IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JOSEPH LEE GIBSON et al., Plaintiffs, versus BOY SCOUTS OF AMERICA, et al., Defendants.	Civil Action No. 1:04cv00190 Judge Gladys Kessler Deck Type: Pro se General Civil

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) AND REQUEST FOR ORAL ARGUMENT

Plaintiffs, Joseph Lee Gibson and P. David Richardson, hereby respectfully submit this Memorandum in Opposition to Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6).

I. INTRODUCTION

At issue in this case is whether the Boy Scouts of America, a federally-chartered organization, can summarily expel a dedicated Scoutmaster without providing him or the Troop that chose him as its leader with any notice of the reasons for his expulsion, without affording him any opportunity to appear at a hearing or other proceeding to state his position, without disclosing the written or documentary evidence against him, if any, without identifying the person or persons who sought or prompted his expulsion or their reasons, and without even

notifying him of the membership of the tribunals that would decide his fate or when, where and under what circumstances they would meet to consider his case.

In their "Memorandum of Points and Authorities in Support of Rule 12(b)(6) Motion to the Plaintiffs' Amended Complaint" (hereinafter, "Defts' Mem."), Defendants Boy Scouts of America ("BSA") and National Council Area Council ("NCAC") stake out the position that a plaintiff who is wronged by a "private organization" such as the BSA is not entitled under any circumstances to seek redress through the court systems (Defts' Mem. at 7) – apparently without regard for what actions the BSA takes or how arbitrary the procedures it employs in taking them. In essence, Defendants contend that they may with impunity expel a member who has not been charged with wrongdoing of any description – and who is not affiliated with any class (such as homosexuals or agnostics) against which the Boy Scouts contend they may lawfully discriminate – for any reason or, as in this case, for no apparent reason whenever someone in the BSA or NCAC hierarchy decides he doesn't like the cut of a Scoutmaster's jib.

As shown in detail below, the law of the District of Columbia and other jurisdictions does not condone this degree of arrogance even in organizations such as the Boy Scouts. Not-for-profit corporations in the District of Columbia are obligated by law to establish procedures that comport with fundamental fairness and natural justice, and to treat their members in accordance with those procedures. The BSA, moreover, as the beneficiary of multiple federal statutes that direct federal agencies to use federal resources and tax dollars to assist the BSA, cannot contend that it is completely exempt from the fundamental due process precepts that ordinarily constrain governmental action. Defendants, furthermore, like any other not-for-profit corporation, are obligated to abide by the contracts implied-in-fact that arise when their members devote years of effort and commit thousands of dollars based on the expectation that they will continue to enjoy

membership in the organization under its stated rules. Nor can Defendants make statements and take actions that clearly impugn a plaintiff's character, reputation and standing in his community, then claim they are not answerable in a court of law to a claim for defamation.

Plaintiffs' First Amended Complaint (hereinafter, "Amended Complaint") pleads sufficient facts to support each of the causes of action identified above. Plaintiffs should be permitted to attempt to prove their claims, and should be allowed to proceed with discovery to pierce the shroud of secrecy in which Defendants have wrapped their proceedings in this matter. The motion to dismiss should be denied.

II. FACTUAL BACKGROUND

Under familiar principles, when considering a motion to dismiss pursuant to Rule 12(b)(6), the factual allegations of the complaint are taken as true. E.g., Williams v. Holiday Inn, 295 F.Supp. 27, 29 (D.D.C. 2003) ("when proceeding under Rule 12(b)(6), all factual allegations of the complaint are taken as true."). Accordingly, the following facts are taken as true for purposes of this motion:

From 1996 to February 7, 2003, Plaintiff Joseph L. Gibson ("Gibson)" was an adult member of the Scouting movement, registered and in good standing. Beginning in 1998, Gibson served as the Scoutmaster of Troop 869, having been duly selected by the Troop Committee with the approval of Trinity United Methodist Church (McLean, Virginia), Troop 869's sponsor. Amended Complaint ¶ 12.

On February 7, 2003, without prior notice of the nature of charges against him and without notice that Defendant NCAC was even considering charges against him, Gibson received a registered letter from NCAC, informing him that his membership in the Scouting

movement had already been revoked. Amended Complaint ¶ 13. NCAC's letter was devoid of any reason for or explanation of its expulsion of Gibson. Amended Complaint ¶ 16.

NCAC did not at any time convene a hearing or similar proceeding with Gibson present, where he could learn the specific charges against him or defend against such charges. Amended Complaint ¶¶ 2, 14, 15. Instead, NCAC apparently conducted some sort of meeting or proceeding in this matter in secret, by persons not known to Plaintiffs, without notice to Gibson, without his knowledge, and without his being present, in person or by representative. Amended Complaint ¶¶ 2, 15.

Gibson sought relief from his expulsion from BSA, first through its Northeast Region office and then through its national headquarters in Texas. Amended Complaint ¶ 16. At the time of Gibson's expulsion, Plaintiff P. David Richardson ("Richardson") was a member of the Troop 869 Troop Committee. BSA's National Legal Counsel, David K. Park, informed Richardson (who was acting as Gibson's counsel at that time) that the charges against Gibson did not involve youth abuse or other matters that ordinarily warrant expulsion, but rather involved matters relating merely to the governance of Troop 869 – described by Park as a "modal difference" as to how the affairs of Troop 869 should be conducted. Amended Complaint ¶¶ 2, 19. Moreover, Park admitted to Richardson that such matters are solely within the authority and jurisdiction of the Troop's sponsor, Trinity United Methodist Church, and the 869 Troop Committee. Amended Complaint ¶¶ 2, 19.

The limited avenues permitted by BSA to seek redress from NCAC's decision were fatally flawed and deficient. BSA refused to inform Plaintiffs of the identify of the persons reviewing the matter. By letter of July 7, 2003, Richardson sought assurances that the reviewers were not biased against Gibson and requested the identity of the reviewers. BSA did not respond

to Richardson's request, but rather ignored the request, rejecting it sub silentio. Amended Complaint ¶¶ 2, 18, 19, 21, 26.

Like NCAC, BSA did not conduct any sort of hearing with Gibson present, where he or his representative could learn of the specific charges against him or respond to the charges. Amended Complaint ¶¶ 2, 21. BSA also apparently conducted some of sort of meeting or proceeding to review this matter in secret, without notice to Plaintiffs or an opportunity to appear and respond to the charges. Amended Complaint ¶¶ 2, 21.

BSA also declined to inform Gibson of the specific charges against him or the rules or authority for the expulsion. By his July 7, 2003 letter to Defendant BSA's Counsel Park, Defendant Richardson requested the basis of the charges, as well as the By-Laws, Membership Rules, or other authority for the expulsion. Defendant BSA sub silentio rejected those requests. Amended Complaint ¶¶ 18, 19, 21, 25.

By letter dated December 23, 2003 – ten months after Gibson's membership was revoked by NCAC – BSA notified Plaintiffs of its decision to ratify NCAC's action. Amended Complaint ¶ 21. Defendant BSA's letter did not provide any explanation for its action.

After BSA had ratified Gibson's expulsion, however, BSA (by its Counsel Park) informed Richardson that there were "other matters" that Gibson had not told to Richardson and these "other matters" were the real reason, i.e., the basis or motivation, for the expulsion. Amended Complaint ¶¶ 2, 19. Defendants have never specified, nor accorded Plaintiffs an opportunity to respond to, these "other matters."

III. ARGUMENT

A. Plaintiffs Have Stated A Cause Of Action Under District Of Columbia Law For Violation Of The Right To Fair Procedure

Defendant's motion to dismiss Count I of Plaintiffs' Amended Complaint rests upon a single proposition: "A plaintiff who simply believes he has been wronged by [a] private organization is not entitled to seek redress through the court systems." Defts' Mem. at 7. Defendants rely on a single case – a 1941 Oregon decision – to support this proposition: Allen v. Southern Pacific Co., 166 Or. 290, 306, 110 P.2d 933, 939 (1941).

Whatever the law in Oregon in 1947,[1] the common law of the District of Columbia has for more than 100 years required that a membership association accord its members fundamental rights of fair procedure in a matter regarding expulsion from the association. In 1897, the Court of Appeals for the District of Columbia ruled that a member facing expulsion from the Metropolitan Club was entitled, prior to expulsion, to notice of the allegations against him and to a hearing before a quasi-judicial body of the club, where the accused member is given an opportunity to defend himself. De Ytrubide v. The Metropolitan Club of the City of Washington, 11 App. D.C. 180, 199 (D.C. Cir. 1897). The Metropolitan Club court stated that a membership organization, when acting in a judicial or quasi-judicial capacity in deciding whether to expel a member, should abide by the following principles:

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[1] In fact, Allen itself does not stand for the sweeping proposition for which Defendants cite it. The "'settled law'" on which the Allen decision rested is that "'members of an unincorporated, voluntary association . . . are bound by the determination of the association's tribunals if the decision is reached after observance of the formalities it prescribes, after fair opportunity for presenting their case, where there has been no excess of jurisdiction, no bad faith or capricious, unreasonable action.'" 166 Or. at 305, 110 P.2d at 939 (quoting Donovan v. Travers, 285 Mass. 167, 188 N.E. 705) (emphasis added). Thus, even if Allen were the law in the District of Columbia, Plaintiffs in this case have alleged that the BSA violated all of the principles that the Allen court says a voluntary organization must observe in order to render its membership decisions immune from judicial review.

> ... [T]hey should in such matters act strictly in accordance with the rules of the club, and the ordinary principles of justice; and they should pay particular attention to the constitution of the court, by seeing that due notices are sent to all the persons who ought to be summoned, whether as committeemen, witnesses or accused, and that no one who has any bias or personal interest in the matter in question should sit as a member of the tribunal on the inquiry; the accused person should be given full opportunity of defending himself; and finally, the decision should be arrived at in a bona fide manner, on the circumstances in evidence, without malice and without caprice. If any of these considerations can be shown to have been disregarded, then a judicial tribunal will interfere, and the decision of the quasi-judicial tribunal will be set aside.

11 App. D.C. at 199 (citations omitted).

The principles articulated in this seminal D.C. case were among those reviewed by Professor Zachariah Chafee, Jr., in his 1930 article in the Harvard Law Review, summarizing the precedents on expulsion from a membership association as requiring the following three tests to determine whether the expulsion was wrongful: "(1) the rules and proceedings must not be contrary to natural justice; (2) the expulsion must have been in accordance with the rules; and (3) the proceedings must have been free from malice (bad faith)." Zachariah Chafee, Jr., The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1014 (1930) (copy enclosed for the convenience of the Court and Defendants).

The requirements of Natural Justice, Professor Chafee noted, include the requirement that the association provide notice to the accused member of the charges against him and give him an opportunity to defend himself, id. at 1015, as well as the right of the accused member to a notice and hearing . . . ." Id. at 1016. Moreover, the association and member must adhere to the association's own rules. Id. at 1019. Finally, regarding malice or bad faith, Professor Chafee noted: "The real reason for his [the member's] expulsion must not be something different from the charges on which he is tried." Id. at 1020.

Courts in the District of Columbia have consistently followed the Metropolitan Club decision and have cited Professor Chafee's article. In 1947, the D.C. Circuit held that the National Women's Party improperly excluded a member, citing the Chafee article and relying particularly on the Metropolitan Club decision: "Fifty years ago this court recognized that if a member of an incorporated club were expelled without a 'regularly conducted' trial, on due notice, by 'constituted corporate authorities' and a 'judgment arrived at * * * in good faith,' specific relief could be granted." Berrien v. Pollitzer, 165 F. 2d 21, 23 (D.C. Cir. 1947); accord, Bryant v. The District of Columbia Dental Society, 26 App. D.C. 461 (D.C. Cir. 1906) (where the Court ruled that the Metropolitan Club decision was controlling and concluded that the association had complied with the Metropolitan Club requirements of providing notice of the specific charges against the member and conducting a fair hearing with the member present and having an opportunity to address the hearing panel on the charges).[2]

Similarly, Levant v. Whitney, 755 A.2d 1036 (D.C. Ct. App. 2000) involved the dismissal of an officer from her position in the association, who sought judicial review of only whether the association had followed its own rules. 755 A.2d at 1043-44. Citing the Metropolitan Club decision, the Court ruled that the association had, in fact, followed its own rules and, furthermore, held that the association's rules accorded the officer fair process in

[2] Maryland and Virginia precedents also are in accord with these principles. See, e.g., Chisholm v. Hyattstown Vol. Fire Dept., Inc., 115 Md. App. 58, 71, 691 A.2d 776, 782 (Md. C.A. 1997) (Maryland Court of Appeals held that a membership association may expel a member "for good cause, provided, as a rule, that the member is notified of the charges and there is a hearing and opportunity to defend"); Gotleib v. Economy Stores, Inc., 199 Va. 848, 857, 102 S.E.2d 345, 352 (Va. 1959) (Virginia Supreme Court held: "In reviewing an action expelling a member of a corporation, they [courts] may inquire whether the member was given reasonable notice of the hearing of the charges against him, whether he was afforded an opportunity to be heard, and whether the hearing and expulsion were in good faith.").

providing notice of allegations; a hearing before an investigatory body; and a review of the report of the investigation and a vote by the Lodge on the expulsion). Id.

Defendants overlook these cases and assert, instead, that precedents from other jurisdictions limit the doctrine of fair procedure to circumstances involving an economic interest. Plaintiffs cite two precedents, neither of which involves expulsion from a membership association, in support of their position: Allen v. Southern Pacific Co., 166 Or. 290, 110 P.2d 933 (Ore. 1941) and Kim v. Southern Sierra Council Boy Scouts of America, 117 Cal. App. 4th 743 (Cal., Kern County Superior Court 2004). In Allen, the court stayed its hand where the seniority complaints of Railroad workers had been thoroughly heard by a union committee and then by a union appeal board. In the Kim case, the Kern County (California) Superior Court held that California precedents requiring fair procedure for expulsion from an association did not apply to a case which involved the denial of the award of Eagle rank to a youth member of Scouting.[3] The court noted that plaintiff Kim cited only precedents involving an economic interest, which the Eagle rank does not involve; but the court did not limit the California doctrine of Fair Procedure to only cases where the member can show an economic interest.

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[3] The Superior Court held at 746-7:

> "... Kim's argument that the doctrine of fair procedure applies to the decision whether he should be promoted to the rank of Eagle Scout fails because Kim cannot cite any decisional authority in which the right to fair procedure was applied to a situation other than the expulsion of the complainant from membership. All of the cases cited by Kim concern the exclusion or expulsion of the complainant from membership in a professional society, a trade union or limited group of health professionals. [citations omitted.] Research did not reveal any state or federal case that applied the right to fair procedure to an organization's decision whether to confer on a member a specific rank, award or leadership role. Kim offers no compelling justification for expansion of existing law to encompass internal decisions that are unrelated to exclusion or expulsion from membership. We do not discern any basis in public policy or a sound legal theory that would warrant such a broad extension of current law."

Defendants also cite Lee v. Snyder, 285 Ill. App.3d 555, 673 N.E.2d 1136 (Ill. Ct. App, 1st Dist. 1996) which involved an attempt by parents to dissolve a written agreement committing their son to play for a particular youth hockey team. The court stayed its hand because the complaint had been heard by an investigating committee of the association, where the parents were present to make their case, and had been reviewed by the board of directors. "Judicial review of an association's conduct is limited to whether the association exercised its power consistently with its own internal rules and the members' fundamental right to a fair hearing." Id. at 559, 1139. The court did not consider, as Defendants assert is essential, the issue of whether the matter involved an economic interest.

In any event, the D.C. Circuit in Berrien v. Pollitzer, supra, expressly rejected the notion that a plaintiff wrongfully expelled from a membership organization must show that a property right is involved: "A plaintiff expelled from a corporation or association not organized for profit need not show that he has even a nominal property interest to protect . . . . The [Metropolitan Club] case contains no suggestions that a property right is necessary." 165 F.2d at 23. Accordingly, it is clear that Plaintiffs here need not allege any economic interest in order to state a cause of action for violation of this common law right of fair procedure.[4]

Just as it is clear that the District of Columbia recognizes a cause of action for violation of the right of fair procedure, it is equally clear that Plaintiffs have adequately alleged a violation of that right in this case. The Amended Complaint makes abundantly clear the facts that NCAC and BSA failed to employ even the rudiments of fair procedure: they provided Plaintiffs with no notice of the charges against Gibson, gave them no opportunity to appear and be heard, and did

[4] Defendants also assert that Richardson lacks standing to assert a claim for violation of fair procedure because he has not suffered an injury in fact and "was not adversely affected in any way by the decision to revoke membership to Gibson." Plaintiffs show in Section D hereof, that Richardson has been adversely affected in several ways.

not disclose any documentary evidence that Defendants considered in connection with Gibson's case. Indeed, Defendant conducted their deliberations in secret, without disclosing the time or place of the meeting or the identity of those involved in the decisionmaking process.

In short, Defendants clearly either do not have a set of fair procedural rules for expelling members that would survive judicial scrutiny under the precedents cited above or, if they have such rules, have failed to disclose and follow them in this matter. Defendants motion should be denied as to Count I.

B. Defendants Have Failed To Show That Plaintiffs' Claims Of Violation Of The Constitutional Rights Of Due Process And Freedom Of Association Cannot Be Sustained

Defendants assert that Plaintiffs have no Constitutional rights of Due Process and Freedom of Association because Defendants are not governmental entities and, Defendants contend, "[a] claim for 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." Defts' Mem. At 9. Embedded in Defendants' argument, however, is an assertion of fact that remains in dispute on this record: namely, whether, as Defendants' contend, "the Boy Scouts is a private organization and is not subject to substantial government involvement." Defts' Mem. At 10. This assertion ignores the following facts:

First, Defendant BSA is a federally chartered organization, chartered by the Federal Government, in 1916, pursuant to 36 U.S.C. § 3901; see Amended Complaint ¶¶ 1, 6.

Further, BSA's finances and activities are, as a matter of federal statutory law, intricately entwined with the Federal Government. Federal statutes that authorize and direct federal agencies to use federal resources and tax dollars to assist BSA include the following:

- 7 U.S.C. § 7630 (Department of Agriculture grants to BSA);
- 10 U.S.C. § 2554 (Department of Defense assistance to BSA for National Jamboree);
- 10 U.S.C. § 2606 (Department of Defense assistance to BSA in foreign areas);
- 10 U.S.C. § 4682 (Army surplus to BSA);
- 10 U.S.C. § 7541 (Navy and Marine surplus to BSA);
- 10 U.S.C. § 9681 (Air Force surplus to BSA);
- 14 U.S.C. § 641 (Coast Guard surplus to BSA);
- 16 U.S.C. § 539f (National Forest lands, waiver of fees for BSA use);
- 20 U.S.C. § 7905 (Department of Education: guarantee BSA access to schools); and
- 32 U.S.C. § 508 (National Guard training assistance BSA).

As one example, the Armed Services are authorized and directed by Federal statute to support the BSA's National Jamboree conducted every fourth year. 10 U.S.C. § 2554. Pursuant to this statute, BSA has conducted its National Jamboree on the U.S. Army post at Fort A P. Hill near Fredericksburg, Virginia, for many years, with all branches of the armed services both present and providing equipment, logistical, and other valuable support.

Thus, stating as a proposition of law that a cause of action for violation of constitutional rights requires governmental action or action under color of law does not resolve whether such an action will lie here. The dispositive question here is one of fact: whether the BSA and the federal government "are so significantly involved with one another as to render the private actor subject to the constitutional responsibilities of the state." Jensen v. Farrell Lines, Inc., 625 F.2d 379, 384 (2d Cir. 1980) (citation omitted). Accordingly, Plaintiffs are entitled to take discovery to determine whether BSA's actions are so entertwined with those as the Federal Government as to make its actions state actions for purposes of the constitutional claims asserted in Count II of

the Amended Complaint under the standards of Rendell-Baker v. Kohn, 457 U.S. 830 (1982) and other cases.

Defendants rely heavily on the Supreme Court decision in Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 1226 (2000) for their assertion that BSA is a private organization, and, therefore, not obligated to provide Constitutional protections to members. That case, however, determined that BSA's countervailing constitutional rights of freedom of association and speech exempted it from the public accommodation statute of the State of New Jersey which prohibits discrimination against homosexuals. That case did not decide whether BSA is so substantially involved with Federal agencies, programs, and funding as to be required to extend the protections of the U.S. Constitution to its members where, as here, BSA's actions are not in furtherance of some compelling interest of its own. While Dale may permit BSA to discriminate on the basis of sexual preference, it cannot and should not be read so broadly as Defendants would read it, to allow BSA to trample any constitutional rights, in any context, with immunity from judicial review.

Defendants' motion as to Count II should be denied, so that Plaintiffs may pursue the claim that Defendants acted under color of law in violating constitutional rights. If, at the close of discovery, the facts as to the BSA's entanglement with the Federal Government are undisputed, a motion for summary judgment by one party or another is the appropriate mechanism for early disposition of this issue.

C. Plaintiffs Stated A Cause Of Action Of Breach Of Implied Contract Regarding Gibson

To prevail on their Rule 12(b)(6) Motion, Defendants must, under familiar principles, show that there is no set of facts that can sustain Plaintiffs' claim of an implied contract.

Plaintiffs allege that an implied contract between Gibson and Defendants arose out of Gibson's sustained and continued membership in the Scouting Movement and his sustained and continued service to the Scouting Movement generally and Troop 869 particularly. Amended Complaint ¶¶ 3, 22. During October 1998, Gibson was selected by the Troop Committee and the Troop sponsor, Trinity United Methodist Church, to serve as Scoutmaster of Troop 869. Amended Complaint ¶ 12. Gibson devoted un-counted hours to rejuvenating the Troop as to both recruiting new youth members and initiating a new program. Amended Complaint ¶¶ 3, 22, 33. Moreover, Gibson expended substantial funds from his own pocket for his participation in the Troop and its activities and for other un-reimbursed expenses of the Troop. Amended Complaint ¶ 3, 33. Gibson also devoted un-counted hours to the furthering several others programs of Defendants NCAC and BSA, and Gibson expended his own funds to participate in and support these several programs of Defendants. Amended Complaint ¶33. In addition, Gibson donated his money to NCAC, Amended Complaint ¶¶ 3, 33. These contributions included the annual United Givers Fund, as well as $1,000.00 contributed by Gibson and his spouse and accepted by NCAC on December 31, 2002, approximately 35 days before Defendants expelled Gibson.

From his devotion of service, time and effort, as well as his funds, there arose an understanding, indeed an implied contract, that Gibson would be permitted by Defendants to continue his membership in the Scouting Movement, which is a prerequisite for his service to the youth and families of Troop 869 as Scoutmaster if selected by the Troop Committee and the sponsor, Trinity United Methodist Church. Amended Complaint ¶¶ 34, 35.

At the least, there arose an implied contract that Gibson was entitled to common decency and fair procedure regarding any dispute or charges against him. An association's by-laws create

an agreement or contract between the association and the members, in that the member and the association agree to abide by the by-laws when the member joins the association. Gotleib v. Economy Stores, Inc., 199 Va. 856, 102 S.E.2d 351. (Quoting with approval from Kalbitzer v. Goodhue, 52 W.Va. 435, 44 S.E. 264 (1903)): "The Constitution and by-laws adopted by a voluntary association constitutes a contract between the members, which, if not immoral or contrary to public policy, or the law, will be enforced by the courts."); see Chafee, supra, at 1001.

Furthermore, at the least, there arose an implied contract that Defendants would abide by their own rules and procedures regarding the selection of a Scoutmaster by a Troop Committee and its sponsor, and that Defendants would not interfere with that the right and prerogatives of Troop 869 and Trinity United Methodist Church to select the Scoutmaster of Troop 869. Amended Complaint ¶¶ 34, 35.

Indeed, in numerous cases, BSA and local Scout councils have consistently denied liability, usually successfully, on the ground that BSA and the local council are not responsible for the conduct of a Scoutmaster because they do not select the Scoutmaster, as the troop makes that selection. E.g., Wilson v. Boy Scouts of America, 989 F. 2d 953 (8th Cir. 1993) (involving BSA's denial of liability for negligence by an adult troop leader resulting in injury on a troop outing); McQuiggan v. Boy Scouts of America, 73 Md. App. 705, 536 A.2d 137 (Md. Ct. Spec. App. 1987) (eye injury during troop meeting); McGarr v. Boy Scouts of America, 74 Md. App. 127, 536 A.2d 728 (Md. Ct. Spec. App. 1998) (injury on troop campout); Infant C v. Boy Scouts of America, 239 Va. 572, 391 S.E.2d 322 (Va. 1990) (sexual molestation); Juarez v. Boy Scouts of America, 81 Cal. App. 4th 377, 97 Cal. Rept. 2d 12 (Cal. App. Ct. 1st Dist. 2000) (sexual

molestation); Young v. Boy Scouts of America, 9 Cal. App. 2d 760, 15 P.2d 191 (Cal. App. Ct. 4th Dist. 1935) (bicycle trek).

In these cases, BSA consistently maintained that its role and authority regarding a Scoutmaster is limited to its maintaining a secret or confidential list of individuals that it has determined are homosexuals or otherwise deemed un-suitable for service as an adult leader in the Scouting Movement.[5] BSA uses its secret list to screen the persons who have been selected by a troop to serve as Scoutmaster and BSA declines to approve the selection of those persons who are on BSA's secret list.

Consistent with its legal position in litigation, BSA's official guidance to sponsoring organizations and troops authorizes and directs that the sponsor, in conjunction with a duly selected group of adults who constitute the Troop Committee, select the adult who serves in the adult leadership position of Scoutmaster. BSA's official guidance is set forth in its written materials, publications, and guidebooks that it distributes or sells, including its official Troop Committee Guidebook.[6]

Gibson's reliance, in devoting his time and financial resources to the Troop, NCAC and BSA, upon these rules as to the authority of the Troop to select its Scoutmaster gave rise to a contract implied-in-fact that NCAC and BSA would abide by these rules in their treatment of

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[5] BSA's secret or confidential list includes persons that BSA deems unsuitable to serve as adult Scout leaders because these persons are homosexuals, do not profess a religious belief, are suspected or convicted of abuse of youth, financial wrongdoers, or criminals. See, Juarez v. Boy Scouts of America, 97 Cal. Rptr. 2d 386; Infant C v. Boy Scouts of America, 391 S.E.2d 324.

[6] In its Troop Committee Guidebook (1998), BSA directs:

> "The Scoutmaster is selected and recruited by the troop committee and approved by the chartered organization representative." (at p. 9)
>
> "The chartered organization must also approve all adult leaders." (at p. 8)

Gibson. By summarily revoking his Scouting membership and thereby disabling the Troop from selecting Gibson as its Scoutmaster, NCAC and BSA breached this contract.

Defendants assert that Virginia law does not permit a volunteer to recover "the fair value" of his services freely and voluntarily donated. Defts' Mem. at 11-12. Defendants rely on two precedents, both of which involve an express contract in a commercial venture. In Mullins v. Mingo Lime and Lumber Co., 176 Va. 44, 50, 10 S.E. 492, 494 (Va. 1940), plaintiffs claimed that they had formulated an oral, express contract for the payment of sales commissions in an unspecified amount; the jury rejected their claim; and the Virginia Supreme Court approved the jury's finding: "Even if the jury had believed the fact as testified to by plaintiffs, there is serious doubt whether the whole transaction possess that certainty which is essential to a contract." In Nedirch v. Jones, 245 Va. 465, 429 S.E.2d 201 (Va. 1993), the Virginia Supreme Court declined to expand the terms and scope of a written contract of employment to require a bonus for a subject lease on a building that was owned, not by the plaintiff's employer, but by an affiliated, but legally separate entity, a general partnership in which the plaintiff's employer was the general partner.

Moreover, in asserting that the value of volunteer services may not be recoverable as damages, Defendants assert that if this item is not recoverable, then there can be no implied contract. With this logical fallacy, Defendants seem to confuse what items may be recovered as damages with whether an implied contract arose. Substantial consideration provided by Gibson to and accepted by Defendants supports the implied contract for Gibson's continued membership in the Scouting movement and opportunity to be of service to Troop 869, its members and parents, and its sponsor, Trinity United Methodist Church. The damages flowing from this

breach are a separate issue and may be quantified separately from the consideration that supports the contract.

Plaintiffs have adequately alleged the existence and breach of an implied contract, and that they were damaged thereby. The proper measure of damages in these circumstances can be determined later.

D. Plaintiffs Have Stated A Cause Of Action For Breach Of An Implied Contract Regarding Richardson

In seeking to dismiss Count IV, Defendants repeat their assertion that Richardson lacks standing because he was not injured in any way. Defts' Mem. at 13.

This is plainly wrong on its face. As alleged in the Amended Complaint, at all times relevant, Richardson was a parent with at least one son who was a Scout in Troop 869 and receiving the benefit of Gibson's leadership of the Troop. Amended Complaint ¶ 38. Also, at all times relevant, Richardson was a member of the Troop Committee, giving of his time in support of Troop 869. Amended Complaint ¶¶ 38, 39. The Troop Committee is authorized to select the Scoutmaster, in conjunction with the Troop's sponsor. Amended Complaint ¶¶ 2, 12, 30, 41. Richardson paid, not only dues to BSA and Troop 869, but also substantial fees and expenses generated by the extensive program of the Troop. Amended Complaint ¶¶ 38, 39.

Defendants by their actions have deprived Troop 869, including Richardson and his family, of the services, devotion, and leadership of Gibson as their Scoutmaster, leader, and guiding light. Amended Complaint ¶ 17.

In making these investments of time and funds, Richardson relied on a reasonable expectation, an implied contract that Gibson would be permitted by Defendants to continue his membership in the Scouting Movement and, thus also, to continue his leadership of Troop 869, and that Defendants would accord Gibson common decency and fair procedure regarding any

disputes or charges before overriding the decision of Richardson and the Troop Committee. Amended Complaint ¶¶ 34, 41. Gotleib v. Economy Stores, Inc., 102 S.E.2d 351; Chafee, supra, at 1001.

At the least, there arose an implied contract that Defendants would abide by their own rules and procedures regarding the selection of a Scoutmaster by a troop and its sponsor and that Defendants would not interfere with the relationship that had been established by Troop 869, its members, including Richardson and his family, and its sponsor with Gibson. Amended Complaint ¶ 41. Defendants actions damaged Richardson's rights and prerogatives, as a member of the Troop Committee, to select the Scoutmaster of Troop 869. Amended Complaint ¶¶ 2, 12, 30, 41.

These allegations specifically and adequately allege injury-in-fact to Richardson, as well as the existence and breach of an implied contract.

E. Plaintiffs Stated A Cause Of Action For Defamation

In moving to dismiss Count V, Defendants rely entirely on Virginia precedents on defamation. Defts' Mem. at 14-15. Defendants assert that Plaintiffs have not pled the exact words of the defamatory statements, citing Federal Land Bank v. Birchfield, 171 Va. 200, 3 S.E.2d 405 (Va. 1939) and Fuste v. Riverside Healthcare Association, Inc., 265 Va. 127, 575 S.E.2d 858 (Va. 2003). The Virginia Supreme Court in the Fuste decision found that the allegations of defamation were sufficient and clarified that the Birchfield decision "does not require that a pleading alleging defamation identity to whom, the statements were made and under what circumstances." Fuste v. Riverside Healthcare Association, Inc., 171 Va. 134, 575 S.E.2d 862. The court noted that such details can be provided through a bill of particulars. Id.

The court upheld allegations of defamation that were as specific as those in this Amended Complaint. Id.

Plaintiffs in their Amended Complaint have alleged two specific incidents of defamation sufficient to satisfy these standards:

(1) Statements by an NCAC official to the pastor of Trinity United Methodist Church, the Reverend James C. Sprouse, on or about January 27, 2003 that Gibson was "unfit for Scouting membership" and "unfit to be Scoutmaster of Troop 869." Amended Complaint ¶ 44.

(2) Statements by BSA's National Counsel David K. Park to Richardson during early January 2004, that Gibson has been deceitful, not truthful, with Richardson, because there were "other matters" that were the real reason for his expulsion that Gibson had not told to Richardson. Amended Complaint ¶ 45.

Similarly, Defendants also complain that Plaintiffs have not provided more particulars and details regarding defamatory statements by Defendants to the Troop parents. Both Defendants, however, conducted the process regarding the Gibson expulsion in secret, without Gibson present, either in person or by representative. Amended Complaint ¶¶ 2, 14, 15. Therefore, Plaintiffs on information and belief, understand that other instances of defamation occurred during such secret process prior to the Gibson expulsion (Amended Complaint ¶¶ 44), but, without benefit of discovery, are un-able to recite with certainty and specificity other instances of defamation at this time.

Further, Defendants assert that under the Virginia law of defamation, statements that are expressed as opinions are not actionable as defamation, relying on Virginia precedents that require defamatory statements to be capable of being proved true or false: Williams v.

Garraghty, 249 Va. 233; 455 S.E.2d 863 (Va. 2002); Yeagle v. Collegiate Times, 255 Va. 293, 295, 497 S.E.2d 136, 137 (Va. 1998). The Fuste decision also deals specifically with Virginia law on opinion as defamation: "In this appeal, the primary issue is whether the alleged defamatory communications are statements of fact or expressions of opinion." Fuste v. Riverside Healthcare Association, Inc., 171 Va. 129, 575 S.E.2d 859. The Court in the Fuste decision ruled that the statements were not opinion, could be proved true or false, and upheld the defamatory nature of the statements.

Thus, the issue under Virginia law is whether the statement that Gibson is unfit to be a member of the Scouting Movement, unfit to serve as Scoutmaster of Troop 869, or deceitful, untruthful, and dishonest in withholding information from Richardson are statements that are capable of being proved true or false. Defendants advance no reason or explanation as to why these statements may not be subjected to such proof. Further, the duties and responsibilities of a Scoutmaster are set forth in the BSA's publications, such as the Scoutmaster's Handbook and, therefore, Gibson's performance is subject to proof as to whether he satisfied those responsibilities and duties. Moreover, the statement that Gibson did not communicate the "other matters" to Richardson and was, thus, deceitful, untrustworthy, or dishonest is subject to proof as true or false.[7]

Even assuming – without conceding – that Virginia law applies to Plaintiffs' defamation claims, Plaintiffs have adequately alleged the requisite defamatory statements.

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[7] Moreover, Defendants ignore Virginia law that permits defamation per se where the defamation affects an individual's livelihood or profession. Because an attorney's reputation for honesty and integrity is essential to his ability to practice law, a statement that an attorney is unfit to serve in an office of trust or requiring integrity or that an attorney is deceitful, untrustworthy, or dishonest impugns the attorney's character, affects his profession, and constitutes, in Virginia law, defamation per se. See Carwile v. Richmond Newspapers, 196 Va. 1, 8, 82 S.E.2d 588, 592 (Va.1954). Gibson is an attorney and has been a member of the bar of the District of Columbia, in good standing, since 1967.

F. Defendants Have Failed To Show That The Choice Of Law Affects Their Motion Or The Outcome Of This Case

Defendants assert that Virginia law is controlling because Troop 869 is located in Virginia and because, they urge, certain of the acts alleged in the Amended Complaint occurred in Virginia.

The choice of law, however, does not alter the right of fair procedure in expulsion from a membership association because the District of Columbia, Maryland, and Virginia are in agreement. Defendants have not shown the choice of law makes a difference in the outcome of its Motion or this case. Therefore, unless Defendants demonstrate that the choice of law affects the outcome of this case, Plaintiffs respectfully urge this Court to disregard Defendants' arguments regarding the choice of law and apply the law of the District of Columbia.[8]

IV. CONCLUSION

Defendants have failed to show that there is no set of facts that would not entitle Plaintiffs to relief or that Plaintiffs' claims are barred by law. Therefore, Plaintiff respectfully request that this Court enter an order denying Defendants' Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Rule 12(b)(6).

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[8] If the choice of law is deemed material to this Motion, Plaintiffs would show the Court the following:

> BSA is domiciled in the District of Columbia, by Federal statute. NCAC is a non-profit corporation of the District of Columbia. The second incident of known defamation occurred in a telephone conversation between Richardson and BSA's National Counsel while Richardson was situated in his law office in the District of Columbia. The person who signed NCAC's letter of February 3, 2003, to Gibson is an attorney with offices in the District of Columbia.

NCAC maintains its headquarters in Bethesda, Maryland. On information and belief, Plaintiffs understand that the decision on or about February 3, 2003, to expel Gibson was made at NCAC headquarters in Maryland. Also on information and belief, Plaintiffs understand that conversations between and among NCAC officials, about Gibson and NCAC's concerns prior to the expulsion decision, occurred at those headquarters in Maryland.

A Proposed Order is attached.

Respectfully submitted,

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Plaintiffs pro se

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

JOSEPH LEE GIBSON et al., Plaintiffs, versus BOY SCOUTS OF AMERICA, et al., Defendants.	Civil Action No. 1:04cv00190 Judge Gladys Kessler Deck Type: Pro se General Civil

[PROPOSED] ORDER

Upon consideration of the Motion by Defendants, filed June 9, 2004, to Dismiss this Complaint, as amended, pursuant to Rule 2(b)(6) of the Federal Rules of Civil Procedure and of Plaintiff's Response in Opposition thereto, it is hereby

ORDERED that Defendants' 12(b)(6) Motion to Dismiss Plaintiffs' Amended Complaint is hereby denied.

ENTERED this ___ day of _____, 2004.

_____
Honorable Gladys Kessler
Judge, U.S. District Court
for the District of Columbia

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2004, true and correct copies of the foregoing "Plaintiffs' Memorandum In Opposition To Defendants' Motion To Dismiss Pursuant To Rule 12(b)(6) And Request for Oral Argument" were sent via postage prepaid, first-class mail to the following:

John McGavin
Trichilo Bancroft McGavin Hovarth & Judkins
3920 University Drive
Fairfax, VA 22030

Elizabeth Morris

POINTS AND AUTHORITIES

Statutes:

7 U.S.C. § 7630
10 U.S.C. § 2554
10 U.S.C. § 2606
10 U.S.C. § 4682
10 U.S.C. § 7541
10 U.S.C. § 9681
14 U.S.C. § 641
16 U.S.C. § 539f
20 U.S.C. § 7905
32 U.S.C. § 508
36 U.S.C. § 3901

Law Review Articles:

Zachariah Chafee, Jr., The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930)

Precedents:

Allen v. Southern Pacific Co., 166 Or. 290, 110 P.2d 933 (Ore. 1941)

Berrien v. Pollitzer, 165 F. 2d 21 (D.C. Cir. 1947)

Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 2446 (2000)

Bryant v. The District of Columbia Dental Society, 26 App. D.C. 461 (D.C. Cir. 1906)

Carwile v. Richmond Newspapers, 196 Va. 1, 82 S.E.2d 588 (Va. 1954)

Chisholm v. Hyattstown Vol. Fire Dept., Inc., 115 Md. App. 58, 691 A.2d 776 (Md. C.A. 1997)

De Ytrubide v. The Metropolitan Club of the City of Washington, 11 App. D.C. 180 (D. C. Cir. 1897)

Federal Land Bank v. Birchfield, 171 Va. 200, 3 S.E.2d 405 (Va. 1939)

Fuste v. Riverside Healthcare Association, Inc., 265 Va. 127, 575 S.E.2d 858 (Va. 2003)

Gotleib v. Economy Stores, Inc., 199 Va. 848, 102 S.E.2d 345 (Va. 1959)

Infant C v. Boy Scouts of America, 239 Va. 572, 391 S.E.2d 322 (Va. 1990)

Jensen v. Farrell Lines, Inc., 625 F.2d 379, 384 (2d Cir. 1980)

Juarez v. Boy Scouts of America, 81 Cal. App. 4th 377, 97 Cal. Rept. 2d 12 (Cal. App. Ct.1st Dist. 2000)

Kim v. Southern Sierra Council Boy Scouts of America, 117 Cal. App. 4th 743 (2004)

Lee v. Snyder, 285 Ill. App.3d 555 (Ill. Ct. App, 1st Dist. 1996)

Levant v. Whitney, 755 A.2d 1036 (D.C. Ct. App. 2000)

McGarr v. Boy Scouts of America, 74 Md. App. 127, 536 A.2d 728 (Md. Ct. Spec. App. 1998)

McQuiggan v. Boy Scouts of America, 73 Md. App. 705, 536 A.2d 137 (Md. Ct. Spec. App. 1987)

Mullins v. Mingo Lime and Lumber Co., 176 Va. 44, 10 S.E. 492, (Va. 1940)

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

Rendell-Baker v. Kohn, 457 U.S. 830 (1982)

Williams v. Garraghty, 249 Va. 233; 455 S.E.2d 863 (Va. 2002)

Williams v. Holiday Inn, 295 F.Supp. 27 (D.D.C. 2003)

Wilson v. Boy Scouts of America, 989 F. 2d 953 (8th Cir. 1993)

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

Young v. Boy Scouts of America, 9 Cal. App. 2d 760, 15 P.2d 191 (Cal. App. Ct. 4th Dist. 1935)

Publications:

Boy Scouts of America, Troop Committee Guidebook (1998)