UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	Case No. 2:18-cv-13690 Honorable George Caram Steeh
V.	§	
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

PLAINTIFF/COUNTER-DEFENDANT'S MOTION TO PARTIALLY DISMISS DEFENDANT/COUNTER-PLAINTIFF'S FIRST AMENDED COUNTER-COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Plaintiff/ Counter-Defendant, F.P. DEVELOPMENT, LLC (hereafter, "F.P."), by and through its attorneys, hereby move to dismiss in part the First Amended Counter-Complaint of Defendant/Counter-Plaintiff, CHARTER TOWNSHIP OF CANTON (hereafter "the Township"), ECF No 16.

Canton Code of Ordinances, Art. 5A, (the "Tree Ordinance") makes it a civil and criminal violation to remove any vegetation broadly defined as a tree from your own property without permission from the Township. F.P., which owns property subject to the Tree Ordinance, filed a civil rights lawsuit in this Court seeking

declaratory and injunctive relief on the basis that the Tree Ordinance is unconstitutional.

In response, the Township filed several unrelated state-law counterclaims against F.P., including a claim involving solely state wetlands regulatory issues under Canton Code of Ordinances, Article 2.24 (A) (hereafter the "Wetlands Ordinance"). That claim appears in Count III of the Township's First Amended Counter Claim.

F.P. requests that this Court dismiss the Township's Wetlands Ordinance claim under Fed. R. Civ. P. 12 (b)(1), because it is based wholly on state law, does not share any operative facts with F.P.'s federal claims, and raises complex questions of law and fact that would predominate over F.P.'s federal claims. The Township's Wetlands Ordinance claim is therefore not within this Court's original or supplemental jurisdiction.

In the alternative, F.P. requests that this Court dismiss the Township's Wetlands Ordinance claim under Fed. R. Civ. P. 12 (b)(6), because it fails to allege facts upon which relief can be granted. The Wetlands Ordinance prohibits excavating or moving dirt in certain protected wetlands. Yet, the Township's complaint fails to allege that there are any protected wetlands on the property or that any excavation took place. Moreover, the Township fails to allege that any work that occurred on the property was not routine care or maintenance that is exempt

under the Wetlands Ordinance. The Township's Wetlands Ordinance claim should therefore be dismissed for failure to state a claim.

Each of the above-described defects was present in the Township's Original Counter Complaint. ECF 13. Pursuant to LR 7.1(a), the undersigned counsel brought these defects in the Original Counter Complaint to the attention of the Township's Counsel. In response, the Township's Counsel informed F.P.'s counsel that it would be amending its original counterclaim to deal with such defects and would draft a stipulation to that effect extending F.P.'s deadline to respond. A joint motion to that effect was approved and entered by this Court. ECF 14; ECF 15.

On January 16, 2019, the Township filed its First Amended Counter Complaint. ECF 16. Because the amended counterclaim does not cure the jurisdictional defects F.P. initially pointed out to the Township during the parties' initial conference, this Motion is necessary.

In support of this Motion, F.P. relies on the pleadings on file with the Court, the facts, law, and arguments contained in the accompanying Brief in Support of this Motion, and the exhibits attached thereto.

Respectfully submitted,

Robert Henneke
Texas Bar No. 24046058
rhenneke@texaspolicy.com

Theodore Hadzi-Antich
CA Bar No. 264663
tha@texaspolicy.com
Chance Weldon
Texas Bar No. 24076767
cweldon@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
Center for the American Future
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

Michael J. Pattwell
Michigan Bar No. (P72419)
mpattwell@clarkhill.com
Ronald A. King
Michigan Bar No. (P45088)
rking@clarkhill.com
CLARK HILL PLC
212 E. Cesar Chavez Avenue
Lansing, Michigan 48906
Telephone: (517) 318-3043
Facsimile: (517) 318-3082

Cynthia M. Filipovich
Michigan Bar No. (P53173)
cfilipovich@clarkhill.com
CLARK HILL PLC
500 Woodward Avenue, Suite 3500
Detroit, Michigan 48226
Telephone: (313) 965-8373
Facsimile: (313) 309-6873

Stephon B. Bagne
Michigan Bar No. (P54042)
sbagne@clarkhill.com
CLARK HILL PLC
151 S. Old Woodward Avenue, Suite 200
Birmingham, MI 48009
Telephone: (248) 965-8897

By: */s/Chance Weldon*
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2019, I caused electronic filing of the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all properly registered counsel.

/s/Chance Weldon
CHANCE WELDON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	Case No. 2:18-cv-13690 Honorable George Caram Steeh
V.	§	
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

PLAINTIFF/COUNTER-DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO PARTIALLY DISMISS DEFENDANT/COUNTER-PLAINTIFF'S FIRST AMENDED COUNTER-COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Plaintiff/Counter-Defendant, F.P. DEVELOPMENT, LLC (hereafter, "F.P."), by and through its attorneys, hereby moves to dismiss in part the First Amended Counter-Complaint of Defendant/Counter-Plaintiff, CHARTER TOWNSHIP OF CANTON (hereafter "the Township"), ECF No 16.

CONCISE STATEMENT OF ISSUES PRESENTED

Canton Code of Ordinances, Art. 5A, (the "Tree Ordinance") makes it a civil and criminal violation to remove any vegetation broadly defined as a tree from your own property without permission from the Township. F.P., which owns property subject to the Tree Ordinance, filed a civil rights lawsuit in this Court seeking declaratory and injunctive relief on the basis that the Tree Ordinance is unconstitutional. In response, the Township filed several state-law counterclaims, including a claim involving solely state wetlands regulatory issues under Canton Code of Ordinances, Article 2.24 (A) (hereafter the "Wetlands Ordinance"). That claim raises complex issues of state law that are separate and distinct from the challenged Tree Ordinance. F.P. now files this Partial Motion to Dismiss solely with regard to the Township's counter-claim arising under the Wetlands Ordinance and presents the following issues:

I. Should this Court exercise supplemental jurisdiction over the Township's state-law counterclaim under the Wetlands Ordinance, when that claim does not share a nucleus of operative fact or law with F.P.'s constitutional claims, and raises complex issues of state law that would predominate F.P.'s federal claims?

II. If this Court does exercise supplemental jurisdiction over the Township's state-law counterclaim under Wetlands Ordinance, should that counterclaim be dismissed for failure to allege facts upon which relief could be granted?

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Ashcroft v. Iqbal, 556 U.S. 662 (2009); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966); *Verble v. Morgan Stanley Smith Barney*, LLC, 676 F.App'x 421(6th Cir. 2017); *Salei v. Boardwalk Regency Corp.*, 913 F.Supp. 993 (E.D. Mich. 1996); *Rost v. Heaney*, No. 18-12351, 2018 WL 3753839, at *2 (E.D. Mich. Aug. 8, 2018).

INTRODUCTION

This case involves a constitutional challenge to Canton Code of Ordinances, Art. 5A, (the "Tree Ordinance"). Under the Tree Ordinance, it is illegal for private property owners to remove any vegetation (broadly defined as a "tree") from their property unless the Township deems the removal "necessary" and the owner agrees to replace any removed "tree" with up to three replacement trees of the Township's choosing, or agrees to pay up to $450 for any "tree" removed.

F.P. owns property in the Township that it is prevented from maintaining due to the restrictions in the Tree Ordinance. Accordingly, F.P. filed suit in this Court seeking declaratory and injunctive relief on the grounds that the Tree Ordinance violates its rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

The Township responded by filing a Counter-Complaint alleging that F.P. violated two separate provisions of an unrelated local ordinance, Canton Code of Ordinances, Art. 2.24. In particular, the Township argues that F.P. violated Canton Code of Ordinances, Art. 2.24 (A) (the "Wetlands Ordinance") by allegedly moving dirt in an undisclosed wetland, at an undisclosed time, and on an undisclosed portion of its property. The Township also argues that F.P. violated a separate section of the Canton Code of Ordinances, Art. 2.24 (C), (hereafter, the "Watercourse Ordinance") by cutting trees in a vaguely defined "buffer zone" that the ordinance requires around

watercourses. The instant motion to dismiss seeks dismissal solely of the Township's counterclaim based on the Wetlands Ordinance.[1]

First, this Court lacks supplemental jurisdiction to hear the Township's Wetlands Ordinance claim. A Federal court may only take supplemental jurisdiction over a state law counter-claim if it arises under the "same nucleus of operative facts" as the underlying federal claim. Even if that burden is met, a court should decline jurisdiction if the state law counter-claim raises complex issues of state law, or would predominate over the federal claim in terms of proof or judicial resources.

Here, the Township's claim that F.P. violated the Wetlands Ordinance by moving dirt in a wetland shares no operative law or facts with F.P.'s federal claim that the Tree Ordinance is unconstitutional. The Township can establish the elements of its local wetlands claim completely independently of whether the Tree Ordinance is unconstitutional, and vice-versa. This Court therefore lacks jurisdiction over the Township's counterclaim.

Even if there were some overlap between the parties' state and federal claims, this Court should still decline to exercise its supplemental jurisdiction over the Township's Wetlands Ordinance claim because it raises complex issues of state law

[1] Although F.P. believes that there are similar reasons why the counterclaim made by the Township under its Watercourse Ordinance, Art. 2.24 (C), should also be dismissed, F.P. has decided to take a conservative approach by limiting the instant motion to the Wetlands Ordinance portion of the counterclaim, deferring the Watercourse Ordinance argument to a subsequent phase of this litigation.

and facts that will predominate F.P.'s relatively straightforward constitutional claims. F.P.'s constitutional claims raise purely federal issues of law that rely on the text of the ordinance and largely uncontested facts. These claims will not require extensive discovery, protracted expert fights, or deliberation before a jury. The Township's Wetlands Ordinance claim, by contrast, is based solely on local law, based entirely on contested facts, and will likely require extensive discovery, expert testimony, and extensive deliberation over the meaning of vague terms of state and local law. Exercising supplemental jurisdiction over such a claim would be improper.

Second, even if this Court were to exercise supplemental jurisdiction over the Township's Wetlands Ordinance claim, that claim should be dismissed because the Township fails to plead facts upon which relief could be granted. To establish a violation of the Township's Wetlands Ordinance, Art. 2.24 (A), the Township must show that F.P. moved or excavated dirt in a state-defined wetland and that such movement was not part of routine property maintenance. Yet, nowhere in its complaint does the Township allege that F.P. moved or excavated dirt *anywhere*, much less in a protected wetland. Indeed, the Township fails to even allege that there is a protected wetland on the Property. Likewise, the Township fails to plead that any work that allegedly occurred on the Property was not part of routine property maintenance that is exempt from the ordinance. Accordingly, the Township's

Wetlands Ordinance claim under Art. 2.24 (A) must be dismissed for failure to state a claim.

STATEMENT OF FACTS

A. Laws at issue

Canton Code of Ordinances, Art. 5A.05 (the "Tree Ordinance") requires that private property owners apply for and receive a permit from the Township before removing any "tree" from their own property. "Tree" is broadly defined to include "any woody plant with at least one well defined stem and having a minimum [diameter at breast-height] of three inches." Canton Code of Ordinances, Art. 5A.01.

A tree removal permit will only be granted if the Township concludes that the removal is "necessary"[2] and the owner agrees to either 1) replace any removed tree with up to three trees, or 2) pay a designated amount (currently between $200 and $450 per tree) into the Township's tree fund. Canton Code of Ordinances, Art. 5A.08. Property owners who remove trees from their property without a permit are still required to meet the same replacement or compensation standards that they would have been subject to had they applied for a permit. Additionally, they may be subject to civil and criminal penalties of up to $500 and 90-days imprisonment for each tree removed. Canton Code of Ordinances, Sec. 1-7 (c).

[2] Canton Code of Ordinances, Art. 5A.05 (F).

The Tree Ordinance also requires that property owners place a protective barrier around "landmark/historic" trees before any permitted tree removal can be conducted in the area. Canton Code of Ordinances, Art. 5A.07.

Canton Code of Ordinances, Art. 2.24 (the "Wetlands Ordinance") prohibits three different classes of activities, one of which is relevant to this motion. In particular, Art. 2.24 (A) prohibits "earth movement, excavation, land balancing or earth disruption of any kind …within 25 feet of any wetlands [as defined by the Goemaere-Anderson Wetlands Protection Act (MCA 18.595(51) et seq., MCLA 281.701 et seq.)]." "[N]ormal lawn care, landscaping, and maintenance…" are exempt from this prohibition. *Id*.

B. Background

F.P. is the owner of a parcel of undeveloped industrial property in Canton Township, Michigan (the "Property"). Affidavit of Frank Powelson ¶ 3, (attached as Ex. 1.) In 2018, F.P. began removing targeted, unwanted vegetation from the Property as part of a larger plan to maintain the Property. *Id.* at ¶¶ 12-14. This work did not include earth moving or excavation in or around any watercourse or wetland. *Id.* at ¶ 16.

On September 13, 2018, the Township issued F.P. a Stop Work Order and Notice of Violation alleging that the removal of vegetation on F.P.'s property was violation of the Tree Ordinance. *See*, S.W.O and N.O.V (attached as Ex. 2.). Neither

the Stop Work Order, nor the Notice of Violation alleged that F.P. had violated the Wetlands Ordinance, or moved or excavated dirt in a watercourse or wetland. The Township contended only that F.P. had violated the Tree Ordinance by removing trees from the Property. *Id.*

On November 26, 2018, F.P. filed a federal civil rights lawsuit in this Court alleging that both on its face and as applied, the Tree Ordinance violates the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and seeking to enjoin its enforcement. *See*, Plaintiff's Complaint [ECF No. 1].

The Township responded with counterclaims seeking declaratory, injunctive, and monetary relief for removing trees in violation of the Tree Ordinance, failure to erect protective barriers around "landmark" trees in violation of the Tree Ordinance and a separate counterclaim seeking damages for moving dirt in violation of Wetlands Ordinance. *See*, Counter-Complaint [ECF No 13].

On January 3, 2019, F.P. notified the Township that portions of Count III of the Township's complaint were defective for the reasons explained in this motion. The Township agreed to amend its complaint.

On January 16, 2019 the Township filed its First Amended Counter Complaint (ECF No. 16) alleging the same causes of action as its initial complaint. Because the Township's amended complaint suffers the same defects as the original, F.P. now moves to dismiss the portions of Count III of the Township's First Amended

Counter Complaint arising under Wetlands Ordinance, Art. 2.24 (A), pursuant to Sections 12 (b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

ARGUMENT

I. STANDARD OF REVIEW

A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). *Cartwright v. Garner*, 751 F.3d 752, 759–60 (6th Cir. 2014) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of the Rule 12(b)(1) analysis. *Ritchie*, 15 F.3d at 598. A factual attack challenges the factual existence of subject matter jurisdiction. In the case of a factual attack, a court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings, and has the power to weigh the evidence and determine the effect of that evidence on the court's authority to hear the case. *Id.* Plaintiff, or in this case, the Counter-Plaintiff, bears the burden of establishing that subject matter jurisdiction exists. *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004).

To survive a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2). While the Court must construe the complaint in the light most favorable to the party whose complaint is being challenged and draw all reasonable inferences in their favor, (*Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 835 (6thCir. 2012)), the complaint must, at a minimum, plead factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mere conclusory recitations of law or "bare assertions of legal conclusions" are not enough to state a claim for relief. *Gen. Cable Corp. v. Highlander*, 447 F.Supp.2d 879, 884 (S.D. Ohio 2006); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("A plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions."). The complaint must plead facts which, taken as true, would "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. "[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir.1988).

II. THIS COURT SHOULD DECLINE SUPPLEMENTAL JURISDICTION OVER THE TOWNSHIP'S WETLANDS ORDINANCE CLAIM BECAUSE IT IS AN UNRELATED STATE-LAW CLAIM

Federal courts "are courts of limited jurisdiction marked out by Congress." *Stallworth v. City of Cleveland*, 893 F.2d 830, 837 (6th Cir. 1990). As a general rule, federal courts may only hear claims arising under federal law or where there is diversity of citizenship. *See*, 28 U.S.C. 1331-32. As a result, in most circumstances, "a district court has no business deciding issues of state law." *See, Hagans v. Lavine*, 415 U.S. 528, 552 (1974).

The Township nonetheless asks this Court to exercise jurisdiction over a counterclaim arising solely under its local Wetlands Ordinance. There is no basis for such jurisdiction.

Under 28 U.S.C. § 1367(a), a federal court may exercise supplemental jurisdiction over state law counter-claims, only if those claims "form part of the same case or controversy" as the underlying federal claims. *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165 (1997) (quoting 28 U.S.C. § 1367(a)). Claims will only form part of the same case or controversy when they "derive from a common nucleus of operative fact" such that "the relationship between the federal claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case." *Id.* Even when this standard is met, a court should decline

to exercise jurisdiction over a state law claim if "the claim raises a novel or complex issue of State law," or would "substantially predominate over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c).

As explained below, the Township's counterclaim under the Wetlands Ordinance, Art. 2.24 (A), does not arise under the same nucleus of facts as F.P.'s federal claims, and even it did, the Township's claim raises complex issues of state law that would "substantially predominate" over F.P.'s federal claims. Accordingly, the Townships' Wetlands Ordinance claim should be dismissed.

A. The Township's claim that F.P. illegally excavated dirt in a state wetland does not arise under the same nucleus of facts as F.P.'s federal constitutional challenge to the Tree Ordinance

In order for this Court to exercise supplemental jurisdiction over the Township's counterclaim, the Township must establish that the claim arises out of the same "nucleus of operative facts" as F.P.'s federal claims. In the Sixth Circuit, that burden is not met unless the state and federal claims "revolve around a central fact pattern." *Ammons v. Ally Fin., Inc.*, 305 F.Supp.3d 818, 820–21 (M.D. Tenn. 2018) (citing, *Blakely v. United States*, 276 F.3d 853, 861 (6th Cir. 2002)).

In deciding whether state and federal claims "revolve around a central fact pattern" courts look at the elements of the various claims to determine if they require the adjudication of the same law and facts. *See Salei v. Boardwalk Regency Corp.*, 913 F.Supp. 993, 999 (E.D. Mich. 1996). If the state law claim depends on different

law or facts than the federal claims—that is, if the state law claim could be resolved without reference to the federal claim—jurisdiction should be denied. *Id.; see also,* White *v. Cty. of Newberry, S.C.*, 985 F.2d 168, 171 (4th Cir. 1993) ("supplemental jurisdiction does not encompass claims when one count is separately maintainable and determinable without any reference to the facts alleged or contentions stated in or with regard to the other count.")

In *Salei*, 913 F.Supp. at 999, for example, this Court heard a case involving a corporation's allegedly illegal debt-collection activities against the plaintiff. *Id.* The plaintiff challenged the corporation's debt collection efforts against him under both state and federal law. *Id.* While plaintiff's state and federal claims arose from the same events, the elements of each claim relied on different facts. *Id.* Accordingly, supplemental jurisdiction was improper. This Court's reasoning in that case is worth quoting at length:

> the facts that are relevant to the resolution of Plaintiff's [federal] claim are completely separate and distinct from the facts that bear upon Plaintiff's state claims. The success of Plaintiff's [federal] claim depends not at all on whether Defendant breached a settlement agreement … Rather, irrespective of whether the settlement agreement was breached, Plaintiff will prevail in his federal claim only if he can prove his allegation that Defendant obtained a credit report for an impermissible purpose…. Quite simply, then, two distinct sets of "operative facts" surround Plaintiff's state and federal claims.

Id.

Similarly, here, F.P. will prevail on its federal claims only if it can establish that the Tree Ordinance is unconstitutional. Those claims exist independently of whether any excavation occurred in any alleged wetland. The Township will prevail on its state law claim, by contrast, only if it can show that F.P. excavated dirt in a wetland. The Township's claim exists wholly independently of whether or not the Tree Ordinance is constitutional. Quite simply, then, two distinct sets of "operative facts" surround the state and federal claims and jurisdiction is improper.

B. The Township's state law counterclaim will predominate F.P.'s federal constitutional claims, because the Township's claim is based on complex and fact-intensive questions of state law that will require extensive discovery and judicial resources

Even when a court could exercise supplemental jurisdiction, "if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726–27 (1966).

In general, "the question of whether state law predominates ... must be answered by looking to the nature of the claims as set forth in the pleading and by determining whether the state law claims are more complex or require more judicial resources to adjudicate." *Diven v. Amalgamated Transit Union Int'l & Local 689,* 38 F.3d 598, 602 (D.C.Cir.1994). If the "state law claims may substantially expand

the scope of this case beyond that necessary and relevant to Plaintiff's [federal] claim…the state law claims substantially predominate" and should be dismissed. *Gaines v. Blue Cross Blue Shield of Michigan*, 261 F.Supp.2d 900, 906 (E.D. Mich. 2003).

A recent decision from this Court is instructive. In *Rost v. Heaney*, No. 18-12351, 2018 WL 3753839, at *2 (E.D. Mich. Aug. 8, 2018), this Court refused supplemental jurisdiction over state law assault, battery, and false imprisonment claims arising from a violent arrest that gave rise to 42 U.S.C. 1983 civil rights claim. In refusing supplemental jurisdiction this Court noted that the same exact actions gave rise to both the federal and state law claims. *Id.* Nonetheless, this Court declined jurisdiction, because the state law claims "would require presentation of evidence inapplicable to the federal law claims, involve disparate legal theories on both the claims and defenses, and significantly expand … jury instruction." These factors convinced the Court that the state law claims would "predominate over the federal matters over which the court ha[d] original jurisdiction." *Id.*

Similarly, the introduction of the Township's Wetlands Ordinance claim will greatly expand the scope of law and facts at issue in this case. For example, this Court will have to decide:

1) the definition of "wetlands" under state or local law;

2) whether any "wetlands" exist on the Property;

3) the definition of "excavation" under state or local law;

4) whether any "excavation" occurred in any "wetland" on the Property;

5) the definition of "normal lawn care, landscaping, and maintenance" under state or local law;

6) whether F.P.'s alleged activities constituted "normal lawn care, landscaping, and maintenance."

Resolution of these questions will likely require discovery, expert testimony, and fact witnesses—that will easily predominate F.P.'s straightforward constitutional claims. *See, Cruz v. Don Pancho Mkt., LLC*, 167 F.Supp.3d 902, 907 (W.D. Mich. 2016) (declining jurisdiction over state law counterclaims for "breach of contract, fraud, and conversion" when plaintiff plead "straightforward" federal claim.) This Court should therefore decline jurisdiction over the Township's Wetlands Ordinance claim.

III. THIS COURT SHOULD DISMISS THE TOWNSHIP'S WETLANDS ORDINANCE CLAIM FOR FAILURE TO STATE A CLAIM

Even if this Court could exercise supplemental jurisdiction over the Township's Wetlands Ordinance claim, the Township's claim should nonetheless be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a claim, a counter-complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. At a minimum, that

requires the pleading of facts establishing each element claimed offense. "[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist" and the case should be dismissed. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir.1988).

The Township's Amended Counter-Complaint alleges that F.P. violated the Wetlands Ordinance, but pleads none of the necessary facts to establish any element of that claim, and therefore should be dismissed. To establish a violation of the Wetlands Ordinance, the Township must show: 1) the existence of a wetland, "as defined by Goemaere-Anderson Wetlands Protection Act"; 2) that F.P. engaged in "earth movement, excavation, land balancing or earth disruption" within 25 feet of said wetland; and 3) that said activities were not part of "normal lawn care, landscaping, and maintenance…" Canton Code of Ordinances, Art. 2.24 (A).

The Township's Counter-Complaint pleads none of these facts. While the Counter-Complaint mentions that there is a "drain" on the Property, (Township's First Amended Counter-Complaint, ¶ 9), it does not plead, even in a conclusory fashion, that said drain is a wetland "as defined by Goemaere-Anderson Wetlands Protection Act." Nor does the Counter-Complaint make any allegation that movement of dirt or excavation occurred in said drain or any other alleged wetland on the Property. In fact, the Township's Counter-Complaint indicates that the only activities alleged to have occurred on the property—tree cutting—occurred on the

opposite side of the property from the drain. *See*, Township's First Amended Counter-Complaint, ¶ 22. Nor does the Counter-Complaint allege that any movement of dirt that may have occurred was not "normal lawn care, landscaping, and maintenance."

The Township simply declares, *ipse dixit*, that F.P. violated the Wetlands Ordinance by cutting trees. First Amended Counter-Complaint ¶ 65.[3] Bare "assertions of legal conclusions" are not enough to state a claim for relief. *Twombly*, 550 U.S. at 555.

The Sixth Circuit Court of Appeals' recent decision in *Verble v. Morgan Stanley Smith Barney, LLC*, 676 F.App'x 421, (6th Cir. 2017), is instructive. In that case, the court dismissed a plaintiff's claim brought under 15 U.S.C. § 78u–6 that he had been terminated from his job as retaliation for cooperating with a Federal investigation against his employer. *Id.* at 427. The complaint contained blanket allegations that the plaintiff had been fired in retaliation for cooperation with federal law enforcement, but was "entirely devoid of any factual material describing his work with any law-enforcement agency, including the FBI or SEC." *Id.*

[3] The Township does allege that F.P. cut trees near the drain (¶¶ 67-69)—a fact that F.P. denies. But the Township does not explain how this alleged activity constitutes excavation or is otherwise a violation of the Wetlands ordinance, which does not mention, much less prohibit, cutting trees.

Accordingly, the complaint did "not allege enough facts to state a claim to relief that is plausible on its face" and had to be dismissed. *Id.*

Here, the Township's complaint contains less information than the complaint dismissed in *Verble.* Not only has the Township failed to adequately describe the activities giving rise its claim, it has failed to even allege that such activities (excavation) occurred. Accordingly, the Township has failed to "allege enough facts to state a claim to relief that is plausible on its face" and should be dismissed.

CONCLUSION & PRAYER

For the foregoing reasons, F.P. respectfully requests that this Court enter an order dismissing the Township's Wetlands Ordinance claims found in Count III of the Township's First Amended Counter Complaint.

Respectfully submitted,

Robert Henneke
Texas Bar No. 24046058
rhenneke@texaspolicy.com
Theodore Hadzi-Antich
CA Bar No. 264663
tha@texaspolicy.com
Chance Weldon
Texas Bar No. 24076767
cweldon@texaspolicy.com
TEXAS PUBLIC POLICY FOUNDATION
Center for the American Future
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

Michael J. Pattwell
Michigan Bar No. (P72419)
mpattwell@clarkhill.com
Ronald A. King
Michigan Bar No. (P45088)
rking@clarkhill.com
CLARK HILL PLC
212 E. Cesar Chavez Avenue
Lansing, Michigan 48906
Telephone: (517) 318-3043
Facsimile: (517) 318-3082

Cynthia M. Filipovich
Michigan Bar No. (P53173)
cfilipovich@clarkhill.com
CLARK HILL PLC
500 Woodward Avenue, Suite 3500
Detroit, Michigan 48226
Telephone: (313) 965-8373
Facsimile: (313) 309-6873

Stephon B. Bagne
Michigan Bar No. (P54042)
sbagne@clarkhill.com
CLARK HILL PLC
151 S. Old Woodward Avenue, Suite 200
Birmingham, MI 48009
Telephone: (248) 965-8897

By: _____*/s/Chance Weldon*_____
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2019, I caused electronic filing of the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all properly registered counsel.

/s/Chance Weldon
CHANCE WELDON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	Case No. 2:18-cv-13690 Honorable George Caram Steeh
V.	§	
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

INDEX OF EXHIBITS

Exhibit	**Description**
1	Declaration of Frank Powelson
2	Stop Work Order and Notice of Violation

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	
V.	§	Civil Case No. 2:18-cv-13690
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

DECLARATION OF FRANK POWELSON IN SUPPORT OF PLAINTIFF/COUNTER-DEFENDANT'S MOTION TO PARTIALLY DISMISS DEFENDANT/COUNTER-PLAINTIFF'S COUNTER-COMPLAINT

I, Martin Frank Powelson, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am the representative of F.P. Development, LLC (hereafter, "F.P."). I am authorized to sign this declaration on its behalf.

3. F.P. owns an approximately 24-acre parcel of property (hereafter "the Property") located west of Sheldon Road and South of Michigan Avenue in Canton Township, Michigan.

4. The Property has become the basis of the above styled lawsuit.

5. I have been advised that the Property does not contain any state regulated wetlands.

6. The Property is traversed by a drain (hereafter, "the Drain.") that is supposed to be maintained by Wayne County.

7. Over the years, the Drain fell into a state of neglect and became obstructed by fallen trees, vegetation and other debris.

8. These obstructions impeded the flow in the Drain, causing flooding on the Property and neighboring properties.

9. The flooding mentioned in paragraph 8 made the Property more difficult to use, increased mosquitos, and damaged or caused the death of trees on the Property.

10. On behalf of F.P., I contacted the permit department of Wayne County by telephone to see if the County would be willing to remove the fallen trees from the Drain.

11. The individual I spoke with said that the County would not remove the fallen trees from the Drain, but that F.P. could remove the trees without a permit if it chose.

12. Sometime in the Spring of 2018, F.P. hired Fodor Timber to remove the fallen trees from the Drain.

13. In order to make a path by which to reach the Drain, Fodor Timber was required to remove other trees and vegetation from the Property.

14. Before Fodor Timber could complete the project on the Property, Canton Township issued F.P. a stop work order preventing the removal of any additional trees from the Property.

15. F.P. immediately ordered Fodor Timber to stop work on the project and Fodor Timber complied.

16. To my knowledge, at no time did F.P. or Fodor Timber engage in any earth movement, excavation, land balancing or earth disruption of any kind within

25 feet of any wetlands on the property or within 25 feet of the Drain or any other watercourse.

17. To my knowledge, at no time did F.P or Fodor Timber cut down any tree within the Drain or any other wetland or watercourse on the property.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, to the best of my knowledge, and that this declaration was executed on January 7, 2019, in WAYNE, Michigan.

Martin F Powelson

Martin Frank Powelson

EXHIBIT 2

CANTON
Community

GENERAL OFFICES

1150 Canton Center S.
Canton, MI 48188-1699
734/394-5100
734/394-5128 FAX

Pat Williams
Supervisor
394-5185
394-5234 FAX

Michael Siegrist
Clerk
394-5120
394-5128 FAX

Dian Slavens
Treasurer
394-5130
394-5139 FAX

John Anthony
Sommer N. Foster
Anne Marie Graham-Hudak
Steven Sneideman
Trustees

September 13, 2018

Via electronic mail to mpattwell@clarkhill.com and regular U.S. Mail

Michael Pattwell, Esq.
Clark Hill PLC
212 Cesar Chavez Avenue
Lansing, Michigan 48906

Re: Your client F. P. Development, LLC; Frank Powelson

Dear Mr. Pattwell:

Attached you will find a Notice of Violation for property owned by your client, F. P. Development, LLC, for which Frank Powelson is the resident agent. As we have discussed, Mr. Powelson and/or individuals acting at his direction were seen removing trees from the property without a permit in violation of the Zoning Ordinance. As I advised you yesterday, the Township needs access to your client's property to count the tree stumps to determine the number and types of trees removed. In order the ensure that no further violations are committed by your client, and that existing conditions remain untouched so an analysis of the prior violation can be performed, the property will be posted with a "STOP WORK" order today. Any further tree removal, or any change in the condition of the property as it exists today will constitute an independent ordinance violation. Feel free to contact me, should you have any questions.

Canton Township is requesting dates that staff could access Mr. Powelson's property to conduct a tree count. Kindly provide available dates at your earliest convenience.

Thank you for your attention to these matters.

Kristin B. Kolb

Kristin Bricker Kolb
Corporation Counsel
Charter Township of Canton

Cc: Pat Williams, Supervisor
Tim Faas, Municipal Services Director
Leigh Thurston, Landscape Architect

Enc.\

CHARTER TOWNSHIP OF CANTON

DEPARTMENT OF BUILDING & INSPECTION SERVICES
1150 S. Canton Center Road, Canton, MI 48188

NOTICE OF VIOLATION

CASE NO. CE20180000046
NAME F.P. Development, LLC (Frank Powelson, Resident Agent)
ADDRESS 4850 Sheldon S
Canton, MI 48188
D.L.N.
D.O.B. PHONE

This officer has investigated a complaint at the stated address as required by LAW and has found the following ordinance violation(s):
Article and Section: 5A.05
Zoning Ordinance Article 5A, Section 5A.05, TREE REMOVAL PERMIT. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.
Comments:
On 4/27/18 it was observed that a significant area of the south end of the POCO woods was being cleared that day in the vicinity of the Fisher & Leng/McKinstry Drain. The tree removal was in violation of Zoning Ordinance Article 5A. Forest Preservation and Tree Clearing, Section 5A.05.A.1 Tree Removal Permit: 1. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited; and, 2. The removal or relocation of any landmark tree without first obtaining a tree removal permit shall be prohibited; and 3. The removal, damage or destruction of any tree located within the dripline of a forest without first obtaining a tree removal permit is prohibited; and 4. Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit is prohibited.

Brief inspection of the site on 8/22/18 and evaluation of remaining numbered existing trees, logs, and tree stumps indicate the high quality trees in the woods were being logged and other regulated trees were being cut and/or removed.

Further investigation of the woods is required to determine the probable numbers and species of trees removed and quantity of regulated trees needing replacement.

ADDRESS OF CONCERN:
4850 SHELDON S, Canton, MI 48188
A response to this violation shall be received within 14 day(s). Failure to comply will result in further legal action.

Leigh Thurston

THURSTON, LEIGH — 09/13/18
Officer — **Date**

For further information, call (734) 394-5170 between 8:30 a.m. and 4:30 p.m.

WARNING: Damage or injury resulting from delay or failure to comply with this notice will be attributed to negligence on the part of the responsible party or parties.