

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

SOUTH FLORIDA TEA PARTY, INC.,
et al.,

Plaintiff(s),

vs.

CASE NO. 9:10-CV-80062-MARRA/JOHNSON
(Judge Kenneth A. Marra)

TEA PARTY, *et al.*,

Defendant(s).

_____ /

DEFENDANTS, TEA PARTY AND O'NEAL'S
MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and (b)(6), Fed.R.Civ.P., and Rule 7.1 of the local rules of this Court, Defendant, FREDERIC B. O'NEAL a/k/a "Fred O'Neal," ("Defendant") in his individual capacity and the TEA PARTY, an unincorporated Florida political party, by and through Defendant in his official capacity as its chairman and sole officer, move this Court to dismiss Plaintiffs' Complaint for lack of federal subject matter jurisdiction and for failure to state a claim upon which relief can be granted by this Court under Article III.

In support hereof, Defendant would show this Court the following:

- (a) According to paragraph 2 of Plaintiffs' Complaint, the Court has subject matter herein based on 28 U.S.C. 1331 ("**Federal question**"). Specifically, Plaintiffs

allege “this action arises under the laws of the United States, and the Declaratory Judgment Act 28 U.S.C. Sections 2201 and 2202.”

- (b) The only “law of the United States” alleged in the complaint is the Lanham Act, 15 U.S.C. Sections 1051, *et seq.*.
- (c) However, nowhere in their Complaint do Plaintiffs allege facts showing Defendant has ever claimed or asserted rights to the name “Tea Party” under the Lanham Act.
- (d) Moreover, nowhere in their Complaint do Plaintiffs’ allege Defendant has ever threatened any of the Plaintiffs with litigation over the name “Tea Party” under the Lanham Act.
- (e) Rather, the “facts” alleged in Plaintiffs’ Complaint only show Plaintiffs “fear” the possibility of some day being sued by Defendant under the Lanham Act.
- (f) As such, Plaintiffs have failed to allege sufficient facts to show an “actual controversy” arising under the Lanham Act, as required by 28 U.S.C. Section 2201.
- (g) Put another way, the only “controversy” alleged in Plaintiffs’ Complaint is one that is merely conjectural or hypothetical and based solely on a speculative threat of possible future injury.
- (h) Hence, the Court lacks federal question subject matter jurisdiction to hear this case under 28 U.S.C. Sections 1331 and 2201.
- (i) As for the “facts” which are actually alleged in Plaintiffs’ Complaint, Plaintiffs point to three email exchanges as constituting Defendant’s threat of Lanham

Act litigation over use of the name “Tea Party.” A fair reading of those exchanges shows that none of those emails evidences a threat of litigation over the name “Tea Party” under the Lanham Act.

- (j) By their own words, the email exchanges alleged in paragraphs 34 and 36 have to do with one of the Plaintiffs’ use of the name “Florida Tea Party,” not the name “Tea Party.”
- (k) Moreover, there is no mention in either of those exchanges of “trademarks” or the “Lanham Act.”
- (l) Rather, there is an express mention of “Section 865.09, Florida Statutes.” As an aside, Section 865.09 (“**Fictitious name registration**”), Florida Statutes, is a state (not Federal) statute. It deals with doing “business” (a defined term) under a “fictitious name” (another defined term).
- (m) After citing those two exchanges, Plaintiffs go on in paragraph 37 to incorrectly state the emails evidence a claim by Defendant that he registered rights over the name “Tea Party.” Rather both exchanges clearly reference use of the name “Florida Tea Party,” not the name “Tea Party.”
- (n) Plaintiffs go on to allege they searched “public records,” but failed to find to Defendant’s having registered the name “Tea Party” as a trademark.
- (o) Again, a fair reading of both exchanges shows that undersigned Defendant represented that the name “Florida Tea Party” (quotation marks in the

original), rather than the name “Tea Party,” was registered to him (which it is).¹

(p) The third “threat” alleged is a partial email exchange set forth in paragraph 39 to someone not a party to this lawsuit. That partial email exchange has solely to do with a question of a possible violation of Florida Statutes Section 103.081 (“**Use of party name; political advertising**”). Again, there is no mention of the Lanham Act in that email, nor any threat of Lanham Act litigation.

(q) With specific regard to Count I (“**Declaratory Judgment of Non-Infringement of Trademark**”), Plaintiffs allege in paragraph 49 they are “in fear that they will be sued by the Defendants for Trademark Infringement ...” However, there are no facts alleged in Count I showing a “real and immediate” threat of such a Lanham Act suit.

(r) With specific regard to Count II (“**False Association Under the Lanham Act**”), paragraphs 55, 56, and 57 essentially ask this Court to determine pure “political questions,” such as whether it is better for Tea Party activists to reform the Republican Party rather than support third party candidates and whether the “Tea Party” political party represents the tenets of the Tea Party movement. For that additional reason, Count II is objectionable.

(s) Finally, the relief requested by Plaintiffs, in addition to the allegations of Plaintiffs’ Complaint, show that Plaintiffs are, essentially, asking this Court to

¹ See, the Florida Secretary of State’s acknowledgement of such registration and a print out of the current registration attached to Defendant’s Rule 201 Request for Judicial Notice, filed herewith.

determine “political questions” outside the proper scope of an Article III case and controversy.

- (t) In summary, Plaintiffs have failed to allege sufficient facts showing an “actual controversy” under the Lanham Act necessary to support the Court’s federal question jurisdiction herein under Article III and Title 28, United States Code Sections 1331 and 2201.

Memorandum of Law

- (u) The first questions to decide in any case are, one, whether the court has subject matter jurisdiction over the case, two, whether the court has discretion not to hear the case, and, three, if it has such discretion, whether it should decline to hear the case.

- (v) As this Court stated in its “*Order and Opinion on Motion to Dismiss*,” in Eisenberg v. Standard Insurance Company, 2009 WL 3667086 (S.D.Fla. October 26, 2009) (Marra, judge) (“*Eisenberg*”), “[t]he Declaratory Judgment Act was an authorization, not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.” quoting from, Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112 S.Ct. 580, 7 L.Ed.2d 604 (1962).

- (w) Therefore, skipping to the second and third questions above, this Court has discretion to decide as a threshold question whether it even wants to hear this case.

- (x) Returning to the first question above, this Court must decide whether it has subject matter jurisdiction to hear this case.

Actual Controversy

- (y) The express language of 28 U.S.C. Section 2201 requires that there be an “actual controversy” before a court may exercise jurisdiction over a request for declaratory relief.
- (z) As stated in *Eisenberg*, this requires that the plaintiff “must plead enough facts to state a plausible basis for the claim.” In other words, mere allegations are not enough:

“While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [] a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” “Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true.” *Eisenberg*, quoting from, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964-65, 152 L.Ed.2d 1 (2002).

- (aa) The phrase “actual controversy” was fleshed out by the Eleventh Circuit in the case of Malowney v. Federal Collection Deposit Group, 193 F.3d 1342 (11th Cir. 1999) (“*Malowney*”), as discussed by this Court in *Eisenberg*.

- (bb) On the subject of the requirement of an “actual controversy” in a declaratory relief case, the court in *Malowney*, in pertinent part, stated the following:

“[5][6][7] The federal courts are confined by Article III of the Constitution to adjudicating only actual cases and controversies. ... In order to demonstrate that a case or controversy exists to meet the Article III standing requirement when a plaintiff is seeking injunctive or declaratory relief, a plaintiff must allege facts from which it appears there is a

substantial likelihood that he will suffer injury in the future. Consistent with the cases and controversies requirement of Article III, the Declaratory Judgments Act, 28 U.S.C. Section 2201, specifically provides that a declaratory judgment may be issued only in the case of an actual controversy. Based on the facts alleged, there must be a continuing controversy between adverse parties. The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative, threat of future injury.” (Citations and quotations omitted). *Malowney*, 193 F.3d at 1346-47.

- (cc) In the instant case, the bottom line is that Plaintiffs have alleged no “facts” showing that the undersigned Defendant ever threatened anybody (much less Plaintiffs) with Lanham Act litigation over the name “Tea Party.” They have alleged no “facts” showing that the undersigned ever filed for or intended to file for trademark protection under the Lanham Act for the name “Tea Party.” In short, there are no facts alleged here showing an “actual controversy” between Plaintiffs and Defendant over the name “Tea Party” under the Lanham Act. Hence, any “controversy” over whether the undersigned Defendant may some day sue one of the Plaintiffs for trademark infringement under the Lanham Act over the Plaintiff’s use of the name “Tea Party” is purely conjectural, hypothetical and speculative and fails to amount to such an “actual controversy” as would create federal question jurisdiction herein under Article III and 28 U.S.C. Sections 1331 and 2201.

Political Question Doctrine, Comity and the 10th Amendment

- (dd) As part of the initial jurisdictional Article III “case and controversy” determination a court must make, it must consider to what extent, if any, its

decision to exercise discretion over a 28 U.S.C. Section 2201 case is possibly affected by the political question doctrine, as well as considerations of comity and the 10th Amendment.

(ee) In the instant case, and as reflected by the request for judicial notice filed here with, this Court may go aside the four corners of the complaint and consider the following matters of public record:²

- First, the second sentence of Section 97.021(17), Florida Statutes, states: “Any group of citizens organized for the general purposes of electing to office qualified persons and determining public issues under the democratic processes of the United States may become a minor political party of this state by filing with the department a certificate showing the name of the organization, the names of its current officers, including the members of its executive committee, and a copy of its constitution or bylaws.”
- Second, each of the Plaintiffs had the opportunity to register their organizational names with the Florida Department of State. Obviously, they did not. That Plaintiffs should ask the Court to essentially reward them for failing to follow this law and, conversely, to ask the Court to essentially punish Defendant for having followed the law is contrary to

² See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007) (“[3] *Second*, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. See 5B Wright & Miller Section 1357 (3d ed.2004 and Supp.2007).”

the very foundation of the rule of law on which this nation and its courts are founded.

- Third, in conformity with the requirements of Section 97.021(17), Defendant filed the necessary paperwork with the Florida Department of State, as shown from Defendant's request for judicial notice.
- Third, included in Defendant's filing with the Florida Department of State is the constitution of the Defendant, Tea Party political party. A review of "Article 3: Purposes" of the party's constitution shows, in pertinent part, that: "The party is organized to implement and give voice to the principle that the American public has been taxed enough already ..." That phrase "T-axed E-nough A-lready" is the obvious reason for the choice of the name for the Defendant, Tea Party political party. There is no mention in the party's "purposes" of a connection between the party and the "Tea Party Movement" or that a purpose of the party is to proffer "the theme, agenda, and collective vision of the nationwide Tea Party Movement." Rather, again, the only indication in the constitution as to why the name "Tea Party" was chosen is the party's stated purpose regarding Americans being T-axed E-nough A-lready.
- Fourth, the August 7, 2009 "certificate of organization" filed by the undersigned with the Florida Division of Elections and the subsequent August 14, 2009 acknowledgement of receipt by the Florida

Department of State show that the only officers of the Defendant, Tea Party political party, are the undersigned. Therefore, only the undersigned can legally speak for the Defendant, Tea Party political party. Only the undersigned can make “threats” on behalf of the Defendant, Tea Party political party.

- Fifth, in corroboration of “Article 3: Purposes” of the party’s constitution, the August 7, 2009 certificate of organization states: “The purpose of the “Tea Party” is to implement and give voice to the principle that the American public has been taxed enough already.” Again, there is no mention of the “Tea Party Movement.”
- Sixth, on November 12, 2009, because the Defendant, Tea Party political party, is a Florida political party, undersigned registered the fictitious name “Florida Tea Party” with the Florida Department of State, pursuant to the requirements of Section 865.09 (“**Fictitious name registration**”), Florida Statutes. Again, any of the Plaintiff-organizations and individuals could have done so. But, for whatever reason, they chose not to. Again, that Plaintiffs should essentially ask to be rewarded for not having followed the law and Defendant be penalized for having followed the law is contrary to the rule of law.
- Seventh, on December 28, 2009, in order to participate in the Federal election process, undersigned registered “Tea Party” with the Federal Elections Commission. Just as with the Florida Department of State,

so with the Federal Elections Commission, both governmental agencies charged with administering Federal and state election laws accepted undersigned's registration of "Tea Party" for filing.

- Eighth, Florida has a law, Section 103.081 ("**Use of party name; political advertising**"), Florida Statutes, which in the first sentence of sub-section (2) states: "(2) No person or group of persons shall use the name, abbreviation, or symbol of any political party, the name, abbreviation, or symbol of which is filed with the Department of State, in connection with any club, group, association, or organization of any kind unless approval and permission have been given in writing by the state executive committee of such party."
- Ninth, Florida has another law, Section 106.23 ("**Division of Elections**"), Florida Statutes, which in sub-section (2) allows "any person or organization engaged in political activity" to request an opinion from the Florida Division of Elections "relating to any provisions or possible violations of Florida election laws ..." (*e.g.* Section 103.081(2)). The Division of Elections advisory opinions regarding its interpretation of statutes like Section 103.081(2) are, again, matters of public record. Two such opinions regarding Section 103.081(2) are filed with Defendant's request for judicial notice herein. But, for whatever reason, Plaintiffs have chosen not to seek such an advisory opinion regarding Section 103.081(2) and their use of the

name “Tea Party.” Possibly it is because one downside of requesting such an opinion is that the opinions, once issued, are “binding on any person or organization who sought the opinion...”

(ff) “Political questions” have been held to be nonjusticiable and, therefore, not within the “case of controversy” requirement of Article III. *See, Carmichael v. Kellogg, Brown & Root Services, Inc.*, 572 F.3d 1271, 1280 (11th Cir. 2009) (“*Carmichael*”). Quoting from the Supreme Court’s decision in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Eleventh Circuit in *Carmichael* set out six characteristics of a nonjusticiable “political question.” The presence of any one of the characteristics indicates that such a nonjusticiable “political question” is present. Three of the characteristics are as follows:

- “[2] a lack of judicially discoverable and manageable standards for resolving [the issue];
- “[3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
- “[4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; ...” *Carmichael*, 572 F.3d at 1280.

(gg) Clearly, this is a “political” case. Clearly, Plaintiffs’ Complaint is rife with “political” statements, such as “...longtime Florida tea party activists, such as the Plaintiffs, are working toward reform within the Republican Party and view

third party candidacies as counter-productive.” *See*, Plaintiffs’ Complaint, at paragraph 55.

(hh) Clearly, also, the relief Plaintiffs seek this Court to grant is, essentially, “political” in nature, to-wit:

- “a. All Plaintiffs ... are free to use the phrase “Tea Party” ... in connection with their political activities ...
- “c. All Defendants ... be restrained from falsely associating themselves with any non-affiliated person or entity that utilizes the phrase “Tea Party” in connection with any political movement, or organization;
- “e. Defendants ... be required to amend their filings with the appropriate office of the State of Florida such that their registered political party currently registered as “Tea Party” must include other terms in order to avoid public confusion that the Florida “Tea Party” is somehow endorsed or approved by the Plaintiffs, ...”

(ii) In short, the questions presented by Plaintiffs in their Complaint are, essentially, “political questions” outside Article III’s scope of justiciable “cases and controversies.”

(jj) For example, in asking this Court to grant the relief sought in paragraph “a” of their prayer for relief, Plaintiffs are, essentially, asking this Court to override Section 103.081(2), Florida Statutes, and the role of the States under the 10th Amendment in organizing the electoral systems of those States (all in the name of a speculative claim of possible future Lanham Act litigation). Clearly,

Section 103.081(2) is within the purview of the State's power. Clearly, also, the purpose of Section 103.081(2) is not to grant Defendant some sort of "intellectual property rights" in the name "Tea Party," so much as it is to avoid confusion among the public as to which persons and organizations are or are not associated with a particular, registered political party. By way of example, if one of the Plaintiffs is, hypothetically, currently holding himself out to be the "state coordinator" of the "Official Florida Tea Party" and should that Plaintiff make a public pronouncement in which he describes the President of the United States by using a racially derogatory term, the public might become confused into thinking the Defendant, Tea Party political party, is an association of racial bigots, supporting a white supremacist agenda. The public is entitled not to be so confused. Section 103.081(2) serves a legitimate state purpose in avoiding the public's confusion as what persons and groups of persons are or are not associated with each political party entitled to ballot access. Moreover, part of a political party's First Amendment rights is the right to determine who they do not want to be associated with. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000):

"Consistent with this tradition, the Court has recognized that the First Amendment protects the freedom to join together in furtherance of common political beliefs, which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. That is to say, a corollary of the right to associate is the right not to associate."

(kk) Florida state courts and the Florida State Division of Elections are in a better position to construe and declare the parties' rights and obligations under Sections 103.081(2) and 865.09, Florida Statutes, which, rather than the Lanham Act, are the statutes this dispute is really about. Respect for the functions of those entities dictates in favor of the Court declining to exercise jurisdiction herein.

(ll) In asking this Court to grant the relief sought in paragraph "e," the Plaintiffs are, essentially, asking this Court to override and usurp the functions and roles of the Federal Elections Commission and the Florida Department of State. Again, respect for the roles and functions of those entities dictates in favor of this Court declining to exercise jurisdiction herein.

(mm) In summary, Plaintiff's Complaint fails to allege sufficient "facts" showing federal question jurisdiction and additionally fails to state a claim for which relief may be granted under Article III and Sections 1331 and 2201 of Title 28 of the United States Code. Accordingly, since, as this Court has already ruled in *Eisenberg*, the "Declaratory Judgment Act was an authorization, not a command ..." and did not impose a duty on this Court to make a declaration of rights where, in its discretion, this Court felt it wiser not to do so, Defendant would respectfully ask this Court to dismiss Plaintiffs' Complaint without prejudice to Plaintiffs' seeking such relief elsewhere as they believe they are entitled to.

Respectfully submitted by,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery on this 8th day of February, 2010, to the following persons:

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