IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ROBERT L. VAZZO, LMFT, individually and on behalf of his patients, DAVID H. PICKUP, LMFT, individually and on behalf of his patients, and SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY, individually and on behalf of its members, constituents and clients,

Plaintiffs,

v.

CITY OF TAMPA, FLORIDA, and SAL RUGGIERO, in his official capacity as Manager of the City of Tampa Neighborhood Enforcement Division,

Defendants.

Case No. 8:17-cv-02896- CEH-AAS

DEFENDANT, SAL RUGGIERO, IN HIS OFFICIAL CAPACITY AS MANAGER OF THE CITY OF TAMPA NEIGHBORHOOD ENFORCEMENT DIVISION'S, MOTION TO DISMISS FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, AND DAMAGES WITH PREJUDICE

Defendant, Sal Ruggiero, in his official capacity as Manager of the City of Tampa Neighborhood Enforcement Division, moves the Court, pursuant to Fed. R. Civ. P. 12(b)(6), and the Court's inherent power to govern this action pursuant to Fed. R. Civ. P. 1, for entry of an order dismissing Sal Ruggiero as a party defendant in this action and, further, dismissing, with prejudice, all claims asserted against him in Plaintiff's First Amended Verified Complaint for Declaratory, Preliminary and Permanent Injunctive Relief, and Damages ("Amended

Complaint") with prejudice because he is an unnecessary party and because the Amended Complaint also fails to state a claim for relief against him. The grounds for this motion and the reasons why Mr. Ruggiero should be dropped as a party defendant and the claims dismissed against him with prejudice are set forth in his supporting memorandum below.

MEMORANDUM

Introduction

After receiving permission from the Court, the original Plaintiffs, Robert L. Vazzo and David H. Pickup, filed their First Amended Complaint which added as another plaintiff, Soli Deo Gloria International, Inc., d/b/a New Hearts Outreach, Tampa Bay, a new claim for relief (Count VIII), and ninety new paragraphs containing various and sundry allegations of facts and conclusions.[1] The Amended Complaint contains over three hundred separate paragraphs and is fifty-three pages long. In addition, the original Plaintiffs named a City of Tampa employee, Sal Ruggiero, in his official capacity as Manager of the City of Tampa Neighborhood Enforcement Division, as a defendant.

There is no longer a need to bring official-capacity actions against local government officials because local governments can be sued directly for damages, and injunctive and declaratory relief. *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978); *Kentucky v. Graham,* 473 U.S. 159 (1983). Nevertheless, despite this now well recognized legal principle, the original plaintiffs saw fit to join Mr. Ruggiero, in his official capacity, as a defendant in this action. Because the City of Tampa is already named directly as a defendant,

[1] According to the Amended Complaint "New Heart Outreach" is added "individually and on behalf of its members, constituents and clients".

it is unnecessary, duplicative and superfluous to also name Mr. Ruggiero as a defendant. He should be dismissed as a party to this action and, in addition, the claims against him should be dismissed with prejudice.

Points and Authorities

The Eleventh Circuit has embraced the holdings in *Monell* and *Kentucky* in a context similar, in principle, to this action. Indeed, in the leading case on this issue the Eleventh Circuit was very explicit:

> Because suits against a municipal officer sued in his official capacity and direct suits against municipalities are functionally equivalent, there no longer exists a need to bring official-capacity actions against local government officials because local government units can be sued directly. *Busby v. City of Orlando*, 931 F. 2d 764, 776 (11th Cir. 1991).

More recently (and locally), United States District Judge James S. Moody, Jr., in the context of a constitutional challenge to the City of Temple Terrace, Florida's "Rental Housing Program" dismissed, with prejudice, the claims brought against Temple Terrace's Housing Compliance Officer, Lynn Valenti. As with Mr. Ruggiero, Mr. Valenti had been sued in his official capacity as the Housing Compliance Officer. Citing *Busby*, Judge Moody dismissed Valenti in his official capacity as being, *inter alia,* unnecessary and redundant. Judge Moody also dismissed all claims against Valenti, with prejudice. *LEA Family Partnership v. City of Temple Terrace, Florida*, 2017 WL 1165583.

Assuming the court dismisses Ruggiero as a party defendant in this action and dismisses all claims asserted against him, with prejudice, he would have no reason to address the substantive aspects of Plaintiff's Amended Complaint. But until the court rules on that

specific issue, it is appropriate for Ruggiero to address, briefly, those substantive issues as set forth below.

On June 26, 2018, the City of Tampa filed its Motion to Dismiss First Amended Complaint With Prejudice, And Memorandum Of Law In Support Thereof ("Motion to Dismiss"). To avoid duplication, Ruggiero adopts, by reference, the City's arguments in its Motion to Dismiss in their entirety. But, in addition, Ruggiero is also aware of the recent Supreme Court case, *The National Institute of Family and Life Advocates d/b/a NIFLA v. Becerra*, 2018 W.L. 3116336 (2018) (*NIFLA*), which was decided the same day that the City filed its Motion to Dismiss. Because of the coincidental timing of the *NIFLA* decision it was not addressed in the City's Motion to Dismiss. Thus, in addition to the points and authorities made in the City's Motion to Dismiss, Ruggiero deems it appropriate to comment, briefly, on the affect, if any, that the *NIFLA* decision may have on the issues in this case should Ruggiero not be dismissed.

Unlike the facts in this case, *NIFLA* involved a California statute requiring clinics that primarily served pregnant women to provide certain notices. More specifically, licensed clinics were required to notify women that California provides free or low-cost services, including abortions, and gives them a phone number to call. Unlicensed clinics, on the other hand, must notify women that California has not licensed the clinics to provide medical services. As stated by Justice Thomas, the question to be decided was "whether these notice requirements violate the First Amendment". *NIFLA, supra* at 2018 WL at 3116336*4.

The Supreme Court in *NIFLA*, however, recognized the well-established constitutional principle that regulation of professional conduct which only incidentally burdens speech is an acceptable burden.

> **This Court has afforded less protection for professional speech in two circumstances** – neither of which turned on the fact that professionals were speaking. . . First, **our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'** . . . Second, under our precedents, **State's may regulate professional conduct even though that conduct incidentally involves speech.** *See e.g. Zauder v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed.2d 652 (1985); *Milavetz Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250, 130 S. Ct. 1324, 176 L. Ed.2d (2010); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-456, 98 S. Ct. 1912, 56 L. Ed.2d 444 (1978). *See e.g., id* at 456. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 112 S. Ct. 2791, 120 L. Ed.2d 674 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ). But neither line of precedents is implicated here.

2018 WL at 3116336*8. (Emphasis supplied) Significantly, the above quoted portion of *NIFLA* cites favorably to *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 98 Supreme Court 1912, 56 Law Ed. 2d, 444 (1978). In *Ohralik*, the court made it clear that the State (here the City) "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.*[2] Here, that is all the ordinance at issue seeks to do. Thus, it is at once obvious that the burden on any speech that might be implicated is purely incidental. It follows that because it is nothing more than an incidental burden the Ordinance does not violate Plaintiffs' First Amendment rights. *Ohralik, supra*.

[2] Significantly, the *NIFLA* court expressly recognized this power, notwithstanding its holding that the notices in that case did violate the *NIFLA* plaintiffs First Amendment rights.

CONCLUSION

For all of the above reasons, Ruggiero should be dismissed as a party defendant to this action and all claims against him should be dismissed, with prejudice, as well. Ruggiero requests oral argument if the Court determines that would be helpful to rule on this Motion.

/s/ *Robert V. Williams*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2018 I caused a true and correct copy of the foregoing to be filed electronically with the Clerk of Court. Service will be effectuated on all counsel of record via the Court's ECF/Electronic Service System.

/s/ *Robert V. Williams*
Robert V. Williams, Esquire