundation's claims in this case. They are (1) "to establish procedures that will increase the number of *eligible* citizens who register to vote[,]" (2) to "enhance[] the participation of *eligible* citizens as voters," (3) "to protect the integrity of the electoral process," and (4) "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b) (emphasis added).

Defendants complain that "the NVRA does not require the City to take every conceivable action to ensure that its voter rolls are completely accurate." (R. 27, PageID.586.) They are correct on that point, but the Foundation does not allege that Defendants must take *every* conceivable action because the NVRA does not require a plaintiff to so plead. Congress provided election officials flexibility to implement a generalized program to keep voter rolls clean. Congress did not include a detailed checklist of steps within the NVRA for election officials to follow. Rather, Congress enacted the NVRA "(3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained," 52 U.S.C. § 20501(b)(3)-(4), while specifically directing election officials to remove registrations belonging to those who pass away. 52 U.S.C. § 20507(a)(4)(A). Further, Congress allowed any aggrieved person to file suit to enforce these directives. *See* 52 U.S.C. § 20510(b).

The proverbial proof is in the pudding. When a complaint alleges that a jurisdiction, year after year, decade after decade, allows thousands of dead registrants to remain active on the voter rolls entirely undetected, then an allegation that the list maintenance program is not reasonable is a well-pled allegation under Section 8 of the NVRA. Reasonable list maintenance is the law. 52 U.S.C. § 20507(a)(4). Of course, Congress allowed local election officials flexibility to maintain their rolls free from deceased registrants. But when the dead remain undetected active registrants of the sort cataloged on Defendants' watch, as the Foundation's well-pled complaint details, a claim is stated under the NVRA.

An election official's flexibility to fix such a problem—whether they employ every means available or just a few—is irrelevant to a 12(c) motion when a plaintiff pleads that the problem is acute and the problem persists year after year, decade after decade, unknown to the election official. Discretion regarding *how* to do reasonable list maintenance is not the same as discretion *whether* to do reasonable list maintenance. An election official has an obligation to use tools to maintain the rolls that are reasonably matched to the circumstances of the jurisdiction. *See Voter Integrity Project NC, Inc.*, 301 F. Supp. 3d at 619 (the fact that election officials are not using a readily available tool "may be relevant to determine the reasonableness of [the defendant's] efforts at voter list maintenance.")

The Foundation's allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678, and are sufficient to raise the right to relief "above the speculative level," *Twombly*, 550 U.S. at 555.

Indeed, courts in other Circuits have also approved consent decrees or settlements with flexible remedial plans under the NVRA where election officials conduct various activities based on their circumstances in order to correct their failure to properly maintain their rolls in contravention of the NVRA. *E.g. ACRU v. Sheriff/Tax Assessor-Collector McDonald*, No. 2:14-cv-00012 (W.D. Tex. Mar. 17, 2015); *ACRU v. Clarke County, Miss., Election Commission*, No. 2:15-cv-101 (S.D. Miss. Nov. 25, 2015).

B. The Foundation Alleges that Defendants Are Failing to Remove Deceased Registrants.

The Foundation alleges that "the City of Detroit's voter rolls contain thousands of ineligible deceased registrants, some who have been dead for extraordinary amounts of time, and the Defendants do not have a reasonable list maintenance program to detect and remove deceased registrants from the rolls." (R. 1, PageID.4.)

Defendants raise two primary objections to these allegations. First, Defendants state that the Foundation's claims are "inaccurate." (R. 27, PageID.585.) This is a factual dispute that does not allow for a dismissal under

Rule 12. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995) ("It is not the function of the court to weigh evidence or evaluate the credibility of witnesses" when deciding Rule 12(b)(6) motion.). Second, Defendants say that the Foundation's findings are "statistically insignificant" in light of the number of registrants on the City of Detroit's rolls. (R. 27, PageID.585.) Again, that is a factual dispute. That the Foundation's allegations plausibly state a violation of the NVRA is supported by the overwhelming authority from courts that have reviewed similar complaints.

***Bellitto v. Snipes* (S.D. Fla.)**

Defendants appended only one item to their motion: a complaint from a case from the Southern District of Florida. Notably, the attached complaint is inoperative as it was later amended. *See Drake v. City of Detroit*, 266 F. App'x 444, 448 (6th Cir. 2008) ("[A]n amended complaint supersedes all prior complaints.") More fundamentally, Defendants fail to note that the amended complaint *survived* a motion to dismiss. *Bellitto v. Snipes*, 221 F. Supp. 3d at 1365 ("[T]he Court finds dismissal improper because Plaintiff has alleged that Defendant failed to make a reasonable effort to remove ineligible voters by reason of death or change of address.")

Indeed, the *Bellitto* complaint belies Defendants' position here. Specifically, the *Bellitto* court referred to the following portion of that plaintiff's complaint:

> On information and belief, Defendant has been given reliable information regarding registered voters who *have either died or no*

> *longer reside at the address listed in their registration and has taken no action* to remove them as required by Florida Statutes § 98.075. On information and belief, in the Wynmoor community of Coconut Creek, for example, Defendant has received information regarding over 200 registered voters who have either died or who no longer reside in the community. . . . By failing to implement a program which takes reasonable steps to cure these circumstances, Defendant has violated NVRA and other federal list maintenance statutes.

Id. at 1365 (citing Amended Complaint ¶¶ 13-14 (emphasis added).) The court found that "this factual allegation and other claims made in the Amended Complaint are sufficient to state a claim under Section 8." *Id*.

The Foundation alleges that it provided Defendants with reliable information regarding not hundreds but *thousands* of registrants who have died and that the Defendants have not taken action to remove these individuals from the City of Detroit's voter rolls. (R. 1, PageID.14-18.) Under the analysis in *Bellitto*, the Foundation "has plead sufficient facts to support its claim that Defendant inadequately removed the names of registrants who have died." *Bellitto v. Snipes*, 221 F. Supp. 3d at 1365-66. As to the defendants' allegations that the defendants were in compliance with the NVRA, the court found that "whether Exhibit B [to the plaintiff's complaint] establishes Defendant's full compliance with subsection (c)(1) and defeats Plaintiff's claims is a fact-based argument more properly addressed at a later stage of the proceedings." *Id*. *Bellitto* thus soundly rejects Defendants' attempts to side-step all factual inquiry and be awarded judgment on the merits.

Voter Integrity Project **(E.D.N.C.)**

The U.S. District Court for the Eastern District of North Carolina considered a complaint where the plaintiff alleged that the defendant "'undertakes absolutely no effort whatsoever to use data available from the Wake County Clerk of Superior Court obtained from jury excusal communication' to identify 'residents who self-identify as non-citizens or non-residents' or to identify 'potentially obsolete mailing addresses of registrants.'" *Voter Integrity Project NC, Inc.*, 301 F. Supp. 3d at 618. The defendant, like the Defendant here, claimed that the plaintiff's "allegations are insufficient to show a violation of the obligation to conduct a program that makes a reasonable effort at voter list maintenance." *Id*. The court disagreed and denied a motion to dismiss,

> Thus, the fact that WCBOE does not use a "readily available tool," (Compl., DE # 1, ¶ 19), to remove ineligible voters does not mean in and of itself that WCBOE has failed to make a reasonable effort at voter list maintenance. However, it, along with other evidence, may be relevant to determine the reasonableness of WCBOE's efforts at voter list maintenance.

Id. at 619. The court denied the defendants' motion to dismiss, ruling "a reasonable inference can be drawn that [the defendant] is not making a reasonable effort to conduct a voter list maintenance program in accordance with the NVRA." *Id*. at 620.

C. Allegations Regarding Implausible Registration Rates Support a Finding in the Foundation's Favor.

Defendants devote six pages of argument to contesting facts about registration rates. Importantly, for the reasons stated above, the Foundation has pled more than just implausible registration rates. Regardless, the Foundations' facts must be accepted as true, not the Defendants'.

Nevertheless, Defendants offer factual disputes as to why their registration rates are high, including articles opining that Detroit is difficult to count, (R. 27, PageID.581-82). In other words, Defendants argue the registration rate is high for any number of reasons, *except* those alleged by the Foundation. All of these arguments raise factual issues not properly considered in the motion for judgment on the pleadings. *See Paskvan v. Cleveland Civil Serv. Comm'n*, 946 F.2d at 1235. Rather, the Foundation's Complaint is to be "viewed in the light most favorable to the plaintiff, the allegations in the complaint are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff." *K.S. v. Detroit Pub. Schs*, No. 14-12214, 2015 WL 4459340 at *5 (E.D. Mich. July 21, 2015).

Further, Defendants' arguments have been rejected by a number of courts that reviewed allegations similar to the Foundation's.

***American Civil Rights Union v. Martinez-Rivera* (W.D. Tex.)**

The *Martinez-Rivera* complaint alleged that "the voter rolls for [the] County have more registered voters than there are citizens in the County who are eligible

to vote." *Martinez-Rivera*, 166 F. Supp. 3d at 785. The plaintiff additionally alleged that the County had "failed to maintain accurate voter rolls" over previous election cycles. *Id*. Under Rule 12(b)(6), the defendant argued that "the Complaint fail[ed] to allege specific acts by the Defendant that amount to a violation of the NVRA." *Martinez-Rivera*, 166 F. Supp. 3d at 786. Specifically, the defendant argued "that high registration rates do not demonstrate an NVRA violation; in essence, that the facts in the Complaint do not plausibly demonstrate that ACRU is entitled to relief." *Id*. at 793. The court disagreed, finding that "high registration rate . . . creates a strong inference that the Defendant has neglected her duty to maintain an accurate and current voter registration roll." *Id*. Relying on the Supreme Court's 12(b)(6) jurisprudence, the court held that "the Plaintiff alleged a plausible claim for relief" under the NVRA. *Id*.

***Voter Integrity Project* (E.D.N.C.)**

Similarly, in *Voter Integrity Project*, the plaintiff "allege[d] that 'voter rolls maintained by [the defendant] contain or have contained more registrants than eligible voting-age citizens.'" *Voter Integrity Project NC, Inc.*, 301 F. Supp. 3d at 618. The defendant argued, in part, that the plaintiff's conclusion was "oversimplified" in light of the NVRA's requirements. *Id*.

The Court found that "there is nothing inherently wrong with [the plaintiff's] reliance on census data to support its claim." *Id*. at 619. Further, "while defendant-

intervenors have advanced a potentially reasonable explanation for the high registration rate…the validity of that explanation is not appropriate for determination at this early stage of the litigation, where the court views the factual allegations and inferences drawn therefrom in favor of [the plaintiff.]" *Id.*

***Judicial Watch v. King* (S.D. Ind.)**

In this case, the plaintiffs claimed a violation of the NVRA demonstrated "by a comparison of 2010 Census data and voter registration data, which indicates that the number of persons registered to vote exceeded the total voting population." *Judicial Watch*, 993 F. Supp. 2d at 921. In denying the defendants' motion to dismiss, the court rejected the defendants' arguments that the NVRA has no census triggering mechanism. "The Plaintiffs actually allege that because the Defendants have failed to comply with the NVRA, the voter registration rolls in some Indiana counties are inaccurate, and simply point to the discrepancy between the Census data and the voter registration rolls in those counties as *evidence of* that inaccuracy." *Id.* at 922 n.2 (emphasis in original.)

As in the cases above, the Foundation alleges that the voter rolls maintained by the Defendant contain or have contained more registrants than eligible voting-age citizens. (R. 1, PageID.8-9.) As in the cases above, when taken as true—as they must be at this stage—the Foundation's allegations create a strong inference that the Defendants have fallen short of using reasonable efforts to remove

ineligible registrants in violation of the NVRA. The Foundation's allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678, and are sufficient to raise the right to relief "above the speculative level," *Twombly*, 550 U.S. at 555.

III. Consideration of the Defendants' Outside Evidence Would Require Converting Defendants' Motion to a Summary Judgment Motion.

Defendants rely heavily on matters outside the pleadings in their motion. Defendants provide no explanation for why these materials, many of which are hearsay for which Defendants provide no exception, should be considered in resolving this motion. Defendants exceed the bounds of judicial notice and the Court should disregard evidence presented that is outside the pleadings. *See Wingeart v. Warren*, No. 05-74144, 2011 WL 1085032, at *1 (E.D. Mich. Mar. 23, 2011) ("Federal Rule of Evidence 201 authorizes a court to take judicial notice of an adjudicative fact that is 'not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.' Fed. R. Evid. 201(b).")

In the Sixth Circuit, "Rule 12(c) requires only one action by the district court for the conversion to a summary judgment motion to occur: failure to exclude presented outside evidence." *Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 503 (6th Cir. 2006). If the court does not exclude "matters outside the

pleadings…the motion must be treated as one for summary judgment under Rule 56" and "[a]ll parties must be given a reasonable opportunity to present *all* the material that is pertinent to the motion." Fed. R. Civ. P. 12(d) (emphasis added). Such an opportunity has not taken place here and the Foundation objects to the conversion of this motion to one for summary judgment as discovery is still in its early stages. The court "generally does not consider motions for summary judgment prior to the close of discovery." *Bowens v. Aftermath Entm't*, 254 F. Supp. 2d 629, 639 (E.D. Mich. 2003) (citing *Ramik v. Darling Int'l*, Inc., 161 F. Supp. 2d 772, 776 n.1 (E.D. Mich. 2001)). "Accordingly, if the [material submitted] constitutes a matter outside the pleading, the Court will not convert the present Motions to motions for summary judgment." *Id*.

Defendants rely extensively on a declaration from Defendant Azzouz. (R. 17-12, PageID.382-408.) However, the declaration is impermissible outside evidence that raises factual disputes that are not appropriately resolved in the context of this motion. Defendants generally assert "exhibits to such pleadings" may be reviewed because they are part of the pleadings under Federal Rule of Civil Procedure 10(c). (R. 27, PageID.578.)[1] That rule provides, "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

[1] Notably, the Defendants refer to "ECF No. 17-2 through 17-11" as the exhibits to such pleadings. Defendant Azzouz's declaration is ECF No. 17-12.

But evidentiary material is not a "written instrument" for purposes of Rule 10(c) when it is "evidentiary material" that "serve[s] only to create questions of fact that the Court cannot resolve on a motion to dismiss." *Bowens v. Aftermath Entm't*, 254 F. Supp. 2d at 640 (holding that a DVD is not a "written instrument" under Rule 10(c) because it "does not define the rights and obligations of the parties," but is "evidentiary material [that] should not be attached to the pleadings.") (citations and quotations omitted); *see also In re Empyrean Biosciences, Inc. Securities Litigation*, 219 F.R.D. 408, 413 (N.D. Ohio 2003) (holding that a 16-page affidavit is not a written instrument as contemplated by Rule 10(c)); *Gooden v. Batz*, No. 3:18-cv-302, 2019 WL 3318164 (S.D. Ohio July 22, 2019); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 297 (6th Cir. 2008) (holding that the district court did not convert a Rule 12(c) motion to one for summary judgment because the court considered only a copy of a city ordinance and its legislative record, "while excluding outside evidence including the Linz affidavit" and "additional affidavits presented by both sides that went beyond the legislative record.")

The Azzouz Declaration is outside evidence because it is "directed at contradicting Plaintiff's factual allegations" and therefore "'serve[s] only to create questions of fact that the Court cannot resolve on a motion to dismiss' or for judgment on the pleadings.'" *Olivia Marie v. Travelers Cas. Ins. Co. of Am.*, No.

11-cv-12394, 2011 WL 13220626, at *2 (E.D. Mich. Sept. 15, 2011) (quoting *Bowens*, 254 F. Supp. 2d at 639.)

"[A] Rule 12(b)(6) motion rests upon the pleadings rather than the evidence," *Simon Prop. Grp. v. Taubman Ctrs.*, 240 F. Supp. 2d 642, 646 (E.D. Mich. 2003). "'[I]t is not the function of the court [in ruling on such a motion] to weigh evidence or evaluate the credibility of the witnesses.'" *Id*. (quoting *Miller v. Currie*, 50 F.3d at 377). Accordingly, the Court should exclude Defendants' outside evidence and deny Defendants' motion based upon the appropriate 12(b)(6) standard of review.

CONCLUSION

The Foundation's Complaint states a claim upon which relief may be granted and, therefore, Defendants' motion for judgment on the pleadings should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2020, I filed the foregoing electronically with the U.S. District Court for the Eastern District of Michigan in this matter, which will forward this document to all counsel of record through its e-filing system.

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