

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
**CIVIL TRIAL DIVISION**

WARFIELD PHILADELPHIA, LP	:	MARCH TERM, 2007
	:	
Plaintiff,	:	No. 0154
	:	
v.	:	(Commerce Program)
	:	
TRUSTEES OF THE UNIVERSITY	:	
OF PENNSYLVANIA, <i>et al.</i>	:	Superior Court Docket
	:	No. 1252 EDA 2009
Defendants.	:	
	:	

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**OPINION**

**Albert W. Sheppard, Jr., J. .... May 28, 2009**

This Opinion is submitted relative to the appeal of Warfield Philadelphia, LP (“Warfield”) of three Orders of this court dated: (a) July 31, 2007, (b) February 26, 2009, and (c) March 17, 2009.

The interlocutory Order of July 31, 2007, granted the Trustees of the University of Pennsylvania’s Preliminary Objections, in part and dismissed Warfield’s claims brought under the federal Lanham Act, 15 U.S.C. §1125 and constitutional claims based upon an alleged violations of the 1<sup>st</sup> and 14<sup>th</sup> Amendments under 42 U.S.C. §1983.

The interlocutory Order of February 26, 2009 denied Warfield’s Motion for Leave to File a Second Amended Complaint. The Order of March 17, 2009, granted the Trustees of the University of Pennsylvania’s (“Trustees”) Motion for Summary Judgment, and dismissed Warfield’s claim for interference with prospective contractual relations.

For the reasons discussed, this court respectfully submits that its three decisions should be affirmed.

### **BACKGROUND**

Warfield owns and operates a parking lot located near the University of Pennsylvania (“Penn”) campus in Philadelphia, Pennsylvania.<sup>1</sup> Warfield leases parking spaces to the public and provides its customers with a free shuttle bus service from its parking lot to various locations on the Penn campus.<sup>2</sup> Warfield advertises its business to the public through the use of these same brightly colored shuttle buses, as well as the distribution of fliers on the sidewalks of the Penn campus.<sup>3</sup>

On October 18, 2006, Warfield parked its shuttle bus in a small Penn-operated parking lot facing the Hospital of the University of Pennsylvania.<sup>4</sup> While the shuttle bus was parked in the Penn lot, Warfield distributed advertising fliers to pedestrians walking nearby. The following day, Warfield was approached by an agent of Penn and informed that it could no longer park its shuttle bus in the Penn operated parking lot.<sup>5</sup>

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<sup>1</sup> Amended Complaint §§1,2.

<sup>2</sup> *Id.* at §§2,3.

<sup>3</sup> *Id.* at §§3,4.

<sup>4</sup> *Id.* at §14(a).

<sup>5</sup> *Id.*

In December 2006, David Brooks (“Brooks”), a Penn employee, demanded that Warfield refrain from distributing fliers and instructed Warfield that Penn Police would be arriving at the scene shortly.<sup>6</sup> Moments later, Penn Police arrived, and questioned Warfield personnel whether they had been blocking Penn driveways, and harassing people.<sup>7</sup> Between October 2006 and February 2007, Warfield alleges numerous incidents occurred where Warfield employees were instructed by Penn Police and by Brooks to halt its distribution of fliers.<sup>8</sup> Warfield halted its advertising campaign shortly thereafter.<sup>9</sup>

As a result of these incidents, on March 6, 2007, Warfield sought injunctive relief against the Trustees. That day, this court issued an Order enjoining Penn from interfering with Warfield’s marketing activities, and enjoining Warfield from being “pushy” with pedestrians during flier distributions.<sup>10</sup> This court believed at the time that an amicable resolution had been reached. Unfortunately, that was **not** the case.

On May 3, 2007, Warfield filed an Amended Complaint against the Trustees. The Amended Complaint asserted the claims of interference with prospective contracts, violation of the federal Lanham Act statute prohibiting false or misleading statements about a business, and violation of Warfield’s constitutional rights under the First and Fourteenth Amendments pursuant to 42 U.S.C. §1983. The Amended Complaint reiterated Warfield’s prayer for injunctive relief.

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<sup>6</sup> *Id.* at §14(b).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at §14(a)-(f).

<sup>9</sup> *Id.* at §16.

<sup>10</sup> Special Injunction Order, case No. 0703-0154, control No. 030180.

Trustees filed Preliminary Objections to Warfield's Amended Complaint on May 15, 2007, and this Court sustained Trustees objections in part.<sup>11</sup> This Court dismissed the claims based upon the federal Lanham Act, and the U.S. Constitution, and mooted the claim seeking injunctive relief. Only the claim of interference with prospective contracts survived. On August 14, 2008, Warfield filed a Motion for Leave to File a Second Amended Complaint which was denied by this Court in an Order dated February 26, 2009. Upon completion of discovery, Trustees moved for Summary Judgment, which the Court granted on March 17, 2009.<sup>12</sup> This appeal followed.

### **DISCUSSION**

Warfield raises four issues on appeal. Specifically, Warfield argues the court committed an error of law and/or abuse of its discretion when it dismissed Warfield's Lanham Act claim at the Preliminary Objection stage.<sup>13</sup> Warfield also claims the court erred in dismissing its constitutional claims under 42 U.S.C. §1983 at the Preliminary Objection stage.<sup>14</sup> Also, Warfield avers the court erred in denying the Motion for Leave to File a Second Amended Complaint.<sup>15</sup> Lastly, Warfield states the court erred when it granted Trustees Motion for Summary Judgment.<sup>16</sup>

#### **Lanham Act – 15 U.S.C.S. §1125**

Under 15 U.S.C.S. §1125, it is forbidden for any person in connection with any goods or services used in commerce to make a false or misleading representation

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<sup>11</sup> Order docketed July 31, 2007 case No. 0703-0154, control No. 061289.

<sup>12</sup> Order docketed March 17, 2009, case No. 0703-0154, control No. 086659.

<sup>13</sup> Warfield 1925(b) Statement of Matters Complained of on Appeal, §2.

<sup>14</sup> *Id.* at §3.

<sup>15</sup> *Id.* at §4.

<sup>16</sup> *Id.* at §1.

regarding the nature, quality or characteristics of his or another persons goods or services, or commercial activities.<sup>17</sup> If such a misrepresentation occurs, the perpetrator shall be “liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”<sup>18</sup> In pertinent part, the elements of a federal Lanham Act claim for false advertising are:

- 1) that the defendant has made false or misleading statements as to his own product [or another’s];
- 2) that there is actual deception or at least a tendency to deceive a substantial portion of the intended audience;
- 3) that the deception is material in that it is likely to influence purchasing decisions;
- 4) that the advertised goods traveled in interstate commerce;
- and 5) that there is a likelihood of injury to the plaintiff in terms of declining sales, loss of good will, etc.<sup>19</sup>

The claim under the Lanham Act, Warfield argues, arises because Trustees interfered with Warfield’s advertising campaign by “disparaging Warfield and its parking lot, including by expressly representing Warfield and/or its said parking lot as unsafe, below acceptable standards, and over-priced.”<sup>20</sup> Warfield argues the interstate commerce element of a Lanham Act claim is satisfied because “[p]ersons domiciled in New Jersey and/or Delaware use Warfield’s said parking lot.”<sup>21</sup> In support of this argument, Warfield relies upon cases which are factually distinguishable from the instant matter.

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<sup>17</sup> 15 U.S.C.S. §1125(a)(1), (a)(1)(B).

<sup>18</sup> *Id.* at §1125(a)(1)(B).

<sup>19</sup> Glaxosmithkline Consumer Healthcare, L.P. v. Merix Pharmaceutical Corp., 197 Fed. Appx. 120, 123 (3<sup>rd</sup> Cir. 2006).

<sup>20</sup> Warfield Amended Complaint, §21.

<sup>21</sup> *Id.* at §20.

In Highmark, Inc. v. UPMC Health Plan, Inc. an insurer placed disparaging advertisements about a competitor in the Pittsburgh Post-Gazette (“Gazette”) which the court held met the interstate commerce requirement under the Lanham Act.<sup>22</sup> Specifically, the court concluded the advertisement substantially affected interstate commerce because the Gazette was distributed interstate, the services offered in the ad were available to people in numerous states, and the ad referenced service facilities in numerous states.<sup>23</sup> In The Scott Fetzer Co. v. Raymond G. Gehring, the court found the Lanham Act was triggered even though defendant’s offensive conduct was performed entirely in one state.<sup>24</sup> The court stated that “even though the threat may come only from intrastate commerce,” the plaintiff had presented evidence showing that the product in question affected both interstate and international commerce because it was sold throughout the United States and was trademark protected in eighty (80) foreign countries.<sup>25</sup>

Here, Warfield’s efforts to present a Lanham Act claim must fail. Unlike Highmark and Fetzer, the relevant facts in the Amended Complaint clearly show that the dispute between Warfield and Trustees is focused solely on one geographical region – the Penn campus in Philadelphia, Pennsylvania. Both Warfield’s lot and the Penn campus are located in Philadelphia. Warfield’s shuttle buses and advertisement distribution campaign operated in Philadelphia. The alleged misconduct of Trustees occurred in Philadelphia. The lone argument Warfield offers to meet the interstate commerce

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<sup>22</sup> 276 F.3d 160, 164-66 (3<sup>rd</sup> Cir. 2001).

<sup>23</sup> *Id.* at 165.

<sup>24</sup> 288 F.Supp. 2d 696, 703 (E.D. Pa. 2003).

<sup>25</sup> *Id.* at 704.

requirement is that individuals domiciled in New Jersey and Delaware utilize the Warfield parking lot. These facts do not meet the standards of interstate commerce set in Highmark and Fetzer. Accordingly, the Lanham Act claim was properly dismissed.

### **Constitutional Claims – 42 U.S.C. §1983**

42 U.S.C. §1983 provides that a person will be liable if acting under the color of any statute, ordinance, or regulation of any state, they deprive another individual of their fundamental rights, privileges or immunities secured by federal law.<sup>26</sup> As a matter of law, this statute does not apply to police departments because they are considered “purely instrumentalities of the municipality with no separate identity; thus, they are not “persons” for purposes of §1983 and not capable of being sued under §1983.”<sup>27</sup> Also, “an employer or supervisor cannot be held liable under §1983 on a respondeat superior or vicarious liability theory.”<sup>28</sup> A defendant employer will be liable only if it is shown they have “participated in violating [plaintiff]’s rights, or that defendants directed others to violate them, or that defendants, as the person in charge . . . had knowledge of and acquiesced in their subordinate’s violations.”<sup>29</sup> In order to raise an effective §1983 claim, one must plead more than “vague and conclusory statements,” in their complaint.<sup>30</sup>

Instantly, Warfield fails to present a §1983 claim with sufficient specificity. Warfield’s Amended Complaint cites alleged misconduct performed by the Penn Police,

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<sup>26</sup> 42 U.S.C. §1983.

<sup>27</sup> Gaines v. University of Pennsylvania Police Department, 1997 U.S. Dist. LEXIS 15460, 8 (E.D. Pa. 1997)

<sup>28</sup> *Id.* at 9 (*quoting* Dykes v. Southeastern Pennsylvania Transportation Authority, 68 F.3d 1564, 1566 (3<sup>rd</sup> Cir. 1995)).

<sup>29</sup> *Id.* at 10.

<sup>30</sup> Slater v. Richard E. Marshall and Montgomery County Community College, 906 F. Supp. 256, 259 (E.D. Pa. 1995)(*holding* plaintiffs claim failed to make clear whether the alleged misconduct arose under state law or an internal college procedure).

Brooks and numerous unnamed Penn employees.<sup>31</sup> The Penn Police are not “persons” for purposes of §1983, and are not subject to claims made under §1983. Therefore, the Penn Police will not be considered with respect to this claim.

Regarding Brooks and other unnamed Penn employees, Warfield has not demonstrated they were acting under the direction of the Trustees. Warfield has not presented facts which show Trustees had knowledge of any alleged misconduct by Brooks or other unnamed Penn employees. Warfield has not shown any indication that Trustees participated in the alleged infringement of Warfield’s rights. As a result, Warfield’s claim arising under §1983 must fail because Warfield has not shown any direct, or indirect, conduct by Trustees which specifically implicate the Trustees.

#### **Motion for Leave to File Second Amended Complaint**

Pennsylvania Rule of Civil Procedure 1033 states “[a] party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading.”<sup>32</sup> It is settled that motions to amend shall be considered based upon a liberal standard, however, “amendments will not be permitted where surprise or prejudice to the other party will result.”<sup>33</sup> The decision to grant or deny a Motion to Amend is within the sound discretion of the court and shall not be disturbed absent an abuse of that discretion.<sup>34</sup>

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<sup>31</sup> Warfield Amended Complaint, §§13-15.

<sup>32</sup> Pa. R. Civ. P. 1033.

<sup>33</sup> Debbs v. Chrysler Corp., 810 A.2d 137, 150 (Pa. Super. 2002).

<sup>34</sup> Ferraro v. McCarthy-Pascuzzo, 777 A.2d 1128, 1132 (Pa. Super. 2001).



Here, Warfield seeks leave to file a Second Amended Complaint that includes a claim for Pennsylvania common law Unfair Competition. This Motion to Amend is now brought after the Court has already completed fact discovery, closed expert discovery and the time for dispositive motions has been concluded. Moreover, Warfield has not provided this Court with any explanation for its failure to include this claim at the initiation of this matter. At this point, the burden placed on Trustees to defend against an additional claim as part of a Second Amended Complaint strikes this Court as prejudicial and therefore the Motion to Amend was properly denied.

This Court also notes the instant matter is moot since Warfield has recently filed a new action inclusive of a Pennsylvania common law Unfair Competition claim.<sup>35</sup>

### **Motion for Summary Judgment**

This Court had prepared a separate opinion addressing the granting of Trustees Motion for Summary Judgment. That Opinion is attached as Appendix “A”.

### **CONCLUSION**

For these reasons, this court respectfully submits that the Order dated July 31, 2007 granting Trustees preliminary objections against Warfield and dismissing Warfield’s Lanham Act and §1983 claims, along with the Order dated February 26, 2009 denying Warfield’s Motion to File a Second Amended Complaint, and the Order dated March 17, 2009 granting Trustees Motion for Summary Judgment should be affirmed.

**BY THE COURT:**

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**ALBERT W. SHEPPARD, JR.,**

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<sup>35</sup> C.C.P. No. 0810-2142.