IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE SHERWIN-WILLIAMS COMPANY,	:	
	:	
PLAINTIFF,	:	
	:	CASE NO. 2:18-CV-04517-NIQA
V.	:	CIVIL ACTION
	:	
THE COUNTY OF DELAWARE, PENNSYLVANIA, *ET AL.*	:	
	:	
DEFENDANTS.	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT WITH PREJUDICE

I. INTRODUCTION:

> ***The preposterous nature of Plaintiff's Amended Complaint is without limit. If I think you might sue me, I will sue you first and ask the Court to restrain you from suing me.*** To enable Plaintiff to prohibit the City of Columbus from considering all of its legal options by retaining lawyers with a particular area of expertise not only would violate the City's legal rights, but would also set a dangerous precedent.

Those words, written over a decade ago, by the City of Columbus' Department of Law in defense of a federal lawsuit brought by The Sherwin Williams Company ("SWC") (plaintiff herein) against that City and others for retaining counsel to investigate and perhaps bring a lawsuit against it, are as true today as they were in 2006. *See* Motion of Defendant City of Columbus to Dismiss Plaintiff's First Amended Complaint at 4, *The Sherwin-Williams Company v. The City of Columbus, OH, et al.*, S.D. Ohio, Nov. 13, 2006) (Doc. 38, No. 2:06-cv-829). (Emphasis added). That case was ultimately dismissed by the United States District Court for the Southern District of Ohio. *See Sherwin-Williams Company v. City of Columbus, OH, et al.*, No. 2:06-cv-829, 2008 WL 839788 (S.D. Ohio Mar. 28, 2008).

The Complaint filed in this case by SWC is almost identical to the one it filed against the City of Columbus and others more than a decade ago and is the culmination of a campaign of intimidation waged against Defendants (and, indeed, every single county in this Commonwealth as revealed by the

inclusion of the defendants: "John Doe Counties"), and amounts to nothing more than an attempt to gain an unfair advantage in anticipated state court proceedings that, as of the filing of this motion to dismiss, are not even of-record. In addition to the fact that the Plaintiff, SWC, was the Plaintiff in the Ohio case, and represented by the same law firm, Jones Day. Put simply, this is both SWC, and their counsel's, "*modus operandi*."

SWC's well-worn and rejected gimmick is on full display here: seek to pre-emptively restrain an as-yet-unfiled state court civil action brought solely under Pennsylvania's state law[1], by asking a federal district court to "liberate" SWC from state court litigation that has not even been initiated. Put simply, SWC wants this Court to somehow pre-emptively stop any Pennsylvania county from suing SWC.

Accordingly, there is no lofty goal at issue here for SWC. The goal of the litigation is not vindication of SWC's nebulous due process or first amendment rights. Rather, the goal of this litigation is much more insidious: it is to deter every single county in the Commonwealth of Pennsylvania from bringing any lawsuit against SWC in order to have the presence of lead paint in residential properties declared a public nuisance under Pennsylvania law.[2] Indeed that goal was achieved, twice, in the first 30 days after this case was filed. On November 9, 2018, 18 days after the filing of the Complaint, SWC filed a Notice of Voluntary Dismissal Without Prejudice as to Erie County Defendants Only. (Doc. 9). That Notice states:

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[1] In fact, SWC admits in its Complaint that the claims at issue in the unfiled state case "are based on an application of state law;" (*id.*, at ¶ 87, p. 30); that they are pled and must be measured "under Pennsylvania law," (at ¶ 15, p. 9) and that the "public nuisance" theory animating the claims at issue in the unfiled state court case are governed by "Pennsylvania law;" (*id.*, at ¶ 85 at p. 29).

[2] One need only look at the caption of the Complaint to know this so. SWC named three separate counties as defendants in this case: Delaware, Erie, and York. *See* SWC Complaint (Doc. 1) at 4. Not satisfied with using its scare tactics against solely those three counties, SWC also names as defendants "John Doe Counties." *Id* at 5. Nevertheless, at paragraph 38 of its Complaint, SWC defines "John Doe Counties" not merely as all of the 64 remaining counties in the Commonwealth of Pennsylvania, but as "all counties, political subdivisions, or municipalities in the Commonwealth of Pennsylvania, except for the Commonwealth of Pennsylvania or any of its departments or agencies or the counties of Montgomery and Lehigh. . ." *Id.* at 17; ¶ 38. Apparently SWC's fear-mongering and litigation scare tactics are bounded only by the eleventh amendment.

> Erie County, however, recently has informed Sherwin-Williams that Erie County has rejected private lawyers' representation and otherwise has not intention to file suit against Sherwin-Williams asserting that lead-based paint is a public nuisance. **Because of Erie County's representations to Sherwin-Williams regarding Erie County's *intention not to sue*, Sherwin-Williams, pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), voluntarily dismisses without prejudice, all claims in the above captioned case against only the following Erie County Defendants:** . . . .

Id. at 2 (emphasis added). It is unlikely that any statement could more thoroughly encapsulate both SWC's litigation strategy and the achievement of its goal in such a brief period after filing its Complaint. Nevertheless, the repetition of that exact statement in a separately filed Notice of Voluntary Dismissal Without Prejudice as to York County Defendants Only (Doc. 11)[3], betrays the vexatious and improper purpose for which this case was commenced – to deter, by any means possible, the filing of state court lawsuits based upon the assertion that SWC's lead-based paint constitutes a public nuisance under Pennsylvania's own state law. *Id.*[4]

In asking this Court to intercede on its behalf, SWC seeks an order enjoining a Pennsylvania county's access to Pennsylvania's own Court system. If that were not enough of an affront to the principles of federal-state comity, SWC also asks this Court to enter an order that its affirmative defenses to the County's unfiled claims are meritorious and thus preclude this County (or any other county for that matter) from ever filing a claim against it. In the final insult, SWC (once again under the guise of upholding its Constitutional rights), asks the Court retrospectively to eviscerate an otherwise valid contract between Delaware County and its chosen counsel, without ever attaching the actual contract at issue. Instead, SWC attaches to its Complaint a copy of an unsigned contract with another county (Lehigh) in the Commonwealth and asks this Court to accept (as an article of faith)

[3] There is one difference in the language of the two Notices of Voluntary Dismissal – the names of the respective counties – Erie and York. *Cf.* Doc. 9 *with* Doc. 11.

[4] Accordingly, by November 21, 2018, SWC had secured promises from two of Pennsylvania's 67 counties not to be sued for a declaration that lead-based paint constitutes a public nuisance under Pennsylvania law in exchange for a voluntary dismissal from this case, without prejudice. *Id.*

that the contract between Delaware County and its attorneys is the same (it is not), and based upon that other unsigned contract, to order that all contingency fee contracts between County governments and their chosen counsel are unconstitutional. *See* Exhibit "B" to Plaintiff's Complaint (Doc. No. 1) at pp. 54 – 56. Of course, no law, rule of court, or rule of professional conduct supports such a sweeping argument.

Because there is no pending case filed against SWC and no harm (constitutional or otherwise) has befallen SWC at the hands of the Delaware County Defendants, this Court lacks subject matter jurisdiction, and the present case fails to credibly state a "case" or "controversy" for the purposes of Art. III, § 2 of the U.S. Constitution, as Plaintiff's "anticipatory claims" fail to identify any present concrete injury that can actually be remedied. Finally, Plaintiff fails to state any cause of action upon which relief can be granted. Thus (and for all the reasons that follow), Plaintiff's Complaint must be dismissed with prejudice.

II. FACTUAL AND PROCEDURAL BACKGROUND:

In its most simple and basic terms, this lawsuit was commenced on October 22, 2018 because the Defendants are thinking about and investigating a state court action against SWC and some of them have retained outside counsel to assist them.

This case is facially an action in equity for injunctive and declaratory remedies against Defendants The County of Delaware, Pennsylvania, John P. McBlain, Colleen P. Morrone, Michael Culp, Kevin M. Madden, and Brian Zidek (incorrectly designated as "Brain P. Zidek") ("Delco Defendants" or "Delaware County Defendants") and others for the alleged deprivation of SWC's rights under U.S. CONST. amend. I and for alleged deprivation of its due process rights in violation of U.S. CONST. amend. XIV, §I.[5] The Complaint is pled in three counts and each count alleges a

[5] Delco Defendants presume that SWC has brought Counts II and III of its Complaint pursuant to U.S. CONST. amend. XIV, §I, although no reference to that amendment is found in the Complaint. Instead Defendants merely allege violations of the "Due Process Clause." *See, e.g.*, Doc. 1 at pp. 28; 31.

supposed constitutional harm and presupposes a remedy pursuant to §1 of the Civil Rights Act of 1871, 42 U.S.C. §1983 (2017).[6]

To be clear, this case **does not** seek redress for some injury that has occurred, but rather for some imagined or potential future harm. The objectionable conduct is the anticipated filing of a lawsuit in one of the 60 Courts of Common Pleas in the Commonwealth of Pennsylvania. And while Count III of the Complaint purports to allege a violation of the "Due Process Clause" by the Defendants as a result of executing a contingency fee agreement with outside counsel, no such violation is possible in the absence of an actual lawsuit against SWC, which has not been filed by any of the current Defendants.

Finally, SWC's Complaint names the individual members of the Delaware County Council, John P. McBlain, Colleen P. Morrone, Michael Culp, Kevin M. Madden, and Brian Zidek, solely in their **official** capacities. *See* Compl. (Doc. 1) at pp. 1 -2; 4 at ¶ 4. As such, there was no need to sue them personally, other than to further SWC's improper, fear-mongering and harassing strategy which motivates this case in general.

The Complaint's Background section in approximately 10 pages long, yet and is wholly irrelevant and sounds instead as SWC's affirmative defenses or factual and legal "New Matter"[7] to be plead in response to a Complaint filed by a county against SWC (which none of the Defendants herein have yet done). So, too, the allegations contained in Counts I – III themselves (Compl. at pp. 25 – 33; ¶¶ 73 – 97), are more akin to affirmative defenses or New Matter than actual causes of action or claims. *Id.* It is no accident that almost the entirety of the allegations of the Complaint read like affirmative defenses; in fact, SWC raised these allegations in its losing bid to defend itself against an

[6] The Civil Rights Act of 1871 has alternatively been referred to as the "Enforcement Act of 1871"; the "Third Enforcement Act"; the "Force Act of 1871", the "Ku Klux Klan Act" and the "Third Ku Klux Klan Act." Delco Defendants refer to the act generically throughout in its most modern iteration "section 1983." *See* Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2017).

[7] *See generally* Pa. R. Civ. P. 1030.

actual case in California regarding the application of public nuisance law to lead-based paint in that state. *See People v. Conagra Grocery Prods. Co., et al.*, 227 Cal. Rptr.3d 499 (Cal. Ct. App., Sixth Dist., 2017), *cert. denied sub nom Sherwin Williams Co. v. California*, ___ U.S. ___, 139 S. Ct. 378 (2018)[8]. These defenses were rejected by the trial court and the California Court of Appeals. *Id.* at 529 – 559; and 571 – 572. In addition, SWC repeated the allegations found in this case in its Petition for Writ of Certiorari. *See* Pet. for Writ of Certiorari of The Sherwin Williams Co., No. 18 – 86, 2018 WL 3520856 at *2 - *9; *11 - *34 (U.S. Jul. 16, 2018). Of course, those arguments found no purchase in the Supreme Court of the United States which denied Certiorari on October 15, 2018, only one short week before SWC filed the present case in this Court containing those same rejected arguments. *See Sherwin Williams Co. v. California*, ___ U.S. ___, 139 S. Ct. 378 (2018).

III. STATEMENT OF QUESTIONS PRESENTED

A. Whether this Court lacks jurisdiction over this case either because: there is no "case or controversy;" or this court lacks subject matter jurisdiction to entertain the type of anticipatory requests for advisory relief demanded by SWC?

SUGGESTED ANSWER: YES.

B. Whether the Complaint should be dismissed with prejudice as it fails to state cause of action upon which relief can be granted?

SUGGESTED ANSWER: YES.

IV. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(1):

[8] The verdict in that case after a bench trial was for plaintiffs and against defendants. The Court ordered the creation of an abatement fund totaling more than $1 billion. *Id.* at 514. The California Court of Appeals later reversed the judgment regarding the amount necessary to deposit in the abatement fund and remanded the case with instructions to recalculate that amount. *Id.* at 598. On Petition for Writ of Certiorari to the Supreme Court of the United States (which petition was denied), SWC stated that the parties, including SWC, (represented by the same Jones Day lawyers who filed the instant Complaint) estimated the value of the fund at between $409 million and $730 million. *See* Pet. for Writ of Certiorari of The Sherwin Williams Co., No. 18 – 86, 2018 WL 3520856 at *15 (U.S. Jul. 16, 2018).

Federal Rule of Civil Procedure 12(b)(1) permits defendants to challenge a civil action for lack of subject matter jurisdiction. *Id.* "The district court can grant a Rule 12(b)(1) motion when the claim clearly appears to be immaterial and made solely for the basis of obtaining jurisdiction or is wholly unsubstantial and frivolous." *Sun Co., Inc. (R & M) v. Badger Design & Constructors, Inc.*, 939 F.Supp. 365, 368 (E.D. Pa. 1996) (*citing Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1408-09 (3d Cir. 1991)). "A motion challenging a federal court's subject matter jurisdiction pursuant to FED. R. CIV. P. 12(b)(1) differs from a challenge made pursuant to FED. R. CIV. P. 12(b)(6) (or FED. R. CIV. P. 56) in that it does not afford a plaintiff all of the same procedural safeguards." *Cunningham v. Lenape Regional High Dist. Bd. of Educ.*, 492 F.Supp.2d 439, 446 (D.N.J. 2007) (*citing Robinson v. Dalton*, 107 F.3d 1018, 1021 (3d Cir. 1997)). "[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating the merits of jurisdictional claims." *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). "When subject matter jurisdiction is challenged under Rule 12(b)(1), **the plaintiff** bears the burden of persuasion." *Vidovic v. Losinjska Plovidba Oour Broadarstvo*, 868 F.Supp. 691, 693 (E.D. Pa. 1994) (emphasis added) (*citing Kehr*, 926 F.2d at 1409).

B. Federal Rule of Civil Procedure 12(b)(6):

In *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), the Supreme Court clarified what a complaint must contain to survive a motion to dismiss:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S.Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S.Ct. 1955. **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**. *Ibid.* **Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "** *Id.*, at 557, 127 S.Ct. 1955 (brackets omitted).

Id., citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (emphasis added). The *Iqbal* Court went on to hold that:

> Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. **But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).**

Id. at 679, *citing Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (emphasis added). Accordingly, a plaintiff's obligation to provide the grounds for its entitlement to relief requires more than a legal conclusion, and a formulaic recitation of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 554; *Phillips v. Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). "[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse v. Lower Merion School Dist.*, 132 F.3s 902, 906 (3dCir. 1997) (citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal* 556 U.S. at 678. This standard requires "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

While all well-pleaded facts, as distinguished from conclusory allegations, must be taken as true, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." *Morse*, 132 F.3d at 906 (citations omitted). Additionally, the court need not accept factual allegations if they are patently absurd, *i.e.* their "factual impossibility may be shown from the face of the pleadings." *Twombly*, 550 U.S. at 561. The Court is also not required to assume that the plaintiff can prove facts that are not alleged in the Complaint. *Evancho v. Fisher*, 423 F.3d 347, 354 (3d Cir. 2005) (*i.e.,* as in this case that SWC can prove that Delaware County's contingency fee agreement with counsel is identical or even similar to those of other counties).

Although SWC's Complaint contains lengthy recitations of facts concerning lead paint and the safety of such products, SWC is conspicuously silent about any actionable conduct by the Delaware County Defendants. This is so because the Delaware County Defendants have not yet actually done anything to harm SWC.[9] The failure to set forth the actions allegedly taken by a party in a complaint that purportedly led to a violation of the plaintiff's civil rights clearly warrants dismissal. *See, e.g., Breslin v. City and County of Philadelphia*, 92 F.R.D. 764 (E.D. Pa. 1981) (dismissing complaint that contained no factual or legal allegations against certain defendants). "It is, of course, well established that a defendant in a civil rights case cannot be held responsible for a constitutional violation which he or she neither participated in or approved." *C.H. ex. Rel. Z.H. v. Olivia*, 226 F.3d 198, 210-202 (3d Cir. 2000), *cert. denied*, 533 U.S. 915 (2001).

Indeed, "[t]he omission of a defendant's name from the material allegations of a complaint justifies dismissal of the Complaint against that defendant." *Whittington v. Vaughn*, 289 F. Supp.2d 621, 628 (E.D. Pa. 2003). In *Whittington*, the Court dismissed certain defendants from a civil rights action because the complaint failed to allege that those defendants had any personal involvement in the wrongful conduct at issue. *Id. See also Dolceamore v. Beard*, No. 3-cv-06-0996, 2006 WL 1548857, at *2 (M.D. Pa. May 31, 2006).

In the present case, none of the Delaware County Defendants' names appear in the material allegations of the Complaint. In fact, paragraph 40 of the Complaint states:

> All named Counties, individuals, John Doe Counties, and John Does shall collectively be referred to as "Counties."

Id. at ¶ 40. Given that SWC by its own admission referred to all defendants, named or unnamed, collectively as "Counties," by definition means that the names of the Delaware County Defendants

[9] In fact, one section of SWC's Complaint is entitled: "The Unjustified Imminent Lawsuits." *See* Compl. (Doc. 1 at p. 23).

are omitted from the material allegations of the Complaint since those allegations appear after paragraph 40. For that reason alone, Plaintiff's Complaint should be dismissed.

V. ARGUMENT

A. This Court Lacks Jurisdiction Over This Matter

Instantly, Sherwin-Williams has alleged jurisdiction under a number of different, potentially disparate theories, including: (i) federal question jurisdiction under 28 U.S.C. § 1331; (ii) diversity jurisdiction under 28 U.S.C. § 1332; (iii) civil rights jurisdiction under 28 U.S.C. § 1343(a)(3); and (iv) supplemental jurisdiction under 28 U.S.C. § 1367. (Compl. at ¶¶ 41-43). Yet, Defendants respectfully submit that **all** of these jurisdictional allegations are constitutionally and statutorily insufficient to sustain this Court's jurisdiction.

1. There is No "Case" or "Controversy"

U.S. CONST. Art. III, § 2 confers jurisdiction in the federal courts for "cases" and "controversies." In order to satisfy Article III, the Plaintiff must show: (1) that Plaintiff suffered an "injury in fact," which means an "invasion of a legally protected interest" that is both "concrete and particularized" and "actual and imminent"; (2) a causal connection between the injury and the conduct complained of.; and (3) that a favorable decision would likely redress or remedy the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 - 61 (1992). It is hornbook law that "[t]he party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561 (*citing FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). The United States Court of Appeals for the Third Circuit has similarly held in the context (as here) of declaratory judgments:

> 28 U.S.C. § 2201 allows a federal court to grant a declaratory judgment in "a case of actual controversy." The statute creates a remedy only; it does not create a basis of jurisdiction and does not authorize the rendering of advisory opinions. Thus, the Supreme Court has held that there must be a "live dispute" between the parties, *Powell v. McCormack*, 395 U.S. 486, 517-18 (1969), and there must be a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of

> a declaratory judgment." *Zwickler v. Koota*, 389 U.S. 241, 244 n.3 (1967). The Court has also held that the Declaratory Judgment Act requirement of an "actual controversy" is identical to the constitutional requirement of "cases" and "controversies." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937).

Cutaiar v. Marshall, 590 F.2d 523, 527 (3d Cir. 1979).

Stated as succinctly as possible, SWC has failed to state such a particularized, concrete injury-in-fact for the purposes of demonstrating that either a "case" or "controversy" exists sufficient to satisfy its burden to invoke federal jurisdiction. Throughout its Complaint, the discussion of Delaware County's alleged injurious conduct amounts to nothing more than predictions and hypotheticals, (Compl. Doc. No. 1 at ¶¶ 1, 3-4, 7, 13, 17, 65-66, 68, 78, 86, 88), and utilizes the actions and legal arguments advanced by third parties (*e.g.*, the Counties of Lehigh and Montgomery) as an unsuitable "straw man" for merely anticipated civil claims by the Delaware County Defendants that are not of-record. *Id.* at ¶¶ 1, 7, 9, 11, 38-39, 64-66, 75, 78, 86, 93, 95. In totality, Sherwin-Williams has failed—utterly—to identify a single affirmative action by Delaware County that amounts to injurious conduct.[10] (Now) Chief Judge Sargus of the United States District Court for Southern District of Ohio most succinctly encapsulated SWC's Article III failings when he held in the SWC case against the City of Columbus and others:

> **In this case, the Court concludes that Sherwin–Williams fails to articulate an injury that is both "concrete and particularized" and "actual and imminent." The injury to Sherwin–Williams occurs only in the context of a state court action against it and then, if at all, depending on the claims or defenses asserted. In the Court's view, the fact that an action has been commenced against Sherwin–Williams does not present an immediate injury to Plaintiff sufficient to satisfy Article III.** Sherwin–Williams has the opportunity to raise its First Amendment issues as an affirmative defense to the City of Columbus' claims. **Further, this Court finds**

[10] As an additional example, SWC has advanced ranging allegations of impropriety regarding the fee agreement executed by Delaware County and its counsel admittedly without ever having seen the alleged contract. (*C.f.* Dkt. No. 1 at ¶¶ 4 (stating that Delaware County's fee agreement is "infirm" *with* ¶ 93 admitting SWC has never seen Delaware County's fee agreement).

that the state court is entirely capable of considering such a constitutional challenge.

See Sherwin-Williams Company v. City of Columbus, OH, et al., 2008 WL 839788 at *5 (S.D. Oh. (Eastern Div.) Mar. 28, 2008).

Consistent with the cases discussed above, even assuming, *arguendo*, that Delaware County **had** filed a civil action against SWC, this case would still be jurisdictionally unsound as the entirety of this case is based upon affirmative defenses that can be adequately raised and addressed in state court (when and if Delaware Court's civil action is ever filed). *Accord Sherwin-Williams Company v. City of Columbus, OH, et al.*, 2008 WL 839788 at *5 (S.D. Oh. (Eastern Div.) Mar. 28, 2008).

SWC's claims are equally nonjusticiable because they violate the ripeness doctrine. "The ripeness doctrine helps determine whether a dispute or claim has matured to a point warranting judicial intervention." 13A Charles Allan Wright, *et al.*, FED. PRACTICE AND PROC. § 3532 (2d ed. 1984). "To evaluate ripeness, we must look at the 'fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Doe v. County of Centre, PA*, 242 F.3d 437, 453 (3d Cir. 2001) (*quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). "'A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id.* (*quoting Texas v. U.S.*, 523 U.S. 296, 300 (1998)). Instantly, the words "contingent," "premature," and "unripe" all aptly describe SWC's' Complaint.

2. This Court Lacks Subject Matter Jurisdiction

SWC's ill-conceived Complaint is nothing more than an improper request for an advisory opinion, a premature assertation of affirmative defenses and/or an unripe controversy. Regardless, this Court simply lacks subject matter jurisdiction to entertain it.

a. Affirmative defenses raised in mere anticipation of state law claims do not invoke this Court's subject matter jurisdiction.

One of the bedrock principles of the coextensive judicial systems in the state and federal courts is the unbroken understanding that the jurisdiction of the federal courts found in Article III of the U.S. Constitution is bounded by statute and the Constitution itself:

> Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, *see Willy v. Coastal Corp.*, 503 U.S. 131, 136-137 (1992); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which is not to be expanded by judicial decree, *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951). **It is to be presumed that a cause lies outside this limited jurisdiction**, *Turner v. Bank of North-America*, 4 U.S. 8 (1799), **and the burden of establishing the contrary rests upon the party asserting jurisdiction,** *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 378 (1994) (emphasis added). Since virtually the dawn of our Republic, the federal courts (as guided by Supreme Court precedent cited above) have recognized that (1) the presumption is that, generally, cases lie outside a federal court's limited jurisdiction; and (2) the burden of establishing an exception to the general rule that federal courts lack jurisdiction for cases that would otherwise fit neatly within a state court's general jurisdiction is the party asserting federal jurisdiction, in this case, SWC. *See*, *e.g.*, *Robertson v. Cease*, 97 U.S. 646, 649 (1878) ("As the jurisdiction of the Circuit Court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, the presumption now, as well as before the adoption of the Fourteenth Amendment, is, that a cause is without its jurisdiction unless the contrary affirmatively appears.")

There is no recognized principle of law that permits Sherwin-Williams to anticipatorily immunize themselves against potential state court litigation via the Declaratory Judgment Act.[11] *See*, *e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 143 (2007) ("[T]he Declaratory Judgment Act does

[11] Although Sherwin-Williams has not included a citation to, or discussion of, the Declaratory Judgments Act ("DJA"), 28 U.S.C. § 2201, Defendants respectfully submit that their reliance upon the federal DJA can be presumed based upon SWC's demands for declaratory relief. (Doc. 1 at ¶ 23 and "Prayer for Relief.").

not allow federal courts to give advisory rulings on the potential success of an affirmative defense before a cause of action has even accrued.") (*citing Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (dismissing a case that "attempt[ed] to gain a litigation advantage by obtaining an advance ruling on an affirmative defense")). Sherwin-Williams' Complaint is structured solely as a reactive pleading that does nothing more than speculatively raise a host of anticipated affirmative defensives and factual deflections concerning a civil action that Delaware County has not yet filed. (Doc. No. 1 at ¶¶ 1, 3-4, 7, 13, 17, 65-66, 68, 78, 86, 88) (sampling of paragraphs in which Sherwin-Williams attempts to forecast the nature of an unfiled civil complaint by Delaware County) and asks this Court to adjudicate those factual and legal issues now, thereby preempting any lawsuit any county in this Commonwealth could file against SWC based upon the question of whether lead paint is a public nuisance. In rejecting these exact claims, Chief Judge Sargus held:

> Sherwin–Williams also asserts that, in the § 1983 setting, it is permissible for a Plaintiff to bring suit for state officials' violation of constitutional rights. This is certainly true; **however, in this case, the alleged violation of rights occurs only in connection with the threatened state court actions by the cities. This important, distinguishing factor leads the Court to conclude that it is without subject matter jurisdiction over Sherwin–Williams' request for declaratory relief.** Accordingly, the Court finds the motion to dismiss filed by the Cities of Toledo, East Cleveland and Lancaster, Ohio, meritorious. **The Court notes that it does not pass on the merits of Plaintiff's claims; the issues raised can only be determined in the context of the state-law cases.**

Sherwin-Willliams Co. v. City of Columbus, 2008 WL 839788 at *4.

Not surprisingly, the U.S. Court of Appeals for the Third Circuit has previously found that federal courts lacked jurisdiction to issue anticipatory rulings to allow parties to "test" affirmative defenses to potential state court claims:

> In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 672 (1950), the [Supreme] Court stated that a declaratory judgment action that presented a federal issue did not itself create federal question jurisdiction if it merely anticipated a federal defense. As the [Supreme] Court stated, "[t]o sanction suits for declaratory relief as within the

> jurisdiction of the District Courts merely because, as in this case, artful pleading anticipates a defense based on federal law would contravene the whole trend of jurisdictional legislation by Congress, disregard the effective functioning of the federal judicial system and distort the limited procedural purpose of the Declaratory Judgment Act." *Id.* at 673-74.

Trent Realty Associates v. First Fed. Sav. And Loan Ass'n of Philadelphia, 657 F.2d 29, 32-33 (3d Cir. 1981); *see also*, *e.g.*, *La Chemise v. Alligator Co.*, 506 F.2d 339, 343-44 (3d Cir. 1974) (same). While SWC's Complaint may include "threadbare" references to the U.S. Constitution and federal statutes, at bedrock, its claims for relief necessarily depend upon the unknown content of filings in a state court action by Delaware County that are not only not of record, but nonexistent in any Court. Moreover, the position taken by SWC necessarily requires this Court to determine the merits of various affirmative defenses in a case over which it would, otherwise, have no subject matter jurisdiction. *See, e.g.,* Compl. at ¶¶ 9, 29-30.

The Supreme Court of the United States has already concluded that federal district courts lack subject matter jurisdiction to entertain such anticipatory requests for advisory relief:

> [T]he propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power. While the courts should not be reluctant or niggardly in granting this relief in the cases for which it was designed, they must be alert to avoid imposition upon their jurisdiction through obtaining futile or premature interventions, especially in the field of public law. **A maximum of caution is necessary in the type of litigation that we have here, where a ruling is sought that would reach far beyond the particular case.** Such differences of opinion or conflicts of interest must be 'ripe for determination' as controversies over legal rights. **The disagreement must not be nebulous or contingent but must have taken on fixed and final shape so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them.**
>
> * * *
>
> **Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our**

> **federal system. . . . It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected.** *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945). Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism.
>
> * * *
>
> **Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law.**

Pub. Serv'c Comm'n of Utah v. Wycoff Co., Inc., 344 U.S. 237, 243-45 (1952) (Jackson, J.) (emphasis added); *see also*, *e.g.*, *Wyatt, Virgin Islands, Inc. v. Gov't of the Virgin Islands*, 385 F.3d 801, 808 (3d Cir. 2004) ("In essence, the dispute between the parties is contingent upon events that may not occur at all or may occur differently than anticipated."). Instantly, the viability and merits of SWC's claims are quite literally dependent upon events that have not yet occurred, filings not yet transmitted, and legal arguments not yet made. Worse yet, SWC's only claims for relief relate to anticipated claims by Delaware County that admittedly can only arise under Pennsylvania state law. *See, e.g.,* Compl. at ¶¶ 9, 29-30.

The abject lack of concrete factual and legal allegations against the Delaware County Defendants evinced throughout SWC's Complaint would transform any on-the-merits decision

rendered by this Court into guesswork and sow the potential for the precise unintended consequences against which the courts in *Wycoff*, *La Chemise*, *Trent*, and *Wyatt* warned. Whether conceived of as an improper request for an advisory opinion, a premature assertion of affirmative defenses, or an unripe controversy, this Court simply lacks subject matter jurisdiction to entertain SWC's claims for relief under the guiding precedent of the Supreme Court of the United States, the Third Circuit and other federal courts.[12]

b. <u>This Court lacks subject jurisdiction pursuant to either 28 U.S.C. § 1332 or 28 U.S.C. § 1367</u>

Further highlighting SWC's contemptuous, scattershot and imprecise pleadings is the fact that it has also alleged that this Court has jurisdiction over this matter pursuant to both 28 U.S.C. § 1367 and/or 28 U.S.C. § 1332. *See* Compl. at ¶¶ 41 - 42. To be perfectly clear, SWC's Complaint is plead in three counts:

> Count I – Declaration That the Counties' Claims Violate the First Amendment. (Compl. at pp. 25 – 28; ¶¶ 72 – 81);[13]
>
> Count II – Declaration That the Counties' Claims Violate the Due Process Clause. (Compl. at pp. 28 – 31; ¶¶ 82 – 91);[14] and
>
> Count III – Declaration That the Counties' Contingency Fee Agreements Violate the Due Process Clause. (Compl. at pp. 31 – 33; ¶¶ 92 – 97).[15]

In addition, the "Prayer for Relief" seeks four things:

> First: three separate declarations all related to the alleged deprivations of SWC's First Amendment or Due Process rights foisted upon them by the Defendants;

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[12] *Accord with Sherwin-Williams*, 2008 WL 839788, at *3-*4 ("[T]he alleged violation of rights occurs only in connection with the threatened state court actions by the [municipalities]. This important, distinguishing factor leads the Court to conclude that it is without subject matter jurisdiction over Sherwin-Williams' request for declaratory relief.").

[13] Of course, as noted above, *ad nauseum*, none of the Counties named as Defendants in this case have ever filed a "claim" or "claims" as imagined and hoped for by SWC.

[14] *See supra note 12.*

[15] *See supra* Section I and note 10 confirming that SWC has not attached any contingency fee agreement executed by the County of Delaware or any of the other County Defendants. Instead it attached an unsigned contingency fee agreement with non-party County of Lehigh and assumes that it is identical to the others (assuming there are others).

> Second: for both a preliminary and permanent injunction prohibiting the Counties from filing or proceeding with any lawsuit or civil action which would violate any of the three declarations requested in the first Prayer for Relief;
>
> Third: for an award of attorneys' fees and costs to SWC pursuant to 42 U.S.C. § 1988 (assuming SWC prevails); and
>
> Fourth: a boilerplate request for such "further relief" this Court deems just and proper.

Id. at 33 – 34. What SWC's Complaint makes clear is that all three counts are based upon federal law (42 U.S.C. § 1983 and the first and fourteenth Amendments) and that all of its prayed for relief emanates from those federal claims (including the request for attorneys' fees and costs pursuant to 42 U.S..C. § 1988)).

Given that all of the claims and the relief sought relate solely to SWC's alleged federal civil rights claims, there are no state law claims over which this Court could exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 (". . . in 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."). *See also Wisconsin Dep't. of Corrections v. Schacht*, 524 U.S. 381, 387 (1998) ("Supplemental jurisdiction allows federal courts to hear and decide state-law claims along with federal-law claims when they 'are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.'" *quoting* 28 U.S.C. § 1367(a)). Here, since there are no state law claims alleged, 28 U.S.C. § 1367 cannot provide a jurisdictional basis for this case in this Court.

Similarly, given that none of the "prayers" for relief seeks a monetary award (other than the request attorneys' fees and costs which is a purely discretionary remedy and only applies if SWC is the "prevailing party," 42 U.S.C. § 1988(b)), there is no allegation of the amount in controversy in **this**

case. In paragraph 42 of SWC's Complaint it alleges that: "The Counties imminent claims against Sherwin-Williams seek inspection and abatement costs in the tens of millions of dollars." *Id.* First, none of the County Defendants have filed a lawsuit, therefore, SWC is not under any order to fund any inspection or abatement program in Pennsylvania. Second, any amount ordered to be paid by SWC would not be in controversy in this case, it would be in controversy in the unfiled, nonexistent case brought by either the Delaware County Defendants or one of the John Doe Defendants. Finally, even if a case had been filed by Delaware County or one of the other John Doe Defendants, those cases would have to yield a judgment for which SWC was liable for there to be any amount in controversy, let alone enough to meet the $75,000 threshold identified in 28 U.S.C. § 1332.

Setting aside all of the above identified contingencies, SWC's complaint lacks even a threadbare allegation of the amount in controversy in this case. Paragraph 42 is devoid of even the most nominal allegation that the amount in controversy in this case exceeds the sum of $75,000, exclusive of interest and costs. Accordingly, SWC has failed to sufficiently allege the amount in controversy in this case to permit this Court to ascertain the actual "amount in controversy" for this case. *See*, *e.g.*, 28 U.S.C. § 1332(a); *Gray v. Occidental Life Ins. Co. of Cal.*, 387 F.2d 935, 937 (3d Cir. 1968) ("This jurisdictional requirement is one which must be made to appear affirmatively on the face of the complaint."). Overall, the Complaint is devoid of any metric whatsoever that would permit this Court to ascertain the true "amount-in-controversy" of this case. The "threadbare" allegations relating to the amount of the cost inspection and abatement if Defendants filed a case for such relief and if that relief were granted (*i.e.,* Compl. at ¶¶ 12, 42), are insufficient to carry its burden of establishing an amount-in-controversy in this case for purposes of diversity jurisdiction. Additionally, the speculative nature SWC's Complaint against Delaware County and the others only further reinforces this Court's lack of diversity jurisdiction in this matter—speculation and conjecture are inappropriate factual vehicles for such a jurisdictional determination. *Accord The Bachman Co. v. MacDonald*, 173 F.Supp.2d

318, 327-28 (E.D. Pa. 2001) ("The speculative nature of all of the evidence offered in this case regarding the valuation of the [claims] at issue leaves this Court unable to calculate a valid and correct jurisdictional amount."); *see also*, *e.g.*, *Skalski v. Skalski*, 259 F.Supp. 153, 155 (E.D. Pa. 1966) ("The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure.") (*quoting McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1935)). In the final analysis, Sherwin-Williams' averments are insufficient to carry their burden of jurisdictional proof. Thus, diversity jurisdiction under Section 1332 is unavailable to Plaintiff in this civil action.

Accordingly, because there is no live "case" or "controversy" presented by this case, and because SWC has also failed to carry its burden of establishing this Court's subject matter jurisdiction, this case should be dismissed with prejudice.

B. SWC's Complaint Fails To State A Cause Of Action Upon Which Relief Can Be Granted

The Fourteenth Amendment was not intended to transform every alleged injury which may have been inflicted by a state official acting "under color" of law into a violation of that Amendment cognizable under 42 U.S.C. § 1983. *See Parratt v. Taylor*, 451 U.S. 527, 544 (1981) *overruled in part not relevant here by Daniels v. Williams*, 474 U.S. 327 (1986). The Supreme Court of the United States recognized in *Parratt* and in cases both before and after it that by transforming every injury into a Constitutional harm would "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Id. quoting Paul v. Davis*, 424 U.S. 693, 701 (1976). *See also Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992) ("Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society,' . . .we have

previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law. . . .(citations omitted)).

1. *Monell* Liability

With regard to municipal (as opposed to state) liability, the United States District Court for the Middle District of Pennsylvania in *Wallace v. Powell*, 2010 WL 785253 at *3 (M.D. Pa. Mar. 1, 2010)[16] (Caputo, J) found:

> Under 42 U.S.C. § 1983, municipal liability cannot be established under the doctrine of *respondeat superior*. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) ("a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents"). "A public entity such as [Luzerne] County may be held liable for the violation of a Constitutional right under 42 U.S.C. § 1983 only when the alleged unconstitutional action executes or implements policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy." *Reitz v. County of Bucks*, 125 F.3d 139, 144 (3d Cir.1997). Alternatively, "in the absence of an unconstitutional policy, a municipality's failure to properly train its employees and officers can create an actionable violation of a party's constitutional rights under § 1983 ... where the failure to train amounts to deliberate indifference to the rights of persons with whom the [municipal employees] come into contact.'" *Id.* at 145. Plaintiffs' amended complaint alleges under the latter theory that Luzerne County's policy-maker, the district attorney, was deliberately indifferent to the minor Plaintiffs' rights when training and supervising subordinate prosecutors.

Id.

Accordingly, in order to survive a motion to dismiss pursuant to the *Iqbal* standard, SWC would necessarily have to plead facts, if accepted as true, state a claim to relief that is "plausible" on its face. *Id.* at 678. Here, SWC has failed to allege, because they cannot, that any perceived unconstitutional action on the part of the Delaware County Defendants "executes or implements policy or a decision officially adopted or promulgated by those whose acts may fairly be said to represent official policy." SWC's Complaint is similarly devoid of any allegation that Delaware County

[16] *Wallace v. Powell* is colloquially known as the "Kids-For-Cash" cases.

failed to properly train its employees and officers where the failure to train can be said to be "deliberately indifferent" to the rights of whom the municipal employees come into contact. *Id.*

SWC has not and cannot allege any facts to meet the *Monell* standard. Most significantly, because SWC's Complaint is nothing more than a thinly veiled forum shopping expedition in an attempt to find a more sympathetic ear for its affirmative defenses than the Courts of Common Pleas of the Commonwealth of Pennsylvania, SWC will never be able to allege the facts necessary to overcome *Monell* and *Iqball* since there is no state court case on file and thus no action taken by the Delaware County Defendants from which SWC could suffer a Constitutional injury.

2. The Lack Of A Causal Connection Between SWC's Allege Constitutional Injury And Any Acts On The Part Of The Delaware County Defendants Warrants The Dismissal Of This Case With Prejudice

Assuming, *arguendo*, that this Court could find that SWC plead a policy or custom which represents "official policy" of Delaware County and that said policy inflicted the constitutional harm alleged by SWC, dismissal of the Complaint with prejudice is still required. SWC fails to plead and/or identify a legally cognizable causal connection between any alleged failure to train and their injury.

Section 1983 does not allow liability against a municipal government vicariously, or merely on the basis of a relationship with a tortfeasor. *Monell*, 436 U.S. at 690-95; *Jett v. Dallas Indp. Sch. Dist.*, 491 U.S. 701, 735 (1989). The touchstone of §1983 liability is personal participation. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986). In the absence of such participation, and in the case of the liability of a municipal governmental entity, Plaintiff must establish a clear causal connection between the conduct of a high-level government official and the constitutional deprivation. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). Where there is no affirmative link between the actions giving rise to the alleged deprivation and a governmental plan or policy, Plaintiffs have failed to meet the requisites for a claim. *Id.*

The mere description of an act as "policy" or "procedure" does not meet the threshold for a §1983 claim. *Timko v. City of Hazelton*, 665 F. Supp. 1130, 1137 (M.D. Pa. 1986). Indeed, as noted above, SWC failed to plead how any identifiable Delaware County employees were inadequately trained or supervised. SWC failed to plead that any identifiable Delaware County employees participated in any alleged illegal or unconstitutional activity. SWC also failed to identify any affirmative acts by any identifiable Delaware County employees, and they failed to plead any causal connection between it and any alleged constitutional harm.

"To make out a claim under Section 1983, a plaintiff must demonstrate that the conduct of which he is complaining has been committed under color of state or territorial law and that it operated to deny him a right or rights secured by the Constitution and the laws of the United States." *Mosley v. Yaletsko*, 275 F. Supp. 2d 608, 613 (E.D. Pa. 2003) (*citing Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). **"The plaintiff must also establish that it was the acts of the defendant which caused the constitutional deprivation."** *Id.* (emphasis added) (*citing Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)).

This is precisely what SWC has failed to do. Instantly, there has been no affirmative action taken by Delaware County that could arguably be said to intrude upon (or, indeed, affect in any way) the constitutional rights of SWC. Plaintiff's Complaint confirms as much and is replete only with statements proffering what Delaware County **might** do at some future date, and wild speculation concerning the content of legal filings and documents that either do not currently exist in any court or which SWC has never actually reviewed. Accordingly, SWC's Complaint must be dismissed with prejudice.

C. Traditional Principles Of Equity, Comity And Federalism Warrant Dismissal Of This Case

In *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) the Supreme Court of the United States examined the equitable remedies established by 42 U.S.C. § 1983, with specific attention to the effect of those equitable remedies on principles of equity, comity and federalism:

> Section 1983 by its terms confers authority to grant equitable relief as well as damages, but its words "allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding." *Giles v. Harris*, 189 U.S. 475, 486, 23 S.Ct. 639, 642, 47 L.Ed. 909 (1903) (Holmes, J.). Even in an action between private individuals, it has long been held that an injunction is "to be used sparingly, and only in a clear and plain case." *Irwin v. Dixion*, 9 How. 10, 33, 13 L.Ed. 25 (1850). When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs,' *Cafeteria and Restaurant Workers Union Local 473 A.F.L.-C.I.O. v. McElroy*, 367 U.S. 886, 896, 81 S.Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961)," quoted in *Sampson v. Murray*, 415 U.S. 61, 83, 94 S.Ct. 937, 950, 39 L.Ed.2d 166 (1974).

Id. In the area of injunctive relief, even where a request to enjoin a state court proceeding does not involve state court criminal proceedings, the Supreme Court has cautioned that principles of "equity nonetheless mititate heavily against the grant of an injunction except in the most extraordinary of circumstances." *Id.* at 379. The *Rizzo* Court went on to counsel restraint when determining whether the federal courts should enjoin state court criminal and civil proceedings. *Id.* at 379 – 80. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (relating to ongoing civil proceedings).

In addition, the *Rizzo* Court illuminated the role of the principles of federalism when injunctive relief is sought not against the judicial branch of a state's government, but the executive branch of local governments. In that context, the Supreme Court found:

> **Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here.** Indeed, in the recent case of *Mayor v. Educational Equality League*, 415 U.S. 605, 94 S.Ct. 1323, 39 L.Ed.2d 630 (1974), in which private individuals sought injunctive relief against the Mayor of

> Philadelphia, we expressly noted the existence of such considerations, saying: "There are also delicate issues of federal-state relationships underlying this case." Id., at 615, 94 S.Ct., at 1331.

Id. at 380. As the Supreme Court found in *Mayor v. Educational Equality League*: "But, to the degree that the principles cited by the Mayor reflect concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency, they are in point." 415 U.S. 605, 615 (1974).

Because SWC seeks preliminary and permanent injunctive relief against the Delaware County Defendants and because the acts SWC seeks to enjoin prohibiting the Delaware County Defendants from "filing or proceeding with any lawsuit or civil action of any kind in violation of this Court's declaration of Sherwin-Williams' rights and obligations" which declaration would presumably prohibit the filing of any lawsuit wherein Delaware County seeks to clarify its rights under Pennsylvania's public nuisance law and Pennsylvania's Lead Certification Act, 35 P.S. §§ 5902(a)(1)-(2), such an injunction would interfere with the ability of the elected officials of Delaware County to respond to the "mandate" or concerns of their constituencies. Accordingly, traditional notions of equity, comity and federalism together with consideration of co-equal branch of government militate strongly in favor of dismissing SWC's Complaint with prejudice, since the only goal of the litigation is to prohibit Delaware County's elected officials from filing a lawsuit in state court regarding state law issues.

D. The Complaint Against Individual Defendants McBlain, Morrone, Culp, Madden and Zidek Must Be Dismissed With Prejudice

In addition to naming the County of Delaware as a defendant, SWC also named each of the members of the Delaware County Council as Defendants in their official capacities. *See* Compl. (Doc. No. 1) at p. 1. However, beyond listing the names of these individuals in the caption and providing a *pro forma* description of their official titles, SWC fails to allege any acts and/or events that can be discretely ascribed to any of these individuals. *Id.* Furthermore, the Supreme Court of the United States has taken a straightforward view of the negligible effect of such "official capacity" lawsuits:

> Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n. 55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985). It is *not* a suit against the official personally, for the real party in interest is the entity.

Kentucky v. Graham, 473 U.S. 159, 166 (1985); *see also*, *e.g.*, *Melo v. Hafer*, 912 F.2d 628, 635 (3d Cir. 1990) (same); *Martucci v. Borough*, 2018 WL 1755728, at *3 (M.D. Pa. April 10, 2018) (same). As SWC has named the County of Delaware as a Defendant, its identifying and suing the entire membership of the Delaware County Council in their "official capacities" is purely duplicative, irrelevant and, ultimately, a legal nullity. Nevertheless, it is further evidence of the bad faith motivating SWC's litigation strategy. As such, the claims against these individuals should be dismissed with prejudice.

VI. CONCLUSION:

For all of the foregoing reasons, the Delaware County Defendants respectfully request that this that this Honorable Court grant their motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted and Order that SWC's Complaint and this case be dismissed with prejudice.

Respectfully submitted,

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