IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DÉJÀ VU OF NASHVILLE, INC. and THE PARKING GUYS, INC.	)	
Plaintiffs,	)	**Case No. 3:18-cv-00511**
Vs.	)	**Hon. Wavery D. Crenshaw**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, acting by and through its TRAFFIC AND PARKING COMMISSION, FREDDIE O'CONNELL, individually, LEE MOLETTE, individually, and LINDA SCHIPANI, individually	)	**Hon. Mag. Barbara D. Holmes**
Defendant.	)	

PLAINTIFFS' RESPONSE TO

INTRODUCTION

Defendant Linda Schipani's Motion to Dismiss [Docket No. 17] (the "Motion") relies upon a mischaracterization of Plaintiffs' claims and of Ms. Schipani's (sometimes simply "Schipani") statements before the Traffic and Parking Commission (the "Commission") of the Metropolitan Government of Nashville and Davidson County ("Metro"). Plaintiffs have filed suit against Metro and three individuals (Freddie O'Connell, Lee Molette, and Linda Schipani, the "Individual Defendants") for conspiring to damage Plaintiffs' businesses because they find the First Amendment-protected speech and expression presented by Deja Vu of Nashville, Inc. ("Deja Vu") to be objectionable.

The intended object of the conspiracy was to destroy Deja Vu's ability to conduct business at its present location by cutting off an important mechanism for Deja Vu's customers from reaching its business – valet parking. The Individual Defendants, who have business interests nearby or are an elected representative of the district, are acutely aware of Deja Vu's lack of on-site parking. Denial of the valet permit, Defendants hoped, would hinder Plaintiffs' ability to do business and force it from the location.

To accomplish this result, Defendants Schipani and Molette offered false testimony to the Commission, and enlisted Defendant O'Connell to persuade the Commission to substitute his judgment for their own. The Commission agreed to accept O'Connell's judgment over a traffic study it commissioned, which verified that the ongoing temporary valet operations by Parking Guys serving Deja Vu was not associated with any traffic concerns that would inhibit issuance of the permit.

Importantly, by ways of the present suit, Plaintiffs do not seek issuance of the requested valet parking permit. That is the subject of ongoing litigation in state court. Instead, the present action seeks money damages from Defendants, which is not available is the state action. Thus, federal abstention is not appropriate.

Further, Schipani is not entitled to testimonial privilege or witness immunity because she did not provide testimony under oath or at a proceeding that was judicial in character. Instead, her statements should be afforded only qualified immunity under the First Amendment for activities in furtherance of petitioning the government. The appropriate standard is thus 'malice,' which is met by Plaintiffs pleading that the statement were knowingly false for the purpose of Damaging Defendant's businesses. Defendant's only need to comply with the First Amendment constraints on their federal cause of action and do not need to comply with state-law elements of defamation,

as they assert no claim for defamation. Likewise, Tennessee's one-year limitation period for personal injury governs this suit under 42 U.S.C. §§ 1983, 1985.

Moreover, 42 U.S.C. § 1985 does provide for a claim for conspiracy to violate First Amendment Rights, so long as the plaintiff pleads governmental involvement or an intent to influence governmental actions. Plaintiffs easily meet the appropriate standard.

Schipani's standing argument must be rejected because is misunderstands First Amendment jurisprudence. Government action (including private conspiracy therewith) to deny a privilege or benefit (even absent a privacy right) out of animus toward the recipients First Amendment activity, is an actionable violation of the First Amendment. Plaintiffs acted purposely to damage Plaintiffs' business because they despise the First Amendment activity Deja Vu presents.

For all these and the further reasons explained below, Defendant Schipani's motion should be denied in its entirety.

STATEMENT OF FACTS

For 26 years, Deja Vu operated at 1214 Demonbreun Street in Nashville, Tennessee, where it presented female performance dance entertainment to the consenting adult public. [Complaint, Docket No. 1, ¶¶ 2, 20]. Deja Vu has a long history of lawful operation at the Demonbreun Street location. In fact, the surrounding community blossomed around it to the point where it was bought out by developers in 2016. [Id. at ¶ 20 and Exhibit 2 thereto (Docket No. 1-4)].

Thereafter, as reported by local media, Deja Vu's would-be landlord purchased a new location for Deja Vu to operate at 1418 Church Street in Nashville, Tennessee. [Complaint, Docket No. 1, ¶¶ 21-22]. Despite Deja Vu's history of impeccable operation and growth in the surrounding

community, it was not welcomed with open arms. In August of 2016, Defendant O'Connell introduced Ordinance No. BL2016-350, which would have had the intended effect of prohibiting Deja Vu from operation at the 1418 Church Street Location. [Id. at ¶ 23 and Exhibit 4 thereto (Docket No. 1-6)]. Deja Vu retained public relations professionals and counsel to fight the proposed ordinance. [Id. at ¶¶ 25-26 and Exhibits 6-7 thereto (Docket Nos. 1-8 – 1-9)]. Upon Deja Vu opening on Church Street, Molette, who had fought Deja Vu's move to Church Street, made false statements to the press accusing Deja Vu of being associated with unlawful activity in the area. [Id. at ¶¶ 30-32]. It was reported that Metro was increasing patrols in responses to the complaints. [Id. at ¶ 31]. Deja Vu has yet to be cited for any violation of the law in relation to its Church Street location. [Id. at 29].

Deja Vu entered into a contract with the Parking Guys to provide valet services at the Church Street location. [Complaint, Docket No. 1, ¶ 33]. On or about May 25, 2017, The Parking Guys applied to Metro's Public Works Department for permission to operate a valet service on 15th Avenue North to service Deja Vu at 1418 Church Street. [Id. at ¶ 35]. However, the request was denied for the stated reason that parking is not allowed on Church Street or 14th Avenue in Nashville. [Id.]. The stated reason was pretextual. As the documentation itself shows, the request was for valet parking on 15th Avenue North. [Id. at ¶ 36]. Indeed, there is no customer access to Deja Vu from 14th Avenue.

Mr. Craig Martin, president and CEO of the Parking guys, timely 'appealed'[1] the denial of Parking Guys request to conduct valet parking on 15th Avenue North on or about June 8, 2017.

[1] Since requesting a valet parking permit from Metro Public Works is not explicitly provided for in Chapter 12.41 of the Code of the Metropolitan Government of Nashville and Davidson County, Tennessee (the "Metro Code"), relating to "Valet Services" [*See* Exhibit 1 to Complaint, Docket No. 1-3], the exact character of the request to Metro Public Works is not exactly clear.

[Complaint, Docket No. 1, at ¶ 38]. On June 9, Schipani emailed Diane Marshall of Metro Public Works, with a copy to Molette, stating "[a]nything that you can do to support the denial of this valet parking permit will be appreciated." [Exhibit 12 to Complaint, Docket No. 1-14]. The email enclosed a letter from the "Midtown Church Street Business & Residential Association." [Id.] The letter included numerous false statement, including that Members of the Association had witnessed near miss accidents and traffic congestion caused by valet and that Police had deemed the operation of the valet service to be hazardous. [Complaint, Docket No. 1, at ¶ 42].

Beginning on or about June 14, 2017, the Parking Guys, via Martin, began applying for an receiving a series of "Lane Closure Permits" for the operation of a valet on 15th Avenue North servicing 1418 Church Street during the pendency of the valet permit 'appeal.' [Complaint, Docket No. 1, ¶ 43 and Exhibit 13 thereto (Docket No. 1-15)].

On July 7, 2017, Schipani emailed Chip Knauf and Diane Marshall of Metro Public Works, and Molette, a correspondence and a series of photographs. [Complaint, Docket No. 1, ¶ 44 and Exhibit 14 thereto (Docket No. 1-16). The email contained numerous false statements, including that: the that "Midtown Church Street Business and Residential Association" has had "consistent problems with valet parking on both sides of the street which impedes the flow of traffic, blocking private parking and presenting safety issues for drivers plus pedestrians"; there is no area available for two parking spaces for the valet operation; and the attached photographs demonstrated traffic problems or safety issues related to the operation of a valet parking operation. [Exhibit 14 to Complaint, Docket No. 1-16].

The matter then came before the Commission at a July 10, 2017 hearing. [Complaint, Docket No. 1, ¶¶ 46-47; Minutes of the July 10, 2017 Commission Meeting [Exhibit 16 to the Complaint, Docket No. 1-18]; Transcript of July 10, 2017 Commission Meeting (the "July Meeting

Transcript") (Exhibit 17 to the Complaint, Docket No. 1-19)]. Molette knowingly presented false statements to the Commission, including that: the street it too narrow for a valet operation; the operation of a valet service was causing congestion; the operation of a valet service was causing traffic to back up on 15th Avenue North to Church Street; the congestion caused by the operation of the Valet Service is "day in and day out"; and that a pedestrian was stuck by a vehicle as a result of the valet operation. [Complaint, Docket No. 1, ¶ 49].

Schipani also knowingly provided additional false statements, including that: the valet operation was parking vehicles on her property; the valet operation is causing "traffic up and down the street"; and the valet operation is "constantly" parking in a manner that impedes vehicular ingress and egress to her business's parking lot. [Complaint, Docket No. 1, ¶ 50].

Further at the July 10, 2017 hearing, Diane Marshall of Metro Public works testified that the requested valet permit met technical requirements of the Metro Code. She explained that the "No Parking to Corner" sign could be properly moved from 90 feet to 30 feet from the corner, thereby opening up 60 feet for three 20-foot valet lanes. [Complaint, Docket No. 1, ¶ 52]. Chip Knauf, Traffic Engineer for Metro Public Works further testified that he requested valet permit met the technical requirements of the code, including:

> Okay, I'm going to go back to the technical versus the testimony. Technically, if you've got 30 feet or more you can allow valet parking on the street because you've got the width for passers-by – if everybody is going right. If your parking outside of that 30 feet Diane's referring to, if your parking in a -- if you're valeting in a – in a legal parking area, and if you've met the requirements for insurance and off-street storage and all that, those technical components have been meet.
>
> * * *
>
> That's what we're talking about here, We – they – ***technically all the requirements have been met***. Operationally, do we have evidence that it is – is or isn't working the way it's supposed to? There's a few photos floating around now. There have been an email or two of some photos.
>
> And if we can get our hands on a video, I've hear somebody mention, maybe that

> would help make a decision. But right now they – it meets the technical requirements. Operationally we don't – I don't have enough info.

[Id. at ¶ 53 (emphasis added)].

At the conclusion of the Commission's July 10, 2017 hearing, the matter was deferred to the next meeting to gather additional evidence, including a video claimed to show traffic concerns related to the valet operation servicing Deja Vu. [Complaint, Docket No. 1, ¶ 54]. The video was never produced. [Id. at ¶ 55].

Following the July 10, 2017 hearing, Metro commissioned Collier Engineering Company, Inc. ("Collier") to perform a study of the ongoing valet operation on 15th Avenue North servicing Deja Vu. [Complaint, Docket No. 1, ¶ 56]. Collier submitted a report (the "Collier Report") dated August 11, 2017 [Exhibit 18 to the Complaint, Docket No. 1-20] finding that the existing temporary valet service was not associated with any traffic concerns. In part, the Collier Report Stated:

> As shown in the table, approximately 49 valet maneuvers were counted on Friday, July 28th evening and Saturday July 29th early morning, which results in approximately 25 valeted vehicles, and was the busiest day observed. *It should be noted that rideshare, taxi, and pedicab drop-off and pick-up activities were also observed occurring along the 15th Avenue North block frontage*. The observations also showed that there were five (5) vehicles that experienced delay on 15th Avenue North due to congestion at the valet stand and curb face. One instance was observed during the 9:00 PM hour on Friday evening, one instance during the 1:00 AM hour of Saturday morning, and three vehicles were affected during the 2:00 AM hour on Saturday morning. When this occurred, the street operated with slow "Yield-Flow" conditions. During the observations, northbound traffic on 15th Avenue North *backed up into the crosswalk* at its intersection with Church Street on two occasions both during the 2:00 AM hour. ***One instance lasted approximately 10 seconds and the second lasted approximately 30 seconds. Both involved one vehicle turning onto 15th Avenue North from Church Street and did not extend beyond the crosswalk***. The busiest time period for the valet stand and rideshare/occurred around closing time (3:00 AM) on Friday evening/Saturday morning when through traffic on 15th Avenue North and Church Street is fairly low. Parking and standing was observed on the west side of 15th Avenue North within 20-30 feet of the stop line for southbound 15th Avenue North traffic at Church Street during portions of

> the observations. A couple of vehicles were observed making U-turns from the valet stand to go south on 15th Avenue North and access the traffic signal; however, it is not clear from the data whether those were made by valet staff or the customers/vehicle owners. The traffic signal goes into Flash Mode at 3:00 AM.

[Id. at pp. 2-3 (Emphasis Added)].

The same day as the Collier Report, Schipani submitted an email to Chip Knauf of Metro, falsely claiming that: the neighborhood surrounding the valet permit operation "continues to witness public safety hazards" associated with the Parking Guys' valet operation servicing Deja Vu; the Parking Guys' valet operation servicing Deja Vu was somehow associated with "two pedestrians hit by cars in the past two months"; "[t]he corner of Church Street and 15th is gridlock most nights"; claims gridlock at 15 Avenue North and Church Street was somehow associated with Parking Guys' valet operation servicing Deja Vu; the Parking Guys' valet operation servicing Deja Vu was a cause of traffic backing up from 15th Avenue North to Church Street "thus blocking the traffic light and no one can move . . ."; the photographs attached to the email demonstrate traffic of safety concerns caused by the Parking Guys' valet operation servicing Deja Vu. [Complaint, Docket No. 1, ¶¶62-63 and Exhibit 19 thereto (Docket No. 1-21)].

A few days later, on August 14, 2017, Nashville District 19 Council Member Freddie O'Connell submitted an email to Chip Knauf of Metro Public Works urging denial of the Valet Permit requested by the Parking Guys. [Exhibit 20 to the Complaint, Docket No. 1-22].

Also on August 14, 2017, the 'appeal' of the Parking Guy's request for a Valet Permit servicing Deja Vu was heard by the Commission. [Complaint, Docket No. 1, ¶¶ 67-68, and Exhibits 21 (Agenda, Docket No. 1-23), 22 (Minutes, Docket No. 1-24), and 23 (Transcript of August 14, 2017 Commission Meeting ("August Meeting Transcript"), Docket No. 1-25) thereto]. The meeting minutes [Exhibit 22 to the Complaint, Docket No. 1-24, p. 4] succinctly stated:

> Collier Engineering presented that their findings . . . the operations of the valet service did not cause traffic concerns . . ." ***BUT***, "Mr. Knauf commented that Council Member O'Connell has submitted a letter of support of the denial of the valet permit.

(Emphasis added).

> Specifically, at the Meeting, Diane Marshall of Metro Public works stated:
>
> Okay. At last month's meeting you requested a study be done. And Collier Engineering completed that study for us. Amy with Collier is here. She would like to discuss it. A copy of that information is on also with each – each of the commissioners.
>
> **Based on the observation that Collier Engineering did for us, they did not see direct problems with that valet operation.** But like I stated, Amy is here if there's anything you need to ask her, because she complete the study for us.

[August Meeting Transcript, Exhibit 23 to the Complaint, Docket No. 1-25, pp. 3-4 (emphasis added)].

> Metro Traffic Engineer Chip Knauff similarly explained:
>
> Basically the analysis that Amy found out – and – and let me say – preface this by saying maybe they knew they were being videotaped, I don't know. But the operations had typical valet concerns that you see in just about every valet operation in town where every once in a while they get overwhelmed with business and they have a few that are backed up in a queue, and then they – eventually it calms down and they go park them correctly. That's what we found in the . . . one week of data.

[Id. at pp. 4-5].

Following an explanation of the empirical study presented in the Collier Report, Commission Chairperson Marshall raised the issue of the letter by O'Connell stating: "All – is – everyone's clear about the councilmember's letter." [Id. at p. 9]. Once everyone was indeed 'clear' about O'Connell's letter Commissioner Nora Kern moved to deny the permit:

> Well, I think the report and the pictures seem to be a little bit at odds from – just based on – on – kind of that – but I do think the letter from Councilman O'Connell should stand for a lot since he hopefully has a – the – a good feeling of what's going on on his street. So I would move to deny the valet stand.

[Id. at p. 15].

On September 7, 2017, The Parking Guys filed a petition for a writ of certiorari in Chancery Court (Case No. 17-970-II) (the "State Action"), which sought review of the Commission's denial of the requested Valet Permit. [Exhibits 24 – 26 to the Complaint, Docket Nos. 1-26 – 1-28]. The petition was denied by the Chancery Court by a Memorandum and Order dated July 6, 2018 [**Exhibit 1** hereto]. The Parking Guy's appealed that order on August 1, 2018. [Notice of Appeal, **Exhibit 2** hereto].

During the pendency of the petition for a writ of certiorari to the Chancery Court, Plaintiffs filed the instant action.

ARGUMENT

I. SCHIPANI'S PUBLIC COMMENTS IN FURTHERANCE OF THE CONSPIRACY ARE NOT PROTECTED BY THE IMMUNITY AFFORDED A TESTIFYING WITNESS.

By far, the most interesting issue presented in Defendant's motion is her contention that public comments at a Commission meeting constitute "witness testimony" protected by the witness privilege. This section will also address Schipani's contention that Defendant's claims must meet the state law standards for Defamation. In short, Defendants do not disagree that Ms. Schipani's statements to Commission are protected by the First Amendment. However, her statements are not "testimony," or preparation for "testimony," provided by a witness at a judicial like proceeding. Even if they were, the statements would not be protected due to the "larger conspiracy exception."

Plaintiffs recognize that both Tennessee and federal law provide for witness immunity. It appears such immunity reaches damages from suit under 42 U.S.C. § 1983. Brisco v. LaHue, 460 U.S. 325 (1983). However, the rationale underlying the privilege does not apply to voluntary unsworn comments and public meeting, thus, neither does the privilege. Instead, Plaintiffs submit

that the statements should be treated as statements in furtherance of petitioning the government subject to the 'malice' standard under McDonald v. Smith, 472 U.S. 479 (1985).

Under federal law, the witness privilege was discussed in depth in Brisco, *supra*. Generally, the justification behind the witness privilege is that "the claims of individuals must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." Brisco, 460 U.S. at 325 (citation omitted). The concern is that if a witness may be subjected to civil suit for their testimony, they will shade their testimony to avoid potential liability. Id.

Importantly, the Brisco court explained, "the truth-finding function is better served if the witness's testimony is submitted to 'the crucible of the judicial process to that the factfinder may consider it, after cross-examination together with the other evidence in the case to determine where the truth lies. Id. at 333-34 (citation omitted); Id. at 335 (referencing the "carefully developed procedures" courts use "to separate truth from falsity") Conversely, as the Tennessee Supreme Court has recognized, "the testimonial privilege, like all immunities, comes at a cost. Indeed, any privilege of general application protects those who deserve it, as well as those who do not." Brown v. Birman Managed Care, Inc., 42 S.W.2d 62, 72-73 (Tenn. 2001).

Thus, there exists a balancing equation where on the one hand the privilege is extended to serve the truth seeking process of judicial proceedings, but on the other hand the privilege is not extended so far that it defeats the truth seeking function by protecting those who do not deserve the privilege. Plaintiffs submit where there is little or no semblance of the "crucible of the judicial process," the privilege should not be extended because the privilege less serves the truth-seeking function and will more likely protect the undeserving. For example here, Schipani and other witnesses had not reason not to submit outright lies, such as the valet being associates with

pedestrians being struck by vehicles, because the testimony is not under oath (and subject to perjury) or subject to cross-examination. A contrary conclusion would mean that a commenter such as Schipani can say anything she pleases (provided it is generally relevant to the purpose of the proceeding), with absolutely no consequences. That is the opposite of truth-seeking.

In this vein, Schipani duly points out that the witness privilege has been extended to quasi-judicial proceedings. However, this is not without limits. This Court recently held that the testimonial privilege did not extend further than proceedings where the tribunal is authorized to revoke a license for good cause shown. Alyn v. S. Land Co., LLC, No. 3:15-CV-00596, 2016 WL 7451546, at *15 (M.D. Tenn. Dec. 28, 2016). In Alyn, the matter involved an ethics grievance submitted to a county association of realtors. Id. at *4. This Court recognized that the witness privilege extends to "administrative proceedings before boards or commissions that are clothed with the authority to revoke a license after a hearing for good cause shown." Id. at *15 (quoting Lambdin Funeral Serv. Inc., v. Griffith, 559 S.W.2d 791, 792 (Tenn. 1978)). It then declined to extend the privilege, finding "the authority to revoke a license was clearly central to the Lambdin court's decision. . . ." Id.

It is true that the Commission has the authority to revoke a valet permit. Metro Code § 12.41.060 [Exhibit 1 to Complaint, Docket No. 1-3, pp. 5-6]. However, Meeting at which Schipani spoke was not that type of hearing. Specifically, the Metro Code requires the Commission to "furnish[ ] a written statement of the charges and a notice of the time and place of the hearing . . . ." Metro Code § 12.41.060(A). "At any hearing provided for in this chapter, the licensee or permittee shall have the right to be represented by an attorney of his choice, to present evidence, and to have witnesses testify *under oath* on his behalf." (Emphasis added). None of those

characteristics were present Commission meeting, thus it is not a hearing to which testimonial privilege applies.

Indeed, cases extending immunity to quasi-judicial proceedings reference the protected testimony as being given "under oath." *See, e.g,* Bilal v. Wolf, No. 06-cv-6978, 2009 WL 1871676, at *7 (N.D. Ill. June 25, 2009) (string citation omitted) ("witness immunity has been held applicable to testimony under oath in administrate proceedings"); Etapa v. Asset Acceptance Corp., 373 F. Supp. 2d 687, 690–91 (E.D. Ky. 2004); Bates v. Stapleton, No. 7:08-cv-28, 2008 WL 793623, at *4 (E.D. Ky. Mar. 20, 2008) (referring to statements "under oath"), amended on reconsideration in part, 008 WL 1735170 (E.D. Ky. Apr. 11, 2008). Schipani's statement were not given under oath or as part of preparations to provide testimony either under oath or at an immunity-conferring hearing.

A much better fit for the present circumstances is the qualified privilege set forth in McDonald v. Smith, 472 U.S. 479 (1985). That case involved an unsuccessful candidate for the "the position of United States Attorney." Id. at 481. The defendant wrote two letters to president Regan which allegedly contained defamatory content. Id. at 481-82. The Court noted the First Amendment's protection of the right "to petition the Government for a redress of grievances." Id. at 482. The concurring opinion expounded on the importance of this right.

> McDonald correctly notes that the right to petition the Government requires stringent protection. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." United States v. Cruikshank, 2 Otto 542, 92 U.S. 542, 552, 23 L.Ed. 588 (1876). The right to petition is "among the most precious of the liberties guaranteed by the Bill of Rights," Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967), and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278 (1937). As with the

> freedoms of speech and press, exercise of the right to petition "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and the occasionally "erroneous statement is inevitable." New York Times Co. v. Sullivan, *supra,* 376 U.S., at 270–271, 84 S.Ct., at 720–721. The First Amendment requires that we extend substantial " 'breathing space' " to such expression, because a rule imposing liability whenever a statement was accidently or negligently incorrect would intolerably chill "would-be critics of official conduct ... from voicing their criticism." 376 U.S., at 272, 279, 84 S.Ct., at 721, 725.

McDonald v. Smith, 105 S. Ct. 2787, 2791–92 (U.S. 1985) (Brennan, J., concurring).

Still, the Court (including the concurrence) found that the statements were subject only to a qualified privilege. Id. at 485. Thus, the state law's requirement of "malice," being knowingly false or without probable cause as to the truth, was sufficient to satisfy the qualified privilege set forth in New York Times Company v. Sullivan, 376 U.S. 254 (1964), for compliance with the First Amendment.

Schipani's voluntary correspondence and statements to the Commission much more resembles the petitioning of the government described in McDonald than testimony as a part of truth-seeking, judicial-like proceedings. Plaintiffs' allegations that the statements by Schipani were knowingly false or with reckless disregard for the truth to damage Defendants easily meet this standard. [*See* Complaint, Docket No. 1, ¶¶ 42, 45, 50, 61, 63]

In addition, Schipani's statements are unprotected under the "larger conspiracy" exception to the witness privilege.

> The larger conspiracy exception holds that a witness who gives false testimony that is a "means to, or a step in, the accomplishment of some larger actionable conspiracy" may not claim the privilege; his perjury can provide the basis for a subsequent civil action. Buckner [v. Carlton], 623 S.W.2d [102,] 108 [(Tenn. App. 1981)] (citing Robinson v. Missouri Pacific Transp. Co., 85 F.Supp. 235 (W.D.Ark.1949)). This doctrine does *not* apply to a witness who merely conspires

> to give perjured testimony. Since committing perjury itself does not destroy the privilege, a rule that conspiring to commit perjury will destroy it makes little sense, or, as we have previously stated, "it cannot be that a conspiracy to do a thing is actionable when the thing itself would not be." Felts [v. Paradise], 178 Tenn. at 424, 158 S.W.2d [727,] 729 [(Tenn. 19442)] (citation omitted). In contrast, the larger conspiracy exception applies where the conspiracy is to commit some wrong other than perjury, and the conspirators use the judicial system to help accomplish their plan.

Brown v. Birman Managed Care, Inc., 42 S.W.3d 62, 73 (Tenn. 2001).

Here, the conspiracy was to obtain the wrongful denial of the valet permit. [Complaint, Docket No. 1, ¶ 61]. Because the false testimony was given in the furtherance of the larger conspiracy, and not merely a conspiracy to present false evidence, Schipani's statements are within the exception to the testimonial privilege.

Further, there is no merit to Schipani's claim that Plaintiff's cause of action under 42 U.S.C. § 1983 must comply with the state law elements for defamation. That would be completely contrary to the supremacy clause. The authority referenced by defendant, Boladain v. UMG Recordings, Inc., 123 Fed. Appx. 165, 169 (6th Cir. Jan. 3, 2005) refers to using related state law causes of action, such as unjust enrichment or intentional infliction of emotional distress. Plaintiff's federal causes of action are not dependent upon any state law analysis.

Finally, there is no merit to Schipani's claims that a six-month statute of limitation for defamation should apply. The Sixth Circuit has clearly held that "[i]n *all* actions brought under § 1983 alleging a violation of civil rights or personal injuries, the state statute of limitations governing actions for personal injuries is to be applied." Berndt v. State of Tenn., 796 F.2d 879, 883 (6th Cir. 1986) (emphasis added). In Tennessee, the relevant limitations period is the one year statue for personal injuries set forth in Tenn. Code Ann. § 28-3-104(a). Plaintiff's suit is therefore timely. Simply because Schipani used written and spoken words to commit the constitutional tort

does not change the nature of the cause of action. Many causes of action, such as fraud or conversation by trick, can (and must) be accomplished by words, but that does not change the limitations period.

II. THE COURT SHOULD NOT ABSTAIN UNDER EITHER COLORADO RIVER OR BURFORD

It would not be appropriate for the Court to abstain under any theory of abstention. This federal litigation is of a completely different character than the State action. Specifically, the State Action is a differential review of whether the Commission's decision to deny The Parking Guys a valet permit to service Deja Vu was supported by material and competent evidence, or was the product of improper influence. State ex rel. Moore & Assoc. Inc. v. West, 246 S.W.3d 569, 574 (Tenn. App. 2005) (articulating the standard of review in a petition for a writ of certiorari). The review is generally limited to the record below. Emory v. Memphis City Sch. Bd. of Educ., 514 S.W.3d 129, 140 (Tenn. 2017). This action, which will include discovery, examines, *inter alia*, whether the Defendants acted together to present false information to the Commission with the goal of damaging Defendants businesses. The State Action looks to whether the requested permit should be granted. This action looks to whether money damages are recoverable under 42 U.S.C. § 1983 for the period in which Plaintiffs were unlawfully denied a valet permit.

> "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." Quackenbush, 517 U.S. at 716, 116 S.Ct. 1712. Abstention is an "extraordinary and narrow exception" to that duty. Colorado River, 424 U.S. at 813, 96 S.Ct. 1236 (internal quotation marks omitted). Only the "clearest of justifications" will support abstention. Rouse v. DaimlerChrysler Corp., 300 F.3d 711, 715 (6th Cir.2002).

RSM Richter, Inc. v. Behr Am., Inc., 729 F.3d 553, 557 (6th Cir. 2013). "The Supreme Court has repeatedly held . . . that the mere pendency of a state-court case concerning the same subject matter

as a federal case is not reason enough to abstain." Id. at 557-58 (citing Exxon Mobile Corp v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005)). "Since abstention is an 'extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it,' '[o]nly the clearest of justifications' will warrant abstention." Rouse v. DaimlerChrysler Corp., 300 F.3d 711, 715 (6th Cir. 2002) (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813–19 (1976)).

This action and the State Action involve different parties, different claims, and different request for relief. Federal abstention is not justified.

A. Chicago River Abstention.

Chicago River abstention permits a federal court to abstain in "exceptional" circumstances "pending resolution of a similar state action based on judicial economy and federal-state comity." Wright v. Linebarger Googan Blair & Sampson, LLP, 782 F. Supp. 2d 593, 602 (W.D. Tenn. 2011). The threshold question is whether the state court proceedings are "parallel." Id. If so, the court then balances specified factors to determine whether abstention is appropriate. Id. Here, the proceedings are not parallel and the factors do not supply the requisite "clearest of justifications" for abstention.

Although parallel proceedings generally involve the same parties, parallel proceedings can be found where there is a "congruence of both interests and allegations" because a contrary rule would also the doctrine to be defeated by the simple naming of additional parties or legal theories. Wright, 782 F. Supp. 2d at 603. Here, however, it is clear that the present action is not merely the State Action with additional parties or legal theories. Instead, the present suit involves legal theories and claims that could not be raised in the state court action.

A similarity of causes of action and claims for relief are a key component in determining whether suits are parallels. This is because, as the Sixth Circuit has explained, unless the state suit involves an identity of claims and requests for relief, "the district court would have nothing in favor of which to abstain." Baskin v. Bath Tp. Bd. of Zoning Appeals, 15 F.3d 569, 571 (6th Cir. 1994) (citing Crawley v. Hamilton Co. Commissioners, 744 F.2d 28 (6th Cir. 1984)).

Plaintiff's constitutional claims allege that the Defendants' actions deprived it of its rights under the First Amendment, due process, and substantive due process, are not at issue in the State Action. In fact, The Parking Guys explicitly reserved any constitutional issues for resolution by a federal court, as permitted by England v. Lousiana State Board of Medical Examiners, 375 U.S. 411 (1964). [Brief in State Action, Docket No. 18-2, pp. 2-3].

Likewise, Plaintiff's claim for money damages is not available in the State Action. Tennessee courts do not permit an original suit for damages to be joined with an appeal by a petition for a writ of certiorari. B & B Enterprises of Wilson County, LLC v. City of Lebanon, M2006-02464-COA-R9CV, 2007 WL 1062216, at *2 (Tenn. App. Apr. 9, 2007) ("This court has long held that an appellate cause of action (i.e. a petition for common-law petition of certiorari), cannon be joined with an original cause of action") (citing Winkler v. Tipton County Bd. of Educ., 63 S.W.3d 376, 383 (Tenn. App.2001); Goodwin v. Metro. Bd. of Health, 656 S.W.2d 383, 386-87 (Tenn. App. 1983); Byram v. City of Brentwood, 833 S.W.2d 500, 502 (Tenn. App.1991).

Therefore, because Plaintiffs' original causes of action here are not even available in the State Action, the actions cannot be deemed to be parallel within the meaning of Colorado River. *See* Wright, 782 F.Supp.2d at 603 ("If a state court action and a federal action are truly parallel, resolution of the state court action will also resolve all issue in the federal action") (citing Baskin, 15 F.3d at 572). In addition, it does not appear that the Sixth Circuit extends Colorado River

abstention to administrative proceedings. Haskin v. City of Louisville, 173 F.Supp.2d 654 (6th Cir. 2001). As such it would be illogical to extend such abstention to the functional equivalent of an appeal of an agency's action.

In any event, the Colorado River factors also do not support abstention and, thus, do no supply the compelling basis required for a federal court to abstain from adjudicating federal questions. These factors are:" (1) whether federal or state law provides the basis for decision of the case;(2) whether either court has assumed jurisdiction over any *res* or property; (3) whether the federal forum is less convenient to the parties; (4) avoidance of piecemeal litigation; and (5) the order in which jurisdiction was obtained." Baskin, 15 F.3d at 571.

As to (1), all plaintiff's causes of action are federal. As to (2) no court has assumed jurisdiction over any res or property. As to (3), there is no reason why federal court located in Nashville would be less convenient for the parties. As to (4), piecemeal litigation is inevitable because, as explained above, the claims asserted here may not be joined with a common law petition for a writ of certiorari. As to (5), Plaintiffs do not dispute that the Chancery Court assumed jurisdiction first. Analyzing all the factors, the order of assuming jurisdiction alone does not meet the high bar for federal court abstention, especially where the case involves federal questions including fundamental constitutional rights.

B. Burford Abstention:

Schimpani's plea for Burford abstention fairs no better. This case simply does not involve the type of complex administrative issues Burford abstention is designed to address.

> Burford abstention is used to avoid conflict with a state's administration of its own affairs. *See* id. It applies only if a federal court's decision on a state law issue is likely to "interfere with the proceedings or orders of state administrative agencies." *See* New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S.

> 350, 361, 109 S.Ct. 2506, 2514, 105 L.Ed.2d 298 (1989). The Burford abstention should not be applied unless: (1) a case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or (2) the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *See* Colorado River, 424 U.S. 800, 814, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (discussing *Burford*)

Rouse v. DaimlerChrysler Corp., 300 F.3d 711, 716 (6th Cir. 2002)

This case does not involve any questions of state law, let alone complex issues or issues intertwined with important state policy efforts. Plaintiffs request for Burford abstention is without merit.

III. A CONSPIRACY TO VIOLATION A PERSON'S FIRST AMENDMENT RIGHTS IS ACTIONABLE UNDER 42 U.S.C. § 1985, SO LONG AS THE CONSPIRACY INVOLVED STATED ACTION OR WAS AIMED AT INFLUENCING STATE ACTION.

It has been recognized that 42 U.S.C. § 1985(3) protects citizens against conspiracies to violate the First Amendment, so long as such conspiracy involves state action rather that purely private action.

Generally, in a claim for civil conspiracy under 42 U.S.C. § 1985(3):

> the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, ***any person or*** class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners of Am., Loc. 610, AFL-CIO v. Scott, 463 U.S. 825, 828–29 (1983) (emphasis added).

In Scott, the Supreme Court addressed whether Plaintiff's had sufficiently made out a conspiracy to violate First Amendment rights. The court concluded, "an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) ***unless*** it is proved that the state is

involved in the conspiracy or that the aim of the conspiracy was to influence the state." 463 U.S. at 831. If a conspiracy to violate First Amendment rights was not actionable *at all* under 42 U.S.C. § 1985(3), it would have been unnecessary for the Court to reach whether such a conspiracy required governmental action. The clear instruction from *Scott* is that a conspiracy to violate First Amendment rights *is actionable* where the plaintiff alleges governmental involvement or an aim to influence state actions.

This is precisely the conclusion recently reiterated by a district court in the Sixth Circuit:

> Defendant's objections claim that "the Magistrate quotes [Griffin v. Breckenridge] [403 U.S. 88 (1971)] for the proposition that § 1985(3) does not vindicate the violation of First Amendment rights." Pl. Objs. at 3. But Plaintiff's recitation of the R&R is inaccurate. Rather than ***claiming that § 1985 cannot vindicate one's First Amendment rights — which would, indeed, be a misstatement of the law*** — the R&R explains that "an alleged conspiracy to infringe First Amendment rights is not a violation of § 1985(3) unless it is proved that the State is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the State." R&R at 8 (quoting Scott, 463 U.S. at 830) (emphasis added). ***This qualification explains that § 1985 does vindicate the violation of First Amendment rights.***

Lindensmith v. Webb, No. 16-cv-11230, 2016 WL 3679505, at *2 (E.D. Mich. July 12, 2016) (emphasis added). *See also* Newsome v. Norris, 888 F.2d 371, 376-77 (6th Cir. 1989) ("in Cale, this court recently observed that the 'egregious abuse of governmental power,' in the form of 'retaliation [against a prisoner by prison officials] for exercising his first amendment rights to register a complaint about' inadequate prison ***policies was sufficient to state a claim for deprivation of First Amendment rights in violation of 42 U.S.C § 1983, 1985(3) and 1986***" (emphasis added; clarification in original) (citing Cale v. Johnson, 861 F.2d 943, 951 (6th Cir. 1988)); Federer v. Gephardt, 363 F.3d 754, 758–59 (8th Cir. 2004) (because the First Amendment prohibits both the federal government and the states [ ] from violation the rights of free expression and association guaranteed by the First Amendment, it follows that the "state action" requirement

of § 1985(3), as explained in [Scott], can be satisfied by a federal actor who is a member of the conspiracy") (parenthetical omitted, clarification added); Volunteer Medical Clinic, Inc., v. Operation Rescue, 948 F.2d 218, 226-227 (6th Cir. 1991) (discussion the level of state action required for a 42 U.S.C. § 1985(3) conspiracy to violate rights protected from state action by the Fourteenth Amendment, such as First Amendment rights); Warner v. Greenebaum, Doll & McDonald, 104 Fed. Appx. 493, 499 (6th Cir. 2004) (plaintiff failed to plead 42 U.S.C. § 1985(3) to violate First Amendment rights due to lack of governmental involvement); Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 587 (2d Cir. 1988) ("§1985(3) applies in case of public conspiracy to deprive persons of their rights under the first amendment" (citing Scott, *supra*). *See also* Fisk v. Letterman, 401 F. Supp.2d 362, 377 (S.D.N.Y. 2005) (conspiracy present where it could be inferred that the state actors substituted a person's judgment for its own) (citing Alexis v. McDonald's Rest. Of Mass., Inc., 67 F.3d 341 (3d Cir. 1995)).

Because Plaintiffs allege that Metro was involved in the conspiracy and that the conspiracy was aimed to influence Metro's action [Complaint, Docket No. 1, ¶¶ 79-81], plaintiff meets both methods for a pleading an actionable 42 U.S.C. § 1985(s) conspiracy to violate First Amendment rights. Indeed, the Commission explicitly substituted the other Defendants' judgment for its own. [Complaint, Docket No. 1, ¶¶ 74-75].

IV. SCHIPANI'S STANDING AND RELATED ARGUMENTS ARE WITHOUT MERIT.

Defendant's standing argument appears to be based on the notion that if Deja Vu is able to still present performance dance entertainment, its First Amendment rights have not been violated. However, the denial of a benefit or privilege due to First Amendment animus is actionable. Further, the First Amendment also protects a person's ability to profit off expressive activity.

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.* For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Speiser v. Randall, 357 U.S. 513, 526 [78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958)]. Such interference with constitutional rights is impermissible." Id., 408 U.S., at 597, 92 S.Ct., at 2697 (emphasis added).

Rutan v. Republican Party of Illinois, 497 U.S. 62, 72 (1990) (quoting Perry v. Sindermann, 408 U.S. 593, 596-98 (1972); *See also* G & V Lounge, Inc. v. Michigan Liquor Control Commn., 23 F.3d 1071, 1077-78 (6th Cir. 1994) (state authority could not condition liquor permit on an agreement to refrain from presenting topless activity, but of course the lack of a liquor permit did not preclude the underlying First Amendment activity).

Further, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 115 (1991) (citing Leathers v. Medlock, 499 U.S. 439, 447 (1991). In Simon & Schuster the Court stuck a law that deprived the plaintiff the ability to profit off publications of a certain content – a criminal's works about his criminal activity.

In addition:

> "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," Laird v. Tatum, 408 U.S. 1, 11, 92 S.Ct. 2318, 2324, 33 L.Ed.2d 154 (1972), our modern "unconstitutional conditions" doctrine holds that 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, Perry v. Sindermann, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2d 570 (1972).

Bd. of County Com'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 674 (1996).

The Court in Simon & Schuster explained that a regulation that "imposes a financial disincentive," "raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." 502 U.S. at 116. Damaging Deja Vu and driving it from the marketplace of ideas was precisely Defendants' purpose.

Defendant's actions to orchestrate the denial of the Valet Permit due to their distaste for Deja Vu's expressive activities, which has caused it financial injury, an presents an actionable offense to the First Amendment. Since it cannot be argued that the denial of the valet permit for Deja Vu on account of its First Amendment activity is permissible, it makes no difference that Deja Vu contracted with The Parking Guy's to provide the valet service rather than conducting itself. Both were damages due to improper First Amendment animus.

V. COUNSEL'S STATEMENTS IN THE CHANCERY ACTION ARE NOT ADMISSIONS RELATIVE TO THE PRESENT ACTION.

Schipani's request for dismissal based on 'judicial admissions' of council is without merit. This is not a defamation case. Even if it were, whether a statement is of 'actionable' character in a defamation case is a question of law that is not subject to judicial admission.

Whether a statement is a judicial admission requires a reasoned not mechanistic approach. *See, e.g.*, National Union Fire Ins. Co of Pittsburgh, Pa. v. Arioli, 941 F.Supp. 646, 655 (E.D. Mich. 1996) ("inadvertent statements of fact made by counsel in briefs or memoranda should not be conclusive binding on the client . . ." (quoting American Tile Ins. Co. v. Lace Law Corp., 861 F.2d 224, 226 (9th Cir. 1988) (other citations omitted)). The Parking Guy's position in the State Action is that the false statements of the permit opponents, such as Molette and Schipani, should be give the evidentiary value of lay opinion on an ultimate issue of fact that is the subject of an

expert report. *See, e.g.*, Petitioner's Reply in Support of Petition for a Writ of Certiorari, Docket No. 18-3, p. 3 (citing Sexton v. Anderson Cty. by and through Bd. of Zoning Appeals, 587 S.W.2d 663 (Tenn. App. 1979)].

The evidentiary value that should be afforded to a statement by Schipani for purposes of the State Action is a different legal question than that before the Court, or that would be before the Court in a defamation suit. Whether any specific oral or written statement by Schipani is actionable under defamation law is a question of law for the court. Steele v. Ritz, No. W2008-02125-COA0R3-CV, 2009 WL 4825183, at *2 (Tenn. Ct. App. Dec. 16, 2009) (Defendant's "motion to dismiss raises several important questions of law: (1) whether the alleged statement in this case is non-actionable opinion, actionable opinion that implied false or defamatory facts, or actionable statement of false or defamatory facts. . .").

Schipani's argument lacks merit and should be rejected.

VI. PLAINTIFF'S SHOULD BE GIVEN LEAVE TO AMEND IN LIEU OF ANY DISMISSAL.

Plaintiffs request that, should the Court find the pleadings in the Complaint to be deficient in any regard, that they be given leave to amend in lieu of dismissal. Brown v. Matauzak, 415 Fed. Appx. 608, 614-15 (6th Cir. Jan. 31, 2011) ("generally, if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim, the court should dismiss with leave to amend") (internal quotations and citation omitted).

CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiffs respectfully request that the Honorable Court Deny Defendant Schipani's Motion, in its entirety.

Respectfully Submitted,

/s/ Matthew J. Hoffer

Matthew J. Hoffer (MI P70495)*
Shafer & Associates, P.C.
3800 Capital City Boulevard, Suite 2
Lansing, Michigan 48906
517-886-6560
Email: Matt@BradShaferLaw.com
Attorney for Plaintiffs
**admitted pro hac vice*

Bob Lynch, Jr. (BPR# 6298)
Washington Square, Suite 316
222 Second Avenue North
Nashville, TN 37201
615-255-2888 (Office)
Email: office@boblynchlaw.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 6th Day of August, 2018, the foregoing document was filed with the United States District Court for the Middle District of Tennessee via the Court's CM/ECF system, thereby causing service by operation of the CM/ECF system upon all counsels of record, including:

J. Brooks Fox
Metropolitan Courthouse, Suite 108
P.O. Box 196300
Nashville, TN 37219
brook.fox@nashville.gov
Counsel for Metro Government, The Traffic and Parking Commission, and O'Connell

Daniel A. Horwitz,
1803 Broadway, Suite #531
Nashville, TN 37203
daniel.a.horwitz@gmail.com
Counsel for Linda Schipani

James A Crumlin, Jr.
Bone McAllester Norton PLLC
511 Union Street, Suite 1600
Nashville, TN 37219
jcrumlin@bonelaw.com
Counsel for Defendant Lee Molette

/s/ Matthew J. Hoffer
SHAFER & ASSOCIATES, P.C.