UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Ellyn Burnes, *et al*.,	:
Plaintiffs,	: Case No.: 2:08 CV 329
v.	: Judge Graham
Washington County Fair Board, *et al*.,	: Magistrate Judge King
Defendants.	:

PLAINTIIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO STRIKE EXHIBITS AND ALLEGATIONS OF COMPLAINT

I. Introduction.

The Plaintiffs, Ellyn Burnes and Florence Beidler, have been forced to take the extraordinary measure of obtaining counsel and filing an action with this Court to vindicate their basic First Amendment right to march and speak freely in a public parade. Ms. Burnes and Ms. Beidler ["the Plaintiffs"] allege that the County Fair Board and Board President Steve Tornes ["the Defendants"] denied them in 2007, and continue to deny them, permission march in the annual Washington County Labor Day parade. The Plaintiffs further allege that they have been barred from the parade for unconstitutional reasons, because the Defendants disapprove of the Plaintiffs' political viewpoint toward ERAMET, one of the most powerful businesses in the Marietta, Ohio, area—and the employer of Fair Board President Tornes.

Now, oblivious to the obvious irony of their position, counsel for the Defendants have filed a Motion to Strike those portions of the Plaintiffs' Complaint that even mention

ERAMET (according to the Motion, the entirety of paragraphs One, Two, and Ten of the Complaint, as well as Exhibit A attached to the Complaint), as "immaterial, impertinent, or scandalous matter" within the meaning of Rule 12(f). Apparently, the Defendants would have this Court rewrite the Plaintiffs' Complaint to exclude not only information relevant to the claim that Defendants have imposed a viewpoint-based, prior restraint on speech, but also to eliminate important allegations concerning the precise speech that the Plaintiffs sought to utter on September 1, 2007: the T-Shirt message, banners, and educational information that Defendants by their unlawful actions prevented from being communicated by Plaintiffs during the 2007 Labor Day parade (all described in paragraph 10 of the Complaint). Because this is precisely the sort of "dilatory or harassing tactic" that Wright and Miller describe Rule 12(f) as often being used for, this motion should be "viewed with disfavor" by the Court and denied in its entirety. 5C C. Wright & A. Miller, *Federal Practice and Procedure*, §1380 (3d Ed. 2004)[Hereinafter, "Wright & Miller."]

II. <u>Standard for Granting Motion to Strike.</u>

The weight of authority demonstrates that there is a strong presumption against granting motions to strike under Rule 12(f). The Sixth Circuit has explained that "because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking a pleading should be sparingly used by the courts. It is a drastic remedy to be resorted to only when required for the purposes of justice." *Brown & Williamson Tobacco Corp. v. United States,* 201 F.2d 819, 822 (6th Cir. 1953) (internal citations omitted). This demanding standard has sound policy justifications as well: if Rule 12(f) motions to strike were freely granted, parties would be encouraged to file them all the time in an effort to "gut" their opponent's pleading or to eliminate damaging allegations at the earliest stage possible, before their significance was fully

apparent. Thus, such a motion should only be granted "when the pleading to be stricken has no possible relation to the controversy." *Id.*

In the sole substantive case relied on by the Defendants in support of their motion, the Western Division of this Court stated that motions to strike “are generally disfavored” and should be denied unless the allegations have both, “no possible relation to the controversy and may cause prejudice to one of the parties.” *U.S. Diamond & Gold v. Julius Klein Diamonds LLC*, No. C-3-06-371, 2007 U.S. Dist. LEXIS 23076, *34 (S.D. Ohio March 28, 2007)(emphasis supplied), citing *Schultz v. Braga,* 290 F.Supp.2d 637, 655 (D.Md. 2003), *aff'd,* 455 F.3d 470 (4th Cir. 2006). Cases are legion throughout the federal court system that this high standard is the correct one. *See* 5C Wright Miller §1380 at notes 9 & 10 (citing cases stating that motions to strike are disfavored and should be rarely granted). Applying this standard to the allegations at issue in the instant case, it is apparent that the Defendant’s motion should be denied.

III. Argument.

A. The Defendants’ motion to strike should be denied because it fails to identify any scandalous material as required under Rule 12(f), or any possible prejudice to Defendants from the Complaint.

The Defendants allege that Paragraphs One, Two, and Ten in the Complaint, and Exhibit A, are somehow “scandalous.” [Doc. 6 at 5-6.] In normal English usage, this word refers to matters that are “offensive to propriety or morality,” or “shocking.” *Webster’s Seventh New Collegiate Dictionary* (1971). Indeed, on the rare occasion that a judge of this court has granted a motion to strike, the material at issue was plainly scandalous: in the context of a garden-variety negligence action, plaintiffs inappropriately included allegations that the defendant was involved in a scandal to upgrade diamond certifications in exchange for bribes. *U.S. Diamond & Gold v. Julius Klein Diamonds LLC*, No. C-3-06-371, 2007

U.S. Dist. LEXIS 23076, *35-*37 (S.D. Ohio March 28, 2007)("allegations of JKD's involvement in the scandal are highly prejudicial to JKD"). *See also Alvarado-Morales v. Digital Equipment Corp.,* 843 F.2d 613 (1st Cir. 1988)(striking as scandalous descriptions of the defendant using "repugnant words" such as "concentration camp," "brainwash" and "torture"). Such uses of Rule 12(f) are consistent with the examples commonly given in first-year Civil Procedure classes to illustrate situations where a Rule 12(f) motion to strike might be appropriate, as for instance when the plaintiff alleges that "not only did the defendant breach the contract, he also cheated on his wife by having an affair with the office manager." In such situations, it is evident that the "scandalous" material is included for no reason other than to shock and embarrass the other side.

By contrast, the Court will search in vain for a single statement in the Plaintiffs' complaint or in Exhibit A that is "scandalous" in any sense of the word, or even disparages the Defendants (apart from alleging that they have acted in violation of the Constitution). Paragraph One of the Complaint provides basic background information about the parties and concisely (in a single sentence) seeks to describe the reason that Neighbors for Clean Air have organized in Marietta, Ohio: to combat pollution that they believe is emitted by the ERAMET plant. Paragraph Two outlines the expressive activities in which Neighbors for Clean Air and the Plaintiffs have engaged in the past, and contemplate continuing in the future. To the extent that the Defendants appear to construe as "scandalous anything in the complaint that even implicitly criticizes ERAMET," it is worth noting that Paragraph Two actually states that the Neighbors for Clean Air have "commended ERAMET for its initial efforts to reduce pollution." As for Paragraph Ten of the Complaint, the Plaintiffs are at a complete loss to identify anything that could conceivably be construed as "scandalous" even under the rarified standards that Defendants employ. Paragraph Ten describes much of the

proposed speech that forms the gravamen of the Plaintiffs' Complaint. There is nothing that is in the least bit annoying in this paragraph, let alone profane, insulting, obscene, or outrageous. The only possible explanation for the Plaintiffs' motion is that it is an attempt to remove important allegations about the Defendants' actionable behavior from the Complaint that if successful, might later form the basis for a motion to dismiss for failure to state a claim. The Court should not countenance such a strategy.

Finally, Defendants' seek to strike Exhibit A to the Complaint, the Neighbors for Clean Air's Citizen Audit of Erament, on grounds that it is "scandalous." [Doc. 6 at 2-5.] Frankly, the Plaintiffs are puzzled by the Defendants' characterization. While the report does state that ERAMET has released specific pollutants in amounts that are higher than those stated as safe for community exposure by federal regulators, the document is measured and professional in its tone. Exhibit A seeks to corroborate these contentions with objective data gleaned from ERAMET's Toxic Release Inventory, a document compiled by the U.S. EPA pursuant to federal law. In Exhibit A, Neighbors for Clean Air commend ERAMET for improvements that it has made to lower pollution and further seek to engage the company in a dialogue with members of the community and public officials. The Exhibit includes no libelous material about the Defendants, or even (if that were relevant) about ERAMET. The press release from Marietta Memorial Hospital and the newspaper article attached to Exhibit A are included in the Exhibit because they corroborate the high incidence of cancers, particularly lung cancer, in Washington County. Taken as a whole, Exhibit A simply provides relevant background information about the content and history of the Plaintiffs' expressive activity concerning ERAMET which the Washington County Fair Board sought to squelch when it prevented the Plaintiffs from participating in the 2007 Labor Day Parade.

Given that the Defendants have failed to identify anything in the Complaint that is even vaguely critical of them (apart from descriptions of their suppression of the Plaintiffs' speech), the motion must be denied for failure to show that the Complaint prejudices them in any way. *E.g., Julius Klein Diamonds, infra,* at *35-36 (motion should be denied unless the allegations . . . may cause prejudice to one of the parties"); *Williams v. Hawkeye Community College*, 494 F. Supp. 2d 1032, 1043 (D. C. Iowa, 2007)(denying motion to strike because no showing made of prejudice to defendants); *FRA S.p.A. v. Surg-O-Flex of Am., Inc.*, 415 F.Supp. 421, 427 (S.D.N.Y.1976) ("Unless it is clear that the portion of the pleading . . . will prejudice the defendant, the complaint should remain intact").

B. The Defendants' motion to strike fails to identify any allegations in the Complaint that are "immaterial" or "impertinent" as required under Rule 12(f).

Although the Defendants' motion should be denied because it fails to identify any material that is scandalous or otherwise prejudicial to Defendants, the Defendants are also incorrect that the Complaint includes "immaterial" or "impertinent" information. Defendants seek to prop up their "immateriality" argument by setting up the flimsiest of straw men: they contend that this case is about nothing more than the Plaintiffs' desire to be permitted to display a "slogan" at the Labor Day Parade. [Doc. 6 at 5-6.] By defining the Plaintiffs' contemplated speech so narrowly; they then argue that the only facts "relevant" to Plaintiffs' action are those relating to the slogan being uttered on the day of the parade.

This argument fundamentally mischaracterizes the nature of the Plaintiffs' cause of action. It misapprehends the Plaintiffs' goals in seeking to march in the parade (as the Complaint states, the Plaintiffs sought to march, to hand out educational literature, and to engage the people of Marietta in a continuing dialogue about issues surrounding ERAMET, *see* Complaint at ¶10). Perhaps more importantly, it displays a crabbed vision of the scope

of the First Amendment, which is designed to protect not mere "sloganeering," but the right to effect social change through a variety of expressive activities. Those hostile to the Civil Rights movement in the 1960's might have likewise claimed that Dr. King was just seeking to display a slogan (*e.g.,* "I am a Man"), rather than to engage in a broader dialogue about the role of Negroes in American society.

When considered against the broad canvass of the First Amendment, it is evident that the challenged aspects of the Complaint are highly relevant. Paragraph One's description of the parties and overview of the controversy contains basic, necessary information that is contained in every Complaint with which the undersigned counsel are familiar. Paragraph Two contains allegations that are especially relevant to Plaintiffs' claims for injunctive relief: the Plaintiffs have organized to engage in expressive activity regarding ERAMET in the past, and this makes it plausible to believe that they will continue to do so at future parades. It provides important information about the context within which this law suit arose, since Plaintiffs believe that the Defendants barred the Plaintiffs from marching at least in part because assumptions about their past communications (one representative of the Board was quoted in the local news stating that the Board banned the Plaintiffs because it "did not want the negativism." *Marietta Times,* Sept. 5, 2007). Paragraph Ten contains allegations that go to the very heart of this cause of action: it describes the T-shirts that the Plaintiffs sought to wear in the parade, the banner they intended to carry, and the speech that they proposed to engage in with onlookers. It would be hard to imagine a more material paragraph in the Complaint.

Finally, Exhibit A, including the newspaper article about cancer rates, contains important background information describing to the sort of speech that Neighbors for Clean Air have uttered in the past. This is especially relevant because the Defendants have

argued in defending their actions that they had banned the Plaintiffs from marching because they had "no idea" what sort of expressive activities the Plaintiffs might engage in. Defendant Tornes was even quoted by a Marietta reporter as saying of the plaintiffs' request to march, "they could be handing out pornography." Clearly, Exhibit A demonstrates the serious, scientific nature of Plaintiffs' past speech, a fact that is obviously relevant to rebutting this sort of nonsensical charge. Moreover, courts have frequently held that in the absence of prejudice, there is no reason to strike from a pleading historical background information that is useful to the Court. *See, e.g., Coffin v. South Carolina Dep't of Social Services,* 562 F. Supp. 579 (D.C. S. C. 1983)(allegations regarding plaintiff's earlier actions that allegedly caused defendants to retaliate against them was not immaterial); 5C Wright & Miller § 1382 (a rule 12(f) motion to strike "will be denied if the allegations might serve to achieve a better understanding of the plaintiff's claim for relief or perform some other useful purpose").

IV. Conclusion.

The Plaintiffs' Complaint contains none of the sort of scandalous, redundant, or immaterial allegations that Rule 12(f) was designed to prevent. Defendants' real problem appears to be that by highlighting the speech that the Plaintiffs' sought to engage in, the Complaint "publicize[s]" the views of Neighbors for Clean Air about possible pollution by ERAMET. [Doc. 6 at 4.] In effect, Defendants are attempting to use the Rules of Civil Procedure to achieve the same illegitimate goal that they accomplished when they silenced the Neighbors for Clean Air on September 1, 2007. The Plaintiffs respectfully urge this Court not to permit such a perversion of the Civil Rules—the Motion to Strike should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2008 this entire document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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