

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON KP, LLC,

Plaintiff,

v.

THE CITY OF HOUSTON,

Defendant.

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CIVIL ACTION NO. H-14-2928

MEMORANDUM AND RECOMMENDATION

Pending before the court¹ is Defendant City of Houston's ("City") Motion to Dismiss (Doc. 14). The court has considered the motion, the response, all other relevant filings, and the applicable law. For the reasons set forth below, the court **RECOMMENDS** that the City's motion be **GRANTED** in part and **DENIED** in part.

I. Case Background

This case centers around the settlement agreement between the City and sixteen clubs offering topless entertainment (the "Clubs"), whereby the City agreed not to prosecute the Clubs for violating several municipal ordinances regulating sexually oriented businesses on the condition that the Clubs donate in excess of one million dollars to the Human Trafficking Abatement Fund and adopt certain policies. Plaintiff argues that this agreement has

¹ This case was referred to the undersigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), the Cost and Delay Reduction Plan under the Civil Justice Reform Act, and Federal Rule of Civil Procedure 72. Doc. 4.

illegally affected its business.

A. Factual History

On January 15, 1997, the City enacted Ordinance No. 97-57 (the "Ordinance"), a sixty-five-page ordinance regulating many aspects of sexually oriented businesses and their employees.² The Ordinance doubled the distance required between a sexually oriented business and a residential area, school, church, park or day-care center, required each business to have a permit, and required that permit to be posted in the public entrance.³

The Ordinance also required each entertainer or manager to obtain a permit from the City.⁴ In order to obtain a permit, the applicant must provide the City's vice division with his or her name, date of birth, an identification card, a list of criminal charges and convictions, as well as jail time served, and two photographs.⁵ An applicant will not receive a permit if he or she has been convicted of certain enumerated misdemeanors.⁶ Each entertainer must display the permit while performing.

The Ordinance prohibited an entertainer from touching a customer or the clothing of a customer or being within three feet

² See Doc. 11, Pl.'s Am. Compl. p. 4.

³ Id.

⁴ Id. p. 5.

⁵ Id.

⁶ Id.

of a customer while performing.⁷

The Ordinance resulted in a number of lawsuits filed by sexually oriented businesses.⁸ The City also initiated lawsuits against several clubs.⁹

On or about November 27, 2013, the City entered into a settlement agreement with the Clubs, resolving the pending lawsuits.¹⁰ Under the agreement, which took effect on January 1, 2014, the Clubs were to pay a percentage of their alcohol sales from the prior year to the City's Human Trafficking Abatement Fund, close private "VIP" areas, and institute several policies to raise awareness about, and to encourage reporting of, possible human trafficking in exchange for the non-enforcement of several aspects of the Ordinance.¹¹ For example, entertainers who worked at the Clubs were not required to obtain permits, were exempted from the "no touch" and "three feet" provisions of the Ordinance, and the Clubs were not obliged to pay the five-dollar-per-customer fee to the City.¹²

At some point, Plaintiff asked to join the agreement between

⁷ Id.

⁸ Id.

⁹ Id. p. 6.

¹⁰ Id. pp. 5-6.

¹¹ See Doc. 14-1, Ex. 1 to Def.'s Mot. to Dismiss, Settlement Agreement.

¹² See Doc. 11, Pl.'s Am. Compl. pp. 6-7.

the City and the Clubs, but its request was ultimately denied by the City.¹³

After January 1, 2014, Plaintiff complains, because of the agreement with the City, certain competitors - the Clubs - are permitted to operate as sexually oriented businesses without the need to obtain the required license. Plaintiff claims that it has lost revenue in the amount of \$1,500.00 per day because it may only operate as a "bikini bar," and may not offer topless lap dances or nude entertainment as the Clubs are permitted to do. Plaintiff also complains that the Clubs continue to offer VIP rooms to clients despite their agreement with the City not to do so.

B. Procedural History

Plaintiff filed this lawsuit on October 15, 2014, identifying the following statutory and common-law bases for recovery: (1) the Sherman Act, 15 U.S.C. § 1; (2) the Robinson-Patman Act, 15 U.S.C. § 13(c); (3) state-law tortious interference with prospective business relations; and (4) due process, equal protection, and First Amendment violations pursuant to 42 U.S.C. § 1983. Plaintiff sought a declaratory judgment, temporary restraining order, and permanent injunction against the City's agreement with the Clubs.¹⁴ On December 1, 2014, Plaintiff amended its complaint.¹⁵

¹³ See id. p. 7.

¹⁴ See Doc. 1, Pl.'s Compl. pp. 8-17.

¹⁵ See Doc. 11, Pl.'s Am. Compl.

On December 15, 2014, the City filed a motion to dismiss for lack of subject-matter jurisdiction and failure to state a claim under Federal Rules of Civil Procedure ("Rule") 12(b)(1) and (6).¹⁶ Plaintiff filed a response on January 5, 2015.¹⁷ The court considers the City's motion in the context of Plaintiff's amended complaint.

II. Legal Standard

Rule 12(b)(1) permits the parties to file motions challenging a district court's subject matter jurisdiction. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir. 1998) (internal quotation marks omitted). The court must dismiss the action if it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3).

The party seeking to invoke federal jurisdiction bears the burden of establishing subject matter jurisdiction. Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). The court may find that subject matter jurisdiction is lacking based on (1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."

¹⁶ See Doc. 14, Def.'s Mot. to Dismiss.

¹⁷ See Doc. 15, Pl.'s Resp. to Def.'s Mot. to Dismiss.

Walch v. Adjutant Gen.'s Dep't of Texas, 533 F.3d 289, 298 (5th Cir. 2008) (quoting Robinson v. TCI/US West Commc'ns, Inc., 117 F.3d 900, 904 (5th Cir. 1997)). A court should grant a Rule 12(b)(1) motion "only if it appears certain that the plaintiff cannot prove any set of facts in support of [its] claim that would entitle [it] to relief." Home Builders Ass'n, 143 F.3d at 1010.

Rule 12(b)(6) allows dismissal of an action whenever the complaint, on its face, fails to state a claim upon which relief can be granted. When considering a motion to dismiss, the court should construe the allegations in the complaint favorably to the pleader and accept as true all well-pleaded facts. Harold H. Huggins Realty, Inc. v. FNC, Inc., 634 F.3d 787, 803 n.44 (5th Cir. 2011).

A complaint need not contain "detailed factual allegations" but must include sufficient facts to indicate the plausibility of the claims asserted, raising the "right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Plausibility means that the factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. 678. A plaintiff must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. In other words, the factual allegations must allow

for an inference of “more than a sheer possibility that a defendant has acted unlawfully.” Iqbal, 556 U.S. 678.

III. Analysis

The City argues that Plaintiff has failed to state a claim under the various legal theories contained in its complaint. The City maintains that the court lacks subject-matter jurisdiction over Plaintiff’s claim for tortious interference with prospective business relations, and that Plaintiff’s other claims fail to state a claim for relief. The court considers the City’s arguments in turn.

A. Tortious Interference with Prospective Business Relations

The City argues that Plaintiff’s claim for tortious interference with prospective business relations must be dismissed for lack of subject matter jurisdiction because the City has immunity from state tort claims unless such immunity is specifically waived by the Texas Tort Claims Act. See Tex. Civ. Prac. & Rem. Code § 101.021.

Plaintiff responds it has properly pled a tortious interference with prospective business relations claim against the City. In particular, Plaintiff alleges that the City’s settlement agreement prevented Plaintiff from establishing business relationships with past or prospective customers. Plaintiff admits that the Texas Tort Claims Act does not waive sovereign immunity for tortious interference claims, but argues that Defendant’s

settlement agreement is a proprietary function and thus not subject to sovereign immunity.

Plaintiff is correct that a municipality enjoys no immunity when it engages in a proprietary function. Tex. Civ. Prac. & Rem. Code § 101.0215(b). A proprietary function is a function performed by a city, primarily for the benefit of those within the limits of the municipality. Gates v. City of Dallas, 704 S.W.2d 737 (Tex. 1986). The Supreme Court has explained that proprietary functions are those in which the municipality acts as a corporate body, capable of the same functions as any corporation. Owen v. City of Independence, Mo., 445 U.S. 622, 645 (1980). A governmental function, on the other hand, is when a municipality acts as an arm of the State. Id.

When enacting the Texas Tort Claims Act, the Legislature defined immune governmental functions as “those functions that are enjoined on a municipality by law and are given it by the state as part of the state’s sovereignty, to be exercised by the municipality in the interest of the general public.” Martinez v. City of San Antonio, 220 S.W.3d 10, 15 (Tex. App.–San Antonio 2006)(citing Tex. Civ. Prac. & Rem. Code § 101.0215(a)). Included in the definition of a municipality’s governmental functions were “police . . . protection and control.” Tex. Civ. Prac. & Rem. Code § 191.0215(a)(1).

Plaintiff argues that it is not challenging the City’s

enforcement of certain ordinances, rather it is challenging the City's agreement to forego regulation of certain adult-oriented businesses, which it argues is a proprietary function. The City posits that the regulation of adult-oriented businesses is a governmental function because Texas Local Government Code § 243.001 authorizes a municipality to regulate, via ordinances, sexually oriented businesses within its corporate limits.

Accepting Plaintiff's well-pleaded facts as true, the City's decision to enforce, or not to enforce, certain ordinances regulating sexually oriented businesses, represents an exercise of its police power discretion and is a governmental function. See Tex. Loc. Gov't Code § 243.003. Because the who, when, and where of an ordinance's enforcement is a governmental function, the City retains immunity, absent other waiver.

Here, the Texas Tort Claims Act's waiver expressly excludes those claims involving intentional torts and tortious interference with business relations has been held to be such an intentional tort. Ethio Express Shuttle Serv., Inc. v. City of Houston, 164 S.W.3d 751, 758 (Tex. App.-Houston [14th Dist.] 2005); see also Video Int'l. Prod., Inc. v. Warner-Amex Cable Commc'ns, Inc., 858 F.2d 1075, 1085 (5th Cir. 1988)(finding city not liable for intentional torts and also finding that interference with a contract is an intentional tort); Tex. River Barges v. City of San Antonio, 21 S.W.3d 347, 356 (Tex. App.-San Antonio 2000)(holding

that the city was immune under the Texas Tort Claims Act from liability for claims of conversion and tortious interference with prospective business relations without expressly finding that they were intentional torts).

As the City has not otherwise waived its immunity, the City retains its sovereign immunity. See Tex. Civ. Prac. & Rem. Code § 101.025; Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994). Plaintiff has therefore not alleged a claim for which the City may be held liable. It is **RECOMMENDED** that the City's motion to dismiss Plaintiff's tortious interference claim be **GRANTED** for lack of subject matter jurisdiction.

B. Plaintiff's Antitrust Claims

Plaintiff alleges that the City has conspired with a number of Plaintiff's horizontal competitors and that their settlement agreement constitutes a violation of Section 1 of the Sherman Act and Section 13 of the Robinson-Patman Act. In its motion, the City argues that it is immune from Plaintiff's antitrust claims based on the Local Government Antitrust Act ("LGAA") of 1984 and Parker immunity under Parker v. Brown, 317 U.S. 341 (1943). The City also argues that Plaintiff has failed to state a claim for relief under the Sherman and Robinson-Patman Acts.

1. LGAA, 15 U.S.C. §§ 34-36

The LGAA exempts local governments from paying damages for violations of federal antitrust laws. See City of Columbia v. Omni

Outdoor Adver., Inc. [hereinafter "Omni"], 499 U.S. 365, 370 n. 2 (1991). The relevant section states, "No damages, interest on damages, costs or attorney's fees may be recovered under section 4, 4A or 4C of the Clayton Act [15 U.S.C. §§ 15, 15a or 15c] from any local government, or official or employees thereof acting in an official capacity." 15 U.S.C. § 35(a). Plaintiff argues that it seeks only injunctive relief, making the LGAA inapplicable.

The City argues that injunctive relief is not available, citing City of Coll. Station v. City of Bryan, 932 F. Supp. 877, 892 (S.D. Tex. 1996). However, that court merely found that the unavailability of monetary relief under the LGAA did not satisfy the plaintiff's burden of showing an irreparable injury in determining whether an injunction would issue. Id. at 891.

In fact, many courts have stated that injunctive relief remained available despite the LGAA's prohibition. See Wicker v. Union Cnty. Gen. Hosp., 673 F. Supp. 177, 186 (N.D. Miss. 1987)(stating that the LGAA did not immunize local governments from injunctive relief under Section 16 of the Clayton Act or the costs and attorney's fees imposed thereunder); Jefferson Disposal Co., Inc. v. Jefferson Parish, La., 603 F.Supp. 1125, 1130 (E.D. La. 1985)(suggesting that persons who were injured by anticompetitive conduct of a local government retained rights to injunctive relief under Section 16 of the Clayton Act); Woolen v. Surtran Taxicabs, Inc., 615 F.Supp. 344, 350 (N.D. Tex. 1985)(citing LGAA's

legislative history indicating a Congressional intent to not bar injunctive relief because injunctive relief under Section 16 of the Clayton Act was very broad).

The court concludes that injunctive relief remains available to Plaintiff under Section 16 of the Clayton Act. However, Plaintiff has not sued under Section 16 of the Clayton Act. If Plaintiff intends to seek injunctive relief for its antitrust claims, it must file an amended complaint requesting such relief within twenty days of the adoption of this recommendation.

2. Parker Immunity

In Parker v. Brown, 317 U.S. at 351-52, the Supreme Court held that the State of California had immunity from antitrust claims when it acted as a sovereign. In Parker, a state law was enacted to regulate raisin prices by establishing a prorate system whereby a set percentage of the raisin crop was placed in a “stabilization pool” and the percentage of the crop that could be sold on the open market was likewise limited. Id. at 348. The Court assumed that the California program would violate Section 1 of the Sherman Act if it had been instituted by virtue of a contract or conspiracy between private persons. Id. at 350. The Court held that the price stabilization program imposed by the California Director of Agriculture was a valid regulation of a state industry that did not restrain interstate commerce, even though the effect was to maintain or to raise the price of raisins moving in interstate

commerce. Id. at 367. The Court found the state immune from suit under the Sherman Act.

Because of the importance of free enterprise embodied in federal antitrust laws, state-action immunity is disfavored. F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992).

Even so, the Supreme Court has extended Parker immunity to a municipality only where the municipal ordinance was an authorized implementation of state policy and the resulting suppression of competition was the foreseeable result of what the state law authorized. Omni, 499 U.S. at 370-73.

In Omni, South Carolina statutes authorized municipalities to regulate the use of land and the construction of buildings or other structures within their boundaries. Id. at 371. The City of Columbia enacted zoning, spacing, size, and location ordinances to protect a local billboard business to the exclusion of a Georgia corporation that intended to construct new billboards within the city limits. Id. at 368. The Court acknowledged that the purpose of zoning ordinances was to restrain “unfettered business freedom,” which may have the effect of preventing normal acts of competition, particularly those by newcomers to the market. Id. at 373. The Court refused to carve out an exception to Parker immunity where politicians conspired with private individuals to stifle competition by enacting restrictive ordinances and found that the city was entitled to Parker immunity. Id. at 384.

As explained in Omni, in order to qualify for Parker state immunity, a municipality must establish that it is acting according to an authorized implementation of state policy. Omni, 499 U.S. at 370. The Supreme Court has adopted a broad concept of authority granted by the state, recognizing that the alternative would undermine the purpose of granting a state Parker immunity. Id. at 372.

However, a municipal ordinance will not be accorded Parker immunity unless (1) it constitutes an act of the state itself, acting in a sovereign capacity, or (2) is an implementation of a "clearly articulated and affirmatively expressed state policy." Community Commc'ns Co. v. City of Boulder, 455 U.S. 40, 52 (1982).

In Community Communications Company, the Court found that a state statute authorizing "home rule"¹⁸ powers failed to satisfy the clear articulation prong because there was no express statement of the state's intent to regulate cable television since the state's position was one of neutrality. Id. at 54. The Court stated, "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." Id. at 55. Concluding that the general grant of power to enact ordinances was insufficient, the Court declined to find that the city had Parker

¹⁸ Entitled the "Home Rule Amendment," the statute vested the municipality with "every power theretofore possessed by the legislature . . . in local and municipal affairs." Id. at 52.

immunity. Id. at 56.

The City maintains that it is specifically authorized to regulate sexually-oriented businesses pursuant to Chapter 243 of the Texas Local Government Code, and that authorization satisfies the first element of Omni. See id. at 370. However, authorization to regulate by the state is only half of the inquiry, as explained in Community Communications Company, the City ordinance must also conform to clearly articulated state policies.

Here, Chapter 243 of the Texas Local Government Code merely grants the City authority to regulate sexually-oriented businesses within its geographical boundaries.¹⁹ Tex. Loc. Gov't Code § 243.001. Like the state statute in Community Communications Company, the Texas Local Government Code is neutral on how a municipality might regulate sexually oriented businesses.²⁰ The City's ordinances provide significant detail about where a sexually oriented business could operate, what signage was allowed and what kind of activity could take place inside such a business.

¹⁹ Section 243.001(a) provides:

The legislature finds that the unrestricted operation of certain sexually oriented businesses may be detrimental to the public health, safety, and welfare by contributing to the decline of residential and business neighborhoods and the growth of criminal activity. The purpose of this chapter is to provide local governments a means of remedying this problem.

²⁰ Section 243.003(a) states, "A municipality by ordinance or a county by order of the commissioners court may adopt regulations regarding sexually oriented businesses as the municipality or county considers necessary to promote the public health, safety, or welfare.

However, the court need not decide whether the first prong of the Omni test is satisfied because Plaintiff is not complaining about the City's Ordinance; it is complaining about a settlement agreement with the Clubs. There is no suggestion by the City that the settlement agreement reflects a clearly expressed *state* policy that entitles it to antitrust immunity because the state statute only authorized the enactment of ordinances regulating sexually oriented businesses. The state statute did not purport to authorize the City to exempt certain favored parties from the any ordinance's enforcement. In the court's view, the City cannot satisfy the first prong of the Omni test.

Beyond authority to regulate, Parker immunity also requires a finding that the state's authority to suppress competition is a foreseeable result of what the statute authorizes. Omni, 499 U.S. at 372-73.

In F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. ___, 133 S. Ct. 1003 (2013), a state law granted to municipalities the ability to operate health care facilities for its indigent citizens and allowed municipal hospital authorities the ability to acquire hospitals in furtherance of that goal. Id. at 1007. In furtherance of that authorization, the Phoebe Putney Health System sought to purchase the only other hospital in the county from its for-profit owner. Id. at 1008. Because the purchase would give the hospital district an eighty-six percent market share for acute

care in a six-county region, the Federal Trade Commission objected. Id.

The district and appellate courts determined that the transaction was immune from antitrust scrutiny because the hospital authority was authorized by state law to purchase the hospital and it was foreseeable that such purchase might substantially lessen competition. Id. at 1009. The Supreme Court reversed, concluding that the state law did not clearly articulate and affirmatively express a state policy to displace competition in the market for hospital services. Id. at 1010. The Court stated, "Our case law makes clear that state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively." Id. at 1012. Thus, while the hospital authority was granted the authority to acquire hospitals, the law did not "clearly articulate and affirmatively express a state policy empowering the [hospital] Authority to make acquisitions of existing hospitals that would substantially lessen competition." Id.

The City argues that its regulatory ordinances are comparable to those in Omni and therefore any suppression of trade is foreseeable and it is entitled to Parker immunity. However, here, the suppression of trade stems not as the foreseeable result of the implementation of state policy, rather, it flows from the agreement

between the City and the Clubs to exempt the Clubs from several of the Ordinance's prohibitions. The agreement is not an action specifically delegated by the state, does not represent clearly articulated state policy and therefore cannot be a foreseeable result of state policy. The City's agreement is thus analogous to Phoebe Putney, where the Supreme Court rejected the state's Parker immunity claim.

Because immunity under Parker is limited and disfavored, this court will not extend it, absent clear articulation of state policy. See Phoebe Putney Health Sys., 568 U.S. ___, 133 S. Ct. at 1011; Acoustic Sys., Inc. v. Wenger Corp., 207 F.3d 287, 293 (5th Cir. 2000).

3. Sherman Act Claim

The City additionally argues that Plaintiff fails to state a claim under Section 1 of the Sherman Act, as Plaintiff failed to allege that the City engaged in a conspiracy that substantially affected competition in a relevant market.

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. However, the Court has repeatedly found that the Act applies only to unreasonable restraints on trade, not to all contracts. Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007); State Oil Co v. Khan, 522 U.S. 3, 10 (1997).

Instead, courts use the “rule of reason” to determine if a practice restrains trade in violation of the Sherman Act. Leegin Creative, 551 U.S. at 885. Using this test, the court weighs “whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

Alternatively, if a restraint is unlawful per se, a plaintiff must establish only that the conduct occurred and that it fell within a per se category. Leegin Creative, 551 U.S. at 886; Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984). The Supreme Court has recognized that only restraints that exhibit “manifestly anticompetitive effects” and lack any redeeming quality are held to be unlawful per se. PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 415 (5th Cir. 2010). The per se standard is only applicable if courts have consistently found similar behavior invalidated by the rule of reason. Leegin Creative, 551 U.S. at 887.

The Fifth Circuit addressed whether a master service agreement between tobacco manufacturers and several states that required payments into an annual fund based on market share was unlawful per se, and followed other circuit courts by finding that they were not. S&M Brands, Inc. v. Caldwell, 614 F.3d 172, 177 (5th Cir. 2010); XCaliber Int’l. Ltd. LLC v. Atty. Gen. State of La., 612 F.3d 368, 375 (5th Cir. 2010). The Fifth Circuit determined that

instead, the rule of reason test applies to such agreements. S&M Brands, 614 F.3d at 177. Similarly, the court will apply the standard articulated by the rule of reason in this case.

In order to establish that the City's agreement was an unreasonable restraint of trade under the rule of reason, Plaintiffs must establish that: 1) the City engaged in a conspiracy; 2) the conspiracy had the effect of restraining trade; and 3) the trade was restrained in the relevant market. Wampler v. Sw. Bell Tel. Co., 597 F.3d 741, 744 (5th Cir. 2010); Apani Sw., Inc. v. Coca-Cola Enters., 300 F.3d 620, 627 (5th Cir. 2002).

Plaintiff's current pleadings fail to plausibly allege either that the City and the Clubs engaged in a conspiracy to restrict trade or that such a conspiracy had the effect of restraining trade in a relevant market. In Twombly, U.S. at 556-67, the Supreme Court specifically discussed the requirements of pleading a conspiracy within the context of an antitrust action. In that case, the Court found that allegations of parallel conduct and legal conclusions of conspiracy were not enough to state a plausible claim for relief. Id. at 564.

Here, there is no question that the City and the Clubs reached an agreement, but there is nothing in the agreement's language that bears directly on the restraint of Plaintiff's trade. Plaintiff argues the City and the Clubs reached an agreement settling their ongoing litigation as part of a conspiracy to hinder competition,

and that the City created a human trafficking abatement fund in order to put non-litigating clubs out of business. These conclusory statements presume that the City and the Clubs, at some point during years of litigation, conspired to take action against Plaintiff, a non-party to such action. Such a conclusion, without factual support, is not plausible on its face. See id. at 570.

Plaintiff also failed to characterize the agreement in antitrust terms in its complaint. It appears that the gist of Plaintiff's complaint is that the City has a number of vertical agreements between itself and the Clubs whereby in exchange for a monetary payment, the Clubs were permitted to offer a product or service that the City's Ordinance prohibits.

As a general rule, vertical restraints of trade are not per se illegal, unless they include some agreement on price. See Bus. Elec. Corp. v. Sharp Electronics Corp., 485 U.S. 717, 724-25 (1988). To state an antitrust claim involving vertical price agreements, a plaintiff must plausibly define the relevant geographic market. PSKS, Inc., 615 F.3d at 417. In Apani, the Fifth Circuit held that when a plaintiff fails to define its relevant market with respect to interchangeability and demand or alleges a market that clearly does not encompass all substitute products or services, the court may dismiss a plaintiff's claims. Apani, 300 F.3d at 628.

Here, Plaintiff has not defined its relevant geographic market

in its current pleadings. Instead, Plaintiff makes only general statements about the importance of the City of Houston to international trade and interstate commerce. Without a defined market establishing its competitors or a plausible allegation of a conspiracy, Plaintiff has not stated a claim upon which relief can be granted.

Despite the above-recited shortcomings, the court will allow Plaintiff leave to file an amended complaint that attempts to address the outlined deficiencies.

4. Robinson-Patman Act

The City argues that Plaintiff cannot state a claim under the Robinson-Patman Act because the City is neither a “buyer” nor a “seller” in any commercial transaction with the clubs.

The Robinson Patman Act makes it unlawful to discriminate in price “between different purchasers of like grade and quality.” 15 U.S.C. § 13(a). In addition, no person engaged in commerce may pay or receive a “commission, brokerage, or other compensation, or any allowance or discount . . . except for services rendered in connection with the sale or purchase of goods, wares, or merchandise.” 15 U.S.C. § 13(c).

Plaintiff alleges that the City’s agreement violates the Robinson-Patman Act, 15 U.S.C. § 13(c), because the City receives a percentage of the Club’s liquor sales, not for services rendered, but through the Human Trafficking Fund established by the City.

The City argues that it is not a buyer or a seller for the purposes of the Robinson-Patman Act. It maintains that it does not have any commercial agreement with the Clubs whereby it receives any tangible good. Plaintiff responds that the City crosses the buyer/seller line by refraining from enforcing certain ordinances, i.e., by allowing the Clubs to offer topless lap dances and dances within three feet of a customer, in exchange for contributions to the Human Trafficking Fund.

The City is correct that the Robinson-Patman Act applies to "other compensation" related to the purchase of goods, wares, or merchandise. See Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 140 (5th Cir. 1987). Plaintiff has not alleged that the City purchased or sold any goods, wares, or other merchandise from the Clubs, and, under the facts as alleged, Plaintiff cannot make a plausible claim for relief under the Robinson-Patman Act. The court will allow Plaintiff leave to file an amended complaint that attempts to address the complaint's deficiencies.

D. 1983 Claims

In its complaint, Plaintiff alleges that the City's agreement with the Clubs violated its First Amendment rights, and further violated its due process and equal protection rights under the Fourteenth Amendment, in violation of 42 U.S.C. § 1983 ("Section 1983"). Defendant argues that Plaintiff has failed to state claims

for relief under that statute.

To establish a Section 1983 claim against a municipality, a plaintiff must establish (1) a policymaker; (2) an official policy; and (3) a violation of constitutional rights whose moving force is the policy or custom. Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001). The City argues that Plaintiff is unable to prove any of the elements with respect to its Section 1983 claims.

1. Official Policy

The City argues that Plaintiff has not pled a policy because its agreement with the Clubs is neither an official policy nor a custom. The City additionally argues that Plaintiff's allegation that the City Attorney is a policymaker is a legal conclusion without factual support. Finally, the City maintains that while the City Attorney represents the City in all court proceedings and has some discretion to institute legal proceedings, he does not pass ordinances, which are the final expression of City policy.

An official policy is "either a policy statement, ordinance, regulation, etc., that has been officially adopted by a policymaker, or a persistent, widespread practice of officials or employees, which . . . is so common and well settled as to constitute a custom." Cox v. City of Dallas, Tex., 430 F.3d 734 (5th Cir. 2005).

Here, Plaintiff has alleged that the agreement between the City and the Clubs constitutes a policy of the City. In Sanders-

Burns v. City of Plano, 594 F.3d 366, 380-81 (5th Cir. 2010), the Fifth Circuit held that official policy includes decisions made by law-making officers or those to whom law-makers have delegated authority.

Despite the City's arguments, it appears that Plaintiff has sufficiently pled that the City Attorney is a policymaker necessary to state a claim. Here, Plaintiff's claim is not based on the underlying city ordinance, but on the agreement signed by the City Attorney in his official capacity on behalf of the City. The City's Code specifically authorizes the city attorney to "make any settlement or compromise which in their [sic] judgment is in the best interest of the city." Code of Ordinances, City of Hous., Tex. § 2-262(b). Because the City specifically delegated authority to the City Attorney and the City Attorney did in fact exercise that authority by entering into the agreement, Plaintiff has adequately alleged a policymaker for the purpose of its Section 1983 claim.

Alternatively, the City argues that Plaintiff has failed to state a Section 1983 claim under any of its constitutional theories. The court considers the City's arguments in turn.

2. Due Process

In its complaint, Plaintiff alleges that the City's agreement with the Clubs set up a de facto licensing scheme whereby the Clubs agreed to contribute to the Human Trafficking Fund in exchange for

the City's agreement that it would not enforce certain City ordinances governing sexually oriented businesses. When Plaintiff asked for similar treatment, the City refused.

In its motion, the City claims that Plaintiff has not pled a due process violation. The City argues that due process protects only fundamental rights "deeply rooted in this Nation's history and tradition."²¹ It contends that Plaintiff does not have a fundamental right to operate a sexually oriented business, and, thus has not stated a due process claim. Additionally, the City argues that in order to make a claim based on a de facto licensing scheme, a regulating body must exclude an individual from an industry altogether.

The Fourteenth Amendment states, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1. The Due Process Clause entails both procedural and substantive rights. Cnty. of Sacramento v. Lewis, 523 U.S. 833, 840 (1998).

Procedural due process guarantees, at a minimum, notice and an opportunity to be heard in a meaningful time and manner. Gibson v. Tex. Dept. of Ins.-Div. of Workers' Compensation, 700 F.3d 227, 239

²¹ See Doc. 14, Def.'s Mot. to Dismiss, p. 20 (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

(5th Cir. 2012)(quoting Fuentes v. Shevin, 407 U.S. 67, 80 (1972)). The analysis of a procedural due process claim has two steps: (1) whether a liberty or property interest exists with which the State has interfered; and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient. Meza v. Livingston, 607 F.3d 392, 399 (5th Cir. 2010)(quoting Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989), overruled in part on other grounds, Sandin v. Conner, 515 U.S. 472 (1995)), clarified on denial of reh'g, 2010 WL 6511727, at *1 (5th Cir. 2010)(unpublished).

The constitutional guarantee of due process also includes a substantive component that protects individuals from arbitrary or conscience-shocking executive action. See Doe ex rel. Magee v. Covington Cnty. Sch. Dist. ex rel. Keys, 675 F.3d 849, 867 (5th Cir. 2012)(quoting Cnty. of Sacramento, 523 U.S. at 847). However, such protection is limited. When another provision of the U.S. Constitution provides "an explicit textual source of constitutional protection," the plaintiff's claims must be analyzed under that provision rather than the "more generalized notion of substantive due process." Wilson v. Birnberg, 667 F.3d 591, 599 (5th Cir. 2012)(quoting Conn v. Gabbert, 526 U.S. 286, 293 (1999)).

In this case, Plaintiff's amended complaint refers to its due process rights without specifying either the procedural or substantive component or the property right involved. The City

argues that Plaintiff has not pled a due process violation because it has not identified a fundamental right or pled any process it was entitled to receive.

In support of a substantive due process claim, Plaintiff alleges that the agreement has led to arbitrary and capricious law enforcement whereby the City does not enforce the same laws against the Clubs that it enforces against Plaintiff.

In order to state a substantive due process claim, a plaintiff must establish that a defendant's actions "(1) caused an injury; (2) were grossly disproportionate to the need for action under the circumstances; and (3) were so inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience." Hernandez v. U.S., 757 F.3d 249, 278 (5th Cir. 2014).

The Supreme Court has stated that the Due Process Clause was "intended to prevent government officials from abusing their power, or employing it as an instrument of oppression." Cnty. of Sacramento, 523 U.S. at 846. Courts have found that when government behavior shocks the conscience, it violates a plaintiff's substantive due process rights. Doe ex rel. Magee, 675 F.3d at 867 (citing Rochin v. California, 342 U.S. 165, 172 (1952)). The doctrine was created by the Supreme Court following a case where police officers ordered doctors to pump a suspect's stomach to induce vomiting in order to regain two capsules of

morphine. Id. at 166. Courts have found that conduct so brutal and offensive that it did not comport with ideas of fair play and decency can shock the conscience. See Cnty. of Sacramento, 523 U.S. at 847. Because it is such a high standard, “Only the most egregious executive action can be said to be ‘arbitrary’ in the constitutional sense” necessary to shock the conscience. Id. at 834.

Accepting Plaintiff’s pleading as true, the City’s conduct arbitrarily and capriciously enforces the laws differently against similarly situated businesses. Such behavior could be considered arbitrary in the constitutional sense. The court will therefore not recommend dismissal of Plaintiff’s substantive due process claims at this time, but will give Plaintiff leave to amend and clarify its position.

The City argues that Plaintiff has not pled any process that it was entitled to receive but was denied. Plaintiff alleges that it attempted to become party to the agreement between the City and the Clubs, and while the City at one point said it would allow clubs such as Plaintiff to join the agreement, Plaintiff was ultimately unable to join the agreement.²² In support of a liberty or property interest, Plaintiff has pleaded that the City’s agreement with certain clubs constitutes a de facto licensing scheme. Plaintiff argues that it was denied the de facto license

²² See Doc. 11, Pl.’s Am. Compl. p. 7.

and that such denial, without due process, was unlawful. Plaintiff thus argues that it had a liberty interest in a license.

Both Plaintiff and the City rely in part on Phillips v. Vandygriff, 711 F.2d 1217 (5th Cir. 1983), in their interpretations of claims involving a de facto licensing scheme. In that case, the Fifth Circuit found that the difference between formal and de facto licensing was unimportant, and recognized that a “loss of . . . liberty interest through a custom of de facto licensing is a deprivation actionable under the fourteenth amendment.” Id. at 1223. The City argues that the holding in Phillips is limited only to situations where the regulating body or official excludes an individual from an industry. While the Fifth Circuit has rejected several attempts to expand Phillips, it has not stated that it applied only in circumstances where an individual was completely excluded from a profession or industry. See, e.g., Blackburn v. City of Marshall, 42 F.3d 925, 940-41 (5th Cir. 1995)(finding no protected property interest in the unilateral expectation of using the local police radio frequency to receive local government referrals); (San Jacinto Savings & Loan v. Kacal, 928 F.2d 697, 702 (5th Cir. 1991)(police officers’ continued harassment of customers raised a fact issue of a deprivation of a property interest in lost profits and a liberty interest in operating a business)).

Plaintiff has pled that it has a liberty interest in the de facto license from the City and that the City’s refusal to extend

the agreement represented a deprivation of that license. The court cannot say, as a matter of law, that Plaintiff cannot prove any set of facts showing that a liberty interest was violated.

The City does not dispute that Plaintiff was not given a hearing following the decision not to allow Plaintiff to join the agreement. Plaintiff has thus pled the deprivation of a liberty interest without timely and adequate due process.

3. Equal Protection

The City argues that Plaintiff has not pled an equal protection claim, because it has pled only that the underlying ordinance was selectively enforced. In response, Plaintiff alleges that the agreement allows the Clubs to avoid enforcement of city ordinances and that this constitutes a valid equal protection claim. Plaintiff argues that it is not limited to a "class of one" standard because the City's actions have violated the rights of other clubs not included in the agreement.

Plaintiff misunderstands the nature of a "class of one" equal protection claim. In Village of Willowbrook v. Olech, 528 U.S. 562 (2000), the Supreme Court recognized that a plaintiff could maintain an equal protection claim even in the absence of pleading membership in a protected class. Id. at 564. The Court held that a plaintiff states a valid "class of one" equal protection claim when it alleges that it has "been intentionally treated differently from others similarly situated and that there is no rational basis

for the difference in treatment.” Id.; Lindquist v. City of Pasadena, Tex., 669 F.3d 225, 233 (5th Cir. 2012). Here, Plaintiff is a club arguing that the City has selectively enforced its sexually oriented business ordinance; it has not pled that it is a member of a protected class, and thus its equal protection claim must be based on a class of one theory, regardless of how many other clubs were potentially affected by the city’s enforcement policies.

In order to state a claim under the Equal Protection Clause, a plaintiff first must allege “that two or more classifications of similarly situated persons were treated differently” by a state actor. Gallegos-Hernandez v. United States, 688 F.3d 190, 195 (5th Cir. 2012). If successful, the court determines the appropriate level of scrutiny for the classification made. Id. (citing Stefanoff v. Hays Cnty., Tex., 154 F.3d 523, 525 (5th Cir. 1998).

Here, Plaintiff alleges that the agreement created a situation whereby similarly situated clubs are subject to selective enforcement and that the City’s enforcement is motivated by animosity. The City responds that personal animosity is not a constitutionally improper motive.²³ The City also argues that Plaintiff’s allegations, directed at unidentified individuals, does not meet the standard of Twombly.

In order to raise a class of one equal protection claim, a

²³ See Doc. 14, Def.’s Mot. to Dismiss p. 22.

plaintiff “must allege that an illegitimate animus or ill-will motivated [its] intentionally different treatment from others similarly situated and that no rational basis existed for such treatment.” Shipp v. McMahon, 234 F.3d 907, 916 (5th Cir. 2000) overruled on other grounds.

In Beeler v. Rounsavall, 328 F.3d 813, 817-18 (5th Cir. 2003), the circuit court questioned whether personal vindictiveness might be an improper motive without deciding the issue. Id. at 817-18. However, in Shipp v. McMahon, the Fifth Circuit found that a plaintiff could maintain a class of one selective enforcement claim against a police dispatcher where the dispatcher was potentially motivated by vindictiveness, relying on the language of Olech. Shipp, 234 F.3d at 916-17. In Olech, the Supreme Court specifically recognized that a state action motivated by a “spiteful effort to ‘get’ [a plaintiff] for reasons wholly unrelated to any legitimate state objective” was actionable under the class of one theory. Olech, 528 U.S. at 564.

Based on the Supreme Court’s holding in Olech, it appears that Plaintiff has pleaded an improper motive. While several courts have found, after the close of discovery, that a plaintiff has been unable to raise a fact issue of improper motive, at this point Plaintiff need only state a plausible claim upon which relief can be granted.

4. First Amendment

The City argues that Plaintiff has not pleaded a plausible First Amendment claim because the underlying ordinance has been upheld by the Fifth Circuit following a challenge by the Clubs. See N.W. Enter. Inc. v. City of Hous., 352 F.3d 162, 197-98 (5th Cir. 2003).

Plaintiff alleges that the City's agreement violates Plaintiff's constitutional rights because it represents content- and viewpoint-based speech restrictions. Plaintiff argues that the City's agreement limits the "expressive character of a dancers' actions."²⁴ Plaintiff maintains that while the ordinance may be constitutional, the selective enforcement of the ordinance following the agreement creates content-and-viewpoint-based restrictions.

The City is correct that the Fifth Circuit has found that the city's sexually oriented business ordinance was narrowly tailored to serve a substantial government interest. See id. at 197. Following the original enactment of the ordinance, the Clubs challenged it on multiple grounds, and the district court addressed the Clubs' claims that the ordinance interfered with expressive conduct. N.W. Enter. Inc. v. City of Hous., 27 F. Supp. 754, 855-56 (S.D. Tex. 1998) aff'd in part, 352 F.3d at 176-77. The district court found that close proximity in itself was not protected speech and that the ordinance was constitutionally valid.

²⁴ Doc. 15, Pl.'s Resp. to Def.'s Mot. to Dismiss p. 22.

Id. at 856.

The agreement neither changes the language of the ordinance nor represents any new restriction on Plaintiff, making Plaintiff's First Amendment arguments moot.

IV. Conclusion

Based on the foregoing, the court **RECOMMENDS** that the City's motion to dismiss be **GRANTED** with respect to Plaintiff's tortious interference with prospective business with prospective business relations and First Amendment claims, and **DENIED** with respect to Plaintiff's Sherman Act, Robinson-Patman Act, due process and equal protection claims.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have fourteen days from the receipt thereof to file written objections thereto pursuant to Federal Rule of Civil Procedure 72(b) and General Order 2002-13. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk electronically. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

SIGNED in Houston, Texas, this 14th day of July, 2015.



U.S. MAGISTRATE JUDGE