UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS;

RYAN MANNING,	§	
PLAINTIFF	§	
VS	§	CIVIL ACTION
WHOLE FOODS MARKET GROUP, INC., JOHN P. MACKEY, DAVID J. FILIPPONE, AND GREG PALLADINO,	§	NO. 1:21-CV-10833-ADB
DEFENDANTS	§	

MEMORANDUM OF LAW IN OPPOSITION TO

DEFENDANT'S MOTION TO DISMISS

(VIEW ONLINE : HTTPS://WWW.VIRGOCITY.NET/WINNING-CASES)

Now come Ryan Manning, hereinafter referred to as "Plaintiff," and files this opposition to Defendant's Rule 12(b) motion to dismiss as follows:

I. FAILURE TO SPEAK WITH CANDOR

Since the *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, decision, even though the courts indicated that they did not intend to raise the pleading standard, they did precisely what they claimed they did not intend to do and a Rule 12 motion has become knee-jerk for Federal defense counsel. Plaintiff will show that the instant petition has met the heightened standards imposed by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, but since opposing counsel felt obligated to file the Rule 12(b) motion, he was compelled to fudge the facts and law a bit to get a reasonable sounding motion. Plaintiff will show that, although, on the surface, the motion looks reasonable, on closer examination, it is a fraud on the court. Plaintiff will show that counsel repeatedly misstated the law and the facts to the court to achieve a result that would further the denial of due process alleged in Plaintiff's complaint.

A. Challenging Times

Defendant argues that these are challenging time and Plaintiff agrees. Not only are these challenging times relative to your health, they are also challenging times relative to our Constitution. We must always exercise due diligence when it comes to our sacred Constitution. Politicians will never allow a good crisis to go to waste and the instant circumstance is a case in point. Under the guise of a national health scare, the Governor would strip us all of our constitution and extend his power far beyond what the constitution allows.

1. Our Founders Greatest Terror

Our founder's greatest fear when structuring our current form of government was the Governor. Of all the branches and individuals populating the offices of those branches, the Governor was recognized as, potentially the most dangerous. It was the governor who was most likely, at any opportunity to try to institute a power grab, to attempt to extend his authority beyond the limits of the separation of powers and that is exactly what is happening here. At trail, Plaintiff will show that the governor acted to usurp the Massachusetts Legislature and improperly extend his power beyond the executive branch and to the masters he serves.

2. What Price Safety and Security

The American revolution was won by 3% of the people and that same 3% now rises up to resist unconstitutional incursions on the Constitution and the rights of a free people. What price are you willing to pay for a little supposed safety and security? Benjamin Franklin warned us about this as follows:

> *"Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."*

B. Rule 8 Pleading Standard

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) is inappropriate in the instant case. The standard was developed in a complex contract case. The instant case is not complex and does not go to contract issues.

> *This case presents the antecedent question of what a plaintiff must plead in order to state a §1 claim. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in*

> *order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests,"* Conley *v.* Gibson, *355 U. S. 41, 47. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,* ibid., *a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Applying these general standards to a §1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief."*

Defendant argument that Plaintiffs request for a restraining order was not properly made is well founded, but the claim of an intentional tort does not suffer that weakness. This is the mater of a simple tort claim and should be judged by Rule 8(a)(2) instead of Rule 12(b)(6).

> *(a) Claim for Relief. A pleading that states a claim for relief must contain:*
>
> *(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;*
>
> *(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and*
>
> *(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.*

C. Defendant is Not a Private Business

Plaintiff alleges that, while Defendant may operate a business, it is not a private business. Defendant is required by standing federal law to grant equal access to the public and is not free to deny service to anyone as Defendant business is a public accommodation as construed by 42 U.S. Code § 2000a(a) , which reads as follows:

> *(a)Equal access*
>
> *All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of* ***public***

> ***accommodation**, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.* ***(emphasis added)***

Defendant's doors were open to the public and the establishment offered it products and services ostensibly to public access without a membership requirement, as construed by 42 U.S. Code § 2000a(b) , which reads as follows:

> *(e)Private establishments*
>
> *The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).*

Complainant had reason to believe that said establishment was an establishment of public accommodation within as intended by 42 U.S. Code § 2000a(b) , which reads as follows:

> ***(b)ESTABLISHMENTS AFFECTING INTERSTATE COMMERCE OR SUPPORTED IN THEIR ACTIVITIES BY STATE ACTION AS PLACES OF PUBLIC ACCOMMODATION; LODGINGS; FACILITIES PRINCIPALLY ENGAGED IN SELLING FOOD FOR CONSUMPTION ON THE PREMISES; GASOLINE STATIONS; PLACES OF EXHIBITION OR ENTERTAINMENT; OTHER COVERED ESTABLISHMENTS***
>
> *Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:*
>
> *any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;*
>
> ***(2)** any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;*
>
> ***(3)** any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and*
>
> ***(4)** any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.*

Defendant operates a grocery store and, therefore, is a "public accommodation" as specified by 42 U.S. Code § 12182(7)(E) which reads follows:

> ***(7)PUBLIC ACCOMMODATION****The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—*
>
> *(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;*

1. Playing With Words

In Defendant' introduction, Defendant alleges that Defendant is a private business and is free to refuse service to Plaintiff for any non-discriminatory reason as follows:

> *Moreover, Whole Foods Market stores are private businesses and free to refuse service to Plaintiff for any nondiscriminatory reason (e.g., "No shoes, no shirt, no mask, no service").*

In point of fact, Plaintiff has alleged that Defendant is not so private a business and that it cannot arbitrarily deny service to Plaintiff. Defendant cites the well-known phrase: No shoes No Shirt No Service. While the alliteration may ring well in the mind, however, Plaintiff does not breath through his toes or his nipples and Defendant my not capriciously violate standing federal law the way it plays with alliteration.

D. Unconstitutional Provisions

Defendant offers that it was acting in accordance with Executive Orders issued by the Governor as follows:

> *Further, Governor Barker, on May 1, 2020, issued COVID-19 Order No. 31 that required all people in Massachusetts, who are over two years of age and not exempt due to a medical condition or Department of Public Health guidance, to wear a mask or face covering over their noses and mouths at all times when inside grocery stores, pharmacies and other retail stores. See Add. at pp. 4-6. It also authorized grocery stores, among others, to deny entry to anyone who refused to wear a face mask or covering for non-medical reasons.*

1. Admission to Sedition

Defendant alleges that it acted in accordance with an order issued by Governor of Massachusetts, Governor Baker, which purported to act directly on the people. Plaintiff is prepared to Where it is shown that the authority alleged by Defendant is, in fact, an ongoing criminal conspiracy by the Governor and those acting in concert and collusion with him were colluding to usurp the Massachusetts Constitution and violate criminal laws, rather than provide an affirmative defense, Defendant has given admission to acts in concert and collusion with an ongoing conspiracy to war with the Constitution and in as much as the store personnel engaged armed agents to assist in it criminal enterprise, it must be construed that Defendants have admitted to sedition against the state and federal Constitutions.

Article 94. Mutiny or sedition.

(a) A person subject to this code who:

(1) with intent to usurp or override lawful military authority, refuses, in concert with another person, to obey orders or otherwise do their duty or creates any violence or a disturbance shall be guilty of mutiny;

(2) with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with another person, revolt, violence or other disturbance against that authority shall be guilty of sedition; or

(3) fails to do their utmost to prevent and suppress a mutiny or sedition being committed in such person's presence or fails to take all reasonable means to inform such person's superior commissioned officer or commanding officer of a mutiny or sedition which such person knows or has reason to believe is taking place shall be guilty of a failure to suppress or report a mutiny or sedition.

(b) A person who is found guilty of attempted mutiny, mutiny, sedition or failure to suppress or report a mutiny or sedition shall be punished as a court-martial may direct.

The act of the Governor of Massachusetts, in usurpation of the laws and Legislature of the State fall within the scope of sedition and all who work in concert and collusion with such acts bind themselves to the mutiny.

2. Conspiracy to Violate Federal law

Defendant gave notice to store personnel, at the time, that the above incident that the company policy had the effect of violating federal law (See video

https://www.youtube.com/watch?v=VEw1CeIU87k and https://www.youtube.com/watch?v=JJM0PYHBoC4) After store police were summoned, store personnel and the police acted with callous disregard for the law stated and offered in written form.

3. Knowing Violation

Under the Screws Doctrine (Screws et al. v United States 325 US 91) the above actors had culpable knowledge of the wrongful nature of their actions as follows:

> *For the specific intent required by the Act is an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them. Take the case of a local officer who persists in enforcing a type of ordinance which the Court has held invalid as violative of the guarantees of free speech or freedom of worship. Or a local official continues to select juries in manner which flies in the teeth of decisions of the Court. If those acts are done willfully, how can the officer possibly claim that he had no fair warning that his acts were prohibited by the statute? He violates the statute not merely because he has a bad purpose but because he acts in defiance of announced rules of law. He who defies a decision interpreting the Constitution knows precisely what he is doing. If sane, he hardly may be heard to say that he knew not what he did. Of course, willful conduct cannot make definite that which is undefined. But willful violators of constitutional requirements, which have been defined, certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. When they act willfully in the sense in which we use the word, they act in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite. When they are convicted for so acting, they are not punished for violating an unknowable something. (Screws et al. v United States 325 US 91)*

4. Notice Given

Defendant admits that Plaintiff gave ample notice to Defendants of the wrongful nature of their behavior as follows:

> *Plaintiff alleges defendants WFM Group, Filippone and Palladino (collectively "Defendants") do not have the right to tell him what to do with his body and that his religion prevents him from wearing a mask. See Dkt. No. 1, ¶¶46-47, 52-56. Plaintiff further alleges Defendants discriminated against him in violation of his Constitutional rights by denying him equal access to the Dedham store. Id., ¶¶15-16, 22, 26. Based on these allegations, Plaintiff asserts claims for: 1) violations of the Civil Rights Act – 42 U.S.C. § 1983; 2) deprivation of rights under the color of law – 18 U.S.C. § 242; 3) discrimination in a place of public accommodation –*

42 U.S.C. § 2000a; 4) conspiracy to interfere with civil rights – 42 U.S.C. § 1985; 5) unauthorized practice of medicine – Mass. G.L. c. 112 s. 6; 6) civil harassment; and 7) false imprisonment. Plaintiff seeks injunctive relief and compensatory damages.

E. Defendant's Argument

In Defendant argues for dismissal under Rule 12(b)(1) as follows:

The Court should dismiss Plaintiff's Complaint for lack of subject matter jurisdiction because he has not alleged facts establishing his standing under Article III of the United States

Constitution. The Court should also separately dismiss Plaintiff's claim under the Public Accommodations Act for lack of jurisdiction because he failed to provide notice to state authorities of his alleged claim of discrimination in a place of public accommodation prior to filing suit.

1. Facts On The Record

The court will notice that Defendant commits the very act Defendant accuses Plaintiff of. He merely states that Plaintiff failed to plea sufficient facts to give the court subject matter jurisdiction. In the section above, Defendant stipulates that Plaintiff gave particular notice of specific violations of standing federal law. These facts are clearly alleged in Plaintiff's statement of facts and clearly proven by the included video.

2. Failure to Refute Factual Allegations

Defendant stipulated to the facts on the record, then simply asserted that they did not matter and stipulates that all the facts alleged by Plaintiff must be accepted as true as follows:

When considering a motion under Rule 12(b)(1), the Court must "accept all well-pled factual allegations as true and draw all reasonable inferences in favor of the nonmoving party." Clean Water Action, 268 F. Supp. 3d at 279 (citing Sanchez ex rel. D.R.-S. v. United States, 671 F.3d 86, 106-07 (1st Cir. 2012)).

3. Failed to Refute Facts Alleged

Defendant notices the court that it must disregard legal conclusions as follows:

"Furthermore, under the First Circuit Court of Appeals' well-pled complaint rule, a court must disregard statements that 'merely offer legal conclusion[s] ... or

> *[t]hreadbare recitals of the elements of a cause of action'." Clean Water Action, 268 F. Supp. 3d at 279 (quoting Ocasio–Hernandez v. Fortuno–Burset, 640 F.3d 1, 12 (1st Cir. 2011)).*

After giving said notice, Defendant failed to give any law or legal argument relating to the facts on the record that would show that they are somehow conclusionary. It is evident on the face of it that the law cited appears to forbid the specific behavior plead and the ample notice was given to Defendant of the statutory prohibitions. Perhaps counsel forgot, mid-sentence that merely offering a legal conclusion was to be ignored by the court. If that is the case, Plaintiff, by the above reminds that court that plaintiff alleged facts sufficient to state a claim in this court.

4. Claim Sufficiently Plead

The court should rule that Plaintiff plead sufficient facts to establish a matter in controversy and sufficient evidence, if considered as true, to demonstrate a substantial likelihood that Plaintiff will prevail at trial.

F. Injury in Fact

Defendant alleges that Plaintiff failed to allege an injury in fact as follows:

> *Plaintiff fails to allege an "injury-in-fact" because he does not show any "invasion of a legally protected interest." Lujan, 504 U.S. at 560. Setting aside Plaintiff's conclusory allegations that his rights to freedom of religion and speech were violated, Plaintiff fails to show how WFM Group's face mask policy and its requirement that Plaintiff wear a face mask while shopping in its Dedham store violated those rights.*

Perhaps counsel slept through the law school class on due process. Plaintiff clearly alleged that Defendant violated a federal law, which had the effect of denying Plaintiff the full and free access to or enjoyment of a right.

As a general rule, there is a presumption of irreparable harm when there is an alleged deprivation of constitutional rights. See, e.g., Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing; Statharos v. New York City Taxi and Limousine Comm'n, 198 F.3d 317, 322 (2d Cir. 1999) ("Because plaintiffs allege

deprivation of a constitutional right, no separate showing of irreparable harm is necessary.") (citing Bery v. City of New York, 97 F.3d 689, 694 (2d Cir .1996)); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.") (citing 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973)); see also Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir.1996) ("The district court . . . properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights.").

G. Private Business

Defendant argues that Defendant is a private business as follows:

> *WFM Group is "a private business, not a state actor whose conduct would be limited by the Constitution in this instance." Cangelosi v. Sizzling Caesars LLC, No. 20-cv-2301, 2021 WL 291263, at *2 (E.D. La. Jan. 28, 2021) (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982)).*

1. Enforcing State Mandate

In the instant case, Defendant alleged to be enforcing state requirements as follows:

> *WFM Group changed is mask policy, in accordance with guidance from the CDC and state or local mandates, in May 2021 to allow fully vaccinated customers to shop in its stores without wearing a face mask. Add. at pp. 22-24. Masks, however, are still required in Whole Foods Market's Canada and United Kingdom locations, as well as any U.S. stores with a state or local mandate. Id.*

Defendants further argue that:

> *WFM Group's Mask Policy Complies with CDC Recommendations and State Orders.*
>
> *WFM Group's face mask policies have compiled and continue to comply with the recommendations of the CDC, as well as the Executive Orders issued by Massachusetts*
>
> *Governor Charles D. Barker. According to the CDC, community use of masks helps prevent transmission of COVID-19 by reducing the emission of virus-laden droplets ("source control") by the mask wearer. Masks have the secondary benefit of also helping to reduce inhalation of these droplets by the wearer ("filtration for personal protection"). See Add. at pp. 26-27.*

> *Further, Governor Barker, on May 1, 2020, issued COVID-19 Order No. 31 that required all people in Massachusetts, who are over two years of age and not exempt due to a medical condition or Department of Public Health guidance, to wear a mask or face covering over their noses and mouths at all times when inside grocery stores, pharmacies and other retail stores. See Add. at pp. 4-6. It also authorized grocery stores, among others, to deny entry to anyone who refused to wear a face mask or covering for non-medical reasons. Id. at p. 5.*
>
> *COVID-19 Order No. 55 rescinded and replaced Order No. 31 on November 6, 2020. Id.*
>
> *at p. 10. Order No. 55 raised the age limit for those required to wear a mask or face covering from two to five years old, and maintained the mask requirement anytime a person was inside a grocery store as well as the authorization to deny entry to those who refused to wear a mask for non-medical reasons. Add. at pp. 8-10. Order No. 55 remained in effect until April 30, 2021, and was the effective COVID-19 Order at the time Plaintiff alleges he was denied entry into the Dedham Whole Foods Market store. See Add. at p. 14.*

By the above Defendant also stipulates that Defendant was acting in concert and collusion with Massachusetts Governor, Charles D. Barker and the Center for Disease Control and Prevention by enforcing the above referenced executive orders and recommendations as if they were law.

Plaintiff has alleged that Defendant acted under color of law in an attempt to enforce state mandates, which had the effect of violating federal law, specifically 42 U.S. Code § 2000a(a) which reads as follows:

> *(a)Equal access*
>
> *All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of **public accommodation**, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin. **(emphasis added)***

In as much as the doors were open to the public and the establishment offered it products and services ostensibly to the public without membership requirement, Complainant had reason to believe that said establishment was an establishment of public accommodation within the meaning of 42 U.S. Code § 2000a(b) , which reads as follows:

Defendant operate a grocery store and, therefore, is a "public accommodation" as specified by 42 U.S. Code § 12182(7)(E) which reads follows:

(7)PUBLIC ACCOMMODATION The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce—

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

H. Failure to Give Notice Objection Well Taken

Defendant alleges that Plaintiff failed to give notice as follows:

Plaintiff Failed to Comply with the Notice Provisions of the Public Accommodations Act, the Court Lacks Jurisdiction Over That Claim.

Plaintiff's third count alleges a claim against Defendants for violation of the Public Accommodations Act, 42 U.S.C. § 2000a ("Title II"), asserting he was denied the benefits of a public accommodation (i.e., entry to the Dedham Whole Foods Market store) presumably due to his religious beliefs. See Dkt. No. 1, ¶¶70-74. While this claim fails on its face for several additional reasons detailed in Section III.B.3 below, Defendants initially move to dismiss the claim because Plaintiff failed to comply with the notice requirements of Title II. Specifically, Section 2000a-3(c) provides that when state law prohibits the purportedly discriminatory practice alleged in a Title II claim, "no civil action may be brought ... before expiration of thirty days after written notice of such an alleged act or practice has been given to the appropriate State or local authority." 42 U.S.C. § 2000a-3(c). "Since the requirements of Section 2000a-3(c) are jurisdictional ...these procedural prerequisites must be satisfied before [the district court has] jurisdiction over a Section 2000a claim." Bilello v. Kum & Go, LLC, 374 F.3d 656,659 (8th Cir.

2004).

That is a reasonable issue when a litigant is asking a Federal Court to enjoin a State Court and Plaintiff will concede that the request for an injunction was untimely.

I. Claims and Causes of Action

A. Civil Rights Act

Defendant alleges that Plaintiff cannot make a claim under the Civil Rights Act as follows:

1. Plaintiff Fails to State a Claim for Relief Under the Civil Rights Act.

Plaintiff asserts that Defendants violated his Constitutional rights to the free exercise of religion and freedom of expression by refusing to let him to shop inside

the Dedham Whole Foods Market store without wearing a mask or face covering. Dkt. No. 1, ¶¶64-68. Based on these allegations, Plaintiff asserts a claim for deprivation of rights under the Civil Rights Act, 42 U.S.C. § 1983 (the "CRA"). To state a CRA claim, Plaintiff must establish "(1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused (3) by the conduct of a 'person' (4) who acted under color of any statute, ordinance, regulation, custom[,] or usage, of any State or Territory or the District of Columbia." Summum v. City of Ogden, 297 F.3d 995, 1000 (10th Cir. 2002); Davis v. Olin, 886 F. Supp. 804, 808–09 (D. Kan. 1995).

Plaintiff in his complaint clearly establishes a cause of action and more than fulfills the requirements to bring forth a valid claim. Plaintiff stated facts which have been stipulated by defendant which establish:

(1) a violation of rights protected by the federal Constitution or created by federal statute or regulation,

(2) proximately caused

(3) by the conduct of a 'person' (4) who acted under color of any statute, ordinance, regulation, custom[,] or usage, of any State or Territory or the District of Columbia."

As contemplated by Summum v. City of Ogden, 297 F.3d.

1. Violation of Protected Right

Plaintiff gave notice to Defendant of 42 USC 2000a. Said notice was stipulated to by Defendant in it's motion to dismiss.

2. Facts Supporting Proximate Causation On the Record

Plaintiff stipulated facts that were stipulated to by Defendant which show that the acts of Defendants were the proximate cause of the breach of 42 USC 2000a(supra).

3. Conduct Under Color of Law

The record of the instant case, in Defendant's motion to dismiss, Defendant stipulated that Defendant acted willfully in denying Plaintiff access to a public accommodation in furtherance and under color of the executive orders of the Massachusetts Governor and recommendations of

the SEC, neither of which are laws and both of which constitute a violation of standing federal law.

4. Claim Sufficiently Made

Considering the above undisputed facts above as true and application of those facts to the law now before the court are sufficient to constitute a claim on which recovery can be had.

> *"By the plain terms of § 1983, two – and only two – allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." Gomez v. Toledo, 446 U.S. 635, 640 (1980); 23 see also, e.g., Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995)*

Plaintiff clearly alleged and repeatedly gave notice to Defendant that Defendant's were acting at their personal risk by acting in the face of existing federal law. Cf. Thomas v. Zinkel, 155 F. Supp.2d 408, 412 (E.D.Pa. 2001) ("Liability of [local government] entities may not rest on respondeat superior, but rather must be based upon a governmental policy, practice, or custom that caused the injury. . . . The same standard applies to a private corporation, like CPS, that is acting under color of state law.").

Defendant stipulated that it was acting under the color of the alleged official authority of the Governor of Massachusetts when they violated Plaintiff's rights. Even after Plaintiff gave them repeated fair notice of the specific federal statutes they were violating. These are not facts in dispute as addressed above.

Based on the deliberate actions of Defendants in knowing and intentional defiance of existing law, Plaintiff made a sufficient claim under 18 USC 1983 in accordance with the ruling in Tower v. Glover, 467 U.S. 914, 920 (1984) which reads in pertinent part as follows:

> *"[T]o act 'under color of' state law 18 for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting see [sic] 'under color' of law for purposes 21 of § 1983 actions." Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (citing Adickes v. S. H. Kress & 22 Co., 398 U.S. 144, 152 (1970); United States v. Price, 383 U.S. 787, 794 (1966)); see also Abbott 23 v. Latshaw, 164 F.3d 141, 147-48 (3d Cir. 1998). "[A]n otherwise private person acts 'under color of' state law when engaged in a conspiracy with state officials to deprive another of federal*

rights." 25 Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Dennis, 449 U.S. at 27-28);

5. Threshold Standards Met

Plaintiff's pleadings met the threshold standard by alleging facts sufficient to demonstrate, and Defendant, in it's Rule 12 motion stipulated that Defendants were acting under what Plaintiff erroneously alleged was state law. The courts have developed a threshold test in Estades-Negroni, 412 F.3d at 5 (citing Rockwell v. Cape Code Hosp., 26 F.3d 254 (1st Cir. 1994)) as follows:

> *Courts in this district apply "three tests to determine whether a private party fairly can be characterized as a state actor: the state compulsion test, the nexus/joint action test, and the public function test." Estades-Negroni, 412 F.3d at 5 (citing Rockwell v. Cape Code Hosp., 26 F.3d 254 (1st Cir. 1994)).*

6. Actions Under Color of Law

Plaintiff, however, alleged facts from which the Court can plausibly infer (through any of these tests) that Defendants purported to act under color of state law. In particular, Plaintiff alleged facts that support a finding that:

1) the state coerced or encouraged Defendants' actions,

2) the state inserted itself into a position of interdependence with Defendants such that it became a joint participant in Defendants' action; or

3) that Defendants' actions performed a public function that is traditionally the exclusive prerogative of the state

Plaintiff alleged, and Defendant stipulated that Defendants acted in furtherance of specific executive orders issued by the Governor of Massachusetts and recommendations of the CDC as addressed above.

7. Defendant's Would Deny Federal Remedy

Defendant fails to speak with candor to the court when it alleged as follows:

> *Second, as discussed in Section III.A.1 above, Plaintiff fails to state a CRA claim because WFM Group's policy requiring its customers to wear face masks while shopping in its stores does not violate or interfere with any Constitutional right.*

Plaintiff, in Plaintiff's statement of facts allege uncontested facts that Plaintiff clearly noticed Defendants that they were acting in specific violation of federal law, specifically 42 USC 2000a. Defendant, in this pleading stipulates that Plaintiff gave said notice. Now Defendant asserts that such notice was not given. Under the doctrine of collateral estoppel, Defendant cannot make such a claim and, it can hardly be lost on Defendant that its statements are mutually exclusive.

8. District Court Rulings Are Not Controlling

Defendant cites rulings by district courts as if they were controlling.

> *A store policy "asking Plaintiff to wear a mask does not violate any right guaranteed by federal law." Cangelosi v. Edwards, No. 20-cv-1991, 2020 WL 6449111, at *5 (E.D. La. Nov. 3, 2020). "A private business owner may refuse service to any person for any non-discriminatory reason." Cangelosi v. Sizzling Caesars LLC, supra, 2021 WL 291263, at *3. In sum, Plaintiff's claim that Defendants violated his right to the free exercise of religion and expression is specious, and his claim should be dismissed.*

No amount of district court rulings can overcome the specific restriction codified into 42 USC 2000a(supra).

9. No Private Right of Action under 18 USC 242

Defendant alleges that a violation of 18 USC 242 does not give a claim as follows:

> *There Is No Private Right of Action for Deprivation of Rights under 18 U.S.C. Section 242.*
>
> *Plaintiff's second count alleges a claim for deprivation of rights under 18. U.S.C. section 242. This is a criminal statute that provides criminal penalties for its violation. See Fiorino v. Turner, 476 F. Supp. 962, 963 (D. Mass. 1979). There is no private right of action available to enforce this statute against Defendants. See, id. ("the case law indicates that violation of these statutes does not give rise to a civil cause of action."); see also Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) ("Only the United States as prosecutor can bring a complaint under 18 U.S.C.*

Perhaps Defendant counsel forgot about Bivens v 6 Unknown Federal Officers and failed to read the news of late concerning *Tanzin v. Tanvir*.

The Supreme Court unanimously ruled in TANZIN v. TANVIR. 894 F. 3d 449 that a trio of Muslim men may sue a group of FBI agents for damages after the government officials put them on the no-fly list for refusing to spy on their own communities. It's been hailed as a win for religious liberty, and it is. But the ruling also strikes at something deeper: namely, that the tide may be turning on how we are able to hold public officials accountable when they violate our constitutional rights. The court ruled in part as follows:

> *The Government urges us to limit lawsuits against officials to suits against them in their official, not personal, capacities. A lawsuit seeking damages from employees in their individual capacities, the Government argues, is not really "against a government" because relief "can be executed only against the official's personal assets."* Kentucky *v.* Graham, *473 U. S. 159, 166 (1985).*
>
> *The problem with this otherwise plausible argument is that Congress supplanted the ordinary meaning of "government" with a different, express definition. " 'When a statute includes an explicit definition, we must follow that definition,' even if it varies from a term's ordinary meaning."* Digital Realty Trust, Inc. *v.* Somers, *583 U. S. ___, ___ (slip op., at 9) (quoting* Burgess *v.* United States, *553 U. S. 124, 130 (2008)). For example, if a statute defines a "State" to include territories and districts, that addition to the plain meaning controls. See,* e.g., *15 U. S. C. §267. So too here. A "government," under RFRA, extends beyond the term's plain meaning to include officials. And the term "official" does not refer solely to an office, but rather to the actual person "who is invested with an office." 10 Oxford English Dictionary 733 (2d ed. 1989). Under RFRA's definition, relief that can be executed against an "official . . . of the United States"* is *"relief against a government." 42 U. S. C. §§2000bb–1(c), 2000bb–2(1).*
>
> *Not only does the term "government" encompass officials, it also authorizes suits against "other person[s] acting under color of law." §2000bb–2(1). The right to obtain relief against "a person" cannot be squared with the Government's reading that relief must always run against the United States. Moreover, the use of the phrase "official (*or other *person . . .)" underscores that "official[s]" are treated like "person[s]."* Ibid. *(emphasis added). In other words, the parenthetical clarifies that "a government" includes both individuals who are officials acting under color of law* and *other, additional individuals who are nonofficials acting under color of law. Here, respondents sued the former. TANZIN v. TANVIR. 894 F. 3d 449*

10. Violation of 42 USC 2000a

Plaintiff alleges the violation of the specific prohibition contained in 42 USC 2000a(supra). Such a violation has the effect of denying Plaintiff in the Constitutional right to the due course of the law and, whoever violates one of those laws harms the victim per se as argued above.

B. Plaintiff Fails to State a Claim for Discrimination in a Place of Public Accommodation.

Defendant argues that Whole Foods is not a public accommodation as follows:

> *Plaintiff has not set forth a tenable claim of religious discrimination; and 3) Plaintiff does not seek a form of relief to which he might be entitled under Title II.*
>
> *a. Whole Foods Market Is Not a Place of Public Accommodations. Title II does not apply to all places of public accommodation, but rather only to places of public accommodation "as defined in this section." 42 U.S.C. § 2000a(a). The statute defines the term "public accommodation" as follows:*
>
> > *any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence; any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises,* ***including, but not limited to, any such facility located on the premises of a retail establishment****; or any gasoline station; any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment;* ***and any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.***
>
> *Id. at § 2000a(b). Court have generally refused to expand Title II "public accommodation" status to establishments beyond those specifically delineated in the statute. See, e.g., Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427, 431(4th Cir. 2006) (finding that Title II "sets forth a comprehensive list of establishments that qualify as a 'place of public accommodation'. . . and in so doing excludes from its coverage those categories of establishments not listed"); see also Dragonas v. Macerich, No. 20-cv-01648-PHX, 2021 WL 363852, at *4 (D. Ariz. Feb. 3, 2021) ("Courts have consistently declined to expand this definition to include facilities not specifically listed."); Touma v. Gen. Counsel of Regents, No. 17-cv-1132-VBF, 2017 WL 10541005, at *12*

> *n.5 (C.D. Cal. Dec. 13, 2017) ("[C]ourts have interpreted the definition of places of public accommodation narrowly, generally adhering to the three categories outlined in the statute – lodgings, restaurants, and entertainment facilities.").*
>
> *Retail grocery stores, which are not alleged to sell food for consumption "on the premises," do not fall within the definition of places of public accommodations.*[1] *Dunn v. Albertsons, supra, 2017 WL 3470573, at *4 ("A grocery store is not a place of public accommodation under the Public Accommodation Act unless it meets the criteria of subsection (4)."). Whole Foods Market stores do not fall within the establishments explicitly identified in subsection (1)-(3). Further, Plaintiff has not alleged that the Dedham Whole Foods Market contained a functioning restaurant or falls within the additional criteria of subsection (4). Thus, Plaintiff has failed to allege facts showing the Dedham Whole Foods Market qualifies as a place of public accommodation.*

This is not simply lawyer word crafting, this is out-right lying to the court. Inside Whole Foods Dedham there is a coffee bar selling coffee and food for consumption. What part of Grain Bowl's and Allegro Coffee is hard of this lawyer to understand? This is a food and coffee bar inside Whole Foods Market.

Besides, this is not the place to argue whether or not Allegro Coffee is a restaurant or not. Under Rule 12 or Rule 8 the only consideration is whether or not Plaintiff has stated a claim. Plaintiff has stated that Defendant is a public accommodation. If the facts taken as true would give Plaintiff a claim, the issue of whether Defendant is a public accommodation is a matter for the trial court subsequent to discovery.

C. Defendants Are Not Engaged in the Unauthorized Practice of Medicine.

Here Defendant attempts to argue the merits of his claim at the pleading stage as follows:

> *Plaintiff alleges that Defendants' demand that he wear a face mask to shop inside the Dedham Whole Foods Market constitutes the unauthorized practice of medicine in violation of Mass.Gen.L. c. 112, § 6. See Dkt. No. 1, ¶¶78-79. Plaintiff's assertions distort the science and policy behind face mask requirements and fail to identify his standing to assert such a claim.*
>
> *Face masks are intended to prevent the spread of COVID-19 by reducing the emission of virus-laden droplets by the mask wearer. While masks do have the*

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secondary benefit of also helping to reduce inhalation of these droplets by the wearer, they are not intended as medical treatment for the mask wearer. As a Florida court recently explained:

> *Requiring facial coverings to be worn in public is not primarily directed at treating a medical condition of the person wearing the mask/shield. Instead, requiring individuals to cover their nose and mouth while out in public is intended to prevent the transmission from the wearer of the facial covering to others (with a secondary benefit being protection of the mask wearer). Requiring facial coverings in public settings is akin to the State's prohibiting individuals from smoking in enclosed indoor workplaces. While imposing limitations on the places where one can smoke may benefit the smoker by curtailing opportunities to engage in a practice linked to many detrimental health issues impacting the smoker, the express purpose of the Florida Clean Indoor Air Act 'is to protect [other] people from the health hazards of secondhand tobacco smoke and vapor and to implement the Florida health initiative in s. 20, Art. X of the State Constitution.'"*

*Machovec v. Palm Beach Cty., No. 4D20-1765, 2021 WL 264163, at *4 (Fla. Dist. Ct. App. Jan. 27, 2021). Moreover, even if wearing a mask constitutes a "medical treatment," Plaintiff is free to refuse that treatment by choosing not to enter Whole Foods Market stores, utilizing curbside pickup or ordering online. Cruzan by Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261,*

*278 (1990); Cangelosi v. Sheng, No. 20-cv-1989, 2020 WL 5960682, at *3 (E.D. La. Oct. 8, 2020); Cangelosi v. Sizzling Caesars LLC, supra, 2021 WL 291263, at *2.*

All the above extolls the virtue of masks but the virtue of masks is not the issue. The issue in this context is, can Defendant require the wearing of a medical device where such medical device can possibly have negative health effects to certain individuals? The question now before the court is not whether or not wearing a mask is a good idea or not, the question is, can Defendant require the use of a medical device?

Neither Rule 12 or Rule 8 require that Plaintiff prove up his claims at the pleading stage. Plaintiff as already demonstrated at least one cognizable claim, the rest of Defendants arguments are moot.

D. 6. Plaintiff Fails to State a Claim for Civil Harassment.

Defendant argues civil harassment as follows:

> *Plaintiff's Complaint asserts a claim of civil harassment, alleging that WFM Group's mask policy interfered with Plaintiff's ability to shop for food and that defendants Filippone and Palladino would not allow him to shop on his own*

> *without a mask. Dkt. No. 1, ¶¶82-84. Civil harassment is defined as "[three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damages to property and that does in fact cause fear, intimidation, abuse or damages to property."*
>
> *Mass.Gen.L. c. 258E, § 1; see also Seney v. Morhy, 467 Mass. 58, 60, 3 N.E. 3d 577 (2014).*
>
> *Plaintiff's harassment claim fails for a couple of straightforward reasons. First, he has not alleged facts showing Defendants committed three acts of willful or malicious conduct. Seney, 467 Mass. at 63-64 (vacating harassment prevention order because the incidents described by plaintiff did not amount to the three requisite acts of harassment). Indeed, the Complaint makes no effort to allege separate incidents of alleged harassment. Second, Plaintiff has not alleged any facts demonstrating Defendants' intended to cause, or actually caused, abuse, intimidation, fear of personal injury or property damage. Seney, 467 Mass. at 63 ("an essential element of civil harassment is intent."). Plaintiff's conclusory assertions fail to articulate the elements for civil harassment and his claim of harassment should be dismissed.*

Plaintiff, in his statement of facts, alleged that Defendant placed illegal signage for the purpose of threatening or intimidating anyone who would attempt to use their public accommodation without wearing a mask. Defendant employees physically interfered with and threatened Plaintiff in order to cause fear and dread if he tried to use the public accommodation. Police were then called who stopped and questioned Plaintiff and ordered plaintiff to not use the public accommodation on threat of arrest.

E. Plaintiff Fails to State a Claim for False Imprisonment.

Defendant argues that Plaintiff was not falsely imprisoned as follows:

> *Plaintiff's eighth and final count asserts a claim against Defendants for false imprisonment. Plaintiff alleges that Defendants' actions denied him entry to his Whole Foods Market store and restricted his freedom of movement. Dkt. No. 1, ¶¶86-87. "The tort of false imprisonment consists in the '(1) intentional and (2) unjustified (3) confinement of a person, (4) directly or indirectly (5) of which the person confined is conscious or is harmed by such confinement.'" Ball v. Wal-Mart, Inc., 102 F. Supp. 2d 44, 55 (D. Mass. 2000) (quoting Noel v.*
>
> *Town of Plymouth, 895 F. Supp. 346, 354 (D. Mass. 1995).*
>
> *Plaintiff's claim of false imprisonment, as it relates to this motion, turns on whether Plaintiff was confined. "In Massachusetts, a review of the cases reveals that the key factor in determining whether there has been 'confinement' is determining whether the person is free to leave." Ball, 102 F. Supp. 2d at 55.*

> *Plaintiff has not alleged any facts from which the Court might infer that Plaintiff was not free to leave. He has not alleged any statement, action or conduct by Defendants that might lead to a reasonable apprehension that Plaintiff could not leave the Whole Foods Market without interference or at any time he wanted. Indeed, quite the opposite. Plaintiff complains Defendants would not let him into the store. Plaintiff was always free to leave at any time of his choosing. Thus, he has not and cannot allege a claim for false imprisonment and Count Eight should be dismissed.*

Plaintiff alleges in his statement of facts that he was held and questioned by the police prior to being forced to leave the premises on threat of arrest. Where Plaintiff has a right to access to a public accommodation and was held for questioning that prevented from using said public accommodation at the constructive point of a gun by police, plaintiff has a claim for false imprisonment.

II. CONCLUSION

By the above, Plaintiff stated a claim such that, if all facts are taken as true, amounts to a claim cognizable in this court and, thereby defeats and cause for dismissal.

III. PRAYER

Plaintiff moves the court to dismiss Defendants Motion under Rule 8 or Rule 12.