UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

LIGHTBORNE PUBLISHING, INC. d/b/a City Beat,	:	**CASE NO. 1:08-cv-00464**
Plaintiff,	:	**Judge Spiegel**
vs.	:	
CITIZENS FOR COMMUNITY VALUES, et al.,	:	**BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT SUBMITTED BY DEFENDANTS, REV. JERMAINE ARMOUR, BISHOP E. LYNN BROWN, PAULA BUSSARD, JACKIE CARNEY, PASTOR GREGORY CHANDLER, SR., REV. WAYNE DAVIS, PATTI GARIBAY, PAM GLENN, REV. AARON GREENLEA, JOSEPH GUBASTA, MICHAEL HOWARD, BISHOP MAURICE JACKSON, REV. JOEL JAMES, KATHLEEN KEILY, DR. JERRY KIRK, REV. MICHAEL MACK, REV. ALEX MCENTIRE, MAJOR KENNETH MAYNOR, REV. JAMES PANKEY, BOBBI RADECK, PASTOR RICHARD ROSE, SR., CINNY ROY, RICK SCHATZ, REV. K. Z. SMITH, SCOTT D. STEPHENS, FORD TAYLOR, LORI VIARS, PASTOR CLARENCE WALLACE, PAULA WESTWOOD, BISHOP DWIGHT WILKINS, and PASTOR CHARLIE WINBURN**
Defendants	:	

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MAY IT PLEASE THE COURT:

In support of their Motion to Dismiss, brought under Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6), Defendants, REV. JERMAINE ARMOUR, BISHOP E. LYNN BROWN, PAULA BUSSARD, JACKIE CARNEY, PASTOR GREGORY CHANDLER, SR., REV. WAYNE DAVIS, PATTI GARIBAY, PAM GLENN, REV. AARON GREENLEA, JOSEPH GUBASTA, MICHAEL HOWARD, BISHOP MAURICE JACKSON, REV. JOEL JAMES, KATHLEEN KEILY, DR. JERRY KIRK, REV. MICHAEL MACK, REV. ALEX MCENTIRE, MAJOR KENNETH MAYNOR, REV. JAMES PANKEY, BOBBI RADECK, PASTOR RICHARD ROSE, SR., CINNY ROY, RICH SCHATZ, REV. K. Z. SMITH, SCOTT D. STEPHENS, FORD TAYLOR, LORI VIARS, PASTOR CLARENCE WALLACE, PAULA WESTWOOD, BISHOP DWIGHT WILKINS, and PASTOR CHARLIE WINBURN (all hereinafter referred to collectively as the "Private Party Defendants"), submit the following:

BRIEF SUMMARY OF THE CASE

Plaintiff, LIGHTBORNE PUBLISHING, INC., d/b/a City Beat (hereinafter "City Beat"), brings this suit under 42 U.S.C. § 1983 and 1985, alleging that the named public and private Defendants engaged in a conspiracy to violate City Beat's First Amendment rights and to chill its future free speech by "demanding" that the newspaper refrain from accepting and publishing advertisements for sexually oriented businesses and prostitution services. Plaintiff further claims Defendants have somehow engaged in tortious interference with City Beat's business relationships in violation of state law. Plaintiff's novel case seeks declaratory and injunctive relief, monetary damages, costs and attorney fees.

The merits need not be addressed, however. Because the Plaintiff's First Amended Complaint for Declaratory, Injunctive, and Monetary Relief ("Amended Compl.") fails to state

any cause of action upon which relief can be granted against the Private Party Defendants hereto, fails to satisfy its burden to meet Article III standing requirements, and is a baseless SLAPP ("Strategic Lawsuit Against Public Participation") against these parties under Supreme Court doctrine—the case must be dismissed against these individuals in accordance with Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6).

LAW AND ARGUMENT

I. THE CASE SHOULD BE DISMISSED UNDER RULE 12(b)(6) BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST THE PRIVATE PARTY DEFENDANTS.

A. Current Standard of Review for Rule 12(b)(6) Motion.

"A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of the complaint." *Metz v. Supreme Court of Ohio,* 46 Fed.Appx. 228, 232 (6th Cir. 2002). "'The Supreme Court has recently clarified the pleading standard necessary to survive a Rule 12(b)(6) motion.'" *Bassett v. National Collegiate Athletic Ass'n,* 528 F.3d 426, 430 (6th Cir. 2008) (*quoting CGH Transport Inc. v. Quebecor, World, Inc.*, 261 Fed.Appx. 817, 819-20 (6th Cir.2008) *citing Bell Atl. Corp. v. Twombly,* --- U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). That is, "[f]actual allegations contained in a complaint must 'raise a right to relief above the speculative level.'" *Bassett,* 528 F.3d at 430 (*quoting Twombly,* 127 S.Ct. at 1965). *Twombly* requires that the complaint include at least "'enough facts to state a claim to relief that is plausible on its face.'" *Bassett,* 528 F.3d at 430 (*quoting Twombly,* 127 S.Ct. at 1974).

"In reviewing a motion to dismiss, we construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh,* 487 F.3d 471, 476 (6th Cir.2007). "In construing the complaint in favor of the plaintiff, however, we 'are not bound to accept as true a legal

conclusion couched as a factual allegation.'" *Ferron v. Zoomego, Inc.*, 276 Fed Appx. 473, at 2 (6th Cir. 2008) (*quoting Papasan v. Allain,* 478 U.S. 265, 286 (1986)). "[T]he Court does not accept 'the bare assertion of legal conclusions' as enough, nor does it 'accept as true ... unwarranted factual inferences.'" *Zaluski v. United American Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008) (*quoting In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir.1997)).

"While Rule 8(a)(2) does not require a complaint to set out detailed factual allegations, 'a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.' The notice pleading requirements of Rule 8(a)(2) 'still require[ ] a 'showing,' rather than a blanket assertion of entitlement to relief.'" *Ferron,* 276 Fed.Appx. 473, at 2 (*quoting Twombly,* 127 S.Ct. at 1964-65). "Accordingly, a complaint 'must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.'" *Ferron,* 276 Fed.Appx. 473, at 2 (*quoting Lewis v. ACB Business Serv., Inc.*, 135 F.3d 389, 406 (6th Cir.1998)).[1]

B. The Amended Complaint is Insufficient Because It Fails to Present Any Plausible Allegation against the Private Party Defendants.

In the present case, there are clearly no "direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory" (*Id.*), because the Amended Complaint is nearly silent with regard to particular allegations concerning the Private

[1] "When a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett,* 528 F.3d at 430 (*citing Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001)).

Party Defendants. In fact, only nine short sentences in the body of the Amended Complaint contain any passing reference the Private Party Defendants at all,[2] and of these, *only four sentences directly reference the Private Party Defendants* who bring this Motion to Dismiss.[3] These meager **references** certainly do not include "'enough facts to state a claim to relief that is plausible on its face.'" *Bassett,* 528 F.3d at 430 (*quoting Twombly,* 127 S.Ct. at 1974).

The Plaintiff cannot prevail in this motion because its Amended Complaint ultimately asserts only two unsubstantiated and sparsely-pled claims against the Private Party Defendants. Importantly, both of these claims are presented as "a legal conclusion couched as a factual allegation" which the Court is "not bound to accept as true." *Ferron,* 276 Fed.Appx. 473, at 2 (*quoting Papasan,* 478 U.S. at 286).

To wit, the Amended Complaint first states that "each and every Defendant named [in the suit] conspired together to violate City Beat's First Amendment rights by [endorsing and] sending the June 6, 2008 letter [requesting that City Beat discontinue its sexual services ads], and by conducting a press conference unveiling the letter inside Cincinnati City Hall." Amended Compl., ¶¶ 67, 55. However, with regard to the Private Party Defendants here, there are no allegations that any of them ever strategized, contacted, or even communicated in any way with the governmental defendants named in the suit. In fact, there are no allegations that the Private Party Defendants have done *anything* in this matter other than be "listed as endorsing the letter." Amended Compl., ¶ 55. These are glaring and fatal omissions in the Plaintiff's pleading.

The second supposed cause of action loosely stated in the Amended Complaint is equally unsupported. Although the pleading posits that "Defendants tortiously interfered with the

[2] *See* Amended Compl., ¶¶ 53-55, 57, 67, 68, 70-72

[3] *Id.*, at ¶¶ 55, 67, 68, 70.

business relationship between City Beat and its advertisers and in particular those businesses and individuals who place advertisements for adult oriented businesses" (*Id.,* ¶ 70), Plaintiff presents no allegations with regard to *how, when* or *where* such interference supposedly took place, nor any allegations that any of the Defendants ever identified, contacted, or even communicated in any way with a single City Beat advertiser.

Because "the Court does not accept 'the bare assertion of legal conclusions' as enough, nor does it 'accept as true .... unwarranted factual inferences,'" (*Zaluski* 527 F.3d at 570 (*quoting In re Sofamor Danek Group,* 123 F.3d at 400)), the anemic Amended Complaint in this case utterly fails in the test of its sufficiency to survive the Rule 12(b)(6) motion brought by the Private Party Defendants hereto. While it is unnecessary for the Court's analysis to proceed any further, the following additional reasons to dismiss the complaint against the moving parties are included in an abundance of caution.

C. The Amended Complaint Fails to State a 42 U.S.C. § 1985 Conspiracy Claim Against the Private Party Defendants.

There are several other reasons why the Plaintiff's lawsuit cannot possibly survive the current motion. Among these is the obvious fact that City Beat has based its lawsuit upon a federal cause of action that simply does not exist. There is no viable legal theory that can support the Plaintiffs' conspiracy claim under 42 U.S.C. § 1985, because that statute *does not apply* to this case. Moreover, even if the statute did somehow apply—which it clearly does not—Plaintiff has failed to sufficiently plead all the necessary elements of such a conspiracy claim.

1. *42 U.S.C. § 1985 simply does not apply in this context.*

The case at bar is premised upon a federal statute that does <u>*not*</u> provide the Plaintiff with

a cause of action because the statute has no conceivable application to the facts at issue. The Amended Complaint fails to specify a particular subsection of 42 U.S.C. § 1985, so one can only guess that Plaintiff is attempting to invoke subsection (3). The background and actual language of this provision are important to note.

Entitled "Conspiracy to interfere with civil rights," 42 U.S.C. § 1985 contains three subsections. 42 U.S.C. § 1985(3) is the surviving version of § 2 of the Civil Rights Act of 1871, also known as the "Ku Klux Klan Act." The law was enacted to help ensure equal protection under the law for persons qualifying as a racial minority. The current text of 42 U.S.C. § 1985(3), subtitled "Depriving persons of rights or privileges," reads in its entirety as follows (emphasis added):

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the **equal protection** of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the **equal protection** of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support **or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person** as an elector for President or Vice President, or as a Member of Congress of the United States; **or to injure any citizen in person or property on account of such support or advocacy**; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

The limited application of 42 U.S.C. § 1985(3) is well-established. The seminal case on the subject, decided nearly forty years ago, is *Griffin v. Breckenridge*, 403 U.S. 88 (1971). In *Griffin,* African American citizens filed a damages action under § 1985(3) after they were

stopped on a rural highway by several white males, and attacked and brutally beaten with deadly weapons. *Griffin,* 403 U.S. at 90. The district and appellate courts dismissed the plaintiffs' case, but the Supreme Court granted certiorari "to consider questions going to the scope and constitutionality of 42 U.S.C. § 1985(3)." *Id.* at 93. After an exhaustive review of the language and legislative history of the statute, the Court unanimously concluded:

> It is thus evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies. That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. .... The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. ***The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.***

Griffin, 403 U.S. at 101-102 (internal citations omitted, emphasis added).

The Sixth Circuit has held that the protections of § 1985(3) extend beyond the realm of purely racial animus—but the court has faithfully applied the *Griffin* parameters in every § 1985(3) case. For example, in *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973), a supporter of an incumbent sheriff's election opponent brought suit after he was arrested and jailed for distributing campaign pamphlets. *Cameron,* 473 U.S. at 609. The court found a violation of § 1985(3), but only because the facts of the case presented an equal protection violation in the context of a disenfranchised campaign worker. The court explained:

> We hold that § 1985(3)'s protection reaches ***clearly defined classes***, such as supporters of a political candidate. If a plaintiff can show that he was denied the protection of the law ***because of the class of which he was a member***, he has an actionable claim under § 1985(3). This interpretation does not transform the statute into the "general federal tort law" feared by the *Griffin* Court and gives full effect to the Congressional purpose in enacting the statute.

Cameron, 473 U.S. at 610 (emphasis added).

Later cases have followed and applied this same principle. *See e.g., Browder v. Tipton,* 630 F.2d 1149, 1150 (6th Cir.1980) (interpreting § 1985(3) to hold that "the class of individuals protected by the 'equal protection of the laws' language of [§ 1985(3)] are those so-called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics"); *Volunteer Medical Clinic, Inc. v. Operation Rescue,* 948 F.2d 218, 224 (6th Cir.1991) (finding that women constitute a cognizable class under § 1985(3) because "[g]ender is precisely the type of 'immutable characteristic' that has consistently been held an improper basis upon which to differentiate individuals in the allocation of rights."); *Dohner v. Neff,* 240 F.Supp.2d 692, 705-06 (N.D. Ohio, 2002) ("§ 1985(3) is concerned only with conspiracies to deny equality of rights. .... Thus, the gravamen of a claim under § 1985(3) is denial of equal protection or equal privileges and immunities.... The *Griffin* Court imposed the class-based-animus requirement as a means of confining § 1985(3) to its intended purpose: to provide a means of redressing deprivations of equality under the law." (*citing Griffin,* 403 U.S. 88; *Taylor v. Brighton Corp.,* 616 F.2d 256 (6th Cir. 1980)).

In the case at bar, City Beat has not made—and, of course, *cannot* make—any allegation that it is part of a "class of individuals protected by the 'equal protection of the laws'" because it is obviously not a member of one of the "'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics." *Browder,* 630 F.2d at 1150. A corporation is not an individual, and has no inherent immutable/personal characteristics.[4] And there can certainly be no argument that a company

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[4] Accordingly, as explained in Section II(A) herein below, Plaintiff lacks standing to bring this action.

publishing and promoting sexually oriented services is in any way a minority that receives special protection under the Equal Protection Clause.

Because such an allegation would be nonsensical, City Beat's lawsuit does not allege that it was treated unfairly because it is a member of a particular protected class. In fact, there is not a single paragraph in the Amended Complaint that states *any* allegation as to why City Beat was supposedly treated unfairly. These errors require that the Private Party Defendants' Rule 12(b)(6) motion to dismiss be granted. *See, e.g., Dohner,* 240 F.Supp.2d at 706 (former county dispatcher's § 1985(3) conspiracy claim against sheriff and others was dismissed because "Plaintiff in this case does not allege she was treated unfairly because she was a member of a particular group. Because her complaint does not allege that a class-based animus motivated the defendants, it fails to state a claim under § 1985(3).")

Like the Sixth Circuit, other federal courts have heeded the Supreme Court's defining construction of § 1985(3). Some have had occasion to specifically affirm that § 1985(3) can in no way serve as the basis for a lawsuit, like City Beat's, that claims a violation of free speech and expression. *See, e.g., Egan v. City of Aurora,* 291 F.2d 706 (7th Cir. 1961) (§ 1985(3) provides a right of action to a person deprived, by a conspiracy, of equal protection of laws, but it does not create cause of action based on conspiracy to deprive party of right to freedom of speech and assembly); *Africa v. Anderson,* 510 F.Supp. 28 (E.D. Pa. 1980), *affirmed,* 707 F.2d 1399 (3rd Cir. 1983) (§ 1985(3) is not addressed to conspiracies to infringe upon First Amendment rights); *Porter v. Bainbridge,* 405 F.Supp. 83 (S.D. Ind. 1975) (§ 1985(3) does not extend to conspiracies to deny rights of freedom of speech and assembly under the First Amendment); *Accord, Oaks v. City of Fairhope,* 515 F.Supp. 1004 (S.D.Ala. 1981); *Feng v. Sandrik,* 636 F.Supp. 77 (N.D. Ill. 1986) (the scope of substantive rights protected through

actions for conspiracy to deprive an individual of civil rights does not include those contained in the First Amendment). This Court should not deviate from this volume of well-established law, but instead acknowledge that § 1985(3) has no conceivable application for City Beat in this matter.

2. *Even if 42 U.S.C. § 1985 did apply here, Plaintiff has clearly failed to sufficiently plead all the necessary elements.*

Assuming *arguendo* that 42 U.S.C. § 1985 *did* somehow apply in this context—which it does not—the City Beat lawsuit would still have to be dismissed for its failure to state a claim. As the Supreme Court affirmed last year, a complaint must include at least "'enough facts to state a claim to relief that is plausible on its face.'" *Bassett,* 528 F.3d at 430 (*quoting Twombly,* 127 S.Ct. at 1974). This Amended Complaint fails the test.

According to the Supreme Court, the necessary pleading elements of a § 1985(3) case are:

> (1) a conspiracy; (2) for purposes of depriving, either directly or indirectly, any person or class of persons of **the equal protection of the laws,** or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Dohner, 240 F.Supp.2d at 704 (emphasis added) (*citing United Brotherhood of Carpenters, Local 610 v. Scott,* 463 U.S. 825, 828-29 (1983)). *See also, Johnson v. Hills & Dales General Hosp.,* 40 F.3d 837, 839 (6th Cir.1994).

As noted above, City Beat has not presented and cannot present an *equal protection* case. But even if this were an equal protection lawsuit, it would still require dismissal because Plaintiff has failed to plead any of the elements of an equal protection violation. Moreover, the Amended Complaint fails to plead even the elements of a conspiracy of any kind.

According to the Amended Complaint, the case is brought because "Defendants engaged in a conspiracy to violate [City Beat's] protected First Amendment rights and to chill City Beat's free expression and freedom of the press in the future by, under color of state law, demanding in writing that the newspaper refrain from accepting and publishing advertisements for adult oriented businesses." Amended Compl., ¶ 1. The "result" of the alleged conspiracy was "a June 6, 2008 letter and press conference in Room 115 of Cincinnati City Hall demanding that City Beat cease accepting and publishing adult oriented advertisements." *Id.*, ¶6.

This pleading is insufficient and unsustainable against the moving parties for several reasons. Most obvious is the point that flashes like a bright neon sign above this case: ***The only thing these Private Party Defendants have done here is engage in a quintessential form of protected free speech.***[5] Even if the few, vague allegations made against these parties could be proven absolutely true, there could be no showing of a violation of any law.

The letter itself is innocuous, and of no legal consequence whatsoever. That document, which is attached as Exhibit "A" to the Amended Complaint, is itself the best evidence of its contents and meaning. A review of the letter shows that it was not a "demand" to do anything, but rather an "appeal to [City Beat's] integrity as a corporate citizen" and a respectful "request" that City Beat "refuse to accept [future] ads [ ] for sexual services." Amended Compl., Ex. A.,

[5] "A citizen's right to petition is not limited to goals that are deemed worthy, and the citizen's right to speak freely is not limited to fair comments. This case presents us with the delicate and sensitive task of accommodating the First Amendment's protection of free expression of ideas with the common law's protection of an individual's interest in reputation. It is a truism that the free flow of ideas and opinions is integral to our democratic system of government." *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292 (6th Cir. 1992), *cert. denied*, 508 U.S. 957 (1993) (*citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)) "Expressions of opinion are [also] protected under the Ohio Constitution...." *Harris v. Bornhorst*, 513 F.3d 503, 522 (6th Cir. 2008) (*citing Vail v. Plain Dealer Publ'g Co.*, 72 Ohio St.3d 279, 281, 649 N.E.2d 182, 185 (Ohio 1995), *cert. denied*, 516 U.S. 1043 (1996) ("The Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press.") *See* Section III herein below for further discussion.

A careful analysis of the Plaintiff's claims is in order Importantly, **the *only* specific allegation** made against each of the Private Party Defendants is that "his name appears" or "her name appears on the list of individuals who endorsed the June 6, 2008 letter to City Beat." *See* Amended Compl , ¶¶ 15-46 *Of course, a citizen's mere consent to have his/her name included on a letter that requests a corporation to act in a responsible manner is one of the purest forms of free speech*[6] The Plaintiff cannot survive this motion to dismiss because its Amended Complaint makes no further allegation that any of the Private Party Defendants hereto had any knowledge of or consented to the participation of any other (governmental or private) party in these matters other than Citizens for Community Values ("CCV"), or even contacted or communicated in any way with any other (governmental or private) party other than CCV. The Amended Complaint also makes no allegation or implication regarding how the Private Party Defendants became involved, or were involved at all, other than having their "name[s] appear[] on the list of individuals who endorsed the June 6, 2008 letter to City Beat." *Id* Likewise, there is no allegation or evidence presented that any of the specific Private Party Defendants hereto participated in, or even had prior knowledge of, the press conference described in the lawsuit.[7]

In order to demonstrate the existence of a conspiracy, a plaintiff must show more than "vague and conclusory allegations unsupported by material facts." *Gutierrez v. Lynch,* 826 F.2d

[6] It should be noted, however, that the Amended Complaint fails to allege even this Nowhere in the pleading is it stated that the Private Party Defendants *actually consented* to being involved To the contrary, the pleading concedes: "While ***no individual actually signed the letter***, the names of numerous religious leaders and family values activists ***are listed*** as endorsing the letter Each ***apparent signatory*** is named as a Defendant to this lawsuit." Amended Compl., ¶ 55 (emphasis added).

[7] The substantive allegation states only that "a coalition of local religious officials and 'family values' activists led by CCV held a press conference" Amended Compl , ¶ 53. **It does not allege or specify that any particular Private Party Defendant** other than CCV was a participant, either in the press conference's planning or attendance.

1534, 1538 (6th Cir.1987). Instead, "a complaint 'must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.'" *Ferron,* 276 Fed.Appx. 473, at 2 (*quoting Lewis,* 135 F.3d at 406). In the case at bar, there exists ***no*** legal theory under which the Plaintiff's federal claim for conspiracy can possibly proceed against the parties to this motion. The Amended Complaint fails the Rule 12(b)(6) review standard in every regard, and the case must be dismissed.

D. The Amended Complaint Fails to Adequately State a Tortious Interference Claim Against the Private Party Defendants.

City Beat cannot salvage its lawsuit against the Private Party Defendants by relying upon its state law claim either.[8] By all appearances, the Plaintiff tossed in its half-hearted "tortious interference with business relationships" allegation as an afterthought. It should be dismissed by the Court just as easily.

The Amended Complaint does not "'contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory'" on this claim. *Id.* "Under Ohio law, ... [t]he elements of tortious interference with a business relationship are (1) a business relationship, (2) the wrongdoer's knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom." *Harris v. Bornhorst*, 513 F.3d 503, 523 (6th Cir. 2008) (*citing McConnell v. Hunt Sports Enters.*, 132 Ohio App.3d 657, 725 N.E.2d 1193, 1216 (Ohio Ct.App.1999)).[9] But the

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[8] If the state law claim is not dismissed outright by this Court (as it should be because the Amended Complaint fails to state any federal claim upon which relief can be granted against the Private Party Defendants), the Court should alternatively decline to exercise pendent jurisdiction over the state law claim.

[9] Some Ohio courts now consider a fifth necessary element: "lack of justification" for the activity of the alleged tortfeasor. *See, e.g., Dixon v. Northridge Local School Dist. Bd. of Edn.*, Slip Copy, 2008 WL 2572103, *10 (Ohio App. 5 ist., 2008) (*citing Sony Electronics, Inc. v. Grass Valley Group, Inc.*, 2002 WL 440749 (Ohio App. 1

tort requires a further showing of wanton or malicious conduct. *See, e.g., Vistein v. American Registry of Radiologic Technologists*, 509 F. Supp. 2d 666 (N.D. Ohio 2007). "Actual malice in this context requires proof that the defendant [ ] made statements. . . . with knowledge they were false or with reckless disregard for whether they were true or false." *Wall v. Ohio Permanente Med. Group, et al.*, 119 Ohio App.3d 654, 666, 695 N.E.2d 1233 (Ohio 1997) (*citing Jacobs v. Frank*, 60 Ohio St.3d 111, 114-115, 573 N.E.2d 609 (Ohio 1991)). "[T]he party seeking relief must present evidence that the defendant[ ] knew the statements were false, entertained serious doubts about whether they were false, or disregarded a high probability that they were false." *Id.*

With regard to the Private Party Defendants, the Amended Complaint presents no allegation or even implication of the necessary elements of intentional interference, nor wanton or malicious conduct, nor false or reckless statements. Further, as stated above, there is no allegation that any particular sexually oriented advertiser of City Beat was ever known to or identified by the Private Party Defendants, much less contacted, communicated with, or "intentionally interfered" with in any way. (In fact, this would be impossible for Private Party Defendants to do, since nearly all sexually oriented advertisers of City Beat use false names anyway. *See, e.g.*, Exhibit "A" hereto.) Without these necessary elements, the purported state law claim cited in the Amended Complaint cannot survive the current motion and must be dismissed.

II. THE CASE SHOULD BE DISMISSED UNDER RULE 12(b)(1) BECAUSE PLAINTIFF LACKS ARTICLE III STANDING TO BRING THE ACTION AGAINST THE PRIVATE PARTY DEFENDANTS.

Any party seeking to invoke the jurisdiction of a federal court must satisfy the burden of

Dist., 2002)). The "lack of justification" element has similarly not been pled in this case by City Beat.

establishing standing under Article III of the Constitution, *see, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-104 (1998), which is comprised of three elements. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact' - an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical' . . . ." *Id.* (internal citations omitted). "Second, there must be a causal connection between the injury and the conduct complained of . . . ." *Id.* (citations omitted). "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* (citations omitted). In the instant case, Plaintiffs cannot satisfy their burden of proving Article III standing because they cannot satisfy any of the above elements.

A. The Plaintiff Cannot Prove Injury in Fact.

1. There is no legally protected interest at issue here.

There is no invasion of a legally protected interest here because there is no constitutional right to commercial speech related to the solicitation of illegal activity. City Beat's "adult services category" is comprised of advertisements for various forms of unlawful prostitution services. (*See, e.g.*, attached Exhibit "A," sample online City Beat advertisements, showing some of the more overt examples.) Many of the ads state so overtly, while others are just as obvious in meaning, but misleading in wording. According to the Supreme Court:

> The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 563-64 (1980)

(internal citations omitted).

Assuming *arguendo* there were some legally protected First Amendment interest here, the Private Party Defendants could not possibly violate the First Amendment and thus invade those interests. (As explained above, because this is pled and presented by Plaintiff as a First Amendment action and not an Equal Protection case, 42 U.S.C. § 1985 has no application here and provides no "conspiracy" standing for Plaintiff to proceed against Private Party Defendants in that regard.)

Moreover, City Beat has failed to allege or show any "concrete and particularized" invasion of any interest at all. *The Plaintiff's entire case against the Private Party Defendants is that each party's name was included in a list of individuals on a letter requesting responsible corporate citizenship.* Plaintiff's claim that this simple action has caused City Beat an injury in fact is purely "conjectural and hypothetical."

2. *There is no causal connection between the alleged injury and the conduct complained of.*

City Beat is responsible for its *own* alleged financial losses, to the extent there are any. In the section of its Amended Complaint entitled "City Beat's Response and Damages" (p.17), the Plaintiff acknowledges that it has made a conscious business decision to continue to publish its ads for sexually oriented businesses, and further, that it organized and held a public event *to announce and self-promote its decision.* Amended Compl., ¶ 59. City Beat then admits: "That decision, however, has not been without cost." *Id.,* ¶ 60. It is not the CCV coalition's free speech (the request that City Beat stop running sex-for-sale ads) that has caused the Plaintiff's alleged reduction in revenues. Rather, to the extent City Beat *has* suffered any loss of revenue, it is the conscious actions and activities of the Plaintiff itself that are responsible.

It bears repeating that the Amended Complaint makes no allegation or showing that the Private Party Defendants had any knowledge of the identity of any particular advertiser of City Beat, nor that any such advertiser was contacted or communicated with in any way by the Private Party Defendants. Accordingly, there is no casual connection between the supposed injury and the limited alleged actions of the movers hereto (*i.e.*, having their names included on the June 6, 2008 letter).

3. *It is not likely that the alleged injury would be redressed by a favorable decision.*

Because of the Plaintiff's *own decision* to hold a public event, and continually publicize and editorialize this matter and the present lawsuit on an ongoing basis,[10] it is highly unlikely that a favorable decision in this litigation would solve City Beat's problems with the "long-standing advertiser—a family-owned restaurant" that has allegedly discontinued its advertisements (Amended Compl., ¶ 60), or with any others who may be concerned. If some advertisers are indeed shying away from City Beat, as it implies, a favorable outcome of the present lawsuit for the Plaintiff would logically exacerbate, rather than redress, its problem. (*I.e.*, If an advertiser has ostensibly pulled its ads because it has become aware of or concerned about local citizens' discontent with the sexually oriented business section of the magazine, that level of discontent would only increase if the citizen activists have a judgment rendered against them.) Because the Plaintiff has failed to satisfy each of these necessary elements of Article III standing to proceed against the Private Party Defendants, the case must be dismissed as a threshold matter.

III. THE SUIT SHOULD BE RECOGNIZED AS A "SLAPP" CASE AND THE CLAIMS ACCORDINGLY DISMISSED.

Federal courts are obliged to dismiss a "SLAPP" (Strategic Lawsuit Against Public Participation) action when one is recognized. Here, the Plaintiff's case meets the classic definition of a SLAPP, described as:

> [A] civil suit or countersuit filed against nongovernmental individuals and groups because of their communications to government (bodies, officials, agents, or the electorate) on issues of some public or social significance. By far it is most commonly an action brought for defamation (libel, slander, business libel), followed by claims for business torts (interference with contract, business . . .), followed by claims for . . . conspiracy, constitutional and civil rights violations . . . .
>
> The essential nature of the SLAPP action is that it is not brought with any real expectation of success on the merits. And, indeed, even when such cases go to verdict, most—but not all—of them are victories for the defendant.
>
> The pernicious effect of the SLAPP is its "chilling effect" upon First Amendment rights. Facing the serious risks, anxiety, and expense of actually being sued and looking at litigation defense costs, delays and risk, the public citizen is quick to settle for the dropping of the litigation in exchange for silencing their constitutional rights of freedom of speech, association, and redress.
>
> The SLAPP plaintiff then achieves its desired end result by a perversion and abuse of the litigation process. While anyone may become the victim or target of an abuse of process, where the litigant's action seeks to interfere with the exercise of First Amendment rights, important public law issues arise.

Kathleen L. Daerr-Bannon, Esq., 22 CAUSES OF ACTION 2d 317, at § 5 (2007), *Cause of Action Bringing and Defending Anti-SLAPP Motions to Strike or Dismiss*.

As discussed herein above, the few alleged actions of the Private Party Defendants in this case were fully protected by the fundamental First Amendment right to engage in free speech. Like its sister courts, the Sixth Circuit has affirmed and applied the idea that "[t]he First

[10] City Beat continues to publicize this matter in a series of editorials, ongoing stories, and online postings at its website. *See, e.g.*, excerpt from City Beat's own website, accessed on 8/29/08, attached hereto as Exhibit "B."

Amendment prohibits efforts to ensure 'laboratory conditions' in politics; [opposing] speech rather than damages is the right response to distorted presentations and overblown rhetoric. A campaign to influence [public action] is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account." *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 299 (6th Cir. 1992), *cert. denied*, 508 U.S. 957 (1993) (*quoting Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir.1988), *cert. denied*, 489 U.S. 1065 (1989))

In *Eaton*, a former school principal brought a § 1983 and 1985 action against a teachers' union and its local managing agent to recover for aggressive lobbying that led to the principal's discharge. The Sixth Circuit held there was no conspiracy, and overturned a jury's damages verdict for the plaintiff, because the defendants' public campaign was protected by the First Amendment. *Id.*, 975 F.2d at 299.

"A citizen's right to petition is not limited to goals that are deemed worthy, and the citizen's right to speak freely is not limited to fair comments. ... It is a truism that the free flow of ideas and opinions is integral to our democratic system of government." *Id.* at 298 (*citing Gertz*, 418 U.S. at 339-40). The *Eaton* court noted its reliance upon the Supreme Court's "*Noerr-Pennington* doctrine," which has established that liability may not be assessed for such free speech activities, "regardless of the motives of the petitioners, even where the petitioning activity has the intent or effect of depriving another of property interests." *Id.* at 298 (multiple citations omitted). *See also, Stachura v. Truszkowski,* 763 F.2d 211 (6th Cir.1985), *rev'd on other grounds, Memphis Community Sch. Dist. v. Stachura,* 477 U.S. 299 (1986). The *Noerr-Pennington* doctrine provides the basis and legal theory for a SLAPP motion to dismiss.

Public participation or citizen involvement in government is the hallmark of our

> democratic society and political life and our constitution, laws, government institutions and political style all encourage us as citizens to petition, lobby, debate, campaign, testify, complain, litigate, demonstrate and otherwise . . . .

Penelope Canan and George Pring, SLAPPs: An Overview of the Practice, 935 ALI-ABA 1, 5 (1994). Indeed, the right to be protected from SLAPPs arises out of core First Amendment freedoms, and the need to combat such litigation abuses has been acknowledged by many federal and state courts. Because the case at bar clearly meets this definition, it should be dismissed on that basis.

CONCLUSION

Because Plaintiff's Amended Complaint fails to state any cause of action upon which relief can be granted against the Private Party Defendants, fails to satisfy its burden to meet Article III standing requirements, and is a baseless SLAPP lawsuit against these parties—the case against them must be dismissed in accordance with Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6).

Respectfully submitted, this 8th day of September, 2008.

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