IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

JASON GONZALES,	)	
	)	
Plaintiff,	)	Case No. 16 C 7915
	)	
v.	)	Judge Matthew J. Kennelly
	)	
MICHAEL J. MADIGAN, *et al.*	)	
	)	
Defendants.	)	

MOTION TO STRIKE WITH PREJUDICE
DEFENDANTS' FIRST AFFIRMATIVE DEFENSE

NOW COMES Plaintiff, JASON GONZALES, by and through his counsel, and, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, moves this Honorable Court to strike with prejudice Defendants' First Affirmative Defense. In support of this Motion, Plaintiff states as follows:

In this proceeding, Defendants have almost exclusively focused their discovery on a contention that in the 2016 Primary Election Plaintiff was "a party outsider sent to infiltrate the Democratic Party" and his purported affiliation and coordination with the Republican Party. (Dkt. No. 170, p. 11). But such a contention has never been specifically pleaded by Defendants, thereby preventing Plaintiff from (1) pinning down precisely what defense in law was being asserted or (2) moving to have that defense stricken as insufficient in law.

To flush the game from the bush, Plaintiff filed a Motion to Quash against a series of deposition subpoenas issued to third parties. (Dkt No. 169). In the Motion to Quash, Plaintiff asserted that Defendants' apparent rationale for the third party discovery was an affirmative defense of "justification" that was not pleaded and therefore no basis for issuing subpoenas.[1]

[1] A justification defense is defined as "a maintaining or showing a sufficient reason in court why the defendant did what he is called upon to answer . . ." *Black's Law Dictionary*.

Defendants' Response to the Motion to Quash was an exercise in double-talk. The defense asserted that "Defendants have not filed a 'justification' affirmative defense because they are not asserting a 'justification' defense." (Dkt No. 170, p. 9). But later in the Response Defendants contradicted themselves, asserting that "the more evidence that discovery yields demonstrating that Plaintiff is affiliated with Republicans and party outsiders, the more important Defendants' First Amendment right to exclude Plaintiff from the nomination becomes." (Ibid at p. 11).

Defendants pointed to their First Affirmative Defense as the basis for the subpoenas. But the text of the defense contains elements of justification:

> Plaintiff's claims are barred or limited because the imposition of a judgment in favor of Plaintiff and against any Defendant would violate the First Amendment to the United States Constitution by infringing, and imposing adverse consequences based on, each Defendant's exercise of his or her right to participate in the political process to either support or defeat a political candidate, including (but not limited to) the acts alleged by Plaintiff that form the basis for his complaint. Those rights are protected at all times, but are especially subject to First Amendment protection where, as in this case, the acts alleged involve conduct related to a partisan primary election in which a political party was engaged in choosing its nominee to run for public office.

(Answer to Second Amended Complaint, Dkt. No. 97 at p. 81)(emphasis added).

Defendants have even admitted in open court that they are pursuing a defense of justification. In pretrial proceedings on July 5, 2018, the following colloquy occurred between the Court and defense counsel:

> THE COURT: This wouldn't be a defense that you didn't do it. It's a defense that you did it and we had a darn good reason to because it was -- it was basically -- it was basically a mole from the other side trying to infiltrate the Democratic primary. I'm being rather colorful about that, let's just say.
>
> MR. RIZZO: I think that is one strategy that we have.

Exhibit "A". Defendants can engage in verbal gymnastics as they wish but their claimed defense

plainly is legal justification.

As will be shown, the First Affirmative Defense cannot stand. First, it is not the short and plain statement required by Rule 8, as Defendants fail to plainly state the defense in the pleading. Second, the Defense contains no factual allegations at all, much less facts which demonstrate a viable defense. Third, the purported defense has no basis in law given Defendants' unlawful conduct. The First Affirmative Defense must be stricken with prejudice.

While the Seventh Circuit Court of Appeals holds the view that motions to strike defenses are generally disfavored, the Court of Appeals recognizes that such motions sometimes can "serve to expedite, not delay," when a motion acts to "remove unnecessary clutter from the case." *Heller Fin. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir.1989). Further, affirmative defenses are subject to a motion to strike when they are "insufficient on the face of the pleadings." *Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1400 (7th Cir.1991). The First Affirmative Defense is both insufficient on its face ***and*** "clutter," for it is an empty allegation designed to put Plaintiff on trial before the jury, all without basis in the Federal Rules or law.

I. DEFENDANTS' FIRST AFFIRMATIVE DEFENSE FAILS TO MEET THE ADEQUATE NOTICE REQUIREMENT OF F.R.CIV.P. 8.

Affirmative defenses are pleadings, subject to all pleading requirements of the Federal Rules of Civil Procedure including the requirement of a "short and plain statement" that adequately puts the plaintiff on notice of the defense. Fed.R.Civ.P. 8(a); *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286 (7th Cir. 1989). The meandering and evasive First Affirmative Defense does no such thing. Defendants obfuscate their defense by stating it backwards, claiming not that their actions were justified or privileged under the First Amendment, but that a judgment by this court against them would be a constitutional deprivation of their First Amendment rights by a state agency. The pleading must be stricken.

II. DEFENDANTS' FIRST AFFIRMATIVE DEFENSE FAILS TO PROVIDE FACTS UNDERLYING THE DEFENSE AS REQUIRED BY F.R.CIV.P. 8.

Rule 8 requires "a short and plain statement of the facts upon which the affirmative defenses could be maintained." *Nat'l Acceptance Co. of Am. v. Regal Products, Inc.*, 155 F.R.D. 631, 637 (E.D. Wis. 1994). A Rule 12(f) motion admits only well pleaded facts, so mere conclusions of law made without well pleaded facts are ineffective. *U.S. v. 416.81 Acres of Land*, 514 F.2d 627 (7th Cir. 1975). An affirmative defense made up of "bare bones conclusory allegations" does not meet the requirements of Rule 8. *Nat'l Acceptance, supra.* Instead, Defendants must provide factual allegations sufficient to raise the asserted defenses above the "speculative level." *Malibu Media, LLC v. Doe*, 13 C 3648, 2014 WL 2581168, at *2 (N.D. Ill. June 9, 2014)(Kennelly, J.), citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007).[2]

Here, application of Rule 8 is simple: no facts are alleged at all. The Third Amended Complaint contains no facts in support of the defense. Accordingly, Defendants have failed to come forward with facts, requiring that the defense be stricken.

III. UNDER FEDERAL LAW, DEFENDANTS' CLAIMED "POLITICAL PLANT" JUSTIFICATION IS NO DEFENSE TO PLAINTIFF'S CLAIM FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS.

Defendants' claimed "defense" is not a defense in law and must be stricken on a simple ground that should be self-evident: the First Amendment provides no defense to persons who use otherwise protected speech or expressive conduct to engage in unlawful conduct. *Nat'l Org. for Women, Inc. v. Scheidler*, 86 C 7888, 1997 WL 610782, at *29 (N.D. Ill. Sept. 23, 1997),

[2] To the knowledge of Plaintiff after research, the Seventh Circuit has never ruled on whether an affirmative defense must meet the pleading tests of *Twombly* and *Ashcraft v. Iqbal*, 556 U.S. 662 (2009). District Court precedent remains split. *Cf. Malibu Media, supra,* and *Sarkis' Cafe, Inc. v. Sarks in the Park, LLC*, 55 F. Supp. 3d 1034, 1040 (N.D. Ill. 2014) (applying *Twombly*) with *McKinley v. Rapid Global Business Solutions, Inc.*, 2017 WL 2555731, at *1 (S.D. Ind. June 13, 2017)

citing, Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 388–89, 93 S. Ct. 2553, 2560–61, 37 L.Ed.2d 669 (1973). "First Amendment rights may not be used as the means or the pretext for achieving 'substantial evils' which the legislature has the power to control." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 514, 92 S. Ct. 609, 613, 30 L.Ed.2d 642 (1972). In *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 705–06, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986), a municipality ordered the closure of a book store selling adult books on the conclusion that solicitation of prostitution was occurring on the premises. The shop claimed that the municipal order violated its First Amendment rights. The Court gave this short shrift:

> In any event, this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders.

Arcara v. Cloud Books, Inc., 478 U.S. 697, 705–06, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986).

Defendants cannot be heard to state the outrageous contention that the First Amendment is a license to rig an election. Defendants' alleged conduct was unlawful as a matter of law. *Smith v. Cherry,* 489 F.2d 1098 (7th Cir. 1973). Those assuming the effective mantle or procedures of the state in order to take private action to manipulate the outcome of a primary election by unlawful means, by whatever motive, are not subject to First Amendment protection. *Terry v. Adams,* 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152 (1953). The claimed defense is no defense at all.

Even Defendants' claimed "legal right" does not exist. In the Response, Defendants

attempted to justify their conduct under the well-established principle under the First Amendment that "a political party has a right to exclude outsiders from its primaries," citing *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000).[3] In so doing, however, Defendants overlooked the facts that (1) they are not political parties; (2) Defendants Madigan, Rodriguez and Barbosa ran in the 2016 Primary as candidates, not political parties; (3) Defendants never "excluded" Plaintiff from the Primary since he appeared on the Primary ballot; (4) Defendants' purported exercise of "First Amendment rights" was to engage in unlawful conduct; and (5) that the *Jones* case, which dealt with a party's right to conduct an "open" or closed" primary election, is utterly inapposite on its facts, as this Court recognized in open court at hearing on the Motion to Quash. The cited precedent does not come close to protecting the purported rights of a few conspirators acting to rig a primary election in favor of one candidate.

In their Response to the Motion to Strike, Defendants articulated an alternative formulation that Plaintiff's "affiliation and coordination with the Republican Party means he had no constitutional right to participate in the 2016 Democratic primary." (Dkt. No. 170, p. 11). The statement is just a troubling version of justification: since Plaintiff had no First Amendment right to participate, Defendants had license to rig a public election against him.

Defendants cited "authority" in the Response consisted of two quotes lifted completely out of context from factually inapposite cases. The first quote was from the *Jones* case, already deemed completely inapposite by this Court. The second quote was from the equally inapposite case of *Maslow v. Bd. of Elections*, 658 F.3d 291 (2d Cir. 2011). *Maslow* addressed the propriety of a New York statute that limited circulators of petitions for primary ballots to "enrolled voter[s] of the same political party as the voters qualified to sign the petition." N.Y.

[3] See also *Tashjian v. Republican Party of Connecticut*, 79 U.S. 208, 213-17, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1989).

Elec. Law § 6-132(2). Under Illinois law, however, a candidate for State Representative need only be over 21 years of age, be a United States citizen and be a resident of the district for two years preceding the election and a registered voter. Illinois Constitution, Article IV, Section 2(c). Section 8-8 of the Illinois Election Code sets out the applicable candidate filing requirements. Nothing in the section creates any requirement of state party registration, voter history or "loyalty." 10 ILCS 5/8-8 (2016). For a candidate to be on the primary ballot, Section 8-8 requires only that that the candidate files proper papers and obtain a specified number of valid signatures on nomination petitions from registered voters of the district. 10 ILCS 5/8-8(2016). Further, Defendants have offered no internal bylaw or other provision within the Democratic Party that creates requirements other than those in the Illinois Election Code, much less one that authorizes unlawful action to "protect the party."

Thus, for Mr. Gonzales there were no requirements of party affiliation, prior voting or party registration to run in the 2016 Democratic Primary for State Representative. Because Plaintiff's candidacy was completely legal, Defendants held no "right" to interfere other than by the lawful means of debate and communication to primary voters in the election campaign. Defendants chose an unlawful path, leaving them outside of the First Amendment. The purported "defense" must be stricken with prejudice.

WHEREFORE, Plaintiff, JASON GONZALES, respectfully requests that this Honorable Court strike with prejudice Defendants' First Affirmative Defense and grant Plaintiff such other and further relief as this Honorable Court deems appropriate in the premises.

Respectfully submitted,

JASON GONZALES

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