IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

BRIAN KIRK, Plaintiff, v. CITY OF ST. JOSEPH, MISSOURI, *et al*., Defendants.	)	Case No. 5:24-cv-06023-SJ-GAF

DEFENDANTS BLEVINS AND GREIERT'S OPPOSING SUGGESTIONS TO PLAINTIFF'S MOTION TO AMEND

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COME NOW, Defendants Pastor Josh Blevins and Steven Greiert ("Defendants"), who respectfully request the Court deny Plaintiff's Motion for Leave to File His First Amended Complaint ("Motion to Amend"), **Doc. 22**, and grant Defendants' Motion to Dismiss and Motion to Strike ("Motions to Dismiss and Strike"), **Doc. 12**.

The Court should deny Plaintiff's Motion to Amend because the motion falls outside the 21-day window, and the proposed amendments are futile, prejudice Defendants, constitute undue delay, and demonstrate bad faith and dilatory motive.

Plaintiff has also failed to respond to Defendants' Motions to Dismiss and Strike in a timely manner. Therefore, for the reasons stated herein and for the reasons stated in Defendants' Motions to Dismiss and Strike, **Doc. 12**, and Suggestions in Support, **Doc. 13**,[1] the Motions are ripe for this Court's review and the Court should grant both Motions.

I. The Court should deny Plaintiff's Motion to Amend.

Plaintiff brings this Motion to Amend outside the 21-day window to freely amend under Fed. R. Civ. P. 15(a)(1). While the Court may grant leave to amend when justice so requires, there is "no absolute right to amend a pleading." *Hammer v. City of Osage Beach, Mo.*, 318 F.3d 832, 844 (8th Cir. 2003) (citation omitted). In fact, courts will not grant leave to amend "where there are compelling reasons such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment." *Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc.*, 406 F.3d 1052, 1065 (8th Cir. 2005) (quoting *Hammer*, 318 F.3d at 844). Here, the futility of the

[1] **Doc. 12** and **13** explain more fully that Plaintiff's action against Pastor Blevins and Mr. Greiert must be dismissed because Plaintiff has failed to state a claim against them upon which relief may be granted, Fed. R. Civ. P. 12(b)(6), and Plaintiff's claims are subject to a special motion to dismiss under the Missouri anti-SLAPP statute, § 537.528, RSMo.

amendments, prejudice to Defendants, undue delay, bad faith, and dilatory motive all bar Plaintiff's Motion to Amend.

a. Futility of the Amendments.

First, a plaintiff may not amend a complaint if the amendment would be futile. *See id.*; *Rogers v. Casey's Gen. Store & Marcelle*, No. 18-01019-CV-W-GAF, 2019 WL 13493780, at *1 (W.D. Mo. Jan. 24, 2019). "[A] court denies leave to amend on the ground of futility" when it concludes "the amended complaint could not withstand a Rule 12 motion" to dismiss. *In re Senior Cottages of Am.*, LLC, 482 F.3d 997, 1001 (8th Cir. 2007); *see also Cornelia I. Crowell GST Tr. v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir. 2008) ("when the court denies leave on the basis of futility, it means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure"); *Rogers*, 2019 WL 13493780, at *1.[2] Moreover, to amend, a plaintiff must show "how the complaint could be amended to save the meritless claim." *Wisdom v. First Midwest Bank, of Poplar Bluff*, 167 F.3d 402, 409 (8th Cir. 1999); *see also GWG DLP Funding V, LLC v. PHL Variable Ins. Co.*, 54 F.4th 1029, 1036-37 (8th Cir. 2022). Plaintiff's Motion to Amend is futile for several reasons.

i. The Proposed Amended Complaint does not cure deficiencies.

First, the Proposed Amended Complaint, **Doc. 22-1**, does nothing to cure the deficiencies identified in Defendants' Motion to Dismiss. *GWG DLP Funding V, LLC*, 54 F.4th at 1036-37. The only amendments are "to withdraw the claim for equitable relief Subsection V, changing a church's

[2] Not only may the district court preclude amendment to the complaint due to futility, but the "district court may dismiss a complaint with prejudice under Rule 12(b)(6) when amendment of a complaint would be futile." *Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751, 758 (8th Cir. 2021).

tax status, and replacing V with a count for defamation against Defendants Josh Blevins and Steve Greiert." **Doc. 22, ¶ 2**. But all the other problems Defendants rightly identified with Plaintiff's § 1983 constitutional claims against non-State actors persist. **Doc. 13**. Accordingly, these amendments do not save Plaintiff's meritless claims and are thereby futile. *GWG DLP Funding V, LLC*, 54 F.4th at 1036-37.

ii. The Proposed Amended Complaint cannot survive a Rule 12(b)(6) dismissal.

The additions of Missouri defamation claims against Pastor Blevins and Mr. Greiert, **Doc. 22-1**, also do not save Plaintiff's case. Even with these claims, the "amended complaint could not withstand a motion to dismiss under Rule 12(b)(6)." *Zutz v. Nelson*, 601 F.3d 842, 849 (8th Cir. 2010) (quoting *Cornelia I*., 519 F.3d at 782); *Rogers*, 2019 WL 13493780, at *1 (denying motion to amend when the proposed amendment could not survive Rule 12(b)(6)). Accordingly, the Court should both deny leave to amend and dismiss the complaint altogether. *Knowles v. TD Ameritrade Holding Corp*., 2 F.4th 751, 758 (8th Cir. 2021) ("It is well settled that a district court may dismiss a complaint with prejudice under Rule 12(b)(6) when amendment of a complaint would be futile.").

To overcome a Rule 12(b)(6) dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Specifically, to bring a defamation claim, Plaintiff must plausibly plead with sufficient facts: "1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation." *Bloodworth v. Kan. City Bd. of Police Comm'rs*, 89 F.4th 614, 622 (8th Cir. 2023) (quoting *Smith v. Humane Soc'y of the U.S.*, 519 S.W.3d 789, 798 (Mo. banc 2017)).

And the pleading requirements are not the only barrier to entry. The First Amendment of the U.S. Constitution provides robust protection to the speech at issue here. In the typical defamation lawsuit, courts "worry" that defamation lawsuits will lead to "self-censorship" and that the "uncertainties and expense of litigation will deter speakers from making even truthful statements." *Counterman v. Colorado*, 600 U.S. 66, 76 (2023) (citation omitted). As such, the First Amendment "requires that [courts] protect some falsehood in order to protect speech that matters." *Id.* (quoting *Gertz v. Robert Welch*, 418 U.S. 323, 341 (1974)). Here, those First Amendment concerns are amplified for two reasons. First, Defendants' alleged statements involve "political issues" (*i.e*. public office appointment), which are "generally afforded greater protection than other types of speech." *Hammer*, 318 F.3d at 843. Second, not only are Defendants' First Amendment free speech rights at stake, but Defendants' First Amendment rights to freely exercise their religions, associate, and petition their government are too. **Doc. 13, at 6, 13**. Thus, the Court should be especially wary before imposing any restrictions on Defendants' quadruply protected activity.

But we need not even reach the prevalent First Amendment concerns at stake here because Plaintiff cannot satisfy the pleading requirements for a typical defamation lawsuit. For one, Plaintiff must show and cannot show that the alleged statements are false—not statements of opinion or truth. *Bloodworth*, 89 F.4th at 622. "Statements of opinion, even if made maliciously or insincerely, are afforded absolute privilege under the free speech clause of the First Amendment and cannot be actionable" defamation. *Hammer*, 318 F.3d at 842 (citing *Pape v. Reither*, 918 S.W.2d 376, 380 (Mo. Ct. App. 1996)). "Neither imaginative expression nor rhetorical hyperbole is actionable as defamation." *Others First Inc. v. Better Bus. Bureau of Greater St. Louis, Inc*., 105 F. Supp. 3d 923, 930 (E.D. Mo. 2015) (quoting *State ex rel. Diehl v. Kintz*, 162 S.W.3d 152, 155 (Mo. Ct. App. 2005). This is a question the Court must address: "Whether a purportedly

defamatory statement is a protected opinion or an actionable assertion of fact is a question of law for the court." *Hammer*, 318 F.3d at 842. "The test for determining whether a statement is an opinion is 'whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact.'" *Id*. (quoting *Ribaudo v. Bauer*, 982 S.W. 2d 701, 705 (Mo. Ct. App. 1998)). "The court must examine 'the totality of the circumstances to determine whether the ordinary reader would have interpreted the statement as an opinion.'" *Hammer*, 318 F.3d at 842-43 (quoting *Diez v. Pearson*, 834 S.W.2d 250, 253 (Mo. Ct. App. 1992)). Critically, when "making this determination, 'the words must be stripped of any pleaded innuendo and construed in their most innocent sense.'" *Others First Inc*., 105 F. Supp. 3d at 930 (quoting *Kintz*, 162 S.W. 3d at 155). Additionally, the truthfulness of a statement is "an absolute defense." *Id.* (citing *Rice v. Hodapp*, 919 S.W.2d 240, 243 (Mo. banc 1996)). A statement is only defamatory if it can be proven false. *Smith*, 519 S.W.3d at 799.

The allegedly defamatory statements in the Proposed Amended Complaint are not false—they are either true or matters of opinion. Plaintiff alleges that "Defendants Blevins and Grier [*sic*] defamed Plaintiffs in emails to others claiming that Plaintiff presented a danger to society and children because he would try to 'indoctrinate' other people and children into becoming part of the LGBTQ community while on the Library Board." **Doc. 22-1, ¶ 77**. Plaintiff says the statements were false because "Plaintiff never sought to convert others to become gay." ***Id.* ¶ 78.** But the actual alleged statements, ***id.* ¶ 77** (citing ***id.* ¶ 29**, **34**, **40-41, Ex. A**), when properly "stripped of any pleaded innuendo and construed in their most innocent sense" say no such thing. *Others First Inc*., 105 F. Supp. 3d at 930 (quoting *Kintz*, 162 S.W. 3d at 155). Among them are statements Pastor Blevins allegedly made in a sermon (***id.* ¶ 29**), in a petition to the St. Joseph City Council (***id.* Ex. A**), and on his personal Facebook page about petitioning the government (***id.* ¶ 34**), and Mr. Greiert

allegedly made in a petition to the St. Joseph City Council and in an email (***id.* ¶¶ 40-41**). All alleged statements are either true or statements of opinion that are incapable of being proven false. *Others First Inc*., 105 F. Supp. 3d at 931. Plaintiff's spin on these alleged statements cannot carry his burden to properly plead his defamation claim.[3]

Plaintiff has also failed to meet the other elements for defamation. For example, Plaintiff fails to identify a single quote where Defendant Greiert identifies Plaintiff. *Id.* at 929 (requiring words to identify plaintiff). Nor does he identify a third-party recipient of the email, **Doc. 22-1, ¶ 41**, that could qualify it as a publication. *Bloodworth*, 89 F.4th at 622 (requiring publication to third party). Additionally, Plaintiff pleads no facts to show Defendants possessed the requisite mental state—actual malice—when they made the alleged statements. *Counterman*, 600 U.S. at 76; *Nelson Auto Ctr., Inc. v. Multimedia Holdings Corp*., 951 F.3d 952, 956 (8th Cir. 2020); *Ribaudo*, 982 S.W.2d at 704. Plaintiff's conclusory allegation that Defendants acted with actual malice, **Doc. 22-1, ¶ 82**, does not "contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Accordingly, the addition of this claim is futile.

iii. The defamation claims cannot survive an anti-SLAPP motion to dismiss.

The defamation claims are also subject to Missouri's anti-SLAPP law, § 537.528, RSMo., which bars "[a]ny action against a person for conduct or speech undertaken or made in connection with a public hearing or public meeting," such as the City Council meeting at issue here. § 537.528-1, RSMo.; *id*. § 537.528-4 (applying law to city council meetings). All the statements alleged in the Proposed Amended Complaint involve protected First Amendment speech "made in

[3] Since the question of whether a statement is a fact or opinion is a question of law for the Court, *Hammer*, 318 F.3d at 842, Defendants are more than willing to provide additional briefing if the Court so desires.

connection" with the City Council meeting and the potential political appointment of Plaintiff to the Library Board. *Id*. § 537.528-1. Accordingly, for the same reasons the § 1983 claims cannot survive an anti-SLAPP motion to dismiss, ***see*** **Doc. 13, at 16**, the defamation claims also cannot survive an anti-SLAPP motion to dismiss. Therefore, the defamation claims are futile.

iv. The Court does not have jurisdiction over the defamation claims.

Finally, defamation is a state law claim. *Hammer*, 318 F.3d at 842. Once the Court dismisses the federal claims against Defendants for the reasons stated in Defendants' Motions to Dismiss and Strike, **Doc. 12**, and Suggestions in Support, **Doc. 13**, the Court no longer has jurisdiction to hear the state law defamation claims against them. *See* 28 U.S.C. § 1367 (requiring federal district courts to have original jurisdiction before they may exercise supplemental jurisdiction over state law claims). Even though other governmental Defendants will remain in the case, this state law claim of defamation does not share a "common nucleus of operative fact" with the § 1983 constitutional claims against the governmental Defendants, nor has the Court "expended time and resources to resolve [the] federal claims." *Baker v. Bentonville Sch. Dist*., 75 F.4th 810, 819 (8th Cir. 2023); *see also Cox v. Snug*, 484 F.3d 1062, 1068 (8th Cir. 2007) (severing and dismissing distinct claims against some but not all defendants). Accordingly, Plaintiff's additions of state law defamation claims are futile because like the federal claims, these state law claims will be dismissed.

b. Undue Delay

Plaintiff provides no reason for the delay in filing his Motion to Amend. No new facts have emerged since Plaintiff filed the Complaint several months ago on January 25, 2024. **Doc. 1-1, at 1** (Notice of Removal). The "only reason for the untimeliness of the motion was [Plaintiff's] lack

of due diligence." *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998). Thus, the Court should deny the Motion to Amend.

c. Prejudice to Defendants

Courts will also deny leave to amend when such amendments would prejudice non-moving parties. *Hammer*, 318 F.3d at 844. That occurs when the additional, amended claims are not "reasonably related to the pleaded allegations" and thereby do not provide a defendant "notice" that a plaintiff is "pursuing such a claim." *Id*. Similarly, courts deny leave to amend when "the issues raised by the proposed amendment involve different legal and factual issues from those in the original complaint." *Id*. (citing *Bell*, 160 F.3d at 454). Such "new theories of recovery" inevitably create "prejudice." *Bell*, 160 F.3d at 454. Here, the defamation claims are not related to Plaintiff's original § 1983 claims and raises different legal and factual issues than the original claims. Accordingly, Defendants face prejudice from the additions of these claims.

A second type of prejudice, more detrimental than in the typical case, exists here due to the nature of the defamation claims. The additional defamation claims violate Defendants' protected First Amendment rights and thereby prejudice them, not only because the claims substantively seek to keep Defendants from engaging in protected speech, but also because the procedural delay of the Motion to Amend treads upon their rights.

The Missouri anti-SLAPP statute "recognizes that many such [SLAPP] suits are intended to prevent participation in governmental matters and accelerates the consideration of motions to dispose of such obstructive efforts." *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, No. 08-0840-CV-W-ODS, 2010 WL 4853848, at *1 (W.D. Mo. Nov. 22, 2010). That is why such lawsuits are "considered by the court on a priority or expedited basis to ensure the early consideration of the issues raised by the motion and to prevent the unnecessary expense of

litigation." § 537.528-1, RSMo. Defendants requested such expedited consideration in their Motions to Dismiss and Strike, **Doc. 12**, and Suggestion in Support, **Doc. 13**, because the unnecessary expense and chilling effect of litigation threatens Defendants' First Amendment rights. The Motion to Amend would only create further delay and additional harm. And for what? Merely to add another meritless claim to a list of other frivolous ones. *See supra* Part I.a. The Court should deny such an attempt to drag out this lawsuit.

d. Bad Faith and Dilatory Motive

Finally, the Court should deny the Motion to Amend because Plaintiff, by and through counsel, has acted with deliberate "bad faith" and "dilatory motive" to delay the proceedings. *Moses.com Sec., Inc.*, 406 F.3d at 1065.

Plaintiff's counsel has taken advantage of the parties' agreement to allow Plaintiff additional time to file a Response to Defendants' Motions to Dismiss and Strike. **Ex. A**. Defendants filed their Motions to Dismiss and Strike on March 7, 2024. **Doc. 12**. Plaintiff's deadline to respond was March 21, 2024. *See* W.D. Mo. Local Rule 7(c)(2) (allowing 14 days from date of filing to file opposing suggestions to motions). The day of the deadline, March 21, 2024, Plaintiff filed a motion requesting an extension of time to respond to Defendants' Motions to Dismiss and Strike by April 4, 2024. **Doc. 15**. Plaintiff's counsel represented to Defendants' counsel that she needed time to draft a response, and Defendants' counsel did not oppose based on that understanding. **Ex. A, at 5-6**. Then the day of the ***second*** deadline, April 4, 2024, Plaintiff filed a second motion for extension of time to respond to Defendants' Motions to Dismiss and Strike by April 12, 2024. **Doc. 20**. Plaintiff's counsel again represented that she needed time to draft a response, and Defendants' counsel did not oppose based on that understanding. **Ex. A, at 3-4**. The day of the ***third*** deadline, April 12, 2024, Plaintiff's counsel emailed Defendants' counsel for a third extension of time to

respond to Defendants' Motions to Dismiss and Strike by April 16, 2024. **Ex. A, at 2**. Plaintiff's counsel again represented that she needed time to draft a response, and Defendants' counsel did not oppose based on that understanding. **Ex. A, at 2**. Plaintiff never filed a request for an extension with this Court. Then on April 16, 2024 (***40 days after*** the Motions to Dismiss and Strike were filed), Plaintiff failed to meet this ***fourth*** deadline to respond. Only this time, Plaintiff's counsel provided Defendants' counsel with no notice that Plaintiff would not be responding in compliance with their agreement. Instead, by and through counsel, Plaintiff filed a Motion to Amend and stated: "If the Court for some reason denies the Motion to Amend the Complaint, Plaintiff will seek additional time to respond to Defendant's Motion to Dismiss." **Doc. 22, ¶ 2**. These hide-the-ball tactics exhibit bad faith.

Bad faith and dilatory motive are evident for another reason: Plaintiff's Motion to Amend and Proposed Amended Complaint did not alter or respond to any of Defendants' concerns about the frivolous § 1983 constitutional claims. **Doc. 22**. The Proposed Amended Complaint merely added another claim and changed the requested remedy. Thus, Plaintiff's counsel knew Defendants would continue to press the same arguments presented in the Motion to Dismiss even if Plaintiff successfully amended the Complaint. But still, Plaintiff's counsel refused to respond to the Motion to Dismiss. **Doc. 22, ¶ 2**. And why? It appears Plaintiff's counsel acted with bad faith and dilatory motive to stretch the time to respond to the Motions from weeks overdue to months overdue. *See Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC*, 781 F.3d 1003, 1009 (8th Cir. 2015) (affirming that "motions to amend in an effort to avoid an ultimate ruling on the merits of one's claims do not serve the interest of justice, but rather operate as a waste of the parties' and the Court's resources" and "[s]uch motions demonstrate dilatory tactics to avoid dismissal of the action"). Accordingly, the Court should forbid a Motion to Amend at this juncture. *Id*. at 1015.

II. Defendants' Motion to Dismiss and Motion to Strike is ripe for the Court to decide.

Defendants' Motions to Dismiss and Strike, **Doc. 12**, are ripe for this Court to decide. Plaintiff has waived any right to respond by failing to respond within the time proscribed by W.D. Mo. Local Rule 7(c)(2) or requested extensions. As previously stated, Plaintiff has had ample time to respond to the Motions to Dismiss and Strike, almost two months from the time the Motions were filed, and Plaintiff has neglected that opportunity. The time for briefing is over. W.D. Mo. Local Rule 7(c)(2); *see also Jetton v. McDonnell Douglas Corp.*, 121 F.3d 423, 426 (8th Cir. 1997) ("[L]ocal rules in aid of federal procedural rules and laws of Congress are specifically authorized by Federal Rule of Civil Procedure 83(a)(1). One of the most common types of local rules . . . are rules on when and how motions are to be presented and heard, and such rules have routinely been upheld. A local rule of a district court has the force of law, and the parties are charged with knowledge of the district court's rules the same as with knowledge of the Federal Rules and all federal law." (citations and footnote omitted)). Plaintiff has not sought another extension of time to respond since April 12, 2024, or shown any good cause for his failure to comply with the mandatory rules or the parties' agreement. *Travelers Indem. Co. of Mo. v. Adame & Assocs. of Kan. City, L.L.P.*, No. 04-225-CV-W-GAF, 2005 WL 3107700, at *1 (W.D. Mo. Nov. 18, 2005). Plaintiff's counsel has shown bad faith by deliberately misleading Defendants' counsel when requesting extensions for time. Plaintiff's failure to comply with the Local Rules, lack of good cause, and bad faith should result in a judgment in favor of Defendants. *Id.* (granting motion for summary judgment when nonmovant failed to file timely response).

CONCLUSION

For the foregoing reasons, Defendants Blevins and Greiert respectfully request the Court deny Plaintiff's Motion for Leave to File an Amended Complaint, **Doc. 22**, and grant Defendants' Motion to Dismiss and Strike, **Doc. 12**.

Dated: April 29, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I caused the above and foregoing to be filed with the Court's electronic CM/ECF filing system, which automatically served counsel for all parties with a notice of filing the same.

/s/ Katherine E. Graves
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