IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE UNITED STATES OF AMERICA,)
)
Plaintiff,) CIVIL ACTION NO.
) 1:06-CV-01652
v.)
) JUDGE KATHLEEN M. O'MALLEY
CITY OF EUCLID, OHIO; EUCLID CITY)
COUNCIL; CUYAHOGA COUNTY)
BOARD OF ELECTIONS,)
)
Defendants.)
)

**UNITED STATES' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS
AND/OR FOR MORE DEFINITE STATEMENT**

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I. STATEMENT OF ISSUES TO BE DECIDED

Defendants', City of Euclid and Euclid City Council ("the City"), motion to dismiss or, alternatively, for a more definite statement raises the following issues: (a) whether the Complaint alleges facts sufficient to establish the first of three preconditions identified in Thornburg v. Gingles, 478 U.S. 30 (1986), as necessary to prove a Section 2 violation; (b) whether a narrowly-tailored Section 2 remedy violates the Equal Protection Clause; (c) whether the Euclid City Council lacks capacity to be sued; and (d) whether the Complaint is vague or ambiguous.

II. SUMMARY OF ARGUMENT

First, contrary to the City's assertion, the Complaint alleges facts sufficient to establish the first Gingles precondition. Second, a narrowly-tailored Section 2 remedy does not violate the Equal Protection Clause. Third, to resolve the party status of the Euclid City Council, the United States believes the most efficient and expedient course is for the Court to drop the Euclid City Council as a named defendant pursuant to Rule 21. Fourth, the Complaint contains clear and unambiguous factual allegations establishing the essential elements of a claim under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. These allegations must be accepted as true and viewed in the light most favorable to the United States. Accordingly, the City's motion for dismissal or a more definite statement of the Complaint should be denied.

III. STATEMENT OF FACTS

Plaintiff, the United States of America, filed its Complaint against the City of Euclid, Ohio, the Euclid City Council, and the Cuyahoga County Board of Elections on July 10, 2006. The Complaint contains the following factual allegations.

The Euclid City Council is composed of nine members, five of whom are elected at large and four of whom are elected by ward. (Compl. ¶ 10.) The at-large council members include one council president and four members elected from "numbered posts." Id. All nine council members are elected to two-year concurrent terms. Id.

According to the 2000 Census, the City of Euclid has a total population of 52,717. Id. at ¶ 8. Of this total population, 30.5 percent (16,297) is African-American,[1] and 65.7 percent (34,678) is white. Id. Further, of the total voting age population in the City of Euclid, 27.8 percent (11,397) is African-American and 69.7 percent (28,528) is white. (Compl. ¶ 9.)

The City of Euclid's African-American population is sufficiently numerous and geographically compact so that a properly apportioned single-member district plan for electing the Euclid City Council can be drawn in which African-American citizens would constitute a majority of the total population and voting age population in two districts. (Compl. ¶ 11.)

Racially polarized voting patterns prevail in Euclid City Council elections. Id. Specifically, African-American voters are politically cohesive when voting in Euclid City Council elections. Id. Further, white bloc voting usually results in the defeat of candidates who are preferred by African-American voters. Id. That is, in Euclid City Council elections since

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[1]The City's counsel takes issue with plaintiff's use of the term African-American. (Defs.' Mem. Supp. Dismiss at 5, n.1.) Both the U.S. Census Bureau and the Department of Justice have used the terms African-American and black in recent years. See e.g., United States v. Charleston County, 316 F. Supp. 2d 268, 271 n.1 (D.S.C. 2003), aff'd, 365 F.3d 341 (4th Cir. 2004), cert. denied, 543 U.S. 999 (2004). The United States respectfully notes that this Court has used the term African-American with some regularity in reported decisions. See e.g., Curry v. Scott, 249 F.3d 493, 497 (6th Cir. 2001); Byrd v. Brandeburg, 922 F. Supp. 60, 62 (N.D. Ohio 1996). The United States will of course abide by the Court's preference regarding the use of either term.

1995, white voters have consistently voted as a bloc so as to defeat every African-American preferred African-American candidate. Id.

In addition, several features of the current election system for the Euclid City Council reduce the opportunity of African-American voters to overcome the effect of white bloc voting, including the use of numbered slots to elect the four at-large council members. (Compl. ¶ 12.) The use of numbered slots has the effect of limiting at-large races to single seat elections, resulting in head-to-head contests. Id. This in turn eliminates the opportunity of African-American voters to single-shot vote. Id.

Other factors found in Euclid include the following: African-Americans have suffered from a history of official discrimination; significant socioeconomic disparities exist between white and African-American residents, which have the effect of limiting African-American participation in Euclid City Council election; and racial separation in the City of Euclid's social, civic, and political life results in African-American candidates for city office having less opportunity than white candidates to solicit the votes of the white majority. (Compl. ¶ ¶ 13-15.)

Paragraphs 16 and 17 of the Complaint identify the cause of action as follows: under the totality of the circumstances, the at-large and ward method of election for the Euclid City Council has the effect of diluting African-American voting strength. (Compl. ¶ 16.) This results in African-American citizens being denied an opportunity equal to that afforded other members of the electorate to participate in the political process and elect representatives of their choice in violation of Section 2 of the Voting Rights Act. Id. Unless enjoined, Defendants will continue to conduct Euclid City Council elections under the present method of election. (Compl. ¶ 17.)

IV. ARGUMENT

The case law is clear that pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).[2] Further, the "court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993). As argued below, the Complaint pleads a set of factual allegations which, when accepted as true, strongly support a claim for relief under Section 2. "It is no accident that most cases under section 2 have been decided on summary judgment or after a verdict, and not on a motion to dismiss." Metts v. Murphy, 363 F.3d 8, 11 (1st Cir. 2004).

A. The Complaint Alleges Facts Establishing the First Gingles Precondition.

Gingles is the seminal Section 2 case that sets forth three necessary preconditions plaintiff must establish in order to prove a violation. The three preconditions are:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id. at 50-51.

The City's argument that the Complaint fails to establish the first Gingles precondition is

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[2]Although the City does not expressly reference Rule 12(b) nor discuss the standards applicable to motions brought under this rule, it appears the City's primary argument is premised on Rule 12(b)(6) (failure to state a claim upon which relief can be granted).

difficult to comprehend. It consists of at least three seemingly unrelated sub-parts. First, the crux of the City's argument appears to be that because the African-American voting age population is 27.8 percent in the City of Euclid as a whole, African-Americans do not constitute a majority in a geographic district sufficient to satisfy the first Gingles precondition.[3] Second, the City discusses the concept of influence districts, presumably because it believes incorrectly that the United States' Complaint is fatally premised on influence districts. Third, the City concludes by suggesting that the United States proposes that the City's African-Americans be "jammed into a district with a super majority," a scenario which itself can be dilutive. These arguments, considered separately or in combination, are meritless.

1. A minority group need not form the majority in the challenged jurisdiction

The first Gingles precondition does not, as the City argues, require the United States to show that African-Americans form a majority of voters city-wide. The City's argument is inapposite; indeed, it stands Gingles on its head to argue that a minority group need be a majority in the challenged jurisdiction. If African-Americans constituted an effective voting majority city-wide (i.e., within the four at-large council districts) a Section 2 claim would be much more difficult to advance. On the other hand, the fact that the City's African-Americans

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[3]The City states as follows: "a population of 27 percent fails, as a matter of law, to meet the first precondition set forth in" Gingles. (Defs.' Mem. Supp. Dismiss at 6.) The City goes on to argue that a "plaintiff cannot maintain a Section 2 claim for a racial group that makes up less than 50 percent of the population...." Id. at 8 (citations omitted). The City concludes this section of its argument by stating that a "27% Black voter population fails miserably to meet the first Gingles precondition." Id. at 9.

The City states that as a result of the minority African-American population within the City, "to create a majority minority district redrawing of the lines of the wards, along racial lines is necessary." Id. at 7. However, aside from this passing reference, the City's equal protection argument appears in a separate section which follows the Gingles discussion. The United States will thus treat it as a distinct argument.

fail to constitute an effective voting majority city-wide is a critical factor supporting the Section 2 claim and not grounds for dismissal of this lawsuit.

The first Gingles precondition states that it is a "minority group" that must be "sufficiently large and geographically compact to constitute a majority in a single-member district." Id. (emphasis added). The first Gingles precondition refers to a hypothetical or illustrative single-member district that a plaintiff must show can be fairly drawn to remedy a potential Section 2 violation. See id. at 50, n.17. Consequently, a plaintiff typically establishes the first Gingles precondition by producing an illustrative plan featuring at least one majority-minority single-member district. As just one example, United States v. Charleston County involved a challenge to the at-large method for electing the Charleston County Council. 316 F. Supp. 2d at 270. The district court found that the United States established the first Gingles precondition by showing that "the African-American population of Charleston County is sufficiently numerous and geographically compact to constitute a majority in at least one of nine single-member districts in an illustrative plan." Id. at 276-77 (emphasis added).

This is precisely what the United States alleges here. Paragraph 11 of the Complaint states:

> The African-American population of the City of Euclid is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant City Council can be drawn in which black citizens would constitute a majority of the total population and voting age population in two districts.

As is apparent, paragraph 11 alleges that two illustrative single-member districts can be drawn, the appropriate standard against which to measure minority group potential to elect representatives of choice. Gingles at 50; see also Sanchez v. Colorado, 97 F. 3d 1303, 1311

(10th Cir. 1996) (stating that the first Gingles precondition "simply asks whether any remedy is possible in the first instance"). The City makes no specific reference to the language in paragraph 11, a perplexing omission since it directly addresses the first Gingles precondition. Thus, since the Complaint's factual allegations, including those in paragraph 11, are to be accepted as true and the Complaint read in the light most favorable to the United States, the City cannot establish that it is entitled to a Rule 12(b)(6) dismissal. See In re DeLorean Motor Co., 991 F.2d at 1240.

2. The Complaint does not allege an influence-dilution claim.

The City discusses "influence-dilution" claims, and argues that the first Gingles precondition would have to be modified or eliminated in order to consider such a claim. "An influence district is one where a distinct group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected." Id. at 1104. According to the City, the Sixth Circuit in Cousin v. Sundquist, 145 F.3d 818 (6th Cir. 1998), previously rejected influence district claims. But see Parker v. Ohio, 263 F. Supp. 2d 1100, 1112 (S.D. Ohio 2003) (Gwin, J., concurring) (writing that the Sixth Circuit's discussion of influence district claim is "obvious dicta"). Although the relevance of the City's influence district discussion is not readily apparent, the implication is that the United States' seeks to prove the first Gingles precondition through such a theory. However, influence districts are of no relevance to the United States' claim.

Once again, the complaint's paragraph 11 clearly alleges the first Gingles precondition by stating that two majority African-American city council wards could be properly drawn. The Complaint in no way suggests that the United States intends to establish the first Gingles

precondition, or any other aspect of its claim, by showing that influence council districts could be drawn. The 27.8 percent figure refers to the city-wide African-American voting age population. It has no relation to influence districts, and establishes only that the City has a minority African-American voting age population for which, as the Complaint goes on to allege, two single-member African-American majority council wards may be drawn.

3. The Complaint does not allege any facts suggesting African-Americans will be packed into super majority districts thereby diluting voting strength.

The City, citing Voinovich v. Quilter, 507 U.S. 146, 153-54 (1993), argues that "a plan itself can cause dilution where Blacks are jammed into a district with a super majority." (Defs.' Mem. Supp. Dismiss at 8.) The City states that the "rationale from Quilter, supra, is exactly the result plaintiff would impose upon the City of Euclid." Id. at 9. However, Quilter is inapposite to the City's arguments.

Quilter involved a Section 2 challenge to Ohio's decennial reapportionment of its state legislature. Quilter, 507 U.S. at 149. One of plaintiffs' arguments was that the reapportionment plan "packed black voters by creating districts in which they would constitute a disproportionately large majority," thereby minimizing the "total number of districts in which black voters could select candidates of choice." Id. at 149-50. Plaintiffs argued that instead "the plan should have created a larger number of 'influence' districts." Id. at 150.

In reversing the judgment in favor of plaintiffs, the Quilter Court discussed how a dilutive "packing" argument is typically framed, and provided an example by way of illustration. Id. at 153. The Court stated that a minority group may have sufficient numbers to constitute an effective voting majority in three districts and elect three candidates of choice. Id. "But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only

two candidates." Id. at 153-54. The Court then contrasted the typical "packing" argument with the plaintiffs' influence-dilution claim and assumed for the purpose of resolving the case that the plaintiffs established "a cognizable claim." Id. The Court went on to reverse the district court for reasons unrelated to the "packing" argument or the influence-dilution claim. Id. at 157-58.

The City raises a dilutive "packing" argument, although, as Quilter suggests, it is one raised by a party when arguing that a minority group is entitled to additional single-member majority districts. Yet, the City does not argue that the United States proposes the "packing" of African-American in the City of Euclid into too few single-member majority districts. Instead, the City makes arguments having nothing to do with Quilter or dilutive "packing." According to the City, "by carving out two majority Black wards" the United States would: 1) eliminate the opportunity for African-American candidates to run at-large and attract cross-over votes, and 2) limit the number of African-American candidates with an opportunity to run in the other six wards because these would become "super majority white wards." These additional arguments are also baseless.

The Complaint seeks an order enjoining the City from conducting future elections for the Euclid City Council under the current mixed at-large and ward method. The Complaint, in paragraph 4 of the "prayer for relief," requests that the City and the Euclid City Council be ordered "to devise and implement an election system for the Euclid City Council which complies with Section 2." In devising an acceptable remedy, it would first be up to the City to determine whether it is necessary to eliminate all at-large council seats. See e.g., Westwego Citizens for Better Gov. v. City of Westwego, 946 F.2d 1109, 1124 (5th Cir. 1991) (stating that it is "appropriate to give affected political subdivisions at all levels of government the first

opportunity to devise remedies for violations of the Voting Rights Act"); McGhee v. Granville Co., 860 F.2d 110, 115 (4th Cir. 1988) (holding that county's legislative body given "first opportunity" to devise an acceptable remedial plan); Clark v. Calhoun County, 21 F.3d 92, 95 (5th Cir. 1994); Cf. Reynolds v. Simms, 377 U.S. 533, 586 (1964) ("[L]egislative reapportionment is primarily a matter for legislative consideration and determination.").

It may well be that the City could devise and implement a new method of election that remedies the Section 2 violation while maintaining some number of at-large council seats. In any event, the characteristics of the remedy will not be know until after the Court has found a violation of Section 2, and is far from a ripe question for disposition in a Rule 12(b)(6) motion.

Further, the Complaint does not specify the total number of single-member wards necessary to remedy a violation. Nor does it specify the racial composition of the single-member wards beyond the paragraph 11 allegations that two majority African-American city council wards could be properly drawn. The Complaint need not allege the total number of wards to nor the racial composition of the wards, as the City of Euclid will be given the first opportunity to devise an appropriate remedy. Again, the Complaint requests that the City and City Council be ordered to devise and implement a remedy that complies with Section 2. Ignoring the standards for a Rule 12(b)(6) motion, the City refuses to acknowledge or accept as true the complaint's factual allegation that two African-American single-member wards can be fairly drawn. Instead, the City interjects facts, unsubstantiated by the Complaint, alleging the creation of six "super majority white wards." The City may not agree with the Complaint's allegations, particularly paragraph 11, yet disbelief in a complaint's factual allegation cannot form the basis for a Rule 12(b)(6) dismissal. See In re Delorean Motor Co., 991 F.2d at 1240.

Finally, the City's arguments show a fundamental misunderstanding of Section 2 challenges to at-large election systems. Eliminating some number of at-large districts or placing minorities in previously existing districts may result from a court-ordered Section 2 remedy. If so, there is ample case law to support it. See e.g., United States v. Dallas County Com'n, Dallas County, Ala., 850 F.2d 1433, 1438-40 (11th Cir. 1988) ("[A]greeing with the government that the district court's [mixed at-large/ward] election plan does not comply with section 2 [because it] . . . perpetuates rather than ameliorates the inequities which have resulted in an abridgement of Dallas County's black citizens' access to the political process."). Further, the Complaint's factual allegations are presumed to be true at this stage. For purposes of this motion, the City must then accept that, based on the totality of the circumstances, African-Americans have less opportunity than other members of the electorate to elect representatives of their choice. Thus, the City claims a hollow right for African-American candidates – an opportunity to run for at-large or ward seats in which African-Americans do not have an equal opportunity to elect candidates of choice.[4]

B. A Narrowly-Tailored Remedy in a Section 2 Violation Does Not Violate the Equal Protection Clause of the Fourteenth Amendment

The City argues that the potential remedy in this action would require redrawing ward lines in a manner in which race would predominate. According to the City, where race is a predominate factor in a redistricting plan "strict scrutiny must be used to determine whether the

[4]Additionally, the City, at page 9 of its Memorandum, makes various miscellaneous statements. These statements address either policy considerations (the potential for the litigation to polarize the community) or alternative remedies (tasking the City's with attracting minority candidates). However, the United States is not required to plead policy considerations or to account for alternative remedies in its Complaint. These arguments are simply not the proper subject of a Rule 12(b)(6) motion.

Equal Protection Clause has been violated." The City only cites to Shaw v. Hunt, 517 U.S. 899 (1996) ("Shaw II"), in support of its argument. (Defs.' Mem. Supp. Dismiss at 5, n.1.)

Once again, the City is putting the cart before the horse. As stated above, were this Court to find a Section 2 violation, the City of Euclid would be offered the first opportunity to devise an adequate remedy that comports with the Equal Protection Clause. As a result, the details of the actual remedy that might be ordered in this case are not identified in the Complaint, nor should they be.[5] The City's constitutional arguments challenge a remedy which has not yet been fashioned. Again, the City's arguments are not ripe for proper adjudication on a Rule 12(b)(6) motion.

Further, the City's argument implicates an intensive factual analysis which most certainly is not the proper subject of a Rule 12(b)(6) motion. For example, the case the City cites, Shaw II, involved an Equal Protection Clause challenge to North Carolina's Congressional redistricting. The Court concluded that the challenged majority-minority district would not survive strict scrutiny because it was not narrowly tailored to the asserted end. Shaw II, 817 U.S. at 915. In reaching this conclusion, the Court analyzed the challenged district and determined that "no one looking at District 12 could reasonably suggest that the district contains a 'geographically compact' population of any race." Id. at 916. To make such an argument the City would need a well developed factual record containing the remedial redistricting plan. Of course, this would only come at the remedial stage and only after the City had been offered the

[5]As discussed above, the United States has adequately pled the essential elements of a Section 2 violation. Paragraph 11 adequately pleads the three Gingles preconditions, including the first precondition. It states that a "properly apportioned single-member district plan" could be drawn in which African-Americans would comprise the majority in two wards. The first Gingles precondition requires plaintiff to establish only that a potential remedy exists and not the actual remedy.

first opportunity to devise such a plan.

If the City means to argue that, as a matter of law, any Section 2 remedy that creates majority-minority districts violates the Equal Protection Clause, case law does not support such a proposition. The City, citing only to Shaw II, and without further elaboration, states that "the court rejected a number of rationales for drawing the districts along racial lines." However, the Shaw II Court did not reject compliance with Section 2 as a rationale for a remedy creating majority-minority districts. Id. at 915. In fact, the Shaw II Court, as the Court has done in several other cases, assumed for purposes of deciding the case that compliance with Section 2 could form the basis for a compelling state interest. Id.; see also Miller v. Johnson, 515 U.S. 900, 921 (1995).

In Bush v. Vera, 517 U.S. 952 (1996), five Justices indicated that compliance with Section 2 was a compelling governmental interest.[6] Id. at 992 (O'Connor, J., concurring); id. at 1030-31 (Stevens J., joined by Ginsburg and Breyer, J.J., dissenting); id. at 1045-46 (Souter, J., joined by Ginsburg and Breyer, J.J., dissenting); see also Clark v. Calhoun County, 88 F.3d 1393, 1405 (5th Cir. 1996); Sanchez v. Colorado, 97 F. 3d 1303, 1327 (10th Cir. 1996). Further, the Supreme Court has described how strict scrutiny review of a Section 2 remedy can be satisfied. For example, in Bush v. Vera, the Court rejected as "impossibly stringent" the district court's view that narrow tailoring required that a district have the least possible amount

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[6]In the Supreme Court term just completed, four other Justices indicated that compliance with Section 5 of the Voting Rights Act can be a compelling state interest. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2667 (2006) (Scalia, J., concurring in part, dissenting in part, joined by Thomas, J., and Roberts, C.J. and Alito, J., as to relevant part of opinion). While the Court's opinion did not expressly address whether compliance with Section 2 is a compelling state interest, it nonetheless ordered the redrawing of one Congressional district to bring it into compliance with Section 2. Id. at 2623.

of irregularity in shape. 517 U.S. at 977. The Court adopted a more relaxed standard for purpose of analyzing a Section 2 district under strict scrutiny. See also Goosby v. Town of Hempstead, 956 F. Supp. 326, 350 n.28 (E.D.N.Y. 1997) (citing Bush v. Vera for the proposition that "a relaxed standard of compactness applies to districts drawn to remedy a Section 2 dilution violation"). The Court stated:

> A Section 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests."

Bush v. Vera, 517 U.S. at 977. Again, as is evident from the nature of this inquiry, it is a fact based one that is neither ripe nor the proper subject of a Rule 12(b)(6) motion.

The interrelation between Section 2 and the Court's Equal Protection Clause jurisprudence was well summarized in Barnett v. City of Chicago, 969 F. Supp. 1359 (N.D. Ill. 1997), vacated in part on other grounds, 141 F.3d 699 (7th Cir. 1998):

> It would approach theater of the absurd to impose a rule stating that a remedy intended to correct race-based discrimination in districting could not be race-conscious. In the domain of identifying a [Section] 2 violation, Gingles retains its full vitality. Shaw II and Bush, however, operate as a brake upon the extent of a remedy to a [Section] 2 violation. Shaw II and Bush instruct that race cannot override all other traditional districting principles any more than reasonably necessary to remedy a [Section] 2 violation. So long as a remediation plan comports with traditional districting criteria, it is presumptively constitutional.

Id. at 1408 n.13 (citation omitted). In sum, the fashioning of a Section 2 remedy that creates majority-minority districts does not, as a matter of law, run afoul of the Equal Protection Clause. See also Perez v. Pasadena Indep. Sch. Dist., 958 F. Supp. 1196, (S.D. Tex. 1997) ("The Fifth Circuit has made it clear that requiring race-based remedies under Section 2 of the Voting Rights Act is consistent with the Supreme Court's decisions [in Miller, 515 U.S. at 900, Shaw II, 517

U.S. at 899 and Vera, 517 U.S. at 952.]")

C. The Euclid City Council May Be Dropped as a Defendant Pursuant to Rule 21

The City's dismissal motion states that the Euclid City Council in not sui juris, and "may not be a proper defendant in this case." In support, the City does not identify the mechanism for relief. Indeed, the City's Memorandum does not offer an argument, but instead only contains a three-case string citation. (Defs.' Mem. Supp. Dismiss at 10.)

Consequently, the United State is unclear as to which Rule and what precise relief the City seeks. One approach the Court may take is to deem this a Rule 21 motion and to drop the Euclid City Council as a named defendant. Rule 21 provides that a party "may be dropped or added by order of the court on motion of any party." At least one court has, pursuant to Rule 21, "dropped" a party co-defendant on grounds that it lacks capacity to be sued. See Grow v. City of Milwaukee, 81 F. Supp. 2d 990, 995-96 (E.D. Wis. 2000), disapproved of on other grounds, Driebel v. City of Milwaukee, 298 F.3d 622, 641 (7th Cir. 2002) (noting that Grow "improperly truncates the holding of . . . United States v. Mendenhall, 446 U.S. 544 (1980)").[7] Like in Grow, the Complaint names multiple defendants one of whom believes it lacks capacity to be sued. And like in Grow, the dropping of one city agency as a defendant should not dispose of the case. As Rule 21 makes clear, misjoinder of "parties is not ground for dismissal of an action."

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[7]Other courts have addressed arguments that a party lacks capacity to sue or be sued pursuant to Rule 12(b)(2) and 12(b)(6) motions. See e.g., Slaughter v. Billot, 2006 WL 456488 (W.D. La. 2006) (involving a motion to dismiss pursuant to Rule 12(b)(2)); Texas v. Ysletsa del Sur Pueblo, 79 F. Supp. 2d 708 (W.D. Tex. 1999) ("In addressing a 'capacity' claim, a Rule 12(b)(6) motion is favored, given that a court cannot grant relief to a party lacking capacity to sue."). Still another court considered a motion to dismiss filed pursuant to Rule 9(a), which provides that a party desiring to raise an issue as to capacity shall do so by "specific negative averment." See Plan Comm. v. Price Waterhouse Coppers, LLP, 335 B.R. 234 (D.D.C. 2005).

Thus, the United States believes the most efficient and expedient course is for this Court to drop the Euclid City Council as a named defendant pursuant Rule 21. See also Letherer v. Alger Group, LLC, 328 F.3d 262, 266 (6th Cir. 2003) (court stating that it will assume district court dropped a co-defendant as a party pursuant to Rule 21 where plaintiff "did not dismiss the entire action, but rather sought to dismiss only one party from the action"). As the City of Euclid would remain a party, an order compelling it to devise a Section 2-Compliant remedy would allow the City to submit the task to its legislative body. Id. at 267.

D. The Complaint is Clear and Unambiguous

The City argues in the alternative for an order pursuant to Rule 12(e) requiring the United States to provide a more definite statement. Rule 12(e) provides that a party may move for a more definite statement where "a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." The motion "shall point out the defects complained of and the details desired." Id. The Complaint, however, is clear and unambiguous, containing detailed factual allegations sufficient to state a claim for relief. The City's Rule 12(e) motion should be denied.

The Federal Rules of Civil Procedure are premised on a "liberal system of 'notice pleadings.'" Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993). Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." As the Supreme Court has made clear, the Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Conley v. Gibson, 355 U.S. 41, 78 (1957). Not surprisingly then, motions for a more definite statement are not favored by the courts. Schwable v. Coates, 2005 WL 2002360 at *1 (N.D. Ohio Aug. 18, 2005), citing, Innovative Digital Equip., Inc. v. Quantum Tech., Inc. 597 F. Supp. 983, 989 (N.D. Ohio 1984). Further, "motions for more definite statement are not to be used as a substitute for discovery." Id.

The Complaint provides a clear and unambiguous statement, placing the City on fair notice of the claim for relief under Section 2. The Complaint identifies the essential elements of a vote dilution claim, identifying the at-large and ward method of electing the Euclid City Council and setting forth the factual background and details necessary for establishing the three Gingles preconditions. The Complaint goes further and, in paragraphs 12, 13, 14, and 15, specifies various other factors present in Euclid that have the effect of denying African-American voters an equal opportunity to elect representatives of choice. This is far from the "shotgun" approach the City alleges. After reading the Complaint, no reasonable defendant could be left guessing of the nature of the cause of action or its underlying factual basis. The Complaint is not so vague and ambiguous that "defendants cannot reasonably be required to frame an answer." Id. If the City is "unable to determine the issues [they] must meet," the blame lies not with the Complaint. Innovative Digital Equip., Inc., 597 F. Supp. at 988.

Contrary to the City's arguments, the Complaint is not one "styled along" the lines which allege the City has engaged in vote denial behavior like "voter intimidation" or establishing "literacy tests" or "poll taxes." (Defs.' Mem. Supp. Dismiss at 10.) As is apparent from the factual allegations, the Complaint sets forth allegations supporting a claim for vote dilution under the "results test" of Section 2. Id.

The Senate Report accompanying the 1982 amendments to the Voting Rights Act stated that, for a Section 2 claim, rather than focusing on the question of intent (which involves divisive "charges of racism on the part of individuals officials or entire communities"), the "right" question to ask is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice." See Gingles, 478 U.S. at 44, quoting, (S.Rep at 28.) In order to answer this question, "a court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective factors.'" Id. The objective factors, commonly known as the Senate Factors, were identified in the Senate Report. Id. at 45.

The City takes issue with paragraphs 13, 14, and 15, each of which identify separate Senate Factors alleged to be present in the City of Euclid.[8] These paragraphs should be viewed with the understanding that the Senate Factors are "neither comprehensive nor exclusive" and that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Id. The paragraphs thus put the City on fair notice that at least four Senate Factors are present in the City of Euclid.

A "motion for more definite statement 'is designed to strike at unintelligibility rather than simple want of detail.'" Schwable 2005 WL 2002360 at *1. Paragraphs 13, 14 or 15 are not unintelligible, and clearly identify Senate Factors alleged to be present in the City of Euclid. Discovery will flesh out the details of the Senate Factors pled and may uncover proof of additional factors. The information the City seeks is thus evidentiary and can be obtained through discovery.

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[8]In addition, paragraph 12 identifies a fourth Senate Factor.

The Complaint, including the Senate Factor paragraphs, provides reasonable notice sufficient to permit the City to frame a responsive pleading. The claim is aptly summarized in paragraph 16: the at-large and ward system for electing the Euclid City Council dilutes African-American voting strength resulting in the denial to them of an equal opportunity to participate in the political process and elect representatives of their choice in violation of Section 2 of the Voting Rights Act. It is hard to imagine a more succinct or clearer statement of the issue the City must address in its answer. Indeed, one defendant, the Cuyahoga Board of Elections, has already done so. Further, motions for a more definite statement are especially curious when presented in the same pleading with a Rule 12(b)(6) motion to dismiss. On the one hand, the City states that the Complaint "is so vague and ambiguous with respect to the aforementioned matters that defendants cannot reasonably be required to frame an answer," and simultaneously, it is able to discern enough from the Complaint to assert that no legal claim is stated therein. Innovative Digital Equip., Inc., 597 F. Supp. at 988, citing United States v. Metro Dev. Corp., 61 F.R.D. 83 (N.D. Ga. 1973). For these reasons, the City's alternative motion for more definite statement should be denied.

V. CONCLUSION

Based on the foregoing, the United States respectfully request this Court deny the City's motion to dismiss as well as the City's alternative motion for a more definite statement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

Pursuant to 28 U.S.C. § 1746, undersigned counsel certifies that the foregoing United States' Memorandum in Opposition to Defendants' Motion to Dismiss and/or for More Definite Statement is 20 pages and within the limitations of an unassigned or standard track matter.

/s/ Abel Gomez
ABEL GOMEZ
Attorney for United States of America

CERTIFICATE OF SERVICE

I certify that on August 28, 2006, a copy of the foregoing United States' Memorandum in Opposition to Defendants' Motion to Dismiss and/or for More Definite Statement was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ Abel Gomez
ABEL GOMEZ
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