

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

SUSAN STARTZELL, et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 05-05287
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.,	:	
	:	
Defendants.	:	

**MEMORANDUM AND ORDER**

Stengel, J.

May 26, 2006

This civil rights action involves competing constitutional rights. Plaintiffs<sup>1</sup> are a group of Christian evangelists who allege that they have been prevented from exercising their First Amendment rights to freedom of speech and freedom of expression.

Defendants Philly Pride Presents, Inc., Fran Price, and Charles F. Volz, Jr. (the "Philly Pride Defendants") contend that their actions were a proper exercise of their own First Amendment right to assemble. The Philly Pride Defendants have moved to dismiss claims 7 and 8 of Plaintiffs' Second Amended Complaint (the "Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Rule 12(b)(6) requires the Philly

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<sup>1</sup>Plaintiffs in this case are (1) Susan Startzell; (2) Nancy Major; (3) James Cruse; (4) Gerald Fennell; (5) Randall Beckman; (6) Linda Beckman; (7) Michael Marcavage; (8) Mark Diener; (9) Dennis Green; (10) Arlene Elshinnawy; and (11) Lauren Murch.

Pride Defendants to demonstrate that Plaintiffs can prove no set of facts sufficient to support their claims. I find that the Philly Pride Defendants have not met this burden, and I will deny their motion.

## **I. BACKGROUND<sup>2</sup>**

This case arises out of a series of events occurring at an annual festival held in Philadelphia, Pennsylvania entitled "OutFest." OutFest is held to honor "National Coming Out Day" and, according to Plaintiffs, is a "celebration of one's proclamation of his/her homosexuality." The Philly Pride Defendants helped to plan and organize the OutFest event held in 2004.

During the afternoon of October 10, 2004, Plaintiffs—a group of Christians "whose religion teaches that homosexual behavioral [sic] is sinful"—arrived at OutFest to proselytize attendees of the event. Plaintiffs brought signs and a bullhorn to OutFest as part of their efforts to "proclaim the Christian message of salvation through Jesus Christ." Upon their arrival at OutFest, Plaintiffs were confronted by Philadelphia police officers and the "Pink Angels," a "self-described security force comprised of homosexuals, transvestites, etc." The Pink Angels situated themselves between Plaintiffs and the main OutFest celebration, and linked their arms together to block Plaintiffs' entry to the festivities. Plaintiffs made several attempts to bypass the Pink Angels' barricade, but they were driven back each time.

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<sup>2</sup>The facts have been taken from the Complaint, viewed in the light most favorable to Plaintiffs.

Plaintiff Michael Marcavage eventually asked the police to order the Pink Angels to step aside, and, while the police ultimately granted the request, they took an "unreasonable amount of time" to do so. Plaintiffs eventually chose a location on a public sidewalk near the center of the event's festivities and began to convey their message. As soon as Plaintiffs attempted to speak and raise their signs, however, the Pink Angels surrounded Plaintiffs and began to blow whistles and shout at them. Eventually, the Pink Angels held up a wall of pink styrofoam boards to prevent others from hearing Plaintiffs' religious message.

Plaintiffs again requested that the police stop the Pink Angels' actions, but this time the police officers forcibly escorted Plaintiffs to another location. The Pink Angels continued to taunt, whistle, and shout at Plaintiffs, and at some point the police ceased escorting them. Plaintiffs responded by again attempting to express their message. Shortly thereafter, defendant Chief Inspector Tiano ordered Plaintiffs to relocate to an area outside of Outfest. As Plaintiffs began to leave, the police arrested them, placed them in handcuffs, and transported them to a police station for booking.<sup>3</sup> On February

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<sup>3</sup>Plaintiffs were charged with eight criminal counts. The felony counts were: (1) criminal conspiracy; (2) ethnic intimidation; and (3) riot. The misdemeanor counts were: (1) obstructing a highway; (2) recklessly endangering another person; (3) failure to disperse; (4) disorderly conduct; and (5) possession of an instrument of crime.

17, 2005, an unidentified court held a hearing to address Plaintiffs' motion to dismiss the criminal charges brought against them. That court granted the motion and summarily dismissed all of the criminal charges.<sup>4</sup>

Plaintiffs initiated this case on October 6, 2005, and the Court granted Plaintiffs' motion to file a second amended complaint on January 23, 2006. The Complaint alleges (1) seven violations of 42 U.S.C. § 1983 ("section 1983"); (2) a violation of 42 U.S.C. § 1985(3) ("section 1985(3)"); (3) three violations of the Pennsylvania Constitution; and (4) state law claims for battery and false imprisonment. The Philly Pride Defendants filed the instant motion on February 7, 2006, seeking to dismiss count 7 (conspiracy in violation of section 1983) and count 8 (conspiracy in violation of section 1985(3)) of the Complaint. The Court heard oral arguments on May 5, 2006.

## **II. STANDARD FOR A MOTION TO DISMISS**

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted examines the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). When considering whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004). See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

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<sup>4</sup>The Complaint fails to identify the court that dismissed these charges.

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Id. A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). Accordingly, a federal court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino, 376 F.3d at 159 (quoting Conley, 355 U.S. at 45-46).

### **III. DISCUSSION**

#### **A. Count 8: Conspiracy in Violation of Section 1985(3)**

Section 1985(3) provides individuals with a means to enforce their substantive constitutional rights against conspiring parties. See 42 U.S.C. § 1985(3). Section 1985(3) only provides a mechanism for enforcing these rights, and not a separate right in and of itself. See Brown v. Philip Morris, 250 F.3d 789, 805 (3d Cir. 2001). The statute provides in pertinent part:

If two or more persons in any State or Territory conspire . . . 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 . . . the

party so injured or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators.

42 U.S.C. § 1985(3).

Beginning with Griffin v. Breckenridge, 403 U.S. 88, 101-2 (1971), the Supreme Court has held in a line of cases interpreting section 1985(3) that a plaintiff must allege the following four elements to state a claim under the statute:

(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 injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Bhd. of Carpenters & Joiners v. Scott, 463 U.S. 825, 828-29 (1983) (citing Griffin, 403 U.S. at 102-03). The Griffin Court also held that section 1985(3) applies to private persons conspiring to violate another's federal rights. Griffin, 403 U.S. at 101-2. However, the Court has been careful to limit the statute's scope so as to avoid creating a "general federal tort law."<sup>5</sup> See id. In this case, the Philly Pride Defendants argue that Plaintiffs cannot meet the first two elements described by the Griffin Court.

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<sup>5</sup>The Supreme Court has specifically noted that Congress did not intend section 1985(3) to provide a federal cause of action for "all tortious, conspiratorial interferences with the rights of others." Griffin, 403 U.S. at 102.

## 1. The First Griffin Element: "Conspiracy"

A conspiracy is "a combination of two or more persons to do a criminal act, or to do a lawful act by unlawful means or for an unlawful purpose." Marchese v. Umstead, 110 F. Supp. 2d 361, 371 (E.D. Pa. 2000) (quotations and citations omitted). It is well-settled that conspiracy claims must be pleaded with some degree of specificity. Conroy v. City of Philadelphia, 421 F. Supp. 2d 879, 888 (E.D. Pa. 2006) (citations omitted). In order to plead the conspiracy element of a section 1985(3) claim, a complaint "must allege specific facts suggesting there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end." Lamb Found. v. N. Wales Borough, No. 01-950, 2001 WL 1468401, at \*15 (E.D. Pa. Nov. 16, 2001) (citing Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990)); Safeguard Mut. Ins. Co. v. Miller, 477 F. Supp. 299, 304 (E.D. Pa. 1979). Plaintiffs must allege specific facts "of a combination, agreement or understanding among all or between any of the defendants" along with "factual allegations that the defendants plotted, planned, or conspired together to carry out the chain of events." Amlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974).

In this case, Plaintiffs have pleaded sufficient facts to infer a conspiracy between the Philly Pride Defendants and the other defendants.<sup>6</sup> The Complaint alleges a number of facts sufficient to support an inference of a conspiracy to deprive Plaintiffs of their

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<sup>6</sup>I note that paragraph 162 of the Complaint baldly asserts the existence of a conspiracy. Compl. ¶ 162 ("Defendants Philly Pride, Volz, Price, City of Philadelphia, Fisher, Tiano and Simmons conspired with each other to deny Plaintiffs their constitutionally protected rights"). I cannot ultimately find a conspiracy based on this "vague and conclusory assertion" alone. See Morse, 132 F.3d at 906 (neither "bald assertions" nor "vague and conclusory allegations" in the Complaint are accepted as true when considering Rule 12(b)(6) a motion to dismiss).

constitutional rights. First, the Complaint states that a meeting took place between the Philly Pride Defendants and the City of Philadelphia. Compl. ¶ 164 (the Philly Pride Defendants met with the City of Philadelphia); Compl. ¶ 167 (the Philly Pride Defendants "confirm[ed] that its members met with the City of Philadelphia Police Department").

Second, the Complaint states that employees of one of the conspirators (the City of Philadelphia) took actions that violated Plaintiffs' constitutional rights after the meeting. Compl. ¶ 172(b) (city police officers did nothing to stop the Pink Angels); Compl. ¶ 172(c) (police refused to allow Plaintiffs to stay in one location); Compl. ¶ 172(c) (police interfered with Plaintiffs' use of signs and a bullhorn). See also Compl. ¶ 172(d) (police improperly arrested Plaintiffs).

Third, the Complaint alleges facts allowing me to infer a coordination of plans between the defendants. Compl. ¶ 154 (Chief Inspector Tiano advised the police officers that the Pink Angels would be working with the police to exchange information); Compl. ¶ 155 (Chief Inspector Tiano stated he was sure that the Pink Angels' actions at OutFest "would cause a problem and that it will be interesting to see what happens"). After taking all reasonable inferences in Plaintiffs' favor, these allegations demonstrate a conspiracy to violate Plaintiffs' constitutional rights. Plaintiffs have therefore adequately alleged the first Griffin element of a section 1985(3) claim.



## **2. The Second Griffin Element: "Depriving a Class of Equal Protection"**

Plaintiffs must demonstrate that they are a "class" within the meaning of section 1985(3) and that the Philly Pride Defendants invidiously discriminated against this class. The Third Circuit has recently established a two-requirement pleading standard for alleging a "class-based, invidiously discriminatory animus." Farber v. City of Paterson, 440 F.3d 131, 135 (3d Cir. 2006). First, a plaintiff must allege that "the conspiracy was motivated by [a] discriminatory animus against an identifiable class." Id. (citing Aulson v. Blanchard, 83 F.3d 1, 4-5 (1st Cir. 1996)). Second, a plaintiff must allege "that the discrimination against the identifiable class was invidious." Id.

### **a. Identifiable Class Protected by Section 1985(3)**

Plaintiffs allege that they are members of a religious group class comprised of "Christians." For the purposes of a section 1985(3) claim, a class "cannot be defined simply as the group of victims of [a defendant's tortious] action." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269 (1993) (quotations and citations omitted). Instead, a section 1985(3) class must have an identifiable existence separate and apart from the fact that its members were victims of the defendant's tortious conduct. Farber, 440 F.3d at 136. An identifiable class exists only when a reasonable person could "readily determine by means of an objective criterion or set of criteria who is a member of the group and who is not." Aulson, 83 F.3d at 5-6.

The Supreme Court has not extended section 1985(3)'s protection to any class other than race. See Bray, 506 U.S. at 269. In addition, the Third Circuit has not directly addressed whether section 1985(3) applies to a class defined by the religious beliefs of its members. The Third Circuit has, however, suggested that it may consider religious groups to be a class protected by section 1985(3). See Wilson v. Rackmill, 878 F.2d 772, 775 (3d Cir. 1989) (remanding case in part because parolee's civil rights complaint alleging discrimination due to "racial and religious animus" did not "clearly lack any arguable factual or legal basis"). See also King v. Township of E. Lampeter, 17 F. Supp. 2d 394, 424 (E.D. Pa. 1998) (noting in context of alleged "anti-Amish animus" that "although no court within this Circuit has applied [section] 1985(3) in the context of . . . religious discrimination, we believe that such protection would likely be appropriate in some cases").

Furthermore, other Circuits have recognized religious groups as a "class" for purposes of a section 1985(3) claim. See, e.g., Ward v. Connor, 657 F.2d 45, 48 (4th Cir. 1981) (noting that while the Supreme Court has declined to extend section 1985(3)'s ambit to include religious beliefs, "the lower federal courts have, almost without exception, extended the coverage of the statute to religious groups"); Galloway v. Louisiana, 817 F.2d 1154, 1159 (5th Cir. 1987) ("A plaintiff must show membership in some group with inherited or immutable characteristics (e.g., race, gender, *religion*, or

national origin)") (emphasis added); Marlowe v. Fisher Body, 489 F.2d 1057, 1065 (6th Cir. 1973) (holding that complaint alleging conspiracy to discriminate based on a plaintiff's Jewish faith sufficiently stated a section 1985(3) claim).

I find that religious groups are a protected class under section 1985(3) after considering (1) that there is no direct authority from the Supreme Court or the Third Circuit on this issue; (2) indirect indications from the Third Circuit and other courts in this district; and (3) the holdings of other federal courts.

I also find that Plaintiffs have alleged that they are part of an identifiable class for purposes of this motion to dismiss. The Complaint alleges that Plaintiffs are part of a class of Christians. See Compl. ¶ 23 ("Plaintiffs are Christians"). See also Compl. ¶ 25 ("As part of their ministry, Plaintiffs display signs and offer literature to passersby" in an effort "to persuade men and women to abandon their sinful lifestyle and place their faith and trust in Jesus Christ"). A reasonable person reading these paragraphs in conjunction with the other allegations in the Complaint could readily identify the class in this case as "Christians."<sup>7</sup>

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<sup>7</sup>It is possible that the class actually alleged by the Complaint is "Christians who oppose homosexuality," rather than a class comprised of "Christians" generally. See Compl. ¶ 23 ("Plaintiffs are Christians who believe, and whose religion teaches, that *homosexual behavioral* [sic] *is sinful*") (emphasis added); Compl. ¶ 24 ("Plaintiffs regularly locate themselves on the public ways to peaceably express their message in love that *homosexual behavior is sinful*") (emphasis added); Compl. ¶ 161 ("Plaintiffs believe that they are called as part of their religious faith . . . to pursue opportunities *such as the OutFest* . . . to spread the gospel message") (emphasis added). However, after considering the high burden necessary to grant a Rule 12(b)(6) motion, I find that Plaintiffs have adequately alleged an identifiable class of persons protected by section 1985(3) at this stage of the proceedings. The exact definition of the class may be considered again if the issue is raised after the close of discovery.

**b. Discriminatory Animus**

Plaintiffs must also allege that the Philly Pride Defendants' conspiracy against their class was motivated by a "discriminatory animus" to meet the second Griffin element. Mere opposition to a viewpoint, such as "a value judgment favoring childbirth over abortion," shared by class members is not the "class-based, discriminatory animus" required by the Supreme Court. See Bray, 506 U.S. at 274. Rather, a section 1985(3) plaintiff must allege additional facts demonstrating that the conspiring defendants discriminated against the source of the plaintiff's message. See id.

Several allegations in the Complaint create an inference that the Philly Pride Defendants had a discriminatory animus against Plaintiffs as Christians, and not merely against their anti-homosexual viewpoints. First, the Complaint alleges that Chief Inspector Tiano referred to Plaintiffs as "the religious right" at the police roll call prior to OutFest. Compl. ¶¶ 153, 168 ("[Chief Inspector Tiano] referred to Plaintiffs as the 'religious right' and described their message as being from the 'religious right'").

Second, the Complaint states that the Philly Pride Defendants described Plaintiffs as "Christians" when addressing how the Philly Pride Defendants would counter Plaintiffs' actions at OutFest. See Compl. ¶ 31 (Volz stated that "members of the Pink

Angels would carry large signs alongside *Christians* to block their access to OutFest") (emphasis added). See also Compl. ¶ 167 (the Philly Pride Defendants "met with the City of Philadelphia Police Department to address how they were going to handle the *Christian evangelists* who attend the OutFest event") (emphasis added).

Third, the Complaint states that two of the alleged conspirators made statements that could reveal a discriminatory animus against Plaintiffs' class. Compl. ¶ 151 (Volz stated "[w]e'll have a moving pink wall around them" and that "[h]opefully, [Plaintiffs] will be so frustrated, they won't come again"); Compl. ¶ 155 (Chief Inspector Tiano stated that he was sure that the Pink Angels' actions at OutFest "would cause a problem and that it will be interesting to see what happens").

Standing alone, any one of these allegations would be insufficient to support the inference of a discriminatory animus against Plaintiffs' class. Viewed together, however, I find that Plaintiffs have sufficiently pleaded a discriminatory animus against their class for the purposes of this motion.<sup>8</sup>

### **c. Invidiousness**

Finally, Plaintiffs must allege facts demonstrating that the Philly Pride Defendants' discrimination against Christians is "invidious" to satisfy the second Griffin element of a section 1985(3) claim. Three guidelines appear to guide the Third Circuit's

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<sup>8</sup>The "discriminatory animus" element of Plaintiffs' section 1985(3) claim balances precariously on a number of stretched inferences. While discovery may develop this issue, this is a motion to dismiss and I must accept as true all specific facts as pleaded by Plaintiffs as well as draw all reasonable inferences in their favor.

determination of what makes a discriminatory animus against a class "invidious": (1) the immutability of the class's characteristics; (2) a history of pervasive discrimination against the class; and (3) whether there is an "emerging rejection" of such discrimination against the class. See Lake v. Arnold, 112 F.3d 682, 688 (3d Cir. 1997).<sup>9</sup>

In Farber, 440 F.3d at 142, the Third Circuit held that discrimination on the basis of political patronage was not invidious because, *inter alia*, such patronage is a mutable characteristic. Citing the Supreme Court's decision in Bray, the Farber court noted that, unlike racial discrimination, discrimination based on political patronage could have a rational basis. Id. at 142 n.12. Notably, the Farber court specifically stated that it did not hold that discrimination based upon a class's mutable characteristics could not be invidious. Id. at 142.

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<sup>9</sup>Characteristics such as a person's religion and religious beliefs are not "immutable" as that word is generally used outside of the legal community. The Oxford English Dictionary, for example, defines "immutable" as "not subject to or susceptible of change; unchangeable, unalterable, changeless." OXFORD ENGLISH DICTIONARY (2d ed. 1989). A person may change his or her religion or religious beliefs, and therefore these characteristics are not immutable in the ordinary sense of the word.

The Third Circuit has not defined what constitutes an "immutable characteristic" in the context of section 1985(3). At least one court in this Circuit, however, has provided some indirect guidance. In Sunkett v. Misci, 183 F. Supp. 2d 691, 706 (D.N.J. 2002), the District of New Jersey noted that "the Supreme Court's opinions, and the Third Circuit cases interpreting them, seem to demand that a [section] 1985(3) defendant have discriminated on the basis of *relatively immutable, highly identifiable, and discrete group identification* [characteristics], such as race, gender, disabled status, or perhaps *religion*." (emphasis added). While a person's religion and religious belief are not literally immutable, I find that they are relatively immutable, highly identifiable, and may be used to identify a discrete group of persons. Moreover, these are characteristics that a person should not be forced to change. Plaintiffs' allegations, with all reasonable inferences taken in their favor, are therefore sufficient to identify a class protected by section 1985(3) at this stage of the litigation.

Plaintiffs have adequately alleged that the Philly Pride Defendants' discrimination was invidious in this case. As with the political patronage at issue in Farber, Plaintiffs' religion and religious beliefs are not truly immutable characteristics, as are a person's race or national origin. However, these characteristics are relatively immutable, highly identifiable, and may be used to identify Plaintiffs as a group. See Sunkett, 183 F. Supp. 2d at 706. Moreover, there is no rational basis for discriminating against Plaintiffs' religious beliefs. Cf. Farber, 440 F.3d at 142 n.12. Accordingly, despite a lack of clear authority from the Third Circuit, I find that Plaintiffs have adequately alleged that the discriminatory animus at issue was invidious.

**B. Count 7: Conspiracy in Violation of Section 1983**

I will also deny the Philly Pride Defendants' motion with regard to Plaintiffs' conspiracy claim under section 1983. To state a claim for conspiracy in violation of section 1983, a plaintiff must allege "(1) the existence of a conspiracy involving state action; and (2) a [deprivation] of civil rights in furtherance of the conspiracy by a party to the conspiracy." Marchese, 110 F. Supp. 2d at 371. Similar to a conspiracy claim under section 1985(3), the plaintiff must plead the "combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events." Id. (citations omitted).

In this case, I find that Plaintiffs have met the pleading requirements for a section 1983 conspiracy claim. First, Plaintiffs have alleged that the conspiracy involved state action through the participation of the City of Philadelphia. Second, Plaintiffs have sufficiently pleaded a deprivation of their civil rights in furtherance of the conspiracy by defendants for the same reasons that I have discussed at length above. I therefore find that Plaintiffs have alleged a section 1983 conspiracy claim.

#### **IV. CONCLUSION**

For the reasons described above, I find that Plaintiffs have alleged all of the requirements necessary to bring conspiracy claims under section 1985(3) and section 1983. I will therefore deny the Philly Pride Defendants' motion to dismiss counts 7 and 8 of the Complaint. An appropriate Order follows.



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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUSAN STARTZELL, et al.,	:	CIVIL ACTION
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Plaintiffs,	:	NO. 05-05287
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v.	:	
	:	
CITY OF PHILADELPHIA, et al.,	:	
	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 26th day of May, 2006, upon consideration of the Philly Pride Defendants' Motion to Dismiss Counts Seven and Eight of the Second Amended Complaint (Docket No. 25), Plaintiffs' response thereto (Docket No. 28), and oral arguments held before the Court on May 5, 2006, it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.