UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH LEE GIBSON
966 Towlston Road
McLean, Virginia 22102,

P. DAVID RICHARDSON
7728 Georgetown Pike
McLean, Virginia 22102

Plaintiff,

Case Number; 1:04CV00190
Judge: Honorable Gladys Kessler
Deck Type: Pro se General Civil
Date Stamp:

v.

BOY SCOUTS OF AMERICA,

JOHN DOE, No. 1-7,

NATIONAL CAPITAL AREA COUNCIL
BOY SCOUTS OF AMERICA,

and

RICHARD ROE, No. 1-7,

Defendants.

RULE 12(b)(6) MOTION TO DISMISS
TO PLAINTIFF'S AMENDED COMPLAINT

COME NOW the defendants, Boy Scouts of America and the National Capital Area Council Boy Scouts of America, by counsel, and hereby move this Honorable Court to dismiss this action pursuant to Federal Rules of Civil Procedure 12 (b) (6)

for failure to state a claim upon which relief can be granted. In support of this Motion a Memorandum of Points and Authorities is attached.

Please take further notice that the plaintiffs have the right to state their position in support of or in opposition to said Motion by filing whatever papers deemed appropriate. Failure to file a response within eleven (11) days of the date of service may result in the Court treating the Motion as conceded, or may result in the Court considering the defendants' Motion without hearing the plaintiffs' position.

BOY SCOUTS OF AMERICA,
And
NATIONAL CAPITAL AREA COUNCIL
BOY SCOUTS OF AMERICA
By Counsel

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_____
John D. McGavin, Esquire
D.C. Bar No. 475899
Counsel for Defendants Boys Scouts of America
National Capital Area Council Boy Scouts of America

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **RULE 12(b)(6) MOTION TO DISMISS** was served by mail, first class, postage prepaid on this **9th day of June, 2004**, to:

Joseph Lee Gibson
Plaintiff pro se
966 Towlston Road
McLean, Virginia 22102

P. David Richardson
Plaintiff pro se
7728 Georgetown Pike
McLean, Virginia 22102

John D. McGavin

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BOY SCOUTS OF AMERICA,

and

RICHARD ROE, No. 1-7,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RULE 12(b)(6) MOTION TO THE PLAINTIFFS' AMENDED COMPLAINT

COME NOW, the Defendants, Boy Scouts of America, (hereinafter "Boy Scouts") and National Capital Area Council Boy Scouts of America (hereinafter "NCAC"), by counsel, and in support of their Motion to Dismiss the Amended

Complaint pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, state as follows:

I. FACTS

This Motion arises from the Amended Complaint for Injunctive Relief and Damages filed by Plaintiffs, Joseph Lee Gibson (hereinafter "Gibson") and P. David Richardson (hereinafter "Richardson") against the Boy Scouts and NCAC. It is undisputed that Gibson was the Scoutmaster for Boy Scout Troop 869 in McLean, Virginia whose sponsor was and is Trinity United Methodist Church (hereinafter "Trinity"), and that Gibson's adult-volunteer membership in the Boy Scouts ceased on February 7, 2003. Richardson is the father of a scout member of Troop 869.

In his Amended Complaint Gibson alleges that from 1996 until February 7, 2003 he was a registered adult-volunteer member of the Boy Scouts of America. He further alleges that, in October 1998, he was selected to serve in the position as Scoutmaster of Troop 869 by Trinity.

Gibson alleges that NCAC and Richard Roes one through seven conducted a "secret meeting" to which he was not privy. Following this "secret meeting", he was notified by NCAC that his membership in the Boy Scouts had been revoked. Gibson timely appealed the revocation to the Boy Scouts of America at its national headquarters in Irving, Texas, and was represented by Richardson, an attorney. After this appeal process, Gibson alleges that defendants Boy Scouts and NCAC along with John Does one through seven convened a "secret meeting or review

board at a location unknown to Plaintiff", and that this review board based their ratification of his revocation upon a file, the contents of which he has never seen.

Gibson and Richardson allege that the actions of Boy Scouts of America and NCAC, along with other defendants, have caused him substantial harm, and they assert five claims: Count I–Violation of Right of Fair Procedure by both plaintiffs, Count II–Violation of Due Process and Right to Association by plaintiff Gibson, Count III – Breach of Implied Contract by plaintiff Gibson, Count IV - Breach of Implied Contract by plaintiff Richardson, and Count IV– Defamation by plaintiff Gibson. The plaintiffs seek compensatory and punitive damages as a result of the alleged violations against them. The plaintiffs fail to state a cause of action for any count, and the defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6).

II. PRINCIPLES OF LAW AND ARGUMENT

A. Standard for Motion

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a pending action if the plaintiff's pleadings fail to state a cause of action for which relief may be granted. A court will dismiss a plaintiff's case under this Rule if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Williams v. Holiday Inn Washington D.C. on the Hill*, 295 F.Supp 2d 27, 28 (D.D.C. 2003). This Rule is used to eliminate legally deficient pleadings from the court system. *Id*. at 29, n.1.

B. Count I Fails to State a Cause of Action on Behalf of Either Plaintiff for a Violation of the Right of Fair Procedure

Both plaintiffs allege that the defendants violated internal rules and regulations, and therefore a common law action lies in favor of the plaintiffs for a violation of their rights of "fair procedure."

The Boy Scouts of America is a completely private entity. Boy Scouts of America and Monmouth Council v. Dale, 530 U.S. 640, 120 S.Ct. 1226 (2000). The entity has its own internal procedures and regulations regarding the registration of youth and adult members. A plaintiff who simply believes he has been wronged by this private organization is not entitled to seek redress through the court systems, because "when the constitution and bylaws of an unincorporated, voluntary association... are reasonable and valid and provide a mode for determining when relief shall be given or denied to its own members by tribunals provided for therein, redress therefore may not be sought in the courts." *Allen v. Southern Pacific Co., et al.*, 166 Or. 290, 306, 110 P.2d 933, 939 (1941).

Some jurisdictions have recognized a common law right to fair procedure in situations where the plaintiff establishes "arbitrary exclusion or expulsion from membership in a 'private entity affecting the public interest' where the exclusion or expulsion has substantial adverse economic ramifications." *Kim v. Southern Sierra Council Boy Scouts of America*, 117 Ca. App. 4th 743, 746 (2004). The plaintiffs do not allege, however, that the Boy Scouts is the type of quasi-public organization that

would fall within this doctrine. The Boy Scouts is a purely private entity, and without sufficient pleadings establishing its effect on public interest, the plaintiffs do not state a claim.

Further, the plaintiffs have not alleged that the decision regarding revocation of Gibson's membership adversely affected "an important, substantial economic interest." *Id*. at 747. The plaintiffs allege only that Gibson was deprived of the many hours he spent voluntarily working for the organization, and there is no allegation that Richardson was deprived of any assets as a result of this decision. As the Boys Scouts is a social organization, Gibson's membership and leadership position did not constitute an economic, contract, or property interest. *Lee v. Snyder*, 285 Ill. App.3d 555, 559 (1996). There is no allegation that state that either plaintiff is unable to work or to obtain financial benefits through other means. The plaintiffs therefore have failed to state a cause of action for breach of the common law right of "fair procedure."

Plaintiff Richardson has not stated any harm that he has suffered as a result of this decision, and thus does not have standing to assert a claim for violation of fair procedure. A plaintiff must have suffered an "injury in fact" to have standing, which is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Friends of Tilden Park, Inc., v. District of Columbia*, 806 A.2d 1201, 1207 (D.C. App. 2002). Richardson was not affected adversely in any way by the decision to revoke membership to Gibson; therefore he has no standing to sue.

C. Count II Fails to State a Claim for Violation of Due Process and Right of Association for Plaintiff Gibson

Gibson alleges that the Boy Scouts and NCAC have violated his First Amendment right to freedom of association, and his Fourteenth Amendment right to due process, when it terminated him as Scoutmaster of Troop 869. The law is clear that a claim for a violation of a Fourteenth Amendment right can only be brought against a government or quasi-government entity that acts under color of state or federal law. *Rendell-Baker v. Kohn*, 457 U.S. 830; 102 S.Ct. 2764 (1982). A claim for violation of the right to free association under the First Amendment can only be made against a governmental entity, as the "guarantees under the First Amendment ... embrace only abridgments by federal or state governments." *Havas v. Communications Workers of America*, 509 F.Supp. 144, 147 (N.D. NY 1981).

In *Boy Scouts of America v. Dale*, 530 U.S. 640; 120 S.Ct. 2446 (2000), the Supreme Court held that the Boy Scouts is "a private, not-for-profit organization" not subject to public accommodation laws of the State of New Jersey. The Court held that an application of New Jersey's public accommodation laws would have intruded into the group's internal affairs because it was not a government entity and not subject to substantial governmental involvement. *Id*. at 659, 2457. Further, the Court stated that "the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association in the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id*. at

648, 2451. Since the Boy Scouts is a private organization and is not subject to substantial governmental involvement, Gibson's allegation that Boy Scouts and NCAC violated his First Amendment right to free association fails to state a claim upon which relief can be granted.

In *Kohn, supra*, the plaintiffs made claims for violation of their Fourteenth Amendment rights of due process against a privately run high school, but the Court found that the employer was a private entity and not acting under color of state law when it discharged the employees. In so holding, the Court stated that "the relevant question is not simply whether a private group is serving a 'public function.' We have held that the question is whether the function performed has been 'traditionally the *exclusive* prerogative of the state.'" *Id*. at 842, 2772. The ruling in *Kohn* was consistent with the law when it held that the Fourteenth Amendment "applies to acts of the states not to acts of private persons or entities." Id. at 837, 2769. In this case, Gibson alleges a violation of his due process rights under the Fourteenth Amendment, against private, non-governmental entities, and therefore his pleading fails to state a claim for which relief can be granted.

D. Count III Fails to State a Claim for Breach of Implied Contract on Behalf of Gibson

Plaintiff Gibson alleges that an implied contract to allow him to associate with Troop 869 and to act as Scoutmaster was created between himself and defendants based on the consideration of his expenditure of time and money. He alleges that

defendants breached this contract when he was removed from his position, and seeks a return of the "fair value of the labor he devoted" in compensation. (Amended Complaint, 36 at p. 15).

In determining the substantive law to apply in a diversity case, a "federal court must follow the choice of law rules of the forum state." *Felch v. Air Florida, Inc., et al.*, 866 F.2d 1521, 1523 (D.C. Cir. 1989). The District of Columbia uses the "governmental interests" tests, which requires that a court identify the governmental policies at issue and determine which state's policies would be most advanced by having its law applied. *Raflo v. United States of America, et al.*, 157 F.Supp.2d 1, 5 (D.D.C. 2001). In this case, to evaluate whether the District of Columbia or Virginia has a stronger interest, the court must consider:

> 1) the place where the injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and 4) the place where the relationship is centered. *Id*. at 5-6.

With the respect to the alleged breach of an implied contract, the contract was allegedly created and entered into in Virginia, and the breach complained of occurred in Virginia. Both the plaintiffs and the defendants reside or do business in Virginia, and the relationship amongst the members of Troop 869 is centered in Virginia. Therefore, Virginia substantive law applies.

As a matter of law, an implied legal obligation cannot arise from the rendering of services which are gratuitous. *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44; 10 S.E. 2d 492 (1940); *Nedrich v. Jones*, 245 Va. 465; 429 S.E. 2d 201 (1993). A

volunteer renders his services without expectation of compensation. The position of Scoutmaster of Troop 869, the subject of this litigation, is and was a purely voluntary position. There is no basis in law for granting plaintiff a return of the "fair value" of the services that he freely and voluntarily donated.

There is no allegation of any express or tacit agreement from which an implied contract arose; plaintiff simply stated that mutual promises existed, and that he gave consideration for the promises. The Virginia courts, however, have consistently found that individuals who provide services voluntarily to one another, without promise of payment, cannot recover on a claim of breach of implied contract. *See* *Mullins*, *supra*, *Nedrich*, *supra*. The plaintiff's bare legal conclusions that an implied contract existed is not sufficient to state a claim for which relief may be granted.

Gibson alleges an implied contract between Boys Scouts, NCAC and himself, despite his own admission that he was a volunteer to the "Scouting Movement" from 1996 through February 7, 2003. Plaintiff alleges no agreement to pay him for his services, nor any mutual promise that he would retain his membership and position as Scoutmaster for any specified period of time. The pleadings are insufficient to establish an implied contract existed based on voluntary services, and the plaintiff fails to state a claim.

E. Count IV Fails to State a Cause of Action for Breach of an Implied Contract on Behalf of Plaintiff Richardson

Plaintiff Richardson alleges an implied contract between himself and the

defendants to allow Richardson the "expectation of continuing to enjoy his own and his sons' association with Plaintiff Gibson as Scoutmaster of Troop 869" and participation in selection of the Scoutmaster. (Amended Complaint, ¶ 39 at p. 15). In consideration of these promises, Richardson alleges that he paid dues and made financial contributions to the Boy Scouts. As a result of Gibson's removal from his position as Scoutmaster, Richardson claims he has been damaged.

As in Gibson's claim, Richardson voluntarily paid dues and made financial contributions to the Boy Scouts. An implied contract does not arise when the services provided by one party were voluntary. *Mullins, supra*.

Further, Richardson does not allege any direct negative action taken against him personally, but instead argues he was damaged based on the actions taken against Gibson. Richardson has no standing to challenge the actions taken by defendants that reflect only upon Gibson. Richardson alleges no "injury in fact" that is imminent as a result of Gibson's removal. *Friends of Tilden Park*, *supra*. No implied contract existed because any donations made by Richardson were voluntary, and no agreement was reached between Richardson and the defendants which would have justified the existence of a mutual promise. Richardson has not pled sufficient facts to establish the existence of an implied contract, and he has no standing to assert a claim for damages based on actions taken by the defendants that relate solely to Gibson. Therefore, Count IV fails to state a claim for which relief can be granted.

F. Count V Fails to State a Cause of Action for Defamation

Gibson alleges that Boy Scouts and NCAC made defamatory statements about him, and that "NCAC by or through one or more of the officials, employees or agents named as Richard Roes" made statements to others that he (Gibson) was "unfit for Scouting membership and unfit to be Scoutmaster of Troop 869." (Amended Complaint, ¶ 44 at p. 16) The plaintiff further states that "upon information and belief" similar comments were made to parents of troop members. *Id*.

Virginia law will apply under the District of Columbia choice of law provisions. Under the governmental interests test, the alleged defamatory statements were made and published in Virginia. The parties, as well as the persons to whom the statements were made, all reside or do business in Virginia. Therefore, Virginia has a greater interest in having its laws applied to the defamation action. *See Raflo, supra.*

It is well established in Virginia that in issues of defamation "[g]ood pleading requires that the exact word spoken or written must be set out in the declaration *in haec verba*...it must purport to give the exact words." Federal Land Bank v. Birchfield, 173 Va. 200, 210; 3 S.E.2d 405, 410(1939); Fuste v. Riverside Healthcare Ass'n., 265 Va. 127; 575 S.E. 2d 858(2003). The plaintiff simply alleges that he was referred to as "unfit," and does not plead any specific statements or comments made by a defendant. There is no detail given regarding any statements made to troop parents, and in fact it is simply alleged that the plaintiff *believes* such statements were made.

Statements which might be defamatory, or which leave a listener to speculate as to their meaning, cannot be defamatory. *Fleming v. Moore*, 221 Va. 659, 665, 47 S.E.2d 329, 332 (1948).

The Virginia Supreme Court has stated that it is "firmly established that pure expressions of opinion are protected by both the First Amendment of the Federal Constitution and Article I, §12 of the Constitution of Virginia and, therefore, cannot form the basis of a defamation action." Williams v. Garraghty, 249 Va. 224, 233; 455 S.E.2d 683(2002). The plaintiff does not allege any statements of fact that were made against him, but only that he was referred to as "unfit," and that the defendant stated Gibson "had not fully disclosed to Richardson, to the troop or to the affected community the reasons for the revocation of his Scouting membership." (Amended Complaint, ¶ 45 at p. 17). There are no actual statements quoted in the amended complaint, and no negative facts published against Gibson are recited. The Virginia Supreme Court has stated that "speech which does not contain a provably false factual connotation, or statements which cannot be reasonably interpreted as stating actual facts about a person cannot form the basis of a common law defamation action." *Yeagle v. Collegiate Times*, 255 Va. 293, 295, 497 S.E.2d 136, 137 (1998).

Gibson alleges defamation based on statements expressed as opinions. Further, Gibson fails to plead any particular statements or false factual allegations made against him. Therefore, the plaintiff fails to state a cause of action for which relief may be granted based on a claim of defamation.

III. CONCLUSION

As to all Counts pled by Gibson and Richardson in their Amended Complaint for Injunctive Relief and Damages, the Defendants Boy Scouts and NCAC have shown herein that as matter of law, these claims fail to state claims for which relief can be granted.

WHEREFORE, the Defendants, Boy Scouts and NCAC move this Honorable Court to dismiss this Complaint under Rule 12(b)(6) of the Rules of Federal Civil Procedure and such other relief as the Court may deem appropriate.

Points of Law and Authorities

1. *Allen v. Southern Pacific Co., et al.*, 166 Or. 290, 110 P.2d 933 (1941)
2. Boy Scouts of America and Monmouth Council v. Dale, 530 U.S. 640, 120 S.Ct. 1226 (2000)
3. Federal Land Bank v. Birchfield, 173 Va. 200, 3 S.E.2d 405 (1939)
4. *Felch v. Air Florida, Inc., et al.*, 866 F.2d 1521 (D.C. Cir. 1989)
5. *Fleming v. Moore*, 221 Va. 659, 47 S.E.2d 329 (1948)
6. *Friends of Tilden Park, Inc., v. District of Columbia*, 806 A.2d 1201 (D.C. App. 2002)
7. Fuste v. Riverside Healthcare Ass'n., 265 Va. 127, 575 S.E. 2d 858 (2003)
8. *Havas v. Communications Workers of America*, 509 F.Supp. 144 (N.D. NY 1981)
9. *Kim v. Southern Sierra Council Boy Scouts of America*, 117 Ca. App. 4th 743

(2004)

10. *Lee v. Snyder*, 285 Ill. App.3d 555 (1996)

11. *Mullins v. Mingo Lime & Lumber Co.*, 176 Va. 44, 10 S.E. 2d 492 (1940)

12. *Nedrich v. Jones*, 245 Va. 465, 429 S.E. 2d 201 (1993)

13. *Raflo v. United States of America, et al.*, 157 F.Supp.2d 1 (D.D.C. 2001)

14. *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764 (1982)

15. Williams v. Garraghty, 249 Va. 224, 455 S.E.2d 683 (2002)

16. *Williams v. Holiday Inn Washington D.C. on the Hill*, 295 F.Supp 2d 27 (D.D.C. 2003)

17. *Yeagle v. Collegiate Times*, 255 Va. 293, 497 S.E.2d 136 (1998)

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By Counsel

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John D. McGavin, Esquire
DCB Number 475899
Counsel for Defendants Boys Scouts of America and
National Capital Area Council
Boy Scouts of America

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RULE 12 (b)(6) MOTION TO DISMISS** was mailed, postage pre-paid on this 9th day of June, 2004 to:

Joseph Lee Gibson
Plaintiff pro se
966 Towlston Road
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P. David Richardson
Plaintiff pro se
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