Exhibit X

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

DAVID SCHIED,

Plaintiff,

vs.

Case No. 07-1256-AW

HON. WILLIAM E. COLLETTE

STATE OF MICHIGAN, GOV. JENNIFER GRANHOLM, KELLY KEENAN, MICHELE RICH, MICHIGAN STATE ADMINISTRATIVE BOARD, ATTORNEY GENERAL MIKE COX, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, COMMISSIONER LAURA COX, WAYNE COUNTY OFFICE OF THE PROSECUTOR, WASHTENAW COUNTY OFFICE OF THE PROSECUTOR, MICHIGAN STATE POLICE, NORTHVILLE CITY POLICE, MICHIGAN DEPARTMENT OF CIVIL RIGHTS, MICHIGAN DEPARTMENT OF EDUCATION, WAYNE COUNTY RESA, NORTHVILLE PUBLIC SCHOOLS BOARD OF EDUCATION, SCOTT SNYDER, KATY PARKER, DAVID BOLITHO, LEONARD REZMIERSKI, KELLER THOMA LAW FIRM, SANDRA HARRIS, LINCOLN CONSOLIDATED SCHOOLS BOARD OF ED., MICHIGAN SUPREME COURT et al & DOES 1-30,

Defendants.

_____/

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BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

PROCEDURAL HISTORY:

As noted in Plaintiff's Complaint, Plaintiff previously initiated litigation against Dr. Sandra Harris, then Superintendent of Lincoln Consolidated Schools and the Lincoln Consolidated Schools Board of Education. (See Exhibit A, Plaintiff's original Complaint filed on May 25, 2004) That Complaint makes allegations identical to those allegations made in Plaintiff's instant Complaint.

In the original case, Plaintiff ultimately fired his attorney. Plaintiff hired a new attorney who, on April 21, 2005, filed a First Amended Complaint. Again, that Complaint set forth identical allegations when compared to the instant Complaint. Without a doubt, the allegations against Dr. Harris and Lincoln arise out of one event – Plaintiff's termination as a probationary employee of Lincoln. The Court should note that termination occurred on November 6, 2003.

Defendants' Motion for Summary Disposition was granted on November 10, 2005. (See Exhibit C) Plaintiff took an appeal as of right on December 7, 2005. (See Exhibit D) The Michigan Court of Appeals affirmed the grant of summary disposition in favor of the Defendants. (See Exhibit D)

Plaintiff sought leave to appeal to the Michigan Supreme Court. The Michigan Supreme Court denied leave on November 29, 2006. (See Exhibit D) On September 13, 2007, almost four years after his separation from Lincoln, Plaintiff initiated this Complaint by filing a Complaint which is more than 400 pages in length.

Plaintiff's Complaint also refers to greater than 160 exhibits. However, no exhibit was served upon these Defendants.

STATEMENT OF FACTS

A. Plaintiff's employment with Defendants.

Plaintiff obtained his teaching certificate while living in California in August 2000. He taught in California for two years and decided to relocate his family to Michigan. In September 2003, Plaintiff Schied applied for a teaching position with the Lincoln Consolidated Schools. He filled out the requisite paperwork and employment application. As part of his application, there was a separate form which inquired about Plaintiff's criminal history. Mr. Schied was required to check one of two boxes regarding his criminal history. Mr. Schied checked the box that read:

> "I have not been convicted of, or pled guilty or nolo contendere (no contest) to any crimes."

The bottom half of the page contained an explanation as to the requirement of a school district to perform a criminal background check on applicants pursuant to 1993 Public Act 68 and Public Act 83 of 1995. The form also notified Mr. Schied that:

> "(2) until that report is received and reviewed by the School, *I am regarded as a conditional employee*; and
>
> (3) *if the report received from the Department of State Police is not the same as my representation(s) above* respecting either the absence of any conviction(s) or any crimes of which I have been convicted, *my employment contract is voidable at the option of the School.*"

These last two paragraphs appeared just above Mr. Schied's signature. This language served to put Plaintiff on notice that he was a conditional employee until

the criminal background check has been performed and, that if he misrepresented his criminal background on his application, he could be terminated at the option of the school.

As part of the application process for Lincoln Consolidated Schools, a criminal background check is performed on all applicants. Pending the results of that background check, Mr. Schied was offered a temporary probationary employment contract. The contract was for the period September 11, 2003 through June 14, 2004. Plaintiff signed the page of his application indicating that he understood his employment was "conditional" pending the results of his criminal background check.

On October 10, 2003, Defendants received Plaintiff's criminal history results from the State of Michigan and the FBI. The Michigan report did not reveal any criminal history for Plaintiff. However, the FBI report revealed Plaintiff had a conviction for aggravated robbery in 1977. Plaintiff had been placed on 10 years probation as a result of the conviction. There was no further information contained in the FBI report regarding the status of Plaintiff's conviction.

This newly acquired information prompted the scheduling of a pre-termination hearing, scheduled for November 3, 2003, held with Plaintiff and various members of the school board. During that meeting, Plaintiff was questioned regarding the discrepancy in his employment application and the criminal background results. Plaintiff refused to allow Dr. Harris and others to review documents Plaintiff had brought with him – documents that Plaintiff alleged said confirmed the dismissal of his indictment. Plaintiff was placed on suspension without pay until the next meeting scheduled for November 10, 2003.

Following that meeting, a confirming letter was sent to Plaintiff by Defendant Dr. Harris dated November 5, 2003. The letter confirmed that after the school had conducted a criminal background check, the results revealed a 1977 conviction in Texas for aggravated robbery. A second meeting was then held on November 6, 2003 and a letter was sent to Plaintiff from Dr. Harris. The letter confirmed that the school board was still of the opinion that Plaintiff had misrepresented his criminal history on his employment application and that the school board was exercising its option to terminate his employment.

Plaintiff filed suit against the Defendants on May 25, 2004. Discovery ensued and Plaintiff's first deposition was taken on October 28, 2004. During that deposition, Plaintiff refused to produce the documents he had brought with him and terminated the deposition.

On January 7, 2005, the depositions of Ms. Secor (school employee), Defendant Dr. Harris, and Lisa Desnoyer (director of special education) were scheduled. After the deposition of Ms. Secor, Plaintiff fired his attorney and took the other two depositions himself. Plaintiff then retained new counsel who filed his First Amended Complaint in April of 2005. Plaintiff's deposition was continued on June 28, 2005, with his new attorney present. During that deposition, Plaintiff admitted that the December 20, 1979 order of dismissal did not indicate he could truthfully deny his aggravated robbery conviction. Plaintiff further admitted that the State of Texas had on its record his conviction for aggravated robbery. Plaintiff's deposition was not completed on that date.

PLAINTIFF'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

While it is difficult to ascertain the precise legal theories asserted by Plaintiff, it appears that he makes the following claims against Harris and Lincoln[4]:

A. Retaliation by using an erroneous FBI report as a cornerstone and platform to her own career – retaliation (Plaintiff's Complaint, ¶6);

B. "Multiple misdemeanors" by publishing Plaintiff's criminal record to school administrators – defamation. (Plaintiff's Complaint, ¶11)[5]

C. Retaliation for challenging "Sandra Harris' authority over the salary issue" – retaliation. (Plaintiff's Complaint, footnote #24)

D. Larceny by conversion ". . . for stealing Mr. Schied's employment income". (Plaintiff's Complaint, ¶22)

E. Depravation of rights under color of law – 42 USC §1983. (Plaintiff's Complaint, ¶25)

Plaintiff then lists 51 State and Federal Statute which Plaintiff believes are applicable to this cause of action.[6]

All claims set forth by Plaintiff can be summarized as wrongful discharge claims (Elliot Larsen Civil Rights Act), defamation claims or claims under 42 USC §1983.

Plaintiff's claims are barred by the statute of limitations, as follows:

- Defamation: 600.5805(9) – 1 year;

[4] The Complaint refers to Lincoln but fails to make any specific allegation of tortious conduct by Lincoln.
[5] There has never been a criminal prosecution against these Defendants.
[6] Most statutes cited by Plaintiff did not relate to any possible claim against Dr. Harris or Lincoln. Moreover, Plaintiff's Complaint cites no factual or legal basis for application of these statutes to Plaintiff's allegations.

- 42 USC §1983: 600.5805(10) & *Goodman v Lukens Steel Co*, 482 US 656, 676 (1987) – 3 years;
- Elliot Larsen Civil Rights Act: 600.5805(10); *Nelson v Ho*, 222 Mich App 74 (1997) – 3 years.

Clearly, Plaintiff's Complaint was initiated after the statute of limitations expired and, accordingly, all claims are ripe for summary disposition.

PLAINTIFF'S CLAIMS ARE BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL

A. Res Judicata:

Plaintiff admits, in his Complaint, that the claim is barred by res judicata and collateral estoppel. Specifically, Plaintiff states as follows:

> "32. Michigan civil court justices, in both the circuit court level and at the Michigan Court of Appeals, were properly informed about all of the above unfolding events in the legal briefs drafted by both Mr. Schied's private attorney and the attorney for the Michigan Educational Association that eventually became involved and shared in the civil fight." (Exhibit E, Plaintiff's Complaint, ¶32)
>
> "33. Though Mr. Schied has the understanding that he has no further recourse against [Harris] or [Lincoln] by way of Michigan civil court proceedings . . . " (Exhibit E, Plaintiff's Complaint, ¶33)

Plaintiff admits that his claim is barred by res judicata and collateral estoppel. Accordingly, summary disposition is appropriate.

Dr. Harris, the highest elected or appointed official in the District is entitled to summary disposition as a matter of law.

Res judicata bars a subsequent action between the same parties when the facts were evidence essential to the action are identical to those essential to the

prior action. *Chestonia Twp v Starter Twp.* 266 Mich App 423, 429 (2005). The purposes of res judicata are to relieve the parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication. *Richards v Tibaldi*, 272 Mich App 522, 530 (2006). Res judicata requires that: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involve the same parties or their privies. *Baraga County v State Tax Emission*, 466 Mich 264, 269 (2002).

The instant cause of action meets all applicable elements of res judicata. That is, the prior action was decided on the merits. The action involved the same parties. The action was certainly a final decree, indeed, Plaintiff took an appeal and sought leave to appeal to the Michigan Supreme Court. Clearly, every allegation set forth in Plaintiff's instant Complaint "was or could have been resolved" in the initial action. Accordingly, Plaintiff's Complaint is barred by res judicata.

B. Collateral Estoppel:

Generally, for collateral estoppel to apply, three elements must be satisfied:

1. A question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment;

2. The same parties must have had a full and fair opportunity to litigate the issue; and,

3. There must be mutuality of estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684 (2004).

However, the defensive use of collateral estoppel does not require mutuality. *Id at 691-692.*

Here, it is clear that all elements of collateral estoppel are met. Essentially, the sole question presented in Plaintiff's original Complaint (was Plaintiff wrongfully discharged and was Plaintiff defamed) were resolved between the same parties after a full and fair opportunity to litigate the issues. Accordingly, Plaintiff's claim is barred by the doctrine of collateral estoppel.

THE CLAIM AGAINST DR. HARRIS IS BARRED BY GOVERNMENTAL IMMUNITY AS SHE IS THE HIGHEST APPOINTED OFFICIAL

As set forth in Defendants' Motion for Summary Disposition responding to Plaintiff's initial Complaint, governmental immunity is afforded to Defendant, Harris, as a Superintendent of Lincoln Consolidated School. She is the highest elected appointed official at Lincoln. MCL 619.1407(5) provides for absolute immunity for the highest appointed or elected official at all levels of government. Specifically, the statute states, in its pertinent part: "The elected or highest appointive of all levels of government [is] immune from tort liabilities for injuries to persons or damage to property if he or she is acting within the scope of his or her . . . executive authority."

There is no dispute that Defendant Harris was acting in the course and scope of her employment as a Superintendent of the school. Indeed, Plaintiff's Complaint does not indicate, in any way, that Superintendent Harris acted outside of the scope of her authority or outside of her role as Superintendent of the school. Accordingly, summary disposition is warranted on the grounds of governmental

immunity as it relates to Defendant, Harris. Likewise, Lincoln is immune from liability for those allegations set forth in Plaintiff's Complaint.

Likewise, Lincoln is cloaked with governmental immunity. MCL 691.1407 et seq. provides government agencies with immunity when performing a governmental function. Specifically, MCL 691.1407 (1); MSA 3.996(107)(1) provides:

> Except as otherwise provided in this act, all governmental agencies shall be immune from tort liability in all cases wherein the government agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act shall not be construed as modifying or restricting the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

This statute is effective as to claims arising on or after July 1, 1986, and thus governs the events which form the basis of Plaintiff's complaint.

Prior to the passage of MCL 691.1407(1), courts had grappled with the task of defining the term "governmental function". In *Ross v Consumers Power Company* (On R'hrg), 420 Mich 567 (1984), the Supreme Court articulated a definition of governmental function which provided that:

> [A] governmental function is an activity which is expressly or impliedly mandated or authorized by constitution, statute or other law. When a governmental agency engages in mandated or authorized activities, it is immune from tort liability unless the activity is proprietary in nature...or falls within one of the other statutory exceptions to governmental immunity...

With the passage of MCL 691.1401(f), the Michigan legislature adopted the Ross court's "governmental function" definition with slight modification:

> (f) "Governmental Function" is an activity which is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance or other law.

In defining the parameters and the scope of Michigan's statutory immunity scheme, the *Ross, supra*, court described MCL 691.1407; MSA 3.996(107), "the heart" of Michigan's governmental tort liability act, as providing "broad" immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function, 420 Mich at 595. Upon embracing a definition of the term "governmental function" as that is used in MCL 691.1407; MSA 3.996(107), the *Ross, supra*, court reiterated that the immunity from tort liability provided in §1407 is expressed in the broadest possible language and extends to all governmental agencies for all tort liability whenever they are engaged in the exercise or discharge of a governmental function. 420 Mich 567, 617.

Post-Ross decisions have followed the Ross court's pronouncement that MCL 691.1407; MSA 3.996(107) provides broad immunity from tort liability and that the exceptions to governmental immunity are to be narrowly construed. See *Peterman v The Dep't of National Resources*, 446 Mich 177, 203 (1994); *Wade v Dep't of Corrections*, 439 Mich 158 (1992); and *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 245 (1986). In *Nawrocki v Macomb County Road Com'n*, 463 Mich 143; 615 NW2D 702 (2000), the Supreme Court reaffirmed the holding in *Ross, supra*, and noted that the Ross decision constituted "a significant change in governmental immunity jurisprudence". *Nawrocki, supra*. The *Nawrocki* court reiterated the principle established in Ross that "the immunity conferred upon governmental agencies is broad,

and the statutory exceptions thereto are to be narrowly construed." (Emphasis in original.) Id. at 158.

There exists ample authority to establish that Lincoln is a governmental agency. Const 1963, art 8, § 2 charges the Michigan legislature with maintaining and supporting a system of free public elementary and secondary schools. The operation of a school district area is governed by the School Code of 1976, MCL 380.1, et seq; MSA 15.4001, et seq. Thereunder, the board of a school district is charged with making reasonable regulations concerning anything necessary for the proper establishment, maintenance, management, and carrying on of public schools, MCL 380.1300; MSA 15.41300.

In *Nalepa v. Plymouth-Canton Community School District*, 207 Mich App 580 (1995), aff'd on other gds, 450 Mich 934 (1995), the court concluded that "a school district is a 'level of government'". *Id. at 587.* In support of its conclusion, the *Nalepa* court analyzed the characteristics of a school district and stated,

> A school district shares many aspects of governance with other political subdivisions traditionally considered levels of government. A school district, like a county, township, or city, encompasses a defined geographical area. Like other forms of government, a school district has the power to levy taxes. M.C.L. § 380.1211; M.S.A. § 15.41211. A school district has the power of eminent domain. M.C.L. § 380.1621; M.S.A. § 15.41621. The decisions made at the school district level have a wide effect on the community not unlike decisions made by political subdivisions. Finally, like the governing bodies of other political subdivisions, the board of a school district is elected by the voters who live in the school district. M.C.L. § 380.1101; M.S.A. § 15.441101.

Id. at 587.

Lincoln is organized under the School Code of 1976. It qualifies as a First Class school district under MCL 380.402, of the School Code. As a First Class school district, Lincoln is "a body corporate" that operates under the name and title of its school board and it "may sue and be sued". MCL 380.401. As a 'body corporate' Lincoln has characteristics of a level of government as set forth in *Nalepa, supra.* In particular, pursuant to MCL 380.1132; MSA 15.41132, a school district may acquire and take real and personal property for educational purposes within or without its corporate limits. MCL 380.1511; MSA 15.41511 empowers the school district to equip and maintain lands and buildings and to expend funds therefore. At MCL 380.1282; MSA 15.41282, the school board is authorized to establish and carry on the grade schools, and departments it deems necessary or desirable for the maintenance and improvement of the schools and to determine the courses of study to be pursued.

Explicit case law authority proves that, as a level of government, a school district is entitled to absolute governmental immunity when performing government functions. The controlling decision on point is *Nalepa v Plymouth-Canton Community School District, supra*. In that case, the plaintiffs' decedent, a second-grade student at Gallimore Elementary School in the defendant school district, and his fellow classmates were shown the film "Nobody's Perfect". The movie told the story of a young amputee who became so depressed that he twice attempted to commit suicide. One of the attempts involved the boy's effort to hang himself. In the film, the young boy did not succeed with his suicide attempts but was taught by an older boy how to deal with his handicap.

The night after seeing the movie, the decedent in Nalepa was found hanging by a belt from the safety railing of the upper bunk bed in his bedroom. He was pronounced dead by asphyxiation upon arrival at a local hospital. The Nalepa plaintiffs brought suit against the school district, the school board, and the school superintendent. In turn, those defendants argued that they were entitled to governmental immunity. The plaintiffs responded by citing case authority construing the Ross opinion and holding that superintendents and school board members were not entitled to absolute immunity. The *Nalepa* court rejected plaintiffs' argument which relied upon the pre-statute case law authority.

In rejecting plaintiffs' arguments, the *Nalepa, supra* court analyzed MCL 691.1407(5); MSA 3.996(107)(5) and concluded that a school district was entitled to absolute immunity. Specifically, the court stated:

> In 1986, in response to the court's opinion in Ross, our legislature enacted 1986 PA 175, which amended MCL 691.1407; MSA 3.996(107). Although the legislature borrowed much of the language for its amendments from the Supreme Court opinion, it did not simply parrot the language. Thus, with regard to absolute governmental immunity, MCL 691.1407(5); MSA 3.996(107)(5) now provides:
>
> Judges, legislators, and the elective or highest appointive executive officials of all levels of government are immune from tort liability for injuries to persons or damages to property whenever they are acting within the scope of their judicial, legislative, or execute authority.

Id. at 586. With this analytical background, the *Nalepa* court examined the question of whether a school district was a "level of government" within the meaning of MCL 691.1407(5); MSA 3.996(107)(5). Id. at 586-87. The court answered that question in the affirmative:

> On the basis of these characteristics, we conclude that a school district is a level of government of the type contemplated by the legislature.

Id. at 587. Accordingly, the *Nalepa* court dismissed plaintiff's claims against the government agencies in the case, including the claims brought against the school district, because the government agencies were entitled to absolute governmental immunity. Id. at 591.

Similarly, Lincoln is entitled to absolute governmental immunity for the performance of a government function. *Ross, supra*, at 649-650 and *Eichhorn v Lamphere School District*, 166 Mich App 527, 537-538 (1988). MCL 380.11a sets forth the general powers of school districts, including first class school districts. Pursuant to MCL 380.11a(3)(a), a school district has the right, powers and duty to educate pupils. Such education includes the "operation of a preschool, lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons." MCL 380.11a(3)(a). The actions taken by Lincoln, as vague as they are in Plaintiff's Complaint, were expressly provided for in MCL 380.11a. Therefore, the conduct of Lincoln qualifies as a government function.

As a government agency, Lincoln is absolutely immune from tort liability.

PLAINTIFF'S COMPLAINT MUST BE DISMISSED AND SANCTIONS AWARDED PURSUANT TO MCR 2.114

Plaintiff's Complaint clearly makes arguments against these Defendants which are identical to those allegations made in Plaintiff's previous claim. Even though Plaintiff is not an attorney, Plaintiff is bound by the statutes and court rules of the State of Michigan. A party is required to sign pleadings filed with the court. The effect of a

signature "constitutes a certification by the signor that (1) he or she has read the document; (2) to the best of his or her knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. (MCR 2.114(D))

Accordingly, when the party of record signed the Complaint, the party attested that he had made a good faith inquire that the document was well founded in fact and was warranted by existing law.

Plaintiff's Complaint seems to contradict MCR 2.114(D); that is, Plaintiff's Complaint is filed to harass these Defendants. In other words, this Complaint was not filed in good faith and is rightfully dismissed.

Dismissal may be the appropriate remedy, "without first requiring that an order compelling discovery enter and be violated by a party". #2 Dean & Longhoer Michigan Court Rules Practice, 4th Ed., §2313.4, p. 403.

It is within the trial court's discretion to sanction a party for violating the Court Rules. *Morinelli v Provident Life & Accident Ins Co.*, 242 Mich App 255, 265 (2000).

WHEREFORE, Defendants, SUSAN HARRIS and LINCOLN CONSOLIDATED SCHOOL BOARD OF EDUCATION, hereby request this Honorable Court grant the within Motion for summary Disposition consistent with MCR 2.118(C)(7)

and (10) and award costs and attorney fees so wrongfully sustained in defending this litigation.

PLUNKETT COONEY

BY: _____

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Dated: October 8, 2007

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed in the pleadings on 10-8-07.

BY:

X	U.S. MAIL	___	FAX
___	HAND DELIVERED	___	OVERNIGHT EXPRESS
___	FEDERAL EXPRESS	___	OTHER

Signature: _____
DEBRA GIORDANO

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