

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA

THINKSTREAM, INC. and BARRY BELLUE

CIVIL ACTION NO. 05-844 P 2:37

VERSUS

NO. 05-844-JJB-CN
BY DEPUTY CLERK

PAUL ADAMS, DOUG HEBERT, ET AL.

RULING

On October 4, 2005, plaintiffs filed a motion for preliminary injunction. Thereafter, six separate motions to dismiss under Rule 12(b)(6) were filed by the individual defendants: (1) defendant Doug Hebert filed a Cross-motion to Dismiss for failure to state a claim, lack of subject matter jurisdiction, and for abstention, which was joined by co-defendant Paul Adams (doc. 51); (2) defendants Templar and Archer filed a Motion to Dismiss for failure to state a claim, lack of subject matter jurisdiction, and for abstention (doc. 63);¹ (3) defendants Catherine Kimball and Chris Andrieu filed a Motion to Dismiss for failure to state a claim, lack of subject matter jurisdiction, or, alternatively, motion for abstention (doc. 70); (4) defendant, the Louisiana Commission on Law Enforcement, filed a Motion to Dismiss based upon 11th Amendment immunity (doc. 74); (5) defendant Doug Hebert filed a Motion to Dismiss for failure to state a claim, lack of subject matter jurisdiction, and for abstention (doc. 77); and (6) defendant Paul Adams filed a Motion to Dismiss for Failure to State a Claim and for Summary Judgment (doc. 78). In addition, defendants have filed three separate Motions for Sanctions (doc. 103

¹ Defendants Templar and Archer also filed a Special Motion to Strike Plaintiffs' Complaint and Anti-Slapp Motion to solely be considered if this Court determined it had jurisdiction over plaintiffs' claims, which it does not. (doc. 43).

filed by defendants Catherine Kimball and Chris Andrieu; doc. 110 filed by defendant Adams; doc. 112 filed by defendant Doug Hebert). Plaintiffs have filed Attorney Affidavits Under Seal for in camera inspection in response to defendants' motions (doc. 120). Oral argument was heard on the pending Motions to Dismiss and Motion to Strike, as well as the pending Motion for Preliminary Injunction, on January 19, 2006.² Post-hearing memoranda have been filed by the parties (doc. 105; doc. 106; doc. 109; doc. 115). The Court shall dismiss the pending action for the reasons stated herein.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs, Barry Bellue and Thinkstream (plaintiffs), have filed a complaint³ under 42 U.S.C. §1983 with supplemental state law claims,⁴ and a Motion for Preliminary Injunction⁵ against defendants. Essentially, plaintiffs have alleged that defendants, whom they have jointly referred to as "state actors," engaged in a conspiracy to convince the Department of Administration to cancel the state-wide Integrated Criminal Justice Information System (ICJIS) award which had been granted to plaintiff Thinkstream.

² doc. 118, Transcript, January 19, 2006 oral argument.

³ doc. 1.

⁴ Plaintiffs' supplemental state law claims include the following: defamation, false light publicity, unreasonable public disclosure of private facts, intentional interference with business relations, and violation of the Louisiana Unfair Trade Practices Act.

⁵ doc. 9.

In July 2003, the ICJIS Policy Board invited vendors to submit proposals for a \$1.5 million federal grant for consulting services contract.⁶ As a result of this request, thirteen proposals were submitted.⁷ ICJIS established a technical advisory committee who ranked all of the vendors, and submitted the top three to the policy board; the top three vendors were Templar, Thinkstream, and PEC.⁸ Thereafter, on January 16, 2004, all three top vendors were permitted to give presentations to the policy board,⁹ and ultimately, on March 19, 2004, the policy board awarded the contract for the project to Thinkstream.¹⁰

Templar filed a “formal protest of the Board’s selection of Thinkstream,” which was ultimately denied.¹¹ Subsequently, defendant Templar appealed the ICJIS’ policy board’s, of which defendants Kimball and Andrieu are members, decision to the Commission of the Division on Administration on April 29, 2004;¹² the Commissioner vacated the contract award.¹³ However, rather than appeal the

⁶ doc. 1, 3.

⁷ doc. 1, 3.

⁸ doc. 1, 3.

⁹ doc. 38, 5.

¹⁰ doc. 38, 8 and 15.

¹¹ doc. 38, at 9.

¹² doc. 32, 3; doc. 38, 10.

¹³ doc. 38, 11.

ICJIS' decision as allowed by the Louisiana Administrative Code,¹⁴ plaintiff Thinkstream filed suit¹⁵ against Templar in state court for damages for the negligent interference with contractual and business relations seeking damages for the following: "loss of revenues from the ICJIS contract"; "loss of amounts invested in preparation for the ICJIS contract"; "diminution in Thinkstream's economic value"; "loss of appreciation in Thinkstream's value"; "lost opportunities to be awarded additional law enforcement contracts other than the ICJIS project"; "damages to Thinkstream's reputation and business goodwill"; and "loss of income and other damages."¹⁶ Subsequently, the 19th Judicial District Court dismissed Thinkstream's lawsuit against defendant Templar for failure to cure the defects of its original petition (failure to state a cause of action and join necessary parties) at the plaintiff's costs.¹⁷ Thereafter, Thinkstream filed a Motion for New Trial which was denied by the trial court;¹⁸ Thinkstream has appealed this decision to the Louisiana First Circuit Court of Appeals, 2005-CA-1968.¹⁹ In June, 2005, Thinkstream, alleging

¹⁴ doc. 32, 4. Louisiana Administrative Code 34V.145(11) states, "If an aggrieved party is not satisfied with the agency's decision, then that party may appeal said decision in writing to the commissioner of administration. "

¹⁵ Thinkstream, Inc., v. Templar, Inc., No. 521, 438, Div. 26, 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, doc. 40, exhibit 2.

¹⁶ *Id.* at paragraphs 22 and 23.

¹⁷ doc. 44, exhibit A, 136 (section 19).

¹⁸ doc. 40, exhibit 3. Thinkstream had been provided 15 days to amend its pleading to cure this defect but failed to do so. doc. 44, exhibit A, 139, exhibit B, 169 (sections 21 and 25).

¹⁹ doc. 32, 5; doc 40, exhibit 4.

violations arising under 42 U.S.C. § 1983, filed the pending lawsuit in federal court.²⁰

In their federal lawsuit, plaintiffs initially alleged that defendants “had secured an entitlement to the [ICJIS] contract, amounting to a property interest,” which they were deprived of due to “the actions of the rump group” in “violation of due process rights guaranteed by the Constitution of the United States and the Fourteenth Amendment.”²¹ However, during oral argument held on Thursday, January 19, 2005, plaintiffs conceded that they were no longer alleging a cause of action arising out of the constitutional deprivation of a property interest.²²

Now, plaintiffs’ only remaining constitutional claim is founded upon plaintiffs’ assertion that they have they have been deprived of their “liberty interests under the Constitution of the United States of America and the Fourteenth Amendment.”²³ More specifically, plaintiffs claim that they have a “guaranteed right under the Constitution of the United States of America and the Fourteenth Amendment thereof to participate in an impartial process for contracts in the State of Louisiana,” and that, “The actions of the rump group have so stigmatized Bellue and Thinkstream as to result in a change of ‘status.’ Thinkstream and Bellue have lost the right to participate in competitive bidding for contracts in the State or any of its political

²⁰ doc. 1.

²¹ doc. 1, at 5.

²² doc. 118, Transcript, January 19, 2006 oral argument, at 25.

²³ doc. 1, at 6.

subdivisions due to the actions of the rump groups”²⁴ Plaintiffs allege that their “reputation [has] been damaged beyond repair; the false allegations have been spread by the rump group in a malicious effort to undermine Bellue and Thinkstream’s reputation among the law enforcement community.”²⁵ Plaintiffs further allege, that the “false allegations of criminal and unethical behavior were done with malice and have stigmatized Bellue and Thinkstream around the State of Louisiana and in other jurisdictions where Thinkstream and Bellue do business or attempt to do business.”²⁶

In support of plaintiffs’ claims that they have been deprived of a liberty interest, they allege that defendants engaged in the following activities: (1) defendants “began covertly meeting with other vendors in an effort to derail the selection of Thinkstream;”²⁷ (2) defendant Archer held secret meetings with Glenn Archer of Templar “about challenging the vote in favor of Thinkstream by falsely and maliciously claiming Thinkstream and Bellue had engaged in criminal and unethical activity;”²⁸ (3) defendant Templar filed an appeal with the Louisiana Division of Administration raising the false allegations orchestrated and contrived by

²⁴ doc. 1, at 5-6.

²⁵ doc. 1, at 5.

²⁶ doc. 1, at 5.

²⁷ doc. 1, at 4.

²⁸ doc. 1, at 4.

defendants;²⁹ (4) defendant Kimball held a secret meeting with Governor Blanco and the Executive Director of the Administration which contributed to the cancellation of Thinkstream's contract;³⁰ (5) subsequent to the cancellation of the contract, plaintiffs have been told on three separate occasions that bidding on other state and local law enforcement contracts would be a waste of time because of Kimball's influence;³¹ and (6) defendant Hebert and Adams have continued to publish maliciously, false and defamatory statements, such as "Barry Bellue is corrupt through and through," to State law enforcement personnel.³²

LEGAL STANDARD

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." However, the Rule 12(b)(6) motion is viewed with disfavor and is rarely granted.³³ Instead, a Rule 12(b)(6) motion should only be granted if it appears beyond doubt that the nonmovant could prove no set of facts in support of her claims that would entitle her to relief.³⁴ The court must accept all well-pleaded facts as true and view them in the light most favorable to the non-

²⁹ doc. 1, 5.

³⁰ doc. 1, 5.

³¹ doc. 1, 5-6.

³² doc. 1, at 6.

³³ Kaiser Aluminum and Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)(citing 5B Wright and Miller § 1357 at 598 (1967)).

³⁴ Conley v. Gibson, 335 U.S. 41, 45-46 (1957).

movant.³⁵ However, neither conclusory allegations nor unwarranted deductions of fact will suffice to avoid a motion to dismiss.³⁶ Furthermore, the court must not look beyond the pleadings when determining whether a complaint states a claim upon which relief may be granted.³⁷

ANALYSIS

A. STATE ACTORS AND CONSPIRACY

Plaintiffs have brought their action under 42 U.S.C. § 1983, which “affords redress only for conduct committed by a person acting under color of state law. A person only acts under color of state law only when exercising power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of the- state.’”³⁸ Recovery under 42 U.S.C. § 1983 requires proof of two essential elements: (1) that the defendants’ conduct occurred under color of state law, and (2) that the defendants’ conduct deprived plaintiffs of a right, privilege, or immunity secured by the Constitution or a law of the United States. 42 U.S.C. § 1983 liability is only imposed for violations of rights protected by the United States Constitution, not for violations of rights and/or duties arising under state tort

³⁵ Capital Parks, Inc. v. Southeastern Advertising and Sales System Inc., 30 F.3d 627, 629 (5th Cir. 1994).

³⁶ U.S. ex rel. Willard v. Humana Health Plan of Texas, Inc., 336 F.3d 375, 379 (5th Cir. 2003).

³⁷ Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 499-500 (5th Cir. 1982).

³⁸ Thibodaux v. Bordelon, 740 F.2d 329, 332-33 (5th Cir. 1984).

law.³⁹

I. WAS DEFENDANT PAUL ADAMS A STATE ACTOR?

In plaintiffs' complaint, they alleged that defendant Paul Adams was a state actor. Plaintiffs specifically alleged that Adams was a member of the Louisiana Integrated Criminal Justice Information System Policy Board ("ICJIS Board") and the "rump group" of individual Board members consisting of Adams . . . [who] began covertly meeting with other vendors in an effort to derail the selection of Thinkstream."⁴⁰ However, during oral argument, plaintiffs conceded that defendant Adams was actually not appointed to the ICJIS Board.⁴¹ Because the only allegations against defendant Adams stem from his role on the ICJIS Board, the Court shall dismiss the plaintiffs' claims against defendant Paul Adams.

II. DID DEFENDANTS' CONDUCT AMOUNT TO A CONSPIRACY?

In their complaint, plaintiffs alleged that defendants Adams, Kimball, Hebert, Craft, and Andrieu were state actors for purposes of 42 U.S.C. § 1983. In oral argument, plaintiffs conceded that Templar and Archer were not state actors. However, plaintiffs qualified their initial allegations that defendants "Templar and Archer were also state actors as they were used, and agreed to be used, to further the plan to derail Thinkstream's contract."⁴²

³⁹ Baker v. McCollan, 443 U.S. 137, at 147, 99S.Ct. 2689 (1979).

⁴⁰ doc. 1, at 4.

⁴¹ doc. 118, Transcript, January 19, 2006 oral argument, at 11.

⁴² doc. 1, at 6.

But in order to establish a 42 U.S.C. § 1983 claim against private actors, there must be allegations of a conspiracy to violate BOTH the constitutional rights of another AND to commit an “illegal act.” In Priester v. Lowendes County, the Fifth Circuit specifically laid out the requisites for establishing such a conspiracy: “The plaintiff must allege: (1) an agreement between the private and public defendants to commit an illegal act and (2) a deprivation of constitutional rights. Allegations that are merely conclusory, without reference to specific facts, will not suffice”⁴³ Therefore, in order for plaintiffs to state a conspiracy claim against defendants Templar and Archer they must allege specific facts to establish these two factors. However, as will be discussed below, because this Court fails to find an alleged constitutional deprivation of plaintiffs’ liberty interest by any of the defendants, there can be no conspiracy claims.

B. DID DEFENDANTS’ CONDUCT DEPRIVE PLAINTIFFS OF A RIGHT, PRIVILEGE, OR IMMUNITY SECURED BY THE CONSTITUTION OR A LAW OF THE UNITED STATES?

i. LIBERTY INTEREST

As discussed above, during oral argument, plaintiffs conceded that they had no property right or interest in the ICJIS award.⁴⁴ Therefore, the plaintiffs’ claim that they had been deprived of a constitutionally protected property right under the 14th Amendment and the due process clause shall be dismissed and no longer considered by the Court. Instead, the Court’s analysis shall focus on whether

⁴³ Priester v. Lowendes County, 354 F.3d 414, 420 (5th Cir. 2004).

⁴⁴ doc. 118, Transcript, January 19, 2006 oral argument, at 11.

plaintiffs were deprived of a constitutionally protected liberty interest.

Plaintiffs' liberty interest claims against defendants are at best described as being somewhat vague and amorphous. Plaintiffs do not nail down definitively a concrete liberty interest that they have been deprived of; therefore, for the purpose of its analysis, the Court will review case law which defines liberty interests as being both damage to reputation and loss of one's right to operate a legitimate business. Plaintiffs essentially contend that defendants (1) defamed them through "false allegations of criminal and unethical behavior . . . done with malice"⁴⁵ causing injury to both their business reputation and business goodwill and (2) have stigmatized⁴⁶ plaintiffs such that they have been de facto debarred from "participat[ing] in competitive bidding for contracts with the State or any of its political subdivisions"⁴⁷ in the RFP or any future state contracts.⁴⁸ During oral argument, plaintiffs restated their jeopardized liberty interest as, "The right to do business unfettered with the State of Louisiana, free from stigmatizing remarks, free from a conspiratorial effort to blacklist and de-bar Thinkstream and Mr. Bellue from competing with state contracts."⁴⁹ Defendants contend that "Plaintiffs fail to allege any facts under which this Honorable Court could conclude that plaintiffs were deprived of a

⁴⁵ doc. 1, at 5.

⁴⁶ doc. 1, p. 6.

⁴⁷ doc. 1, p. 6.

⁴⁸ doc. 115, p. 6.

⁴⁹ doc. 118, Transcript, January 19, 2006 oral argument, at 8.

constitutionally protected liberty right.”⁵⁰

a. Test for Determining Whether There is a Constitutionally Protected Liberty Interest: The Stigma-Plus Infringement Test or State Created Liberty Interest

The fundamental liberty interest case is the United States Supreme Court decision Paul v. Davis.⁵¹ In Paul, the Supreme Court held that defamation by a government actor/official that causes damage to “reputation alone, apart from some more tangible interests such as employment,”⁵² is neither a liberty or property interest by itself sufficient to invoke the procedural protection of the due process clause.⁵³ In other words, there is no constitutional doctrine that converts alleged defamation by a government official into the deprivation of “liberty” within the meaning of due process.⁵⁴ So, “before a liberty interest can be implicated, there must be a showing that the defamation resulted in injury not only to reputation, but also to some other interest.”⁵⁵ In Paul the Supreme Court laid out the “stigma-plus-infringement” test, which the Fifth Circuit has adopted and consistently applied.⁵⁶ In

⁵⁰ doc. 71, p. 3.

⁵¹ 424 U.S. 693, 96 S.Ct. 1155 (1976).

⁵² *Id.* at 701.

⁵³ *Id.* at 702.

⁵⁴ *Id.*

⁵⁵ Marrero, 625 F.2d 499, at 516

⁵⁶ San Jacinto Savings & Loan v. Kacal, 928 F.2d 697, 701 (5th Cir. 1991).

order for plaintiffs in the case at bar to satisfy this test, they must show a “stigma” plus an “infringement” of a protected liberty interest.

To satisfy the “stigma” element in the Fifth Circuit, plaintiffs must “prove that the stigma was caused by a false communication.”⁵⁷ Furthermore, the Fifth Circuit has “found sufficient ‘stigma’ only in concrete, false factual representations or assertions, by a State actor, of wrongdoing on the part of the claimant.”⁵⁸ To establish the “infringement” element of the “stigma-plus-infringement” test, the plaintiffs must establish that the State or State actor “sought to remove or significantly alter a life, liberty, or property interest recognized and protected by state law or guaranteed by one of the provisions of the Bill of Rights that has been ‘incorporated.’”⁵⁹ The burden that plaintiffs essentially must meet in the case at bar is to demonstrate to the Court that harm to reputation through defamation and impairment of future employment opportunities are constitutionally cognizable injuries.

It is also important to note, however, that the Paul Court also reasoned that states may through the enactment of law(s) establish legal guarantees whereby “enjoyment of reputation” will be treated as a liberty or property interest such that “defamation alone, without deprivation of any other interest, would be actionable

⁵⁷ San Jacinto Savings & Loan v. Kacal, 928 F.2d 697, at 701 (5th Cir. 1991).

⁵⁸ *Id.*

⁵⁹ *Id.* at 701-02.

under § 1983.”⁶⁰ Therefore, in the case at bar, in order for plaintiffs’ 42 U.S.C. § 1983 claim to state a cause of action and remain viable, they must establish either (1) that their “liberty” interest has been violated which invokes the protection of the due process clause, once the stigma-plus-infringement test has been satisfied, or (2) identify the Louisiana state law that has created a protected “liberty” interest in the “business reputation and business goodwill” guaranteed against such deprivation without due process of law.

II. *DAMAGE TO BUSINESS REPUTATION AND BUSINESS GOODWILL*

As has been discussed, damage to one’s reputation is not a federally, protected liberty interest. This principle has been reaffirmed by the U.S. Supreme Court in cases such as Siegert v. Gilley,⁶¹ where the Court reasoned and held that although “The statements contained in the letter would undoubtedly damage the reputation of one in his position and impair his future claims,” the plaintiff nonetheless failed to state a constitutional claim because “so long as damage flows from injury caused by the defendant to a plaintiff’s reputation, it may be recoverable

⁶⁰ Paul, 711-12; Marrero, 514.

⁶¹ 500 U.S. 226, 111 S.Ct. 2920 (1991). The background facts of Siegert involved plaintiff’s former employer writing a letter to plaintiff’s prospective employer, in which he stated, “I consider Dr. Siegert to be both inept and unethical, and perhaps the least trustworthy individual I have supervised in my 13 years [at St. Elizabeth].” *Id.* at 228. “After receiving this letter, the Army Credentials Committee told Siegert that ‘since reports about him were ‘extremely unfavorable’ . . . the committee was . . . recommending that [Siegert] not be credentialed.” *id.* at 228. Because plaintiff did not receive his credentials, he was ultimately turned down for a position with the Army hospital. *Id.* Thereafter, plaintiff filed suit alleging that defendant’s letter had “rendered him unable to obtain other appropriate employment in the field.” *Id.* at 229.

under state court law, but it is not recoverable as a constitutional tort in a Bivens action.”⁶² Arguably, based upon plaintiffs’ own complaint, any damage to Thinkstream’s business opportunities is the result of such reputational harm.⁶³

Plaintiffs however attempt to distinguish their case from Paul and Siegert by repeatedly making the argument that in the Fifth Circuit, “Damage to business reputation and business goodwill by unconstitutional state action remains a constitutional tort”⁶⁴ Yet, when the Fifth Circuit cases relied upon by plaintiffs, such as Marrero v. City of Hialeah⁶⁵ and its progeny, are reviewed more closely, it becomes apparent that business “reputation” and “goodwill” are only treated as protected liberty interests when either individual state law has defined them as such, or when they amount to a total loss of one’s right to operate a legitimate business or a business of one’s choice.

- a. Does Marrero support Plaintiffs’ argument that they have a liberty interest?

Essentially, the Fifth Circuit in Marrero relied upon and applied the following principle of law established in Paul: “a liberty interest will be implicated if the

⁶² *Id.* at 234.

⁶³ doc. 1.

⁶⁴ doc. 115, at. 9. Other circuits have evaluated Marrero too, and have reached similar conclusions: “In Marrero, however, the state not only defamed the plaintiff’s business, but also deprived the plaintiff of more tangible property interests: the Hialeah Police Department illegally seized most of the plaintiff’s inventory in violation of the Fourth Amendment.” (Cypress Ins. Co. v. Clark, 144 F.3d 1435, at 1437 (11 Cir. 1998)).

⁶⁵ 625 F.2d 499 (5th Cir. 1980).

defamation in addition to injuring reputation, causes the loss of either a protected right or some 'more tangible' interest."⁶⁶ As such, this Court finds that Marrero does not stray away from Paul's rule of law requiring stigma-plus-infringement. Plaintiffs, however, erroneously rely on Marrero to support their position that they have satisfied the stigma-plus-infringement requirement because they have suffered damage to their reputation and business goodwill.⁶⁷

Plaintiffs have overlooked two important/crucial distinctions between their case and Marrero. First, in Marrero, the court emphasized that, "the defamation here does not stand alone . . . the defamation was **intimately connected** with the unlawful arrest of appellants and the unlawful search and seizure of practically the entire inventory of their store."⁶⁸ The Marrero court honed in on the nexus between the alleged defamation and the defendants' unconstitutional conduct (4th amendment violation), from which they determined that plaintiffs had satisfied the stigma-plus-infringement test from Paul. Secondly, the Marrero court recognized that **under Florida law**, "business goodwill" is a protected property right; therefore,

⁶⁶ *Id.* at 515.

⁶⁷ During oral argument, plaintiffs continually asserted that Marrero supported their position that state law claims for defamation "rise to a constitutional level when it is a continuing tort that affects the goodwill of [the] company and also affects Mr. Bellue's ability to do business with any company, including his own . . . when a public official goes out and engages in stigmatizing conduct, the stigma-plus-infringement test applies. But the infringement can equal a damage to a business' goodwill." doc. 118, Transcript, January 19, 2006 oral argument, at 10. However, as this Court explains, plaintiffs have not accurately interpreted the reasoning and/or holding of the Marrero decision.

⁶⁸ *Id.* at 517. (emphasis added).

because the state actors' defamatory statements in Marrero caused **both** injury to reputation and damage to a protected or more tangible interest - business goodwill under Florida law - the stigma-plus-infringement requirement of Paul had been satisfied.⁶⁹ Hence, Marrero does not provide plaintiffs with any other means for establishing that they have sustained an infringement of their protected liberty interests or rights, than those established in Paul.⁷⁰ Therefore, under both Paul and Marrero, in order for plaintiffs to have a viable "defamation causing damage to business reputation and goodwill" claim, they must demonstrate that either their constitutional rights were violated in conjunction with the defamation, or that they have a protected state liberty interest.⁷¹

b. Progeny of Marrero - San Jacinto Savings & Loan v. Kacal⁷² and

⁶⁹ *Id.* at 516. (emphasis added).

⁷⁰ However, in dicta, the Fifth Circuit Marrero Court did raise a potential "alternative theory" based upon Paul, such that, "when defamatory statements directly disparage a person in his business capacity, arguably the protected or tangible 'plus' of the stigma-plus requirement of Paul is inescapably present . . . injury to business reputation, if it occurs at all, necessarily results in harm to business interests that are either protected or at least more tangible." *Id.* at 516, n.22. The Marrero court never reached a decision regarding this "alternative theory" because they determined on other grounds that plaintiffs had stated a claim for injury to their business reputations. *Id.*

⁷¹ Similarly, plaintiffs also rely upon Vander Zee v. Reno, 73 F.3d 1365 (5th Cir. 1996) to support their contention that they have a viable 42 U.S.C. § 1983 claim. However, in Vander Zee, the Fifth Circuit clearly stated, "Neither harm to reputation nor the consequent impairment of future employment opportunities are constitutionally-recognizable injuries . . . to the extent that [plaintiff's] ability to obtain other employment . . . has been impaired, this impairment is the result of harm to his reputation rather than as a result of any direct restrictions placed upon him by . . . defendants . . ." *Id.* at 1369-70. Vander Zee simply reaffirms the holding of Marrero which this Court has already concluded does not lend itself to support plaintiffs' argument.

⁷² 928 F.2d 697 (5th Cir. 1991).

Stidham v. Texas Comm'n on Private Security,⁷³: Case Law

Establishing that it is a Liberty Interest to Operate a Legitimate
Business

Plaintiffs also attempt to rely on the “progeny” of Marrero to further demonstrate that defendants violated their constitutionally protected liberty of “goodwill.” Plaintiffs contend that their loss of “goodwill” is demonstrated through their “loss of endorsements, contracts, the right to fairly participate in bidding and delays in receiving approval due to stigmatizing allegations.” Plaintiffs further contend that they are now viewed as untrustworthy due to their loss of “goodwill.” However, the “progeny-line” of Marrero cases, such as San Jacinto Savings & Loan v. Kacal⁷⁴ and Stidham v. Texas Comm'n on Private Security,⁷⁵ go further in what plaintiffs contend is enough for a violation of their liberty interests. In Kacal and Stidham, the Fifth Circuit held that plaintiffs had satisfied the “infringement” element of the stigma-plus-infringement test by demonstrating a liberty interest had been violated, because plaintiffs were no longer able to operate a legitimate business⁷⁶ and no longer able to operate a business of his chosen occupation,⁷⁷ respectively. These two rights were deemed by the Fifth Circuit to be protected liberty interests

⁷³ 418 F.3d 486 (5th Cir. 2005).

⁷⁴ 928 F.2d 697 (5th Cir. 1991).

⁷⁵ 418 F.3d 486 (5th Cir. 2005).

⁷⁶ 928 F.2d 697 (5th Cir. 1991)

⁷⁷ 418 F.3d 486 (5th Cir. 2005).

under the Bill of Rights. However, unlike the plaintiffs in Kacal and Stidham, plaintiffs Thinkstream and Bellue have not been forced to “lose so much of [their] business that [they] had to close [their] doors and default on [their] lease.”⁷⁸ Nor has plaintiffs’ alleged sufficient facts that defendants’ alleged actions “destroyed [their] business.”⁷⁹ Therefore, it is clear to the Court that the “progeny-line” of Marerro cases do not lend support to plaintiffs’ contention that they have sustained a liberty interest.

*III. APPLICATION OF STIGMA-PLUS-INFRINGEMENT AND STATE CREATED
CONSTITUTIONAL LIBERTY INTERESTS TO CASE AT BAR*

Plaintiffs attempt to satisfy the stigma-plus-infringement test by arguing that a nexus or connection exists between the defendants’ alleged defamatory actions and what plaintiffs define as a “constitutional harm” - the “de facto debarment of Thinkstream and Bellue from participation in the RFP and future state contracts related to integrated justice which, by Louisiana law, must be approved by the Policy Board”⁸⁰ As discussed above, defamation alone is insufficient to satisfy the stigma-plus-infringement test established in Paul, and supported by Marrero, irregardless of the intended purpose of such statements.⁸¹ Additionally, although

⁷⁸ 928 F.2d 697, at 703 (5th Cir. 1991).

⁷⁹ 418 F.3d 486, 487-88 (5th Cir. 2005).

⁸⁰ doc. 115, p. 6.

⁸¹ Plaintiffs stated, “Though defamatory statements were part and parcel of the plan, defamation was not the point In other words, the point was not to say unkind words about Bellue and Thinkstream; the point was (and is) to stop the proliferation of Thinkstream’s technology at the State level and among local sheriff’s, clerk’s of court

the Marrero “progeny” line of cases establish that, in certain situations, a liberty interest has been violated when one’s liberty interest to operate a business has been infringed upon (i.e., “put to an end”), such a finding does not aid plaintiffs in their argument in the case at bar. Unlike the plaintiffs in Kacal and Stidham, under the facts alleged, the plaintiffs in the case at bar remain free to conduct business, and have continued to do so, in the State of Louisiana.⁸² Thus the Court finds that plaintiffs are unable to demonstrate the infringement element of the stigma-plus-infringement test necessary to establish a protected liberty interest.

Furthermore, as discussed in Paul, states may through the enactment of law(s) establish legal guarantees whereby “enjoyment of reputation” will be treated as a liberty or property interest such that “defamation alone, without deprivation of any other interest, would be actionable under § 1983.”⁸³ However, in this case, the alleged damage to business reputation and business goodwill are nothing more than types of defamation. Plaintiffs have failed to offer any case law to this Court that clearly establishes that business or personal reputation, or business goodwill, are protected liberty interests, under Louisiana law. Simply because “business

and police departments.” doc. 115, at 3.

⁸² doc. 38, exhibit H, Barnett sworn statement, 106-09; Exhibit H to Plaintiff’s Motion for Preliminary Injunction (doc. 32, 12-14); See, doc. 103, exhibits D, E, F, G, H, and I, which are news articles describing the successes that Plaintiffs have had in securing other business deals with sheriff’s offices around the state of Louisiana in 2005; doc. 118, Transcript, January 19, 2006 oral argument, at 42 (Of the \$1.5 million in this grant, Thinkstream received “less than \$500,000” of the award to assist Sheriff Edwards in implementing a “state hub.”)

⁸³ Paul, 711-12; Marrero, 514.

goodwill” has been recognized as “an incidental property right connected with [a commercial] business and capable of sale and transfer from one owner to another,”⁸⁴ a right that may be protected through non-compete agreements,⁸⁵ and as an asset in divorce proceedings,⁸⁶ does not mean that it should be deemed to be a protected liberty interest, and the plaintiffs have failed to convince this Court otherwise. As such, this Court finds that business reputation and business goodwill are not deemed to be constitutionally protected state liberty interests under Louisiana law, which is necessary to satisfy the “infringement” part of the Paul “stigma-plus-infringement” test. Hence, because plaintiffs have failed to allege that defendants have deprived them of a constitutionally protected liberty interest, the Court concludes that plaintiffs have no claim under 42 U.S.C. §1983.

C. SHOULD PLAINTIFFS BE GIVEN THE OPPORTUNITY TO AMEND

Rule 15(a) of the Federal Rules of Civil Procedure states that “A party may amend the party’s pleading once as a matter of course and at any time before a responsive pleading is served” In addition, “A motion to dismiss . . . is not a responsive pleading that ‘extinguishes a plaintiff’s right to amend a complaint.’”⁸⁷

⁸⁴ Levin v. May, 887 So.2d 497, at n. 4 (La.App.1 Cir. 2004).

⁸⁵ Louisiana Smoked Products, Inc. v. Savoie’s Sausage, 696 So.2d 1373, n. 1 (La. 1997).

⁸⁶ LeBlanc v. LeBlanc, 694 So. 2d 1172, 1173 (La.App.1 Cir. 1997). For purposes of valuing community business, “Commercial goodwill is the sum of all favorable attributes contributing to the earning power of a business and is an intangible asset separate from the business enterprise itself.” *Id.*

⁸⁷ Von Eschen v. League City Texas, 233 F.3d 575, at 1 (5th Cir. 2000).

Plaintiffs contend that they should be given the opportunity to amend their complaint because it is their “right”, and it would be beneficial in the clarifying information pertaining to some of the alleged “covert communications” among defendants, “the depth and breadth of debarment from participation in State-level contracts,” “three additional instances of lost business opportunity,” and the “failure to exhaust remedies argument.”⁸⁸

Although plaintiffs assert that it is their “right” to amend their complaint, they fail to cite any case law that supports their contention. Rather, the case law cited by plaintiffs for this proposition fails to support their contention, or make any reference to amending complaints, whatsoever.⁸⁹

In the Fifth Circuit, Rule 12(b)(6) motions to dismiss have been granted without allowing for the opportunity to amend, particularly when plaintiff had filed “an extensive response to the defendants’ motion to dismiss” that responded “specifically to the defendants’ objection that the complaint contains insufficient facts to maintain a cause of action.”⁹⁰ In this case, plaintiffs have filed numerous pleadings⁹¹ and participated in oral argument⁹² to address the deficiencies and/or challenges raised by defendants’ in their separate motions to dismiss (and

⁸⁸ doc. 115, at 23-24.

⁸⁹ Home Capital Collateral, Inc. v. F.D.I.C., 96 F.3d 760 (5th Cir. 1996).

⁹⁰ Jacquez v. Procunier, 801 F.2d 789, at 792 (5th Cir. 1986).

⁹¹ See, doc. 68, doc. 96, doc. 115.

⁹² See, doc. 118, Transcript, January 19, 2006 oral argument.

supplemental memoranda) regarding plaintiffs' failure to state a claim because they suffered no liberty interest. In retrospect it is clear that the issue of the adequacy of plaintiff's 42 U.S.C. § 1983 allegations has been at issue for quite some time, and has been the focus of extensive pleading practice. For these reasons, plaintiffs shall not be permitted to amend their complaint because allowing plaintiffs to do so would only "prolong the inevitable." the dismissal of plaintiffs' 42 U.S.C. §1983 claim.⁹³

D. PLAINTIFFS' SUPPLEMENTAL STATE LAW CLAIMS

When a plaintiff's 42 U.S.C. § 1983 claims are dismissed, under 28 U.S.C. § 1367(c)(3), "the district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if – . . . (3) the district court has dismissed all claims over which it has original jurisdiction." In this matter, the Court has concluded that plaintiffs' 42 U.S.C. § 1983 claims should be dismissed. Plaintiffs have offered no support or reasoning to the Court as to why it should retain its jurisdiction over the

⁹³ Plaintiffs have continued to operate their business and have even received a portion of the original ICJIS \$1.5 million federal grant which served as the foundation for plaintiffs' complaint. See, doc. 118, Transcript, January 19, 2006 oral argument, at 42 (Of the \$1.5 million in this grant, Thinkstream received "less than \$500,000" of the award to assist Sheriff Edwards in implementing a "state hub."); doc. 38, exhibit H, Barnett Sworn Statement, 106-09. Barnett's testimony submitted by plaintiffs in support of their Motion for Preliminary Injunction, indicates that once the \$1.5 million ICJIS award was withdrawn from plaintiff Thinkstream, the money went back to the Louisiana Commission on Law Enforcement. Thereafter, plaintiff Thinkstream submitted another RFP and won this contract. See, doc. 103, exhibits D, E, F, G, H, and I, which are news articles describing the successes that plaintiffs have had in securing other business deals with various sheriff's offices around the state of Louisiana in 2005.

remaining supplemental state law claims.⁹⁴ Therefore, because this “district court has wide discretion to refuse to hear [the] pendant state law claims,”⁹⁵ plaintiffs’ state law claims of defamation, false light publicity, unreasonable public disclosure of private facts, intentional interference with business relations, and violation of the Louisiana Unfair Trade Practices Act shall also be dismissed without prejudice.

E. SANCTIONS

After carefully the arguments raised by defendants in their Motions for Sanctions (docs. 103, 110, and 112), the Court has determined that such motions shall be denied because, among other reasons, “the claims, defenses, and other legal contentions therein are warranted by . . . a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.”⁹⁶ For these reasons, defendants’ Motions for Sanctions shall be dismissed.

CONCLUSION

For the reasons stated herein, plaintiffs’ 42 U.S.C. § 1983 claims shall be dismissed with prejudice and pending state law claims shall be dismissed without prejudice, thereby granting all of the defendants’ individual Motions to Dismiss (docs. 51, 63, 70, 74, 77, and 78) . In addition, plaintiffs’ Motion for Preliminary Injunction (doc. 9) shall be dismissed as moot, based upon this Court’s ruling on the

⁹⁴ See, doc. 68, doc. 96, and doc. 115. Plaintiffs have failed to make any argument in favor of the retention of their state law claims.

⁹⁵ Robertson v. Neuromedical Center, 161 F.3d 292, at 296 (5th Cir. 1998).

⁹⁶ Rule 11(b)(2), Federal Rules of Civil Procedure.

Motions to Dismiss concluding that plaintiffs would not have prevailed on the merits of their claims. Furthermore, the defendants' Motions for Sanctions shall be **DENIED** (docs.103, 110, and 112.).

Baton Rouge, Louisiana, August 28th, 2006.



A handwritten signature in black ink, consisting of several large, overlapping loops and a long, sweeping tail that extends to the right. The signature is written over a horizontal line.

JAMES J. BRADY, JUDGE
MIDDLE DISTRICT OF LOUISIANA