UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

ISRAEL PEREZ and MAGDALENO ESTRADA ESCAMILLA, on behalf of themselves and all other Mexican/Chicano Day Laborers and/or Latino Day Laborers similarly situated,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 01-6201 (JS) (WDW)
POSSE COMITATUS, SHERIFF'S POSSE COMITATUS, AMERICAN PATROL, THE CREATIVITY MOVEMENT, NATIONAL ALLIANCE, SACHEM QUALITY OF LIFE ORGANIZATION, INC., WORLD CHURCH OF THE CREATOR, CHRISTOPHER SLAVIN, and RYAN WAGNER,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY

SACHEM QUALITY OF LIFE ORGANIZATION, INC. ("SQL")

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Introduction

Sachem Quality of Life Organization ("SQL") respectfully submits this memorandum of law in support of its motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint, on the ground that it fails to state a claim on which relief can be granted.

The Complaint, a putative class action, seeks to hold SQL, a non-profit corporation dedicated to opposing illegal immigration, liable along with six other organizations for a violent attack allegedly committed against the plaintiffs, two Mexican day laborers, by two individuals, defendants Slavin and Wagner. It also seeks to hold all the defendants, including SQL, liable for an indeterminate number of unspecified acts of violence and allegedly ongoing conspiracies against the entire class of Mexican or Latino day laborers. Why SQL is named in the Complaint is a mystery, since the plaintiffs do not allege that any member or officer of SQL participated in any attacks.

Instead, the plaintiffs seek to hold SQL liable based on their conclusory allegation that SQL and the other organizations somehow conspired with Slavin and Wagner to attack the plaintiffs. But the plaintiffs provide no additional allegations to explain why they believe any conspiracy existed, or why they think SQL is part of any such conspiracy. The only allegation

focusing on SQL in particular is the claim that it engages in anti-immigrant rhetoric, speech which is protected by the First Amendment. In short, the Complaint's conspiracy allegations are so conclusory that they fail to provide SQL with an adequate statement of the claim for relief against it.

SQL vehemently denies that it has ever advocated violence, white supremacy or any racist doctrine, much less conspired to attack the plaintiffs, and rejects any insinuation in the complaint that seeking to uphold America's immigration laws and safeguard our country's borders is in any way "racist." But even if the Complaint's unflattering portrait of SQL's purpose were true, the Complaint would nevertheless fail to state a claim against SQL, since the only specific actions the plaintiffs accuse SQL of taking are protected by the First Amendment.

Legal Standard

In evaluating a motion to dismiss for failure to state a claim, a court must decide whether the facts alleged, if true, would entitle the plaintiff to some form of legal remedy against the defendant. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." 2 *Moore's Federal Practice* § 12.34[1][b] (3d ed. 2001), *quoting Campbell v. San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995); *accord Hirsch v. Arthur Anderson & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995)("conclusory allegations of the legal status of the defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss"). The court need not "swallow the plaintiff's invective hook, line, and sinker; bald assertions [and] unsupportable conclusions . . . need not be credited." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

Argument

THE COMPLAINT FAILS TO STATE A CLAIM AGAINST SQL

Plaintiffs Perez and Escamilla allege that they were assaulted on September 17, 2000 in Farmingville by two men, Slavin and Wagner, who had hired them to work as day laborers. The Complaint does not allege that either Slavin or Wagner mentioned SQL in the course of the attack. Nor does it even

allege that Slavin or Wagner were members of SQL or attended any of its meetings -- facts that would, in any event, be insufficient to hold SQL liable, in light of the First Amendment.[1]

Instead, the allegations of the Complaint fall into two categories: a repetitious, and conclusory, allegation of conspiracy, *see* Complaint, ¶¶ 78-80, 84, 118; *see also id.*, ¶¶ 2, 71 (alleging defendant organizations provided unspecified assistance to Slavin and Wagner), and allegations that SQL's speech somehow emboldened or encouraged Slavin and Wagner to attack the plaintiffs, *see* Complaint, ¶¶ 12, 20, 70, 72. Neither states a claim for relief.

I. THE ALLEGATIONS OF CONSPIRACY ARE TOO CONCLUSORY

Although the Complaint repeatedly alleges a conspiracy against the plaintiffs -- as well as an indeterminate number of unspecified acts of violence and ongoing conspiracies against the entire class of Mexican or Latino day laborers to which they

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[1] *Barnes Foundation v. Tp. of Lower Merion*, 242 F.3d 151, 163 (3d Cir. 2001)(rejecting allegations of discriminatory conspiracy because "the First Amendment requires more than evidence of association to impose liability for conspiracy and, in fact, prohibits liability on that basis alone"), *citing NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918-19 (1982). *See also Elfbrandt v. Russell*, 384 U.S. 11, 17 (1966) (rejecting "doctrine of `guilt by association'"); *Gibson v. Florida Legislative Investigating Comm.*, 372 U.S. 539 (1963) (First Amendment barred investigation of NAACP based on members' subversive connections).

belong -- it fails to adequately plead a conspiracy claim, for two reasons. First, it does not provide the time or place of any agreement to enter into a conspiracy, or allege even a single statement suggesting the existence of any such conspiracy. Second, it does not list any SQL officers (or even members) who allegedly participated in any conspiracy. Thus, it never places SQL on notice of any misconduct by it constituting a conspiracy.

The Complaint contains four conspiracy allegations, three of which repeat a conclusory allegation of conspiracy against the two plaintiffs,[2] and one of which conclusorily alleges multiple wrongful acts and conspiracies against the entire class of Latino day laborers.[3] (Presumably based on these conclusions, the Complaint also alleges that the defendants knew of the conspiracy

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[2] These allegations of conspiracy are as follows:

(1) "The Actions of the Defendants POSSE COMITATUS, SHERIFF'S POSSE COMITATUS, AMERICAN PATROL, THE CREATIVITY MOVEMENT, NATIONAL ALLIANCE, SACHEM QUALITY OF LIFE, INC., WORLD CHURCH OF THE CREATOR, CHRISTOPHER SLAVIN, and RYAN WAGNER in conspiring . . . for the purpose of depriving the Plaintiffs of the equal protection of the laws, and of equal privileges and immunities under the laws, and of equal privileges and immunities under the laws, were in violation of 42 U.S.C. § 1985(3)." Complaint, ¶ 78.

(2) "The defendants did enter into a conspiracy in violation of 42 U.S.C. § 1985 for the purpose of either directly or indirectly depriving the members of the class which plaintiffs represent of their constitutional rights under the First, Thirteenth, and Fourteenth Amendments to the U.S. Constitution, and of their statutory rights under 42 U.S.C. § 1981 and § 1985 because of the race or color of the members of said class." Complaint, ¶ 79.

(3) "The said conspiracy of the said [ ], which was entered into for the purposes of intimidating and creating a climate of fear within the Mexican/Chicano and Latino Communities of the state of New York, and the aforementioned overt acts in furtherance of said conspiracy, deprived plaintiffs and the class which they represent of [various rights under the Constitution and civil rights law]." Complaint, ¶ 80.

[3] *See* Complaint, ¶ 118 ("Upon information and belief, Defendants have engaged in a continuing pattern and practice of unjustifiably harassing, humiliating, assaulting, battering, and other acts and conspiracies calculated to deprive the Mexican/Chicano Day Laborers and/or Latino Day Laborers similarly situated of their rights as secured by the First, Thirteenth and Fourteenth Amendments and by 42 U.S.C. §§ 1981, 1985 and 1986, and by the Constitution and laws of the State of New York, and will continue to do so unless restrained by this Court.")

against the plaintiffs and failed to stop it).[4] None of the conspiracy allegations contains so much as a single supporting detail as to how SQL in particular participated or entered into any conspiracy. Although plaintiffs have alleged conspiracies to violate a vast array of laws, the only interaction with Slavin and Wagner alleged in the complaint is the boilerplate allegation that the defendant organizations collectively provided unspecified "material and ideological" assistance to Wagner and Slavin.[5] But plaintiffs have not set forth a single factual allegation to support these sweeping conclusions. This is

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[4] *See* Complaint, ¶ 84 ("That defendants POSSE COMITATUS, SHERIFF'S POSSE COMITATUS, AMERICAN PATROL, THE CREATIVITY MOVEMENT, NATIONAL ALLIANCE, SACHEM QUALITY OF LIFE, INC., WORLD CHURCH OF THE CREATOR, CHRISTOPHER SLAVIN, and RYAN WAGNER having knowledge of the aforementioned conspiracy to commit the aforementioned wrong acts and knowing that said acts were about to be committed, and having power to prevent or help prevent the commission of same, neglected or refused to do so, and therefore are liable to plaintiffs under 42 U.S.C. § 1986 for all damage which said defendants by reasonable diligence could have prevented.")

[5] Complaint, ¶ 2 ("Upon information and belief, a number of associations, groups, and organizations both incorporated and unincorporated, have provided a support network and have aided, and upon information and belief continue to aid, Defendants [Slavin and Wagner] in the violation of Plaintiffs' rights. These associations, groups, and organizations include, but are not limited to, defendants POSSE COMITATUS, SHERIFF'S POSSE COMITATUS, AMERICAN PATROL,CREATIVITY MOVEMENT, NATIONAL ALLIANCE, SACHEM QUALITY OF LIFE, INC., and WORLD CHURCH OF THE CREATOR. These associations, groups, and organizations, all of which promote hatred and intolerance against immigrants and day laborers, upon information and belief, provided DEFENDANTS SLAVIN and WAGNER with support and assistance, both material and ideological"); *see also* Complaint, ¶ 71 ("SLAVIN and WAGNER acted with the support of SHERIFF'S POSSE COMITATUS, AMERICAN PATROL,CREATIVITY MOVEMENT, NATIONAL ALLIANCE, SACHEM QUALITY OF LIFE, INC., and WORLD CHURCH OF THE CREATOR").

insufficient to survive a motion to dismiss.

A "conclusory allegation of conspiracy warrants summary dismissal of [the] complaint under either Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 56." *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 256 (2d Cir. 1984). "[C]omplaints containing only `conclusory,' `vague,' or `general allegations' of a conspiracy to deprive a person of constitutional rights will be dismissed." *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977); *Jemzura v. Public Service Commission*, 961 F. Supp. 406, 413 (N.D.N.Y. 1997). *Accord X-Men, Inc. v. Pataki*, 196 F.3d 56, 70-71 (2d Cir. 1999); *Salahuddin v. Cuomo*, 861 F.2d 40, 43 (2d Cir. 1988); *Angola v. Civiletti*, 666 F.2d 1, 4 (2d Cir. 1981). Conclusory allegations of conspiracy do not satisfy even the liberal pleading standards of Rule 8, *Ryan v. Mary Immaculate Queen Center*, 188 F.3d 857, 860 (7th Cir. 1999); *Jemzura*, 961 F. Supp. at 413; *Mann v. Meachem*, 929 F. Supp. 622, 635 (N.D.N.Y. 1996); *Ray v. General Motors Acceptance Corp.*, 1995 U.S. Dist. LEXIS 21467, *24 n.16

(E.D.N.Y. March 27, 1995), much less the heightened pleading standard that applies in cases involving speech.[6]

Similarly, a conclusory assertion that a particular defendant materially assisted other defendants, or aided and abetted them, does not state a claim against that defendant. *Solieri v. Ferrovie Dello Stato SPA*, 1998 U.S. Dist. LEXIS 11201, *3 (S.D.N.Y. July 23, 1998)("conclusory allegation that [defendant] aided and abetted" discrimination dismissed under Rule 12(b)(6)); *In re Santa Fe Pacific Corp. Shareholder Litig.*,

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[6] A heightened pleading requirement applies to claims based in whole or in part on speech. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1082-83 (9th Cir. 1976)("in any case . . . where a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations [in the complaint] than would otherwise be required" under Rule 12(b)(6)), *cert. denied*, 430 U.S. 940 (1977); *accord Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982); *Boone v. Redevelopment Authority*, 841 F.2d 886, 894 (9th Cir. 1988)("conclusory allegations are insufficient to strip [defendants' actions] of [First Amendment] protection. . .Although we may be more generous in reviewing complaints in other contexts, our responsibilities under the first amendment in a case like this one require us to demand that a plaintiff's allegations be made with specificity"); *Falwell v. Penthouse Int'l*, 521 F. Supp. 1204, 1209 (W.D. Va. 1981)("general allegation" of conspiracy was insufficient, since pleading requirements "must be rigorously observed when possible restriction of First Amendment activities is at stake").

669 A.2d 59, 72 (Del. 1995)(dismissing claim under Rule 12(b)(6) standards where plaintiffs conclusorily alleged that "[defendant] had knowledge of the Individual Defendants' fiduciary duties and knowingly and substantially participated and assisted in the Individual Defendants' breaches of fiduciary duty, and therefore, aided and abetted such breaches")(relying on state law incorporating Rule 12(b)(6)).

To plead conspiracy, plaintiffs must "specify in detail the factual basis necessary to enable [the defendants] intelligently to prepare their defense." *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977). That includes "specific instances of misconduct" showing a "nexus" between the particular defendant and the conspiracy." *Id.*

Among the facts required in order to provide minimal notice of the wrongful conduct alleged are the time and place of the alleged agreement to enter into the conspiracy. *Salahuddin v. Cuomo*, 861 F.2d 40, 43 (2d Cir. 1988)(to survive motion to

dismiss, plaintiff should provide "details of time and place and the alleged effect of the conspiracy")(citing *Moore's Federal Practice*); *Dwares v. City of New York*, 985 F.2d 94, 100 (2d Cir. 1993)(same); *Turley v Hall's Motor Transit Co.*, 296 F. Supp. 1183, 1187 (M.D. Pa. 1969)(same); *see Ryan v. Mary Immaculate Queen Center*, 188 F.3d 857, 860 (7th Cir. 1999)(should allege "when [the] agreement between [the conspirators] was formed, what its terms were . . . [and] what [the particular defendant's] role was" under the agreement). Moreover, when a corporation is accused of conspiracy, plaintiffs should state which of its officers or agents engaged in the conspiracy, since a corporation can act only through such persons. *Savage v. Western Union Tel. Co.*, 32 S.E.2d 785, 788-89, 198 Ga. 728, 734-35 (Ga. 1945).

Plaintiffs have not done any of these things. Plaintiffs have not specified any times or places at which the conspiracy to attack the plaintiffs was allegedly formed, much less given any details as to how SQL in particular came to be involved in the

alleged conspiracy. They have never alleged that any officers or agents of SQL -- or even any of its members -- so much as met with Slavin and Wagner, much less alleged facts supporting the conclusion that SQL reached any kind of agreement with them to harm the plaintiffs. Nor have they described what kind of assistance SQL in particular provided Slavin and Wagner.

Moreover, they have not provided any allegations to support their sweeping allegation that the defendants have entered into multiple, ongoing conspiracies against the entire class of Mexican or Latino day laborers. This extraordinarily broad allegation is made in a single, conclusory sentence alleging that the defendants, including SQL, "have engaged in a continuing pattern and practice of unjustifiably harassing, humiliating, assaulting, battering, and other conspiracies calculated to deprive Mexican/Chicano Day Laborers and/or Latino Day Laborers similarly situated of their rights." Complaint, ¶ 118. Not a single one of these alleged acts of violence is described. Nor does the Complaint hint at the number, location, or time of the alleged conspiracies, or why the plaintiffs believe that such conspiracies exist, or why they believe SQL is involved in any such conspiracy.

Thus, they have not complied with the requirement of *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977), that they plead allegations sufficient to demonstrate a "nexus" between each defendant and the conspiracy. In *Ostrer*, the plaintiff alleged that the defendants, state and federal prosecutors investigating violations of the tax laws, had conspired to harass him through a long pattern of public defamation, duplicative subpoenas, and interference with the operation of his business. The Second Circuit nevertheless affirmed the dismissal of his conspiracy claims, because the plaintiff's allegations were collectively against the defendants as a whole, not the federal prosecutors in particular, and the only connection between them and the harassment was the plaintiff's general allegation that the defendants, including but not limited to the federal prosecutors, had collectively conspired to harass him. The conspiracy allegation was impermissibly conclusory because it "fail[ed] to show any nexus between the pattern of harassment allegedly

inflicted upon [plaintiff] and the acts of the [federal prosecutors]. At best there is a vague claim that [the federal prosecutors] are linked to a broad conspiracy, involving other federal and state agencies, designed to destroy his business unless he cooperates with the Government." *Id.* at 553.

In short, a general conspiracy allegation against a defendant does not suffice to subject it to liability for acts pursuant to the alleged conspiracy. This case is even weaker than *Ostrer*, since the plaintiff in *Ostrer* at least alleged that the appellees were among the defendants who actually inflicted his injuries, whereas plaintiffs in this case merely allege that SQL conspired against them, not that it actually participated in the attack.

Similarly, the Complaint's conspiracy allegations are even more conclusory than the one dismissed in *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 256 (2d Cir. 1984). *San Filippo* shows that pleading conspiracy requires allegations showing that a

conspiracy in fact existed, not just speculation or the hypothetical possibility of a conspiracy. *San Filippo* dismissed a conspiracy claim against bank officers who were sued for allegedly conspiring with prosecutors to deprive the plaintiff of his civil rights by falsely testifying to the grand jury and withholding exculpatory evidence. The plaintiff provided more detail about the conspiracy than the complaint in this case, alleging that the conspiracy was formed at specific meetings between the prosecutors and the bank officers, and providing times and places. The Second Circuit nevertheless found that "plaintiff [had not] alleged one shred of evidence in support of his conclusory assertion of conspiracy," since the meetings he alleged could just as easily have involved legitimate activities, such as gathering evidence. *Id.* at 256. *See also Tonkovich v. Kansas Bd. of Regents*, 159 F.3d 504, 533 (10th Cir. 1998)(similar; "`a plaintiff must allege specific facts showing an agreement and concerted action amongst the defendants'").

The Complaint's conspiracy allegations are not made any less conclusory by virtue of its allegation that the organizational defendants shared Slavin and Wagner's white supremacist ideology. Conspiracy is not demonstrated by the mere fact that the defendant has an ideological affinity with other defendants, or even that it advocated the injury of which the plaintiff complains, as *X-Men, Inc. v. Pataki*, 196 F.3d 56, 71 (2d Cir. 1999) demonstrates.

X-Men dismissed a claim against two legislators alleging that they conspired with the operators of a low-income housing complex in Brooklyn to prevent the renewal of the contract of a security firm because of the religious affiliation of its owners (*viz.*, its affiliation with the Nation of Islam). Based on the firm's religious affiliation, the two legislators condemned the firm at public meetings, wrote to state and federal agencies asking that they investigate it, and advocated that its contract be terminated, after which the operators of the complex in fact

terminated the firm's contract. *Id.* at 61-62, 68. Nevertheless, the Second Circuit rejected the allegation of conspiracy against the legislators. "The only concrete acts ascribed to [the legislators] are attending meetings, making statements, and writing letters" that urged that the firm not be retained. *Id.* at 71. These alleged acts were insufficient support for the general allegation that they conspired with the operators of the complex to terminate the contract, or that they actually participated in the ultimate decision to terminate the contract. *Id.* Thus, even if plaintiffs were correct that SQL shared Slavin and Wagner's ideology, or approved of their acts, that would not be enough to support the plaintiffs' allegation of conspiracy against SQL under *X-Men*. *See also Barnes Foundation v. Tp. of Lower Merion*, 242 F.3d 151, 164-65 (3d Cir. 2001)(fact that one opponent of reopening a black-owned art gallery was apparently motivated by racism did not show that the other opponents of the gallery were conspiring with him); *Rodgers v.*

Lincoln Towing Service, Inc., 771 F.2d 194, 201 (7th Cir. 1985)(conspiracy not shown by fact that arresting officer was friend of individuals who allegedly conspired to have plaintiff falsely arrested); *Slotnick v. Garfinkle*, 632 F.2d 163, 165 (1st Cir. 1980)(allegation that attorneys, court clerk, and hospital superintendant each engaged in acts of misconduct in confining plaintiff to mental hospital did not show conspiracy).

II. THE REMAINING ALLEGATIONS DEAL WITH PROTECTED SPEECH

The Plaintiffs' remaining allegations against SQL allege that it engaged in anti-immigrant rhetoric and "ideologies" that Slavin and Wagner were "subjected to" and that Slavin and Wagner thus felt "encouraged" to attack the plaintiffs.[7] (The Complaint does not state who "subjected" Slavin and Wagner to SQL's opinions). It also asserts that SQL "perpetuated unlawful discriminatory acts and abuse" which served as a "catalyst" for Slavin and Wagner. Complaint, ¶ 20. These acts are not identified in the Complaint. Plainly, vague references to "unlawful discriminatory acts" are insufficient to meet even the loose standards of Rule 8 of the Federal Rules. *Martin v. New York State Dep't of Mental Hygiene*, 588 F.2d 371, 372 (2d Cir. 1978).

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[7] The allegations consist of the following:
(1) "defendants POSSE COMITATUS, SHERIFF'S POSSE COMITATUS, AMERICAN PATROL,CREATIVITY MOVEMENT, NATIONAL ALLIANCE, SACHEM QUALITY OF LIFE, INC., and WORLD CHURCH OF THE CREATOR. . .promote hatred and intolerance against immigrants and day laborers." Complaint, ¶ 2.
(2) "the SACHEM QUALITY OF LIFE, INC. (hereinafter "Sachem Quality of Life") is an incorporated association composed of

The specific references to speech against immigration identify only speech that is protected, even if listeners react inappropriately to it. Although the Complaint provides no explanation or specifics about how SQL's rhetoric could have led to the attacks on the plaintiffs, it would not matter if it did. Even if plaintiffs could show that SQL's rhetoric somehow inspired the attacks, their attempt to hold SQL liable based on its speech against illegal immigration would still violate well-established First Amendment principles.

Speech does not lose its First Amendment protection merely because others engage in violence or illegal conduct after being

(..continued)
white persons which advocates hatred and intolerance against immigrants, and in particular, day laborers. Said organization is closely linked with AMERICAN PATROL, another defendant to this action. The association also works closely with other organizations which advocate white supremacy and intolerance against various minorities and religions. Among other things, SACHEM QUALITY OF LIFE refers to the presence of day laborers on Long Island as an `invasion' and advocates the belief that immigration is part of a Mexican governmental plot to annex United States territories." Complaint, ¶ 12.

(3) "defendants Slavin and Wagner were subjected to and adopted the influences and ideologies of POSSE COMITATUS, SHERIFF'S POSSE COMITATUS, AMERICAN PATROL, THE CREATIVITY MOVEMENT, NATIONAL ALLIANCE, SACHEM QUALITY OF LIFE, INC., and WORLD CHURCH OF THE CREATOR. Through and by this influence, individual defendants were encouraged and felt empowered to perform the acts of violence against plaintiffs." Complaint, ¶ 20.

(4) "The INDIVIDUAL DEFENDANTS and ORGANIZATIONS, [WORDS OMITTED FROM COMPLAINT] which transform their rhetoric into violative and illegal, violent, and criminal actions not protected by the 1st Amendment as they seek to and do violate the rights of plaintiffs and the plaintiff class as defined herein." Complaint, ¶ 72.

exposed to it. The First Amendment does not allow the government "to forbid or proscribe the advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Advocacy is unprotected only if it is "intended to produce, and likely to produce, imminent disorder"; "advocacy of illegal action at some indefinite future time" is protected. *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973). "`Imminent lawless action,' as used in *Brandenburg*, means violence or physical disorder in the nature of a riot." *White v. Lee*, 227 F.3d 1214, 1229 (9th Cir. 2000).

Putting aside the Plaintiffs' conclusory conspiracy allegations, their remaining allegations against SQL suggest that its speech somehow incited Slavin and Wagner's violent acts. (It is hard to tell why, since the one allegation which explicitly mentions violence is a completely incoherent sentence fragment).[8]

[8] Paragraph 72 of the Complaint is missing words, leaving only a rambling and vituperative string of adjectives. *See* n.7, *supra*.

None of the remaining allegations asserts that SQL advocated committing imminent violence. Even if the complaint arguably could be read to suggest that SQL somehow encouraged violence at an indefinite future time, that is not enough to state a claim.

Instead, they describe only constitutionally protected speech. The Complaint alleges that SQL "advocates hatred and intolerance against immigrants," *id.* at ¶ 12; *see also id.* at ¶ 2, that created a "climate of fear," *id.* at ¶ 80, and inspired "unlawful discriminatory acts." *Id.* at ¶ 70. Similarly, they contend that the individual defendants were "subjected to and adopted [SQL's] influences and ideologies" that made them feel "encouraged and empowered to perform the acts of violence." *Id.* at ¶ 20.

None of these allegations overcomes the First Amendment's protection for advocacy. "Advocating hatred and intolerance against immigrants" is protected speech; indeed, even racist speech inciting acts of bigotry is protected. *E.g., R.A.V. v. St. Paul*, 505 U.S. 377, 393-94 (1992)(ban on bigoted fighting words that aroused "anger, alarm, or resentment" in others violated the First Amendment because it selectively restricted "messages of `bias-motivated' hatred" and "messages of racial, gender, or religious intolerance"); *United States v. Eichman*, 496 U.S. 310, 318 (1990)(even "virulent ethnic and religious epithets" are protected speech); *White v. Lee*, 227 F.3d 1214 (9th

Cir. 2000)(advocating discrimination in violation of the Fair Housing Act is protected); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978)(invalidating ordinances restricting hate speech within community of Holocaust survivors, including public assemblies that "incite violence, hatred, abuse, or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national, or religious affiliation" and restricting the "dissemination of any materials . . . which promotes or incites hatred against persons by reason of their race, national origin, or religion").

Conclusion

Since the plaintiffs' claim against SQL is based entirely on conclusory conspiracy allegations and constitutionally protected speech, the complaint should be dismissed because it fails to state a claim on which relief can be granted.

DATED: December 7, 2001

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CERTIFICATE OF SERVICE

I, Hans Bader, hereby certify that on December 7, 2001, a copy of the Memorandum In Support Of Motion To Dismiss By Sachem Quality Of Life Organization, Inc., was served by first-class mail, postage prepaid, upon the following individuals:

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