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

APRIL DEFIBAUGH, et al.,	)	
Plaintiffs,	)	
vs.	)	CASE NO. 1:17-cv-00645
BIG BROTHERS/BIG SISERS OF NORTHEAST OHIO BOARD OF TRUSTEES, et al.,	)	JUDGE PATRICIA ANNE GAUGHAN
Defendants	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

KENNETH D. MYERS (005365)
6100 Oak Tree Blvd., Suite 200
Cleveland, OH 44131
(216) 241-3900
(440) 498-8239 Fax
kdmy@aol.com

GEOFFREY T. BLACKWELL
American Atheists Legal Center
1220 L St. NW, Suite 100-313
Washington, D.C. 20005
(908) 276-7300
legal@atheists.org

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INTRODUCTION

V is a young boy who had the misfortune of having an older sister who for a time had some behavioral problems. These problems brought V's family under the purview of the Geauga County Juvenile Court, which in turn ordered the Geauga County CASA for Kids (CASA), an organization that works with the Geauga County Juvenile Court and exists solely for the purpose of assigning Guardians ad Litem (GALs) to children who come under the authority of the Juvenile Court, to assign a GAL to V. CASA assigned Margaret Vaughan (Vaughan), who in her private life was a devoted member of the Morning Star Friends Church (Morning Star) and a believer in spreading the Gospel of Jesus Christ to everyone with whom she came in contact.

Vaughan then contacted her church friend, David Guarnera (Guarnera), who also believed in spreading the word, and she not only directed him to join Big Brothers/Big Sisters of Northeast Ohio (BBBS), but she obtained approval from the Juvenile Court to have both BBBS and Guarnera assigned to work specifically with V in helping him to socialize (although V had no specific legal issues that would ordinarily have brought him under Court supervision).

With court-appointed and court-approved access to V and his family, Vaughan and Guarnera began a campaign of preaching and proselytizing to V and his parents, and coercing the DeFibaughs

to accept the religious indoctrination under the implied threat of harsher action and more intrusion by children's services and the Juvenile Court if the family did not cooperate.

This religious indoctrination, led by Vaughan and Guarnera, acquiesced to by CASA and BBBS, culminated in the full immersion baptism of V by Guarnera and Matthew Chesnes (Chesnes), pastor of Morning Star. This baptism was done without the consent of V's parents, and in fact, in blatant disregard of Mr. and Mrs. DeFibaugh's instructions to Vaughan, Guarnera, CASA and BBBS that the family be spared any religious indoctrination.

The DeFibaughs have filed suit in this Court, alleging violations of their First Amendment rights to freedom of religion, as well as several other state and federal torts.

The defendants have filed four separate motions to dismiss, claiming they are not state actors and therefore, beyond the scope of a First Amendment lawsuit, and also claiming various other immunities and protections.

In this consolidated response, plaintiffs set forth their opposition to defendants' motions to dismiss and ask this Court to overrule the motions in their entireties.

BRIEF STATEMENT OF THE ISSUES

1. Are defendants CASA, BBBS, Vaughan, and Guarnera "state actors" who acted "under color of state law" in committing the acts alleged in the Amended Complaint?

2. Is defendant Vaughan absolutely immune from liability pursuant to the quasi-judicial immunity doctrine?

3. Are defendants Morning Star and/or Chesnes immune from suit pursuant to the "church autonomy doctrine?"

4. Have plaintiffs sufficiently pleaded causes of action for federal and state conspiracy?

5. Should this Court exercise supplemental jurisdiction over plaintiffs' state law claims?

6. Does the addition of facts and evidence outside the four walls of the Amended Complaint automatically convert defendants' motions to dismiss into motions for summary judgment?

FACTS OF THE CASE

The facts alleged are contained in the Amended Complaint, and will not be repeated here, except to illuminate or rebut specific arguments. The Amended Complaint is incorporated herein.

LAW AND ARGUMENT

A. STANDARDS GOVERNING RULE 12 MOTIONS TO DISMISS

1. Rule 12(b)(1) motions

"Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction generally come in two varieties: a facial attack or a factual attack." *Gentek Bldg. Prods. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007) (citation omitted). If the challenge consists of a facial attack on the complaint, i.e., that the facts alleged do not provide a sufficient basis for federal jurisdiction, the court "takes the allegations in the complaint as true" and "[i]f those allegations establish federal claims, jurisdiction exists." *Id.* If, on the other hand, the moving party raises a factual challenge to the court's subject-matter jurisdiction, which "implicates an element of the cause of action, then the district court should *find that jurisdiction exists* and deal with the objection as a direct attack on the merits of the plaintiff's claim." *Id.* (emphasis in original) (internal quotation omitted). As will be explained in more detail below, this Court may and should deny defendants' motions under Rule 12(b)(1) because the

defendants' facial and factual attacks on the Amended Complaint fail.[1]

A federal court may exercise *supplemental* jurisdiction to hear state law claims over which it would otherwise lack subject-matter jurisdiction if those state law claims "are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy." 28 U.S.C. § 1367(a). "Claims form part of the same case or controversy when they 'derive from a common nucleus of operative facts.'" *Blakely v. United States*, 276 F.3d 853, 861 (6th Cir. 2002) (citing *Ahearn v. Charter Twp.*, 100 F.3d 451, 454-55 (6th Cir. 1998)). This Court should exercise supplemental jurisdiction over plaintiffs' state law claims because the state law claims are part of the same case or controversy as the federal claims.

2. Rule 12(b)(6) motions

Rule 12(b)(6) permits the dismissal of a cause of action on the grounds that the plaintiff has "fail[ed] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A

[1] Defendants Morning Star and Chesnes present their motion as one pursuant to Rule 12(h)(3). Rule 12(h)(3) states: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." In considering a motion under Rule 12(h)(3), courts apply an identical standard to that used to adjudicate motions filed pursuant to 12(b)(1). Because the identical standard applies, Defendants' Morning Star and Chesnes' Rule 12(h)(3) motion will be treated as a Rule 12(b)(1) motion.

plaintiff's challenged cause of action survives such a motion if the complaint "alleged facts that state a claim to relief that is plausible on its face and that, if accepted as true, are sufficient to raise a right to relief above the speculative level." *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The court may only dismiss the claim if it concludes that "*no set of facts*," if proven true, would entitle the plaintiff to the relief sought. *Id.*, (emphasis added). This Court may and should deny defendants' motions under Rule 12(b)(6) because the facts alleged in the Amended Complaint, taken as true, state a prima facie case for each of the counts contained in the Amended Complaint.

3. Rule 12(c) motions

Rule 12(c) states: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). If the defendant has not filed an answer in a matter, judgment under Rule 12(c) is "unavailable." *F.R.C. Int'l, Inc. v. United States*, 278 F.3d 641, 642 (2002)(district court properly construed Rule 12(c) motion as one for summary judgment). This Court may and should deny the portion of the motion filed by defendants Morning Star

and Chesnes premised on Rule 12(c), because that portion of the motion was improperly filed.

In the matter presently before this Court, no defendant has filed an answer to the Amended Complaint. Because the motion filed pursuant to Rule 12(c) by defendants Morning Star and Chesnes is premature, plaintiffs respectfully request that the Court deny these defendants' motion for judgment on the pleadings or, in the alternative, convert the motion into one for summary judgment pursuant to Rule 56 and permit plaintiffs to conduct discovery before issuing a decision.

B. COUNT I OF THE AMENDED COMPLAINT SUFFICIENTLY STATES A CAUSE OF ACTION FOR THE VIOLATIONS OF RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS, PURSUANT TO 42 U.S.C. 1983, A CLAIM OVER WHICH THIS COURT HAS JURISDICTION.

1. This Court has jurisdiction to hear 1983 claims.

In the matter currently before this Court, defendants BBBS and Guarnera premise their argument against subject-matter jurisdiction on a determination of whether each of them was acting under color of law as alleged in Count I, a factual challenge that implicates an element of the plaintiffs' federal claims under 42 U.S.C. § 1983. BBBS Motion at 14; Guarnera Motion at 14-15. In accordance with the Sixth Circuit's decision in *Gentek*, *supra*, this Court should deny these defendants' 12(b)(1) motion, find that jurisdiction exists, and treat the

motion as a direct attack on the merits of the plaintiffs' claim against them.

2. Stating a prima facie case under § 1983.

Contrary to the arguments presented by defendants CASA, Vaughan, BBBS, and Guarnera, the plaintiffs in the matter currently before this Court have alleged facts sufficient to maintain claims against those defendants pursuant to 42 U.S.C. § 1983 ("1983 Claims"). A plaintiff properly states a claim under § 1983 by alleging facts showing "that a defendant acted under color of state law" and "that the defendant's conduct deprived the plaintiff of rights secured under federal law." *Handy-Clay*, 695 F.3d at 539. The phrase "under color of law" should not be read so narrowly as to only encompass statutes, regulations, and judicial precedents, but includes agency or officer custom, because such "settled practices of state officials may, by imposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167-68 (1970).

A person acts "under color of state law" by taking action which is "fairly attributable to the state." *Lindsey v. Detroit Entm't, LLC*, 484 F.3d 824, 827 (6th Cir. 2007). Determining that private action is attributable to the state "is a matter of normative judgment, and the criteria lack rigid simplicity."

Lindsey, 484 F.3d at 827-28. However, "it is enough that [the party] 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 'under color' of law for purposes of § 1983 actions." *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). "If a private party has *conspired with state officials* to violate constitutional rights, then that party qualifies as a state actor and may be held liable pursuant to § 1983." *Cooper v. Parrish*, 203 F.3d 937, 952 n.2 (6th Cir. 2000)(emphasis added); *see also Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004).

Where the plaintiff has not alleged cooperation or concerted action between state and private actors, the courts utilize four tests in determining whether a private party was acting under color of law: (i) the symbiotic relationship (or substantial nexus) test; (ii) the state compulsion test; (iii) the public function test; and (iv) the entwinement test. *Marie v. American Red Cross*, 771 F.3d 344, 362 (6th Cir. 2014). The actions of defendant Vaughan and defendants BBBS and Guarnera fall within the symbiotic relationship, state compulsion, and entwinement tests.

i. Symbiotic relationship/substantial nexus test

A private entity can be found to be a state actor under the "symbiotic relationship or nexus test" if "the state is intimately involved in the challenged private conduct." *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). Contrary to the picture painted by defendants CASA and Vaughan, the courts have not universally found GALs to be non-state actors. Under the right circumstances, where a GAL wields significant authority, he or she may very well constitute a state actor subject to liability under § 1983. *Reguli v. Guffee*, 371 F.App'x 590, 601 (6th Cir. 2010) (unpublished); *see also Kirtley v. Rainey*, 326 F.3d 1088 (9th Cir. 2003); *Thomas S. v. Morrow*, 781 F.2d 367, 377-78 (4th Cir. 1986). "We can imagine that some court-appointed programs for juveniles could be sufficiently intertwined with state functions that the participants can be found to be state actors." *Reguli*, 371 F.App'x at 601 (internal quote and citation omitted).

Under Ohio law, the prototypical "guardian ad litem is an agent of the court, and, while charged to protect the child's best interest, nevertheless owes his or her first duty to the court itself." *In re Alfrey*, 2003-Ohio-608, ¶ 16 (2nd Dist. 2003). However, a GAL appointed in a dependency matter may go beyond that limited scope, instead performing "*whatever functions are necessary* to protect the best interest of the

child, including, *but not limited to*, investigation, mediation, monitoring court proceedings, and monitoring the services provided the child by the public children services agency or private child placing agency that has temporary or permanent custody of the child, and shall file any motions and other court papers that are in the best interest of the child in accordance with rules adopted by the supreme court." Ohio Rev. Code Ann. § 2151.281(I) (emphasis added).

Furthermore, under Ohio law a GAL for a dependent child could continue performing those duties until "[t]he child reaches the age of eighteen if the child does not have a developmental disability or physical impairment or the child reaches the age of twenty-one if the child has a developmental disability or physical impairment." Ohio Rev. Code Ann. § 2151.281(G)(5). Even after a court has issued a disposition in a dependency matter, a new matter may be instituted by "any person having knowledge of a child who appears to . . . be an unruly, abused, neglected, or dependent child," presumably including the GAL in the previous dependency matter. Ohio Rev. Code Ann. § 2151.27(A)(1).

ii. State compulsion test

State action can be found under the state compulsion test where the state "has exercised coercive power or has provided such *significant encouragement, either overt or covert*" that the

choice of a private party must be deemed to be that of the state. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)(emphasis added). However, "[t]he state agency must do more than approve the private entity's conduct or course of behavior for the private entity's actions to be attributable to the state." *Probst v. Central Ohio Youth Center*, 511 F.Supp.2d 862, 867 (S.D. Ohio 2007). "[T]he likelihood that state action will be found increases when officers take a more active role" in the alleged acts. *Hensley v. Gassman*, 693 F.3d 681, 689 (6th Cir. 2012).

iii. Entwinement test

"[T]he crucial inquiry under the entwinement test is whether the 'nominally private character' of the private entity is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings such that there is no substantial reason to claim unfairness in applying constitutional standards to it." *Marie*, 771 F.3d at 364.

3. Absolute immunity to liability for claims under 42 U.S.C. § 1983.

Defendants whose acts might otherwise make them liable under § 1983 may nonetheless be protected by judicial immunity. However, judicial immunity only extends to *acts integral* to the judicial process, not to officials whose role happens to include some judicial functions. *Barnes v. Winchell*, 105 F.3d 1111,

1115-16 (6th Cir. 1997). A party claiming immunity has the burden of demonstrating that the alleged acts fall within the scope of the claimed immunity. *Burns v. Reed*, 500 U.S. 478, 486 (1991). In order to meet that burden, the *moving party* must show that the alleged acts were integral to his or her role in the judicial process. *Barnes*, 105 F.3d at 1115-16.

In determining whether a particular defendant is entitled to absolute judicial immunity the court must "look[] to 'the nature of the function performed, not the identity of the actor who performed it.'" *Holloway v. Brush*, 220 F.3d 767, 774 (6th Cir. 2000) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)).

4. Defendants CASA for Kids' and Margaret Vaughan's arguments.

Defendants CASA and Vaughan argue that neither of them can be liable for claims under § 1983. Vaughan argues that, in her capacity as GAL for V, she does not constitute a "state actor" for the purposes of a § 1983 claim. CASA Motion at 5-6. She also argues that she is entitled to judicial immunity as she was appointed to the court to provide testimony and recommendations. CASA Motion at 6-7. CASA argues that it is entitled to absolute quasi-judicial immunity because it is an arm of the Geauga County Juvenile Court and is an integral part of the judicial process. CASA Motion at 7-8. While not explicitly argued, both

defendants imply that the claims against them should be dismissed because the Juvenile Court had ended their involvement in the matter prior to the baptism. CASA Motion at 7.

These defendants argue that "[v]arious federal courts have held that guardians ad litem are not state actors for the purposes of Section 1983." CASA Motion at 5. They cite several cases (none of which are Sixth Circuit cases and therefore, not binding on this Court) to support this assertion.

These defendants also argue that even if they are held to be state actors, they are entitled to absolute immunity "for performing job duties that are a part of the judicial process," CASA Motion at 6, and that public policy considerations mitigate in favor of immunity, CASA Motion at 7. They cite *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984) and *Gardner v. Parson*, 874 F.2d 131 (3d Cir. 1989), as well as other cases for the proposition that GALs are immune, CASA Motion at 7-6, but they do not explain how or why public policy is implicated in this matter or what public policy would approve of a court-appointed GAL using her official authority to preach the Gospel of Jesus Christ to a child under her charge and that child's parents.

The defendants also seem to imply that the Geauga County Juvenile Court terminated the relationship between the plaintiffs and the defendants prior to the baptism. CASA Motion at 7. In doing so, the defendants reference a purported court

document showing that the GAL's role ceased prior to the baptism. Id. Although it is not explicitly argued, it seems as though these defendants are saying that if CASA and Vaughan were no longer assigned to the DeFibaughs by the Court, they could not have been responsible for any conduct by themselves or others after that date. Since this argument is not fully developed, plaintiffs are not bound to respond to it and this Court should not address the issue. However, to the extent that these defendants desire to more fully develop this argument, this Court should defer any decision on defendants' motion to dismiss and convert the motion into a motion for summary judgment, since these defendants are not accepting the facts as stated in the Amended Complaint as true and have added additional material outside the four corners of the pages of the Amended Complaint.

5. Defendants BBBS's and David Guarnera's arguments

Defendant BBBS argues that it cannot be held liable under § 1983 because it was not acting "under color of law" for § 1983 purposes and that if Guarnera was acting on behalf of the State of Ohio when he allegedly mentored and baptized V, then the constitutional claims must be dismissed as to Guarnera. BBBS Motion at 8. Defendant Guarnera also argues that he cannot be held liable under Section 1983 because he was not acting "under color of law." Guarnera Motion at 9. Guarnera makes essentially

the same arguments as does BBBS, i.e., that his conduct did not meet the requirements of any of the four tests to determine if a private actor is operating under color of law. Guarnera Motion at 9-13. With regard to the public function test, the plaintiffs agree with both these defendants.

Plaintiffs reject, however, the contention of defendants BBBS and Guarnera that the state compulsion, symbiotic relationship, and entwinement tests do not apply. Defendant BBBS argues that it does not meet the standards for the state compulsion test because the Amended Complaint does not allege that the Juvenile Court coerced or encouraged Guarnera's or BBBS's actions. BBBS argues that it does not meet the standards for the symbiotic relationship test because neither BBBS nor Guarnera are state-regulated entities and the state was not intimately involved in the challenged private conduct and therefore, the conduct cannot be attributed to the state for purposes of § 1983. BBBS Motion at 10-11. It also argues that the entwinement test does not apply because there is no allegation that the Juvenile Court was entwined with the policies of BBBS or that the Juvenile Court was involved in any manner with the management or control of BBBS or Guarnera. BBBS Motion at 11-12.

BBBS's claims that neither it nor Guarnera were acting under color of state law depends to some extent on whether

Margaret Vaughan was considered a state actor and acting under color of law. "According to federal case law, the GAL is not acting as a state actor when she makes recommendations, so BBBS and Guarnera cannot be state actors when implementing the GAL's recommendations. Court approval of a GAL recommendation does not endow that recommendation with the power of the state, nor does it bring the performance of that order within the meaning of 'color of state law.'" BBBS Motion at 9-10. For the reasons stated below, these challenges to plaintiffs' Amended Complaint are fatally flawed.

6. Defendants Morning Star Friends Church's and Matthew Chesnes' arguments

Defendants Morning Star and Chesnes argue that they cannot be held liable under § 1983 because they are not state actors, nor were they acting under color of law. Since the Amended Complaint states that Count I is only brought against defendants CASA, BBBS, Vaughan, and Guarnera, plaintiffs need not address the arguments of defendants Morning Star and Chesnes on this point.

7. Plaintiffs' response to defendants' arguments

In order to understand why the defendants should be considered state actors who were acting under color of state law, it is important to understand the dual identities and interlocking relationships between the defendants.

For example, Margaret Vaughan was not just a GAL; she was also a member of Morning Star's congregation who mixed her personal Christian beliefs with her job as an official appointee of the Juvenile Court and who, according to the Amended Complaint, used her power and authority as GAL to advance her personal beliefs. Am. Comp. at ¶¶ 15-16. Likewise, David Guarnera was not just a Big Brother; he was also a member of Morning Star's congregation who, through his relationship with Margaret Vaughan as a fellow congregant, got himself appointed to be V's Big Brother via an appointment by the Juvenile Court. Am. Comp. at ¶¶ 21-24. He, too, under the umbrella of both Vaughan as GAL and the Juvenile Court, was able to use his official position to advance his personal religious beliefs and to coerce V, an 11-year-old boy, into a religious baptism. Am. Comp. at ¶¶ 28-36. Whether or not the Juvenile Court actually knew that V and his parents were being religiously coerced by Vaughan and Guarnera, both individuals used their positions to make the DeFibaughs believe that their actions had the backing of the Juvenile Court.

Vaughan's authority to insert herself into the lives of the DeFibaughs came entirely from her affiliation with CASA, which in turn derived its authority entirely from the Juvenile Court. Am. Comp. at ¶¶ 8, 13. CASA for Kids exists entirely to provide GALs and has an exclusive contract with the Geauga County

Juvenile Court. Am. Comp. at ¶ 13. As is stated above, GALs are agents of the court and their first duty is to the court. Am. Comp. at ¶ 8. Without the court appointment of Vaughan through CASA for Kids, she would have had no authority, whether real or perceived, and in fact, no contact with the family. But with the court appointment, she had a great deal of power and authority, up to and including the authority to recommend to the court that V and/or his sister be removed from the DeFibaughs' home. Am. Comp. at ¶ 18.

Taking the Amended Complaint at face value, Vaughan intermingled her roles as GAL and church-member. She "supported Morning Star's mission of proselytizing and attempting to persuade people to love Jesus Christ. Using the imprimatur of the state government via her assignment as GAL, and in her capacity as GAL, defendant Vaughan more than once left the DeFibaughs with books, tapes, CDs and other works of religious content. Defendant Vaughan repeatedly told the DeFibaughs that 'families need God to raise children.'" Am. Comp. at ¶¶ 16-17. In so doing, Vaughan made it clear that there was a connection between her official government capacity, i.e., her oversight of V and the DeFibaughs' parenting of him, and their acquiescence to her religious indoctrination.

Defendant CASA apparently approved of and encouraged this conduct by Vaughan; the DeFibaughs complained on several

occasions to Vaughan's supervisors at CASA which ratified and adopted Vaughan's actions by taking no steps to remedy the behavior:

> . . .[N]ot only were the DeFibaughs upset that defendant Vaughan was attempting to influence their own religion and the religious upbringing of their children, but they were upset at the coercion that was implied in defendant Vaughan's constant religious talk; defendant Vaughan, having been assigned by the Juvenile Court and CASA, had the power to work hand-in-hand with [children's services] and to recommend to the Juvenile Court that V should be labeled as 'dependent,' thus triggering state involvement, and to further recommend extreme remedies for V's 'dependency,' up to and including recommending that V be removed from the DeFibaugh home with custody being given to [children's services] if the DeFibaughs did not go along with the religious indoctrination.
>
> Am. Comp. at ¶ 18.

When the DeFibaughs' complaints to Vaughan's supervisors seemed to fall on deaf ears, the DeFibaughs became intimidated by Vaughan's constant discussion of religion. Am. Comp. at ¶ 19. Thus, both Vaughan and CASA for Kids used the coercive power of the state (via the Juvenile Court) and created the perception that the Juvenile Court approved of and encouraged their religious indoctrination actions.

The actions of both Vaughan and CASA, in religiously proselytizing (in the case of Vaughan) and failing to stop such conduct (in the case of CASA for Kids) must be deemed state action because they used the authority granted them by the Juvenile Court to violate plaintiffs' freedom of religion by

implicitly threatening them with possible state sanctions if they did not listen to and adopt the religious beliefs and practices of defendant Vaughan. By using their state-approved authority to invade plaintiffs' religious life, and tying plaintiffs' religious practices to the state's continued involvement in their lives and the possible removal of the DeFibaughs' children, defendants Vaughan and CASA for Kids acted under color of state law.

Vaughan further inculpated herself by recruiting Guarnera, a member of her church who shared her religious beliefs and her enthusiasm for proselytizing; she "used her official position and state-sponsored power and authority over V and his family" to recruit Guarnera "to spend time with V with the intent of encouraging Guarnera to inculcate V with Guarnera's religious beliefs." Am. Comp. at ¶¶ 21, 22. Vaughan would not have had the ability to both continually proselytize to the DeFibaughs and to encourage the DeFibaughs to allow V to spend time with Guarnera absent her official position as a court-appointed GAL.

Vaughan, using her official authority as GAL, then conspired with Guarnera to "disguise the link between defendant Guarnera and defendant Morning Star Friends Church" by recommending that Guarnera become a volunteer with BBBS so that social contacts between Guarnera and V could be provided under the auspices of an officially non-sectarian organization. Am.

Comp. at ¶ 23. Vaughan then used her official authority to recommend to the Juvenile Court that BBBS be officially appointed by the court to assist V, which the Juvenile Court did. Am. Comp. at ¶ 24. Further, the Juvenile Court permitted Vaughan to select the individual "big brother" to be assigned to V and the Juvenile Court approved Vaughan's selection of Guarnera. Id. So both BBBS and Guarnera also operated under the official imprimatur of the Juvenile Court. BBBS and Guarnera utilized the coercive power of the state, because absent Vaughan's recruitment of Guarnera and other machinations, and the Juvenile Court's approval of both BBBS and Guarnera, the DeFibaughs would not have felt compelled to allow V to spend time with Guarnera and Guarnera would not have had on-going access to V.

The DeFibaughs explicitly informed representatives from BBBS, along with Guarnera and Vaughan, that they did not want any religious indoctrination to occur and received assurances from Vaughan and BBBS that their wishes would be respected. Am. Comp. at ¶ 26. Yet throughout his relationship with V, Guarnera used his position as the court-approved representative of BBBS to inculcate V with Guarnera's religious beliefs, talking about religion, playing religious songs on the car radio, and linking religion with his official status by telling V, "If you don't

like God, you're not part of Big Brothers/Big Sisters." Am. Comp. at ¶ 29.

It was in this atmosphere, which Vaughan, Guarnera, CASA, and BBBS created, that the baptism occurred. Guarnera specifically concealed from V's parents that he was going to take V to be baptized. As the Amended Complaint states:

> Unbeknownst to V or his parents, and without the permission of the DeFibaughs and contrary to their express prohibition of defendant Guarnera or anyone from BBBS attempting to religiously indoctrinate V, defendant Guarnera, acting in his official capacity as a representative of BBBS and the state of Ohio, under the auspices of defendant CASA and with the express or implied consent of defendant CASA and defendant Vaughan, conspired with defendant Morning Star and defendant Chesnes, the pastor at Morning Star, to have V baptized into the Christian faith at that "picnic."
>
> Am. Comp. at ¶ 32.

Further, Guarnera threatened V that if he did not go through with the baptism, he would not take V to any more baseball games, which had become a favorite destination of V's when he was with Guarnera. Am. Comp. at ¶ 33.

V was repeatedly indoctrinated into a religion not of his parents' choosing and baptized into the Christian faith against the express wishes of his parents "under the guise of a government-sanctioned, court-approved social program" in violation of the plaintiffs' First Amendment rights to freedom of religion. Am. Comp. at ¶ 40.

Defendants Vaughan, CASA, Guarnera, and BBBS qualify as state actors under the symbiotic relationship test; under that test, "a private party's conduct constitutes state action where there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Marie v. American Red Cross*, 771 F.3d 344, 363 (6th Cir., 2014) (internal quotation and citation omitted).

In this case, the defendants had power and authority vested in them by the Juvenile Court; the defendants could not have inserted themselves into plaintiffs' lives in the way they did without wearing the mantle of authority granted by the Juvenile Court. There were threats, both implicit and explicit, that if the plaintiffs did not cooperate with the defendants' religious indoctrination there would be negative consequences meted out through the Juvenile Court. The defendants made religion part and parcel of their ongoing contact with plaintiffs, leading up to the baptism of V against his parents' express wishes. There was a symbiotic relationship between the Juvenile Court and the defendants, who worked with and for the Court in their official capacities, and used their official capacities to indoctrinate plaintiffs with defendants' own personal religious beliefs.

Defendants Guarnera and BBBS qualify as state actors under the state compulsion test, which requires that a state actor has

at least provided such "significant encouragement, either overt or covert" that the choice of a private party must be deemed to be that of the state. *Blum*, 457 U.S. at 1004. Here defendants Vaughan and CASA—through its ratification and adoption of Vaughan's actions—did far more than merely approve the actions of BBBS, a private entity. Defendant Vaughan recruited Guarnera into her scheme and directed him to volunteer with BBBS. Am. Comp. at ¶¶ 20-24. More than mere approval, Vaughan's actions constituted significant encouragement, if not outright compulsion, of Guarnera's actions, making Guarnera and BBBS state actors under the state compulsion test.

Defendants also constitute state actors under the entwinement test, the "crucial inquiry" of which "is whether the 'nominally private character' of the private entity is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings such that there is no substantial reason to claim unfairness in applying constitutional standards to it." *Marie*, 771 F.3d at 364.

In this case, the "nominally private character" of CASA is the key; while it is a private, non-profit organization, it exists solely to supply GALs to the Juvenile Court, GALs who are agents of the court and whose prime allegiance is to the court. Through CASA for Kids, Margaret Vaughan was appointed as V's GAL; using that official capacity and that court appointment,

Vaughan not only repeatedly indoctrinated the plaintiffs with religion and made it clear there was a connection between accepting religion and keeping their kids, but she then slipped her church friend and fellow evangelist David Guarnera into the lives of the plaintiffs, securing a court appointment for Guarnera under the guise of a non-sectarian Big Brother program. Using the cover unwittingly provided by the Juvenile Court, Guarnera continued to indoctrinate V, leading up to the baptism. In the eyes of the DeFibaughs, Vaughan and Guarnera were the state, clothed with the same power and authority to intrude on their lives that children's services of the Juvenile Court possessed.

None of the defendants would have been able to accomplish their religiously motivated goals without the official authority conferred upon them by the Juvenile Court. Their actions were thus intertwined with the functions of the Juvenile Court. Under the guise of the government-approved goal of helping to provide for the best interests of V and his family, the defendants broke down the wall that is supposed to exist between church and state. The state, whether it is the Juvenile Court or its appointees, cannot be in the business of telling private individuals that they must raise their children in accordance with any particular religion.

Finally, defendant Vaughan's actions fell outside the scope of any immunity to which she might otherwise have been entitled. Her actions in proselytizing to the DeFibaughs, Am. Comp. at ¶ 17, in coercing them in the raising of their child, Id., and in bringing her fellow church-member, David Guarnera, into the lives of the DeFibaugh family, Am. Comp. at ¶ 20-24, all fell well beyond the scope of any acts that may have been "integral to the GAL's role in the judicial process." To the extent that defendant Vaughan was acting beyond the scope of a prototypical GAL, she is not entitled to immunity, and determining whether she took non-judicial acts will require discovery, making a motion to dismiss inappropriate.

C. COUNTS II, III, AND IV OF THE AMENDED COMPLAINT FALL WITHIN THE SCOPE OF THIS COURT'S SUPPLEMENTAL JURISDICTION.

None of the defendants attack the sufficiency of the factual allegations supporting plaintiffs' claim for civil assault and battery, intentional infliction of emotional distress, or negligence and negligent supervision. Rather, defendants Guarnera, BBBS, Morning Star, and Chesnes argue that, pursuant to Rule 12(b)(1), these causes of action should be dismissed if the plaintiffs' federal claims are dismissed.

Plaintiffs have provided a sufficient factual basis to support the federal claims contained in Counts I and V. As a result, this Court may and should exercise its supplemental

jurisdiction over the claims raised in Counts II, III, and IV. The baptism of V by defendants Chesnes and Guarnera was the result of a concerted and sustained effort by defendants Vaughan and Guarnera to deny the DeFibaughs their right to govern the religious upbringing of their child. As such, these claims arise from the same nucleus of operative facts as the plaintiffs' federal claims. Consequently, this Court has supplemental jurisdiction over these claims and defendants' motions to dismiss Counts II, III, and IV should be denied.

D. COUNTS V AND VI OF THE AMENDED COMPLAINT SUFFICIENTLY STATE CAUSES OF ACTION FOR CIVIL CONSPIRACY UNDER FEDERAL AND STATE LAW, RESPECTIVELY; CLAIMS OVER WHICH THIS COURT HAS ORIGINAL AND SUPPLEMENTAL JURISDICTION.

1. Prima facie case for civil conspiracy.

i. Federal civil conspiracy

Under federal law, a civil conspiracy is an agreement between two or more persons to injure another by unlawful action. *Spadafore v. Gardner*, 330 F.3d 849, 854 (6th Cir. 2003)(quoting *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985)). Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. *Id.* Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. *Id.* All that must be shown is that there was a single plan, that the alleged co-conspirator shared in the general conspiratorial objective,

and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant. *Id.*

ii. Civil conspiracy under Ohio law

In Ohio, a civil conspiracy is a tort defined as "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 475 (1998). One cannot maintain a claim for civil conspiracy without the presence of an underlying unlawful act." *Gosden v. Louis*, 116 Ohio App. 3d 195, 219 (Ohio App. 1996). The "malicious combination [of two or more persons] to injure does not require a showing of an express agreement between defendants, but only a common understanding or design, even if tacit, to commit an unlawful act." *Id.*

Ohio law does not require each member of an alleged conspiracy to have committed an unlawful act; the unlawful acts of any one member of the conspiracy will satisfy the "underlying unlawful act" requirement. As the Ohio Supreme Court said in *Williams*:

> In a conspiracy, the acts of coconspirators are attributable to each other. *See Prosser & Keeton on Torts* (5 Ed. 1984) 323, Section 46 ("All those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's act done for their benefit, are equally liable." [Footnotes omitted.])

Williams, 83 Ohio St. 3d at 475 (editor's note in original).

Nor does Ohio law require there to be government activity or state action for there to be a conspiracy. *See Matthews v. New Century Mortgage Corp.*, 185 F.Supp.2d 874 (S.D. Ohio 2002).

A plaintiff is "not required to plead with particularity each and every element of the claim of civil conspiracy." *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 90 Ohio App.3d 284,292 (Ohio App. 1993).

2. Defendants' arguments

Regarding the federal and state conspiracy claims, defendants CASA and Vaughan merely reiterate that Vaughan was not a state actor and both parties are entitled to absolute immunity. CASA Motion at 8. They do not argue or refute any of the factual matters contained in the Amended Complaint, or respond to how, if the Court finds they do not have immunity and/or if Vaughan is considered a state actor, their own actions relate to the actions of the other defendants for purposes of conspiracy allegations.

BBBS argues that plaintiffs' civil conspiracy claims must fail because "Guarnera, a private citizen acting as a volunteer for a nonprofit, and BBBS a non-profit corporation, were not acting under color of state law," and that the guardianship "had been terminated and closed more than a year prior to the

baptism." BBBS Motion at 12-13. Defendant BBBS further argues that there is no allegation that BBBS knew about the baptism in advance, much less conspired with anyone to have V baptized. BBBS Motion at 13.

Similarly, Guarnera argues that he cannot be held liable for a civil conspiracy since he was not acting under color of state law and that defendant Vaughan's guardianship had ended for more than a year prior to the baptism. Guarnera Motion at 13.

Defendants Morning Star and Chesnes, for their part, argue that neither of them is a state actor, that performing baptism is not an unlawful act, and that plaintiffs did not plead their civil conspiracy claims with sufficient specificity. Morning Star Motion at 9-10.

3. Plaintiffs' response

In this case, plaintiffs have adequately pled facts showing there was a conspiracy between (at the very least) Vaughan and Guarnera to use their official positions, as appointed by the Juvenile Court and defendant CASA, to unlawfully coerce the DeFibaugh family into religious practice. Vaughan and Guarnera obtained official "cover" from CASA, Am. Comp. at ¶ 18, and BBBS, Am. Comp. at ¶ 26, to further their conspiracy, and eventually Morning Star and Chesnes became involved by

performing the baptism, one objective of the conspiracy, Am. Comp. at ¶ 36.

While the defendants focus their motions on the unlawful baptism, this was not the only unlawful act that plaintiffs allege. The baptism was but the last in a sustained, two-year effort by Vaughan and Guarnera, supported by CASA for Kids and BBBS, to use their official positions to coerce the DeFibaugh family into the Christian religion. The Amended Complaint makes clear that there were numerous and on-going instances of Vaughan and Guarnera at least implicitly linking the religious indoctrination with Vaughan's and Guarnera's official positions, and at worst quite literally forcing V to participate in religious practice. Am. Comp. at ¶¶ 17, 28, 29, 36.

For example, plaintiffs allege: "Using the imprimatur of the state government via her assignment as GAL, and in her capacity as GAL, defendant Vaughan more than once preached to Mr. and Mrs. DeFibaugh about Jesus and more than once left the DeFibaughs with books, tapes, CDs and other works of religious content. Defendant Vaughan repeatedly told the DeFibaughs that 'families need God to raise children.'" Am. Comp. at ¶ 17.

As for Guarnera, plaintiffs allege: "Defendant Guarnera would often link religion with his role as a big brother, telling V, 'If you don't like god, you're not part of Big Brothers/Big Sisters.'" Am. Comp. at ¶ 28.

These examples show that the indoctrination encompassed much more than just the baptism. These allegations, together with other acts alleged in the Amended Complaint, also undercut a contention alluded to by some of the defendants, i.e., that a purported court document showing when the official guardianship ended somehow means that the allegations against the defendants that post-dated that document cannot have been true or are not actionable. As indicated above, not every party to a conspiracy has to be involved in every aspect or overt act of the conspiracy in order to be considered a co-conspirator. Nor does the termination of any official relationship between the defendants, or between the defendants and the plaintiffs, mean that the conspiracy cannot continue.

In this case, the conspiracy alleged between the defendants to unlawfully coerce plaintiffs into religious practice and observance began with the appointment of defendant Vaughan and continued long after the Juvenile Court's official permission for Vaughan and Guarnera to exert influence in plaintiffs' lives is purported to have ended. Defendant Guarnera continued to see V in Guarnera's official capacity in BBBS. Am. Comp. at ¶ 27.

Even after Vaughan's guardianship ended, children's services and the Juvenile Court were still always one phone call away. Had the DeFibaughs run afoul of either Vaughan's or Guarnera's attempts at indoctrination, the guardianship, along

with all of its attendant restrictions and threats, or any other type of Juvenile Court and/or children's services oversight, could easily have been reinstated. Ohio Rev. Code Ann. § 2151.27(A)(1).

There is, of course, the possibility that defendants may be able to argue at summary judgment that the release of the guardianship ended one or more defendant's involvement with the DeFibaugh family, but at the motion to dismiss stage, the defendants should not be permitted to assert facts not contained in the Amended Complaint and use those assertions to gain dismissal.

E. THE CHURCH AUTONOMY DOCTRINE DOES NOT PRECLUDE THIS COURT FROM ADJUDICATING THE CLAIMS AGAINST DEFENDANTS MORNING STAR AND CHESNES.

In addition to the arguments previously discussed, defendants Morning Star and Chesnes argue that they are immune to suit pursuant to the "church autonomy doctrine" (the "Doctrine").

In arguing that this Court lacks jurisdiction to hear claims brought against houses of worship ("HOWs") and clergy, defendants Morning Star and Chesnes misconstrue the scope of the Doctrine. Contrary to the defendants' claim that, as a result of the Doctrine, courts "have repeatedly and consistently dismissed civil actions against churches and pastors/ministers," Morning

Star Motion at 5, courts have been perfectly willing to entertain and decide cases concerning tortious acts committed by HOWs and clergy where the decision can be reached using neutral principles "applicable alike to all" such legal claims. *Watson v. Jones*, 80 U.S. 679, 714 (1872). The Doctrine has not precluded the courts from hearing cases in which churches or clergy faced claims of intentional infliction of emotional distress, *Snyder v. Phelps*, 562 U.S. 443, 458 (2011); trademark infringement, *General Conf. Corp. v. McGill*, 617 F.3d 402, 408 (6th Cir. 2010); property disputes, *Presbyterian Church v. Hull Church*, 393 U.S. 440, 449 (1969); fraud, *United States v. Ballard*, 322 U.S. 78 (1944); undue influence in the transfer of property, *Nelson v. Dodge* 76 R.I. 1, 68 A.2d 51 (1949); kidnapping and malicious prosecution, *Magnuson v. O'Dea*, 75 Wash. 574, 135 P. 640 (1913); unlawful imprisonment, *Whittaker v. Sandford*, 110 Me. 77, 85 A. 399 (1912); and breach of fiduciary duty, fraud, and intentional infliction of emotional distress, *Strock v. Pressnell*, 38 Ohio St. 3d 207 (1988).

The Supreme Court in *Watson v. Jones* succinctly framed the scope of the Doctrine, stating:

> Whenever the questions of *discipline, or of faith, or ecclesiastical rule, custom, or law* have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

Watson v. Jones, 80 U.S. 579 (1871)(emphasis added).

Litigation arising from the acts of an HOW or clergy which do not implicate questions of "discipline, or of faith, or ecclesiastical rule, custom, or law" do not fall within the scope of the Doctrine. *Id.* The Doctrine is premised, at least in part, on the "*implied consent" of all involved* to be bound by the ecclesiastical doctrines and structures created by the religious organization each individual has freely joined. *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 114-15 (1952)(emphasis added). Absent that consent, the foundational rationale of the Doctrine is absent. In short, while the courts may not pass judgment on the *manner* in which a baptism or other sacrament is conducted, our courts are entirely within their authority to adjudicate the question of whether a church had an individual's *consent to perform the sacrament* in the first place.

When it comes to the claims against defendants Morning Star and Chesnes, one of the key issues is whether V, a minor, had the capacity to consent to defendant Chesnes' actions *at all*. This question can be resolved without requiring the government to examine ecumenical matters. Plaintiffs allege that defendant Guarnera took V, a minor, to a church service hosted by defendant Morning Star where he was baptized by defendant Chesnes through full-body immersion against V's parents' express

wishes and religious views, which were known to defendant Guarnera at the time. Determining whether Chesnes intentionally committed that act in no way implicates the specifics of the religious beliefs of Morning Star, the validity of those beliefs, or the ability to exercise those beliefs.

Because adjudicating the claims against defendants Morning Star and Chesnes does not involve an examination of sectarian "*discipline, or of faith, or ecclesiastical rule, custom, or law*," the Doctrine is inapplicable in this matter and this Court may and should exercise jurisdiction over the claims brought against defendants Morning Star and Chesnes.

F. DEFENDANTS' MOTIONS TO DISMISS ATTEMPT TO INTRODUCE NEW FACTUAL ALLEGATIONS AND SHOULD THUS BE CONVERTED INTO MOTIONS FOR SUMMARY JUDGMENT.

BBBS attached to its motion a copy of a court document purporting to show that the official court guardianship "which is the basis for plaintiffs' allegation that defendants acted under color of state law, ended more than a year prior to the baptism." BBBS Motion at 5. BBBS also adds the following "facts" to its motion:

> Plaintiffs knew that Guarnera was taking V to an outdoor church service and picnic on Sunday, August 28, 2016 and voiced no concern or objection. He had gone to the same outdoor service with Guarnera the year before. During the service, V decided to be baptized. He was in no way coerced by Guarnera, nor was he harmed in the process. Any distress V has suffered is the result of [p]laintiffs' decision to

> end V's relationship with BBBS and prohibit V from any further contact with Guarnera.
>
> BBBS Motion at 5.

The other defendants also either refer to or attach the Juvenile Court document, or add additional facts to their motions to dismiss.

The fact that each defendant has added factual material to their motions means they are not accepting the facts as pled by plaintiffs, and their motions should therefore be converted to Rule 56 motions for summary judgment, which would require the plaintiffs to be permitted to conduct discovery.

> A motion under Fed.R.Civ.P. 12(b)(6) tests the sufficiency of the plaintiff's claim for relief. Therefore, when deciding a motion to dismiss a court may consider only matters properly a part of the complaint or pleadings. Once matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Fed.R.Civ.P. 56. Fed.R.Civ.P. 12(b). Because of the risk of prejudicial surprise arising from the court's treating a motion to dismiss as a motion for summary judgment, Rule 12(b) further requires notice and an opportunity to supplement the record before the court enters summary judgment.
>
> *Armengau v. Cline*, 7 F.App'x 336, 343 (6th Cir. 2001)(internal quotations and citations omitted).

Thus, this Court is required to either exclude all outside evidence or other information outside of the four corners of the Amended Complaint, or convert the motions to dismiss to motions for summary judgment and give the plaintiffs an opportunity to supplement the record.

CONCLUSION

The standard for granting a motion to dismiss is very high for defendants. The Court must accept all well-pleaded facts as true and it must construe all facts in a light most favorable to plaintiffs. Given this standard and the fact that the Court must not go beyond the four corners of the Amended Complaint, it cannot be said that there is no way for plaintiffs to make out plausible causes of action. In other words, at the pleading stage, plaintiffs have pled sufficient factual foundations for the causes of action raised. Defendants may well be able to show, after discovery, that they are entitled to one or more forms of immunity; or that one or more defendants were not "state actors" for purposes of this lawsuit. On the other hand, discovery may show that defendants' attempts at religious indoctrination were well-known, of long-standing duration and openly sanctioned by their institutions.

Based strictly on the allegations and facts contained in the Amended Complaint and the reasons set forth above, this Court may and should deny defendants' motions to dismiss and discovery should be permitted.

Respectfully submitted,

/s/Kenneth D. Myers
KENNETH D. MYERS [0053655]
6100 Oak Tree Blvd., Suite 200
Cleveland, OH 44131
(216) 241-3900

(440) 498-8239 Fax
Kdmy@aol.com

GEOFFREY T. BLACKWELL
American Atheists Legal Center
1220 L St. NW, Suite 100-313
Washington, D.C. 20005
(908) 276-7300
legal@atheists.org

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The foregoing has been sent to all counsel of record via the Court's electronic filing system on this 28th day August, 2017.

/s/Kenneth D. Myers
KENNETH D. MYERS

Counsel for Plaintiffs