In the United States District Court
for the Middle District of Pennsylvania

FRIENDS AND RESIDENTS OF SAINT THOMAS TOWNSHIP, INC. (FROST), a nonprofit corporation incorporated under the nonprofit laws of the Commonwealth of Pennsylvania;	:	
MICHAEL A. URBAN, WINFRED L. WALLS, and GLORIA S. SABERIN, as Representatives of the Class Composed of All Residents of Saint Thomas Township, Franklin County, Pennsylvania;	:	**No. 1:04-CV-0627**
	:	***Hon. Yvette Kane, J.***
v.	:	
ST. THOMAS DEVELOPMENT, INC., *et. al.*	:	

PLAINTIFFS' REPLY TO THE CORPORATE DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY THE CLASS ACTION

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I. The Corporate Defendants' Contention - That the Class Cannot be Certified Because the Representative Plaintiffs Lack Standing - is Wholly Unsupported by the Facts of this Case and Applicable Law.

In an attempt to prevent this Court from certifying the class in this action, the Defendants again claim that the Plaintiffs lack the standing to sue and therefore, that the Representative Plaintiffs cannot represent the class[1]. *See Corporate Defendants' Brief in Opposition to Plaintiffs' Motion to Certify the Class Action* at 7.

In a new twist, the corporate Defendants now advance the proposition that the Plaintiffs should have sued the Plaintiffs' own newly elected Supervisor, the corporate Defendant's own lawyer, or the Township Solicitor, because those individuals – and not the corporate Defendants – are responsible for violating the constitutional rights of the Plaintiffs.[2] *Id.* at 2-3,10.

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[1] In their *Brief*, the corporate Defendants fail to challenge Plaintiffs' assertions that (1) the class is so numerous that joinder of individuals is impracticable, (2) the claims of the Representative Plaintiffs are both common to, and typical of, the class, (3) injunctive and declaratory relief is appropriate as applied to residents of the Township as a whole, (4) the Representative Plaintiffs will fairly and adequately protect the interests of the class, and that (5) prosecution of separate actions could create a significant risk of establishing incompatible constitutional standards. Those assertions are thus admitted for purposes of this *Motion*.

[2] The corporate Defendants continue to claim that Supervisor Stearn somehow *voluntarily recused himself* from voting on the corporate Defendants' project, after having "successfully run as a write-in candidate in opposition to the Project." *Id.* at 2,10. Such an argument borders on the nonsensical. In addition, the Defendants again assert that it was their "corporate counsel" – and not the Defendants – who violated the Plaintiffs' constitutional rights, even though the corporate Defendants

In their *Brief*, the corporate Defendants again allege that the Plaintiffs have not been injured, that injuries suffered by the Plaintiffs were not caused by the Defendants, and that this Court lacks the authority to remedy past and future injuries resulting from the actions of the corporate Defendants. *Id*. at 9-11.

The corporate Defendants' arguments range from the unsupported to the nonsensical. It is clear that the representative Plaintiffs have standing, that they have suffered injuries common to, and typical of, those suffered by the Class composed of all St. Thomas Township residents, and therefore, that the Plaintiffs' request for certification of the Class must be granted.

A. The Corporate Defendants' Actions Have Injured the Representative Plaintiffs and Will Continue to Injure Them.

Even a cursory review of the facts of this case and the Plaintiffs' *Affidavits* reveal that the Representative Plaintiffs have suffered "distinct and palpable" injuries to themselves, and that they "seek relief in order to protect or vindicate an interest of their own, and of those similarly situated." *See Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Baker v. Carr*, 369 U.S. 186, 207 (1962). Courts have uniformly held that an injury "shared by the many rather than by the few" does not make

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directed counsel to send their letter on behalf of the Corporation. *Id*. at 10. Finally, the Defendants – for the first time in this Court – claim that it was the Township Solicitor himself who violated the Plaintiffs' constitutional rights, and that Plaintiffs should have sued him instead. *Id*. at 3.

Plaintiffs "less deserving of legal protection through the judicial process," but confers standing upon them as long as the Plaintiffs assert a "personal injury to a cognizable interest." *See Americans United for Separation of Church and State v. U.S. Dept. of H.E.W.*, 619 F.2d 252, 258 (1980).

Indeed, Plaintiffs have not merely suffered one injury at the hands of the corporate Defendants, but three distinct types of injuries.

First, the corporate Defendants' threat of litigation against the Township was specifically intended to "chill" Supervisor Stearn's actions by leveraging the Corporation – and resulting fear of financial liability of the Township - to force the incumbent Supervisors to silence Stearn.[3] Those actions of the corporate Defendants – using corporate "rights" to bar Stearn from representing the citizens of St. Thomas Township - "chilled" the constitutionally protected political activity of the citizens of the Township that elected Stearn to represent them.[4]

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[3] Although the decision to recuse is a personal one to be made by an individual elected or appointed official, the corporate Defendants *did not* direct their February 18, 2004 demand letter to Supervisor Stearn, but instead, *directed the letter solely* to the incumbent Chairman of the St. Thomas Township Board of Supervisors. The corporate Defendants failed to even copy Supervisor Stearn on the letter. Such actions were clearly aimed at intimidating the two incumbent Supervisors into taking action to bar Supervisor Stearn from representing the residents of the Township.

[4] As noted in previous filings by the Plaintiffs, when the Township Board of Supervisors refused to release the corporate Defendants' February 18, 2004 demand letter to the Chambersburg *Public Opinion* and the public, *the corporate Defendants sent the letter* to the area newspaper for dissemination. *See Plaintiffs'*

The U.S. Supreme Court and the Third Circuit Court of Appeals have held that the "spectre of punishment" for "speaking one's views freely" is sufficient to confer standing to sue. *Mallick v. International Broth. of Elec. Workers*, 644 F.2d 228, 235 (1981)(*citing Dombrowski v. Pfister*, 380 U.S. 479 (1965)). In *Mallick*, members of a labor union brought suit against the union, contending that the union's proscription against certain First Amendment activities violated the members' constitutional rights. *Id*. at 228. In holding that the members had standing to sue, the Court declared that "harm to free speech rights . . . is not measured solely in economic terms, nor must concrete punishment be meted out to confer standing to sue." *Id; See also Meese v. Keene*, 481 U.S. 465, 473 (1987)(holding that federal law declaring certain films to be "political propaganda" sufficiently "chilled" the plaintiff's actions in showing films, and thus conferred standing on him).

As delineated by the *Affidavits* previously filed by the Representative Plaintiffs in this proceeding, the corporate Defendants' threat succeeded in producing its intended effect – "chilling" the exercise of the Plaintiffs' political

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Brief in Opposition to the Corporate Defendants' Motion to Dismiss Amended Complaint at 3. The only plausible reason for releasing the letter for public distribution was to "chill" the residents of St. Thomas Township from continuing to exercise their political rights that resulted in the election of Stearn.

activity.[5] The "chilling" of the exercise of the Plaintiffs' constitutionally protected political activity was clearly not a subjective injury, but objectively inevitable and logical – resulting directly from the nullification of core, fundamental, and inalienable rights to engage in constitutionally protected political activity.

Second, not only have the actions of the corporate Defendants "chilled" the Plaintiffs' exercise of political rights, they have also caused the Township Board of Supervisors to actually remove Supervisor Stearn from the decisionmaking process. As evidenced by Supervisor Stearn's *Affidavit*, on at least two occasions, the Chairman of the Board of Supervisors and the Township Solicitor – solely on the basis of the corporate Defendant's threat to sue – prevented Stearn from voting and working on behalf of the Township's residents.[6] The nullification of Stearn's

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[5] Common threads running through the Representative Plaintiffs' *Affidavits* are the injuries caused by the corporate override of the Plaintiffs' "constitutional right to vote and be represented," the abandonment of community activism, the "powerless[ness] to influence the destiny" of the community, and the refusal to "assert. . . rights, or participate in governing." *See* Plaintiffs' Affidavits (attached to *Plaintiffs' Brief in Opposition to the Corporate Defendants' Motion to Dismiss Amended Complaint*).

[6] Stearn's *Affidavit* reveals that on April 7, 2004, the Chairman of the Supervisors withdrew an assignment given to Stearn – to draft a letter to DEP outlining the concerns of the Township regarding the quarry – based on the corporate Defendants' threats. In addition, the *Affidavit* recounts another occasion in which Stearn was prevented by the Township Solicitor – compelled by the corporate Defendants' threats - from casting a vote to approve a request by the corporation for a lot addition submission to the DEP. *See Affidavit of Frank Stearn* at ¶¶1-6. (Attachment One to the *Plaintiffs' Brief in Opposition to the Corporate Defendants' Motion to Dismiss Amended Complaint*). In his *Affidavit*, Stearn

ability to govern – directly traceable to the corporate Defendants' threat to sue the Township for ostensibly violating the Corporation's constitutional "rights" – has denied the Plaintiffs their core constitutional right to self-government.

Finally, the Plaintiffs have shown that the corporate Defendants' actions will continue to cause harm to the Plaintiffs. The corporate Defendants' demands inflict an "imminent threat of [future] harm" because each new act resulting from those threats - barring Stearn from exercising governing authority - creates recurring injury to the Plaintiffs and further "chills" the exercise of protected political activities within the Township. *See, e.g., In re Grand Jury Proceedings*, 625 F.2d 1106, 1108 (3rd Cir. 1980) (declaring that "a person should not have to wait for actual injury to satisfy the dictates of article III."). Each new act of severing the relationship between the citizens of St. Thomas Township and their elected officials constitutes injury because it denies residents the "plain, direct, and adequate interest in maintaining the effectiveness of their votes" and pursuing constitutionally protected political activity. *See Baker v. Carr*, 369 U.S. 186, 208 (1962).

The imminency of those recurring injuries recently prompted the St. Thomas

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concluded that "in the absence of the February 18, 2004 demand letter sent by the St. Thomas Development Corporation and its managers, I would have been able to participate in these – and future – decisions made by the Board of Supervisors on behalf of the residents of the Township." *Id*. at ¶8.

Township Board of Supervisors to file a separate action against the corporate Defendants, asking a County Court to issue a declaratory judgment regarding the ability of the Township to resolve issues related to the corporate Defendants' project.[7] *See Township of Saint Thomas, et al., v. St. Thomas Development, Inc.*, Docket No. 2004-1374 (Franklin County Court of Common Pleas).

The Representative Plaintiffs have clearly shown that they have suffered a range of past and present injuries – and will suffer future injuries - as a result of the corporate Defendants' actions.

B. The Corporate Defendants' Contention - That the Plaintiffs' Injuries Cannot be Traced to The Actions of the Corporate Defendants – is Unsupportable.

In a thinly veiled attempt to distance themselves from liability for their actions, the corporate Defendants now contend that the Plaintiffs should have sued the corporation's own counsel, Supervisor Stearn himself, or the Township's own Solicitor. *See Corporate Defendants' Brief in Opposition to Plaintiffs' Motion to*

[7] In that litigation, the Township Board of Supervisors claim that the "Defendant's letter has deprived the Township of the right to have Frank M. Stearn, one of the three elected Supervisors of the Township, participate in the decision making process with regards to matters involving the Defendant." *See Township's Answer to Preliminary Objections Filed by Defendant St. Thomas Development, Inc.* at ¶1(d). It should be noted, however, that because the Township does not challenge the *existence* of the rights asserted by the corporate Defendant, the action will not resolve any of the primary issues raised in this litigation.

Certify the Class Action at 2, 3, 10. In advancing that novel proposition, they attempt to argue that the Plaintiffs' injuries cannot be traced to the actions of the corporate Defendants, and thus, that the Plaintiffs lack standing to sue.

The Supreme Court has determined that injuries "fairly attributable" to the actions of the Defendants satisfy the causation component of the standing inquiry. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 44 (1976). But for the corporate Defendants' threat to sue – and the assertion that any infringement of corporate "rights" would be remedied through the force of the State - the protected political activity of the Plaintiffs would not have been "chilled." But for the corporate Defendants' threats, newly elected Stearn would not have been barred from representing the citizens of the Township, and the Township would not be compelled to make decisions based on the potential for financial liability to the corporate Defendants. Clearly, it is apparent that the corporate Defendants' actions ignited a series of events traceable directly to the assertion of corporate constitutional "rights," wielded specifically to deny the fundamental political rights of the class.

C. Plaintiffs' Request for Relief Would Prevent Further Injuries to the Plaintiffs' Right to Self-Government.

The corporate Defendants again claim that this Court lacks the authority to grant relief that will redress the Plaintiffs' injuries. *See Corporate Defendants'*

Brief in Opposition to Plaintiffs' Motion to Certify the Class Action at 10-11. Defendants are clearly mistaken.

Remedies requested by the Plaintiffs are commensurate with the range of injuries suffered by them. To remedy past invasions of constitutional protections, the Plaintiffs have requested that this Court award monetary damages to the class under 42 U.S.C. §1983. *See Amended Complaint* at 18, ¶¶ (g) – (h). To enjoin the ongoing harms – caused by the corporate Defendants' threat to sue the Township for violating corporate "rights" bestowed by the State – Plaintiffs have requested that this Court remove the authority of the corporation to assert those threats. Specifically, the Plaintiffs have asked this Court to declare that the corporation's asserted constitutional "rights" are without basis in law, and thus, enjoin the corporation from illegitimately asserting those "rights" against the Township and residents of the Township. *Id.* ¶¶ (b) – ©). Finally, the Plaintiffs request that this Court overturn 15 Pa.C.S. §1501 and order the Commonwealth Defendants to revoke or amend the corporation's charter to permanently eliminate the ability of the Corporation to assert those illegitimate rights. *Id.* at ¶¶ (e) – (f).

Those requested remedies - delivered collectively or individually - would directly redress the Plaintiffs' past, present, and future injuries.

II. The Corporate Defendants' Assertion - That the Exercise of the Corporation's Constitutional "Rights" Could Not Injure the Plaintiffs - Has Historically Been Used to Shield the Denial of Rights.

Arguing to this Court that Plaintiffs could not have suffered cognizable injuries as a result of the exercise of the Corporation's "rights" is not a new tactic for those seeking judicial sanction to violate the rights of others. As a result of that argument in the past, in other settings, jurists have been diverted from seeing – and addressing – people's claims to fundamental constitutional rights. In his book on the slave system, federal Judge Leon Higginbotham, Jr. explored that proposition, quoting an 1829 case in which a North Carolina court emphasized that, for the slave,

> there is no remedy. . . The slave, to remain a slave, must be made sensible that there is no appeal from his master; that his power is in no instance usurped; but is conferred by the laws of man at least, if not by the law of God.

Leon Higginbotham, Jr., IN THE MATTER OF COLOR – RACE & THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 8-9 (1978) (*citing State v. Mann*, 13 N.C. (1 Dev.) 263, 266-267 (1829)).

Many other courts, in cases creating what later generations regarded as "settled law," similarly dismissed people's claims to basic rights – claims whose vindication courts today regard as commonplace. Decisions relying on "settled law" as a substitute for weighing specific facts and circumstances that inflicted injuries, are now regarded as grave injustices. *See, e.g, Dred Scott v. Sandford*, 19 How. 393 (1857); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *U.S. v. Cruikshank*, 92

U.S. 542 (1876); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Buck v. Bell*, 274 U.S. 200 (1927) (affirming the forced sterilization of a woman because "three generations of imbeciles are enough. . ."); *Bradwell v. Illinois*, 83 U.S. (Wall.) 130 (1873) (affirming the refusal of the State of Illinois to accept women into the State's Bar, declaring that "the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.") (Bradley, J., concurring); *Minor v. Happersett*, 21 Wall. 162 (1875) (denying a claim that women's right to vote was constitutionally protected, declaring that "no argument as to woman's need of suffrage can be considered").

Struggles to define rights, to define injuries to those rights, and to secure commensurate remedies, have been necessary because some of the founding documents of this country denied whole classes of people – women, African-Americans, indentured servants, native peoples, and whites without property or education – basic constitutional rights. People *with* rights – often backed by their large institutions – historically wielded the law to impose their will on those whose rights the law denied. They also battled people claiming their rights in legislatures, courts, jails, voting booths, and village squares.

A society dominated by a rights-wielding minority trained lawyers, editors, law professors, judges, historians, and others not to "see" injuries which the law inflicted on the Ms. Minors, the Ms. Bradwells, the Ms. Bucks, the Mr. Scotts, and

the Mr. Plessys. To make themselves visible to the law, people - speaking out and assembling - built great campaigns for the abolition of slavery, women's suffrage, and civil rights. Those social movements taught much of society – including members of the Bar – to see what universities, newspapers, legislatures, and other institutions reflecting the dominant "rights" culture had trained them not to see.

But it wasn't enough for people's movements to drive the Bill of Rights, the 13th Amendment, the 14th Amendment, the 15th Amendment, and the 19th Amendment into the Constitution. They then had to help legislatures and courts - in Bill after Bill and case after case – to "see," so that legislatures and courts would secure and vindicate their rights. Such campaigns were often characterized by violence inflicted upon the "invisible and rightless" people initiating lawsuits that eventually made their way to the United States Supreme Court. For example, it took massive – and what "settled law" regarded as illegal sit-ins against "legal" segregation - to provoke the Warren Court to make the effort to sift "facts" and weigh "circumstances." *See, e.g., Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

During these struggles, there was another – a parallel - campaign. This one was directed by men secure in their individual constitutional rights from the moment of the nation's founding. Their goal was plain: to find the corporation in the Constitution.

Because the Constitution made no mention of corporations, this was not an easy discovery. But as corporate advocates and lawyers did their work, the Supreme Court began to "see" corporations in a new light. *See, e.g., Dartmouth College v. Woodward*, 4 Wheat. 518 (1819) (declaring that corporate charters were protected from state amendment by the Constitution's Contracts Clause); *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886) (declaring that corporations were "persons" protected by the 14th Amendment's Equal Protection Clause); *Minneapolis & St. Louis Railroad Co. v. Beckwith*, 129 U.S. 26 (1889) (declaring that corporations were "persons" protected by the 14th Amendment's Due Process Clause); *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893) (declaring that corporations were protected by the Fifth Amendment's Due Process Clause); *Hale v. Henkel*, 201 U.S. 43 (1906) (declaring that corporations were protected by the Fourth Amendment); *Fong Foo v. United States*, 369 U.S. 141 (1962) (holding corporations entitled to Fifth Amendment protections against double jeopardy); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (extending to the corporation constitutional guarantees of First Amendment protected political speech); *Pacific Gas & Electric Co. v. Public Utility Commission*, 475 U.S. 1 (1986) (holding that corporations were entitled to "negative" free speech rights under the First Amendment, and therefore, could not be compelled to speak).

To create new constitutional "rights" for corporations, advocates and lawyers quite logically built upon the great judicial legal victories for human rights won by people's movements over several generations. The extraordinary accomplishments of denied and invisible people were thus turned against them. This is the history and reality Plaintiffs confront today.

In the instant case, the corporate Defendants claim that the Plaintiffs have not been injured because the corporation merely exercised its "First Amendment rights," and therefore, that the Plaintiffs cannot possibly receive a remedy from this Court. *See Brief of Corporate Defendants in Opposition to Plaintiffs' Motion to Certify the Class Action* at 9, fn.2. Their assertion clearly contradicts the hidden history that the corporate Defendants have discouraged this Court from seeing.

The Defendants in this case argue that their interpretation of the facts of this case render the Plaintiffs' injuries invisible, and thus, render the Plaintiffs invisible to this court.

A contemporary Court - like all institutions in today's society - facing conflicting claims to fundamental rights involving plain people and corporate actors must scrutinize exceedingly complex – and often inconsistent - decisions arising out of cross-generational struggles for human rights. Those decisions are often obscured by the commandeering of people's rights by institutions of property. As with society in general, which has been trained not to "see," such a

Court must proceed with the greatest of care. To determine the true shape and form of the Defendants' invasion of the Plaintiffs' basic human and political rights, it must not shirk from "sifting facts and weighing circumstances."

Such an examination will reveal that the Representative Plaintiffs have been grievously injured as a result of the actions of the corporate Defendants, and that they therefore have standing to bring this action on behalf of the class.

III. Plaintiffs' Have Shown That Plaintiffs' Counsel is Uniquely Qualified to Serve as Counsel for the Class, and the Corporate Defendants' Have Failed to Challenge Those Qualifications.

The balancing test envisioned by Fed.R.Civ.Pro. 23 (g)(1)©) enables courts to use selected criteria to determine whether class counsel will "fairly and adequately represent the interests of the class." The Plaintiffs have advanced the uncontested proposition in their *Motion to Certify the Class* that Plaintiffs' existing counsel is one of the few legal experts in the country on the precise constitutional issues raised in this suit. Given the handful of practitioners familiar with these issues in the United States, it is well within the discretion and expertise of this Court to determine that "knowledge of the applicable law" must be the dominant consideration in appointing legal counsel to represent the class.[8]

[8] The corporate Defendants have failed to challenge the Plaintiffs' claims that (1) counsel is uniquely qualified because of prior work "identifying or investigating" claims, and (2) counsel possesses "knowledge of the applicable law." In addition, counsel has already committed substantial resources to representing the Plaintiffs in this action, thus evidencing the ability to commit future adequate resources to representing the class.

IV. Conclusion

For the foregoing reasons, the Plaintiffs request that this Court certify this class action, and declare that the class action is maintainable under Local Rule 23.3 and Fed.R.Civ.Pro. 23(a) and 23(b).

Submitted this 2nd Day of August 2004 .

/s Thomas Alan Linzey

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CERTIFICATE OF SERVICE OF PROCESS

The undersigned hereby swears and affirms that this day I served the foregoing *BRIEF* in the matter of *FROST, et al. v. St. Thomas Development, Inc., et al*. on the following entities listed below, by electronic transmission and hardcopy mail.

The following parties were served on the 2nd Day of August, 2004:

Michael L. Harvey, Esq. (Electronic Service)
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Counsel for Defendants St. Thomas Development, Inc., Peter DePaul, Anthony DePaul, and Donna DePaul-Bartynski

I hereby swear and affirm that the *BRIEF* was served on the above individuals on this 2nd Day of August, 2004.

Signed,

/s Thomas A. Linzey

_____

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