

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, <i>et al.</i> ,)	
Plaintiffs)	
)	
v.)	Docket No. 2:12-cv-184
)	
KENNETH L. MILLER, <i>et al.</i> ,)	
Defendants)	

DEFENDANTS PHILIP ZODHIATES, VICTORIA HYDEN
AND RESPONSE UNLIMITED, INC.’S REPLY IN
SUPPORT OF MOTION TO DISMISS THE SECTION 1985 AND CIVIL
CONSPIRACY CLAIMS IN THE REVISED SECOND AMENDED COMPLAINT

Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc. (the “Zodhiates Defendants”), by their attorneys, Gravel & Shea PC, reply in support of their Motion to Dismiss the Section 1985 and Civil Conspiracy Claims in the Revised Second¹ Amended Complaint as follows, and in doing so, incorporate by reference their earlier briefs and those of their co-defendants:

Preliminary Statement

This action was commenced on August 14, 2012, as an attempt to hold twelve defendants liable for conspiring to deprive Janet Jenkins of her civil rights and to kidnap Isabella Miller-Jenkins. In its October 24, 2013 ruling on motions to dismiss (Doc. 115), the Court dismissed five defendants and certain claims, including a 42 U.S.C. § 1985 conspiracy claim. The Court

¹ On December 7, 2016, Plaintiffs requested leave to file a proposed Third Amended Complaint. However, the document Plaintiffs ultimately filed is titled the Revised Second Amended Complaint. Defendants moved to dismiss Doc. No. 223, the currently operative complaint, and refer to Doc. No. 223 herein as the “Complaint.”

subsequently twice granted Plaintiffs leave to amend. In the most recent Amended Complaint, Plaintiffs seek to state Section 1985 claims and a common law claim against the Zodiates Defendants who file this reply brief.²

The Section 1985 conspiracy claim against the Zodiates Defendants should be dismissed because as stated the claim violates the First Amendment right of free speech. The claim is unconstitutionally overbroad, and the Complaint fails to sufficiently allege that the Zodiates Defendants acted with “animus,” or for the purpose of depriving Plaintiffs of protected rights, or with sufficient intensity to “hinder” the courts in Vermont from exercising their power.

Discussion

I. AS INTERPRETED BY THIS COURT, SECTION 1985 VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

As interpreted by the Court, the hindrance clause of Section 1985 violates the First Amendment of the United States Constitution. In its October 24, 2013 Opinion and Order, the Court concluded that a Section 1985 claim exists if private citizens conspire against a protected class with invidiously discriminatory animus for the purpose of preventing State authorities from securing equal protection of the law. *Jenkins v. Miller*, 2013 U.S. Dist. LEXIS 152846, *84-85 (D. Vt. October 24, 2013). As the facts alleged supporting the conspiracy in this case are interpreted by the Court, Section 1985 is overbroad, vague and punishes speech without a demonstration of clear and present danger.

² Defendants Philip Zodiates, Victoria Hyden and Response Unlimited, Inc. have filed briefs opposing Plaintiffs’ Section 1985 and common law claims previously on November 10, 2014, December 29, 2014 and May 16, 2017 (Docs. 170, 179 and 228, respectively). For the purposes of preserving issues for appeal, Defendants incorporate by reference the arguments made in those prior motions to dismiss, as well as those made by other defendants.

To make out a First Amendment facial challenge that a statute is impermissibly overbroad, the movant must “demonstrate that a substantial number of instances exist in which a law cannot be applied constitutionally.” *Speet v. Schuette*, 726 F.3d 867, 873 (6th Cir. 2013). “The overbreadth doctrine prohibits the government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” *Ashcroft v. The Free Speech Coalition, Inc.*, 535 U.S. 234, 255 (2002).

In the Revised Second Amended Complaint and in their Opposition, Plaintiffs allege that the Zodiates Defendants, or some of them, participated in a conspiracy by exercising their First Amendment right of free speech. Among other things, Plaintiffs allege that Victoria Hyden solicited donations from Liberty Law School personnel to support Lisa Miller outside the country³ and several individuals urged civil disobedience to rulings felt to be unjust. Complaint, ¶¶ 44, 51 and 54.

While Plaintiffs suggest that there is no intent to pin liability on anyone for advocating civil disobedience, they simultaneously say that such evidence would not be “irrelevant” in a jury’s consideration of the underlying conspiracy. Doc. 261 at 77, fn. 11. In doing so, Plaintiffs confirm for the Court that their conspiracy claim will rely on First Amendment-protected activities, therefore rendering Section 1985 overbroad as it is interpreted by the Court in this case and in violation of the First Amendment.

³ As applied to Victoria Hyden, Section 1985 is unconstitutional because fundraising and advocacy of civil disobedience are both protected by the First Amendment. *Sec’y of State of Md. v. Munson Co.*, 467 U.S. 947, 959 (1984); *NAACP v. Button*, 371 U.S. 415, 431-37 (1963); *Brandenburg v. Ohio*, 345 U.S. 444, 447 (1969). Because Section 1985 directly punishes her protected speech, she should be dismissed with prejudice.

Plaintiffs seek to justify this infringement of constitutionally-protected activity by arguing that the cause of action is not predicated on the conduct described in those factual allegations. Doc. 261 at 72. They would analogize the alleged conduct of the Zodiates Defendants to that of a political candidate who punches a bystander when leaving the stage after giving a campaign speech, and suggest that a resulting assault claim is not improper or subject to a First Amendment overbreadth claim just because the claim also alleges conduct that is protected by the First Amendment. *Id.* at 72-73. That argument and analogy fail: while the punch is unrelated to the campaign speech in the analogy, Plaintiffs' conspiracy allegations cannot survive without the support of the First Amendment-protected activities alleged in the Complaint. To allow the Section 1985 conspiracy alleged in this case to survive a motion to dismiss would result in a violation of the First Amendment and would impermissibly prohibit and chill a broad swath of protected speech.⁴

II. PLAINTIFFS FAIL TO STATE A CLAIM UNDER 42 U.S.C. § 1985.

Even if the claims stated were constitutional, they would still be subject to dismissal for failure to state a claim. To successfully state a claim under 42 U.S.C. § 1985, a complaint must allege that “the defendants did (1) ‘conspire or go in disguise on the highway or on the premises of another’ and (2) ‘for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws. . . .’” *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), *quoting* 42 U.S.C. § 1985. A viable complaint must also allege that “one or more of the

⁴ If First Amendment-protected activities are permitted to act as the basis for a Section 1985 conspiracy claim, then it would follow that an attorney advising her client to invoke his Fifth Amendment rights when facing allegations implicating the denial of civil rights to another is potentially entering in a Section 1985 conspiracy with her client.

conspirators (3) did, or caused to be done, ‘any act in furtherance of the object of [the] conspiracy,’ whereby another was (4a) ‘injured in his person or property’ or (4b) ‘deprived of having and exercising any right or privilege of a citizen of the United States.’” *Id.* These requirements apply both to the deprivation and hindrance clauses. To allege a conspiracy in violation of the deprivation clause of Section 1985(3), a plaintiff must also show: (1) some racial or perhaps otherwise class-based invidiously discriminatory animus; and (2) that the conspiracy aimed at interfering with rights that are protected against private as well as official encroachment. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 267-268 (1991).⁵ This Court has previously ruled that Plaintiffs do not state a claim under the deprivation clause.

Although few other courts have addressed the claim, both the First Circuit and most members of the Supreme Court in *Bray* agreed that, in addition to class-based invidiously discriminatory animus, a “hindrance” claim requires allegations of a significant level of force that interferes with the capabilities of State law enforcement. Plaintiffs’ Second Amended Complaint fails to allege that Defendants acted with animus, with the purpose of depriving Plaintiffs of rights, or used any level of force. The Court should dismiss the claim.

⁵ In its October 24, 2013 opinion, the Court held that a valid cause of action was stated “[w]hether one concludes that a hindrance clause claim is not limited to rights protected only against official encroachment, or that interfering with state officials necessarily implicates state action.” *Jenkins*, 2013 U.S. Dist. LEXIS at 152846 at *84-85. Defendants do not concede that this is a correct statement of the law as it stands today. In *Bray*, the Supreme Court held that the Section 1985 claim failed, among other reasons, because the plaintiffs had not identified a right protected against private action (and instead had only identified one protected against official encroachment). *Bray*, 506 U.S. at 278. The issue of whether a Section 1985 claim of a private conspiracy can proceed against a right not protected against private action remains to be settled post-*Bray*. At the time of its writing, the Supreme Court identified a right to interstate travel and a right to be free from involuntary servitude as the only two rights protected against private, as well as official, encroachment. *Id.*

A. Plaintiffs Fail To Allege That The Zodiates Defendants Acted With Animus Or For The Purpose Of Depriving Plaintiffs of Rights.

Plaintiffs fail to allege that the Zodiates Defendants acted with any animus toward same-sex couples or those with different sexual orientation. The required state of mind for “invidiously discriminatory animus” is a high one. *Bray*, 506 U.S. at 269-270. It involves actions that tend “to excite odium, ill will, or envy; likely to give offense; esp., unjustly and irritatingly discriminating.” *Id.* at 274 quoting Webster’s Second International Dictionary 1306 (1954). The requirement of discriminatory animus applies to claims under the hindrance clause of Section 1985(3). *Libertad*, 53 F.3d at 448.

In *Bray*, the court held that protests against abortion did not satisfy the standard for invidious discrimination against women. Here, Plaintiffs continue to fail to allege any facts surrounding the specific state of mind of Philip Zodiates, Victoria Hyden or Response Unlimited, Inc. and therefore similarly fail to satisfy the standard for invidious discrimination against same-sex couples. In their opposition, Plaintiffs point only to the “RUL Defendants’ central role in the conspiracy to kidnap” as proof of their animus against same-sex couples. Doc. 261 at 86. Plaintiffs’ allegation that the RUL Defendants merely participated in an alleged conspiracy cannot be used to support the very element of that conspiracy which requires an invidiously discriminatory animus. By doing so, Plaintiffs do exactly what the Supreme Court warned against in *Griffin* when looking at the motivation of a Section 1985 defendant: “The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus.” *Griffin*, 403 U.S. at 102 fn. 10.

Plaintiffs use this same type of conclusory logic to support their claims that the Zodiates Defendants engaged in the conspiracy for the purpose of depriving rights to same-sex couples.

The Supreme Court similarly rejected that approach in *Bray*:

A conspiracy is “not for the purpose” of denying equal protection simply because it has an effect upon a protected right. The right must be “*aimed at*,” . . . ; its impairment must be a conscious objective of the enterprise. Just as the “invidiously discriminatory animus” requirement, discussed above, requires that the defendant have taken his action “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group,” . . . so also the “intent to deprive of a right” requirement demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; he must act at least in part for the very purpose of producing it.

Bray, 506 U.S. at 275 (internal citations omitted). Plaintiffs fail to allege any facts in the Complaint that support their argument that Philip Zodiates, Victoria Hyden and Response Unlimited, Inc. acted with discriminatory animus against same-sex couples or acted with the purpose, not just the effect, of impeding State officials from securing equal protection rights to same-sex couples. *Id.*; *see also Libertad*, 53 F.3d at 450 (“the *purpose*, not merely the *effect*, of the conspiracy, must be to impede State officials in their efforts to secure equal protection of the laws.”) The utter lack of facts makes it impossible to conclude that the Zodiates Defendants acted with odium, ill will, envy or with the purpose of denying rights to same-sex couples.

Without such allegations toward Jenkins, there is no claim for a civil rights violation.

B. Plaintiffs Fail To Allege That The Zodiates Defendants Acted With Sufficient Intensity To “Hinder” Vermont’s Exercise Of Its Power.

This Court should hold that pleading a Section 1985 hindrance claim requires allegations of force to “hinder” or “prevent.” In their opposition, Plaintiffs neglect to acknowledge *Bray* and

argue only that *if* some force is to be required under a Section 1985 claim, then the fact that the conspiracy to kidnap Isabella Miller-Jenkins “continues to withstand the force of the United States law enforcement” is proof enough that force has been used. Doc. 261 at 97. As with their animus argument, Plaintiffs attempt to utilize the same conclusory logic and suggest that the mere continuing existence of the alleged conspiracy is proof of the element of force itself.

Even if the Court were to accept that some force is alleged in the Complaint, the force used against State authorities is, at best, nothing more than the evasion of law enforcement. If evasion were deemed to be sufficient force to support a Section 1985 claim, then anytime an individual acts in concert with another to evade the State police on the highway they might be subject to a 1985 claim. Not only does this run counter to the purpose of the enactment of Section 1985 as a reaction to the violent suppression of rights by the Ku Klux Klan immediately after the Civil War, it extends far beyond it. *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 835-36 (1983); *see also id.* at 839 (Blackmun, J., dissenting) (“The Ku Klux Klan Act was the Reconstruction Congress’ response to politically motivated mob violence in the past between the South designed to intimidate persons in the exercise of their rights.”) Because there is no suggestion in the Complaint that Defendants acted with the purpose of, let alone even attempted to, overwhelm the ability of State law enforcement officials or that Defendants were “too strong” for the State of Vermont, the Section 1985 claim must be dismissed.

Conclusion

Plaintiffs' Section 1985 and civil conspiracy claims fail to state a claim for relief. The Court should dismiss them with prejudice.

Dated: Burlington, Vermont
September 6, 2017

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CERTIFICATE OF SERVICE

I, Robert B. Hemley, Esq., attorney for Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc., certify that, on September 6, 2017, I served Defendants Philip Zodhiates, Victoria Hyden and Response Unlimited, Inc.'s Reply in Support of Motion to Dismiss the Section 1985 and Civil Conspiracy Claims in the Revised Second Amended Complaint, through the CM/ECF system on the following individuals:

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