UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EDWARD FODDRILL SR	§	
Plaintiff	§	
v.	§	
	§	
MICHAEL D. BERNARD, individually and	§	
In his official capacity as San Antonio City	§	NO. 5:13-CV-00051
Attorney, WILLIAM P. McMANUS,	§	
individually and in his official capacity as	§	
San Antonio Police Chief and the	§	
CITY OF SAN ANTONIO	§	
Defendants	§	

PLAINTIFF'S RESPONSE TO DEFENDANT'S REPLY TO MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW the Plaintiff, John Edward Foddrill Sr., and makes this reply to Defendants response, again asks that his cause be left intact and again asks that the Court not assist the defendants in their criminal endeavors.

I. Statement of the Case

1. The Plaintiff requests that the Court leave this Cause intact, and since the Plaintiff is appearing pro se, he asks that his complaint be liberally construed and "held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007), and as a consequence, he be allowed to amend his Complaint to correct any deficiencies in these Causes as filed.

II. Dismissal Standard

2. The Plaintiff has made every effort to provide documentation supporting his claims that he is not time-barred from bringing this cause. In deciding the Defendants' Rule 12(b) (6) motion, the court must examine the

sufficiency of plaintiffs' complaint by "accept[ing] 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff[s].'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007). To survive the motion to dismiss, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Plaintiff has provided facts proving the "unclean hands" of the Defendants and the law firm of Fitzpatrick & Kosanovich in that they conspired to present a "fraud upon the court" in an effort to hide decades of public/police corruption and when their crimes were exposed the Defendants issued an illegal, unconstitutional Criminal Trespass Warning (CTW), confiscated all evidence and swore city persons to secrecy to prohibit any public discussion. Plaintiff provided evidence of Continuing Violations, Estoppel, Equitable Tolling to show that his claim is not time-barred. Plaintiff provided evidence of Capable of Repetition whereas the Defendants now has the same law firm that helped them defraud the courts in 2009 – Fitzpatrick & Kosanovich - to again assist them in hiding the ongoing criminal conspiracy that includes the CTW , the middle of the night SAPD raid, the terroristic threats, etc.

III. Adequacy of First and Fourteenth Claims

3. The Plaintiff insists that his complaint is NOT time barred. The Plaintiff cites the Continuing Violation Theory, Equitable Tolling, Estoppel, Unclean Hands and the fact that the criminal, unconstitutional act may be repeated at any time. The Plaintiff makes reference to Cuellar v. City of San Antonio, et al, SA-13-CA-0091-XR in an effort to show that the Defendants arguments for enforcing criminal trespass warnings absent of any police report, due process hearing, etc. were rejected by the Courts in an effort to avoid any misuse of the Court's time and resources rehashing the same tired arguments presented by the Defendants.

IV. Continuing Violation Theory

4. The Continuing Violation Theory DOES apply to the Plaintiff's 42 USC 1983 complaint. The Court in Heard v. Sheahan, 253 F.3d 316, 318-19 (7th Cir. 2001) stated: "Numerous cases assume that a federal doctrine of continuing wrongs is indeed applicable to suits under 42 U.S.C. sec. 1983. E.g., Perry v. Sullivan, 207 F.3d 379, 383 (7th Cir. 2000); 287 Corporate Center Associates v. Township of Bridgewater, 101 F.3d 320, 324 (3d Cir. 1996); Lavellee v. Listi, 611 F.2d 1129, 1132 (5th Cir. 1980); Neel v. Rehberg, 577 F.2d 262, 263-64 (5th Cir. 1978). We agree."

5. Defendant Bernard issued illegal, unethical instructions that all City persons were to ignore ALL reports from ALL citizens concerning his efforts and the efforts of other public servants to cover up criminal activity inside the City of San Antonio TX and the criminal trespass warning issued to stifle public outcry. Every report and every plea for relief that was ignored from July 2009 to April 2013 marked a fresh infliction of punishment and caused the statute of limitations to run anew. When newly elected Councilpersons (Bernal, Medina, Saldana, Ozuna, Soules) (see Exhibits 1-5) ignored pleas to have the ban lifted and to have city persons stop ongoing efforts to stifle the Plaintiff's speech they prolonged the infliction of punishment and caused the stature of limitations to run anew. Councilpersons, SAPD officers, City attorneys, City staff and others had the power and obligation to report the criminal activity, to expose the efforts by Castro, Bernard, McManus, Sculley and others to hide the crimes and to call for the efforts to stifle the Plaintiff's speech (especially the unconstitutional, illegal ban) to be halted. They ignored the reports and pleas for assistance complying with Bernard's illegal, unethical instructions. The Court in Heard v. Sheahan, 253 F.3d 316, 318-19 (7th Cir. 2001) stated: "This refusal continued for as long as the defendants had the power to do something about his condition, which is to say until he left the jail. Every day that they prolonged his agony by not treating his painful condition marked a fresh infliction of punishment that caused the statute of limitations to start running anew. A series of wrongful acts creates a series of claims. Palmer v. Board of Education, 46 F.3d 682, 686 (7th Cir. 1995); Webb v. Indiana National Bank, 931 F.2d 434, 438 (7th Cir. 1991); Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 828 (11th Cir. 1999); Kuhnle Bros., Inc. v. County of Geauga, 103 F.3d 516, 522-23 (6th Cir. 1997)."

6. Every request by the Plaintiff to attend public meetings, to enter City Hall and to speak with elected officials that was ignored added additional exclusions from public discussions concerning the approval or rejection of city ordinances, grants, zoning ordinances, etc. to the long list of injuries inflicted upon the Plaintiff. The Court has found that deliberate indifference was fair game by virtue of the doctrine of "continuing violation" (also referred to as "continuing wrong," "continuing harm," or "continuing tort"). For the general principle see, e.g., Filipovic v. K & R Express Systems, Inc., 176 F.3d 390, 396 (7th Cir. 1999); Taylor v. Meirick, 712 F.2d 1112, 1118 (7th Cir. 1983); Newell Recycling Co. v. EPA, 231 F.3d 204, 206-07 (5th Cir. 2000); Tiberi v. CIGNA Corp., 89 F.3d 1423, 1430-31 (10th Cir. 1996) Freeman v. Madison Metropolitan School District, 231 F.3d 374, 381 (7th Cir. 2000); Provencher v. CVS Pharmacy, 145 F.3d 5, 14 (1st Cir. 1998) and Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 481 (3d Cir. 1997).

7. The middle of the night raid by armed SAPD officers and refusal to protect the Plaintiff from terroristic threats made to silence his reports of the illegal, unconstitutional ban and the criminal conspiracy to hide long-term corruption did indeed have the same effect as the issuance of the Criminal Trespass Warning (CTW). When the Plaintiff delivered proof of the criminal acts of City Attorney Michael Bernard and others the Defendants issued the CTW and provided instructions that ALL reports and complaints by ALL citizens concerning the ban and underlying corruption be ignored. When the Plaintiff used emails and postal mail to report the criminal conspiracy armed SAPD officers were dispatched to his home in the middle of the night to perform a mental health examination and using the "color of the law" intimidate him into silence. When the Plaintiff employed the internet to publish proof of the criminal conspiracy supporters of Councilman Diego M Bernal (after a series of on-line communications with the Councilman) threatened the Plaintiff via the telephone and internet at which time the SAPD, City Council and others ignored pleas for protection. The act of dispatching armed SAPD officers to the Plaintiff's home when he had done nothing wrong and the deliberate indifference to threats made against the Plaintiff for publishing on-line reports of the criminal conspiracy stifled his Constitutional rights to free speech. SAPD Internal Affairs, SAPD Command Staff and the Defendants ignored reports detailing how SAPD Sgt. Romana Lopez falsified official reports stating

that SAPD did not have the Plaintiff's phone number when armed SAPD officers were dispatched to his home in the middle of the night on July 4, 2011- Independence Day. (see Exhibits 6-7) The Plaintiff continues to fear that if he continues in his efforts to expose the lawlessness that less-honest SAPD officers could be dispatched to his home and not unlike Sgt. Lopez they could falsify reports justifying the Plaintiff's arrest and again ban him from public meetings and City Hall. The Plaintiff fears that supporters of Councilman Bernal could in fact harm him and his family with no fear of apprehension and arrest.

V. Equitable Tolling

8. Despite Defendant's claims to the contrary the Plaintiff diligently pursued his rights. He diligently contacted elected officials, law enforcement and the media. He also employed at least four separate attorneys.

9. As of 2010 the FBI had on file at least 1,218 pages of information concerning the illegal, unconstitutional ban and the underlying criminal activity that the Defendants wish to keep hidden. (see Exhibits 8-9) FBI agent D. True Brown published a fraudulent document stating that no wrongdoing was discovered during three separate meetings. Since 2009 the FBI has been unable to provide any information concerning the "ghost" meetings including the dates, times, participants, etc. FBI SAC Fernandez, like his predecessors, ignores requests that Brown's lies be exposed. As of February 2013 a FOIA request for information concerning the three "ghost" meetings is still on file. (see Exhibits 10-12)

10. The Texas Department of Public Safety has received a similar amount of information. Chief Denby, like his predecessors, ignores reports of the criminal conspiracy. DPS Major Alvin Alexis ignores postal and email reports as well. In a May 29, 2013 report he simply replies... "NOPE". (see Exhibits 13-14)

11. Plaintiff submitted a complaint "pro-se" after numerous requests of his Counsel to follow the law and file a formal complaint fell on deaf ears. Plaintiff's attorney, Edward Pina, refused to report the criminal acts of the

Defendants to law enforcement and refused to follow the "Rules" governing his conduct as an attorney licensed to practice law in the State of Texas . Attorneys Malinda Gaul, David Willborn, Kathleen Cassidy Goodman and Edward Pina have been retained by the Plaintiff but each has refused to follow the law and the Professional Rules of Conduct in their refusal to report the criminal acts of the Defendants and the law firm of Fitzpatrick & Kosanovich. Judge Antonia Arteaga also refuses to follow the law and the " Rules".

VI. Estoppel

12. Estoppel is an equitable doctrine created to prevent one from benefiting from his own wrongdoing and to avoid injustice. See generally Loranger Constr. Corp. v. E.F. Hauserman, 376 Mass. 757 , 760-761 (1978); Cellucci v. Sun Oil Co., 2 Mass. App. Ct. 722 , 727-728 (1974). At the Sept. 13, 2010 meeting with the plaintiff's attorney, Defendant Barnard made a serious misrepresentations when he stated that he would withdraw the CTW of July 1, 2009 and that prohibitions would be lifted. (see Exhibit 15) The plaintiffs relied upon the misrepresentations and, as a result, took no further action believing that the ban would be lifted, he could again attend public hearings and could again speak with elected officials inside City Hall.

13. The basic principles of equitable Estoppel are well established and easily stated. "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623.) " 'Generally speaking, four elements must be present in order to apply the doctrine of equitable Estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the Estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' " (City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 489, quoting Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305.)

14. It is clear that Defendant Bernard was not truthful and his dishonest act far exceed standards the court has set in deciding questions of Estoppel. Defendant Bernard provides no reason why he did not comply with his agreement or why he was dishonest. In McLearn v. Hill, supra, at page 524, it was said that it was not necessary to charge deceit, bad faith, or actual fraud. "Facts falling short of these elements may constitute conduct contrary to general principles of fair dealing and to the good conscience which ought to actuate individuals and which it is the design of courts to enforce. It is in the main to accomplish the prevention of results contrary to good conscience and fair dealing that the doctrine of Estoppel has been formulated and taken its place as a part of the law."

VII. Capable of Repetition

15. A defendant may not moot a claim for injunctive relief simply by ceasing the unlawful conduct. A contrary rule would encourage the resumption of unlawful conduct following the dismissal of litigation. In United States v. W.T. Grant Company, the Supreme Court held that the voluntary cessation of illegal conduct would moot a case only if the defendant established that "there is no reasonable expectation that the wrong will be repeated." United States v. W.T. Grant Company, 345 U.S. 629, 633 (1953) Unless the defendant meets that "heavy" burden, the court has the power to hear the case and the discretion to grant injunctive relief. Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983)

16. Litigation involving the regulation of abortion, elections, and press access to trials has proceeded despite claims of mootness without any apparent basis for a finding of probable recurrence. The public importance of the issue may explain the more relaxed approach in these narrow categories of cases. Alton and Southern Railway Company v. International Machinists and Aerospace Workers, 463 F.2d 872, 880 (D.C. Cir. 1972); accord United States v. W.T. Grant Company, 345 U.S. 629, 632 (1953) (repetition or review element, "together with a public interest in having the legality of the practices settled, militates against a mootness conclusion").

17. In Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911) the Supreme Court stated : "The case is not moot where interests of a public character are asserted by the Government under conditions that may be immediately repeated, merely because the particular order involved has expired... Such orders are usually continuing and capable of repetition, and their consideration, and the determination of the right of the Government and the carriers to redress, should not be defeated on account of the shortness of their term."

18. Defendants want the Court to believe that there is no reasonable expectation that the wrong will be repeated while they continue down the same path. City and County officials continue to ignore requests for meetings and requests for an investigation into the criminal acts of the Defendants. City and County officials refuse to take any action concerning the forty-five months of illegal meetings that took place in violation of the Texas Open Meeting Act due to the illegal, unconstitutional ban. City and County officials ignore requests for assurances that the Defendants will not arrest whistleblowers or issue new bans when the subject of the ongoing criminal conspiracy is discussed in public.

19. The public importance of the issue calls for the Court to hear this case.

VIII. Unclean Hands

20. The Court has long recognized the maxim that "No one can take advantage of his own wrong." (Civ. Code. § 3517.) Put another way, "[h]e who comes into equity must come with clean hands." (See Wilson v. S.L. Rey, Inc. (1993) 17 Cal. App.4th 234, 244; Kendall-Jackson Winery, Ltd v. Superior Court (1999) 76 Cal. App.4th 970, 978.) While a majority of court cases cite "unclean hands "of the Plaintiff a defendant's unclean hands can also be claimed and proven by the plaintiff to claim other equitable remedies and to prevent that defendant from asserting equitable affirmative defenses. In other words, 'unclean hands' can be used offensively by the plaintiff as well as defensively by the defendant.

21. Attorneys for the Defendants are less than candid in their discussion of the "Defendants and the law firm representing them in hiding decades of public/police corruption, grant fraud, accounting fraud, theft of public funds, etc." The law firm of Fitzpatrick & Kosanovich – the very same firm now calling for this case to be dismissed and all evidence to be ignored- is the firm that assisted the Defendants in defrauding our judicial system and hiding decades of criminal activity inside the City and County. Defendant Bernard used public funds to pay the law firm of Fitzpatrick & Kosanovich to help represent the City of San Antonio TX in the case of Foddrill v. City of San Antonio, 2010 (Tex. App-San Antonio 2010) (see Exhibits 16-17)

22. Attorney Mark Kosanovich (Fitzpatrick & Kosanovich) helped City Attorney Deborah Klein and City IT Manager Hugh Miller coach City witnesses to present fraudulent and at times totally fabricated testimony in an effort to hide decades of criminal activity.

23. In Chief Information Officer Richard Varn's courtroom testimony of February 10, 2009 he is recorded stating that he has devoted his life to investigating and fixing "improper things going on in government." (Exhibit 18 pg 8 lines 9-16) He details how in 2005 he investigated the telephone variable account and found no violations of city ordinances, rules, policies or the law. He speaks of " some kind of variable in the telephone system" used for "charging things out that would pop up" as they "had to have some way of balancing their budget and serving their needs". (see Exhibit 18 page 23) When asked about the use of the variable he states "I want to be very specific and there's nothing illegal about it. It does not violate any city policies, rules or ordinance. Doesn't violate Texas law" (see Exhibit 18 page 25 lines22-25) He goes on to state "Ones (allegations) I've looked into haven't borne out what he was claiming to be wrong". (see Exhibit 18 page 27 lines 13-14) Varn goes on to testify that he learned of the variable from Telecommunications Manager Foddrill in 2005 stating "I understood the telecom variable cause that's the one that seemed to be the largest one that was used to adjust the budgets". (see Exhibit 18 page 41 lines 17-19) Varn stated that he looked into the issues by stating " I did the best to my ability, ma'am yes" (see Exhibit 18 pg 41 line 24) Varn explained that he looked into the variable and made sure that it did not violate federal regulations by saying " Yeah, I

did and I didn't think it was". (see Exhibit 18 pg 43 line 22) Varn declares that "I have actually visited with a number of federal officials in Washington asking them about". (see exhibit 18 pg 45 line 14-15) Varn goes on to explain "everyone had equal access to come in and make a plea to the department director to say, I have a problem this year, or I have an issue with this financing , or the department director would say this ended up being more expensive than we thought. We have to figure out how to cover the costs". (see Exhibit 18 pg 44 lines 1-6) When asked if he stopped the process of the variable in 2005 when he found out about it he replied "No. There was no alternative." and handed it off to incoming CIO Michael Armstrong.

24. The Court never saw CIO Richard Varn's deposition (Exhibit 19), City Administrative Directive 6.12 (Exhibit 20), the City Charter, other City Administrative Directives, the Local Government Code, OMB regulations, etc. as they were kept hidden. City Attorney Deborah Klein, attorney Mark Kosanovich and City IT Director Hugh Miller kept them hidden while they coached false testimony from witnesses. Sadly attorney Malinda Gaul assisted with the "fraud upon the court", kept the material evidence hidden, refused to object to the perjured/ suborned testimony, refused to call for a mistrial-criminal charges and refused to demand a new and fair trial. The court was defrauded and the criminal conspiracy continued.

25. When deposed CIO Richard Varn didn't even recognize the term "variable" and admitted that he knew little of budget allocation procedures. When asked about the process of obtaining money when a department ran out he stated "Gosh, I'm not really sure how that worked.....I don't know how a department requested something to be changed about their allocation for money in their budget.....It's not my thing". (see Exhibit 19 pg 12 lines 13-22)

26. When deposed in 2007 CIO Richard Varn was asked "Have you ever heard of an account in that telecommunications department that was called the variable account?" to which he replied "No. Were there any other names for it?" and "I don't know what that is". (see Exhibit 19 pg 38 lines 17-25)

27. After being provided with an explanation about the variable account Varn states "I don't have any knowledge of that" and "if there's an account for that, I just don't know". (see Exhibit 19 pg 39 line 7-20)

28. City Administrative Directive 6.12 (Exhibit 20) was published in 1982 and details the procedures for consolidating monthly Centrex (207 numbers) telephone bills, paying the bills and charging each City department for their fair of the costs. The "variable" was never a means to balance budgets, pay for pop up costs, fix an issue with financing, etc. The variable was never a legal means to gain access to tens of millions of dollars over the past three decades. The Court never saw a copy of AD 6.12 as it was kept secret while CIO Richard Varn was coached to provide a totally fabricated courtroom testimony ...a fraudulent testimony that other city witnesses were coached to embellish.

29. The email of November 29, 2005 consolidates the findings of a Municipal Integrity investigation started by the Plaintiff when he was the City's Telecommunications Manager. OMI manager Quinn reveals that the investigation was concluded with a finding of "lack of evidence/unfounded" but went on to describe twenty-five years of "unsupervised and unregulated billing" for an "untold amount of goods and services". Quinn falsely states that no laws or written rules were violated....." because there never were any" when she helps the Defendants hide the existence of AD 6.12 and other regulations, rules and laws. Quinn then presents her fraudulent testimony under oath in court supporting CIO Varn's lies.

30. Efforts to have Bexar County District Attorney Susan Reed investigate and prosecute the crimes were hindered by roadblocks and outright false statements. Written statements by at least three DA staff members show that they delayed any investigation by stating that they had no jurisdiction and could do nothing unless called upon by the Texas Rangers. (see Exhibits 22-24) Written correspondence from the Attorney General's Office and the Texas Rangers show that DA Reed's staff – including White Collar Crime Division Chief Adriana Biggs- were not being honest and were in fact helping the Defendants hide the criminal activity.

31. In June 2009 proof of the ongoing criminal conspiracy and the "fraud upon the court" was compiled. BCSO case # 2009-081395 and SAPD case # 9.0471467 were created citing the perjury and cover- up of the criminal activity. Police reports, documentation and audio recordings were delivered to elected officials. Within days the criminal trespass warning was issued on July 1, 2009, instructions were issued to ignore all reports of the crimes and the documentation delivered to elected officials was confiscated. The Defendants and their co-conspirators Fitzpatrick & Kosanovich now ask the Court to assist them in keeping their crimes a secret.

Conclusion and Prayer

For the reasons stated herein, Plaintiff again requests that the Court deny Defendants' Motion to Dismiss Plaintiffs' Original Complaint.

Respectfully submitted,

John Edward Foddrill Sr. (Pro Se)
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San Antonio TX 78254
210-824-3502

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing response were hand delivered to the U.S. District Clerk's Office at 655 E. Cesar E. Chavez Blvd., Room G65 San Antonio, Texas 78206 and a single copy was mailed by certified U S Mail # 7010 3090 0002 7075 2029 on June 25, 2013 to:

Shawn Fitzpatrick
Fitzpatrick & Kosanovich
P O Box 831121
San Antonio TX 78283-1121

John E Foddrill Sr.