

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DEBORAH HENDERSON, ET AL.,)
)
 PLAINTIFFS)
)
 v.)
)
 MAINE ATTORNEY GENERAL,)
 ET AL.,)
)
 DEFENDANTS)

CIVIL No. 01-33-B-H

**MEMORANDUM DECISION AND ORDER ON DEFENDANTS’ MOTION TO DISMISS
AND PLAINTIFFS’ MOTION TO AMEND COMPLAINT**

The plaintiffs are members of an organization called “A Woman’s Project.” They claim that the Maine Attorney General and various district attorneys are violating their First Amendment rights to associate by threatening to prosecute them under the Maine law prohibiting pyramid schemes. 17 M.R.S.A. § 2305. The prosecutors have moved to dismiss the complaint, arguing that the First Amendment does not protect the plaintiffs from engaging in illegal fundraising efforts. They have filed a counterclaim that seeks a declaration that A Woman’s Project does in fact violate Maine’s pyramid scheme law, as well as damages for the plaintiffs’ alleged unfair trade practices. In response, the plaintiffs have moved to amend their complaint to add a section 1983 claim for retaliation (because the prosecutors filed the counterclaims) and to allege more explicitly that the prosecutors’ statements to the press and threats of prosecution have chilled their

First Amendment rights. Because the lawsuit is in its early stages, I **GRANT** the motion to amend. However, I **DISMISS** the Amended Complaint.¹ I conclude that the prosecutors have not violated the plaintiffs' First Amendment rights.

I. BACKGROUND

According to the Second Amended Complaint, A Women's Project is a voluntary association of women who meet for what they refer to as gifting parties or dinner parties. Second Am. Compl. ¶ 6. The group attracts women members for a variety of reasons, including helping others, empowering themselves, discussing women's issues and giving to favorite charities. Id. ¶ 7. To join, each new member makes an initial gift of \$5,000 to a member who has previously proceeded through the stages of the organization and reached the top ("dessert level"). Id. ¶ 8. As a result, that member receives \$30,000 to \$40,000 upon reaching the highest level of the organization and then leaves this dessert level, id. ¶ 9, although everyone is assured that there is no guarantee of this occurring. Id. ¶¶ 8, 12.

Participation in A Woman's Project is voluntary. Id. ¶ 6. All members are entitled to leave the association at any time; no members are required to recruit other members; members are permitted to have a sponsor for their initial gift; and there are no oral or written contracts between the members. Id. ¶¶ 11; 13-15. In addition, any member who requests the return of her initial gift receives a refund from the next gifting member. Id. ¶ 10.

¹ In light of these rulings, the plaintiffs' motion for summary judgment on the defendants' counterclaims is **Moot**.

During 2000 and 2001, A Woman's Project came under public scrutiny from the Attorney General of Maine and several district attorneys. *Id.* ¶¶ 17, 19. These officials issued press releases that certain organizations within Maine, including A Woman's Project, appeared to be illegal pyramid schemes under Maine law and urged any women victimized by such groups to make a formal complaint. *Id.* The members of A Woman's Project who filed this claim under 42 U.S.C. § 1983 for injunctive and declaratory relief assert that these threats of prosecution and statements to the press violated their First Amendment rights to freedom of association, *id.* ¶ 33, and that the prosecutors' counterclaim under the Maine statute is designed to and has had the effect of chilling their right of free access to the courts. ¶¶ 29, 32, 34. As of March 6, 2001, no participants from A Woman's Project had been prosecuted for their participation. *Id.* ¶ 23. The plaintiffs claim that their activities in the project in fact do not violate the Maine anti-pyramid statute. ¶ 18.

II. DISCUSSION

A. Prosecutors' Threats as First Amendment Violations

In order to state a section 1983 claim, the plaintiffs must allege that (1) the prosecutors' actions (here, threats of prosecution) were committed under color of state law and (2) the threats worked a denial of rights secured by the Constitution. *See Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001). The prosecutors concede that the first requirement is met. But they contend that their press releases

about A Woman's Project do not improperly chill the plaintiffs' First Amendment rights.

First, the prosecutors argue that the plaintiffs' activities in A Woman's Project do in fact violate 17 M.R.S.A. § 2305 and therefore do not deserve any First Amendment protection. Defs.' Obj. to Pls.' Mot. to Amend and Supplement Compl. at 1. The prosecutors have not presented a factual record to support their assertion that Maine law has been violated, however. On a motion to dismiss I must take the plaintiffs' allegations as true. The plaintiffs maintain that their activities in A Woman's Project do not violate 17 M.R.S.A. § 2305 or any other Maine statute. Second Am. Compl. ¶ 18.

Instead, they claim that the prosecutors' threats and statements to the press—in the absence of any illegal conduct on the plaintiffs' part—chill their First Amendment rights to freedom of association. *Id.* ¶ 30. They appear not to be contesting the constitutional validity of 17 M.R.S.A. § 2305, either facially or as applied, and they do not assert bad faith on the part of the prosecutors, but merely a lack of probable cause to prosecute and a lack of reasonable investigation to support the truth of the prosecutors' assertions. *Id.* ¶¶ 20-21.

Informal methods of enforcing the law, like a prosecutor's statements to the press that he/she considers particular conduct illegal, do not violate First Amendment rights. State Cinema of Pittsfield, Inc. v. Ryan, 422 F.2d 1400, 1402 (1st Cir. 1970) (affirming motion to dismiss where the "essence of plaintiff's complaint seems to be that this [good faith attempt by the police and prosecutor to

enforce state law] was done in an informal manner. . . . [i]n our view this is not actionable, absent bad faith”). In order to state a constitutional claim for the prosecutors’ statements and threats alone, the plaintiffs would have to plead that these threats and statements amounted to a scheme to squelch First Amendment rights without using the ordinary criminal prosecution process in the courts—an “effective state regulation superimposed upon the State’s criminal regulation [of pyramid schemes] and making such regulation largely unnecessary and obviating the need to employ criminal sanctions.” Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69 (1963); State Cinema, 422 F.2d at 1401 (“Bantam Books held unconstitutional the creation and practice of a state commission which passed on the acceptability of literature, publicly denounced as objectionable materials which failed to meet with its approval, and threatened distributors of the materials with prosecution—though the commission had no prosecutorial powers.”). Prosecution threats or statements are actionable only if they amount to an informal system of censorship of First Amendment activities independent of the criminal statutes. Bantam Books, 372 U.S. at 71; see also State Cinema, 422 F.2d at 1402 (“The record in this case shows no more than a good faith attempt by the police and prosecutor to enforce state law, the validity of which has not been called into question.”); Hammerhead Enter., Inc. v. Brezenoff, 707 F.2d 33, 39 (2d Cir. 1983) (statements not actionable where no evidence that communications were part of an informal system of censorship).

The plaintiffs have not alleged anything close to the censorship scheme the Supreme Court struck down in Bantam Books, 372 U.S. at 70-71. The plaintiffs have alleged only that the prosecutors made prosecution threats and statements to the press that A Woman's Project was illegal. Second Am. Compl. ¶¶ 17, 19. There is no separate regulatory scheme apart from the pyramid statute. The plaintiffs have not alleged that the prosecutors were engaged in an informal system of censorship, attempting to stop the plaintiffs from supporting the social and economic issues of women, or that the prosecutors were acting in bad faith. The plaintiffs are complaining merely that the prosecutors are trying to enforce the law informally before proceeding through the legal process, and that the law is ultimately inapplicable to them. As alleged, the claims under section 1983 are not actionable.

In fact, the Supreme Court has noted that informal contact between prosecutors and potential law violators is proper. The Court stated that

We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws...Where such consultation is genuinely undertaken with the purpose of aiding the [violation] to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.

Bantam Books, 372 U.S. at 71-72. What the plaintiffs have pleaded here sounds just like what the Supreme Court described as constitutionally sound in Bantam Books, 371 U.S. at 71-72: the plaintiffs have not alleged that the prosecutors were doing anything more than advising them and the public that in their view A

Woman's Project violates 17 M.R.S.A. § 2305.

B. Retaliation

The allegations supporting the plaintiffs' section 1983 retaliation theory are not sufficient to state a claim. The retaliation claim is based upon the assertion that the plaintiffs' right of free access to the courts is illegally chilled or discouraged by the fact that the prosecutors filed a counterclaim seeking a declaration that the plaintiffs have in fact violated the pyramid scheme statute, as well as damages for the plaintiffs' alleged unfair trade practices. Second Am. Compl. ¶¶ 29, 32, 34.

By definition, counterclaims in a lawsuit are retaliatory in nature, but this does not make them illegal. The plaintiffs have not presented any case authority that states that a counterclaim in an existing lawsuit may be illegal retaliation under section 1983. Counterclaims can, of course, be dismissed if appropriate, but here the plaintiffs have not sought *any* such relief (not dismissal on the merits, not dismissal as frivolous, not sanctions under Rule 11, nor any damages). They have continued to pursue their original suit. They have not been deterred in the exercise of their right of access to the courts by the defendants' counterclaims.

In short, there is no basis for a claim of illegal retaliation. (Indeed, according to the plaintiffs, they too want a judicial declaration concerning the lawfulness of their activities. *Id.* ¶ 24.)

III. CONCLUSION

The plaintiffs' motion to amend complaint is **GRANTED**. The defendants' motion to dismiss is **GRANTED**. The defendants' counterclaim is **DISMISSED WITHOUT PREJUDICE** because I decline to assert jurisdiction under 28 U.S.C. § 1367(c)(3). If there is a legitimate question concerning the statute's application to A Woman's Project, it should be resolved in the state courts.

SO ORDERED.

DATED THIS ____ DAY OF AUGUST, 2001.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Bangor)
Civil Docket For Case #: 01-CV-33

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DISTRICT ATTORNEY FOR
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