UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

DEFENDANTS' RESPONSE TO PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S MOTION FOR PRELIMINARY INJUNCTION (DOC. 11)

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CONCISE STATEMENT OF ISSUES PRESENTED

Plaintiff Catholic Charities West Michigan's (Plaintiff or CCWM) request for injunctive relief must be denied because it cannot establish a likelihood of success on the merits, it has suffered no irreparable injury, and the interests of the public and both the public interest and the Michigan Department of Health and Human Services (MDHHS) would suffer if such relief were granted.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Mich. Comp. Laws § 722.124e

Mich. Comp. Laws § 722.124f

Fulton v. City of Philadelphia,
320 F. Supp. 3d 661 (E.D. Pa. 2018), aff'd 922 F.3d 140 (3d Cir. 2019)

New Hope Family Servs. v. Poole,
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261 Mich. App. 17, 680 N.W.2d 62 (Mich. Ct. App. 2004)

INTRODUCTION

A preliminary injunction is always an extraordinary remedy, but Plaintiff's request is even more startling. It seeks an order requiring Michigan Department of Health and Human Services (MDHHS) to alter, or ignore, the terms of the standard contract it provides to all Child Placing Agencies (CPAs), whether faith-based or secular, to allow discrimination in services provided to children.

Neither federal nor state law authorize this. Plaintiff's Free Exercise and Freedom of Speech claims have been rejected by several federal courts in recent decisions. *Fulton v. City of Philadelphia,* 320 F. Supp. 3d 661 (E.D. Pa. 2018), aff'd 922 F.3d 140 (3d Cir. 2019); *New Hope Family Servs. v. Poole,* No. 5:18-cv-1419, 2019 U.S. Dist. LEXIS 82461 (N.D.N.Y. May 16, 2019). A requirement imposed on a contract entered voluntarily is not a burden of constitutional significance under the state constitution. And, the legislature expressly excluded services provided under the contracts at issue – foster care case management and adoption contracts—from activities for which a CPA can exercise an objection based on its sincerely held religious beliefs. Mich. Comp. Laws § 722.124e(7)(b).

MDHHS's policy is non-discrimination and it expects CPAs with which it contracts to provide foster care and adoption services to act consistent with this policy when carrying out contractual duties. This was true long before Defendant

Attorney General Nessel took office and the *Dumont* litigation settled. Federal and state law support this policy. Plaintiff's motion must be denied.

BACKGROUND

As detailed in Defendants' Response to Plaintiff's Motion to Change Venue (Doc. 16), the present case arises out of *Dumont v. Gordon*, Case No. 2:17-cv-13080 (E.D. Mich.), and the Consent Decree ending it (Doc. 82, 83). The facts set forth therein are incorporated herein pursuant to Fed. R. Civ. P. 10(c).

A. MDHHS's role in foster care and adoption services contracts.

Defendant MDHHS administers Michigan's foster care and adoption services program, in large part, through 137 contracts with 57 private CPAs who are licensed by MDHHS. (Goad Aff., ¶¶ 6-8, Ex. A.) CCWM is one CPA. (Goad Aff., ¶ 12.) MDHHS is aware of no evidence that religiously affiliated CPAs are more effective than other CPAs. (Hoover Aff., ¶ 13, Ex. B.) All CPAs sign the same master contract for foster care and adoption services. (Goad Aff., ¶ 7.)

The decision to certify a foster parent or approve an adoption rests on MDHHS. Pursuant to contract and statute, the CPA's role is to complete a home study, assess and make a recommendation to MDHHS as to whether a prospective foster or adoptive parent(s) ("Applicant") meets state requirements. (Neitman Aff., ¶ 12, Ex. C.) Criteria assessed during the home study include factors relevant to determining if, and to what extent, the Applicant can meet a child's needs and

whether a child may be a good fit for a particular family. (Neitman Aff., ¶¶ 10-11.)

A CPA's assessment does not constitute an endorsement or approval of any relationship or religious belief. (Neitman Aff., ¶ 12.) CPAs expressly agree not to discriminate against an Applicant on the basis of sexual orientation or marital status. (Hoover Aff., ¶¶ 21-22; Goad Aff., ¶¶ 18-19.) MDHHS asks CPAs to assess whether an Applicant meets legal licensing requirements, not to endorse any relationship, including same-sex marriage, or speak in favor of it. (Goad Aff., ¶ 11; Neitman Aff., ¶ 12.) CPAs receive an administrative rate and/or contracted rate for all services performed under these contracts, including home studies and other activities related to licensing foster families or assessing prospective adoptive families. (Goad Aff., ¶¶ 15-16; Hoover Aff., ¶¶ 10,12.)

MDHHS monitors CPAs' compliance with adoption and foster care contracts via audits and investigating allegations of noncompliance. (Neitman Aff., ¶¶ 14, 19). Alleged noncompliance with licensing rules, statutes, or contract requirements does not typically result in immediate contract termination. (Neitman Aff., ¶¶ 16-17.) Pursuant to contract and state law,[1] when an allegation of noncompliance is received, it is referred to a licensing consultant, who conducts an

[1] Mich. Comp. Laws §§ 722.113(1) and 722.120(1), the PAFC Master Contract, p. 21, § 2.21; the DCWL Policy and Procedure Manual, Chapter 6 Special Investigation, p. 46. (Ex. C, ¶ 19.)

investigation, meets with the CPA's administrators, and completes an investigation report. (Neitman Aff., ¶¶ 14-15.) The CPA can submit a corrective action plan (CAP) to address any noncompliance. Its failure to do so could result in a recommendation for disciplinary action, revocation of a license, or termination of the contract, which the CPA can appeal. (Neitman Aff., ¶¶ 16-18.)

B. MDHHS's long-standing policy of nondiscrimination is evidenced by its contracts and prior conduct.

MDHHS has always enforced the CPA contracts' non-discrimination clause. The *Dumont* settlement did not result in a "new" policy, but merely reaffirmed MDHHS's long-standing practice. (Bladen Aff., ¶ 25, Ex. D.)

Plaintiff is aware of this. For several years, its Private Agency Foster Care (PAFC) and Adoption Contracts included the following nondiscrimination clause:

> c. The Contractor shall comply with the MDHHS non-discrimination statement:
>
> Michigan Department of Health and Human Services (MDHHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs or disability.
>
> The above statement applies to all applications filed for adoption of MDHHS supervised children, including MDHHS supervised children assigned to the contracted agency. [Bladen Aff., ¶¶ 15-16.]

Plaintiff was investigated twice for noncompliance because of sexual orientation discrimination. A January 2017 investigation led MDHHS to establish violations based on Plaintiff's refusal to complete a child's adoption by a same-sex

couple. And, in March 2018, Plaintiff failed to place siblings together because one sibling resided with a same-sex couple. Plaintiff submitted CAPs that MDHHS accepted to remedy noncompliance. (Neitman Aff., ¶¶ 20-22; Bladden Aff., ¶ 24.)

C. Michigan law and MDHHS policy do not authorize discrimination in services provided under foster care and adoption contracts.

MDHHS's adoption and foster care contracts are consistent with Public Acts 53, 54, and 55, which amended Michigan's Adoption Code (Mich. Comp. Laws §§ 710.1, *et. seq*.), Michigan's Child Care Organization Act (Mich. Comp. Laws §§ 722.111, *et seq.*), and Michigan's Social Welfare Act (Mich. Comp. Laws §§ 400.1, *et. seq*.).

Michigan law grants a CPA discretion to "decide not to accept the referral" of a child or individual in need of foster care or adoption services if "the services would conflict with the [CPA's] sincerely held religious beliefs…." Mich. Comp. Laws § 722.124f(1). A "referral" is MDHHS's offering of a child or individual's case to a CPA under contract with MDHHS to provide foster care case management or adoption services. (Bladen Aff., ¶ 4.) This is evident from the PAFC and Adoption Contracts. (PAFC, Doc. 1-2, Page ID #85; Goad Aff., ¶ 12.)

In practice, CPAs generally accept a "referral" by signing a 3600 Agreement with MDHHS (Bladen Aff., ¶ 4); however, a CPA may also accept a referral by engaging in activity that obligates MDHHS to pay for services related to it. Mich. Comp. Laws § 722.124f(1). (PAFC, Doc. 1-2, Page ID #85.) Before the CPA

accepts a referral, it has "sole discretion to decide whether to engage in activities or perform services related to that referral." Mich. Comp. Laws § 722.124f(1).

It is undisputed that Plaintiff has accepted referrals from MDHHS. Having accepted these referrals, Michigan law does not allow Plaintiff to refuse services to these children based on sincerely held religious beliefs, including turning away an Applicant based on sexual orientation or gender identity. The discretion provided to CPAs in Mich. Comp. Laws § 722.124f to refuse a referral from MDHHS does not authorize a CPA to turn away an Applicant. MDHHS does not direct Applicants to a particular CPA, unless the Applicant is a relative of a child for whom a CPA has already accepted a referral. (Bladen Aff., ¶ 5; Goad Aff., ¶¶ 9-10.) If an Applicant calls MDHHS with a question, s/he is directed to a Foster Care Navigator, an experienced foster parent, who assists Applicants through the licensing process and who provides information on CPAs in the Applicant's geographic area. Applicants are encouraged to explore multiple CPAs to determine which is the right fit for them. (Bladen Aff., ¶ 5; Hoover Aff., ¶ 17.)

Once the CPA accepts a referral it may ***not*** discriminate in providing "foster care case management and adoption services provided under contract with [MDHHS]." Mich. Comp. Laws § 722.124e(7)(b). The definition of "services" for purposes of the 2015 amendments expressly excludes these services from those for which the CPA can exercise its religious objection. *Id.*; *see also* Mich. Comp.

Laws §§ 710.23g, 400.5a (incorporating Mich. Comp. Laws § 722.124e). Home studies, orientations, and other activities necessary to license or approve an Applicant are services provided to children accepted as referrals under the PFAC or Adoption Contract. (Hoover Aff., ¶¶ 6-8.) Such services are provided to children in connection with the "paramount goal" of securing the child's placement. Mich. Comp. Laws § 722.124e(1)(a).

ARGUMENT

I. Neither federal nor state law supports Plaintiff's claim that MDHHS violates the law by mandating compliance with the nondiscrimination clause in foster care case management and adoption contracts.

A preliminary injunction is an "extraordinary remedy, involving the exercise of a very far reaching power." *Leary v. Daeschner*, 228 F.3d 729, 739-40 (6th Cir. 2000) (internal quotations and citations omitted). Plaintiff bears a weightier burden of proof here than would be required on a motion for summary judgment. *Id.*; *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 573 (6th Cir. 2002). Plaintiff falls far short of meeting its burden.[2]

A. Plaintiff is unlikely to succeed on the merits.

The first factor, and the factor most often determinative in a case like this involving alleged constitutional violations, is the likelihood of success on the

[2] The factors for preliminary injunctive relief are well-established. See *Leary*, 228 F.3d at 736 (quoting *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 459 (6th Cir. 1997)).

merits. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 689 (6th Cir. 2014) (internal quotations omitted). Plaintiff must show more than a "mere 'possibility'" of success, but rather, a "strong or substantial *likelihood* or *probability* of success on the merits." *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261n.4 (6th Cir. 1977) (emphasis in original). It has not made such a showing here.

1. Neither Michigan law nor MDHHS policy allow discrimination in services provided under these contracts.

Plaintiff cannot establish a likelihood of success that MDHHS's actions and contract terms violate Michigan law. Nor can Plaintiff demonstrate that MDHHS's settlement in *Dumont* constitutes a new policy. MDHHS's policy of prohibiting discrimination in the provision of foster care case management and adoption services to children for whom Plaintiff has accepted a referral remains unchanged.

The "paramount goal" of Public Act 53 is to place a child "in a safe, loving, and supportive home." Mich. Comp. Laws § 722.124e(1)(a). It is not to protect any family structure, as Plaintiff suggests. (Pl.'s Mot., Doc. 11, Page ID #609.)

To that end, MDHHS "makes a referral" to a CPA of a child or individual in need of foster care or adoption services.[3] Mich. Comp. Laws § 722.124f(1).

[3] A "referral" for purposes of these foster care case management and adoption contracts denotes MDHHS's offering of a child or individual's case to a CPA under contract with MDHHS to provide foster care case management and adoption services. (Ex. D, ¶ 4.) It does not denote the direction of an Applicant to a CPA. While this term is not defined in the statute, this understanding is evident from

Michigan law and MDHHS policy allow a CPA to refuse this referral for any reason, including if providing services to this referral would conflict with the CPA's sincerely held religious beliefs. *Id.*

However, once a CPA has accepted a referral, neither Michigan law nor MDHHS policy allow a CPA to discriminate when providing "foster care case management and adoption services provided under contract with [MDHHS]." Mich. Comp. Laws § 722.124e(7)(b). The Legislature expressly excluded these services from those that a CPA may decline based on religious beliefs. *Id.* Plaintiff has accepted referrals of children and individuals from MDHHS. Therefore, Applicant recruitment and activities necessary to advise MDHHS whether an Applicant meets objective criteria for licensing, placement, and adoption of a particular child accepted as a referral (including training, orientation, home studies, etc.) are "foster care case management and adoption services provided under contract with the state." (Hoover Aff., ¶¶ 8, 12.) No CPA can claim a religious exception to the nondiscrimination clause in its contract for the provision of these services to children accepted through referrals from MDHHS.

Mich. Comp. Laws § 722.124f(1), which describe the process by which a CPA accepts a "referral," and Mich. Comp. Laws § 722.124e(1)(h), which recognizes that a CPA does not receive public funding "with respect to a particular child…referred by [MDHHS] unless the agency affirmatively accepts the referral. The contracts Plaintiff entered with MDHHS also make this clear. (*See* PFAC, Doc. 1-2, Page ID #85, ¶ 1.2; Adoption Contract, Doc. 1-2, Page ID #141, ¶ 1.2.)

In its claim that Defendants violate Michigan law and changed policy, Plaintiff conflates its statutory right to reject a referral *from* MDHHS with the prohibited practice of turning away and refusing to evaluate Applicants for children accepted through referrals and sending the Applicant to other CPAs. The latter constitutes discrimination in the provision of services to such children and is prohibited under the contract, law and policy.

2. Enforcing the nondiscrimination clause does not violate the Free Exercise Clause of the First Amendment.

Nor can Plaintiff demonstrate a substantial likelihood of success on its Free Exercise Clause claim. "The free exercise of religion means, first and foremost, the right to believe and profess whatever doctrine one desires[]" and, also, to engage in activities like assembling for worship and participating in the sacraments without State interference. *Mount Elliott Cemetery Ass'n v. City of Troy,* 171 F.3d 398, 403 (6th Cir. 1999) (quoting *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)).

It does ***not*** require MDHHS to alter its standard contract or policy, or ignore noncompliance in order to accommodate Plaintiff's religious beliefs. MDHHS's enforcement of the nondiscrimination provision is not a "new policy" embedded in the *Dumont* settlement agreement and the April 2019 Communication Issuance. Rather, these documents simply confirm that which MDHHS already does, to wit, maintain and enforce a nondiscrimination provision that has been in MDHHS's

standard contract for several years and with which Plaintiff agreed to comply. (Compl., Doc. 1-2, Page ID #46-47, ¶¶ 129-32; PFAC, Doc. 1-2, Page ID #88; Adoption Contract, Doc. 1-2, Page ID #144; Bladen Aff., ¶ 27.)

a. The nondiscrimination clause is neutral, generally applicable, and presumed valid.

When a neutral and generally applicable provision like MDHHS's nondiscrimination clause is at issue, "a free exercise challenge is presumably precluded." *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 932 (6th Cir. 1991). Plaintiff cites no case that warrants disregarding this presumption here.

i. Ministerial Exception does not apply.

Plaintiff's reliance on *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm.*, 138 S.Ct. 1719 (2018) is misplaced. Neither have any relevance here.

Plaintiff asserts a ministerial exception to anti-discrimination laws. In *Hosanna-Tabor*, the Supreme Court held that a "ministerial exception" "ensures that the authority to select and control who will minister to the faithful is the church's alone" and bars an employment discrimination claim by a minister against a church and associated parochial school. 565 U.S. at 179-80, 194-95. Similarly, Plaintiff characterizes *Masterpiece* as suggesting that a similar exception applies if "a member of the clergy" did not perform a same-sex wedding. 138 S.Ct. at 1727.

Plaintiff is neither a minister nor clergy in the context of providing foster care case management and adoption services. It performs this function under contract with MDHHS in exchange for taxpayer funds. No ecumenical duty or religious teaching or training is required. To the contrary, CPAs assess an Applicant and perform home studies to determine if s/he meets the state criteria for licensing or adoption, without regard to religion, sexual orientation, or other protected criteria. (Neitman Aff., ¶¶ 9-13; Goad Aff., ¶ 14.)

MDHHS's requirement that Plaintiff not discriminate in the performance of this contracted function is consistent with the Supreme Court's repeated admonition that state-sponsored discrimination against same-sex couples violates the Constitution. *Obergefell v. Hodges,* 135 S.Ct. 2584 (2015); *Pavan v. Smith,* 137 S.Ct. 2075 (2017). The Supreme Court did not retreat from this in *Masterpiece*. In fact, the excerpt Plaintiff relies on its brief – when read in full– characterizes a clergy's objection to performing a wedding ceremony as an "exception" that if not confined, would result in a "long list of persons" refusing to provide goods and services to gay persons, "thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws . . . ." 138 S.Ct. at 1727. *Masterpiece* does not authorize an expansion of the ministerial exception to encompass a private agency's duties in a state contract. Thus, Plaintiff cannot show a likelihood of success on its Free Exercise claim.

ii. Plaintiff has not been categorically excluded from a public benefit because of its religious affiliation.

Plaintiff's reliance on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017), is equally misplaced. In *Trinity*, the state offered a grant to nonprofits that installed playground surfaces, but held a "strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity." *Id.* at 2017. This exclusion of a "public benefit" to a nonprofit "solely because of [its] religious character" violated the Free Exercise Clause. *Id.* at 2024. Here, Plaintiff voluntarily contracted with MDHHS to perform a governmental function. This is not a public benefit. *Teen Ranch, Inc. v. Udow*, 479 F.3d 403, 409-11 (6th Cir. 2007). In addition, MDHHS does not categorically exclude faith-based CPAs but, rather, works with both faith-based and secular CPAs on equal terms. (Hoover Aff., ¶ 5.) Plaintiff's Free Exercise claim fails on the merits.

b. No hostility toward religion exists.

The nondiscrimination clause in MDHHS contracts and policy reflects MDHHS's commitment to nondiscrimination against Applicants on a variety of factors, including race, religion, gender identity, and sexual orientation, without reference to the Catholic faith or any religious belief or practice. (Goad Aff., ¶¶ 17-18; Neitman Aff., ¶ 13; Bladen Aff., ¶¶ 17, 20-21; Hoover Aff., ¶ 5.) It

appears in contracts with every CPA – whether faith-based or secular – and compliance is enforced uniformly. (Goad Aff., ¶¶ 17-18; Bladen Aff., ¶ 17; Hoover Aff., ¶ 5.) Its comprehensive language and neutral application easily distinguish it from regulations found unconstitutional by the Supreme Court in *Church of Lukumi Babalu Aye*, where "almost the only conduct subject to [the regulatory language] [was] the religious exercise of the Santeria church members." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535-36 (1993).

MDHHS's widespread inclusion in the contracts and prior enforcement of the nondiscrimination provision also easily distinguish this case from another case cited by Plaintiff. In *Ward v. Polite*, the Sixth Circuit allowed a Free Exercise claim to go to the jury because the defendant could not point to any written policy barring the plaintiff from her activity that led to expulsion from a graduate program. 667 F.3d 727, 738 (6th Cir. 2012). In fact, the governing code of ethics suggested the plaintiff's action was permissible. *Id.* at 739.

Here, the inclusion of sexual orientation in MDHHS contracts and policy is reflective of the widespread recognition that discrimination on this basis constitutes a social harm. *Obergefell*, 135 S.Ct at 2604; *Romer v. Evans*, 517 U.S. 620, 635-36 (1996). Plaintiff cannot demonstrate a substantial likelihood of success with respect to its Free Exercise claim.

c. Rational basis review applies.

This neutral, generally applicable clause survives rational basis review. [4] "Rational basis review is extremely deferential," requiring the provision be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Bowman v. United States*, 564 F.3d 765, 775-76 (6th Cir. 2008) (internal quotations and citations omitted). The nondiscrimination clause reflects federal requirements, MDHHS's goal of nondiscrimination in the context of foster care and adoption services, and the best interest of children. *See* 45 C.F.R. § 75.300(c). It should be upheld. *Fulton*, 320 F. Supp. 3d at 703-04, 922 F.3d at 165. Plaintiff has not shown a likelihood of success on the merits on this issue, and its motion must be denied.

3. The nondiscrimination requirement in contracts and policy does not violate Article I, § 4 of the Michigan Constitution.

Plaintiff's claim that MDHHS's nondiscrimination requirement violates Michigan's Constitution is unavailing and cannot support the relief sought.

[4] The nondiscrimination clause also survives strict scrutiny because ending invidious discrimination in government contracts is, in itself, a compelling state interest. *Roberts v. United States Jaycees,* 468 U.S. 609, 628-29 (1984). And, requiring compliance with a neutral, generally applicable contract is the least restrictive way to accomplish this compelling interest. *Fulton*, 922 F.3d at 163 (internal citations and quotations omitted).

a. The nondiscrimination requirement does not burden Plaintiff's religious beliefs or conduct.

Given the discretion Plaintiff has to reject referrals under these foster care case management and adoption contracts, it can hardly be heard to argue that the nondiscrimination policy "coerced" it to violate its religious beliefs, or denies Plaintiff its share in the "rights, benefits, and privileges enjoyed by other citizens" due to its religious beliefs. *People v. DeJonge*, 501 N.W.2d 127, 136 (Mich. 1993) (internal quotations omitted). Plaintiff cannot meet these threshold requirements to establish a violation of Michigan's Free Exercise Clause in this case.

First, a government-funded contract for foster care or adoption services is not a public benefit. *Teen Ranch, Inc.*, 479 F.3d at 410-11. Second, Plaintiff is not required to renounce its religious beliefs on marriage or otherwise in order to participate in the contract. (Neitman Aff., ¶ 12; Goad Aff. ¶ 11.) Home studies and other licensing-related activities require an assessment of whether an Applicant meets the state criteria, not an endorsement or approval of any relationship on religious grounds. (Neitman Aff., ¶¶ 10-12.)

Third, Plaintiff's participation is voluntary. No state sanction or criminal penalty applies if Plaintiff chooses not to contract with MDHHS. Even after entering the contracts, Plaintiff may decline a referral of a child or individual in need of foster care and adoption services for any reason, including its religious beliefs. Mich. Comp. Laws § 722.124f(1). Only after voluntarily accepting the

referral does Plaintiff become obligated to comply with MDHHS's contract and policy prohibiting discrimination in the provision of services provided under contract. A state requirement necessary for participation in a voluntary program does not impose a constitutionally significant burden under Michigan law. See *Reed v. Kenowa Hills*, 680 N.W.2d 62, 69-70 (Mich. Ct. App. 2004) (state regulation requiring enrollment in public school to participate in athletics found not to violate homeschooled students' freedom of religion because participation in athletics is voluntary and, therefore, did not impose a constitutionally significant burden on religious exercise). Plaintiff's claim under Article I, Section 4 fails.

b. Compelling state interests justify any burden.

Even if Plaintiff could demonstrate that the nondiscrimination policy imposes a burden of constitutional significance on its religious beliefs, several compelling state interests justify this. One such compelling interest is ending invidious discrimination in government contracts, including discrimination on the basis of sexual orientation. *Obergefell*, 135 S.Ct at 2604; *Roberts v. United States Jaycees*, 468 U.S. 609, 628-29 (1984).

A second, equally compelling interest is promoting the best interests of Michigan's children. "The care and protection of children has long been a matter of utmost state concern." *Fisher v. Fisher*, 324 N.W.2d 582, 584 (Mich. Ct. App. 1982). Even in the 2015 amendments, the Legislature recognized that its

"paramount goal" is to "place the child in a safe, loving, and supportive home." Mich. Comp. Laws § 722.124e(1)(a). This goal is advanced by maximizing the number of qualified foster and adoptive *parents* available for children in care, and in working with CPAs that comply with the law and their contracts. (Bladen Aff., ¶ 7.) This includes the contractual provision prohibiting discrimination.

Michigan law requires judicial placement decisions be made with a "constitutionally mandated neutrality with respect to the merits of the religious beliefs of the parties[]" because the best interests of the children takes precedence over either parent's right to freely exercise his/her religion. *Fisher*, 324 N.W.2d 585-86. The "best interests of the child" is defined according to statute, and religion affiliation is not a factor to be considered. See, e.g., Mich. Comp. Laws § 710.22. MDHHS expects the same of the CPAs with which it contracts. This serves a compelling state interest.

c. No less intrusive way to satisfy state interest.

No less intrusive means of satisfying the state's compelling interest exists. Compliance with a neutral, generally applicable contract provision, like the non-discrimination clause, is the least restrictive way to accomplish a compelling state interest of eradicating discrimination. *Equal Employment Opportunity Comm'n v. R.G.*, 884 F.3d 560, 593-97 (6th Cir. 2018); see also *Fulton*, 922 F.3d at 163. Including the non-discrimination provision in the standard contract, and enforcing

it in accordance with long-standing policy, helps MDHHS maximize the number of licensed foster homes and adoptive families available for children serviced under foster care and case management contracts, and ensure CPAs uniformly consider the "best interest" of the child by evaluating the factors set forth in Michigan law. (Bladen Aff., ¶¶ 7, 9.)

4. The CPA contracts do not provide a forum for or necessitate protected speech.

Plaintiff's claim that the nondiscrimination clause "compels speech" fails because MDHHS's contract with CPAs does not create a forum for protected speech. *Teen Ranch*, F. Supp. 2d at 839-40; *Fulton*, 320 F. Supp. 3d at 696-97.

Nor does the nondiscrimination clause compel speech. The Northern District of New York recently evaluated, and rejected, claims similar to Plaintiff's here. *New Hope Family Servs. v. Poole*, No. 5:18-cv-1419, 2019 U.S. Dist. LEXIS 82461 (N.D.N.Y. May 16, 2019), Ex. E. The court appropriately recognized that the private agency's contract authorized it to perform a governmental function as an extension of the agency and, thus, any speech made pursuant to contract was "governmental speech." Moreover, like the nondiscrimination clause here, the challenged regulation "simply prohibits discrimination against potential adoptive parents on the basis of marital status and sexual orientation[,]" and"[i]n approving an unmarried or same-sex couple for adoption, the only message that would be

conveyed is that, applying the regulatory criteria . . . placement with such couple is in the child's best interest." *Id.* at 42-43.

This analysis applies with equal force. CPAs, including Plaintiff, voluntarily contract with MDHHS to perform the governmental function of foster care and adoption services. Plaintiff is not required to sanction any Applicant's sexual practices on religious grounds. (Goad Aff., ¶ 14; Neitman Aff., ¶¶ 12-13; Bladen Aff., ¶ 17.) The assessments referenced in Plaintiff's brief must be evaluated based on the Department's licensing guidelines and without moral judgment or religious opinion. (Goad Aff., ¶ 14; Neitman Aff., ¶¶ 7, 9, 12-13; Bladen Aff., ¶ 17.) Consequently, Plaintiff cannot demonstrate a likelihood of success here.

5. Plaintiff cannot show a substantial likelihood of success on claims against Defendant Nessel.[5]

Plaintiff's complaint challenges contractual language and MDHHS's long-standing policy of requiring nondiscrimination in providing services to children

[5] Defendant Nessel is not the only defendant against whom Plaintiff fails to state a claim as a matter of law or to which immunity applies. No defendant is a "person" as is required for Plaintiff to continue with its claims for money damages under 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). In addition, MDHHS is entitled to both 11th Amendment and sovereign immunity. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978). Finally, the individual Defendants sued in their official capacity are entitled to 11th Amendment immunity with respect to money damages. *Edelman v. Jordan*, 415 U.S. 651, 676 (1974). Contrary to Plaintiff's earlier assertions, removal to federal court did not constitute a waiver of immunity on the federal law claims. See, e.g., *Agrawal v. Montemagno*, No. 13-4313, 574 Fed. Appx. 570 (6thth Cir. July 23, 2014) (Ex. F);

under foster care case management and adoption contracts. Defendant Attorney General Nessel's only role in the *Dumont* litigation was to serve as legal advocate for her clients. (Bladen Aff., ¶¶ 25, 28.); *see also* Mich. Comp. Laws § 14.28, *et. seq*. (defining duties of the Attorney General). Contrary to Plaintiff's unfounded allegations, she could not – and did not – force settlement of the *Dumont* litigation, nor did she "drive" a "new policy." (Bladen Aff., ¶¶ 25, 28.) She is entitled to absolute immunity here. *Brown v. Tennessee Dep't of Labor and Workforce Dev.*, 64 Fed. Appx. 425, 426 (6th Cir. 2003), unpublished, Ex. I.

In addition, Plaintiff's claim against the Attorney General is based on misconstrued statements, most of which were made before she took office, and are insufficient to state a claim against her as a matter of law.

First, statements by a government official are not in-and-of-themselves actionable. *Trump v. Hawai'i*, 138 S.Ct. 2392, 2416-18 (2018). As the Supreme Court explained, courts must determine the legality of a facially neutral policy, "not whether to denounce the statements." *Id*. at 2418; s*ee also McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 125 S.Ct. 2722 (2005) (Courts should review policy "without any judicial psychoanalysis of a drafter's heart of hearts.").

---

see also *Miller v. Mich. Dep't of Corr.*, No. 1:11-cv-1278, 2012 U.S. Dist. LEXIS 6777 (W.D. Mich. 2012)(Ex. G); *Burke v. Ky. State Police*, No. 14-cv-00024, 2016 U.S. Dist. LEXIS 9889 (E.D. Ky. 2016) (Ex. H).

Second, the statements were made well before she took office and express no animosity toward religion, much less the Catholic faith. Many express Defendant Nessel's opinions as a private citizen on pending legislation. For example, she opined that "***a proponent of this type of bill***" would "have to concede that [s/he] dislike[s] gay people more than [s/he] care[s] about the needs of foster care kids," or that, "***[t]hese types of laws*** are a victory for the hate monger but again a disaster for the children and the state." Rick Pluta, *Faith-based adoption bills head to House floor*, Michigan Radio NPR (2015), https://michiganradio.org /post/faith-based-adoption-bills- headed-house-floor (Emphasis added); Fox 2 Detroit, *Opponents say adoption bill discriminates against gays and lesbians*, http://www.fox2detroit.com/news/opponents-say-adoption-bill-discriminates-against-gays-and-lesbians (Emphasis added). These statements did not disparage any religious belief or practice, including the Catholic faith. This lack of expressed religious animosity, in addition to her role as legal advocate and not an adjudicator, distinguishes this case from *Masterpiece*, in which the Supreme Court found that statements by a commissioner expressly disparaged the plaintiff's religion and "cast doubt on the fairness and impartiality of the Commission's adjudication" of the case. *Id*. at 1729-30. Here, Plaintiff cannot demonstrate a substantial likelihood of success on its claims against Defendant Nessel.

II. Public policy and the Defendants' interest outweigh any alleged irreparable injury.

A. Plaintiff cannot show that it will suffer irreparable injury.

Plaintiff's allegations of irreparable injury are insufficient to warrant the extraordinary relief sought. Any loss of business opportunity would be a result of Plaintiff willfully breaching its contract with MDHHS, not the conduct of any Defendant. Such allegations are insufficient to constitute irreparable injury. *Shuttle Packaging Sys. v. Tsonakis*, No. 1:01-cv-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001), Ex. J; *S. Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991). Nor is a claim that some of Plaintiff's staff may lose employment or income necessarily sufficient to constitute irreparable injury.[6] *Essroc Cement Corp v. CPRIN, Inc.*, 593 F. Supp. 2d 962, 969 (W.D. Mich. 2008). Moreover, if Plaintiff decided to end its contracts, the Applicants with whom it works could continue with any contracted CPA. (Hoover Aff., ¶ 24.) Plaintiff's alleged injuries do not warrant a preliminary injunction.

B. Public interest and balance of equities weigh in Defendants' favor.

The public interest is served by enforcing voluntary contract obligations and discrimination-free contracting processes, especially for this state contract. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ran*, 67 F. Supp. 2d 764, 781 (E.D. Mich.

[6] Any claim on behalf of Plaintiff's staff or any prospective foster or adoptive parent, all of whom are non-parties, cannot be raised in the present case.

1999). Michigan's citizens deserve the benefit of their agency's bargain with regard to foster care and adoption services. *First Nat. Bank of Louisville v. J. W. Brewer Tire Co.*, 680 F.2d 1123, 1126 (6th Cir. 1982).

Moreover, there is a strong public interest in ending discrimination against LGBTQ individuals– especially when a private agency provides foster care and adoption services to children in MDHHS's care. *Obergefell*, 135 S.Ct at 2604;[7] *Fulton*, 320 F.Supp.3d at 704, n.35. Plaintiff's request that the Court rewrite the CPA contracts to allow CPAs to discriminate against LGBTQ persons improperly sends the "message . . . that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist*. v. *Doe*, 530 U.S. 290, 309 (2000).

Plaintiff's claim that Michigan's foster children will be harmed if injunctive relief is not granted has no basis in law or fact. If Plaintiff chooses to cease providing foster care or adoption services, the foster families with whom it currently works would be able to work with any CPA with a foster care or adoption contract. (Hoover Aff., ¶ 24.) Accordingly, the interests of the public, Defendants,

[7] The recognition of this significant public interest is not limited to *Obergefell*. Federal courts throughout the nation have recognized this. *United States v. Windsor*, 570 U.S. 744, 775 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003); *Romer*, 517 U.S. at 635-36; *Equal Employment Opportunity Comm'n*, 884 F.3d at 590; *Boyd County High School Gay Straight Alliance v. Bd. of Educ. of Boyd County, Kentucky*, 258 F. Supp. 2d 667, 692-93 (E.D. Ky. 2003); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1150-51 (C.D. Cal. 2000).

and most importantly Michigan's children weigh strongly against Plaintiff's request for injunctive relief.

CONCLUSION AND RELIEF REQUESTED

Plaintiff fails to demonstrate a substantial likelihood of success on the merits the public interest, and MDHHS's interest in continuing the nondiscrimination policy in services provided pursuant to the foster care case management and adoption contracts outweigh the irreparable injury alleged. This Court should deny Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

Dana Nessel
Attorney General

/s/ Toni L. Harris
Toni L. Harris (P63111)
Joshua S. Smith (P63349)
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Dated: July 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2019, I electronically filed **Defendants' Response to Plaintiff Catholic Charities West Michigan's Motion for Preliminary Injunction** with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Toni L. Harris
Toni L. Harris (P63111)
Assistant Attorney General
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

INDEX OF EXHIBITS
TO DEFENDANTS' RESPONSE TO PLAINTIFF CATHOLIC CHARITIES WEST MICHIGAN'S MOTION FOR PRELIMINARY INJUNCTION

INDEX OF EXHIBITS

Exhibit	Description
A	Affidavit of Goad
B	Affidavit of Hoover
C	Affidavit of Neitman
D	Affidavit of Bladen
E	*New Hope Family Servs. v. Poole*, No. 5:18-cv-1419, 2019 U.S. Dist. LEXIS 82461
F	*Agrawal v. Montemagno*, No. 13-4313, 574 Fed. Appx. 570 (6thth Cir. 2014)
G	*Miller v. Mich. Dep't of Corr.*, No. 1:11-cv-1278, 2012 U.S. Dist. LEXIS 6777 (W.D. Mich. 2012)
H	*Burke v. Ky. State Police*, No. 14-cv-00024, 2016 U.S. Dist. LEXIS 9889 (E.D. Ky. 2016)
I	*Brown v. Tennessee Dep't of Labor and Workforce Dev.*, 64 Fed. Appx. 425 (6th Cir. 2003), unpublished
J	*Shuttle Packaging Sys. v. Tsonakis*, No. 1:01-cv-691, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001)

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

AFFIDAVIT OF SARAH GOAD

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Sarah Goad, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department or MDHHS) as a State Administrative Manager, Office of Child Welfare Policy and Programs.

2. I have served the Department in this capacity for three years and five months, and make this affidavit based on my experience and knowledge of foster care policy, contracts and state and federal laws related to foster care.

3. My job duties include overseeing development and implementation of the children's foster care policies, programs; including integration of federal and state laws into policy and providing bill analysis and leadership on child welfare bills. Additionally, my position oversees the Title IV-E State Plan and resulting Program Improvement Plan. My duties also include interpretation and administration of private provider contracts for foster care and residential placement.

4. The Department is the Title IV-E agency in Michigan responsible for administering Foster Care and Adoption Services programs.

5. The foster care program for children and young adults (under 21) provides placement and supervision of children when a court finds they have been abused and/or neglected and cannot remain in their family homes safely. Services must be focused on resolving the problems which necessitated removal. There are approximately 13,500 children in foster care, about 2,000 of whom are available for adoption. That care is provided in foster-family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e).

6. The Department holds 137 contracts with 57 private child placing agencies, or CPAs, to provide foster care or adoption services throughout Michigan, including Catholic Charities West Michigan.

7. All CPAs sign the same master contract for foster care or adoption services, regardless of whether they are faith-based CPAs.

8. The Department contracts with CPAs to provide foster and adoption services. In addition, the Department itself is a CPA and may provide foster care services, including licensing foster parents. The Department does not generally provide direct adoption services; most adoption services in Michigan are privatized.

9. If an individual comes to the Department to inquire about becoming a foster or adoptive parent, the Department will direct the individual to a listing of CPAs in their area.

10. The Department does not direct individuals to a specific CPA unless the individual is a relative inquiring about a specific child.

11. The Department does not require Catholic Charities West Michigan or any other CPA to endorse or approve of a specific relationship or type of relationship.

12. The Department contracts with CPAs, including Catholic Charities West Michigan, to provide foster care and adoption services pursuant to the Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 *et seq.*, administrative rules, Mich. Admin. Code R. 400.12101 *et seq.*, contracts, and Department policy, as found in the Department's Children's Foster Care Policy Manual (http://www.mfia.state.mi.us/OLMWeb/ex/FO/Public/FOM/000.pdf#pagemode=bookmarks) and the Adoption Services Policy Manual

(http://www.mfia.state.mi.us/OLMWeb/ex/AD/Public/ADM/000.pdf#page mode=bookmarks).

13. Under the Department's contracts, CPAs recruit prospective foster and adoptive applicants, complete home studies and assess whether the person or family meets the Department's licensing requirements. Those licensing requirements are set forth in Act 116 and administrative rules.

14. The Department does not ask or require CPAs providing foster care or adoption services under a contract to endorse or approve of any relationship, including same-sex marriages. Nor does the Department ask or require CPAs speak in favor of any relationship, including same-sex marriages. The Department's contracts only require the CPA to determine whether the foster applicant meets the minimum licensing requirements mandated by law. And only the Department can certify a foster home applicant by issuing a license.

15. Under the terms of the contracts, the Department pays CPAs for the services they render. One of the many tasks undertaken by government and non-government CPAs is to license foster families. Other services undertaken by CPAs include: placement and supervision

of children who are or have experienced out of home care; reunification and other permanency planning efforts as appropriate; assessment of needs and progress for children and parents; service referral; and documentation of all case management services.

16. The administrative rate paid to CPAs for foster care and adoption services is for all services performed under the respective contracts.

17. The Department's master foster care and adoption contracts with CPAs include non-discrimination clauses.

18. Catholic Charities West Michigan is a licensed CPA and the Department holds contracts with Catholic Charities West Michigan to provide foster care and adoption services The Private Agency Foster Care (PAFC) Contract, at § 2.9(c), states:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.
>
> The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially

provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

19. Since July 8, 2016, the Department's signed and executed foster care contract with Catholic Charities West Michigan has included the non-discrimination clause.

Sarah Goad

Subscribed and sworn to by Sarah Goad before me on the 17th day of July, 2019.

Signature Katherine L McClain

Printed name Katherine L McClain

Notary public, State of Michigan, County of Eaton

My commission expires 12/31/2019

Acting in the County of: Ingham

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Ingham

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

AFFIDAVIT OF CATHERINE HOOVER

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Catherine Hoover, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department or MDHHS) as a State Administrative Manager, Adoption, Guardianship, Recruitment and Retention Program Manager, Office of Child Welfare Policy and Programs.

2. I have served the Department in this capacity for eight (8) years and make this affidavit based on my experience and knowledge of adoption policy, adoption contracts, recruitment and retention and state and federal laws related to adoption.

3. My job duties include development, modification and implementation of policies and programs regarding adoption, guardianship, relatives, recruitment and retention, analysis and development of state laws regarding adoption and guardianship, administration of adoption contracts with CPAs, and oversight of closed adoption records and the Central Adoption Registry.

4. CPAs provide foster and adoptive services, pursuant to contract, and within the parameters of Michigan law.

5. All CPAs sign the same master contract for foster care or adoption services, regardless of whether the CPAs have a faith affiliation.

6. CPAs must evaluate all families who attend an orientation and complete an application.

7. Payments made by the Department to a CPA, including Catholic Charities West Michigan, for foster care services include the home study, recruitment and placement of foster children. The foster care administrative rate paid to Catholic Charities West Michigan supports the staff who conduct recruitment and licensing activities, including completion of home studies. See PAFC Contract § 2.9 Additional Compliance Provisions: "The Contractor shall comply with the provisions of: . . . e. 1973 Public Act 116, as amended, being MCL 722.111 *et seq.*, Michigan Child Care Organization Act."

8. The Adoption Contract states, at § 2.10(b)(1), "The Contractor shall develop and implement a plan for adoptive home recruitment, retention, and support consistent with the MDHHS DCWL licensing standards specific to the Contractors' license specified in section 2.4."

9. The completion of home studies by a CPA is one of the services that the CPA has agreed to complete under its contract with the Department and is an integral part of the foster care and adoption process for which the CPA is compensated. Rule 400.12308 requires an agency to act on a completed and signed foster home application. The

completion of a home study by a CPA requires a CPA to evaluate prospective foster families and adoptive families based on criteria set forth under Act 116, administrative rules and Department policy at Rule 400.12310 (foster home), Rule 400.12605 (adoption), and Adoption Services Manual 510 (adoption).

10. Included in the services for which the Department contracts with CPAs is the evaluation of prospective foster families and adoptive families based on the criteria set forth under Act 116, administrative rules and Department policy at Rule 400.12310 (foster home), Rule 400.12605 (adoption), and Adoption Services Manual 510 (adoption). The Department requires CPAs to perform these services under its contract and the administrative rate and/or contract rates paid to CPAs compensates them for these services.

11. Part of the adoption process includes the completion of a DHS-612 Adoptive Family Assessment Addendum. The completion of a family assessment by a CPA requires a CPA to evaluate prospective adoptive families based on the criteria set forth in Adoption Services Manual 510 (adoption). (DHS-612, Attachment 1.)

12. Also included in the services for which the Department contracts with CPAs is the recruitment of potential foster parents and

adoptive families. Rule 400.12304 requires a CPA to have an ongoing foster home recruitment program to ensure an adequate number of suitable and qualified homes to meet the needs of children served by the agency. Rule 400.12706 and Adoption Services Manual 400 require a CPA to have an ongoing recruitment program to ensure an adequate number of suitable adoptive parents for the timely placement of all children serviced by the agency who are legally free for adoption with a goal of adoption. The Department requires CPAs to perform these services under its contract and the administrative rate and/or contract rates paid to CPAs compensates them for these services.

13. The Department values its relationships with all CPAs. At the same time, the Department is not aware of any information to support the assertion that CPAs who have a religious affiliation are more effective than other CPAs at recruiting families who might otherwise not choose to foster or adopt.

14. Catholic Charities West Michigan's three locations had an overall licensing recruitment goal of 44 in FY 18 and have a current goal of 53 for FY 19.

15. While the Department values its relationship with Catholic Charities West Michigan, it cannot definitively say Catholic Charities

West Michigan is "one of the largest foster care and adoption providers in the State of Michigan." Catholic Charities West Michigan's three locations licensed 29 non-related foster homes or .0008% of the 1,186 unrelated foster homes licensed in FY 18.

16. Overall, On May 31, 2019, Catholic Charities West Michigan's three locations have 102 foster homes licensed to accept placement of unrelated children. This accounts for only .02% of the statewide total of 4,775 unrelated foster homes.

17. The Department recognizes that CPAs will vary and that not every agency is a good fit for every prospective foster or adoptive family. And the Department encourages families to look for a foster or adoption agency that is a good fit for them by directing them to Foster Care and/or Adoption Navigators. Foster Care Navigators are experienced foster parents who help guide families through the licensing process. Adoption Navigators are experienced adoptive parents who help guide families through their adoption journey. They provide information about the available CPAs in the family's area and encourage prospective foster and adoptive parents to explore multiple agencies to determine the right fit for them.

18. But this does not mean that the Department allows CPAs to turn away otherwise qualified foster applicants and prospective adoptive families on the basis of sexual orientation or same-sex marital status. Although many factors can go into determining which agency works best for foster applicants and prospective adoptive families, that is a decision for the families, not CPAs. And it certainly does not mean that the Department condones or allows a CPA to discriminate against foster applicants and potential adoptive families on the basis of sexual orientation, same-sex marital status or other characteristics.

19. After a family is licensed to provide foster care, they are on the CPAs roster of eligible families with whom children in foster care may be placed. Before, during and after the licensing process, the CPA remains bound by the non-discrimination clause of its foster care contracts with the Department.

20. Catholic Charities West Michigan currently has three (3) adoption contracts with the Department; one contract for each of their locations.

21. The Adoption Contracts between the Department and Catholic Charities West Michigan, including the one attached to the Preliminary Injunction Motion, at § 2.9(c), state:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs or disability.
>
> The above statement applies to all applications filed for adoption of MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

22. Since October 1, 2015, the Department's adoption contract with Catholic Charities West Michigan has included the non-discrimination provision.

23. The Department may need to place a child very quickly and a CPA may have only one hour to find an appropriate initial placement. If a particular CPA lacks the capacity for an appropriate placement, the Department must find another CPA that is able to make the placement. A child may be placed with a relative or with another unrelated foster family to reunite with a sibling following an initial placement. CPAs, including Catholic Charities West Michigan, must assist and cooperate with the Department in order to find the most appropriate placement for a child.

24. Accordingly, if Catholic Charities West Michigan were to voluntarily cease providing foster or adoptive services under its contract with the Department, a family would be able to work with any CPA that has a foster care or adoption contract.

25. All foster care and adoption services contracts are statewide contracts and are not limited to any geographical area.

26. Families may also use the Michigan Adoption Resource Exchange (MARE) website to find information about children who are legally free for adoption without an identified adoptive family.

27. Although MARE encourages potential adoptive families to choose a CPA with which they are comfortable and compatible, the Department does not allow a CPA to discriminate against prospective adoptive families based on race, religion, sexual orientation or same-sex marital status.

28. The Department does not contract with CPAs to provide direct consent adoptions or international adoption services. If CPAs, including Catholic Charities West Michigan, provides such services, they do not

provide them through any contract with the Department and the Department does not track any figures related to such adoptions.

Catherine Hoover

Catherine Hoover

Subscribed and sworn to by Catherine Hoover before me on the 17th day of July, 2019.

Signature Katherine L McClain

Printed name Katherine L McClain

Notary public, State of Michigan, County of Eaton

My commission expires 12/31/2019

Acting in the County of: Ingham

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Ingham

ATTACHMENT 1

ADOPTIVE FAMILY ASSESSMENT ADDENDUM

Michigan Department of Health and Human Services

"Click here to enter agency name and address"

Prospective Adoptive Parent:	Cell Phone Number:
Prospective Adoptive Parent:	Cell Phone Number:
Address:	Home Phone Number:

Adoption Worker:	Agency:	Report Date:

DATES OF CONTACT

Dates "Click here and type"	With whom (include role/position)	Type and reason

Current Household Members:
Any Changes In Living Arrangements Or Financial Status:
Current Health Report (include date of exam, any new physical or mental conditions):
Current References (within12 months or if family has adopted a child since last assessment):
Current Record Clearances:
Other Significant Factors:
Type of Child Desired:

1. What are the applicant's expectations of adoption?

2. What are the extended families' attitudes toward adoption?

3. What are the family's plans to discuss adoption with the adopted child(ren)?

4. How will the applicant(s) assist the child(ren) in maintaining relationships with siblings or other significant persons (if appropriate)?

5. For relative adoptions: How has the prospective adoptive family demonstrated the willingness and ability to keep the child safe from continuing physical or emotional harm from the birth parents?

6. If any of the following apply document the family's ability to care for a large sibling group (see ADM 510 for requirements):
   - The total number of children who will be placed in the home will result in more than four adopted children in the home.
   - Placement of a child will result in more than three children under the age of 3 in the home.
   - Placement of a child will result in a total of 6 or more children in the home.

7. What are the alternate care plans for the permanent care of the child(ren)? Include more extensive details if the applicant(s) age and/or health status are assessed to be a concern. (See ADM 510 for requirements.)

8. If applicable, summarize the professional references (DHS-610) received for the adoptive family.

9. If applicable, summarize any Adult Child References (DHS-611) received for the adoptive family.

10. The following specific child(ren) are identified for adoption by the adoptive family:

11. The following training or support needs have been identified for the adoptive family:

Recommendation:

Adoption Worker Signature:	Date
Adoption Supervisor Signature:	Date

I have received a copy of the Adoptive Family Assessment Addendum.

Prospective Adoptive Parent Signature	Date	Prospective Adoptive Parent Signature	Date

The Michigan Department of Health and Human Services (MDHHS) does not discriminate against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, genetic information, sex, sexual orientation, gender identity or expression, political beliefs or disability.

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

AFFIDAVIT OF PATRICIA NEITMAN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Patricia Neitman, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (DHHS) as a Director, Division of Child Welfare Licensing (DCWL).

2. I have served the Department in this capacity for two months and make this affidavit based on my experience and knowledge of the Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws § 722.111 *et seq*., Licensing Rules, and foster care and adoption contract requirements.

3. Prior to my current position I worked in child welfare as a licensing worker, licensing supervisor, clinical therapist, and program manager in private child placing agencies for 12 years; worked as a licensing consultant in the DCWL for 13 years, and as the DCWL program manager for over 2½ years, before assuming the position of DCWL director.

4. My job duties include oversight of the Division of Child Welfare Licensing (DCWL). DCWL staff are responsible for regulation of child placing agencies and child caring institutions licensed in Michigan, including responsibility for monitoring compliance with licensing rules and MDHHS contract requirements.

5. The Department of Health and Human Services administers Michigan's foster and adoption system.

6. This system provides temporary care and custody to children when a court finds that children have no legal guardian or have been neglected or abused. There are approximately 13,000 children in foster care, about 2,000 of whom have a permanency goal of adoption. That care is provided in foster-family homes, child-care institutions, and relative homes. Mich. Comp. Laws § 712A.13a(1)(e).

7. The Department contracts with CPAs to provide foster and adoption services. In addition, the Department itself is a CPA and may provide foster care services, including licensing foster parents. The Department does not provide adoption services; all adoption services are private in Michigan.

8. Child Placing Agencies, or CPAs, including Catholic Charities West Michigan, must be licensed by the Department in order to provide foster care and adoption services.

9. CPAs are required by contract and administrative licensing rules to perform a home study on prospective foster or adoptive families. Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws

§ 722.111 *et seq.*, requires that an on-site inspection be completed by the CPA for prospective foster homes. (See DHS-3130 Home Study, Attachment 1.)

10. The Department mandates the criteria for home studies, which include a review of several factors, including the "[s]trengths and weaknesses" of the parents and the "[s]trengths of the relationship" between the couple, including "level of satisfaction" and stability of the relationship and their relationship history. Other factors that must be assessed include marital and family status and history, including current and past level of family functioning and relationships, parenting skills and childrearing techniques, values and the role of religion in the family. The Department requires assessment of these criteria for all CPAs, including the Department itself.

11. These criteria are used to determine whether and to what extent foster applicants or adoptive families are able to meet the needs of children served by the agency or Department. These criteria are also used to determine whether a child may be a good fit for a particular family.

12. A CPA's assessment of these factors does not constitute an endorsement, recommendation or approval of a specific relationship or a type of relationship. Nor does a CPA's assessment of these factors constitute an endorsement of any particular religious faith or the absence of a religious faith. Nor can these factors be used as a means of discriminating against prospective foster parents or adoptive families on the basis of their sexual preference or same-sex marital status. Instead, a CPA must assess on these factors and make a determination of compliance or noncompliance with administrative licensing rules and statute.

13. CPAs must follow the requirements of Michigan law, including Act 116, administrative rules and Department policy. CPAs must also perform their duties under their contracts, including following the non-discrimination clause, which states:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability. The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and

> families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.
>
> (Private Agency Foster Care (PAFC) Master Contract Template, page 6, 2.9 Compliance Requirements, c)).

14. When allegations of noncompliance with licensing rules, statute, or contract requirements are made, DCWL will initiate an investigation. The investigation is assigned to a DCWL licensing consultant, who will conduct investigatory activities including interviews and review of documents, in order to make a determination of compliance or noncompliance with applicable rules, statute, or contract requirements.

15. At the conclusion of the investigation the licensing consultant will conduct an exit meeting with the agency's administrators to discuss preliminary findings of the investigation. The licensing consultant will complete an investigation report, which is reviewed and approved by the consultant's manager. The report will detail the allegations, investigative activities, findings of compliance or noncompliance, and a recommendation regarding the status of the license and contract.

16. If there are findings of noncompliance, a corrective action plan to address the noncompliance will be required and this will be indicated in the investigation report. The corrective action plan is due within 15 days from receipt of the report by the agency and must be approved by the consultant. Failure to submit an acceptable corrective action plan will result in a recommendation for disciplinary action, which may include revocation of the license and termination of the contract.

17. A recommendation for any disciplinary action on the license is reviewed by the DCWL director and the Child Services Agency (CSA) director. A recommendation for any disciplinary action on the contract is reviewed by the DCWL director, the CSA director, and the contract administrator. If a recommendation for disciplinary action on the license is made, the licensee has the opportunity to appeal the recommendation, which includes a compliance conference and an administrative hearing. If a recommendation for disciplinary action on the contract is made, the licensee/contractor has the opportunity to appeal this recommendation during a meeting with the contract administrator.

18. Unless and until an investigation is complete, the Department does not know whether a statute, rule, policy or contract provision has been violated.

19. The Department is required to open investigations, as follows:

a. Mich. Comp. Laws § 722.120 (1): The department may investigate, inspect, and examine conditions of a child care organization and may investigate and examine the books and records of the licensee.

b. Mich. Comp. Laws § 722.113(1): The rules promulgated by the department under this act shall be used by the department, the bureau of fire services, and local authorities in the inspection of and reporting on child care organizations covered by this act.

c. PAFC Master Contract Template, page 21, § 2.21: The Division of Child Welfare Licensing: DCWL shall be responsible for review of the Contractor's compliance with the Contract and any court orders, via an Annual Compliance Review (ACR) and Special Investigations.

DCWL may review, analyze, and comment on all activities covered within the terms of the Contract or court order.

d. DCWL Policy and Procedure Manual, Chapter 6 Special Investigation, page 46: 6-5. Special Investigation: DCWL responds to complaints where it is alleged that the licensee has not complied with the terms of the statute, rules, the Implementation, Sustainability and Exit Plan (ISEP) from *Dwayne B. v. Whitmer*, E.D. Mich. No. 06-13548, Department policy, and contracts. DCWL encourages individuals who want to file a complaint to utilize the public website's online complaint form. DCWL will also accept complaints verbally or in other written formats.

e. A. Upon receipt of an allegation, the DCWL field consultant will initiate a special investigation (SI). The DCWL field consultant will not dismiss allegations without consultation with the area manager. Intake allegations are logged into the database system by DCWL central office staff or the DCWL field consultant within 24 hours or the next business day.

20. In January 2017 and May 2018, the Department opened two investigations of Catholic Charities West Michigan in (CB610201023), Investigation #2017C0208001, and Catholic Charities West Michigan (CB410245705), Investigation #2018C0223029.

21. The Department found noncompliances in Investigation #2017C0208001 as follows: Adoption Contract § 2.9, Mich. Comp. Laws § 722.124e, and CPA Rule 400.12602 (1), for failure to comply with the non-discrimination statement, the agency's refusal to complete adoptions in three assigned contracted cases based on the sexual orientation and marital status of the identified adoptive applicants, and failure by the agency to follow their own program statement. A corrective action plan was submitted by the agency and accepted by the Department.

22. The Department found noncompliances in Investigation #2018C0223029 as follows: ISEP 6.10, Mich. Comp. Laws § 722.124e, and FOM 722-03, for failure by the agency to placed three siblings who were contracted cases assigned to the agency, together into one foster home due to the sexual orientation and marital status of the foster

parents. A corrective action plan was submitted by the agency and accepted by the Department.

23. Catholic Charities West Michigan is not the only organization investigated for alleged non-compliance with the non-discrimination clause. In September 2017, the Department became aware of allegations that other CPAs were not complying with the non-discrimination clause when the *Dumont v. Lyon* lawsuit was filed. The *Dumont* plaintiffs alleged that they had been denied the opportunity to serve as foster or adoptive parents by St. Vincent Catholic Charities, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing.

24. When that lawsuit was filed, the Department investigated the allegations in the same manner as it investigates other complaints, including complaints against Catholic Charities West Michigan. It opened investigations of St. Vincent Catholic Charities, Bethany Madison Heights and Bethany Christian East Lansing.

25. Due to the then-pending *Dumont* lawsuit, the Department did not finalize its investigations of St. Vincent Catholic Charities, Bethany Madison Heights and Bethany Christian East Lansing.

26. Since the *Dumont* case was settled, Bethany Christian Services has agreed that it will comply with its legal contract requirements, including the non-discrimination clause.

27. The Department has not been able to finalize its investigation of St. Vincent Catholic Charities, because it filed another lawsuit shortly after *Dumont* was settled.

28. As of July 15, 2019, Catholic Charities West Michigan does not have any pending investigations regarding any alleged non-compliance with the non-discrimination clause.

Patricia Neitman

Subscribed and sworn to by Patricia Neitman before me on the 16th day of July, 2019.

Signature _____

Printed name Kristine Anne Manion

Notary public, State of Michigan, County of Ingham

My commission expires 9-1-2021

Acting in the County of: Ingham

KRISTINE ANNE MANION
NOTARY PUBLIC, STATE OF MI
COUNTY OF INGHAM
MY COMMISSION EXPIRES Sep 1, 2021
ACTING IN COUNTY OF

ATTACHMENT 1

INITIAL FOSTER/ADOPTION HOME EVALUATION

Michigan Department of Health and Human Services
Division of Child Welfare Licensing

Applicant(s) interested in:

☐ Relative Assessment.
If yes, please describe legal relationship: _____

☐ Foster Care

☐ Adoption

AGENCY NAME:
AGENCY LICENSE NUMBER: Date of Report:

1. FOSTER/RELATIVE/ADOPTIVE HOME INFORMATION:
Home name:

Foster home license number, (CF # or CG#): _____

Address:

Home telephone number: Other telephone number (s):

Email address:

Driver's license number/State ID number for all adult members of the household; verification of valid driver's license:

MEMBERS OF HOUSEHOLD:

Name	DOB	Relationship to Caregiver	Date of Placement (if applicable)
"Click Here and Type"			

DIRECTIONS TO THE HOME:
"Click Here and Type"

SOCIAL WORK CONTACTS:

Date	Persons	Type of Contact/Place
"Click Here and Type"		

2. CENTRAL REGISTRY:
Michigan Date of Central Registry Check: _____ Has applicant lived in any other states in the last 5 years? ☐ Yes ☐ No
If yes, identify what states the person lived in. There must be a central registry clearance from that state.

The confidentiality of information in this section of this document is protected by the Michigan Child Protection Law. Anyone who violates this protection is guilty of a misdemeanor and is civilly liable for damages (1975 PA 238, as amended, MCL 722.621 et seq.).
Central Registry Results:

☐ N/A: Not found

☐ Yes, there is a history of child abuse or neglect.

a. Describe the length of time since the substantiation and any services that have been provided to rectify the concern.

b. Address any risk factors that might impact the safety of the child and describe what protective interventions are in place currently.

***If there is any household member who is on Central Registry, THE HOME CANNOT BE LICENSED.**

Are there any rules that are in non-compliance? ☐ Yes ☐ No

If Yes, list all rules and headings:

☐ Willful ☐ Substantial

Supporting documentation:

ART: ☐ Yes ☐ No

3. COMMUNITY:

Type of community (rural, urban, etc.):

Socio-economic makeup:

Racial/cultural makeup:

Availability of recreational facilities:

School system, including special education:

Hospitals and medical care, noting facility utilized by family:

Availability of churches, noting family's choice of church:

4. DESCRIPTION OF HOME: (R.400.9206, R.400.9301, R.400.9302, R.400.9303, R.400.9304, R.400.9305, R.400.9306, R.400.9307, R.400.9308, R.400.9309, R.400.9401, R.400.9410, R.400.9411, R.400.9414, R.400.9418, R.400.9419)
Description of home and all rooms, noting condition, layout, appearance: (Does the home meet the minimum level of cleanliness necessary to meet the needs of the child to be placed? If not, is the applicant taking action to address the home's deficiencies?)

Description of play space:

Safety considerations, including weapons or pets:

- Are there pets in the home? ☐ Yes ☐ No Does the pet have current vaccinations? ☐ Yes ☐ No
- Is the pet friendly or is the pet a safety concern? (Explain what makes the pet a friendly or a safety concern. Describe how does the pet interacts with others.)

- Is the pet well cared for? ☐ Yes ☐ No
- Are there any water hazards on or near the premises? ☐ Yes ☐ No If yes, describe how the caregiver plans to safeguard children around them. Any exterior door that leads directly to the area where there is a water hazard needs an alarm. Any pool, spa, hot tub or pond needs rescue equipment available.

- Are there working smoke detectors on each floor and between each sleeping area and the rest of the home? ☐ Yes ☐ No

- Is there a working carbon monoxide detector installed as recommended by the manufacturer? ☐ Yes ☐ No

- If there are weapons in the home, specify what they are, where they are stored and how they are secured. Document all weapons (rifles, handguns, bow and arrows, air/paint guns, etc.), registrations, trigger locks/inoperable and storage. Weapons must be inoperable and locked in a place separate from ammunition or stored in a locked gun safe.

- Where are medications stored?

Explain the proposed sleeping arrangements for family members and foster/adoptive children.

Is there a CPSC compliant crib if there are children under the age of 2 or the home is to be licensed for children 0-2?

Do all bedrooms have a window and a door than can be used to get out of the house in an emergency? ☐ Yes ☐ No
If "NO", please explain:

Are there people sleeping in other rooms in the home? Please describe.

Water, sewer, refuse arrangements, health inspection results if applicable:

Water temperature tested 120° Fahrenheit or less? ☐ Yes ☐ No

Emergency procedures information completed and posted in view of the home telephone:

Adequacy of the house, property, neighborhood, schools and community for the purpose of fostering/adopting as determined by on-site visits:

Means of transportation; i.e. ages and makes of automobiles, reliability, proof of insurance on each vehicle, availability of required safety seats for young children, accessibility of public transportation if needed:

DESCRIBE PLANS FOR DAY CARE AND/OR SUBSTITUTE CARE. (R400.9403(d)(ix), R400.9412)

Routine Day Care:

After hours and emergency substitute care:

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance requested? ☐ Yes ☐ No

5. FINANCIAL: (R.400.9201, R.400.9206)
Date family provided with information of Ineligible Grantee Funds, Medicaid, Food Stamps, WIC in DHS-Pub-114 for children in relative care:

Source of income, how this was verified, stability of income, how expenses were verified. Does the family have a plan for any known financial changes that may occur in the future i.e., unemployment payments ending, cash assistance ending?

If income is based on disability, i.e. SSI, Social Security Disability, long term disability payments from a job, workmen's compensation, etc., describe the verification of the physical or mental disability and an assessment of how that impacts the ability to provide foster/adoptive care or be a member of the household.

If child support payments are ordered, are the payments being made and are they current? If there are arrears, how much and what is the plan to bring the payments current? How was this verified?

Detail a financial statement that specifies the amount of net income for the household and identifies all ongoing and routine bills and expenses including, but not limited to, housing (mortgage or rent, insurance, property taxes), utilities, food, clothing, transportation (car payments, insurance, fuel), credit cards, student loans, contributions to religious organizations, savings contributions, etc.

Assess the family's money management skills and ability to meet their needs with their current income. Is the family current on their bills? Can the family meet the financial expenses of having a relative/foster child placed in their home prior to payment starting?

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance? ☐ Yes ☐ No

6. **SOCIAL HISTORY:** (for each adult member of the household, including adult children who live in the home) (R.400.9201, R.400.9202, R.400.9206)
Descriptive information: Age, height, weight, hair color, nationality, race or ethnicity, place of birth. American Indian heritage must be consistent with information on the BCAL-3889 and the BCAL-0120-A. Family of origin description. Include:

Number of siblings, parents' roles, personalities, expectations, parenting involvement, styles, values.
Relationship with each parent and siblings (if any) growing up and now.
Parents'/primary caretakers' childrearing techniques, including discipline.
How family dealt with losses. Describe family celebrations.
Parents' substance use and how it affected the family, lasting impact on individual.
How family dealt with any abuse or victimization issues, continuing impact on individual.
Role of religion in the family.
Other significant influences when a child, e.g. grandparents, step parents, aunts, uncles.

Any history of out of home care? This should include any history in non-court-ordered out of home care.
Educational history and any special skills and interests:
Employment history – If the person does not have an employment history or there are large gaps in the employment history, explain how they were supported during that period of time:
Relationship history – Significant relationships prior to current one; how they ended; if previously married, whether divorce has been obtained or considered and whether there is verification.

Any children from previous relationships. ☐ Yes ☐ No

Note any history of involvement in domestic violence, including as a victim, or absence of history:

Description of personality, personal goals, hobbies, interests

Strengths and weaknesses, worker's assessment in addition to what the applicant tells you:

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

7. FAMILY LIFE: (R.400.9201, R.400.9202, R.400.9206, R.400.9405, R.400.9418)
Marital and family status and history, including current and past level of family functioning and relationships and any incidents of domestic violence:

Current relationship. Include:

Brief history, including date and place of marriage, if applicable.
Any history of infertility and how that has been dealt with.
Any history of separations or domestic violence.
Strengths of relationship, areas of work or attention.
Common/shared interests or lack thereof.
Roles, division of labor, decision-making process, handling stress or disagreements.
Assess level of satisfaction, stability.
Describe relationship w/parent of children if separated.

Family:

Activities, goals, values, role of religion, church involvement:

Challenges, stressors, any history of help-seeking:

Losses and how dealt with:

Expected impact of fostering/adopting on all members of the household:

Any individuals other than children of applicants currently living with the family, impact of those individuals on family functioning.

8. CHILDREN: (R.400.9201, R.400.9202, R.400.9206, R.400.9404, R.400.9407)
All children must be interviewed/observed apart from the parents, even adult children no longer living in the home, or the agency must note all attempts to contact them. If unsuccessful, the applicant's explanations as to why you were unable to contact them.

For each child living in the home including relatives/foster children:

Identifiers: name, birth date, race (if different from parents') school and grade, and/or employment. Date of placement for children already placed in the home (relatives).
Parents' description of child's personality, interests, activities.
General adjustment, note if any involvement with law enforcement or the criminal justice system.
Worker's assessment of child's adjustment, development, special needs, relationships with parents and their significant others, and other strengths and weaknesses.
Child's ideas and attitudes about fostering/adopting based on interview with the child.
Child's description of the discipline techniques used in the family.

For children who are grown and/or out of the home:

Identifiers: name, age, where living, marital status.
School and/or employment.
General adjustment: note if any problems with law enforcement or the criminal justice system.
Their opinion of their parents' parenting skills and of their desire to foster/adopt children.
Description of the discipline techniques used when they were a child.
The willingness of the adult child to provide substitute care, if appropriate, or be involved with the foster/adopted children who may be placed into the home.
Any ongoing reliance by the adult child on the applicant for child care, monetary assistance, etc.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance? ☐ Yes ☐ No

9. HEALTH: (For each member of the household, both adult and children): (R.400.9201, R.400.9202, R.400.9206)
Assessment of physical, mental and emotional health and substance use history.

Indicate current health status. (Is anyone in the household prescribed medication? If so, list the medications. How long has he/she been taking these medications/what are the medications prescribed to treat?)

Does anyone in the household have a physical or mental health diagnosis or condition that would make care of the child difficult? If so, describe how it may affect the care of a child.

Describe current substance use patterns, history if indicated. If there is a past substance use problem (including alcohol use) indicate how diagnosed, resolved, and when. What is the current treatment?

Does any member of the household smoke? ☐ Yes ☐ No If yes, do they smoke in the house? ☐ Yes ☐ No

Reference a medical statement, completed within the 12 month period before conclusion of the evaluation, for each member of the household that indicated that the member has no known condition which would affect the care of a foster/adoptive child or any other determination if different. Does anyone require special care? Please describe:

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance requested? ☐ Yes ☐ No

10. PARENTING: (R.400.9201, R.400.9206, R.400.9306, R.400.9401, R.400.9403, R.400.9404, R.400.9417)
Parenting skills and attitudes toward children:

Parenting values:
Most important things for parents to do, what they will do similarly to their parents, what they hope to improve upon.

Knowledge of child development, appropriateness of expectations of children.

Ability to provide infant care:
Equipment, safety measures in place (e.g. gates, monitor, car seat, play area, pets)

Safe Sleeping requirements have been trained and reviewed

Understanding of infant care:

Capacity and disposition to give a foster child guidance, love and affection and to deal with difficult children with unacceptable behavior, children who are rejecting and/or oppositional, or children with medical needs.

1. What kinds of behaviors require intervention?

2. How will caregiver intervene/handle that type of behavior? How will they be supportive and nurture children?

Methods of discipline. Flexibility and age appropriateness of approaches, willingness to follow the case plan for the child if it differs from their normal approach to discipline.

Awareness of variety of techniques, use of positive and negative methods.

Understanding of agency's discipline policy and willingness to abide by it. If the family has used spanking or other corporal punishment, or was raised with it, document their current attitudes.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

11. MOTIVATION FOR FOSTER CARE/ADOPTION: (R.400.9201, R.400.9202, R.400.9206, R.400.9403, R.400.9404, R.400.9405, R.400.9411)
Reasons for wanting to provide care for relative/foster/adoptive children, including infertility, if indicated.

Each member's attitude towards accepting a relative/foster/adoptive child.

Previous experience in providing child foster care, child day care, or adult foster care.

Previous adoptive evaluations or placements.

Previous licenses, including applications that did not result in a license. Reference communication with previous agency.

Level of understanding of foster/adoptive care and the potential impact of their family. For example, does the caregiver understand that a social worker will visit the child and relative at least monthly until reunification with parents occurs or permanent custody is achieved?

Evaluation of motivators, (if adoption/relative placement in particular).

Applicant(s) agree to encourage visits and follow health care, religious and discipline policies of this agency

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

12. FAMILY'S ATTITUDES TOWARD THE CHILDREN'S PARENTS AND WORKING WITH THE AGENCY: (R.400.9201, R.400.9202, R.400.9206, R.400.9403)
Understanding of permanency and concurrent planning.

Family's level of understanding of foster/adoption care.

Family's willingness to comply with the child's case plan. If child is in the home, assess current situation.

- The family is willing to cooperate with the supervising agency.

- The family is willing to cooperate with the school system.
- The family is willing to cooperate with the child's therapist.
- The family is willing to cooperate with the parenting time plan outlined in the treatment plan.
- The caregiver is willing and able to protect the child(ren) from further harm.

Attitudes toward the legal parents. How will foster parents discuss legal parents with and around foster/adoptive children?

How will foster parents discuss reasons children entered foster care and/or became available for adoption?

Family understands the goal of the agency in providing foster care and they are willing to support the agency in working toward reuniting a foster child with his or her family.

For Relative Placements:

- Does the family agree to not release the child to anyone, including birth parents, without the supervising agency's approval? ☐ Yes ☐ No
- Does the family agree they will not allow the foster child(ren)'s parents to live in their home without the supervising agency's approval? ☐ Yes ☐ No
- Does the family understand they cannot be licensed to care for foster children whose parents live in the home? ☐ Yes ☐ No

Ability to empathize and work with the parents and children.

Openness to maintaining significant relationships.

Openness to providing permanency to the relative/foster child if needed.

Ability to comply with agency policies and procedures.

Summarize experience of caseworkers for children who have been placed in the home. Assess current compliance.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

13. TRAINING NEEDS: A statement of the number of hours the person/couple need to comply with the training rules is not sufficient. (R.400.9415)
Orientation and training hours credited; include topics covered.

Types of training the family believes they could benefit from.

Worker's assessment of additional training needs and the agency's plan to provide the identified training.

Openness to learning.

Are there any rules that are in non-compliance? ☐ Yes ☐ No
If Yes, list all rules and headings:

☐ Willful ☐ Substantial
Supporting documentation:

Variance requested? ☐ Yes ☐ No

14. TYPE OF CHILDREN DESIRED – INTEREST IN PERMANENCY/ADOPTION PLANNING: (R.400.9201, R.400.9202)
Gender, race, ethnic background and special characteristics of children preferred by applicants.
Types of children the family is willing to consider.

Ability and willingness to care for special needs children, and the problems of the children.

Interest in adoption.

If this evaluation is being completed for an adoption of a specific child, the DHS 612, Adoptive Family Assessment Addendum, must be completed.

15. CROSS CULTURAL PLACEMENT:
Willingness to parent cross-racially or cross culturally and to create an atmosphere that fosters racial identity and culture of a foster child.

Races or cultures requested or that the family does not believe they can effectively parent.

16. REFERENCES: (R.400.9206)
At least three references must be obtained from persons not related to the applicant(s).

Summarize the information received from each reference. If negative information was received, explain how the negative information was resolved.

An agency may choose to obtain additional references from related or unrelated persons, including adult children.

If this is an adoption assessment and there are circumstances that require additional review, include the information provided by the professional reference.

17. RECOMMENDATIONS: (Must be consistent with the information contained in the report.)

Placement with relative is recommended: ☐ Yes ☐ No

If the recommendation is that placement should not be made, the reason for this must be explained in detail.

Licensure is recommended:
(Licensing workers only) ☐ Yes ☐ No ☐ N/A

Licensure and preliminary approval for adoption:
(Licensing workers only) ☐ Yes ☐ No

Approved for adoption:
(Adoption workers only) ☐ Yes ☐ No

- Summary of strengths and areas of growth, attention.

- Issues to be considered in making placements

- Recommended placement specifications to include characteristics, age, sex, and number of children best served by home and types of children who may not be placed in the home.

Recommendation for License Denial:

- List all rules found to be in non-compliance.
- Summarize facts to support rule non-compliance.
- Reference all supporting documentation.

Recommendation for Adoption Denial:

- Basis for recommendation:
- Supporting documentation.

18. CLOSING:

Licensing/Adoption Assessment Submitted by:

Name:

Signature:

Agency:

Title:

Date:

I certify that I have been trained and am qualified to make this recommendation:

☐ Foster Care ☐ Adoption

19. SUPERVISOR'S REVIEW:

Application:

Clearances:

Medical Reports:

References:

Other documentation:

Is the report accurate, factually consistent, unbiased, support by adequate data/information? ☐ Yes ☐ No

Further Explanation:

Supervisor Name:

Signature:

Agency:

Title:

Date:

I certify that I have been trained and am qualified to make this recommendation.

EXHIBIT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

AFFIDAVIT OF STACIE BLADEN

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

Stacie Bladen, first being duly sworn, deposes and says:

1. I am employed by the Michigan Department of Health and Human Services (Department) as a Deputy Director within the Children's Services Agency.

2. I have served the Department in this capacity for 5 years and make this affidavit based on my experience and knowledge of child welfare policies and programs.

3. My job duties include oversight of the development of child welfare policies, protocols, and programs, approval of contract development, implementation of applicable state and federal laws and approval of federally required child welfare program and funding plans.

4. In 2015, Steve Yager, former executive director of the Children's Services Agency, stated "...I would emphasize that we work with agencies based on a contract, not on their belief system, stated or otherwise. We do not compel agencies to accept referrals—never have; rather, we create through contracts a vast array of providers to meet the very diverse needs of the children and families we serve." Mr. Yager's statement pertained to an agency's decision to accept a referral to provide foster care case management or adoption services to a child

or young adult (up to age 21). In this context, when the Department uses the term "make a referral" this means the referral of a child's foster care or adoption case to the agency for the provision of foster care case management or adoption services. Specifically, a "referral" is the offering of a child's case by the Department to a private child placing agency under contract with the Department to provide foster care case management or adoption services. The agency accepts a referral by signing a DHS-3600 Agreement. Mr. Yager's statement that we "create through contract a vast array of providers" pertains to agency's development of foster homes to meet diverse needs of youth.

5. The Department does not use a "referral" to direct prospective foster or adoptive parents to CPAs. If an individual comes to the Department to inquire about becoming a foster or adoptive parent, the Department will direct the individual to a listing of CPAs in their area. The Department does not direct individuals to a specific CPA unless the individual is a relative inquiring about a specific child. In such case, the Department will advise the individual which CPA has accepted a referral for that specific child.

6. The public/private partnership between the state and private CPAs is not the result of the state's inability to meet an acute need on its own. Rather, the number of appropriated full-time equated (FTE) positions would not allow for current caseload restrictions by the Implementation, Sustainability and Exit Plan from *Dwayne B. v. Whitmer*, (E.D. Mich. No. 06-13548), to be met with caseload populations across the state without private agency assistance. For example, the Department was only provided ten FTEs for Adoption.

7. It benefits the Department and Michigan's children who require temporary foster care or adoption services to have as many qualified foster and adoptive parents as possible that can meet the diverse needs of children. It also benefits the Department to work with CPAs that comply with statute, rule, and contract when performing responsibilities as a CPA.

8. The Department can revoke a CPA's license and can terminate its contract(s) with the state. However, it cannot force a non-profit organization to close. Prior to taking adverse action against an agency's license or contract, the Department must investigate

complaints that it receives and determine whether a CPA has violated its contract with the Department or has violated a statute, administrative rule or Department policy.

9. The Department rarely encounters circumstances in which an agency would redirect a prospective foster or adoptive parent to another child placing agency and there are no typical circumstances in which this occurs. Agencies are rarely inclined to turn away a prospective or adoptive parent because they need those homes in order to take cases and serve children and collect the administrative rate. The Department does not allow CPAs to refuse to evaluate, license or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or marital status.

10. CPAs may have a specialized focus, however, all have the same contractual and licensing requirements and all must comply with terms of the contract and license. CPAs performing such work under contract with the department are prohibited from refusing to serve, assess, recommend licensure, or otherwise work with prospective foster

or adoptive parents based on a characteristic like race, religion, sexual orientation or marital status.

11. CPAs cannot refuse to serve prospective foster or adoptive parents based on race, religion, sexual orientation or marital status.

12. Although an agency may focus on providing foster care case management or adoption services to children with certain needs, like those with disabilities, agencies do not exclusively serve those children, nor do they exclude prospective foster and adoptive parents based on race, religion, sexual orientation or marital status.

13. Regardless of any specialization to provide foster care case management or adoption services to children with certain needs, CPAs are required to follow the non-discrimination clause of their contract with the Department. When providing foster care case management and adoption services to any child, including a child with special needs, a CPA may not discriminate against prospective resource parents who identify as members of the LGBTQ community, same-sex couples, or unmarried cohabitating individuals. For instance, Catholic Charities West Michigan could plausibly specialize in placing children whose

parents identify as Catholic, but that specialization would not allow the agency to discriminate against prospective foster and adoptive parents who are members of other faiths. In another scenario, an agency could specialize in serving children from minority populations, but the agency could not discriminate against prospective foster and adoptive parents who are not within the minority population.

14. The non-discrimination clause in Catholic Charities West Michigan's foster care and adoption contracts prohibit discrimination.

15. The Private Agency Foster Care (PAFC) Contract, at § 2.9(c), states:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.
>
> The above statement applies to all MDHHS supervised children, and to all licensed and unlicensed caregivers and families and/or relatives that could potentially provide care or are currently providing care for MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

16. The Adoption Contract, at § 2.9(c), states:

> The Contractor shall comply with the MDHHS non-discrimination statement:
>
> The Michigan Department of Health and Human Services (MDHHS) shall not discriminate against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability.
>
> The above statement applies to all applications filed for adoption of MDHHS supervised children, including MDHHS supervised children assigned to a contracted agency.

17. The Department enforces its non-discrimination clause uniformly. After accepting a referral to provide foster care case management or adoption services, CPAs cannot transfer the child's case to another agency. This is prohibited. And, the agency may not transfer the child's case to the Department except in exceptional circumstances and with high-level Department approval. The Department does not consider or track the religious affiliation of CPAs – an agency's religious affiliation is immaterial to their contract responsibilities.

18. Although CPAs may decline to accept a referral to provide foster care case management or adoption services to a child, once they accept the referral and sign the 3600 Agreement, the CPA must fulfill all of the terms of its contract and cannot discriminate in the provision of services. This means that a CPA cannot refuse to evaluate, recommend for licensure or otherwise work with prospective foster or adoptive parents based on a characteristic like race, religion, sexual orientation or opposite sex or marital status.

19. Although the Department may grant individualized exceptions to its policy "upon the written approval of the County Director, the Children's Services Agency Executive Director, or the Deputy Director[,]" the exercise of this exception is limited.

20. The PAFC Contract states:

1.1. Client Eligibility Criteria

. . .

b. Determination of Eligibility

If MDHHS makes a referral to a child placing agency for foster care case management services pursuant to a

> contract with the child placing agency, the child placing agency must accept or decline the referral within one hour of receipt of the referral. If a need for placement is imminent, MDHHS may make referrals for placement concurrently to other contracted providers. Contractor may not transfer a foster care case to another child placing agency. After acceptance of a foster care referral, the Contractor may not refer the case back to the Department except for the reasons outlined in the Children's Foster Care Manual (FOM) or upon the written approval of the County Director, the Children's Services Agency Director, or the Deputy Director.

Emphasis added.

21. This exception does not allow CPAs to discriminate for any reason and does not permit an agency to assert a religious objection to continue serving a child whose case it already accepted. Rather, this provision allows for unexpected circumstances, whether it be a natural disaster that disallows an agency from providing services, a mass exodus of child placing agency staff, or some other rare and unforeseen circumstance. The language was inserted to enable the Department to assure that all children under its care and supervision receive services they are entitled to and must be provided without harm, delay, or interruption.

22. It is in a child's best interest to maintain stability in care and receive continuity of foster care case management and adoption services. Unnecessary interruption or change of case management responsibility impacts outcomes for the child and the child's family.

23. The quoted language does not enable an agency to return a child's case to the Department so that it may discriminate or refuse to serve the child in accordance with applicable policies. Rather, the language assures that in rare unforeseen circumstances, such as a natural disaster or a mass exodus of staff, the Department has a mechanism to prevent harm to the children involved.

24. In January 2017, the Department opened an investigation of Catholic Charities West Michigan, Investigation #2017C0208001. Subsequently, in March 2018, the department opened Investigation #2018C0223029. In the first case, the Department established rule violations based on the agency's refusal to complete a child's adoption due to the marital status of the same-sex, adoptive couple. In the second case, the agency failed to place siblings together because the siblings resided with a same sex couple.

25. The April 2019 Communication Issuance, which referenced the March 2019 *Dumont* settlement, did not announce a new policy. Instead, the Communication Issuance and *Dumont* settlement reaffirmed the Department's practice of enforcing provisions of the contract, including the non-discrimination clause, which has been in place for several years. Catholic Charities West Michigan signed an adoption contract on August 24, 2015, which included the non-discrimination clause and the contract took effect on October 1, 2015. Catholic Charities West Michigan signed its foster care contract with the non-discrimination clause on June 13, 2016 and it took effect on July 8, 2016. The Communication Issuance and *Dumont* settlement are consistent with the Department's investigation of Catholic Charities West Michigan back in January 2017 and subsequent findings in response to the March 2018 complaint. It is also consistent with the Department's investigations of St. Vincent Catholic Charities, Bethany Christian Services of Madison Heights and Bethany Christian Services of East Lansing, prompted by the *Dumont* lawsuit, which alleged that these three CPAs denied the *Dumont* plaintiffs the opportunity to serve as foster or adoptive parents due to their same-sex marital status.

26. Due to the then-pending *Dumont* lawsuit, the Department did not finalize its investigations of St. Vincent Catholic Charities, Bethany Christian Services Madison Heights and Bethany Christian Services East Lansing. Since the *Dumont* case has settled, Bethany Christian Services has agreed that it will comply with its legal contract requirements, including the non-discrimination clause. Because of the lawsuit St. Vincent Catholic Charities filed shortly after the *Dumont* settlement, the Department has not been able to finalize its investigation of St. Vincent Catholic Charities and has taken no adverse action against St. Vincent Catholic Charities.

27. The Department does not seek to end its relationship with Catholic Charities West Michigan in so far as the agency is willing and able to fulfill the contractual obligations it has voluntarily agreed to, including following the non-discrimination clause, which has been included in Catholic Charities West Michigan's adoption contract since October 1, 2015 and its foster contracts since July 8, 2016.

28. The Department and its staff are responsible for enforcing the Child Care Organizations Act, Act 116 of 1973, Mich. Comp. Laws

§ 722.111 *et seq.*, administrative rules, Department policy and its contracts. The Department's uniform enforcement of the provision of statute, rule, and contract preceded the election of the current AG and were in place after her election and assumption of office. Although Attorney General Nessel and the Michigan Department of Attorney General serve as the Department's legal counsel, they do not have decision-making authority over the Department in matters of CPA contractual duties and licensing matters.

Stacie Bladen

Subscribed and sworn to by Stacie Bladen before me on the 16th day of July, 2019.

Signature Katherine L. McClain

Printed name Katherine L. McClain

Notary public, State of Michigan, County of Eaton

My commission expires 12/31/2019

Acting in the County of: Ingham

Katherine L. McClain
Notary Public - Michigan
Eaton County
My Commission Expires Dec. 31, 2019
Acting in the County of Ingham

EXHIBIT E

New Hope Family Servs. v. Poole

United States District Court for the Northern District of New York

May 16, 2019, Decided; May 16, 2019, Filed

5:18-CV-1419 (MAD/TWD)

Reporter
2019 U.S. Dist. LEXIS 82461 *

NEW HOPE FAMILY SERVICES, INC., Plaintiff, vs. SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York, Defendant.

Core Terms

services, regulation, religious, couples, religion, religious belief, same-sex, authorized agency, adoptive parent, Practices, allegations, rights, generally applicable, Ordinance, agencies, sexual orientation, unmarried, providers, preliminary injunction, motion to dismiss, Scouts, individuals, adult, equal protection claim, similarly situated, unmarried couple, marital status, foster parent, place child, faith-based

Counsel: [*1] For Plaintiff: DAVID A. CORTMAN, ESQ., JONATHAN A. SCRUGGS, ESQ., JEANA HALLOCK, ESQ., ERIK W. STANLEY, ESQ., JEREMIAH GALUS, ESQ., OF COUNSEL, ALLIANCE DEFENDING FREEDOM, Lawrenceville, Georgia.

For Plaintiff: ROBERT E. GENANT, ESQ., OF COUNSEL, OFFICE OF ROBERT E. GENANT, Mexico, New York.

For Defendant: ADRIENNE J. KERWIN, AAG, OF COUNSEL, OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, Albany, New York.

Judges: Mae A. D'Agostino, United States District Judge.

Opinion by: Mae A. D'Agostino

Opinion

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff New Hope Family Services, Inc. ("New Hope") commenced this civil rights action on December 6, 2018 challenging the constitutionality of the New York Office of Children and Family Services ("OCFS") interpretation and application of *18 N.Y.C.R.R. § 421.3(d)*. *See* Dkt. No. 1. Currently before the Court are Plaintiff's motion for a preliminary injunction and Defendant's motion to dismiss. *See* Dkt. Nos. 15 & 34.

II. BACKGROUND

A. Regulatory Scheme

In September 2010, New York State amended its Domestic Relations Law to codify the right to adopt by unmarried adult couples and married couples regardless of sexual orientation or gender identity. *See* 2010 S.B. 1523, Ch. 509; *N.Y. Dom. Rel. Law § 110*. In January 2011, the OCFS informed **[*2]** authorized adoption agencies in New York that the amendment brought the Domestic Relations Law into compliance with existing case law and was "intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home." After providing further guidance, adoption agencies were advised that, among other things, "discrimination based on sexual orientation in the adoption study assessment process is prohibited."

In November 2013, OCFS promulgated *18 N.Y.C.R.R. § 421.3(d)* which, in accordance with existing law, prohibits "discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability" and requires that agencies authorized by New York to provide adoption services "shall take reasonable steps to prevent such

discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur." *18 N.Y.C.R.R. § 421.3(d)*.

Agencies authorized to provide adoption services in New York must receive and **[*3]** respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective parents. *See 18 N.Y.C.R.R. § 421.15*. After an adoption application is received, an adoption study must be completed. *See id.* at *§ 421.13*. An adoption study must explore the following characteristics of prospective parents:

> (1) capacity to give and receive affection;
> (2) ability to provide for a child's physical and emotional needs;
> (3) ability to accept the intrinsic worth of a child, to respect and share his past, to understand the meaning of separation he has experienced, and to have realistic expectations and goals;
> (4) flexibility and ability to change;
> (5) ability to cope with problems, stress and frustration;
> (6) feelings about parenting an adopted child and the ability to make a commitment to a child placed in the home; and
> (7) ability to use community resources to strengthen and enrich family functioning.

Id. at *§ 421.16(a)*. An application may only be rejected if (1) an applicant does not cooperate with the adoption study; (2) an applicant is "physically incapable of caring for an adoptive child;" (3) an applicant is "emotionally incapable of caring for an adopted child;" or (4) an applicant's approval "would not **[*4]** be in the best interests of children awaiting adoptions." *Id.* at *§ 421.15(g)*. Once an application is approved, the agency must add the applicant to the adoptive parent registry. *See id.* at *§§ 421.15(i)*, *424.3(a)*.

Whether the adoption of a particular child by a particular prospective adoptive parent should be approved must be made "on the basis of the best interests of the child." *18 N.Y.C.R.R. § 421.18(d)*. In making placement decisions, the agency must consider, among other things, (1) the ages of the child and prospective parent(s); (2) "the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s);" (3) "the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background;" and (4) the ability of a child to be placed in a home with siblings and half-siblings. *See id.* Additionally, agencies must

> [m]ake an effort to place each child in a home as similar to and compatible with his or her religious background as possible with particular recognition that *section 373(3)* of the Social Services Law requires a court, when practicable, to give custody through adoption only to persons of the same religious **[*5]** faith as that of the child.

Id. at *§ 421.18(c)*. Further, the Social Services Law provides that, "so far as consistent with the best interests of the child, and where practicable," the religious wishes of the birth parents should be honored. *See N.Y. Soc. Serv. Law § 373(7)*.

B. New Hope Family Services

When an entity seeks to facilitate adoptions in New York, it must qualify as an "authorized agency" under the law before it may provide those services. *See N.Y. Soc. Serv. Law § 371(10)(a)*; *N.Y. Soc. Serv. Law § 374(2)*. New Hope is an "authorized agency" with the authority to "place out or to board out children...," *N.Y. Soc. Serv. Law § 371(10)(a)*, and "receive children for purposes of adoption." *N.Y. Dom. Rel. Law § 109(4)*. As an "authorized agency," New Hope must be "incorporated or organized under the laws of this state with corporate power or empowered by law to care for, to place out or to board out children ... [and] shall submit and consent to the approval, visitation, inspection and supervision of such office as to any and all acts in relation to the welfare of children performed or to be performed under this title." *N.Y. Soc. Serv. Law § 371(10)(a)*. Additionally, OCFS must approve an agency's certificate of incorporation. *See id.* at *§ 460-a*.

C. The Complaint

In 1958, Pastor Clinton H. Tasker founded what became New Hope Family Services as a Christian ministry to care for and **[*6]** find adoptive homes for children whose birth parents could not care for them. *See* Dkt. No. 1 at ¶ 3. New Hope dedicates a considerable portion of the complaint setting forth its religious beliefs, which the Court will not fully recount here. The Court fully accepts that New Hope and its employees have these sincerely held religious beliefs.

It is because of these religious beliefs that "New Hope

will not recommend or place children with unmarried couples or same sex couples as adoptive parents." *Id.* at ¶ 153. New Hope's "Special Circumstances" policy states in part as follows:

> If the person inquiring to adopt is single . . . [t]he Executive Director will talk with them to discern if they are truly single or if they are living together without the benefit of marriage . . . because New Hope is a Christian Ministry it will not place children with those who are living together without the benefit of marriage.
>
> If the person inquiring to adopt is in a marriage with a same sex partner . . . ([t]he Executive Director will . . . explain that because New Hope is a Christian Ministry, we do not place children with same sex couples).

Id. at ¶ 154.

New Hope claims that it has worked with unmarried individuals **[*7]** who are truly single in the past and remains willing to work with such individuals. *See id.* at ¶ 155. Further, New Hope claims that because it "handles inquiries from unmarried couples and same-sex couples pursuant to the policy and practice described above, New Hope has never denied an unmarried couple or same-sex couple's application." *Id.* at ¶ 156. "Whenever a same-sex couple or unmarried couple is interested in a referral, New Hope refers them to the appropriate county social services office or another provider." *Id.*

Until recently, New York adoption law required that authorized agencies could only place children for adoption with "an adult unmarried person or an adult husband and his adult wife." *N.Y. Dom. Rel. Law § 110* (2009). As mentioned above, in September 2010, New York amended its law to allow authorized agencies to place children for adoption with "an adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together." *N.Y. Dom. Rel. Law § 110* (2010). New Hope notes that permissive language is used throughout the amended law and claims that "New York has *never* amended its law to *require* authorized agencies to place children for adoption with 'an adult unmarried person,' a **[*8]** same-sex 'adult married couple together,' or 'two unmarried adult intimate partners together.'" Dkt. No. 1 at ¶ 163 (emphasis in original). New Hope contends that "OCFS is attempting to use regulations to require exactly that: on July 11, 2011, OCFS issued a second letter that purported to clarify, but in fact materially changed, the adoption regulations then found in *18 NYCRR 421.16* and subpart (h). In that letter, OCFS declared that 'the intent of' subpart (h) 'is to prohibit discrimination based on sexual orientation in the adoption study assessment process. In addition, OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent.'" *Id.* at ¶ 164 (quoting Office of Children & Family Services, Informational Letter, 11-OCFS-INF-05 (July 11, 2011)).

In 2013, OCFS amended the adoption regulations, declaring that authorized agencies, "providing adoption services shall ... (d) prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital **[*9]** status, religion, or disability...." *18 N.Y.C.R.R. § 421.3* (2018). Following the 2013 changes, OCFS issued another informational letter in 2016 which stated as follows:

> [T]his policy directive requires the formalization of any existing nondiscrimination and harassment policies and procedures, and possibly the revision of such policies and procedures, by requiring that . . . [voluntary agencies] . . . not engage in or condone discrimination . . . on the basis of race, creed, color, national origin, sex, religion, sexual orientation, gender identity or expression, marital status or disability against . . . applicants for adoption services, . . . prospective foster parents, foster parents, or children in foster care.

Dkt. No. 1 at ¶ 167. New Hope claims that OCFS promulgated these new regulations "purporting to require adoption providers to place children with unmarried and same-sex couples in complete disregard for the law, the scope of OCFS' authority, and the rights of adoption providers." *Id.* at ¶ 168.

In January or February of 2018, Suzanne Colligan of OCFS called New Hope's then Acting Executive Director, Judith A. Geyer. *See id.* at ¶ 182. During the call, Ms. Colligan conveyed that, under a new policy **[*10]** implemented in 2018, OCFS would be conducting comprehensive on-site reviews of each private provider's procedures. *See id.* On July 18, Ms. Colligan sent an email to Ms. Geyer to schedule the adoption program review and included a list of things she needed to review, including New Hope's policies and procedures. *See id.* at ¶ 183. Based on Ms. Colligan's direction that she would need a copy of New Hope's policies and procedure manual, Ms. Geyer updated New Hope's formal policies and procedures on

adoption into one consolidated manual. *See id.* at ¶ 184.

On August 28, Ms. Geyer received an email from Ms. Colligan, stating in part:

> I also thought that it might be helpful for you to see the application we use with agencies requiring reauthorization for corporate authority. Since you are authorized in perpetuity, your agency is not required to complete/submit this form. However, I will be asking many of the program questions on it, so you may find it helpful in preparing for my visit.

Dkt. No. 1 at ¶ 185.

On September 6, 2018, Ms. Colligan met with Ms. Geyer and Kathy Decesare, New Hope's Center Director, and took a copy of New Hope's policy and procedure manual with her when she left. *See id.* ***[*11]*** at ¶ 186. On October 1, 2018, OCFS sent a letter to Ms. Geyer that praised a number of strengths in New Hope's program, thanked New Hope for its professionalism during the meeting, and suggested a follow-up meeting to discuss a few opportunities for improvement. *See id.* at ¶ 187. On or about October 9, 2018, Ms. Geyer received a call from Ms. Colligan. During the call, Ms. Colligan stated that she had been reading New Hope's policies and procedures manual and that New Hope's policy not to place children with those who are living together without the benefit of marriage or with same-sex couples violated *18 N.Y.C.R.R. § 421.3*. *See id.* at ¶ 188. New Hope claims that Ms. Colligan told Ms. Geyer that New Hope would have to comply with *§ 421.3* by placing children with unmarried couples and same-sex couples. *See id.* at ¶ 189. Further, Ms. Colligan stated that if New Hope did not comply, New Hope would be "choosing to close." *Id.* at ¶ 190. Ms. Geyer responded that New Hope would be unwilling to violate its religious beliefs by placing children with unmarried or same-sex couples. *See id.* at ¶ 191. Ms. Colligan responded by stating that "'[s]ome Christian ministries have decided to compromise and stay open.'" *Id.* at ¶ **[*12]** 192. Ms. Colligan informed Ms. Geyer that she would be getting a letter from OCFS mandating compliance by a specific date. *See id.* at ¶ 194.

On October 11, 2018, Ms. Colligan emailed Ms. Geyer, stating in part as follows:

> You will be receiving a letter from our office soon requesting a formal written response regarding your agency's position. When OCFS receives written notification of an agency's intention to close a program, OCFS will respond with written instructions to the agency with the steps they must take. These steps include the agency's responsibility to seek and obtain agreement with another NYS authorized agency to maintain and store their adoption records, of which includes the handling of activities outlined in the legally bound agreements with birth parents.

Id. at ¶ 195.

On October 12, 2018, Ms. Colligan sent an email to Ms. Geyer stating that "[w]e will put Monday's follow up meeting [to discuss a few minor improvements identified during the visit] on hold for now. The purpose of the follow up meeting would be to work on the necessary changes to your agency policy manual. Based on our recent phone call, the follow up meeting for those purposes does not appear needed at **[*13]** this time." *Id.* at ¶ 196. On October 17, 2018, Ms. Colligan indicated in an email to Ms. Geyer that she had mailed out a certified letter. That email stated that "[o]nce the letter is returned providing us with written notice of your intent, we will send out a letter outlining our expectations around the handling of those that you are currently providing services and the adoption records." *Id.* at ¶ 197.

On October 26, 2018, Ms. Geyer received an electronic copy of the letter to which Ms. Colligan had referred. The letter stated that New Hope's policy pertaining to "not placing 'children with those who are living together without the benefit of marriage' or 'same-sex couples' violates Title *18 NYCRR § 421.3*." Dkt. No. 1 at ¶ 198. The letter further stated:

> OCFS hereby requests a formal written response from [New Hope] stating the agency's position in regard to revising this policy to eliminate those portions that violate the above-cited regulation. Please respond within 15 days of receipt of this letter indicating specifically whether [New Hope] intends to revise the present policy and continue the existing adoption program, or that [New Hope] will not revise the policy so as to comply with the above-cited **[*14]** regulation. Please be aware that should the agency fail to bring the policy into compliance with the regulation, OCFS will be unable to approve continuation of [New Hope's] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program.

Id. (quoting Dkt. No. 1-7). New Hope was given until November 30, 2018 to respond to OCFS' letter. *See id.* at ¶ 199.

D. Procedural History

On December 6, 2018, filed its complaint alleging that OCFS has violated various constitutional rights protected by the First and Fourteenth Amendments. *See* Dkt. No. 1. In its first cause of action, New Hope contends that OCFS' interpretation and enforcement of 18 N.Y.C.R.R. § 421.3(d) "targets, shows hostility toward, and discriminates against New Hope because of its religious beliefs and practices" in violation of the First Amendment's Free Exercise Clause. *See id.* at ¶¶ 230-263. In its second cause of action, New Hope argues that applying "section 421.3(d) to New Hope requires New Hope to engage in speech and expression that it does not wish to convey — speech and expression that violates its core religious beliefs — by compelling it to recommend same-sex couples or unmarried couples as adoptive parents" in violation of the First amendment. *See id.* at ¶¶ 264-278. In its third cause of **[*15]** action, New Hope contends that section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it in violation of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at ¶¶ 279-290. Finally, in its fourth cause of action, New Hope alleges that OCFS "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." *Id.* at ¶¶ 291-95.

On December 12, 2018, New Hope filed a motion for a preliminary injunction. *See* Dkt. No. 15. On January 14, 2019, OCFS moved to dismiss the complaint in its entirety. *See* Dkt. No. 34. On February 19, 2019, after the motions were fully briefed, the Court held oral arguments on both pending motions. For the reasons set forth below, the Court grants OCFS's motion to dismiss the complaint and denies New Hope's motion for a preliminary injunction as moot.

III. DISCUSSION

A. Standard of Review

1. Motion to Dismiss

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party's claim for relief. *See* Patane v. Clark, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-pleaded facts **[*16]** in the pleading and draw all reasonable inferences in the pleader's favor. *See* ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See* Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See* Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[,]'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *see* id. at 555 (citation omitted), and present claims that are "plausible on [their] face," id. at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops **[*17]** short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting [Twombly, 550 U.S.] at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929). Ultimately, "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief," Twombly, 550 U.S. at 558, or where a plaintiff has "not nudged [its] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed[,]" id. at 570.

2. Preliminary Injunction

A preliminary injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Moore v. Consol. Edison Co., 409 F.3d 506, 510 (2d Cir. 2005) (citation omitted). "A decision to

grant or deny a preliminary injunction is committed to the discretion of the district court." *Polymer Tech. Corp. v. Mimran, 37 F.3d 74, 78 (2d Cir. 1994)* (citation omitted).

A party seeking a preliminary injunction must establish "'a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party.'" *Allied Office Supplies, Inc. v. Lewandowski, 261 F. Supp. 2d 107, 108 (D. Conn. 2005)* (quoting *Motorola Credit Corp. v. Uzan, 322 F.3d 130, 135 (2d Cir. 2003)*). Moreover, in certain circumstances, an even higher standard applies. "The moving party must make a 'clear' or 'substantial' showing **[*18]** of a likelihood of success where (1) the injunction sought 'will alter, rather than maintain, the status quo' — *i.e.*, is properly characterized as a 'mandatory' rather than 'prohibitory' injunction; or (2) the injunction sought 'will provide the movant with substantially all the relief sought, and that relief cannot be undone even if the defendant prevails at a trial on the merits.'" *Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996)* (quoting *Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 33-34 (2d Cir. 1995)*.[1] "Irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono, 175 F.3d 227, 233-34 (2d Cir. 1999)* (internal quotations omitted).

The Supreme Court has observed that the decision of whether to award preliminary injunctive relief is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981)*. Consonant with this view, the Second Circuit has held that a district court may consider hearsay evidence when deciding whether to grant preliminary injunctive relief. *See Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010)*. Therefore, the strict standards for affidavits under the Federal Rules of Evidence and in support of summary judgment under *Rule 56(c)(4) of the Federal Rules of Civil Procedure* requiring that an affidavit be made on personal knowledge are not expressly applicable to affidavits in support of preliminary injunctions. *See Mullins v. City of New York, 634 F. Supp. 2d 373, 384 (S.D.N.Y. 2009)* **[*19]** (citations omitted). Nevertheless, courts have wide discretion to assess the affidavit's credibility and generally consider affidavits made on information and belief to be insufficient for a preliminary injunction. *See* 11A Charles Alan Wright et al., Federal Practice and Procedure § 2949 (2d ed. 1995); *Mullins, 634 F. Supp. 2d at 373, 385, 390 n.115* (declining to fully credit the "defendants' hearsay affidavit" and noting that while the court "may consider hearsay evidence in a preliminary injunction hearing . . ., a court may weigh evidence based on whether such evidence would be admissible under the Federal Rules of Evidence").

In the Second Circuit "there is no hard and fast rule . . . that oral testimony must be taken on a motion for a preliminary injunction or that the court can in no circumstances dispose of the motion on the papers before it." *Maryland Cas. Co. v. Realty Advisory Bd. of Labor Relations, 107 F.3d 979, 984 (2d Cir. 1997)* (quoting *Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 259 (2d Cir. 1989)*). "Generally, the district court is not required to conduct an evidentiary hearing on a motion for a preliminary injunction when essential facts are not in dispute." *Id.*

Even if the plaintiff demonstrates irreparable harm and a likelihood of success on the merits, however, the remedy of preliminary injunctive relief may still be withheld if equity so requires. "An award of an injunction is not something a plaintiff is entitled to as a matter of right, but rather **[*20]** it is an equitable remedy issued by a trial court, within the broad bounds of its discretion, after it weighs the potential benefits and harm to be incurred by the parties from the granting or denying of such relief." *Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 68 (2d Cir. 1999)* (citation omitted).

B. Free Exercise Claim

OCFS contends that the Court must dismiss New Hope's free exercise claim because *18 N.Y.C.R.R. § 421.3(d)* is a neutral law of general applicability that only incidentally imposes a burden on the exercise of religion. *See* Dkt. No. 34-1 at 12-14. Therefore, OCFS alleges that the law only needs to be supported by a rational basis, which is easily met in this case. *See id.* New Hope, however, responds that "cases teach that even a genuinely 'neutral law of general applicability' cannot be applied when to do so would interfere in

[1] As the Second Circuit has noted, "'[t]he distinction between mandatory and prohibitory injunctions is not without ambiguities or critics,' . . . and that in a close case an injunction can be framed in mandatory or prohibitory terms[.]" *Jolly, 76 F.3d at 473-74* (internal quotations and citation omitted).

historically respected areas of religious autonomy." Dkt. No. 36 at 9-10 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012)*). Additionally, New Hope argues that even assuming that the test in *Employment Division, Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)* applies, it is still likely to succeed on this claim because it is alleged that the "'regulation was adopted for the purpose of targeting faith-based adoption ministries.'" *Id.* at 11 (quoting Dkt. No. 1 at ¶ 9). Therefore, New Hope argues that the regulation is not neutral or generally applicable **[*21]** as applied. *See id.* (citing Dkt. No. 1 at ¶ 248). "Further, given that 'there are ... many ways of demonstrating that the object or purpose of a law is the suppression of ... religious conduct,' *Lukumi, 508 U.S. at 533*, New Hope has made extensive factual allegations that support a reasonable inference of a 'targeting' purpose, all of which must be accepted as true for purposes of this motion." *Id.* at 11-12.

"'At a minimum, the protections of the *Free Exercise Clause* pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.'" *Commack Self-Service Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 210 (2d Cir. 2012)* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)*). "Nonetheless, 'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id.* (quoting *Employment Div. v. Smith, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*). "'[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.'" *Id.* (quoting *Lukumi, 508 U.S. at 533, 113 S. Ct. 2217*) (internal citation omitted). "However, 'a law that is neutral **[*22]** and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'" *Id.* (quoting *Lukumi, 508 U.S. at 531, 113 S. Ct. 2217*).

In *Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)*, the Supreme Court held that the *Free Exercise Clause* "means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id. at 877*.

> Thus, the *First Amendment* obviously excludes all governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of doctrines it believes to be false, impose special disabilities on the basis of religious views of religious status, or lend its power to one or the other side in controversies over religious authority or dogma.

Id. (internal citations and question marks omitted) (emphasis in original). Likewise, it forbids government acts specifically designed to suppress religiously motivated practices or conduct. *See id. at 877-78*. The Court concluded that the *Free Exercise Clause* does not, however, "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Id. at 879* (quotation omitted). **[*23]**

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)*, the City of Hialeah, Florida had adopted an ordinance prohibiting the slaughtering of animals except in certain recognized circumstances. The history of the law's adoption made plain, however, that this was no earnest piece of animal welfare legislation, but rather an attempt to suppress the practice of Santeria, a religion that incorporates animal sacrifice in many of its rituals. *See Lukumi, 508 U.S. at 524*. The Supreme Court noted that the emergency sessions that led to the ordinance, held immediately after a Santeria church first tried to open in town, were rife with unrestrained hostility. Council members referred to supposed Biblical prohibitions on animal sacrifice except for consumption and asked "What can we do to prevent the Church from opening?" *Id. at 541*. Further, the audience cheered these remarks and taunted the president of the Church, and the chaplain of the city police department called Santeria "an abomination to the Lord." *Id. at 541-42*.

Additionally, the Supreme Court found that, although the ordinance itself was ostensibly concerned with animal welfare, it clearly reflected the hostility demonstrated during the emergency sessions. Its restriction on animal killing was limited to "sacrifice," and was further **[*24]** limited to the context of "a public or private ritual or ceremony." *Id. at 527*. Although it did not apply if the killing was "for the primary purpose of food consumption," or if the animals were "specifically raised

for food purposes," the ordinance did apply to ritual sacrifice even if the animal was eaten during the ritual, as would often happen in Santeria rituals. *Id. at 527-28*. As the Supreme Court noted, the "net result" of these definitions was that "few if any killings of animals are proscribed other than Santeria sacrifice. ... Indeed, careful drafting ensured that, although Santeria sacrifice is prohibited, killings that are no more necessary or humane in almost all other circumstances are unpunished." *Id. at 536*. This "gerrymander" of the ordinance, *id.*, along with the striking hostility at the public meetings, left the Court with only "one conclusion: The ordinances had as their object the suppression of religion." *Id. at 542*.

In *Fulton v. City of Philadelphia, 320 F. Supp. 3d 661 (E.D. Pa. 2018)*, the plaintiff, Catholic Social Services ("CSS"), and the defendant, the Philadelphia Department of Human Services ("DHS"), entered into a contract for CSS to provide foster care services to the city in exchange for public funding, such services to include screening, training, and certifying **[*25]** resource caregivers (foster parents) to "provide certified resource homes." *Fulton, 320 F. Supp. 3d at 670*. The contract included some limited reasons that CSS might refuse to provide services, along with the following provision: "Provider is in compliance with the laws, ordinances, regulations and executive orders" including the Fair Practices Ordinance ("FPO"), which states that "[provider shall not] discriminate or permit discrimination against individuals in ... public accommodation practices whether by direct or indirect practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, differentiation or preference in the treatment of a person on the basis of ... sex, sexual orientation, gender identity, marital status, familiar [sic] status." *Id. at 671*. Breach of this covenant would permit DHS to suspend the contract. *Id.*

In March 2018, DHS became aware that CSS was refusing to provide services to same-sex couples. James Amato from CSS acknowledged "that CSS would not provide these services on religious grounds" and that under CSS policy they "(1) would not certify same-sex couples as prospective foster parents even if [they] were otherwise eligible ... and (2) would not provide a same-sex **[*26]** couple with a home study as part of [their] application for adoption." *Id.* DHS suspended CSS's intake of new referrals. CSS filed suit alleging, among other things, that DHS' suspension of referrals of new children to CSS' care violated its free speech rights. *See id. at 669*.

In denying the motion for preliminary injunctive relief, the district court first found that the Fair Practices Ordinance that was incorporated into the services contract was, on its face, a neutral law of general applicability under *Smith* and, therefore, rational basis review applied to determine its constitutionality. *See id. at 682-83*. Initially, the court concluded that the Services Contract and the Fair Practices Ordinance were neutral with respect to religion because there was no evidence that either were drafted or enacted with the object "'to infringe upon or restrict practices because of their religious motivation.'" *Id. at 683* (quoting *Lighthouse Inst. for Evangelism, Inc., 510 F.3d at 275*) (emphasis in original). The court found that both demonstrated neutrality in that no reference to religion was made other than that they both prohibited discrimination on the basis of religion. *See id.* Further, the court looked to the legislative history of the Fair Practices Ordinance in finding that **[*27]** it was a neutral law. *See id.*

In finding that the Services Contract and Fair Practices Ordinance were generally applicable, the court noted that they do not "'proscribe particular conduct only or primarily when religiously motivated;' they proscribe only CSS's ability to turn away qualified Philadelphians on the basis of particular character traits without regard to secular or religious reasons." *Id.* (quoting *Lighthouse Inst. for Evangelism, Inc., 510 F.3d at 275*) (other citation omitted). "As applied in this case, the Services Contract and Fair Practices Ordinance were, in fact, implemented in a general manner. Not only has DHS confirmed that it would not permit any foster agency under contract, faith-based or not, to turn away potential foster parents for the foster parents' characteristics under the Services Contract and Fair Practices Ordinance, DHS also closed intake of new referrals by CSS and Bethany Christian Services for the same reason. This evidence supports the conclusion that DHS and Philadelphia are not applying the Services Contract or the Fair Practices Ordinance to target particular religious denominations for any religious reason." *Id. at 684*.

Having concluded that the Services Contract and Fair Practices Ordinance were facially **[*28]** neutral and generally applicable, and that they were applied in a neutral and generally applicable manner, the court in *Fulton* found that they were rationally related to a number of legitimate government objectives. *See id.* These objectives included the following: (1) ensuring that when contractors agree to terms in a government contract, the contractors adhere to those terms; (2) ensuring that when its contractors voluntarily agree to

be bound by local laws, those laws are enforced; (3) ensuring that when DHS and Philadelphia employ contractors to provide governmental services, the services are accessible to all Philadelphians who are qualified for the services; (4) ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers; (5) ensuring that individuals who pay taxes to fund government contractors are not denied access to those services; and (6) avoiding likely Equal Protection Clause and Establishment Clause claims that would result if it allowed its government contractors to avoid compliance with the all-comers, nondiscrimination provisions of the Fair Practices Ordinance by discriminating against same-sex married couples. *See* ***[*29]*** *id. at 684-85*. As such, the court found that the Services Contract and Fair Practices Ordinance survived rational basis review and denied the application for preliminary injunctive relief. *See id.*

After the district court denied the motion for injunctive relief, CSS appealed. On April 22, 2019, the Third Circuit upheld the district court's decision. *See* *Fulton v. City of Philadelphia, ___ F.3d ___, 2019 U.S. App. LEXIS 11711, 2019 WL 1758355 (3d Cir. 2019)*. In affirming the district court, the Third Circuit rejected CSS's claims that the application of the anti-discrimination clause is impermissible under *Smith* and its progeny. *See* *2019 U.S. App. LEXIS 11711, [WL] at *7-*9*. In those cases, the courts have found ostensibly neutral government action unconstitutional because it was motivated by ill will toward a specific religious group or otherwise impermissibly targeted religious conduct. *See* *2019 U.S. App. LEXIS 11711, [WL] at *7* (citing *Masterpiece Cakeshop, 138 S. Ct. 1719, 201 L. Ed. 2d 35*); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)*. The Third Circuit found that these cases "clarify *Smith* by reaffirming that the government may not conceal an impermissible attack on religion behind a cloak of neutrality and general application." *Id.* Therefore, a challenger under the *Free Exercise Clause* must show that it was treated differently because of its religion. *See id.* "Put another way, it must show that it was treated more harshly than the government would **[*30]** have treated someone who engaged in the same conduct but held different religious views." *Id.*

Summarizing the issue to be decided and its ultimate conclusion, the Third Circuit held as follows:

> The question in our case, then, is whether CSS was treated differently because of its religious beliefs. Put another way, was the City appropriately neutral, or did it treat CSS worse than it would have treated another organization that did not work with same-sex couples as foster parents but had different religious beliefs? Based on the record before us, that question has a clear answer: no. The City has acted only to enforce its non-discrimination policy in the face of what it considers a clear violation.

*2019 U.S. App. LEXIS 11711, [WL] at *10*.

As the cases above make clear, evolving *First Amendment* jurisprudence suggests that courts should consider the historical and social context underlying a challenged government action to determine whether the action was neutral or motivated by hostility toward religion. "Factors relevant to the assessment of governmental neutrality include the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or **[*31]** administrative history, including contemporaneous statements made by members of the decisionmaking body." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, U.S., 138 S. Ct. 1719, 1731, 201 L. Ed. 2d 35 (2018)* (internal quotation marks and citation omitted); *see* *id. at 1729-31* (citing hostile comments from members of the Colorado Civil Rights Commission and the commission's inconsistent treatment of religious discrimination and sexual-orientation discrimination to conclude that the commission's treatment of a cake shop owner "violated the [s]tate's duty under the *First Amendment* not to base laws or regulations on hostility to a religion or religious viewpoint"); *Trump v. Hawaii, U.S., 138 S. Ct. 2392, 2417, 201 L. Ed. 2d 775 (2018)* (considering extrinsic evidence of anti-Muslim animus when determining the constitutionality of a presidential proclamation).

In the present matter, contrary to New Hope's assertions in its motion for preliminary injunctive relief and response to the motion to dismiss, *18 N.Y.C.R.R. § 421.3(d)* is, on its face, "neutral and generally applicable" and, therefore, subject to rational basis review. In its complaint, New Hope alleges that the "regulation was adopted for the purpose of targeting faith-based adoption ministries," that OCFS promulgated the regulation for the purpose of suppressing faith-based policies such as those of New Hope, which it found objectionable, and that the **[*32]** regulation is "not neutral or generally applicable as applied." Dkt. No. 1 at ¶¶ 9, 204, 248.

On its face, *18 N.Y.C.R.R. § 421.3(d)* is generally

applicable and it is plainly not the object of the regulation to interfere with New Hope's, or any other agency's, exercise of religion. The regulation states that "[a]uthorized agencies providing adoption services shall ... prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability, and, shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur." *18 N.Y.C.R.R. § 421.3(d)*. The regulation applies to all authorized agencies, regardless of any religious affiliation.

Moreover, *section 421.3(d)* is neutral. In determining the neutrality of a law or regulation, a court may consider, among other things, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, **[*33]** and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)* (citation omitted). "These objective factors bear on the question of discriminatory object." *Id.* (citation omitted).

Nothing before the Court supports the conclusion that *section 421.3(d)* was drafted or enacted with the object "to infringe upon or restrict practices because of their religious motivation." *Id. at 533*. The plain language of the regulation demonstrates its neutrality, which makes no reference to religion, other than to prohibit religious discrimination. Further, as discussed in more detail above, the actions of OCFS leading up to the promulgation of *section 421.3(d)* further support a finding of neutrality. After New York codified the right to adopt by unmarried adult couples and married adult couples regardless of sexual orientation or gender identity, the communications from OCFS indicate that it could not "contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent." Moreover, in discussing the purpose of the regulation, OCFS stated that it was to "[p]rohibit[ ] discrimination **[*34]** on the basis of sexual orientation, gender identity or expression in essential social services." N.Y.S. Register, Nov. 6, 2013, p.3.

The rule making documents and subsequent OCFS Information Letters clearly set forth the intent of *section 421.3(d)*. When read in connection with the explicit intended purpose of the regulation and the established law relating to adoption, the allegations that New Hope's religious beliefs are incidentally affected by the regulation are insufficient for the Court to find that New Hope has pled a plausible *First Amendment* free exercise claim. Absent from the complaint and submissions in support of the motion for a preliminary injunction are any allegations of type of hostility or bias demonstrated in *Masterpiece Cakeshop* or *Lukumi*. Rather, the facts before the Court more closely align with *Fulton*, where the Third Circuit found that the plaintiff was unlikely to succeed on its claim because the record demonstrated that the defendant respected the plaintiff's sincerely held beliefs while enforcing the anti-discrimination provision at issue.

New Hope further argues that "the Regulation is not neutral or 'generally applicable' because it exists within a framework that makes numerous exceptions **[*35]** to OCFS's supposed antidiscrimination policy, permitting and even requiring 'discrimination' in many contexts based on many factors including secular, religious, and racial, as well as based on the very wide individualized discretion of the evaluating agency concerning the fitness of the would-be adoptive parents, all in service of the foundational goal of the best interests of the child." Dkt. No. 36 at 13 (citing Dkt. No. 1 at ¶¶ 172-81, 248-49, 262). Contrary to New Hope's suggestion, these "exceptions" to the anti-discrimination policy do not render the regulation non-neutral or generally applicable. New Hope cites to provisions in the regulations that require authorized agencies to consider things such as the "age of the child and of the adoptive parent(s); ... the cultural, ethnic, or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such background as one of a number of factors used to determine best interests." *18 N.Y.C.R.R. § 421.18*. However, as the Third Circuit found in *Fulton*, there are significant differences between New Hope's refusal to recommend or place children with unmarried couples or same sex couples as adoptive parents and the **[*36]** requirement for authorized agencies to consider such things as the race of the child and prospective adoptive parents in determining the best interests of the child. *See Fulton, 2019 U.S. App. LEXIS 11711, 2019 WL 1758355, at *11*. Most significantly, unlike New Hope's practice, the cited provisions do not permit authorized agencies to refuse to work with individuals because of their membership in a protected class. Instead, the cited provisions are clearly intended to find the best fit for

each child, "taking the whole of that child's life and circumstances into account." *Id.* Further, nothing in the record suggests that OCFS has knowingly permitted any other authorized agency to discriminate against members of a protected class.

New Hope also contends that "the *enforcement* of the Regulation has been decidedly non-neutral, 'target[ing] and show[ing] hostility towards ... New Hope because of its religious beliefs and practices,' ... demanding that New Hope 'compromise' its beliefs as a condition of staying open, ... and revoking approval of multiple faith-based agencies because of their faith-based policies concerning the families with whom they place children." Dkt. No. 36 at 13-14 (quoting Dkt. No. 1 at ¶¶ 236, 192, 202-03). Further, New Hope **[*37]** contends that "OCFS's targeting of and hostility towards New Hope because of its faith-based policy is further demonstrated by OCFS's threat to revoke New Hope's license even though this threat is contrary to law — which authorizes OCFS to order a licensed agency to cease providing services *only* in the event that it makes findings of abuse which OCFS has not made — and could not make — with respect to New Hope." *Id.* at 14 (citing Dkt. No. 1 at ¶¶ 200, 251).

This is a common theme present throughout New Hope's submissions. Basically, New Hope's argument can be broken down as follows: OCFS is targeting New Hope because it discriminates against same-sex couples and unmarried opposite-gender couples; New Hope is discriminating against same-sex couples and unmarried opposite-gender couples because of its religious beliefs; therefore, OCFS is targeting New Hope for its religious beliefs. This syllogism, however, runs directly counter to the premise of *Smith* that, while religious belief is always protected, religiously motivated conduct enjoys no special protections or exemption from neutral, generally applied legal requirements. The fact that New Hope's conduct springs from sincerely held and strongly **[*38]** felt religious beliefs does not imply that OCFS's decision to regulate that conduct springs from antipathy to those beliefs. "If all comment and action on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation's civil rights laws might be as well." *Fulton, 2019 U.S. App. LEXIS 11711, 2019 WL 1758355, at *12*.

Having concluded that *section 421.3(d)* is facially neutral and generally applicable, and that it has been neutrally and generally applied in this case, the Court concludes that OCFS's enforcement of it is rationally related to a number of legitimate government objectives. These legitimate government interests include the following: (1) ensuring that when OCFS authorizes agencies to provide important governmental services, those services are accessible to all New York State citizens who are otherwise qualified for those services; and (2) in the context of foster care and adoption, ensuring that the pool of foster parents and resource caregivers is as diverse and broad as the children in need of foster parents and resource caregivers. *See Fulton, 320 F. Supp. 3d at 684-85*.

In sum, New Hope has failed to plausibly allege a free exercise **[*39]** claim. *18 N.Y.C.R.R. § 421.3(d)* has not been "gerrymandered" as in *Lukumi*, and there is no history of ignoring widespread secular violations as in *Tenafly* or the kind of animosity against religion found in *Masterpiece Cakeshop*. As such, OCFS's motion to dismiss is granted as to New Hope's free exercise claim and New Hope's motion for preliminary injunctive relief is denied as moot.

C. Free Speech

Although far from clear, in its complaint, New Hope appears to assert violations of its rights to be free from compelled speech and expressive association. *See* Dkt. No. 1 at ¶¶ 264-78. The Court will address each claim in turn.

1. Compelled Speech

In support of its *First Amendment* claim, New Hope contends that *18 N.Y.C.R.R. § 421.3(d)* is unconstitutional as applied to it insofar as it forces New Hope to change the content of its message. *See* Dkt. No. 36 at 19 (citing *W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943)*). New Hope alleges that its beliefs lead it to "recommend married opposite-sex couples and truly single individuals as adoptive parents, *see* Dkt. No. 1 at ¶ 269, and that because of those same beliefs it cannot endorse "unmarried couples or same-sex couples as adoptive parents." *Id.* at ¶ 153. "The Regulation, as OCFS seeks to apply it against New Hope, would compel New Hope to radically alter **[*40]** the content of its speech, forcing New Hope to say to both the State and to birthmothers, 'We do believe that adoption by this unmarried or same-sex couple would be in the best interests of this child,' when in fact New Hope believes it

would not be." Dkt. No. 36 at 20 (quoting Dkt. No. 1 at ¶¶ 153, 269-273).

The Supreme Court has advised that courts must examine the purpose of a government program when analyzing whether a government condition to participate in the program is constitutional under the *First Amendment*. *See* *Legal Services Corp. v. Velazquez, 531 U.S. 533, 542, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001)*. Where the purpose of the program is to facilitate private speech, rather than to promote a government message, the restriction violates the *First Amendment* if speech is a prerequisite of participation in the program. *See* *id. at 542-43*.

In *Velazquez*, a group of lawyers employed by the New York City Legal Services Corporation, sought a declaration that Congress's imposition of a funding condition on legal services under the Legal Services Corporation Act was an unconstitutional restriction of their freedom of speech. *See* *Velazquez, 531 U.S. at 536*. Congress' funding condition prohibited legal services corporations' use of federal funds to "amend or otherwise challenge existing welfare law." *Id.* In ruling that the funding condition of **[*41]** the Legal Services Corporation Act was unconstitutional, the Supreme Court focused on the purpose of the law. The law was "designed to facilitate private speech, not promote a governmental message." *Id. at 542*. Indeed, advice from legal services corporation attorneys to their clients, the Supreme Court concluded, "cannot be classified as governmental speech even under a generous understanding of the concept." *Id. at 543*.

In the present matter, OCFS's purpose in authorizing agencies to provide adoption and foster care services is for such agencies to provide adoption and foster care services. The process of authorizing such agencies here, in contrast to *Velazquez*, is not intended to create a forum for private speech or to facilitate private speech. Adoption agencies like New Hope were authorized to perform governmental functions for OCFS. That New Hope's work as an authorized agency is governmental in nature is further supported by the fact that OCFS provides regular oversight of its authorized agencies and, in fact, provides the same services through state operated adoption agencies. As the court found in *Fulton*, New Hope's work as an authorized agency is an extension of OCFS's own work and New Hope's **[*42]** speech, to the extent any is required when performing its services as an authorized agency, constitutes governmental speech under *Velazquez. See* *Fulton, 320 F. Supp. 3d at 697*; *see also* *Teen Ranch v. Udow, 389 F. Supp. 2d 827, 840 (W.D. Mich. 2005)*, *aff'd*, *479 F.3d 403 (6th Cir. 2007)*. Therefore, OCFS is permitted to "take legitimate and appropriate steps to ensure that its message," that adoption and foster care services are provided to all New Yorkers consistent with anti-discrimination policy set forth in *18 N.Y.C.R.R. § 421.3(d)*, was and is "neither garbled nor distorted by" New Hope.

Further, the Court finds that, even assuming *Velazquez* does not apply to the present matter, New Hope's compelled speech claim must still be dismissed because OCFS and the regulation simply do not compel speech. New Hope argues that "requiring New Hope to work with, counsel, and recommend unmarried and same-sex couples 'would, at the very least, force [New Hope] to send a message, both to [other adoptive parents, to birthparents] and to the world, that [New Hope] accepts' such relationships as appropriate and believes that adoption by such couples can be in the best interests of the child." Dkt. No. 36 at 24 (quoting *Dale, 530 U.S. at 653*). Contrary to New Hope's contention, no such message is being compelled. Rather, application of *section 421.3(d)* to New Hope simply prohibits **[*43]** discrimination against potential adoptive parents on the basis of marital status and sexual orientation. In approving an unmarried or same sex couple for adoption, the only message that would be conveyed is that, applying the regulatory criteria set forth above, placement with such a couple would be in the child's best interest.

Although not entirely clear from the face of the complaint, at oral argument, New Hope's counsel clarified that the free speech claim that they are attempting to raise is not that the adoption itself is the expressive activity, but rather the "ministry" that New Hope engages in on an ongoing basis. *See* Transcript of Oral Argument dated Feb. 19, 2019 ("Tr.") at 27. However, as the complaint and other evidence before the Court makes clear, OCFS is not prohibiting New Hope's ongoing ministry in any way or compelling it to change the message it wishes to convey. New Hope is not being forced to state that it approves of non-married or same sex couples. Rather, the only statement being made by approving such couples as adoptive parents is that they satisfy the criteria set forth by the state, without regard to any views as to the marital status or sexual orientation **[*44]** of the couple.

Given the extensive religious ministry and information provided to potential adoptive parents, there is no doubt that New Hope's general disapproval of cohabiting

unmarried couples and same sex couples will continue to be made clear. Indeed, nothing is preventing New Hope from continuing to share its religious beliefs throughout the entire process. All that is forbidden is discrimination against prospective adoptive parents on the basis of their marital status and/or sexual orientation. *See* Telescope Media Group v. Lindsey, 271 F. Supp. 3d 1090, 1119 (D. Minn. 2017) ("The simple ability to disclaim support for same-sex marriage sets this case apart from *Hurley*, where there was not a practicable way to disclaim support of participants' messages in the context of a moving parade") (citing Hurley, 515 U.S. at 576-77, 115 S. Ct. 2338).

Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's compelled speech claim.

2. Expressive Association

Implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather together to express ideas—the freedom to associate. *See* Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) ("F.A.I.R."); Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); Roberts v. United States Jaycees, 468 U.S. 609, 622, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972). The freedom to associate assures that the majority (or a powerful or vocal minority) cannot **[*45]** force its views on groups that choose to express unpopular ideas. *See* Dale, 530 U.S. at 647-48. Government action may impermissibly burden the freedom to associate in a variety of ways; two of them are "impos[ing] penalties or withold[ing] benefits from individuals because of their membership in a disfavored group" and "interfer[ing] with the internal organization or affairs of the group." Roberts, 468 U.S. at 623.

The Supreme Court has held that "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire." *Id.* Freedom to associate "plainly presupposes a freedom not to associate." Dale, 530 U.S. at 648 (quoting Roberts, 468 U.S. at 623, 104 S. Ct. 3244). When the government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person "affects in a significant way the group's ability to advocate" its viewpoint, the government has infringed on the group's freedom of expressive association. Dale, 530 U.S. at 648. However, "the freedom of expressive association, like many freedoms, is not absolute." *Id.; see also* Roberts, 468 U.S. at 623. Infringements on expressive association are subject to strict scrutiny; the right of expressive association "may be overridden **[*46]** 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" Dale, 530 U.S. at 648 (quoting Roberts, 468 U.S. at 623, 104 S. Ct. 3244).

In *Dale*, the Boy Scouts revoked the membership of an "adult scout" who was openly gay, and the scout sued under New Jersey's Law Against Discrimination ("LAD"), which prohibits discrimination based on sexual orientation in places of public accommodation. *See* Dale, 530 U.S. at 645. The Boy Scouts argued that the LAD violated its First Amendment right to associate for expressive purposes. Id. at 643. Applying a three-step analysis, the Supreme Court held that the First Amendment protected the Boy Scouts' right to control its membership. First, it determined that the Boy Scouts was an expressive association because its purpose was to "instill values in young people." Id. at 649-50. Next, the Court evaluated "whether the forced inclusion of [the expelled scout] would significantly affect the Boy Scouts' ability to advocate public or private viewpoints." Id. at 650. It determined that the Boy Scouts' official position was that homosexuality was immoral and that requiring the Boy Scouts to admit the expelled scout would "interfere with the Boy Scout's choice not to **[*47]** propound a point of view contrary to its beliefs." Id. at 655-56. Finally, the Court analyzed whether the LAD was narrowly tailored to a compelling interest. *See* id. at 656-57. Although the Supreme Court noted that eliminating discrimination can be a compelling state interest, it concluded that the "state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scout's freedom of expressive association." Id. at 654.

Similarly, in *Hurley*, the Court held that Massachusetts' public accommodations law could not be constitutionally applied to force a Boston St. Patrick's Day parade organization to accept a parade unit marching under the banner of an Irish gay and lesbian group. The Court held that "[w]hen the law is applied to expressive activity in the way it was done here, its apparent object is simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with a message of their own." Hurley,

515 U.S. at 578. This, the Court said, "is a decidedly fatal objective." Id. at 579.

In the present matter, the Court finds that New Hope's reliance on Dale is misplaced. The slight impairment to New Hope's expressive activity does not approximate **[*48]** the level of harm that triggered the Supreme Court's concern in *Dale*. Whereas, according to the Court, requiring admission of homosexuals to the Boys Scouts would be tantamount to promoting homosexual conduct, a clear violation of that organization's values, New Hope has not alleged facts demonstrating a similar harm that providing adoption services to unmarried or same sex couples would cause to their organization. New Hope is not being required to hire employees that do not share their same religious values. They are not prohibited in any way from continuing to voice their religious ideals. Rather, as in *Roberts* and *Bd. of Dirs. of Rotary Int'l.*, "the enforcement of [the regulation] would not materially interfere with the ideas that the organization sought to express." Dale, 530 U.S. at 657.

In any case, even if the application of the regulation worked a significant impairment on New Hope's association rights, the state's compelling interest in prohibiting the discrimination at issue here far exceeds any harm to New Hope's expressive association. As such, the Court grants OCFS's motion to dismiss as to New Hope's expressive association claim.

D. Equal Protection[2]

1. Selective Enforcement

"To state a **[*49]** selective enforcement claim, plaintiffs must plead facts that allow the court to reasonably infer 'that (1) ... compared with others similarly situated, [they were] selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" Joglo Realties, Inc. v. Seggos, 229 F. Supp. 3d 146, 152-53 (E.D.N.Y. 2017) (quoting LeClair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980)). "'[T]he precise standard for determining whether comparators are similarly situated for' purposes of a selective enforcement claim is an unsettled question in this circuit." Id. at 153 (quoting Mosdos Chofetz Chaim, Inc. v. Vill of Wesley Hills, 815 F. Supp. 2d 679, 693 (S.D.N.Y. 2011)).

Some district courts have held that the standard in selective enforcement cases is the same as that in "class of one' cases," which, as explained in more detail below, require plaintiffs to "show an extremely high degree of similarity between themselves and [their comparators]." Ruston v. Town Bd. for Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010) (quoting Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006)); *see also* Kamholtz v. Yates Cty., No. 08-CV-6210, 2008 U.S. Dist. LEXIS 97985, 2008 WL 5114964, *5 (W.D.N.Y. Dec. 3, 2008).

"Other courts have applied a slightly more lenient standard, asking whether plaintiffs are similarly situated to comparators 'in all material respects.'" Joglo Realties, Inc., 229 F. Supp. 3d at 153 (quotation and other citation omitted). To satisfy this standard, "plaintiffs 'must identify comparators whom a prudent person would think **[*50]** were roughly equivalent, but plaintiffs need not show an exact correlation between themselves and the comparators.'" *Id.* (quotation omitted). In other words, "'[t]he test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.... Exact correlation is neither likely nor necessary, but the cases must be fair congeners.... [A]pples should be compared to apples.'" *Id.* (quoting T.S. Haulers. Inc. v. Town of Riverhead, 190 F. Supp. 2d 455, 463 (E.D.N.Y. 2002)) (other citation omitted).

In the present matter, even applying the more lenient standard, New Hope has failed to plausibly allege a selective enforcement claim. Based on the allegations in the complaint, section 421.3(d) applies to all agencies authorized by OCFS to provide adoption services and, therefore, New Hope has failed to allege a sufficiently similar comparator as required to state an equal protection claim. *See* King v. N.Y.S. Div. of Parole, 260 Fed. Appx. 375, 380 (2d Cir. 2008) (affirming dismissal

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[2] In its complaint, the language used makes clear that New Hope's equal protection claim was being brought as either a selective enforcement or class-of-one claim. *See* Dkt. No. 1 at ¶¶ 280-87. In its response to OCFS's motion to dismiss, New Hope has conceded that it is not alleging a class-of-one equal protection claim. *See* Dkt. No. 36 at 28. New Hope then proceeds to present a convoluted theory of an equal protection violation that is entirely inapplicable to the present matter. As OCFS correctly notes, the complaint is properly construed as alleging a selective enforcement claim. Nevertheless, the Court will also address the claim that New Hope has presented in its response.

of claim because the plaintiff "failed to identify a single individual with whom he can be compared for Equal Protection purposes"). New Hope's allegations of disparate treatment state that "Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because" **[*51]** (1) "faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitted to continue operating" and (2) "parents adopting children are permitted to take into account protected classes and characteristics but in facilitating the adoption New Hope is not." Dkt. No. 1 at ¶¶ 282-83. Neither of these allegations support a selective enforcement claim.

To allege a sufficient comparator, a plaintiff must allege, at a minimum, that it is similarly situated to such a comparator in all material respects. Here, New Hope fails to allege that any other "faith based or secular adoption provider" violated section 421.3(d) and was nonetheless permitted to continue operating its adoption program. It has not alleged that other authorized agencies are being permitted to summarily exclude individuals authorized to adopt from the pool of prospective adoptive parents. Additionally, it has not alleged that any other authorized agencies are refusing to apply the relevant statutory and regulatory factors when determining whether approval of a family's application to adopt would be in a child's best interest. Instead, New Hope alleges only that the general applicability **[*52]** of section 421.3(d) incidentally touches on its beliefs. Such allegations are insufficient to support the inference that New Hope is (1) intentionally being treated differently from other authorized adoption agencies without a rational basis, *see* Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135, 140 (2d Cir. 2010), or (2) intentionally being treated differently because of a protected consideration, *See* Joglo Realties, Inc., 229 F. Supp. 3d at 152-53.

Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's selective enforcement claim.

2. Intentional Discrimination

"The Equal Protection Clause prohibits the government from subjecting individuals to 'selective treatment ... based on impermissible considerations such as ... religion.'" American Atheists, Inc. v. Port Auth. of N.Y. and N.J., 936 F. Supp. 2d 321, 338 (S.D.N.Y. 2013) (quoting Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 166 (2d Cir. 2001)) (other citation omitted). "'To prove an equal protection violation, claimants must prove purposeful' or intentional 'discrimination by a government actor directed at a suspect class, such as' a religious group." *Id.* (quoting Congregation Rabbinical Coll. of Tartikov, Inc., 915 F. Supp. 2d 574, 615 (S.D.N.Y. 2013)) (other citations omitted); *see also* Thomas v. City of New York, 143 F.3d 31, 37 (2d Cir. 1998). This intentional discrimination may be demonstrated in one of three ways: "by pointing to [1] a law that expressly classifies on the basis of [religion], [2] a facially neutral law or policy that has been applied in an unlawfully discriminatory manner, or [3] a facially neutral policy that has an adverse effect **[*53]** and that was motivated by discriminatory animus." Pyke v. Cuomo, 567 F.3d 74, 76 (2d Cir. 2009) (quotation omitted).

If claimants can demonstrate such intentional discrimination on the basis of religion, the government action is "subject to strict judicial scrutiny." Id. at 77. Absent evidence of intentional discrimination, the government action is subject to rational basis review. *See* Abascal v. Jarkos, 357 Fed. Appx. 388, 391 (2d Cir. 2009); Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223, 237 (S.D.N.Y. 2005). Rational basis also applies to classifications that do not involve fundamental rights. *See* Heller v. Doe by Doe, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) ("A classification must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"); Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (applying rational basis to "a statute [that] is neutral on its face ... and passes the *Lemon* test"); Red Earth LLC v. United States, 657 F.3d 138, 147 (2d Cir. 2011). And, absent allegations of "'adverse treatment of individuals compared with other similarly situated individuals' based on religion," an Equal Protection claim fails. Incantalupo v. Lawrence Union Free Sch. Dist., 380 Fed. Appx. 59, 62 (2d Cir. 2010) (quoting Miner v. Clinton County, 541 F.3d 464, 474 (2d Cir. 2008)).

In the present matter, the Court first notes that the facts upon which New Hope relies in support of its equal protection claim are the same as those alleged in support of its First Amendment claims. As such, New Hope's equal protection claim is subject to dismissal as duplicative of its First Amendment claims. *See* Barnes v. Fedele, 760 F. Supp. 2d 296, 302 (W.D.N.Y. 2011) (dismissing **[*54]** the plaintiff's equal protection claim as

duplicative of his First Amendment free-exercise claim) (citations omitted); Conyers v. Abitz, 416 F.3d 580, 586 (7th Cir. 2005) (dismissing equal protection and Eighth Amendment claims based on same circumstances as a free exercise claim because the free exercise claim "gains nothing by attracting additional constitutional labels"); Frisenda v. Incorporated Vill. of Malverne, 775 F. Supp. 2d 486, 518 (E.D.N.Y. 2011) ("Similarly, to the extent that plaintiff also may be attempting to assert an equal protection claim based upon retaliation for First Amendment activity (rather than under a class-of-one theory), such a claim is completely duplicative of the First Amendment retaliation claim and, therefore, should not go forward") (citations omitted); Whitehead v. City of New York, 897 F. Supp. 2d 136, 953 F. Supp. 2d 367, 377 (E.D.N.Y. 2012) (same); *see also* Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (holding that courts should analyze similar claims under the most "explicit source[s] of constitutional protection"). Indeed, the allegations in New Hope's equal protection claim rely almost exclusively on the fact that OCFS's conduct and application of section 421.3(d) violate its various First Amendment rights. *See* Dkt. No. 1 at ¶ 282 ("Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because faith-based or secular adoption providers who hold different views on marriage, the family, and human sexuality are permitted to continue operating"); **[*55]** *id.* at ¶ 283 ("Section 421.3(d) treats New Hope's speech and exercise of its religious views differently from persons similarly situated to it because parents adopting children are permitted to take into account protected classes and characteristics but in facilitating the adoption New Hope is not"); *id.* at ¶ 284 ("Section 421.3(d) violates New Hope's fundamental rights, including its free exercise, free speech, and expressive-associational rights"); *id.* at ¶ 286 ("Forcing New Hope to recommend and facilitate placement with same-sex couples or unmarried couples, in violation of its religious beliefs, does not serve any interest in a narrowly tailored way"); *id.* at ¶ 287 ("Defendant has alternative, less restrictive means to achieve any legitimate interests rather than forcing New Hope to abandon its First Amendment rights"); *id.* at ¶ 289 ("In addition, there is no rational basis for requiring New Hope to violate its religious beliefs in order to continue performing adoption services"). Based on the foregoing, the Court grants OCFS's motion to dismiss as to New Hope's equal protection claim.

Even assuming that this aspect of New Hope's equal protection claim was not duplicative of its First Amendment claims, it is nevertheless still subject to **[*56]** dismissal because New Hope has failed to allege any facts plausibly suggesting that section 421.3(d) or OCFS expressly classifies on the basis of religion, that section 421.3(d), which is a facially neutral law, has been applied in an unlawfully discriminatory manner, or that a facially neutral policy that has an adverse effect and that was motivated by discriminatory animus. *See* Pyke, 567 F.3d at 76.

"Discriminatory purpose implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Hayden v. County of Nassau, 180 F.3d 42, 50 (2d Cir. 1999) (internal quotation marks and emphasis omitted). Though the desire to discriminate need not be the sole motivating factor, *see* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), it must be "a significant reason for a public body's actions," Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778, 786 (2d Cir. 2007).

Here, rather than allege a discriminatory purpose because of New Hope's religious beliefs, the complaint makes clear that OCFS's actions were in spite of them. After reviewing New Hope's adoption program, OCFS praised many aspect of the program and expressed a desire to resolve the issues identified in a way in which New Hope is able to continue providing adoption services. Such facts clearly fail to demonstrate a discriminatory **[*57]** purpose.

In establishing discriminatory effect, a plaintiff is not "obligated to show a better treated, similarly situated group of individuals." Pyke v. Cuomo, 258 F.3d 107, 110 (2d Cir. 2001) (holding that a plaintiff who alleges "that a facially neutral statute or policy with an adverse effect was motivated by discriminatory animus ... is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection"). Indeed, the courts "recognize[ ] that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose." Doe v. Vill. of Mamaroneck, 462 F. Supp. 2d 520, 546 (S.D.N.Y. 2006).

Again, for all the reasons set forth above, nothing in the complaint plausibly alleges that OCFS was motivated by a discriminatory animus. The complaint make clear that the only purpose behind OCFS's actions was to prevent unlawful discrimination on the basis of marital status

and sexual orientation. The complaint further alleges that OCFS enforced or was in the process of enforcing section 421.3(d) against other faith-based providers, including "several Catholic providers, a Jewish provider, an LDS [(Latter Day Saints)], and a Muslim provider" who shared **[*58]** New Hope's beliefs "concerning life, marriage, the family, and human sexuality." Dkt. No. 1 at ¶¶ 202-03. Such consistent enforcement of this neutral regulation against other authorized agencies engaging in the same discriminatory conduct as alleged here renders New Hope's allegation of discriminatory animus implausible.

Since New Hope has failed to allege intentional discrimination, rational basis review applies. As set forth above, OCFS has several legitimate governmental interests in enforcing section 421.3(d) and, therefore, New Hope's equal protection claim is subject to dismissal on this alternative ground.

E. Unconstitutional Conditions

"Pursuant to this 'unconstitutional conditions' doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." Alliance for Open Soc'y Int'l, Inc. v. United States Agency for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011) (citation omitted); *see also* Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). "As the Supreme Court recently reiterated, 'the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.'" **[*59]** *Id.* (quoting Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 59, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)).

New Hope alleges that OCFS "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." Dkt. No. 1 at ¶ 295. The Court views New Hope's unconstitutional conditions claim as a mere repackaging of its various First Amendment claims and, therefore, the Court similarly repackages its resolution of those claims. Having already found that New Hope has failed to plausibly allege any violation of its constitutional rights, the Court grants OCFS's motion to dismiss as to New Hope's unconstitutional conditions claim. *See* Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77, 95 (D. Me. 2004).

IV. CONCLUSION

Undoubtedly, New Hope and all authorized adoption agencies perform essential services that greatly impact the lives of thousands of children who, without such organizations, would grow up without a home. As New Hope notes in its complaint, there are over 440,000 children in foster care in the United States, with over 120,000 of those children waiting to be adopted. *See* Dkt. No. 1 at ¶¶ 29-30. In federal fiscal year 2017, New York had 27,268 children served in foster care, with 19,213 in foster care as of September 30, 2017. *See id.* at ¶ 31. Of **[*60]** those, over 4,400 New York children were waiting to be adopted. *See id.* at ¶ 32. Further, during fiscal year 2017, throughout New York, a total of only 1,729 children were adopted. *See id.* at ¶ 33.

It is clear from the materials before the Court that OCFS does not contend that New Hope is not acting in the best interests of the children when placing these children for adoption. In fact, after OCFS conducted is review on September 6, 2018, Director Sara Simon sent New Hope a letter in which she praised New Hope's strengths in certain areas, including its "strong emphasis on assisting the birth parents in making an informed decision for their newborn, providing them time to make the decision, along with a supportive and detailed adoptive family selection process." Dkt. No. 1-6 at 3. The issue which led to the present matter is the refusal to provide adoption services to unmarried same sex couples or same sex couples regardless of marital status.

The gratitude owed to all those working to better the lives of New York's most vulnerable children is too great to convey in words. While such gratitude is ultimately ineffable, the Court still concludes this Memorandum-Decision and Order by recognizing **[*61]** the parties in this case for their many years of sacrifice and labor.

Until recent events, the parties have had a fruitful relationship; a relationship that has benefitted New York's children in immeasurable ways. For this reason, the Court would prefer that the parties seek out some compromise to their current dispute without further judicial intervention. As the district court noted in *Fulton*, "[c]reative problem solving through concerted and thoughtful discourse without court intervention is often the best method to avoid what may appear to the

parties, or to other persons in the public, to be harsh legal results." *Fulton, 320 F. Supp. 3d at 668*.

Ultimately, OCFS stands on firm ground in requiring authorized agencies to abide by New York's non-discrimination policies when administering public services. Under *Smith*, the *First Amendment* does not prohibit government regulation of religiously motivated conduct so long as that regulation is not a veiled attempt to suppress disfavored religious beliefs. And while New Hope may assert that OCFS's actions were not driven by a sincere commitment to equality, but rather by antireligious bias, the current record does not show religious persecution or bias.

After carefully reviewing the entire **[*62]** record in this matter, the parties' submissions and the applicable law, the Court hereby

ORDERS that OCFS's motion to dismiss (Dkt. No. 34) is **GRANTED**; and the Court further

ORDERS that New Hope's motion for a preliminary injunction is **DENIED**; and the Court further

ORDERS that the Clerk of the Court shall enter judgment in OCFS's favor and close this case; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: May 16, 2019

Albany, New York

/s/ Mae A. D'Agostino

Mae A. D'Agostino

United States District Judge

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EXHIBIT F

Agrawal v. Montemagno

United States Court of Appeals for the Sixth Circuit

July 23, 2014, Filed

File Name: 14a0551n.06

No. 13-4313

Reporter
574 Fed. Appx. 570 *; 2014 U.S. App. LEXIS 14227 **; 2014 FED App. 0551N (6th Cir.); 2014 WL 3635251

DHARMA AGRAWAL, Plaintiff - Appellant, v. CARLO MONTEMAGNO, JOHN G. BRYAN, and UNIVERSITY OF CINCINNATI, Defendants - Appellees.

Notice: NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. *SIXTH CIRCUIT RULE 28* LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE *RULE 28* BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: US Supreme Court certiorari denied by *Agrawal v. Montmagno, 135 S. Ct. 1430, 191 L. Ed. 2d 366, 2015 U.S. LEXIS 1126 (U.S., Feb. 23, 2015)*

Summary judgment granted by, Motion denied by, Dismissed by, in part *Agrawal v. Univ. of Cincinnati, 2015 U.S. Dist. LEXIS 87858 (S.D. Ohio, July 7, 2015)*

Prior History: **[**1]** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

Agrawal v. Univ. of Cincinnati, 977 F. Supp. 2d 800, 2013 U.S. Dist. LEXIS 144681 (S.D. Ohio, Oct. 7, 2013)

Core Terms

district court, adverse employment action, injunctive relief, summary judgment, materially, individual defendant, merit pay, Defendants', grievance, immunity, damages, waived, removing, argues, funds, due process, investigations, capacities, reduction, asserts

Case Summary

Overview
HOLDINGS: [1]-The district court ("DC") properly determined that the professor's breach-of-contract claim was a "retrospective claim for damages" and that defendants had not waived immunity by voluntarily removing the case to federal court; [2]-The professor argued that the DC accepted defendants' rendition of facts in toto and ignored the central theme of his case, but these claims were without merit; [3]-The DC properly concluded that the alleged adverse actions that occurred before October 1, 2008 were time barred; [4]-Among a number of other matters, the court noted that the Eleventh Amendment did not bar continuation of a 42 U.S.C.S. § 1981 action to the extent it sought injunctive relief from state officers sued in their official capacities. The DC was mistaken in stating that the professor named the individual defendants only in their individual capacities.

Outcome
The court affirmed the district court's order granting the university's motion to dismiss, and affirmed the order granting the individual defendants' motion for summary judgment with the exception of the 42 U.S.C.S. § 1981 injunctive relief claim, as to which the court reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] De Novo Review

A court of appeals reviews de novo the district court's order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Governments > Courts > Courts of Claims

Civil Procedure > Preliminary Considerations > Equity > Relief

Contracts Law > Remedies > Restitution

HN2[] Courts of Claims

Not all relief falling under the rubric of restitution is available in equity. Seeking recovery of a sum of money caused by a breach of contractual duties is ultimately an action at law. A claim against the state for money due under a contract is not a claim of equitable restitution and must be brought in the Ohio Court of Claims.

Governments > State & Territorial
Governments > Claims By & Against

Constitutional Law > State Sovereign Immunity > General Overview

HN3[] Claims By & Against

In the context of Ohio law, Lapides is limited to state law claims for which the state has waived or abrogated its immunity from damages claims in the state trial courts. A state that consents to suit in state court cannot invoke a sovereign immunity defense after removing the suit to federal court.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Summary Judgment > General Overview

HN4[] De Novo Review

A court of appeals reviews de novo the district court's grant of summary judgment, viewing the facts and inferences therefrom in a light most favorable to the non-movant.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

HN5[] De Novo Review

A court of appeals reviews de novo the district court's determination that actions are time-barred. An Ohio plaintiff must bring a 42 U.S.C.S. § 1983 case within two years of the alleged adverse employment action.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN6[] Extensions & Revivals

The U.S. Court of Appeals for the Sixth Circuit employs the continuing violations doctrine most commonly in Title VII of the Civil Rights Act of 1964 cases, and rarely extends it to 42 U.S.C.S. § 1983 actions. The Sixth Circuit has concluded that the U.S. Supreme Court's recently imposed limits on the viability of the continuing violation doctrine in Morgan apply to § 1983 claims. In Morgan, the Supreme Court reversed the court of appeals' application of the continuing violation doctrine, observing that discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges, and that hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The Sixth Circuit recognizes two continuing-violation types, the first applies only to hostile-environment claims.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Labor & Employment

Law > Discrimination > General Overview

HN7 **Extensions & Revivals**

Under the second type of continuing violation recognized by the U.S. Court of Appeals for the Sixth Circuit, discrete discriminatory acts that are part of a long-standing and demonstrable policy of discrimination, toll the statute of limitations. To establish this category of continuing violation, a party must demonstrate something more than the existence of discriminatory treatment in his case, such as a continuing overarching policy of discrimination.

Labor & Employment Law > ... > Evidence > Burdens of Proof > Burden Shifting

Evidence > Types of Evidence

Labor & Employment Law > ... > Employment Practices > Adverse Employment Actions > General Overview

HN8 **Burden Shifting**

Direct evidence, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Absent direct evidence, a plaintiff must present circumstantial evidence under the burden-shifting scheme of McDonnell Douglas to survive summary judgment. The first two prima facie elements are that , that he is a member of a protected class and was qualified for his position. A plaintiff must also establish that the actions he challenges were adverse employment actions, that is, more disruptive than a mere inconvenience or an alteration of job responsibilities. Employer investigations into suspected wrongdoing, standing alone, are not generally considered actionable adverse employment actions. A letter of reprimand is not a materially adverse employment action unless accompanied by a loss such as demotion or salary reduction.

Labor & Employment Law > ... > Employment Practices > Adverse Employment Actions > General Overview

HN9 Case law has held that an adverse employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

HN10 **Burdens of Proof**

In the context of a discrimination claim, the fourth prima facie element is that the plaintiff was less favorably treated than a similarly situated person outside his protected class. To be similarly situated a plaintiff and his proposed comparator must have engaged in acts of comparable seriousness.

Civil Rights Law > ... > Section 1983 Actions > Scope > Government Actions

Labor & Employment Law > ... > Disparate Impact > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)

HN11 **Government Actions**

42 U.S.C.S. § 1981 prohibits discrimination in the making and enforcement of private contracts. A plaintiff must present evidence sufficient to raise an inference of intentional race discrimination in a § 1981 action; that is, § 1981 reaches only purposeful discrimination. The express cause of action for damages created by 42 U.S.C.S. § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units.

Governments > State & Territorial Governments > Claims By & Against

Constitutional Law > State Sovereign Immunity > General Overview

Labor & Employment Law > ... > Disparate Impact > Statutory Application > Reconstruction Statutes (secs. 1981, 1983 & 1985)

HN12 **Claims By & Against**

Claims for money damages against state officers in their official capacities are barred by the Eleventh

Amendment. However, the Eleventh Amendment does not bar continuation of a 42 U.S.C.S. § 1981 action to the extent it seeks injunctive relief from state officers sued in their official capacities.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN13[] **Scope of Protection**

A procedural due process claim requires a showing that the plaintiff has been deprived of a protected property interest without adequate process. A protected property interest is one to which a plaintiff has a legitimate claim of entitlement under state law. Potential merit pay increases for tenured professors are not property rights. Simply put, a plaintiff can have no legitimate claim of entitlement to a discretionary decision.

Constitutional Law > Substantive Due Process > Scope

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN14[] Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process. Substantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental. It protects those interests, some yet to be enumerated, implicit in the concept of ordered liberty.

Constitutional Law > Equal Protection > General Overview

Labor & Employment Law > Discrimination > Title VII Discrimination > General Overview

HN15[] The elements for establishing an Equal Protection claim under 42 U.S.C.S. § 1983 and the elements for establishing a violation of Title VII of the Civil Rights Act of 1964 disparate treatment claim are the same.

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For CARLO MONTEMAGNO, JOHN G. BRYAN, UNIVERSITY OF CINCINNATI, Defendants - Appellees: Drew C. Piersall, Office of the Ohio Attorney General, Employment Law Section, Columbus, OH.

Judges: BEFORE: SUHRHEINRICH, MOORE, and WHITE, Circuit Judges.

Opinion by: HELENE N. WHITE

Opinion

[*572] HELENE N. WHITE, Circuit Judge. Dr. Dharma Agrawal, a tenured professor at the University of Cincinnati (UC), brought this action asserting constitutional violations under *42 U.S.C. § 1983*; violation of *42 U.S.C. § 1981* with regard to terms and conditions of his employment; and a state-law breach of contract claim. Defendants removed the case. On Defendants' motion, the district court dismissed all claims against UC. Following discovery, the individual Defendants moved for and were granted summary judgment. We AFFIRM the dismissal of the claims against UC. We AFFIRM the grant of summary judgment to the individual Defendants except as to the *§ 1981* **[**2]** injunctive relief claim, as to which we REVERSE and REMAND.

I. Grant of UC's Motion to Dismiss

HN1[] We review de novo the district court's order granting UC's motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*. *D'Ambrosio v. Marino, 747 F.3d 378, 383 (6th Cir. 2014)*. Agrawal argues that his state-law breach-of-contract claim against UC was an equitable action requesting injunctive relief, not an action at law for damages, and that the district court erred by dismissing it. He also argues UC waived its immunity by removing this action to federal court.

Although Agrawal concedes that the Ohio Court of Claims is the primary venue for hearing cases involving money damages **[*573]** against the state, he argues that the Court of Claims statute permits other courts of the state "to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other

equitable relief." Ohio Rev. Code § 2743.03. Pl. Br. at 66.

HN2[] "[N]ot all relief falling under the rubric of restitution is available in equity." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 214, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). Seeking recovery of a sum of money caused by a breach of contractual **[**3]** duties is ultimately an action at law. *Id.* Cristino v. Ohio Bureau of Workers' Compensation, 118 Ohio St. 3d 151, 2008 Ohio 2013, 886 N.E.2d 857, 861 (Ohio 2008) ("a claim against the state for money due under a contract is not a claim of equitable restitution and must be brought in the Ohio Court of Claims"). Agrawal's amended complaint sought, among other relief, the reinstatement "*per his contract*" of $360,000 in research funds and "control of research funds and grants as well as other support *promised in his contract* of employment." PID 96 (emphasis added). He sought the award of monies he claims were granted to him under a contract, but not paid by UC.

The district court properly determined that Agrawal's breach-of-contract claim was a "retrospective claim for damages" and that Defendants had not waived immunity by voluntarily removing the case to federal court. Although Agrawal cites Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002), which held that the defendants (state university officials) waived Georgia's sovereign immunity from state law claims by voluntarily removing plaintiff's case against them to federal court, HN3[] Lapides is limited to state law claims for which the state has **[**4]** waived or abrogated its immunity from damages claims in the state trial courts. *See* Dantz v. Am. Apple Group, LLC, 123 F. App'x 702, 706-07 (6th Cir. 2005) (unpublished) (*Lapides* "was limited to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings"); *see also,* Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly, 572 F.3d 644, 661 (9th Cir. 2009) (holding that a state that consents to suit in state court cannot invoke a sovereign immunity defense after removing the suit to federal court); Stewart v. N. Carolina, 393 F.3d 484, 488 (4th Cir. 2005). Because that is not the case here, Defendants' removal from state court does not constitute a waiver of sovereign immunity on the state-law contract claim against UC. That claim was properly dismissed.

II. Grant of Summary Judgment to Individual Defendants

HN4[] We review de novo the district court's grant of summary judgment, viewing the facts and inferences therefrom in a light most favorable to Dr. Agrawal. Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 581 (6th Cir. 2007).

The district court's order granting summary judgment sets forth the extensive pertinent background, **[**5]** which we adopt and do not repeat here. Agrawal v. Univ. of Cincinnati, 977 F. Supp. 2d 800, 805-18 (S.D. Ohio 2013). The district court agreed with the individual Defendants that most of Agrawal's challenges are time barred; that Agrawal established only one materially adverse employment action, the denial of a merit pay increase in 2010, but failed to establish that a similarly situated person was treated more favorably than he; and that Agrawal failed to show that Defendants' asserted legitimate reasons for their actions were pretextual. Alternatively, the court determined that the individual **[*574]** Defendants are entitled to qualified immunity.

A.

Agrawal argues that the district court "accepted the defendants' rendition of facts *in toto* ... and ignore[d] the central theme of [his] case: Montemagno deliberately brought Agrawal up on charges known to be false, causing Agrawal to spend tens of thousands of dollars on defense lawyers." Br. at 12. We disagree. The district court recognized Agrawal's "central theme":

> Montemagno notified Dr. Agrawal that he was initiating an Article 9 investigation . . . Dr. Agrawal responded . . . , protesting that he signed the labor verification statements and **[**6]** that the issues about Xie had been aired and resolved by the first grievance panel's decision. He also objected to that hearing panel's report . . . He strenuously objected to a second disciplinary investigation, complaining that he had already incurred attorney's fees and suffered great emotional distress. Notwithstanding Dr. Agrawal's objections, Ackerman continued her office's investigation into Dr. Agrawal's grants . . . .

PID 6210. The court stated several times that Agrawal maintained that Montemagno intentionally set out to destroy his research career and intentionally discriminated against him, and that Agrawal denied that his own wrongdoing brought on UC's two investigations of him. PID 6198, 6200-01, 6210, 6221, 6228-29, 6243,

6245.

Citing many examples, Agrawal claims that the district court improperly accepted the defense's view of the facts. Included in his claims is that the district court "adopted, without scrutiny," the grievance committee's findings as uncontested facts. The court did no such thing. It summarized the grievance panel's findings, PID 6206-09, 6215-17, a logical and necessary thing to do given that Agrawal's grievances are central to his case. The court **[**7]** did not state or suggest that it adopted as fact the grievance panel's findings, only that it took them into account, along with other evidence (*see, e.g.,* PID 6245 "Based upon the facts discussed in the audit reports, Dr. Agrawal's own admissions at the disciplinary hearings, *and* the conclusions of two hearing panels, the Court cannot conclude that the reasons Defendants have offered concerning the denial of merit pay are mere pretext to disguise discrimination"; PID 6244 "The Internal Audit report, entirely separate from Bryan and Montemagno, recommended that the four controls that Dr. Agrawal agreed to in December 2009 be made permanent. The second grievance panel concluded that 'respondents had good reason to distrust Dr. Agrawal and to restrict student related grant activity. The internal controls are fully warranted administrative fiscal remedies ...' The findings of two separate internal investigations fully support Defendants' assertion that the grant restrictions were imposed based on Dr. Agrawal's own conduct.")

Agrawal contends that the district court again usurped the jury's role when it "cited Harold Carter for the proposition that Agrawal's funding proposals were not well **[**8]** written and consequently rejected . . ." when "[t]here is no hint of this position in Carter's letter." Br. at 14, n.32, 18. Carter testified on deposition regarding Dr. Agrawal's first grant proposal:

> [i]t was a terribly written proposal, I'm sad to say. It was very disjointed. It was just kind of a collection of these disparate kinds of things that were loosely connected because they were the same general area. And the English was not good.

[*575] PID 1085. That Carter's *letter* to Agrawal dated May 16, 2006, PID 1209, did not critique Agrawal's proposal writing does not negate Carter's deposition testimony. These claims are without merit, as are Agrawal's remaining claims that the district court did not abide by its obligation to view the facts in the light most favorable to him.

B. Time-barred Claims & Continuing Violation Theory

HN5[] We review de novo the district court's determination that many of Agrawal's alleged adverse employment actions are largely time-barred. *See* *Banks v. City of Whitehall, 344 F.3d 550, 553 (6th Cir. 2003)* (an Ohio plaintiff must bring a *§ 1983* case within two years of the alleged adverse employment action.)

Agrawal filed his complaint in state court on October 1, 2010. **[**9]** The district court properly concluded that the alleged adverse actions that occurred before October 1, 2008 were time barred, i.e., the transfer of OBR funds, transfer of office space, reduction of laboratory space and reduction in the number of his graduate students. *See* *Banks, 344 F.3d at 553*.

The continuing-violation theory does not revive these time-barred claims. ***HN6***[] "This Circuit employs the continuing violations doctrine most commonly in *Title VII* cases, and rarely extends it to *§ 1983* actions." *Sharpe v. Cureton, 319 F.3d 259, 267 (6th Cir. 2003)* (concluding that "the Supreme Court's recently imposed limits on the viability of the [continuing violation] doctrine" in *AMTRAK v. Morgan, 536 U.S. 101, 114-15, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*, apply to *§ 1983* claims). In *Morgan,* the Supreme Court reversed the court of appeals' application of the continuing violation doctrine, observing that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges," and that "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct.")

This circuit recognizes two continuing-violation **[**10]** types, the first applies only to hostile-environment claims. *Sharpe, 319 F.3d at 267*; *Morgan, 536 U.S. at 114-15*. Agrawal's amended complaint does not allege a hostile environment claim. *See* PID 84 (amended complaint filed in Court of Common Pleas, Hamilton County, Ohio). On appeal, he nonetheless argues that a review of the record makes clear "that the department overseen by Defendants was generally hostile to Indians in particular, and "Easterners" in general. The two prime examples of this are Montemagno's mistreatment of Bhattacharya . . . and Dr. Purdy's mostly-undisciplined mistreatment of students." Br. at 30-31. As the district court noted, Bhattacharya denied that Montemagno discriminated against him; he described Montemagno as autocratic and "vicious," and that he appeared to be closer to

several other department heads, but that "I don't think it had anything to do with national origin." PID 2752. And, Dr. Purdy's conduct (a professor who made inappropriate comments to students in 2000, including using the term "turbanheads" or "towelheads") cannot be attributed to either Montemagno or Bryan since the former arrived at UC in 2006 and Bryan assumed the Vice-Provost post in **[**11]** or around early 2009. In addition, neither of these examples suggest or establish that Agrawal himself suffered harassment that unreasonably interfered with his work performance or created an intimidating, hostile, or offensive work environment. *See, e.g.,* *Delaney v. Skyline Lodge, Inc., 95 Ohio App. 3d 264, 642 N.E.2d 395, 399-400 (Ohio App. 1994)*. Because Agrawal did not allege a **[*576]** hostile-environment claim, the time-barred claims are not revived under this continuing-violation theory.

Agrawal also claims ***HN7***[↑] the second type of continuing violation applies, under which discrete discriminatory acts that are part of a longstanding and demonstrable policy of discrimination, toll the statute of limitations. *See* *Sharpe, 319 F.3d at 269*. "To establish this category of continuing violation, appellant must demonstrate something more than the existence of discriminatory treatment in his case, *Sharpe, 319 F.3d at 268* (internal quotations and citation omitted), such as a continuing overarching policy of discrimination, *see* *LRL Properties v. Portage Metro Hous. Auth., 55 F.3d 1097, 1106 (6th Cir. 1995)*.

This claim fails as well, because Agrawal relies on the same instances: Montemagno's alleged discrimination toward Bhattacharya **[**12]** and Purdy's inappropriate comments to students in 2000. Agrawal's argument that the statute of limitations should be equitably tolled during the pendency of the investigations is raised for the first time on appeal, and is thus waived. *See, e.g.,* *Geiger v. Tower Auto., 579 F.3d 614, 622 n.3 (6th Cir. 2009)*.

C. Race and National-Origin Discrimination

Agrawal alleged that the individual Defendants, acting under color of state law in their capacities as UC officers, discriminated against him and violated his equal protection rights on the basis of his national origin and race. PID 6221. The district court properly determined that Agrawal presented no direct evidence of discrimination. ***HN8***[↑] Direct evidence, "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Martinez v. Cracker Barrel Old Country Store, Inc., 703 F.3d 911, 914 (6th Cir. 2013)*. Agrawal relies on Montemagno's remark alluding to a "cultural divide" at Agrawal's second grievance hearing, but the district court correctly concluded that this statement could be interpreted several ways. Dr. Purdy's statements about Asian students in the year 2000 cannot be attributed **[**13]** to either Montemagno or Bryan, and Purdy played no role in Defendants' decisions regarding Agrawal.

Absent direct evidence, Agrawal must present circumstantial evidence under the burden-shifting scheme of *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*, to survive summary judgment. *Sjöstrand v. Ohio State Univ., 750 F.3d 596, 599 (6th Cir. 2014)*. Agrawal established the first two prima facie elements, i.e., that he is a member of a protected class and was qualified for his position. *Adair v. Charter Cnty. of Wayne, 452 F.3d 482, 493 (6th Cir. 2006)*.

Dr. Agrawal must also establish that the actions he challenges were adverse employment actions, that is, "more disruptive than a mere inconvenience or an alteration of job responsibilities." *Mitchell v. Vanderbilt Univ., 389 F.3d 177, 182 (6th Cir. 2004)*. The first conduct within the two-year limitations period Agrawal points to is Montemagno's October 3, 2008 letter initiating the first Article 9 proceeding. But employer investigations into suspected wrongdoing, standing alone, are not generally considered actionable adverse employment actions, *see* *Arnold v. City of Columbus, 515 F. App'x 524, 531 (6th Cir. 2013)*, and Montemagno's **[**14]** proposed discipline was not implemented, *see* *Mitchell, 389 F.3d at 182*; PID 6211. Finally, the letter of discipline that was to have been placed in Agrawal's personnel file has never been located, and a letter of reprimand is not a materially adverse employment action unless accompanied by a loss such as demotion **[*577]** or salary reduction, neither of which occurred here. *See* *Taylor v. Geithner, 703 F.3d 328, 338 (6th Cir. 2013)* (written reprimand that does not lead to a materially adverse consequence such as lowered pay, demotion, suspension, or the like, is not a materially adverse employment action); *Jones v. Butler Metro Hous. Auth., 40 F. App'x 131, 137 (6th Cir. 2002)*.

Bryan's temporary grant restrictions imposed in August 2009 were also within the two-year limitations period. But the district court properly determined that these were not materially adverse employment actions. *See*

Mitchell, 389 F.3d at 182 (actions including reduction in the plaintiff professor's research lab space, revocation of mentor status, loss of graduate research assistant, proposed but unimplemented reduction in pay, forced review of grant applications, and removal from Director position were not materially adverse **[**15]** employment actions, independently or collectively). The investigations that prompted these restrictions were brought on by Xie's letter and Agrawal's own testimony, and Agrawal has not demonstrated that his material responsibilities were diminished or that the temporary grant restrictions had a materially adverse effect on his salary or status of employment at UC. *See* Mitchell, 389 F.3d at 183.

The district court properly determined that Agrawal failed to establish the third prima facie element, that he suffered an adverse employment action, except as to the denial of a merit pay increase in 2010. *Id.* Only the denial of a merit pay increase in 2010 constituted **HN9**[] "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998). Defendants concede that the 2010 denial of merit pay constituted a materially adverse employment action. *See* Szeinbach v. Ohio State Univ., 493 F. App'x 690, 694-95 (6th Cir. 2012). The question then is whether Agrawal established **HN10**[] the fourth prima facie element, that **[**16]** he was less favorably treated than a similarly situated person outside his protected class. *See* Noble v. Brinker Int'l, Inc., 391 F.3d 715, 728-29 (6th Cir. 2004). To be similarly situated a plaintiff and his proposed comparator "must have engaged in acts of comparable seriousness." Wright v. Murray Guard, 455 F.3d 702, 710-11 (6th Cir. 2006) ("Wright and Bradley are not similarly situated because their alleged acts of misconduct are of a very different nature, and there are legitimate reasons why Murray Guard would treat them differently.").

Agrawal inadequately briefed this issue. He asserts simply that he "presented a multitude of facts and charts to support his position that he out-performed every other member of his department, yet the raise he was granted, unlike theirs, was reversed." Even if the issue is not waived, Geiger, 579 F.3d at 622 n.3, Agrawal has not presented evidence from which a jury could conclude that any alleged comparator was treated more favorably than he for similar misconduct.

D. Section 1981 Claim

Agrawal argues that the district court erred by granting summary judgment on his § 1981 claim. Agrawal's amended complaint alleged that Defendants intentionally **[**17]** discriminated against him with respect to compensation, terms, conditions and privileges of employment because of his race and color.

HN11[] Section 1981 prohibits discrimination in the making and enforcement of private contracts, McCormick v. Miami Univ., 693 F.3d 654, 659 (6th Cir. 2012). A plaintiff **[*578]** must present evidence sufficient to raise an inference of *intentional* race discrimination in a § 1981 action; that is, § 1981 reaches only purposeful discrimination. *See* Gen. Bldg. Contractors Ass'n v. Penn., 458 U.S. 375, 389, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982). "The express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units." Arendale v. City of Memphis, 519 F.3d 587, 599-600 (6th Cir. 2008) (quoting Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 733, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989).

The district court properly determined that money damages are not available under § 1981; **HN12**[] claims for money damages against state officers in their official capacities are barred by the Eleventh Amendment. *Id.* at 662; Freeman v. Mich. Dep't of State, 808 F.2d 1174, 1179 (6th Cir. 1987).

However, the Eleventh Amendment does not bar continuation of a § 1981 **[**18]** action to the extent it seeks injunctive relief from state officers sued in their official capacities. McCormick, 693 F.3d at 662; Freeman, 808 F.2d at 1179. In dismissing the claim for injunctive relief, the district court stated that Agrawal named the individual Defendants only in their individual capacities and went on to conclude that because neither Defendant remains at UC, any prospective claim for relief against them is moot. The district court was mistaken; Agrawal clearly named Montemagno and Bryan both in their individual and official capacities. In addition, Agrawal asserts that the successor officers continue to enforce decisions made by Montemagno and Bryan: that he remains ejected from his laboratory and office, the OBR money remains under another's control, he is still suffering under Bryan's 4-point accounting structure, and he is still lacking his merit-pay increase.

Under these circumstances, since Montemagno and Bryan left UC after Agrawal brought this action, the successor officers are automatically substituted under Fed. R. Civ. P. 25(d). We thus remand for substitution of Montemagno and Bryan's successors and leave to the district court how to proceed on remand. **[**19]** *See* Spomer v. Littleton, 414 U.S. 514, 522-23, 94 S. Ct. 685, 38 L. Ed. 2d 694 (1974) (remanding to court of appeals for a determination "whether the former dispute regarding the availability of injunctive relief against the State's Attorney is now moot [because new State's Attorney was elected and respondents did not allege that he intends to continue his predecessor's practices] and whether respondents will want to, and should be permitted to, amend their complaint to include claims for relief against the [new State's Attorney].); Patterson v. MacDougall, 506 F.2d 1 (5th Cir. 1975) (where State officer resigned after the plaintiff filed his complaint, court of appeals remanded to district court to determine whether claims for injunctive relief were moot and whether MacDougall's successor should be substituted as a defendant to the claims for injunctive and declaratory relief.).

E. Property Interest in Employment Contract and Reputation

The district court did not err in concluding that Agrawal's procedural due process claims failed. HN13[] "A procedural due process claim requires a showing that the plaintiff has been deprived of a protected property interest without adequate process." City of Pontiac Retired Emples. Ass'n v. Schimmel, 751 F.3d 427, 432 (6th Cir. 2014). **[**20]** When Bhattacharya *recommended* that Agrawal receive a merit pay increase in 2010, no increase was implemented. A protected property interest is one to which a plaintiff has a legitimate **[*579]** claim of entitlement under state law. *See* Ferencz v. Hairston, 119 F.3d 1244, 1247 (6th Cir. 1997). Potential merit pay increases for tenured professors are not property rights; Agrawal was not entitled to a hearing or other process before a merit pay increase was denied. *See* Richardson v. Twp. of Brady, 218 F.3d 508, 517 (6th Cir. 2000) ("Simply put, [plaintiff] can have no legitimate claim of entitlement to a discretionary decision.") Similarly, Agrawal had no protected property interest in a particular office, laboratory space or control over the OBR funds, which funds were subject to the Board of Regents' discretion. *Id.*

F. Substantive Due Process

Agrawal asserts that the district court erred in determining that Defendants infringed none of his substantive due process rights: "vindictive motives and arbitrary State action give rise to constitutional causes of action," arguing that Montemagno's treatment of him "shocks the conscience because bringing false, uninvestigated, malicious allegations would **[**21]** shock the conscience even if not brought against fully-tenured senior university professors." Br. at 59.

HN14[] "Most, if not all, state-created contract rights, while assuredly protected by procedural due process, are not protected by substantive due process." Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990) (rejecting the plaintiff's claim that denial of a promotion constituted a violation of substantive due process). "Substantive due process affords only those protections so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . . It protects those interests, some yet to be enumerated, implicit in the concept of ordered liberty." *Id.* (internal quotations and citations omitted).

Asserting that Montemagno's conduct violated his right of equal protection, Agrawal relies on Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1990), which has been interpreted as recognizing a narrow substantive due process right to protection against losing one's job because of an independent constitutional violation, Hopkins v. Canton City Bd. of Educ., 477 F. App'x 349, 365-66 (6th Cir. 2012). The district court properly disposed of Agrawal's equal protection claim with his **[**22]** discrimination claims under § 1983.HN15[] "The elements for establishing an Equal Protection claim under § 1983 and the elements for establishing a violation of Title VII disparate treatment claim are the same." Deleon v. Kalamazoo Cnty Rd. Comm'n, 739 F.3d 914, 917-18 (6th Cir. 2014); Gutzwiller, 860 F.2d at 1325.

For these reasons, we AFFIRM the district court's order granting UC's motion to dismiss, and AFFIRM the order granting the individual Defendants' motion for summary judgment with the exception of the § 1981 injunctive relief claim, as to which we REVERSE and REMAND.

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EXHIBIT G

Miller v. Mich. Dep't of Corr.

United States District Court for the Western District of Michigan, Southern Division

January 20, 2012, Decided; January 20, 2012, Filed

Case No. 1:11-cv-1278

Reporter
2012 U.S. Dist. LEXIS 6777 *

ADAM MILLER, Plaintiff, v. MICHIGAN DEPARTMENT OF CORRECTIONS, Defendant.

Core Terms

sovereign immunity, immunity, waived, state-law, state court, federal court, removal

Counsel: **[*1]** For Adam Miller #672265, plaintiff: Loren M. Dickstein, Lewis & Dickstein PLLC, Southfield, MI; Michael H. Cutler, Michael Cutler & Associates PC, Farmington Hills, MI.

For Michigan Department of Corrections, defendant: A. Peter Govorchin, MI Dept Attorney General (Corrections), Corrections Division, Lansing, MI.

Judges: Honorable Paul L. Maloney, Chief United States District Judge.

Opinion by: Paul L. Maloney

Opinion

This is a civil rights action initially filed in the Michigan Court of Claims by a state prisoner. The action raises claims under *42 U.S.C. § 1983* and state law. The action was removed to this Court by Defendant Michigan Department of Corrections (MDOC) pursuant to *28 U.S.C. §§ 1441*, *1443*, and *1446*.

Under the Prison Litigation Reform Act, *PUB. L. NO. 104-134, 110 STAT. 1321 (1996)*, the Court is required to dismiss any prisoner action brought under federal law if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. *28 U.S.C. § 1915A*; *42 U.S.C. § 1997e(c)*. The Court must read Plaintiff's *pro se* complaint indulgently, *see Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*, and accept Plaintiff's allegations **[*2]** as true, unless they are clearly irrational or wholly incredible. *Denton v. Hernandez, 504 U.S. 25, 33, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992)*. Applying these standards, Plaintiff's *Eighth Amendment* claim will be dismissed because Defendant MDOC is entitled to sovereign immunity and is not a person within the meaning of *42 U.S.C. § 1983*. Plaintiff's remaining state-law claim will be remanded to the Michigan Court of Claims.

Factual Allegations

Plaintiff Adam Miller presently is incarcerated with the MDOC and housed at the Alger Correctional Facility, though the facts underlying his complaint occurred while he was housed at various MDOC facilities across the state. He sues the MDOC, alleging that it has been deliberately indifferent to his serious medical needs arising from his diabetes and fatty liver disease, in violation of the *Eighth Amendment*. He also alleges that the MDOC committed the state tort of negligence by failing to use ordinary care in providing basic medical treatment. Plaintiff seeks declaratory and injunctive relief, together with compensatory damages.

Discussion

I. *Section 1983* Claim

Plaintiff may not maintain a *§ 1983* action against the MDOC. Ordinarily, regardless of the form of relief requested, the **[*3]** states and their departments are immune under the *Eleventh Amendment* from suit in the federal courts, unless the state has waived immunity or Congress has expressly abrogated *Eleventh Amendment* immunity by statute. *See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98-101, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*; *Alabama v. Pugh, 438 U.S. 781, 782, 98 S. Ct. 3057, 57 L. Ed. 2d 1114*

(1978); O'Hara v. Wigginton, 24 F.3d 823, 826 (6th Cir. 1993). Congress has not expressly abrogated Eleventh Amendment immunity by statute, Quern v. Jordan, 440 U.S. 332, 341, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979), and the State of Michigan has not consented to civil rights suits in federal court. Abick v. Michigan, 803 F.2d 874, 877 (6th Cir. 1986). In numerous unpublished opinions, the Sixth Circuit has specifically held that the MDOC is absolutely immune from suit under the Eleventh Amendment. *See, e.g.*, McCoy v. Michigan, 369 F. App'x 646, 653-54 (6th Cir. 2010); Turnboe v. Stegall, No. 00-1182, 2000 U.S. App. LEXIS 27967, 2000 WL1679478, at *2 (6th Cir. Nov. 1, 2000).

However, the Supreme Court held in Lapides v. Bd. of Regents, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002), that by voluntarily invoking the jurisdiction of the federal court through removal, the State of Georgia had waived its federal sovereign immunity. In *Lapide*s, Georgia attempted **[*4]** to remove a case from state court, where its sovereign immunity had been waived by state statute, to federal court, where Georgia claimed sovereign immunity still existed. The Court, worried about "unfair tactical advantages," unanimously held that Georgia had waived its sovereign immunity. Id. at 621. However, in *Lapides*, as in the instant case, the only federal claim arose under 42 U.S.C. § 1983. Because the state is not a "person" who may be sued under § 1983, the Supreme Court's holding was expressly limited "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." Id. at 617 (citing Will v. Mich. Dep't of State Police, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)). Thereafter, the Sixth Circuit extended *Lapides* to find that voluntary removal could constitute a waiver of the state's sovereign immunity from federal claims in some circumstances. *See* Ku v. Tennessee, 322 F.3d 431, 435 (6th Cir. 2003). The *Ku* court did not, however, base its finding that the state had waived its sovereign immunity solely on the fact that the state had removed the action. Instead, the court held that appearing in the case and defending the action on the merits **[*5]** together demonstrated a sufficient waiver of sovereign immunity. It is not clearly established, therefore, that the State could waive its Eleventh Amendment immunity on a § 1983 claim simply by removing the action to federal court.

Moreover, the doctrine of sovereign immunity is broader than the Eleventh Amendment's grant of immunity from suit in federal court. *See* Alden v. Maine, 527 U.S. 706, 742- 43, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (recognizing that the concept of state sovereign immunity arises out of the constitutional structure of the relationship between the federal government and the states; the Eleventh Amendment is merely a partial affirmation of that broader immunity). Congress ordinarily may not waive a State's sovereign immunity - either in federal or in state court - absent compelling evidence that those states are "required to surrender this power to Congress pursuant to the constitutional design." Id. at 731. Because the Supreme Court squarely has held that Congress did not intend to waive state sovereign immunity in adopting § 1983, *see* Will, 491 U.S. at 67, the MDOC was entitled to sovereign immunity from suit under that statute regardless of whether the action was brought in federal or state **[*6]** court. In addition, the state courts have recognized that the state has not waived its immunity with respect to § 1983 claims brought in state courts. *See* De Sanchez v. Genoves-Andrews, 179 Mich. App. 661, 446 N.W.2d 538, 542 (Mich. Ct. App. 1989) (citing Smith v. Dep't of Public Health, 428 Mich. 540, 410 N.W.2d 749, 770 (Mich. 1987)); Lowery v. Dep't of Corr., 146 Mich. App. 342, 380 N.W.2d 99, 106 (Mich. Ct. App. 1985) (holding that Michigan's narrow waiver of sovereign immunity did not include claims under 42 U.S.C. § 1983). Removal, therefore, had no bearing on the state's entitlement to immunity. *See* Lapides, 535 U.S. at 617 (limiting the doctrine of constructive waiver by removal to claims for which the state has explicitly waived immunity from state-court proceedings).

Nevertheless, even assuming that the state could or did waive its sovereign immunity by removing the action, Plaintiff fails to state a claim against the MDOC under § 1983. The State of Michigan (acting through the MDOC) is not a "person" who may be sued under § 1983 for money damages. *See* Lapides, 535 U.S. at 617 (citing Will, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45). Nor is this conclusion altered by Plaintiff's demand for prospective injunctive relief. Although the Supreme Court has recognized **[*7]** that a state official sued in his official capacity for prospective injunctive relief is a person within the meaning of § 1983, Will, 491 U.S. at 71, Plaintiff in this case does not sue any state official. He sues only the MDOC. As a result, Plaintiff's § 1983 claim must be dismissed because the MDOC is not a person within the meaning of § 1983.

II. State-Law Claim

In addition to his federal claim, Plaintiff raises a state tort claim of negligence. The district court has discretion to remand a removed case when all federal claims have

been dismissed and all that remains are state-law claims within the pendent jurisdiction of the court. *Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988)*; *Long v. Bando Mfg. of Am., Inc., 201 F.3d 754, 761 (6th Cir. 2000)*. In exercising that discretion, the district court is to consider the "principles of economy, convenience, fairness and comity which underline the pendent jurisdiction doctrine." *Carnegie-Mellon, 484 U.S. at 357*. Plaintiff clearly intended for his state-law claims to be litigated in the state courts. Moreover, the principle of comity favors the disposition of state-law claims by the state courts. Therefore, Plaintiff's state-law claim **[*8]** is remanded to the Michigan Court of Claims.

Conclusion

Having conducted the review now required by the Prison Litigation Reform Act, the Court determines that Plaintiff's *Eighth Amendment* claim will be dismissed pursuant to *28 U.S.C. § 1915A(b)* and *42 U.S.C. § 1997e(c)* because Defendant MDOC is entitled to sovereign immunity and is not a person within the meaning of *42 U.S.C. § 1983*. The remaining state-law claim is remanded to the Michigan Court of Claims.

A Order consistent with this Opinion will be entered.

Dated: January 20, 2012

/s/ Paul L. Maloney

Paul L. Maloney

Chief United States District Judge

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EXHIBIT H

Positive
As of: July 17, 2019 5:55 PM Z

Burke v. Ky. State Police

United States District Court for the Eastern District of Kentucky, Central Division

January 27, 2016, Decided; January 27, 2016, Filed

Civil No. 14-cv-00024-GFVT-EBA

Reporter
2016 U.S. Dist. LEXIS 9889 *; 2016 WL 361690

STEPHEN BURKE, et al., Plaintiffs, v. KENTUCKY STATE POLICE, and RODNEY BREWER, in his official capacity as Kentucky State Police Commissioner, Defendants.

Core Terms

immunity, federal court, waived, removal, courts, summary judgment, waive immunity, dogs, sovereign immunity, state court, genuine, unfair, motion to dismiss, settlement

Case Summary

Overview

HOLDINGS: [1]-Overall, the court did not find anything inconsistent or tactically unfair about allowing defendants, the Kentucky State Police (KSP) and the KSP Commissioner in his official capacity, to assert *Eleventh Amendment* immunity for the federal claim which they permissibly removed to federal court; [2]-The court could not find that defendants waived their immunity by removal when they could have asserted the same defense at the state level. Accordingly, the *Fair Labor Standards Act* claim of plaintiffs, various current and former KSP and Commercial Vehicle Enforcement officers who had at some point been assigned duties as K9 officers, was dismissed; [3]-Without the federal question *FLSA* claim there was no longer a basis for supplemental jurisdiction over the breach of contract claim found in Count Two of the complaint.

Outcome

Defendants' Motion was granted as to Count One of plaintiffs' Complaint. Count One of the Complaint regarding the alleged *FLSA* violation was dismissed with prejudice. Count Two of the Complaint regarding the 2000 settlement agreement was remanded for further consideration by the state court. Any pending motions were denied, as moot.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1 **Appropriateness**

Under *Fed. R. Civ. P. 56*, summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56*. A fact's materiality is determined by the substantive law, and a dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN2[] Evidentiary Considerations

In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. The burden is initially on the moving party to inform the district court of the basis of its motion, and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrates the absence of a genuine issue of a material fact. Once this burden is met, the nonmoving party, must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*. Further, the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact. Instead, the non-moving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > State Sovereign Immunity

HN3[] State Sovereign Immunity

In general, states are immune from claims brought against them by private persons in federal court. *U.S. Const. amend. XI*. *Eleventh Amendment* immunity extends to a public agency if said agency or institution can be characterized as an arm or alter ego of the state. Kentucky State Police is an arm of the state, entitled to the same *Eleventh Amendment* immunity as the Commonwealth of Kentucky. Further, individuals sued in their official capacities stand in the shoes of the entity they represent. A suit against an individual in his official capacity is the equivalent of a suit against the governmental entity.

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

HN4[] Private Suits

Eleventh Amendment immunity is not absolute. Congress may abrogate a state's immunity pursuant to its *Fourteenth Amendment* powers, or a state may waive its immunity. But absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State. Congress has not abrogated Kentucky's immunity from *Fair Labor Standards Act* claims.

Labor & Employment Law > Wage & Hour Laws > Remedies > Private Suits

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

HN5[] Private Suits

A state may waive immunity in a number of ways. First, it may waive immunity expressly, by very clearly articulating its consent to be sued in federal court. Second, a state may waive its immunity through its litigation conduct. Kentucky has not clearly consented to federal court jurisdiction over *Fair Labor Standards Act* claims.

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

HN6[] Waiver of Immunity

Though the Sixth Circuit has not specifically articulated its view on whether removal of a federal claim constitutes waiver of immunity, two Sixth Circuit decisions. Montemagno stated that Lapides is limited to state law claims for which the state has waived or abrogated its immunity from damages claims in the state trial courts. Dantz recognized the holding of Lapides was limited o the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings. Another case mentions that the Lapides court did not go so far as either to treat the *Eleventh Amendment* immunity defense as one, like the defense of lack of personal jurisdiction, that can be permanently waived when a State fails to raise the objection at the outset of proceedings. These decisions encourage the court to

conservatively apply the Lapides holding.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > Waiver of Immunity

HN7[] **Motions to Dismiss**

To avoid waiver, a state should generally invoke its sovereign immunity as a threshold defense, usually by way of a motion to dismiss under *Fed. R. Civ. P. 12(b)(1)*.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Federal Questions

HN8[] **Federal Questions**

Federal courts are courts of limited jurisdiction. In order to hear a suit, the court must have subject-matter jurisdiction over it. *28 U.S.C.S. § 1331* provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction

HN9[] **Supplemental Jurisdiction**

A federal court that has dismissed a plaintiff's federal-law claims should not ordinarily reach the plaintiff's state law claims.

Counsel: [*1] For Stephen Burke, Landry Collett, Jason Fuqua, Ryan Gosser, Randall Honeycutt, Matthew Hutti, Jason McCowan, Michael Sandbrink, Kenny Yarber, Mark Combs, Martin Wesley, Plaintiffs: Edward L. Yancy, LEAD ATTORNEY, Lexington, KY.

For Kentucky State Police, Rodney Brewer, In his official capacity as Kentucky State Police Commissioner, Defendants: Matthew J. Johnson, Morgain M. Sprague, Perry R. Arnold, LEAD ATTORNEYS, Kentucky State Police Legal Office, Frankfort, KY.

Judges: Gregory F. Van Tatenhove, United States District Judge.

Opinion by: Gregory F. Van Tatenhove

Opinion

MEMORANDUM OPINION & ORDER

Various current and former Kentucky State Police officers and Commercial Vehicle Enforcement officers, who have at some point been assigned duties as K9 officers, bring suit against the Kentucky State Police and Commissioner Rodney Brewer for increased overtime compensation related to their care and maintenance of the police dogs. The Defendants have moved for summary judgment on the Plaintiffs' claims, and for the reasons that follow, the Court GRANTS the Defendants' motion as to *Fair Labor Standards Act* claim and REMANDS the Plaintiffs' remaining state law contract claim for further consideration by the state court.

I

[*2] A

The nine Plaintiffs are currently employed, or within the last three years have been employed, as either Commercial Vehicle Enforcement ("CVE") or Kentucky State Police ("KSP") K9 officers. [R. 1-3 at 4.] As K9 officers, the Plaintiffs have or previously had "full responsibility for the care, custody, control, and maintenance of their respective canine charges." [*Id.*] The dogs reside at the officers' personal residences, and the Plaintiffs indicate that all K9 CVE and KSP officers have various responsibilities above and beyond those duties related to the dogs' handling in the field. [*Id.* at 5.] According to the Plaintiffs, their personal "canine maintenance" duties include activities such as feeding, grooming, bathing, training, medicating, and transporting the dogs to veterinarians. [*Id.*] To facilitate care of the dogs outside of the time the dogs are actually used for work-related duties, K9 officers are currently compensated for an additional five hours of work per week. [R. 18 at 2-3.]

In March 2014, the Plaintiffs filed suit against the KSP and Commissioner Rodney Brewer in his official capacity in Franklin Circuit Court, seeking increased

compensation for their care of the dogs. [R. 1-3.] **[*3]** [R. 1.] The Plaintiffs seek overtime wages on two separate theories. Count One of the Plaintiffs' complaint alleges a violation of the *Fair Labor Standards Act*, specifically *29 U.S.C. § 207*. [R. 1-3 at 7-8.] Count Two of the Plaintiffs' complaint seeks relief based on a settlement agreement, stemming from a 2000 Kentucky Personnel Board action to which CVE, but not KSP, was a party.[1] [*Id.* at 8.] Plaintiffs intend for this cause of action to be read as a breach of contract claim. [R. 19 at 12.] Though not entirely clear from the complaint itself, the Plaintiffs appear to be arguing the terms of the settlement agreement[2] should apply to them today, despite the KSP takeover of CVE in July 2008. [R. 1-3 at 7; R. 19 at 12-13.]

On April 2, 2014, Defendants removed the Plaintiffs' suit to federal court, **[*4]** based on this Court's federal question jurisdiction of the *Fair Labor Standards Act* claim and supplemental jurisdiction of the additional claim. [R. 1; *see also* *28 U.S.C. §§ 1331*, *1367*.] Defendants then moved for summary judgment on both claims. [R. 18.]

B

HN1[] Under *Federal Rule of Civil Procedure 56*, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56*. A fact's materiality is determined by the substantive law, and a dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

HN2[] In deciding a motion for summary judgment, the Court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. The burden is initially on the moving party to inform "the district court of the basis of its motion, and [to identify] those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of a material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once **[*5]** this burden is met, the nonmoving party, "must set forth specific facts showing that there is a genuine issue for trial." *Fed.R.Civ.P. 56(e)*. Further, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989)*. Instead, "the non-moving party has an affirmative duty to direct the Court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *In re Morris, 260 F.3d 654, 665 (6th Cir. 2001)*.

II

A

HN3[] In general, states are immune from claims brought against them by private persons in federal court. *See, e.g.*, *Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)*; *U.S. Const. amend. XI*. *Eleventh Amendment* immunity extends to a public agency if "said agency or institution can be characterized as an arm or alter ego of the state." *Hall v. Med. Coll. of Oh., 742 F.2d 299, 301 (6th Cir. 1984)*. In this case, Kentucky State Police is an arm of the state, entitled to the same *Eleventh Amendment* immunity as the Commonwealth of Kentucky. *See Barnes v. Hamilton, 946 F.2d 894*, [published in full-text format at *1991 U.S. App. LEXIS 24593*] 1991 WL 203113, at *2 (6th Cir. 1991) (unpublished); *Baughman v. Brooks, No. 5:15-cv-29-JMH, 2015 U.S. Dist. LEXIS 82514, 2015 WL 3916150, at *2 (E.D. Ky. June 25, 2015)*; *Fleming v. Kentucky State Police, No. 3:09-35-DCR, 2010 U.S. Dist. LEXIS 20495, 2010 WL 881907, at *2-3 (E.D. Ky. March 5, 2010)*. Further, Commissioner Rodney Brewer, who is sued solely in his official capacity, is the functional equivalent of the KSP for purposes of this lawsuit. *See* *Alkire v. Irving, 330 F.3d 802, 810 (6th Cir. 2003)* ("Individuals sued in their official capacities stand in the shoes of the entity they represent); **[*6]** *Matthews v. Jones, 35 F.3d 1046, 1049*

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[1] Kentucky State Police assumed control of Commercial Vehicle Enforcement in July 2008. [R. 1-3 at 7.] Thus, KSP itself was not a party to the Kentucky Personnel Board action relied upon by the Plaintiffs.

[2] The parties identify this agreement as an October 17, 2000, settlement, arising from the Kentucky Personnel Board action *William Adams et al. v. Transportation Cabinet*, Appeal Nos. 99-344, 99-345, 99-349, and 99-350.

(6th Cir. 1994) ("A suit against an individual in his official capacity is the equivalent of a suit against the governmental entity."). Accordingly, both Defendants are entitled to Eleventh Amendment immunity from suit in federal court, unless an exception applies.

HN4[] Eleventh Amendment immunity is not absolute. Congress may abrogate a state's immunity pursuant to its Fourteenth Amendment powers, *see* Alden v. Maine, 527 U.S. 706, 756, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999), or a state may waive its immunity, *see* Sossamon v. Texas, 563 U.S. 277, 284-85, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011). "But absent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State." Va. Office for Prot. & Advocacy v. Stewart, 563 U.S. 247, 254, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011). Congress has not abrogated Kentucky's immunity from Fair Labor Standards Act claims. *See Jackson v. Comm., 129 F.3d 1264 (6th Cir. 1997)*; Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996), *modified*, 107 F.3d 358 (6th Cir. 1997). The relevant question, then, is whether the state has somehow waived its immunity from FLSA suits.

HN5[] A state may waive immunity in a number of ways. First, it may waive immunity expressly, by very clearly articulating its consent to be sued in federal court. *See* Sossamon, 563 U.S. at 284-85. Second, a state may waive its immunity through its litigation conduct. Lapides v. Bd. of Regents, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002); Ernst v. Rising, 427 F.3d 351, 358 (6th Cir. 2005). Kentucky has not clearly consented to federal court jurisdiction over FLSA claims. *See Jackson, 129 F.3d 1264*; *see also* Berry v. Office of the Fayette Cnty. Sheriff, No. 5:14-356-DCR, 2014 U.S. Dist. LEXIS 160596, 2014 WL 6390174, at *1 (E.D. Ky. Nov. 14, 2014). The Plaintiffs, however, argue KSP waived immunity not expressly but impliedly through its litigation conduct—namely, **[*7]** by removing the lawsuit to federal court. [*See* R. 19 at 8-10.]

The Circuit Courts are split as to whether voluntarily removing a lawsuit to federal court constitutes a waiver of the state's immunity. Confusion over the issue stems from the United States Supreme Court's 2002 decision Lapides v. Board of Regents. 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806. In that case, a professor employed by the Georgia state university system filed a lawsuit in a Georgia state court, alleging various federal and state civil rights violations. Id. at 616. The state—which had already waived immunity in Georgia state court pursuant to a state statute—voluntarily removed the case to federal court, attempting to seek Eleventh Amendment immunity. *Id.* The Supreme Court found it unfair for the state to "regain immunity" by removing the case; focusing on "the judicial need to avoid inconsistency, anomaly, and unfairness" through litigation conduct, the court concluded the state's removal waived its Eleventh Amendment immunity. Id. at 620-24. Towards the start of its opinion, the court indicated an intent to limit its holding to the factual framework presented by *Lapides*: "[i]t has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." **[*8]** Id. at 617.

Courts across the country have interpreted *Lapides* in different ways. Some have emphasized the limit on the *Lapides* holding expressed above. These courts refuse to find a waiver of immunity where a state removes a federal claim for which it has not waived immunity in its own courts. Bergemann v. Rhode Island Dept. of Environmental Mgmt., 665 F.3d 336 (1st Cir. 2011); Stewart v. North Carolina, 393 F.3d 484 (4th Cir. 2005); Watters v. Wash. Metro. Area Transit Authority, 295 F. 3d 36, 42 n. 13, 353 U.S. App. D.C. 36 (D.C. Cir. 2002). In *Stewart*, the Fourth Circuit determined that *Lapides* did not apply because North Carolina had never consented to suit in its own state courts. 393 F.3d at 487-90. Therefore, the state did not seek to "regain" any immunity by removing the case to federal court, and the concern about "unfair tactical advantages" in *Lapides* was essentially irrelevant. Id. at 487, 490. The court held North Carolina could "employ removal in the same manner as any other defendant facing federal claims." Id. at 490. Similarly, the First Circuit found in *Bergemann* that, where Rhode Island was immune from suit in both state *and* federal court, removal did not constitute a waiver of immunity. 665 F.3d at 339-43. The court reasoned:

> In the case at hand, Rhode Island's sovereign immunity defense is equally as robust in both the state and federal court. Consequently, there is nothing unfair about allowing the state to raise its immunity defense in the federal court after having removed **[*9]** the action. Simply put, removal did not change the level of the playing field.

Id. at 342.

Other circuits have applied *Lapides* more broadly. These courts find the Supreme Court case imposed a general presumption that removal equates consent to jurisdiction, regardless of whether a waiver of immunity

occurred at the state-court level. Lombardo v. Pennsylvania, 540 F.3d 190 (3rd Cir. 2008); Embury v. King, 361 F.3d 562 (9th Cir. 2004); Meyers ex rel. Benzing v. Texas, 410 F.3d 236 (5th Cir. 2005). These courts generally recognize the Supreme Court's statement arguably limiting *Lapides'* holding to factually similar situations, but find the language of the decision to be broad and properly applied to additional factual scenarios. Meyers, 410 F.3d at 242-43 (holding *Lapides* "applies generally to any private suit which a state removes to federal court" because there is no basis for limiting the principles set forth in *Lapides* but "many reasons to apply those principles generally"). The Third Circuit has stated:

> Despite expressly limiting its holding to state-law claims from which immunity has been explicitly waived, the *Lapides* Court utilized broad language regarding waiver and removal. . . . Applying these principles to the matter at hand, we conclude that the Commonwealth waived its Eleventh Amendment immunity from private suit in a federal forum when it voluntarily removed this case to a federal **[*10]** court. When a State, facing suit in its own courts, purposefully requests a federal forum, it expresses a clear intent to waive immunity from suit.

Lombardo, 540 F.3d at 196-97.

In addition, some courts have articulated two types of sovereign immunity, finding a state may waive its Eleventh Amendment immunity by removal but may also retain the distinct possibility of "immunity from liability." Stroud v. McIntosh, 722 F.3d 1294, 1303-04 (11th Cir. 2013); *see also* Trant v. Oklahoma, 754 F.3d 1158, 1171-73 (10th Cir. 2014); Meyers, 410 F.3d at 253-55. While most circuits have taken one of the three positions, the Sixth Circuit, which controls this Court, has yet to take a clear stance. In the absence of binding Sixth Circuit precedent, the Plaintiffs ask the Court to adopt the approach set forth in the Fifth Circuit Meyers case, which accepts the principles found in *Lapides* as generally applicable. [R. 19 at 10.]

The Court hesitates to adopt the Fifth Circuit's approach and is not convinced the Defendants' actions here waived their Eleventh Amendment immunity. **HN6**[↑] Though the Sixth Circuit has not specifically articulated its view on whether removal of a federal claim constitutes waiver of immunity, two Sixth Circuit decisions do mention the limiting language used by the Supreme Court in *Lapides* in other contexts. Agrawal v. Montemagno, 574 F. App'x 570, 573 (6th Cir. 2014) ("*Lapides* is limited to state law claims for which the state has waived or abrogated **[*11]** its immunity from damages claims in the state trial courts."); Dantz v. American Apple Group, LLC, 123 F. App'x 702, 706-07 (6th Cir. 2005) (recognizing the holding of Lapides was "limited 'to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings'"). Another case mentions that the *Lapides* court "did not go so far as either to . . . treat the Eleventh Amendment immunity defense as one, like the defense of lack of personal jurisdiction, that can be permanently waived when a State fails to raise the objection at the outset of proceedings." Ku v. State of Tennessee, 322 F.3d 431, 434 (6th Cir. 2003). These decisions encourage the Court to conservatively apply the Lapides holding.

Further, other Sixth Circuit cases addressing waiver through litigation conduct do not mandate a finding that the Defendants waived their immunity by removing the case to federal court. In *Ku v. State of Tennessee*, the state engaged in extensive discovery, moved for summary judgment, and then raised the immunity issue in a motion for a stay pending appeal of the district court's order. The court found Tennessee waived its immunity, in great part because it never raised the defense until there was already an unfavorable judgment in place against the state. Id. at 432. In *Barachkov v. Davis*, the state raised **[*12]** sovereign immunity in its answer to the complaint but never filed a Rule 12(b)(1) motion to dismiss, failed to raise the issue of immunity in its motion for summary judgment, but did raise the issue in its reply brief. 580 F. App'x 288, 300 (6th Cir. 2014). The court found the state had not waived its immunity, because the state's "somewhat belated assertion of sovereign immunity" did not appear to be a "strategic decision." *Id.* Distinguishing *Ku*, the court held the state's "litigation conduct was neither unfair nor inconsistent, and it cannot be said that its dilatory assertion of sovereign immunity was but a tactical decision." *Id.*

The matter at hand is more like Barachkov than like Ku. The Defendants did not waive their Eleventh Amendment immunity at the state-court level before removing the suit to federal court, and nothing indicates they have been unduly slow in raising the defense. Though they do not assert immunity as a defense in their answer and never filed a Rule 12(b)(1) motion to dismiss, they did not file any motions to dismiss the case on the merits either. *See id.* Further, their motion for summary judgment is chiefly concerned with the

Eleventh Amendment immunity issue. The Defendants do not ask the Court to consider the merits of the FLSA claim; they ask to be found **[*13]** immune from it altogether, suggesting their motion for summary judgment in reality acts as the same "threshold defense" that would normally be styled as a motion to dismiss. *See* Nair v. Oakland Cnty. Comm. Mental Health Auth., 443 F.3d 469, 476 (6th Cir. 2006) (indicating that, ***HN7***[] to avoid waiver, a state should generally "invoke its sovereign immunity as a threshold defense, usually by way of a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure").

Overall, the Court does not find anything inconsistent or tactically unfair about allowing the Defendants to assert Eleventh Amendment immunity for the federal claim which they permissibly removed to federal court. Another Eastern District of Kentucky court has also adopted a conservative approach to the application of *Lapides* and, while not binding precedent, the Court finds its reasoning persuasive. *See* Crawford v. Lexington-Fayette Urban Cnty. Govt., No. 06-299-JBC, 2007 U.S. Dist. LEXIS 2567, 2007 WL 101862, at *4-6 (E.D. Ky. Jan. 10, 2007) (adopting the Fourth Circuit's limited view of *Lapides* rather than the Fifth Circuit's broader stance). The Court cannot find the Defendants waived their immunity by removal when they could have asserted the same defense at the state level. "Because [the state] has consistently maintained its immunity to FLSA claims (wherever brought), the state did not waive its immunity by removing the instant action to **[*14]** federal court." Bergemann, 665 F.3d at 343. Accordingly, the Plaintiffs' FLSA claim against Defendants is hereby DISMISSED.

B

HN8[] Federal courts are courts of limited jurisdiction. In order to hear a suit, the Court must have subject-matter jurisdiction over it. *See, e.g.,* Thornton v. Southwest Detroit Hosp., 895 F.2d 1131, 1133 (6th Cir. 1990) (explaining a "federal court lacks authority to hear a case without subject matter jurisdiction"). The Plaintiffs' FLSA claim was removable to this Court because the claim arises under federal law. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). The Plaintiffs' second claim, for breach of contract related to the Kentucky Personnel Board settlement agreement, is not a federal question but rather was removed to this Court on the basis of supplemental jurisdiction. *See* 28 U.S.C. § 1367 ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."). Without the federal question FLSA claim, however, there is no longer a basis for **[*15]** supplemental jurisdiction over the breach of contract claim.

Having already dismissed the claim arising under federal law, any remaining state law claims are best reserved for the state courts. *See, e.g.,* Moon v. Harrison Piping Supply, 465 F.3d 719, 728 (6th Cir. 2006) (holding that ***HN9***[] "a federal court that has dismissed a plaintiff's federal-law claims should not ordinarily reach the plaintiff's state law claims") (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)). Accordingly, the Plaintiffs' breach of contract claim found in Count Two of the complaint is properly REMANDED.

III

Therefore, and the Court being otherwise sufficiently advised, it is hereby **ORDERED** as follows:

1. The Defendants' Motion [R. 18] is **GRANTED** as to Count One of the Plaintiffs' Complaint;

2. Count One of the Plaintiffs' Complaint regarding the alleged Fair Labor Standards Act violation is **DISMISSED WITH PREJUDICE**;

3. Count Two of the Plaintiffs' Complaint regarding the 2000 settlement agreement is **REMANDED** for further consideration by the state court;

4. Any pending motions [R. 35; R. 36; R. 44] are **DENIED, AS MOOT**;

5. The upcoming Final Pretrial Conference and Jury Trial are **CANCELLED**; and

6. This case is **STRICKEN** from the Court's active docket.

This the 27th day of January, 2016.

/s/ Gregory F. Van Tatenhove

Gregory F. Van **[*16]** Tatenhove

United States District Judge

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EXHIBIT I

Brown v. Tenn. Dep't of Labor & Workforce Dev.

United States Court of Appeals for the Sixth Circuit

April 2, 2003, Filed

No. 02-6047

Reporter
64 Fed. Appx. 425 *; 2003 U.S. App. LEXIS 6452 **

ROBERT LOUIS BROWN, Plaintiff-Appellant, v. STATE OF TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF WORKERS' COMPENSATION; ATTORNEY GENERAL, STATE OF TENNESSEE, Defendants-Appellees.

Notice: [1]** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: Middle District of Tennessee. 02-00751. Haynes. 8/9/02.

Disposition: Affirmed.

Core Terms

Appeals, review a decision, district court, workers' compensation, immunity, civil rights action, state court, state trial, frivolous, contends, monetary

Case Summary

Procedural Posture

Plaintiff workers' compensation claimant appealed an order of the United States District Court for the Middle District of Tennessee, which dismissed his civil rights action filed under *42 U.S.C.S. § 1983*.

Overview

This case arose from the dismissal of a state court action, where the claimant sought workers' compensation benefits. In the instant case, he sought monetary relief against the State's department of labor, workers' compensation department, and attorney general. The instant court concluded that the district court properly dismissed the complaint. The State and its agencies were immune from liability for monetary damages under the *Eleventh Amendment*. Further, the attorney general was entitled to absolute immunity, as he was an advocate for the State by defending the State in the claimant's civil action in state court. Finally, the instant court did not have the responsibility of reviewing the decision of the State's supreme court.

Outcome
The district court's order was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **De Novo Review**

The district court's order dismissing a civil rights action filed pursuant to *42 U.S.C.S. § 1983* is reviewed de novo.

Civil Procedure > Dismissal > Involuntary Dismissals > General Overview

HN2[] A case is frivolous if it lacks an arguable basis in law or in fact.

Governments > State & Territorial Governments > Claims By & Against

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Civil Procedure > Remedies > Damages > Monetary Damages

Constitutional Law > State Sovereign Immunity > General Overview

HN3[] **Claims By & Against**

Tennessee and its agencies are immune from liability for monetary damages under the *Eleventh Amendment*.

Counsel: ROBERT LOUIS BROWN, Plaintiff - Appellant, Pro se, Nashville, TN.

For STATE OF TENNESSEE DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT, DIVISION OF WORKERS' COMPENSATION, ATTORNEY GENERAL, STATE OF TENNESSEE, Defendants - Appellees: E. Blaine Sprouse, Office of the Attorney General, Nashville, TN.

Judges: Before: BOGGS, SUHRHEINRICH, and SILER, Circuit Judges.

Opinion

[*425] ORDER

Robert Louis Brown, a pro se Tennessee resident, appeals a district court order dismissing his civil rights action filed pursuant to *42 U.S.C. § 1983*. This case has been referred to a panel of the court pursuant to *Rule 34(j)(1), Rules of the Sixth Circuit.* Upon examination, this panel unanimously agrees that oral argument is not **[**2]** needed. *Fed. R. App. P. 34(a)*.

Seeking monetary relief, Brown sued the Tennessee Department of Labor, its Workers' Compensation Department, and the Attorney General of Tennessee. The action arose from the dismissal of a state court action where Brown sought workers' compensation benefits. The state trial court dismissed the suit for lack of subject matter jurisdiction and the Tennessee Court of Appeals affirmed. The district court dismissed the case as frivolous.

In his timely appeal, Brown's brief is construed as arguing that Tennessee has waived its *Eleventh Amendment* immunity; that a state employee committed fraud in his workers' compensation case; and that this court should review the decision of the Tennessee Court of Appeals.

HN1[] The district court's order is reviewed de novo. *See McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997)*. ***HN2***[] A case is frivolous if it lacks an arguable basis in law or in fact. *See Neitzke v. Williams, 490 U.S. 319, 325, **[*426]** 104 L. Ed. 2d 338, 109 S. Ct. 1827 (1989)*.

The district court properly dismissed Brown's complaint. Contrary to Brown's arguments, ***HN3***[] Tennessee and its agencies are immune from liability for monetary **[**3]** damages under the *Eleventh Amendment. See Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472-73, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987)*; *Papasan v. Allain, 478 U.S. 265, 276, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)*; *Berndt v. Tenn., 796 F.2d 879, 881 (6th Cir. 1986)*.

Brown complains of the Attorney General's representation of the state's interest in Brown's state court proceedings. Specifically, Brown contends that the Attorney General filed documents stating that the state could not be sued and that his workers' compensation claim was filed in the wrong court. The state trial court agreed with the Attorney General's position. As the Attorney General was an "advocate" for the state by defending the state in Brown's civil action in state court, the Attorney General's actions were "intimately associated with the judicial phase" of the civil process. Thus, the Attorney General is entitled to absolute immunity in Brown's civil rights action. *See Prince v. Hicks, 198 F.3d 607, 611 (6th Cir. 1999)*. Therefore, Brown's claims against the Attorney General are meritless.

Finally, Brown contends that this **[**4]** court should review the decision of the Tennessee Court of Appeals. This court's responsibility is to review the decision of the federal district court in Tennessee. It is not this court's responsibility to review the decision of the Tennessee Court of Appeals. That responsibility lies with the Supreme Court of Tennessee.

Accordingly, we affirm the district court's order. *Rule 34(j)(2)(C), Rules of the Sixth Circuit.*

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EXHIBIT J

Shuttle Packaging Sys. v. Tsonakis

United States District Court for the Western District of Michigan, Southern Division

December 17, 2001, Decided

Case No. 1:01-CV-691

Reporter
2001 U.S. Dist. LEXIS 21630 *; 2001 WL 34046276

SHUTTLE PACKAGING SYSTEMS, L.L.C., Plaintiff, v. JACOB TSONAKIS, INA S.A., a Greek corporation doing business in the United States, and INA PLASTICS CORPORATION, jointly and severally, Defendants.

Disposition: [*1] Plaintiff's Motion for Preliminary Injunction was denied.

Core Terms

non-competition, manufacturing, purchase agreement, pots, parties, machinery, buyer, email, customers, training, preliminary injunction, Exhibits, Plastics, seller, lines, non-payment, documents, alleges, breach of contract, attachments, terms, likelihood of success, installation, irreparable, complaints, delivery, compete, shipped, specify, double

Case Summary

Procedural Posture
Plaintiff buyer moved for a preliminary injunction restraining defendant sellers from soliciting customers in North America for the purpose of selling equipment subject to a noncompetition agreement contained in a purchase contract between the parties. The buyer alleged breach of the non-competition agreement, and the sellers alleged breach of the purchase contract for failing to make timely payments.

Overview

The buyer purchased a supply thermoforming line equipment from the sellers and alleged various deficiencies in the equipment and support for it. The purchase contract between the parties contained a non-competition agreement which prevented the sellers from selling their equipment and processes in any jurisdiction where the buyer was located. The jurisdiction was not specified, but the evidence showed that the parties believed it to be in the United States. The court denied the buyer's motion for a preliminary injunction, and found that the substance of the dispute was whether the parties were bound by the noncompetition agreement. The court first ruled that the United Nations Convention on Contracts for the International Sale of Goods (Convention), *19 I.L.M. 671 (May 1980)*, governed the controversy except for the issue of the enforcement of the non-competition agreement. The court then ruled that the buyer was not likely to succeed in its case against the sellers because, consistent with the Convention, the sellers could avoid the whole contract because the buyers were in fundamental breach of it for failing to make timely payments due to the sellers.

Outcome
The court denied the buyer's motion for a preliminary injunction against the sellers to enjoin the sellers from soliciting customers to purchase equipment that was covered by a noncompetition agreement.

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN1[] **Preliminary & Temporary Injunctions**

In reviewing a preliminary injunction motion under Fed. R. Civ. P. 65, the court is required to consider four factors: (1) Plaintiff's likelihood of success on the merits; (2) the irreparable harm that could result to Plaintiff if the injunction is not issued; (3) the possibility of substantial harm to others caused by the requested injunction; and (4) the impact on the public interest.

Contracts Law > ... > Discharge & Payment > Defenses > Failure of Consideration

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Modification, Rescission & Waiver

International Law > Sources of International Law

HN2 **Failure of Consideration**

Under the United Nations Convention on the Contracts for the International Sale of Goods, a contract for the sale of goods may be modified without consideration for the modification.

International Law > Dispute Resolution > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

International Law > Sources of International Law

International Law > Treaty Interpretation > Intent > General Overview

International Law > Treaty Interpretation > Particular Treaties > General Overview

HN3 Given the wording of the United Nations Convention on the Contracts for the International Sale of Goods (Convention), federal courts have determined that international sales agreements under the Convention are not subject to the parol evidence rule and are to be interpreted based on the "subjective intent" of the parties based on their prior and subsequent statements and conduct. Convention, arts. 8 and 9.

Mergers & Acquisitions Law > Sales of Assets > General Overview

HN4 Under Michigan law, a non-competition clause relating to the sale of a business is generally enforceable provided that it is reasonable in scope, considering the duration, product and geography of the restriction. The party challenging the non-competition clause bears the burden of establishing its unreasonableness.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Guaranty Contracts

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

International Law > Sources of International Law

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Product Standards

HN5 **Guaranty Contracts**

The United Nations Convention on Contracts for International Sale of Goods (Convention), arts. 38 and 39 require the buyer to examine the goods within as short a period as is practicable in the circumstances and which further state the buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time. The Convention, art. 39 also provides a two-year time period as the outer limit of time for a buyer to notify the seller of a lack of conformity (unless the goods are subject to a longer contractual period of guarantee).

Contracts Law > Breach > General Overview

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Installment Contracts

International Law > Sources of International Law

Business & Corporate Compliance > ... > Sales of Goods > Performance > General Overview

Business & Corporate Compliance > ... > Sales of Goods > Performance > Rights of Buyers

Contracts Law > ... > Secured Transactions > Installment Contracts > General Overview

HN6[] The United Nations Convention on Contracts for the International Sale of Goods (Convention), art. 25 defines a fundamental breach of contract as one which results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. This is a significant definition in that the Convention, art. 64 provides the seller a right to declare the contract avoided due to a fundamental breach of contract. The Convention affords the buyer a right to avoid the contract under the Convention, art. 49 for a fundamental breach. It likewise affords both buyer and seller the right to suspend or avoid an installment contract due to fundamental breach under the Convention, arts. 71-73. The Convention, art. 64 is also specifically worded to give the implication that non-payment of the purchase price is the most significant form of a fundamental breach by a buyer, since, as to a serious non-payment, no additional notifications are required for avoidance of the contract.

Counsel: For Shuttle Packaging Systems, L.L.C., Plaintiff: Valerie P. Simmons, Warner, Norcross & Judd LLP, Grand Rapids, MI.

For Jacob Tsonakis, INA S.A., Defendant: Ronald G. DeWaard, Varnum, Riddering, Schmidt & Howlett, Grand Rapids, MI.

Judges: RICHARD ALAN ENSLEN, United States District Judge.

Opinion by: RICHARD ALAN ENSLEN

Opinion

This matter is before the Court on Plaintiff's Motion for Preliminary Injunction, which was heard on December 11, 2001. The Court now enters this written decision for the purpose of summarizing and publishing its previous findings.

I. PROCEDURAL BACKGROUND

Plaintiff Shuttle Packaging Systems, L.L.C. ("Plaintiff") filed this action against Defendants Jacob Tsonakis, INA S.A. ("INA") and INA Plastics Corp. ("INA Plastics") on October 24, 2001. Plaintiff's sole member is Calvin Diller, who is a citizen of Michigan. This decision refers in many parts to East Jordan Plastics, Inc. ("EJP"), which company is related to Plaintiff by its ownership and operation.

On October 24, 2001, Plaintiff filed motions for a temporary restraining order and preliminary injunction. By Order of October 25, 2001, this **[*2]** Court denied the Motion for Temporary Restraining Order on the ground that Plaintiff had not shown that it was likely to sustain irreparable harm before the Motion for Preliminary Injunction could be heard. The Order also set the Motion for Preliminary Injunction for hearing on December 6, 2001. Due to scheduling problems, the date was later scheduled for December 11, 2001 at 2:30 p.m. Briefing of the Motion was somewhat delayed owing to the fact that Defendant INA is a Greek corporation with its principal place of business in Athens, Greece. (*See* Stip. and Order of Dec. 5, 2001, allowing delayed briefing). As such, some of the legal materials mentioned below were not received until December 10, 2001, the last of them being submitted at 5:00 p.m. Nevertheless, the Court thoroughly reviewed the materials in advance of the hearing by reading them through midnight December 10, 2001.

II FACTUAL BACKGROUND

A. Allegations of Complaint and Answer

Plaintiff's Verified Complaint alleges that on November 1, 2000, it agreed to a purchase agreement with Defendants. Plaintiff alleges that under the purchase agreement Defendants were required to supply thermoforming line equipment **[*3]** for the manufacture of plastic gardening pots together with the technology and assistance to use the equipment. (Plaintiff's Complaint at P 8.) The equipment included a "double line" having an annual output capacity of 1,800,000 lbs. and a "trade gallon line" having an annual output capacity of 3,270,000 lbs. (*Id.* at P 9.) The aggregate purchase price for the equipment was $ 1,200,000 for the double line and $ 1,800,000 for the trade gallon line. (*Id.* at 10.) The Contract also included other terms relating to payment schedules, non-competition,

warranties, notices, expenses, interest, and an integration clause. (*Id.*, Exhibit A--purchase agreement.) The non-competition term did not include the specific terms for non-competition, but required the further execution of a non-competition agreement. (*Id.*) Although it was not alleged in the Complaint, the Court notes for clarification sake that, based on other exhibits filed by the parties and their briefing, the trade gallon line was intended to manufacture 2.5 liter pots and the double line was intended to manufacture 11 centimeter pots on one line and 4 inch pots on the other line.

According to the Complaint, on November 2, 2000, the **[*4]** parties entered into a non-competition agreement which contained various covenants of the seller not to engage in selling its equipment and processes within the "Restricted Area," not to disclose its technical manufacturing processes to others, and not to disclose or use trade information and customer lists of the buyer. (*See* Complaint, Exhibit B--Non-competition Agreement.) The non-competition agreement contained no covenants for the buyer, but listed the payment of the purchase price under the purchase agreement as the consideration. (*Id.*) The "Restricted Area" was defined as "any jurisdiction throughout the world where the Company is, or in which Seller has reason to know the Company expects to engage in, the Business. The jurisdictions included in the Restricted Area as of the date of this Agreement are listed on Schedule I hereto." (*Id.* at P 1a.) No Schedule I was attached to the document. Plaintiff interprets the "Restricted Area" as North America. The non-competition agreement also stated that it was to be interpreted and enforced in accordance with the laws of the State of Michigan. (*Id.* at P 11.)

Plaintiff's Complaint is stated in three state law counts, each **[*5]** premised on diversity jurisdiction. Count One alleges breach of the non-competition agreement and specifically that Defendants are soliciting customers of Plaintiff in North America for the purpose of selling equipment subject to the agreement. Count Two alleges breach of the purchase agreement and more specifically both that Defendants have not provided all of the services required under the agreement and that the equipment has not performed as promised. Count Three alleges a breach of warranty as to the equipment in that the equipment was not in good working order, did not manufacture to the contract specifications and failed to meet industry standards for manufacturing. Count One is pertinent to the request for Preliminary Injunction since it includes the request that the Court temporarily and permanently enjoin violation of the non-competition agreement.

Defendants have also answered the Complaint. The Answer contests most of the factual allegations, but admits jurisdiction and venue. The Answer also contends that Defendant INA Plastics has dissolved and is no longer in business. Plaintiff, during hearing, further clarified that jurisdiction was proper in that Plaintiff had only **[*6]** one member, Calvin Diller, who is a citizen of Michigan.

B. Plaintiff's Affidavits and Exhibits

Plaintiff's Complaint was verified by Calvin Diller, the President and CEO for Plaintiff. Nevertheless, the Complaint does not contain many specific factual allegations which are helpful to understand the factual background for this controversy. Plaintiff has, however, filed other affidavits, including the affidavits of Gary Gurizzian, Mark Lercel, Wayne DeCamp, and Alan Druskin. The affidavits include other attachments.

Gary Gurizzian is the CFO for Plaintiff and the Financial Projects Manager at EJP. (Gurizzian Aff. at P 1.) EJP is located in East Jordan, Michigan, which is also Plaintiff's principal place of business. (Complaint at P 3.) Gurizzian states in his affidavit that Jacob Tsonakis, the President of INA, made representations to him, Calvin Diller and Al Druskin concerning the plastic technology manufacturing equipment sold by his company in July 2000. (*Id.* at PP 3 and 4.) Gurizzian further states that EJP then provided a loan or advance of funds of $ 600,000 with the idea that the parties, EJP and INA, would form a joint venture. (*Id.* at P 5.) The joint venture **[*7]** did not occur, but Shuttle was formed in place of EJP as a possible participant in the joint venture. (*Id.* at PP 5-6.) The parties eventually settled on a purchase agreement for the equipment instead of a joint venture. (*Id.* at P P 6-8.) At the time of the purchase agreement, a contract term requiring non-competition was critical to Plaintiff. (*Id.* at P 9.) Plaintiff has made payments on the equipment consistent with the payment schedule in the contract. (*Id.* at P 17.) The double line was delivered on January 25, 2001, which was after its scheduled date of December 18, 2000. (*Id.* at P 19a.) Upon delivery, Plaintiff discovered that the equipment had been damaged in shipping. (*Id.* at P 19b.) These circumstances required Plaintiff to order pots from INA for sale to its customers instead of manufacturing the pots itself. (*Id.* at P 19c-d.) Due to constant failure of the equipment, Plaintiff suspended payment to INA. (*Id.* at P 20-21.) Gurizzian believes (for

unspecified reasons) that INA is competing in the North American market and underselling Plaintiff, so as to cause Plaintiff an undeterminable financial loss and so as to threaten Plaintiff's business **[*8]** viability. (*Id.* at P 23-28.)

Mark Lercel is the manufacturing engineer for EJP and has served as a consultant for Plaintiff relating to the performance of the purchased equipment. (Lercel Affidavit at PP 1-2.) In his Affidavit, Lercel catalogs a long list of problems concerning the equipment. He lists and describes problems in some 19 sub-paragraphs concerning the trade gallon line's installation, delivery, documentation, tooling, working condition and performance. (*Id.* at P 3.) He lists and describes problems in some 13 sub-paragraphs relating to the double line's design, working condition, guarding, tooling, documentation and performance. (*Id.* at P 4.) He lists and describes problems in 7 sub-paragraphs relating to the training and instructions provided as to both lines. (*Id.* at P 5.)

Wayne DeCamp was the Director of Manufacturing at EJP and is now the Director of Manufacturing for Plaintiff. (DeCamp's Affidavit at 1.) Like Lercel, DeCamp provides a catalog of the problems experienced by Plaintiff with the equipment. (*Id.*) This catalog, for the most part, reiterates the problems described by Lercel in his Affidavit. (*See id.* at PP 3-5).

Alan Druskin is **[*9]** the Vice President of Marketing of EJP and by an administrative agreement also manages the marketing of Plaintiff. (Druskin Affidavit at P 1.) Druskin worked with Jacob Tsonakis to solicit sales for Plaintiff. (*Id.* at P 2.) Druskin claims "on information and belief" that Tsonakis solicited customers of Plaintiff for his own business beginning in February 2001 and made his products available to these customers at prices which undercut Plaintiff's prices. (*Id.* at PP 4-6.) According to Druskin, he has been told by his customers that they will buy from INA instead of Plaintiff because of the cost difference. (*Id.* at P 9.)

C. Defendants' Affidavit and Exhibits

Defendants have filed the very lengthy Affidavit of Jacob Tsonakis, which includes some 185 numbered paragraphs and some 67 attachments. The attachments are mostly either documents pertinent to the case or email communications between the corporate actors involved in this case. Paragraphs 1-9 of the Affidavit give Tsonakis' general education and background and describe his development of the thermoforming technology and its use by INA to make gardening pots at more competitive prices. (Tsonakis Affidavit at **[*10]** PP 1-9.) Paragraphs 10-26 of the Affidavit describe the manner in which Tsonakis has developed thermoforming manufacturing lines for the production of the pots, including descriptions of the equipment used in the lines. (*Id.* at PP 10-26.) Paragraphs 27 through 33 describe the events giving rise to the approval of the purchase agreement. Those paragraphs describe those events in a similar manner to Plaintiff's representatives' descriptions. However, one important difference is that Defendant indicates that he engaged in tele-facsimile correspondence with Calvin Diller on September 28, 2000 in which he indicated that the lines might not be completed until January 15, 2001. (*Id.* at P 32 and Exhibit 1.) The January date was used because much of the described equipment, which was quite large, needed to be shipped by container ship from Greece to the port of Charleston and then shipped by truck to the Plaintiff's plant in Forest City, North Carolina.

Paragraphs 34 through 44 of the Affidavit provide Tsonakis' version of events relating to the approval of the purchase agreement. Most notably Tsonakis attaches a copy of the purchase agreement which he approved, initialed and telefaxed **[*11]** to Plaintiff. Tsonakis' version consists of 9 nine pages, including a Schedule A and C. Tsonakis asserts that Plaintiffs' version of the Agreement, which included replacement pages, was not approved by him as indicated by his failure to initial the replacement pages. Tsonakis also asserts that there never was agreement as to a Schedule B (which Tsonakis did not want to approve) nor as to a Schedule D (which was not created at that time). (*Id.* at PP 34-44 and Exhibit 2.)

Paragraphs 45 through 54 of the Affidavit describe the approval of the non-competition agreement. According to Tsonakis, he inquired of Gurizzian why the balance of the down payment of $ 450,000 had not been sent. When he asked this question, Gurizzian told him that the balance would not be paid until he agreed to the terms of a non-competition agreement. When he reviewed the proposed agreement, he told Gurizzian that the term relating to the "Restricted Area" was unreasonable because it referred to any jurisdiction in the whole world. Gurizzian responded that he should not be concerned since the document was "simply something 'for the file.'" Tsonakis then faxed a signed and initialed copy to Gurizzian. The copy **[*12]** referenced did not include a Schedule I, the schedule describing more particularly the jurisdictions referenced in the agreement. After receiving the balance of the

down payment from Plaintiff, Tsonakis turned over his customers in the United States to Plaintiff (though he did not deem himself required to do so). (*Id.* at PP 45-54 and Exhibit 3.)

Paragraphs 55 through 66 of the Affidavit provides Tsonakis' version of events relating to the delivery of the trade gallon line in the Forest City plant in early 2001. (*Id.* at PP 55-66.) Paragraphs 67 through 74 also relate to the installation of the trade gallon line. According to those paragraphs, certain accessory equipment was not part of the contract and Tsonakis advised Plaintiff of this, without objection, upon his arrival to install the equipment. According to Tsonakis, the only defect in the machinery, a bent cabinet from damage in shipping, was quickly repaired. (*Id.* at P 64-74.)

Paragraphs 75 to 91 of the Affidavit relate to the negligent operation of the trade gallon line, which Tsonakis claims to have witnessed during his assistance at the plant. According to Tsonakis, the machinery was unsafe and inefficient due **[*13]** to Plaintiff's refusal to purchase necessary accessories for the machinery. (*Id.* at P 75.) Also, according to Tsonakis, Plaintiff attempted to use the machinery without a mixer by having employees attempt to manually mix 700 pounds per hour of molten plastic with a shovel over the hot extruder of the line. (*Id.* at PP 78-81.) These compromises caused problems with the homogeneity of the plastic, lack of quality control, and other production problems. (*Id.* at PP 75-91.) Plaintiff's production also suffered from high turnover of the work force and the drug addiction of one key employee who operated the lines. (*Id.* at PP 85-89.) According to Tsonakis, there was a shortage of employees to operate the second line when it arrived in March 2001. (*Id.* at P 90.) Tsonakis also explained in paragraphs 92 through 99 that Plaintiff had some production problems because its workers ignored his production engineer's advice to use some virgin material in mixtures and to avoid contaminants. (*Id.* at PP 92-99 and Exhibits 17-22.)

Paragraphs 100 to 115 of the Affidavit describe the training by INA. This training included the employment of two Greek engineers in the Forest City plant **[*14]** for a five-month period. (*Id.* at P 100.) Tsonakis includes in his various statements relating to training references to email by employees of Plaintiff, which email acknowledge the adequacy of the training. (*Id.* at PP 104-114 and Exhibits 26-29.) Tsonakis also offered more training, though the offer was not accepted. (*Id.* at P 115.)

Paragraphs 116-120 contain Tsonakis' complaint that Plaintiff wrongly deducted repair costs for the machinery from contract payments due his company. Tsonakis communicated with Plaintiff on this subject and instructed Plaintiff that the deductions were wrongful in light of paragraph 11 of the purchase agreement--which allocated the buyer's "expenses" to the buyer.

Paragraphs 121 to 137 contain Tsonakis' complaint that Plaintiff failed to make timely payments for pots Plaintiff ordered from INA for Plaintiff's customers. Tsonakis claims that Plaintiff has not made payments when due and now owes $ 116,344.51 for the pots sold. (*Id.* at P 38.) Tsonakis also claims in paragraphs 138-171 that Plaintiff, after the last equipment line was delivered in April 2001, stopped making the progress payments required under the Purchase Agreement despite **[*15]** his many requests for payment. According to Tsonakis, Gary Gurizzian sent an email to him on July 6, 2001 which requested that there be a 90-day moratorium on progress payments in light of issues concerning performance. (*Id.* at P 172 and Exhibit 60.) Tsonakis responded by email, requesting full payment, which was past due by three months. (*Id.* at PP 173-174 and Exhibits 61 and 62.) Tsonakis sent other email requesting payment which were not heeded. This prompted Tsonakis to send Gurizzian an email in early August 2001 advising Gurizzian that since Gurizzian had not made timely payment according to the agreement Tsonakis did not feel bound by the non-competition agreement. (*Id.* at P 181 and Exhibit 66.) Tsonakis also points out that this lawsuit was filed at the deadline for Plaintiff to respond to a letter from the Trade Commissioner relating to the non-payment by Plaintiff. (*Id.* at P 183.) The remainder of the Tsonakis' Affidavit seeks to discount the statements made by Plaintiff's affiants for various reasons including that the statements made were untrue, that the complaints were not premised on duties of INA under the Purchase Agreement, and that the problems were **[*16]** caused by negligence of Plaintiff or third-parties. (*Id.* at PP 184-185.)

D. Defendants' Supplementary Evidence

Defendants have filed supplementary evidence for the purpose of establishing that performance payments were due on the 11 centimeter line. Defendants have also filed the depositions of Plaintiff's affiants for the purpose of cross-examining and testing their testimony.

An examination of the SPS performance documents

(and email documents) generally shows that the 11 centimeter line had been twice successfully tested by Plaintiff such that the second performance payment of $ 90,000 was due under P 2(b)(ii) of the Purchase Agreement. (*See* Defendants' Attachments B and C.) The documents also reiterate that the standard for successful testing was not complete 8 hour shifts of production (which rarely occurred). Rather, the apparent standard was performance meeting or exceeding the performance of the trade gallon lines, which standard had been previously approved in an email by Gary Gurizzian. (*See* Defendants' Attachments B and C.).

An examination of Plaintiff's affiants' testimonies show them to be generally consistent with the affidavits, but also contain **[*17]** many admissions helpful to the Defendants. Wayne DeCamp admitted that the high degree of manual labor associated with Plaintiff's operation of the lines made training difficult. (DeCamp Dep. at 99-100.) He also admitted that the line operated inefficiently due to employee breaks (*id.* at 101-106) and that the four inch line had not been set up and run by Plaintiff (which was required because of Defendants' expectation of the additional performance payment) and that the necessary part to set up the line (the extruder) had been warehoused (*id.* at 162). DeCamp also confirmed his authoring the email attributed to him by Tsonakis, relating to the adequacy of the line training.

Gary Gurizzian's deposition is also somewhat helpful to Defendants' position. He admitted that he had not complained about late delivery or about the failure to include accessory equipment with the lines. (Gurizzian Dep. at 71-74, 22-23.) Gurizzian's credibility on other points is also undermined by his deposition testimony. For instance, his explanation of his spreadsheet analysis concerning the operation of the lines shows it to be mistaken in significant parts. This spreadsheet analysis appears to bill **[*18]** Defendants for the ordinary operation of the machinery, including repair costs, and accessories which were not included within the Purchase Agreement.

E. Hearing Evidence

Parties to this matter were provided an opportunity to present additional evidence and testimony at hearing. However, no witnesses were called at hearing. In fact, the only additional evidence consisted of four exhibits, two by Plaintiff and two by Defendants. Two of these exhibits, Plaintiff's Exhibit 1 and Defendant's Exhibit 1, were admitted only as demonstrative exhibits--to summarize the testimony of witnesses. The remaining two exhibits were documents pertinent to the case. Plaintiff's Exhibit 2 contains equipment purchase terms and related correspondence between the parties near the time of the purchase agreement. Defendant's Exhibit 2 is an email sent to Baucom's Nurseries by Jacob Tsonakis on March 20, 2001, which tends to prove that he had assigned this former customer to Plaintiff. The Court believes that these documents, when read in context, support the Court's factual conclusions concerning this case.

III. LEGAL ANALYSIS

HN1[↑] In reviewing a preliminary injunction motion under *Federal* **[*19]** *Rule of Civil Procedure 65*, this Court is required to consider four factors: (1) Plaintiff's likelihood of success on the merits; (2) the irreparable harm that could result to Plaintiff if the injunction is not issued; (3) the possibility of substantial harm to others caused by the requested injunction; and (4) the impact on the public interest. *Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992)*; *Performance Unlimited v. Questar Publishers, Inc., 52 F.3d 1373 (6th Cir. 1995)*. This evaluation allows the factors to be balanced and focuses on all four factors--rather than any particular factor. *In re De Lorean Motor Co., 755 F.2d 1223, 1228-30 (6th Cir. 1985)*.

A. Likelihood of Success

The first factor, likelihood of success, in this case relates to the likelihood of success of the merits of its claim for injunctive relief to enjoin the violation of the non-competition agreement and, more specifically, to enjoin competition in places in North America wherein Plaintiff is active in selling greenhouse pots. Jacob Tsonakis has not denied that his companies are competing in North America and his email of August 2001 **[*20]** indicated his intent to compete in North America because of Plaintiff's non-payment. Thus, the Court regards that the substance of this dispute is not over whether Defendants are competing, but whether they are bound by the terms of non-competition agreement to not compete in North America.

To begin this discussion, the Court must make an initial and preliminary assessment of the likely source of law to be applied to this controversy. The Court's preliminary assessment is that this controversy is governed by the United Nations Convention on Contracts for the

International Sale of Goods ("CISG"), *19 I.L.M. 671 (May 1980)*, with one exception. The exception is the legal question of the enforcement of the non-competition agreement, which is governed by Michigan law under the parties' forum selection clause. This assessment is based on the several pertinent facts. The United States and Greece are signatories to the Convention. (*See* Defendants' Brief, Exhibit B.) The goods sold in this case are commercial goods of the type subject to the Convention. While the purchase agreement does not specify the application of any body of law as to the purchase, the non-competition agreement **[*21]** specifies the application of Michigan law, but only as to the enforcement of the non-competition agreement. Also, given the law cited by the parties, they are in apparent agreement as to this choice of law.

With this backdrop, the Court must access whether Defendants now have a legal right to compete for this business in North America. Defendants make several arguments in opposition to the Motion. One argument made by Defendants is that the non-competition agreement is ineffective because of lack of consideration for the agreement. This argument fails. First of all, the non-competition agreement was made part and parcel with the purchase agreement and assumed that the consideration for the non-competition agreement was the consideration for the purchase agreement. Second, ***HN2***[⬆] under the Convention, a contract for the sale of goods may be modified without consideration for the modification. *See* CSIG, Art. 29; Michael Van Alstine, 37 Va. J. Int. Law 1 & n.47 (Fall 1996) (reaching this conclusion based on the U.N. Secretariat's Commentary on the Draft Convention, U.N. Doc. A/Conf. 97/5 (1979)).

Another argument made by Defendant is that the non-competition agreement is unenforceable **[*22]** because the document failed to specify the jurisdictions in which seller was required not to compete. This argument is not apt in the context of the Convention and the facts of this case. Although the meaning of the non-competition agreement was confused because the parties never attached the schedule describing the extent of the restrictions, the parties' subsequent conduct and discussions revealed an intent to apply this restriction to the United States' market. (*See* Tsonakis Affidavit P 54, stating that Tsonakis turned over United States' customer list in consequence of the agreement.) Furthermore, ***HN3***[⬆] given the wording of the Convention, federal courts have determined that international sales agreements under the Convention are not subject to the parol evidence rule and are to be interpreted based on the "subjective intent" of the parties based on their prior and subsequent statements and conduct. CSIG, Articles 8 and 9; *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova d' Agostino, S.p.A., 144 F.3d 1384, 1387-1391 (11th Cir. 1998)*. In this case, the statements and conduct of the parties reveal an intent to require Defendants not to compete as to the United States' **[*23]** market. As such, the failure to specify the precise jurisdiction does not render the agreement invalid.

Defendants also make the related argument that the agreement is invalid because the extent of the non-competition clause was too broad. ***HN4***[⬆] Under Michigan law, a non-competition clause relating to the sale of a business is generally enforceable provided that it is reasonable in scope, considering the duration, product and geography of the restriction. *See Woodward v. Cadillac Overall Supply Co., 396 Mich. 379, 240 N.W.2d 710, 714 (Mich. 1976)* (J. Williams, dissenting) (describing general, common law rules); *Vogue Cleaners & Dyers, Inc. v. Berkowitz, 292 Mich. 575, 291 N.W. 12 (1940)*. The party challenging the non-competition clause bears the burden of establishing its unreasonableness. *Alders v. AFA Corp. of Florida, 353 F. Supp. 654, 657 (D. Fla. 1973)*, *aff'd*, *490 F.2d 990 (5th Cir. 1976)*. In this case, Defendants have scarcely argued this point and have made no real showing that the case law and facts of this case requires a conclusion that the non-competition clause is unreasonably broad. The scope of the clause **[*24]** is five years. The territory of the clause, as interpreted, is the United States. The clause relates to the sale of a unique product--a plastics manufacturing line for specialized horticultural products. The clause is typical of agreements of this type, which by their nature intend the sale of the goodwill of the business in addition to the manufacturing machinery. The person to be enjoined--INA--is also a foreign corporation with a lesser interest in competing in the United States than a corporation chartered in the United States. Under somewhat similar facts, the Fifth Circuit in the *Alders* case affirmed a five-year restriction on competition in the United States, Canada and Mexico. Under these circumstances, this defense is unlikely to prevail.

Defendants have also made equitable arguments based upon laches and unclean hands. These arguments, which are not supported by case authority cited, are not persuasive. There has been no extensive delay in the filing of this suit and the Plaintiff's alleged misconduct, principally non-payment, is not such as to warrant the label of "unclean hands." For instance, in *Cleveland*

Newspaper Guild v. Plain Dealer Pub. Co., 839 F.2d 1147, 1155 (6th Cir. 1988), **[*25]** the Sixth Circuit Court of Appeals rejected both defenses and described the "unclean hands" defense as limited to instances of "bad faith." In the Court's judgment, these defenses simply do not apply on the facts of this case.

Defendants' final argument relating to likelihood of success is that the Plaintiff committed the first material breach of the contract and, as such, Defendants are no longer bound by the terms of the non-competition agreement. Defendants also make a related argument that because Plaintiff delayed in complaining about the performance of the equipment, it is not entitled to suspend payment of money owed under the purchase agreement.

This related argument concerns HN5[] Articles 38 and 39 of the Convention, which require the buyer to "examine the goods . . . within as short a period as is practicable in the circumstances" and which further state the buyer "loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time . . . ." Article 39 also provides a two-year time period as the outer limit of time for a buyer to notify the seller of a lack of conformity **[*26]** (unless the goods are subject to a longer contractual period of guarantee).

This related argument fails. The wording of the Convention reveals an intent that buyers examine goods promptly and give notice of defects to sellers promptly. However, it is also clear from the statute that on occasion it will not be practicable to require notification in a matter of a few weeks. For this reason, the outer limit of two years is set for the purpose of barring late notices. In this case, there was ample reason for a delayed notification. The machinery was complicated, unique, delivered in installments and subject to training and on-going repairs. The Plaintiff's employees lacked the expertise to inspect the goods and needed to rely on Defendants' engineers even to use the equipment. It is also wrong to say, in light of this record, that notification did not occur until July 6, 2001. Long before the July 6 correspondence, there was a steady stream of correspondence between the parties relating to the functioning of the equipment which may have constituted sufficient notice of the complaints. The international cases cited by Defendants are not apposite to this discussion because they concern **[*27]** the inspection of simple goods and not complicated machinery like that involved in this case.

Nevertheless, the Court does accept Defendants' contention that the Plaintiff's non-payment of progress payments on the machinery did constitute a "fundamental breach of contract." HN6[] Article 25 of the Convention defines a "fundamental breach of contract" as one "which results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract. . . ." *See* Delchi Carrier v. Rotorex Corp., 71 F.3d 1024, 1028 (2nd Cir. 1995) (discussing definition). This is a significant definition in that Article 64 provides the seller a right to declare the contract avoided due to a "fundamental breach of contract." The Convention affords the buyer a right to avoid the contract under Article 49 for a fundamental breach. It likewise affords both buyer and seller the right to suspend or avoid an installment contract due to fundamental breach under Articles 71-73. Article 64 is also specifically worded to give the implication that non-payment of the purchase price is the most significant form of a fundamental breach by a buyer, since, as to a **[*28]** serious non-payment, no additional notifications are required for avoidance of the contract.

In this case, the buyer has had some legitimate complaints concerning the machinery throughout the delivery and training process. However, on the whole, the Court concludes that the evidence submitted best supports the proposition that these complaints did not constitute either a fundamental or even a substantial breach of the contract by the seller. This is particularly true since the context for this dispute--namely, the machinery has been successfully operated with Defendants' assistance and Plaintiff is a cash-strapped business raising performance questions only after formal inquiries have been made as to non-payment--tends to show that complaints about performance were opportunistic and not genuine in character. On the other hand, the Court determines that it is likely that non-payment of the large sums due for the performance payments was a fundamental breach of contract and that it excused Defendants' performance of non-competition obligations under the purchase agreement and non-competition agreement. As such, the Court concludes that Plaintiff is unlikely to succeed on the merits.

[*29] B. Irreparable Harm to Plaintiff

Plaintiff has cited cases for the proposition that loss of goodwill and loss of business opportunities are the kinds of losses which are irreparable because they cannot

later be sufficiently quantified for damage purposes. *See, e.g.,* *Basicomputer v. Scott, 973 F.2d 507, 511-12 (6th Cir. 1992)*. While the Court agrees with that legal proposition, it finds it inapplicable here. Because the Plaintiff had, most likely, committed a fundamental breach of the contract by nonpayment, it has also most likely surrendered its right to seek enforcement of the non-competition agreement. As such, on the present record, the Court does not find that Plaintiff is likely to suffer irreparable harm because of Plaintiff's own fundamental non-performance of its duties under the contract.

C. Harm to Others

This factor focuses on the harm to Defendants caused by a possible wrongful injunction. The Court believes that this factor sorts out like the other factors above. Namely, since the Plaintiff has, most likely, wrongfully failed to pay amounts due under the contract, the Defendants should not be expected to honor obligations for which **[*30]** they have not been paid. As such, the Court determines that this factor disfavors granting relief.

D. Public Interest

Of course, the public, in the abstract, cares very little concerning which group of manufacturers should manufacture pots in the United States during the course of this lawsuit. However, the public does have an interest in seeing that these pots, which are produced at a more cost-efficient basis than other agricultural pots, are readily available in the market. Thus, the public's interest is best supported by a resolution which would cause both the parties to manufacture pots in the market pending the resolution of this suit. This is particularly true since the Plaintiff's manufacturing abilities have proven suspect such that the market might be jeopardized by licensing the market solely to Plaintiff--a producer who operates its manufacturing on a shoestring budget. Although, as Plaintiff points out, this resolution might threaten its long-term viability, it seems apparent that there are ample threats to Plaintiff's long-term viability even absent denial of this preliminary injunction motion.

IV. CONCLUSION

Accordingly, an Order shall issue denying **[*31]** the Motion for Preliminary Injunction.

DATED in Kalamazoo, MI:

December 17, 2001

/s/ Richard Alan Enslen

United States District Judge

ORDER

In accordance with the Opinion of this date and the Court's previous findings upon hearing of this matter on December 11, 2001;

IT IS HEREBY ORDERED that Plaintiff's Motion for Preliminary Injunction (Dkt. No. 4) is **DENIED.**

Dated in Kalamazoo, MI:

December 17, 2001

/s/ Richard Alan Enslen

United States District Judge

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