IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

ANIMAL LEGAL DEFENSE FUND; ANIMAL EQUALITY; CENTER FOR BIOLOGICAL DIVERSITY; and FOOD CHAIN WORKERS ALLIANCE **PLAINTIFFS**

V. **NO. 4:19-CV-442-JM**

JONATHAN and DeANN VAUGHT, doing Business as Prayer Creek Farm, and PECO FOODS, INC. **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION TO DISMISS OF SEPARATE DEFENDANTS JONATHAN AND DEANN VAUGHT

The complaint in this suit consists largely of self-laudatory allegations that cast the Plaintiffs in the most favorable light possible and disparaging allegations that cast the Defendants in the most unfavorable light possible. But the court need not decide the merits of any of those allegations because it lacks jurisdiction over this suit, and the complaint fails to state a claim upon which relief can be granted.

Factual Background

Jonathan and DeAnn Vaught ("Jon and DeAnn") own and operate a farm in Sevier County, Arkansas. DeAnn Vaught is also a member of the Arkansas legislature, and was a co-sponsor of the bill that would become Arkansas Code § 16-118-133 (the "Act"). Plaintiffs' Complaint ¶ 44. Until the receipt of a letter dated May 29, 2019 from two of the plaintiffs, neither Jon nor DeAnn had any contact with a plaintiff in this case. (See the Letter attached as Exhibit 1 to Jon and DeAnn's motion to dismiss.) The letter, from the Animal Legal Defense Fund (ALDF) and Animal Equality (AE), stated that ALDF and AE wished to conduct an undercover investigation of Jon and DeAnn's farm but that ALDF and AE feared liability under

the Act, which ALDF and AE described as unconstitutional. Therefore, ALDF and AE demanded that Jon and DeAnn waive all rights under the Act. Jon and DeAnn did not respond to the letter.

ALDF and AE, along with co-plaintiffs Center for Biological Diversity (CBD), and Food Chain Workers Alliance (FCWA) (collectively "Plaintiffs") then filed suit against Jon and DeAnn in this court, alleging that the Act is unconstitutional on its face. Pls.' Compl. ¶ 3. ALDF and AE allege that they wish to conduct an "undercover investigation" of Jon and DeAnn's farm, but that fear of liability under the Act has chilled their speech, preventing them from doing so. Pls.' Compl. ¶ 6. CBD and FCWA allege that they would like to receive and rely on information that these investigations might generate. Pls.' Compl. ¶¶ 86, 94. (CBD and FCWA allege no pre-suit communications or other contact with Jon and DeAnn.) According to Plaintiffs, this fear of speculative future liability creates an actual dispute with Jon and DeAnn. Pls.' Compl. ¶ 7.

When conducting "undercover investigations," Plaintiffs recruit an operative who, by lying about his or her motives and intentions, attempts to secure employment with the targeted facility. If employed, the investigator then performs the duties of the job while searching for evidence of practices or conditions which Plaintiffs might wish to publicize. If such evidence is found, the investigator will document it, often by use of video, and send it to his/her true "employer" to make public. Pls.' Compl. ¶¶ 9, 63-64.

ALDF alleges that it has previously conducted such investigations "around the country." Pls.' Compl. ¶ 56. It is not clear from the complaint that any of these happened in Arkansas, despite the allegation that "[t]he ability to engage in investigations . . . in Arkansas is particularly important." Pls.' Compl. ¶ 12. AE alleges that it has previously conducted such investigations

"across 13 countries." Pls.' Compl. ¶ 62. It is not clear from the complaint that this includes the United States.

The Act provides a private civil cause of action for damages sustained by an owner or operator of commercial property[1] against a person who "knowingly gains access to a nonpublic area of a commercial property and engages in an act that exceeds the person's authority to enter." Ark. Code Ann. § 16-118-113(b). "An act that exceeds the person's authority" includes stealing documents or making recordings, and then using such documents or recordings in a way that damages the owner of the property. *Id*. § 16-118-113(c).

Standard of Review

A court must dismiss an action if it does not have jurisdiction over it. Fed R. Civ. P. 12(b)(1). A court must also dismiss a complaint if it fails to state a claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6). While courts treat all well-pleaded facts as true when analyzing a motion to dismiss, they do not afford such generous treatment to "naked assertion[s] devoid of further factual enhancements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The factual allegations in a complaint must be enough to raise the right to relief above a speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This standards apply to the pleading of facts to establish an injury in fact for jurisdiction. *Ortiz v. Ferrelgas Partners, L.P. (In Re Pre-Filled Propane Tank Antitrust Litig.)*, 893 F.3d 1047, 1057 (8th Cir. 2018).

Argument

I. THE PLAINTIFFS LACK STANDING TO BRING THIS SUIT AGAINST JON AND DEANN.

[1] The Act is not limited to agricultural operations but defines "commercial property" to include all business property.

Jon and DeAnn incorporate herein by reference all the arguments in Section I of the Brief in Support of Peco Foods, Inc.'s Motion to Dismiss.

A. Plaintiffs Have Failed to Allege an Injury in Fact Because Any Injury they May Suffer is Purely Speculative.

Under Article III of the United States Constitution, federal courts have jurisdiction to resolve only "Cases" or "Controversies." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The doctrine of standing establishes that a case or controversy exists only where the plaintiff has suffered an "injury in fact" that is "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)) (internal quotation marks omitted). For a future harm to be an injury in fact, it must be certainly impending, not merely possible. *Id.* at 158. An alleged injury that depends on a chain of speculated possibilities is not certainly impending. *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410 (2013).

It is well established that fear of legal action leading to self-censorship of protected speech may establish an injury in fact. *Laird v.* Tatum, 408 U.S. 1, 11 (1972). However, the plaintiff's actions must be objectively reasonable; a "subjective chill" is not enough. *Id.* at 14-15. When the actions intended by the plaintiff do not actually violate the challenged statute, any alleged chill cannot be objectively reasonable. *Zanders v. Swanson*, 538 F.3d 591, 594 (8th Cir. 2009) (holding that plaintiffs lacked standing to challenge a law that criminalized knowingly filing a false police report because they alleged that they only intended to file accurate reports).

Additionally, the Eighth Circuit Court of Appeals has recognized that the bar for an injury in fact in First Amendment cases is higher when the alleged injury is only the threat of private civil action. *Eckles v. City of Corydon*, 341 F.3d 762, 768-69 (8th Cir. 2003). In *Eckles*, a homeowner erected various signs on his property alleging that county officials had

intentionally overvalued his home. 341 F.3d at 764. The City of Corydon sent a letter threatening to use its official power to have the signs removed, and charge Eckles for the expense; an attorney for the County also sent a letter indicating that he would recommend County officials bring private libel actions against Eckles. *Id.* at 765. Eckles sued the City, the County, and various County officials for violating his First Amendment right to free speech. On appeal, the Eighth Circuit held that Eckles had standing to sue the City because the threat of official action was imminent and not speculative. *Id.* at 678. However, the court dismissed the claims against the County and its officials because the County's letter threatening civil action against Eckles was too speculative to establish injury in fact. *Id.* at 768-69.

Plaintiffs claim that they have suffered injury because the threat of liability under the Act has deterred them from "investigating Defendants' facilities in Arkansas and engaging in advocacy based on the information those investigations would reveal." Pls.' Compl. ¶ 7. But the Plaintiffs' alleged investigation is not an investigation in the common use of the term. What the Plaintiffs describe as an investigation is a long, involved, and highly uncertain process. As alleged in the complaint, Plaintiffs' "investigations" require numerous discreet steps. First, Plaintiffs recruit an investigator who is willing and able to seek employment with a target. Pls.' Compl. ¶ 9. Plaintiffs allege that they have already completed this step. Pls.' Compl. ¶ 73. Once this is done, the investigators "seek out employment opportunities at factory farms and slaughterhouses, apply for and obtain a job through the usual channels . . . [and] document activities in the facility while performing, in good faith, the lawful tasks required of them." Pls.' Compl. ¶ 9. Plaintiffs allege that they have not taken any of these steps for fear of an action under the Act.

Plaintiffs' alleged harm is simply too remote and speculative to be an injury in fact. Essentially, Plaintiffs' claim that at some point *in the future*, after their investigator has applied for employment, been hired, begun work, and gathered information, then and only then, Plaintiffs *might* wish to use the information in a way that would expose them to liability under the Act, and would refrain from acting for fear of legal action. Thus, Plaintiffs claim that because they may, at some unspecified *future* time, if their plan is successful and if their investigation uncovers useful information, engage in self-censorship of that information for fear of legal action, they have *currently* suffered an injury in fact. This is not so. The Plaintiffs presently possess no information secretly gathered from Jon and DeAnn's farm that would give rise to a claim under the Act. Just like the citizens in *Zanders*, who could not reasonably claim to fear that they would be prosecuted for actions that the statute did not prohibit, Plaintiffs here cannot reasonably claim that they fear liability under the Act merely for working with an investigator to gain employment at Jon and DeAnn's farm. Plaintiffs freely admit that the Act "prohibit[s] gathering information if, and only if, the information is use[d]." Pls.' Compl. ¶ 108. *See* Ark. Code Ann. § 16-118-113(c)(1-3) (after knowingly gaining access to a nonpublic area of commercial property, exceeding one's authority to enter therein, and capturing, removing or recording information therefrom, a person must use the information in a manner that damages his employer to incur liability under the Act.) Plaintiffs cannot maintain that they have been deterred from *using* information gathered in a surreptitious investigation, because they have filed this lawsuit before conducting any investigation. Therefore, the Plaintiffs have no information obtained in violation of the Act, cannot show that they likely ever will, and have no speech, i.e., information to publish, which has been chilled.

The alleged injury in this case is even more speculative than in *Eckles*. There the plaintiff had actually received a letter contemplating a lawsuit if he did not change his behavior. Here, Jon and DeAnn have not threatened Plaintiffs, or even communicated with them in any way. Plaintiffs' sole allegation of injury is that Jon and DeAnn did not affirmatively waive their rights under the Act in response to an unsolicited letter. Pls.' Compl. ¶ 47. Under *Eckles*, this is clearly insufficient to establish an injury in fact.

Plaintiffs have not alleged any facts that would make this speculative chain of events imminent or even likely. There is no allegation, for instance, that Jon and DeAnn are currently hiring or that they are likely to be hiring in the near future. Similarly, Plaintiffs have offered no reason for the court to believe that their unidentified investigator would likely be selected for a position if one were available on Jon and DeAnn's family farm. [2] Furthermore, the Plaintiffs' allegations about Jon and DeAnn's farm are scant. At best, Plaintiffs allege that pigs at Jon and DeAnn's farm are "likely" kept in a certain kind of crate. Pls.' Compl. ¶ 67-68. The Plaintiffs' allegations against Jon and DeAnn are merely "naked assertion[s] devoid of further factual enhancement," and thus are not entitled to a presumption of truth. *Ashcroft*, 556 U.S. at 678.

More broadly, Plaintiffs have not alleged a history of past conduct consistent with the investigation that they claim they wish to pursue against Jon and DeAnn. Despite Plaintiffs' long history of deceiving employers for the purposes of gaining information to use against them in the public arena, and the supposed "importance" of such operation in Arkansas, they allege no such intrusions on farms in in the state, or plans to make such intrusions *before the passage of the Act*. AE does not even allege any previous activity in the United States. Furthermore, of the

[2] That the Plaintiffs could plant an employee on a family farm in Sevier County, Arkansas after sending a letter to the owners stating a desire to do so cannot be presumed. In 2016, the estimated total employment of the county was only 4,030, and the total number of employer establishments was only 255. https://www.census.gov/quickfacts/fact/table/seviercountyarkansas/PST045218.

previous investigations detailed in the complaint, none targeted a family farm like Jon and DeAnn's. Three of the investigations (one by ALDF and two by non-parties) targeted industrial slaughterhouses. Pls.' Compl. ¶¶ 17-18; 56. The fourth focused on "the Nation's third largest pig producer." Pls.' Compl. ¶ 57. Plaintiffs do not allege that Jon and DeAnn's farm is of a remotely comparable size; they state only that it is permitted to have 1200 pigs at one time. Pls.' Compl. ¶ 43. Given these deficiencies, the court cannot infer a substantial likelihood of Plaintiffs' allegedly contemplated actions against Jon and DeAnn.

Because Plaintiffs allege no contact or communications with Jon and DeAnn (or any other Arkansas farmer) before the passage of the Act, they have no controversy with Jon and DeAnn or standing to sue them as defendants in this civil suit. The plaintiffs therefore must manufacture a controversy to even approach the threshold of the courthouse door. The plaintiffs do so by sending the letter attached as Exhibit 1 to the motion to dismiss. In that letter ALDF and AE introduce themselves to Jon and DeAnn, state that they would like to surreptitiously go upon their private property, and further tell Jon and DeAnn that if they do not waive their right to bring a claim under the Act (which right would only exist if the plaintiffs damaged them in the future), their inaction will be viewed as a threat.

Plaintiffs do not allege that Jon and DeAnn have done anything in response to the unsolicited letter which arrived in their mailbox. Indeed, they did nothing. Nothing. Jon and DeAnn neither communicated with, nor took any action directed toward, the Plaintiffs before filing this motion to dismiss through counsel. The court should reject this blatant attempt by Plaintiffs to manufacture standing to drag individual farmers into this suit.

In Arkansas, there are some 42,500 farm operations.[3] If the plaintiffs are allowed to manufacture a controversy to bring this suit, then the Plaintiffs will have standing to sue any of those Arkansas farmers in similar fashion. And if the Plaintiffs are allowed to proceed with this suit against Jon and DeAnn, then the Plaintiffs may use litigation in federal court as a weapon against any Arkansas farmer with whom the Plaintiffs have a political dispute. The allegations in the complaint telegraph that Jon and DeAnn were singled out from 42,500 farmers in this state for retribution against DeAnn for introducing a bill in the Arkansas legislature with which the Plaintiffs disagree. No matter that both houses of the legislature passed the bill. No matter that the Governor signed the bill. The Plaintiffs champion in their complaint the fact that they oppose DeAnn's political views and her alleged associations with certain pro-agriculture organizations. *See* Plfs.' Complaint ¶¶ 4, 45-46.

In truth, if this suit is allowed to proceed against Jon and DeAnn, then there will certainly be a chilling effect – DeAnn and other Arkansas farmers will be dissuaded from exercising their own rights to speak on issues of importance to them, to join associations who advocate for farm interests, or to run for elected office, for to do so may raise the ire of internationally funded organizations like the Plaintiffs. And raising the ire of those organizations will make one a defendant in a lawsuit in federal court, without the necessity of any investigation having been conducted of the defendant or information obtained from the defendant's private property. And that lawsuit will, ironically, be brought under the banner of freedom of speech.

B. Plaintiffs Have Failed to Allege a Redressable Injury.

Even if Plaintiffs have suffered an injury, and they have not, it is not redressable by the court because it is not within the courts equitable powers to grant an injunction in this case. To be entitled to an injunction, a plaintiff must show a "likelihood of substantial and immediate

[3] https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=ARKANSAS.

irreparable injury." *Lyons*, 461 U.S. at 111 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). Questions of standing "obviously shade into those determining whether the complaint states a sound basis for equitable relief." *Id.* at 103 (quoting *O'Shea*, 414 U.S. at 499).

In *Lyons*, a citizen sued the City of Los Angeles to enjoin a policy that allowed police officers to use chokeholds in some situations. 461 U.S. at 97-98. The court held that any potential injury was not redressable because Lyons had not shown that he was entitled to the equitable relief he requested. *Id.* at 105. Specifically, the court said that Lyons would need to allege not only that he would have an encounter with the police in the near future, but that police always necessarily choke citizens in such encounters. *Id.* at 106-06.

Here, Plaintiffs have failed to allege facts that would entitle them to equitable relief. As shown above, Plaintiffs' claims of injury are speculative and dependent on a number of contingencies. Even if the allegations were sufficient to allege an injury in fact, and they are not, such an injury would not entitle Plaintiffs to equitable relief under the *Lyons* standard. Not only have plaintiffs not alleged that Jon and DeAnn are currently hiring, Plaintiffs have not alleged that their investigators are always hired by their targets, or that such investigations always uncover wrongdoing, or that they always act to obtain or "use" the information in such a way as to expose them to liability under the Act. Thus, even if Plaintiffs have alleged an injury in fact, that injury is not redressable within the equitable power of the court.

Moreover, the orders sought in this case would not provide Plaintiffs with the relief they desire. The Plaintiffs allege that the ability to engage in their surreptitious investigations of animal agricultural facilities in Arkansas and to engage in advocacy based on information obtained thereby is "particularly important" because of Arkansas' prominence in the agricultural and food supply industries. The Plaintiffs also allege that the court must declare the Act

unconstitutional and enjoin the defendants from using it so that the Plaintiffs' speech will no longer be suppressed. Plfs.' Complaint ¶¶ 7, 12. But under Federal Rule of Civil Procedure 65(d)(2), an injunction against the defendants in this suit would only bind these defendants and would not preclude any of the other 42,500 farmers in Arkansas from bringing in the circuit courts of Arkansas a civil action under the Act for damages. Similarly, a declaration by this court in this suit that the Act is unconstitutional would not preclude the circuit courts of Arkansas, where civil actions under the Act would be filed, from reaching a different conclusion. *See Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 960 (8th Cir. 2015) ("Arkansas courts might find persuasive the decisions of lower federal courts resolving federal constitutional questions, but there is no Arkansas precedent requiring Arkansas courts to treat such decisions as binding authority.") The injunctive and declaratory relief sought by the Plaintiffs would therefore not achieve the broad purposes of this suit, as alleged in the complaint.

II. THE PLAINTIFFS' CONSTITUTIONAL CLAIMS PROVIDE NO CAUSE OF ACTION AND APPLY ONLY TO STATE ACTORS.

Jon and DeAnn incorporate herein by reference all the arguments in section II of the Brief in Support of Peco Foods, Inc.'s Motion to Dismiss.

Plaintiffs' own complaint acknowledges that state action is required to state a claim under the Constitution. The complaint alleges that "*Arkansas* cannot justify these restrictions on speech, and that "*the state* must first attempt to seriously address the problem through means other than targeting speech." Pls.' Compl. ¶¶ 144, 147 (emphasis added) (internal quotation marks omitted). Despite this, Plaintiffs have not named Arkansas, or any state actor. Instead they have chosen to sue a husband and wife, for allegedly no reason other than that they are farmers.

In the context of civil litigation, the First and Fourteenth Amendments serve as a check on the court, not private parties. *Shelley v. Kraemer*, 334 U.S. 1, 13-14 (1948). While the Supreme Court has recognized that a private litigant may be considered a state actor in the limited context of using state-sanctioned procedures for unconstitutional deprivation of property before a judgment, this is a narrow exception to the general rule that "a private party's mere invocation of state legal procedures" is not in itself state action. *Shipley v. First Federal Sav. & Loan Ass'n of Delaware*, 703 F. Supp. 1122, 1130 (D. Del. 1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)).

Even accepting Plaintiffs' claim of speculative future injury, that injury is not the result of a state action. Plaintiffs claim that they fear a private civil lawsuit by Jon and DeAnn. In other words, the act that has supposedly caused (or will cause) the injury, and the act that Plaintiffs seek to enjoin, is "a private party's mere invocation of state legal procedures." *Shipley*, 703 F. Supp. at 1130. Because this is not a state action, the court has no power under the First and Fourteenth Amendments to enjoin it. Therefore, Plaintiffs have failed to state a claim for relief.

The only allegation of anything that might be considered state action contained in the complaint involves DeAnn's membership in the Arkansas legislature. Plaintiffs frequently refer to DeAnn as "Representative Vaught" and allege her involvement in passing the Act. Pls.' Compl. ¶ 44. However, on the face of the complaint, DeAnn is being sued as a private citizen, ostensibly because she and her husband may wish to bring a private civil action against Plaintiffs at some point in the future for any damages caused them by an intrusion on their private property. Pls.' Compl. ¶ 48. In any event, state legislators are absolutely immune from civil suits relating to legitimate legislative action. *United States v. Gillock*, 445 U.S. 360, 372 (1980).

If this is indeed a suit against private farmers, and not barred by legislative immunity, then there is no state action, and plaintiffs have failed to state a claim under the First and Fourteenth Amendments.

Conclusion

Plaintiffs' complaint utterly fails to establish a right to relief against Jon and DeAnn, or even a case or controversy. Plaintiffs' alleged injury rests entirely on a speculative chain of events that may well never come to pass and is wholly insufficient to grant standing. Plaintiffs endorse a sweeping theory of standing that would allow a facial challenge to a civil statute to be filed against essentially anyone, for any reason, as long as the defendant might someday have a cause of action under the statute. This theory is ludicrous on its face, and inconsistent with precedent from the Eighth Circuit Court of Appeals and the United States Supreme Court. Even if Plaintiffs had standing to bring this suit, the court has no power to enjoin purely private behavior under the legal theories Plaintiffs offer; nor are Plaintiffs entitled to an injunction to redress such a remote, speculative injury. The court should dismiss Plaintiffs' unfounded, meritless complaint.

Respectfully Submitted,

LAX, VAUGHAN, FORTSON,
ROWE & THREET, P.A.
11300 Cantrell Road, Suite 201
Little Rock, Arkansas 72212
(501) 376-6565 Office
(501) 376-6666 Facsimile
rrowe@laxvaughan.com

By: /s/ Roger D. Rowe
Roger D. Rowe (85140)
Attorneys for Jonathan and DeAnn Vaught

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following counsel of record:

Alan Keith Chen
University of Denver
Sturm College of Law
2255 East Evans Avenue
Denver, CO 80208

Cristina R. Stella
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931

David Samuel Muraskin
Public Justice P.C.
1620 L Street N.W.
Suite 630
Washington, DC 20036

John Daniel Hays, Jr.
J.D. Hays Law, PLLC
4101 West Huntington Drive
Suite 3103
Rogers, AR 72758

Justin Francis Marceau
University of Denver
Sturm College of Law
2255 East Evans Avenue
Denver, CO 80208

Kelsey Rinehart Eberly
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931

Matthew Glen Liebman
Animal Legal Defense Fund
525 East Cotati Avenue
Cotati, CA 94931

Matthew Daniel Strugar
Law Office of Matthew Strugar
3435 Wilshire Boulevard
Suite 2910
Los Angeles, CA 90010

Sarah Hanneken
Animal Equality
8581 Santa Monica Boulevard
Suite 350
Los Angeles, CA 90069

Hannah Mary Margaret Connor
Center for Biological Diversity
Post Office Box 2155
St. Petersburg, FL 33731

Steven W. Quattlebaum
Chad W. Pekron
Michael B. Heister
Samantha R. Wilson
Quattlebaum, Grooms, & Tull PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201

By: /s/ Roger D. Rowe
Roger D. Rowe (85140)