SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

TWO RIVERS PUBLIC CHARTER SCHOOL, et al., Plaintiffs, v. **ROBERT WEILER, JR., et al.,** Defendants.	**Civil Action No. 2015 CA 009512 B** **Civil II, Calendar No. 7** **Judge Jeanette J. Clark** **Next Court Event:** **Initial Conference** **March 11, 2017, 9:30 AM**

DEFENDANT LARRY CIRIGNANO'S
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

MR. MURPHY: [W]ill Your Honor be entering the preliminary injunction . . . during this intervening period?

THE COURT: **No, you didn't establish that you had a sufficient showing.**

. . . .

MR. VINCENT: . . . . There has to be a motion for such relief and after so much time has passed, the real question is whether harm could ever be shown to be irreparable if an injunction is not issued immediately . . . .

THE COURT: Yes, **that is absolutely true** and so right now the Court was looking at resolving the injunctive issue on the case in the merits at the trial.

. . . .

MR. MURPHY: There have been continuing protests at the, at the site. . . .

. . . .

THE COURT: Well, **I haven't heard you state anything that was an imminent danger warranting [injunctive relief]**. If you had said there were individuals attacking the students or something like that . . . .

. . . .

THE COURT: But **not anything warranting an equitable remedy.**

(Transcript of Hearing, April 29, 2016 ("Hearing Transcript," attached hereto as Exhibit A) at 87:3-89:3 (emphasis added).)

PRELIMINARY STATEMENT

Defendant LARRY CIRIGNANO ("Cirignano"), pursuant to SCR Civil 12-I(e), submits this memorandum of points and authorities in opposition to Plaintiff Two Rivers Public Charter School's Motion for a Preliminary Injunction against Larry Cirignano ("PI Motion") and Plaintiff Two Rivers Public Charter School's Memorandum in Support of its Motion for a Preliminary Injunction against Larry Cirignano ("PI Memorandum").[1]

FACTUAL BACKGROUND

In Two Rivers' Verified Complaint, there is a scant, **single allegation** of conduct by Cirignano (Compl. ¶ 54), which involved his mere standing on a public sidewalk—a traditional public forum—holding a sign depicting one of the most recognizable and common images used by pro-life demonstrators throughout the country. (Declaration of Larry Cirignano, attached as Exhibit 1 to Memorandum of Points and Authorities in Support of Defendant Larry Cirignano's Special Motion to Dismiss Plaintiffs' Complaint ("Cirignano Declaration"), ¶¶ 4, 6; Second Declaration of Larry Cirignano, attached hereto as Exhibit B ("Second Cirignano Declaration"), ¶ 5.) Regarding the other four named Defendants, however, Two Rivers alleged that one or more of them engaged in "menacing," "shouting," "obstruct[ing]," "pursuing," and "following" kids. (Compl., ¶ 13.) But, having devoted its Complaint to this allegedly harmful conduct of the other

[1] To the extent necessary to preserve all jurisdictional arguments and all rights under D.C. Code § 16-5502 (the "Anti-SLAPP Act"), including all rights in Cirignano's appeal of this Court's order denying his Special Motion to Dismiss Plaintiffs' Complaint pursuant to the Anti-SLAPP Act, Cirignano incorporates herein by this reference his Memorandum of Points and Authorities in Support of Defendant Larry Cirignano's Special Motion to Dismiss Plaintiffs' Complaint, Memorandum of Points and Authorities in Support of Defendant Larry Cirignano's Motion to Dismiss Plaintiff's Complaint, and Memorandum of Points and Authorities in Support of Defendant Larry Cirignano's Motion for Stay Pending Appeal and Alternative Motion for Additional Extension of Time to Answer Complaint.

Defendants, Two Rivers never sought preliminary or other immediate relief *against them*. Rather, at the very end of the school year, and for conduct lacking any of the intensity of that alleged in the Complaint, Two Rivers now seeks a preliminary injunction against *Cirignano alone*.

Like the Complaint, Two Rivers' PI Motion seeks relief based not on Cirignano's alleged conduct, but on the alleged conduct of other persons.[2] (PI Mem. at 2-7.) There is not a single allegation that Cirignano has impeded any ingress to or egress from Two Rivers' facilities, or that he has confronted a single student, parent, or agent of Two Rivers. Rather, Two Rivers feigns, with no facts, that Cirignano has directed and encouraged others to harass students at Two Rivers. Thus, while the new "conspiracy" is similar to the Complaint's in that Two Rivers seeks to hold Cirignano responsible for others' conduct, it is far more imaginative. Whereas the Complaint barely alleged a "conspiracy" in which Cirignano was the least-active member,[3] the new conspiracy theory of the PI Motion recasts Cirignano as the first in command. Once again, however, the only record *evidence* relating to Two Rivers' conspiracy theory are the declarations refuting it. (2d Cirignano Decl.; Declaration of Ethel Borel-Donohue, attached hereto as Exhibit C ("Borel-Donohue Declaration").)

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[2] Two Rivers neither details nor verifies any specific conduct by Cirignano subsequent to the Complaint and prior to the events of May 2 and 5 described in the PI Memorandum. (PI Mem. at 2.). Furthermore, of the two non-party actors referred to in the PI Motion and Memorandum, the identity and conduct of one is specified, that of Ethel Borel-Donohue, while the identity and conduct of the other is omitted.

[3] The only allegation in the Complaint even attempting to link Cirignano to the specific alleged conduct of other Defendants is the bare, conclusory allegation that all Defendants "entered into a conspiracy." (Compl., ¶ 86.) This allegation was never verified, and Plaintiff put on no evidence to support it (or any other allegation of Defendant conduct) at the motions hearing on April 29, 2016. Thus, the only record evidence on Plaintiff's "conspiracy" theory is Cirignano's express, verified denial of it, denying any involvement with the alleged activities of any other Defendant or person, and denying any agreement or coordination with any other person as to Cirignano's own activities, in the Cirignano Declaration (¶¶ 2, 7).

Like so many of the great conspiracy theories, the facts behind Two Rivers' theory fall far short of its conclusion: Cirignano and Borel-Donohue demonstrated in the vicinity of the school at the same time, twice; another time Borel-Donahue was not there but Cirignano wished she was; they both, along with hundreds of others, own a sign version of one of the most recognized images of the pro-life movement around the country; and one time they went to Burger King together after demonstrating. (2d Cirignano Decl., ¶¶ 5-9; Borel-Donohue Decl., ¶¶ 3-9; PI Mem. at 6.) In other words, just as the moon shot was faked and Elvis is alive, Cirignano is the mastermind of a vast pro-life conspiracy, which he clandestinely orchestrates from the public sidewalk at the corner of Florida Avenue and 4th Street NE, through "conscription" of pliable surrogates to walk and talk with signs while he stands still with signs.[4]

To be sure, the only supposed surrogate of Cirignano identified by Two Rivers, Ethel Borel-Donohue, is no unwitting minion. Borel-Donohue is a seventeen-year veteran of the pro-life movement, who demonstrates when and where she wants, and how she wants. (Borel-Donohue Decl., ¶¶ 2-13; 2d Cirignano Decl., ¶¶ 3-10, 14.) Contrary to Two Rivers' speculation, it was Borel-Donohue who sought Cirignano's company while demonstrating at the Two Rivers Planned Parenthood site, and neither demonstrator coordinated what the other did. (*Id.*) Thus, apart from discussing the day and time beforehand, they demonstrated independently, with no control or authority over each other. (*Id.*) Even the day and time were not a matter of commitment, as Borel-Donohue demonstrated when she simply decided not to go on May 5, 2016. (*Id.*)

Despite Two Rivers' conclusory and baseless allegations of a grand conspiracy, Cirignano and Borel-Donohue simply exercised their First Amendment rights in pursuit of a common cause of national public interest: "to advocate against Planned Parenthood and the

[4] Two Rivers concedes that Cirignano's actual *observed* conduct, standing across the street from the school on a public sidewalk, would be outside the injunction it seeks. (PI Mem. at 11.)

killing of innocent children by the practice of abortion." (2d Cirignano Decl., ¶ 12; Borel-Donohue Decl., ¶ 12.). Neither of them, together or separately, has ever "chased, followed, or shouted at children or any other person," "trespassed on private property," or "violate[d] any laws." (2d Cirignano Decl., ¶ 15; Borel-Donohue Decl., ¶ 14.) Nor does either have any intention of doing so in the future. (*Id.*)

ARGUMENT

To obtain injunctive relief, a moving party must demonstrate that it is likely to succeed on the merits of its claims, that irreparable injury would result absent injunctive relief, that the balance of the equities favors injunctive relief, and that the public interest would be served by injunctive relief. *See, e.g.*, *Zirkle v. District of Columbia*, 830 A.2d, 1250, 1255-56 (D.C. 2003). As the Supreme Court has repeatedly emphasized, injunctive relief is an "extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Two Rivers has utterly failed to demonstrate these mandatory prerequisites and injunctive relief should be denied.

I. PLAINTIFF IS NOT LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS AGAINST CIRIGNANO.

This Court already held that Two Rivers has not made a sufficient showing to warrant preliminary injunctive relief. (Hrg. Trans. at 87:3-9) ("[N]o, you did not establish that you had a sufficient showing."). Despite this Court's clear admonition, and Two Rivers' utter failure to adduce any more evidence of conduct by Cirignano warranting injunctive relief, Two Rivers bases its entire PI Motion on the assertion that it has somehow already satisfied its burden. (PI Mem. at 8). Such is not the case, as the First Amendment demands much more than conclusory assertions of entitlement to relief. Cirignano's expressive activities in the traditional public forum across from Two Rivers' facilities is unquestionably protected First Amendment activity subject to the highest form of protection. An injunction against Cirignano would constitute a

presumptively unconstitutional prior restraint. An injunction against Cirignano would represent presumptively unconstitutional viewpoint and content discrimination. Moreover, any claims of conspiracy or some agreement to target Two Rivers is unfounded and unsupported by any record evidence, and is disputed by the sworn testimony of Cirignano.

A. Cirignano's Expressive Activities in the Traditional Public Forum Across from Two Rivers is Unquestionably Protected First Amendment Activity Subject to the Highest Form of Protection.

"The right to free speech, of course, includes the right to attempt to persuade others to change their views, and **may not be curtailed simply because the speaker's message may be offensive to his audience**." *Hill v Colorado*, 530 U.S. 703, 716 (2000) (emphasis added). Indeed, such right is at its apex when it occurs in a traditional public forum. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) ("[T]raditional public fora have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."). Areas such as the public streets and sidewalks "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *Id.* (internal quotations omitted). As the Supreme Court just recently recognized, yet again,

> It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. **Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out**. In light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, **this aspect of traditional public fora is a virtue, not a vice.**

Id. (emphasis added).

Indeed, "[c]onsistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is **"very limited**."

Id. (emphasis added). As such, despite the fact that some people – including Two Rivers here – might find speech in such places offensive, "the government may not 'selectively shield the public from some kinds of speech on the ground that they are more offensive than others.'" *Id.* (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975)). "When the government makes it more difficult to engage in these modes of communication, it imposes a significant First Amendment burden." *Id.* at 2536.

Here, it is beyond cavil that Cirignano's expressive activities are protected by the First Amendment. In fact, Cirignano's expressive activities have – as Two Rivers admits – taken place in the traditional public forum of the public sidewalk and street. (PI Mem. at 3, 6). As Cirignano testified, his entire purpose for engaging in his expressive activity was "to exercise [his] right to advocacy on issues of public interest." (2d Cirignano Decl., ¶ 11). Such activity in the traditional public forum – even if offensive to some – enjoys the highest rung of First Amendment protection. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (citing *Connick v. Myers*, 461 U.S. 138, 145 (1983))); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). An injunction against such protected activities would violate entrenched First Amendment precedent on this very issue.

B. An Injunction against Cirignano Would Constitute a Presumptively Unconstitutional Prior Restraint.

"[C]ourt orders that actually forbid speech activities are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993). It is axiomatic that prior restraints are highly suspect and disfavored. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Indeed, "**[a]ny system of prior restraints of expression comes to this**

Court bearing a heavy presumption against its constitutional validity." *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (citing cases) (emphasis added). "Because a censor's business is to censor, there inheres the danger that he may well be less responsive than a court . . . to the constitutionally protected interests in free expression." *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965).

> It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. **[A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition**.

Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 165-66 (2002) (emphasis added); *see also Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) ("[w]hile this freedom from previous restraint . . . upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the [First Amendment]."); *Carroll v. President & Comm'r Princess Anne, et al.*, 393 U.S. 175, 181 (1968) ("**Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect from abridgment**." (emphasis added)).

As this unquestionable precedent makes plainly evident, such prior restraints impose a unique and intolerable burden on speakers engaged in protected activity and are repugnant to the Constitution. As the High Court has noted,

> The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that risks of freewheeling censorship are formidable.

Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975).

Here, imposing a system of prior restraints on Cirignano, prior to any illegitimate or unlawful conduct has been committed by him – or for that matter, even alleged – represents an unquestionably repugnant prior restraint on his protected activities. The First Amendment knows no such restraints and imposes a presumptive unconstitutionality upon precisely what Two Rivers seeks here. Indeed, as Two Rivers admits, Cirignano has done nothing more than stand on the sidewalk peacefully holding a sign. (PI Mem. at 3, 6). He has not intruded into property, invaded the personal space of others, invaded the property of Two Rivers, or done anything other than engage in what the First Amendment affords him the right to do, namely, stand on the sidewalk engaging in peaceful demonstrations on a matter of national importance. Two Rivers is unlikely to succeed on the merits because the remedy sought is presumptively unconstitutional and cannot be imposed as a matter of course.

C. An Injunction against Cirignano Would Constitute Presumptively Unconstitutional Viewpoint and Content Discrimination.

A viewpoint-based restriction on private speech has never been upheld by the Supreme Court or any court. Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id*. at 829. In fact, viewpoint-based regulations are **always** unconstitutional. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 394 (1993) ("**[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others**.") (emphasis added)).

The notion that a content-based restriction on speech is presumptively unconstitutional is "so engrained in our First Amendment jurisprudence that last term we found it so 'obvious' as to

not require explanation." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991). "**Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under First Amendment**." *Id.* at 116 (quoting *Reagan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)) (emphasis added). Furthermore, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000).

Here, the relief sought by Two Rivers in this matter reveals beyond dispute that it seeks an injunction from this Court based solely on the message communicated by Cirignano in his expressive activities. (PI Mem. at 14) (requesting injunctive relief against the particular images displayed by Cirignano); (*id.*) (requesting injunctive relief against particular language used on the signs held by Cirignano during his expressive activities). To single out the specific images and words that can be stated during protected First Amendment activity is textbook content and viewpoint discrimination, and the First Amendment simply does not tolerate such censorship in the traditional public forum (or any forum). Two Rivers is not likely to succeed on the merits, and its Motion should therefore be denied.

II. PLAINTIFF WILL SUFFER NO IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF.

As this Court made abundantly clear, "**I haven't heard you state anything that was an imminent danger warranting [injunctive relief]**," "**[nor] anything warranting an equitable remedy**." (Hrg. Trans at 86:20-21, 89:2-3 (emphasis added).) Yet again, however, Two Rivers rests its entire basis for the extraordinary and disfavored remedy of injunctive relief on the baseless notion that it somehow demonstrated sufficient need for equitable relief at the April 29 hearing. (PI Mem. at 9-10). In fact, Two Rivers seeks to attribute alleged harms in the Complaint to Cirignano despite the fact that all Cirignano is alleged to have engaged in is standing across the street from Two Rivers' facilities with a sign. (PI Mem. at 3, 6). Cirignano is not even

alleged to have caused any of the harm Two Rivers seeks to attribute to him. (*Id.*). The majority of harm Two Rivers alleges deals with intruding into and blocking the reasonable ingress and egress from the school. (PI Mem. at 10.) Yet again, however, Two Rivers **admits that Cirignano has never held his sign or engaged in his peaceful demonstrations in the points of ingress or egress.** (PI Mem. at 3, 6.) If he has never been in the points of ingress or egress, he cannot possibly cause any of the harm allegedly attributed to him.

More importantly, however, is that Cirignano himself would be subjected to irreparable harm as a result of the injury. "The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Swartwelder v. McNeilly*, 297 F.3d 228, 241-42 (3d Cir. 2002) (same). A citizen who exercises the right to free speech exercises a right that "lies at the foundation of free government." *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939). To impose injunctive relief on Cirignano for conduct he is not even alleged to have personally engaged in is to deny him his cherished constitutional rights and impose irreparable injury on his liberties. The irreparable harm here flows to Cirignano, not Two Rivers. In fact, this Court recognized the lack of harm to Two Rivers during the April 29 hearing:

> MR. VINCENT: There has to be a motion for such relief and after so much time has passed, the real question is whether harm could ever be shown to be irreparable if an injunction is not issued immediately is questionable.
>
> THE COURT: Yes, **that is absolutely true** and so right now the Court was looking at resolving the injunctive issue on the case in the merits at trial.

(Hrg. Trans at 87:21-88:3 (emphasis added).)

III. THE BALANCE OF THE EQUITIES FAVORS DENIAL OF INJUNCTIVE RELIEF AGAINST CIRIGNANO.

In analyzing the third element of injunctive relief, the court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the

requested relief." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987). Two Rivers is **not** currently suffering immediate and irreparable injury, but the loss of Cirignano's constitutional rights will cause irreparable injury to him if he is subjected to an unconstitutional injunction. An injunction in this case will run roughshod over the very rights that the Supreme Court has characterized as "lying at the foundation of free government of free men." *Schneider v. New Jersey*, 308 U.S. 147, 151 (1939). The loss of such fundamental freedoms outweighs any interest Two Rivers might have in halting Cirignano's peaceful First Amendment activities, especially given the fact that Two Rivers' basis for the injunction is unsupported by any record evidence.

Two Rivers' response to the unquestionably irreparable injury that will befall Cirignano under an injunction is to suggest that he still has other means available to him to communicate a message. (PI Mem. at 11). Nevertheless, this ignores the fundamental principal of the First Amendment that the Supreme Court has recognized time and again. That Cirignano might remain free to employ other means to disseminate his message "does not take his speech outside of the bounds of First Amendment protection." *Meyer v. Grant*, 486 U.S. 414, 44 (1986). An injunction here would "restrict access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* That such an injunction – as Two Rivers suggests here – would "leave open more burdensome avenues of communication does not relieve its burden on First Amendment expression." *Id.* Indeed, "**[t]he First Amendment protects [Cirignano's] right not only to advocate [his] cause but also to select what [he] believe[s] to be the most effective means for so doing**." *Id.* (emphasis added). The injunction should be denied because the balance tips in Cirignano's favor.

IV. THE PUBLIC INTEREST NECESSITATES DENIAL OF INJUNCTIVE RELIEF AGAINST CIRIGNANO.

The public interest will not be served by granting the injunction. The protection of constitutional rights is of the highest public interest. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Indeed, "the public interest is best served by eliminating unconstitutional restrictions," such as the broad content-based injunction sought by Two Rivers. *See Swartwelder v. McNeilly*, 297 F.3d 228, 242 (3d Cir. 2002). Additionally, there is simply no interest in the imposition of unconstitutional injunctions. *See ACLU v. Ashcroft*, 322 F.3d 244, 250 n.11 (3d Cir. 2003). "[I]t is incontrovertible that 'curtailing constitutionally protected speech will not advance the public interest." *Stilp v. Contino*, 743 F. Supp. 2d 460, 470 (M.D. Penn. 2010) (quoting *ACLU v. Reno*, 217 F.3d 162, 180 (3d Cir. 2000)). In the realm of special First Amendment protection afforded to Cirignano's speech, the public interest can only be served by denying the injunction.

V. PLAINTIFF HAS UTTERLY FAILED TO DEMONSTRATE ANY AGREEMENT WHATSOEVER, MUCH LESS A CONSPIRACY TO COMMIT UNLAWFUL CONDUCT SUFFICIENT FOR INJUNCTIVE RELIEF AGAINST CIRIGNANO.

Despite repeating it throughout the Memo, Two Rivers utterly fails to carry its burden to **demonstrate** that Cirignano engaged in a conspiracy. Unfortunately for Two Rivers, "saying so don't make it so."[5] The burden on Two Rivers was to show – with the support of record evidence – that Cirignano had engaged in activities sufficient to constitute the elements of a civil conspiracy. Like a house of cards, Plantiff's theory of civil conspiracy collapses upon even a cursory examination, and with it, its entire theory of support for injunctive relief against Cirignano.

"The elements of civil conspiracy are: (1) an **agreement** between two or more persons; (2) to **participate in an unlawful act**, or in a lawful act in an unlawful manner; (3) an injury caused by an **unlawful overt act** performed by one of the parties to the agreement (4) pursuant

[5] Mark Twain, *The Adventures of Tom Sawyer* 6 (Dover Thrift ed. 1998).

to, and in furtherance of, a common scheme." *Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 738 (D.C. 2000) (emphasis added). Most problematic for Two Rivers' entire theory, "[t]here is no recognized independent tort action for civil conspiracy in the District of Columbia." *Id.* (quoting *Waldon v. Covington*, 415 A.2d 1070, 1074 n.14 (D.C. 1980). Indeed, "**[c]ivil conspiracy depends on the performance of some underlying tortious act**." *Id.* (emphasis added).

Two Rivers' threadbare and woefully inadequate assertions of conspiracy are akin to those that the Court of Appeals rejected in *Saucier v. Countrywide Home Loans*, 64 A.3d 428 (D.C. 2013). There, the trial court held that the evidence adduced in support of a civil conspiracy "[fell] far short of showing . . . knowing participation . . . in a scheme [to commit an unlawful act]." *Id.* at 446. The Court of Appeals upheld the grant of summary judgment on the conspiracy count because there – as here – the "plaintiff/appellants did not present sufficient evident to prove the elements of the alleged civil conspiracy." *Id.*

Here, despite repeating it over and over again, Two Rivers has utterly failed to even acknowledge, let alone demonstrate, that Cirignano engaged in any of the elements of a civil conspiracy. (*See, e.g.*, PI Mem. at 8.) However, Two Rivers has alleged nothing concerning the first element of an **agreement**, much less the more problematic element of an agreement to do an **unlawful act**. As Cirignano has testified in his sworn declaration, he did not even communicate with any other demonstrators about the method of his demonstration or the content of his planned message. (2d Cirignano Decl. ¶¶ 4, 5, 10, 14.) Neither did any other demonstrator communicate their message or method to Cirignano. (*Id.*; Borel-Donohue Decl., ¶¶ 4, 5, 10, 13.) Cirignano did not instruct, direct, manage, or otherwise coordinate any activities with any other demonstrator. (*Id.*) If Cirignano did not even communicate to other demonstrators the content of his message or the manner in which he would communicate it, then there simply cannot have

been a meeting of the minds in which an agreement was reached. Two Rivers has utterly failed to demonstrate the first element of the alleged conspiracy, as they make no mention of the required agreement.

Moreover, even assuming an agreement had been alleged – which Two Rivers did not – or an agreement was actually reached – which it was not – Two Rivers still would fall fatally short of the required element to show that it was an agreement to commit **an unlawful act**. *Executive Sandwich Shoppe*, 749 A.2d at 738. Cirignano testified that he reached no agreement or even engaged in discussion concerning any agreement. (2d Cirignano Decl., ¶¶ 4, 5, 10. 14; Borel-Donohue Decl., ¶¶ 4, 5, 10, 13.) But, even assuming arguendo that discussing what dates he would be at certain locations to demonstrate constituted some form of an agreement, **it was not an agreement to engage in an unlawful act**. At most, any agreement was to engage in protected First Amendment activity in the public sidewalk and street, which is unquestionably a lawful act done in a lawful manner. Two Rivers' theory of conspiracy simply misses the mark. Injunctive relief should be denied.

CONCLUSION

For the foregoing reasons, Cirignano respectfully requests that Two Rivers' PI Motion be denied.

DATED this June 8, 2016

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed through the Court's authorized eFiling system, which will provide a courtesy copy to Chambers and effect eService upon the following parties or counsel of record:

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DATED this June 8, 2016

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