IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SHEBA ETHIOPIAN RESTAURANT, INC., Plaintiff, v. DEKALB COUNTY, GEORGIA, et al., Defendants.	CIVIL ACTION NO. 1:17-cv-04400-WMR

ORDER

This matter is before the Court on Defendants' Motion to Strike and Motion to Dismiss Amended Complaint. [Doc. 82]. For the reasons set forth below, Defendants' Motion to Strike is GRANTED in part and DENIED in part, and Defendants' Motion to Dismiss is GRANTED in part as to Defendants David Adams and Zachary Williams and DENIED in part as to the remaining Defendants.

I. LEGAL STANDARDS

Motion to Strike. A court may "strike from a pleading … any redundant immaterial, impertinent, or scandalous matter" that "may confuse the issues, or otherwise prejudice a party." *Knous v. United States*, 981 F. Supp. 2d 1365, 1366

(N.D. Ga. 2013); Fed. R. Civ. P. 12(f). Further, a court should strike allegations from a complaint if preclusion principles bar the plaintiff from relitigating the factual or legal issues set forth in those allegations. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994) (striking factual allegations because res judicata barred plaintiff from relitigating issues).

Motion to Dismiss. A court should grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) if the complaint fails to state a claim upon which relief may be granted. When a motion to dismiss is brought pursuant to Rule 12(b)(6), the complaint's factual allegations are assumed true and construed in the light most favorable to the plaintiff. *See Hardy v. Regions Mortg., Inc.*, 449 F.3d 1357, 1359 (11th Cir. 2006); *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1156 (11th Cir. 2006). "However, conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (citations omitted). The Federal Rules of Civil Procedure include no requirement that a plaintiff detail the facts upon which the plaintiff bases a claim. Rather, for a complaint to properly state a claim, it 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 a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted); *accord Financial Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282-83 (11th Cir. 2007) (recognizing that "while notice pleading may not require that the pleader allege a specific fact to cover every element or allege with precision each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory") (citations and internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level," i.e., they must do more than merely create a "'suspicion [of] a legally cognizable right of action,' on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted) (emphasis omitted).

A plaintiff's complaint is required to contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. In addition, the allegations supporting a claim are to be made in separate paragraphs "each limited as far as practicable to a single set of circumstance." Fed. R. Civ. P. 10(b). The court's focus is whether the challenged

pleadings "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations and internal quotation marks omitted); *accord T.D.S. Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1544 n.14 (11th Cir. 1985) ("The purpose of these rules is self-evident, to require the pleader to present his claims discretely and succinctly, so that, his adversary can discern what he is claiming and frame a responsive pleading, [and] the court can determine which facts support which claims and whether the plaintiff has stated any claims upon which relief can be granted . . . .") (Tjoflat, J., dissenting).

II. BACKGROUND

Factual Allegations

In 1998, Plaintiff Sheba Ethiopian Restaurant, Inc., d/b/a Queen of Sheba Ethiopian Restaurant ("Sheba"), obtained a Certificate of Occupancy ("CO") and opened for business in DeKalb County as an eating establishment that provided dining, alcoholic beverage service, musical entertainment, and customer dancing. [Doc. 80 at 2 ¶ 3, 13 ¶ 33, 15, ¶ 40]. Before it opened for business, Sheba had obtained the requisite licenses and permits from Defendant DeKalb County to provide each of these services. [*Id.* at 13 ¶ 33]. Pursuant to its alcohol license, "Sheba served alcohol until 3:55 a.m. Monday through Friday, and until 2:55 a.m. on Saturday and Sunday[.]" [*Id.* at 13 ¶ 35].

In 2008, the County amended its zoning code to reclassify certain establishments as "nightclubs" or "late-night establishments" ("LNE") and to limit the operation of those establishments. [Doc. 80 at 8 ¶ 24]. The 2008 ordinance specifically required that LNEs and nightclubs "located at or within 1,500 feet of any land zoned for residential use" obtain a Special Land Use Permit ("SLUP") from the Board of Commissioners. [*Id.* at 8-12 ¶¶ 24-27]. The County defined a LNE as "[a]ny establishment licensed to dispense alcoholic beverages for consumption on the premises where such establishment is open for use by patrons beyond 12:30 a.m." [*Id.* at 14-15 ¶ 38], and it defined a "nightclub" as "[a] commercial establishment dispensing alcoholic beverages for consumption on the premises and in which dancing and musical entertainment is allowed, where music may be live, disc-jockey, karaoke, and/or non-acoustic." [*Id.* at 15 ¶ 39]. Although Sheba fell within both definitions [*id*. at 14-15 ¶¶ 38-39], the 2008 ordinance also contained a "grandfather" provision: "No late-night establishment or nightclub currently operating under a valid license issued prior to the effective date set forth in this section shall be required to secure a special land use permit from the board of commissioners in order to continue operation." [*Id.* at 10-11 ¶ 26(e), 12 ¶ 27]. Under this grandfather provision, existing businesses like Sheba were permitted to operate as "legal nonconforming late-night establishment[s] or nightclub[s]" instead of obtaining a SLUP. [*Id.* at 14 ¶ 37, 15 ¶ 41]. Sheba continued to renew its alcohol

license and Occupational Tax Certificate ("OTC" or "business license") annually, operating as a legal non-conforming LNE for several years. [*Id.* at 16-17, ¶¶ 47-48].

Sheba is a closely-held corporation, owned and operated by its shareholder, Solomon Abebe, who is black and from Ethiopia. [Doc. 80 at 2 ¶ 3]. Sheba's late-night customers have been predominantly Ethiopian and other Eastern-African nationals, with most of the remainder being African-American. [*Id*. at 16 ¶ 45, 30 ¶ 93]. Sheba is located in District 2 of DeKalb County. [Doc. 80 at 14 ¶ 34]. It is alleged that, of all the districts located in DeKalb County, District 2 has the largest percentage of white residents. [*Id*. at 13 ¶ 32].

In late 2015, a private citizen and DeKalb County resident, Martha Gross, began publicly expressing her opposition to the continued operation of "6 Hookah bars, and 5 Ethiopian restaurants" which operate with late-night alcohol service at or near at the intersection of Briarcliff and Clairmont Road in District 2 of DeKalb County. [Doc. 80 at 18 ¶¶ 51-52, 19 ¶ 54]. In an exchange over the social media app, Nextdoor, Gross indicated that Defendant Kathie Gannon, a County Commissioner, was "trying to determine if there is anything we can LEGALLY do to rid this intersection of these noxious uses." [*Id.* at 19 ¶ 55].

At some point in or before 2016, the County "informally assembled a group of persons to operate as the 'Late Night Task Force.'" [Doc. 80 at 12-13 ¶ 30]. The apparent purpose of this task force was to randomly select and order existing

restaurants to complete a "Letter of Entertainment" ("LOE"). [*Id.*] In December of 2016, Sheba was required to submit an LOE along with its annual business license renewal application for 2017. [*Id.* at 16-17 ¶¶ 47-48]. Sheba had never before been asked to submit any LOE. [*Id.*] On the form, Sheba indicated that it was an LNE, but not a nightclub. The County approved Sheba's LOE, indicating "grandfathering renewed for LNE." [Doc. 80 at 17-18 ¶ 50; *see also* Doc. 26-2 at 122].

Over the next few months, representatives of the County's Fire Marshal's Office and the Code Enforcement Division conducted several code compliance inspections of Sheba. [Doc. 80 at 19-21 ¶¶ 56-60]. During one inspection, Defendant John Jewett, an inspector for the Fire Marshal's office, told Sheba's manager that he was there to find a way to shut Sheba down. [*Id.* at 20 ¶ 57]. The Fire Marshal's office cited Sheba for a number of code violations, including overcrowding by exceeding purported occupancy limits, use of sparklers and open flames, failure to comply with orders given, failure to obtain a permit for construction, and operating outside the purposes that Sheba had specified in its LOE. [*Id.* at 20-21 ¶ 60]. Sheba alleges that these violations were "petty infractions," that "[n]one of the alleged violations were a matter of life safety," and that all of the legitimate accusations were immediately corrected." [*Id.* at 19-20 ¶ 57, 21 ¶ 60].

On March 25, 2017, Defendant Joseph Cox, the Fire Marshal, issued a "Notice of Fire Hazard" and directed Sheba to cease operations until it received approval to

reopen from the Fire Marshal or the Planning and Sustainability Department. [Doc. 80 at 21 ¶ 61]. According to Plaintiff, "[e]very fire hazard issue identified by the County was promptly corrected by Sheba. For example, a sprinkler plan was submitted and approved by the County on March 9, yet the County refused to issue the permit." [*Id*. at 21, ¶ 63].

Then, on April 21, 2017, Defendant Andrew Baker, the Director of DeKalb County's Planning & Sustainability Department, advised Sheba by letter that the County was revoking its CO and terminating its legal nonconforming use status under the zoning code. [Doc. 80 at 23-24 ¶ 69]. On May 5, 2017, Sheba appealed the revocation of its CO and termination of legal nonconforming status to the County Zoning Board of Appeals ("ZBA"). [*Id*. at 24 ¶ 70]. On May 8, 2017, Martha Gross emailed the County Board of Commissioners, Defendant Baker, and other County officials, writing, "At our immediate intersection, we shut down 6 LNEs (talk about proliferation!)" [*Id*. at 22-23 ¶ 67]. On June 14, 2017 the ZBA denied Sheba's appeal. [*Id*. at 24 ¶ 72].

Sheba also appealed the denial of its 2017 business license to the County Certificate Review Board ("CRB"), who reversed the decision and ordered that Sheba's 2016 business license and 2017 business license should be reinstated and approved by the County. [Doc. 80 at 25 ¶ 75]. However, the County continued to

refuse to issue the CO and alcohol license. [*Id*. at 25 ¶ 76]. As a result, Sheba never re-opened. [*Id*. at 21-22 ¶ 64].

After Sheba's successful appeal to the CRB, Martha Gross sent a series of emails to Defendants suggesting ways to prevent Sheba from getting its business license. [Doc. 80 at 27 ¶¶ 79-81]. On September 29, 2017, Gross sent an email to Defendant Zachary Williams, the Chief Operating Officer and Acting Finance Director for the County, which included a list alleging 17 grounds for denying Sheba's business license. [*Id*. at 27 ¶ 79]. Gross sent the same email to Defendant Jeff Rader, the County Commissioner for District 2, asking him to review the 17-point list and imploring him to "do what you can to stop that issuance of a business license." [*Id*. at 27 ¶ 80]. Defendant Rader's Chief of Staff responded to Gross to inform her that Rader had received the email and was reviewing it with Williams and the law department. [*Id*. at 27 ¶ 81].

The next day, September 30, Gross emailed Defendants Jewett and Cox to discuss ways to prevent Sheba from getting a business license, stating that: "It is a shame that the County lawyer who handled the appeal bungled it so badly. . . I only hope we can somehow prevail on the COO to deny [Sheba] a new business license, even though the county lawyers seem to think they have to issue it, even though [Sheba] ha[s] not obtained a CO or other grounds for obtaining it. It will be much

easier to get them NOT to issue the business license than to try to get it revoked once it is issued." [Doc. 80 at 28 ¶ 83].

Sheba alleges that the County's actions were part of a campaign that targeted District 2's Ethiopian restaurants for "heightened enforcement of facially-neutral ordinances regulating commercial establishments" in an effort to "cripple or terminate" the Ethiopian restaurants in District 2. [Doc. 80 at 31 ¶ 94]. Sheba further alleges that Defendant Rader, acting in concert with the other Defendants and certain citizens (including Gross), was involved with the closure of other Ethiopian establishments in the district. [*Id*. at 31-35, ¶¶ 94-107]. Sheba also alleges that other comparable white-owned businesses in the area (such as Bench Warmers and Tin Lizzie's) were not subjected to the same severity of enforcement actions despite their code violations. [*Id*. at 36-37, ¶¶ 109-112].

Prior Litigation

Shortly after receiving notice of the County's administrative decisions, Sheba filed an action in DeKalb County Superior Court against the County; Cox, in his official capacity as Fire Marshal; Baker, in his official capacity as Director of Planning and Sustainability; and Williams, in his official capacity as Acting Finance Director. *Sheba Ethiopian Rest., Inc. v. DeKalb Cty., et al.*, Case No. 17-CV-4864-9 ("*Sheba I*"). Sheba sought a writ of mandamus, injunctive relief, and a temporary restraining order, "challeng[ing] the actions of the Defendants in precipitously

shutting down [Sheba's] restaurant/nightclub, . . . and revoking, denying, or terminating all permits and licenses necessary to continued operations[.]" [Doc. 26-2 at 2-16]. Sheba sought the issuance of its CO and building permit and the reinstatement of its legal nonconforming LNE status. After an emergency hearing, the superior court denied Sheba's application for a temporary restraining order. [Doc. 26-3]. Sheba later voluntarily dismissed the action. [Doc. 26-4].

Following Sheba's administrative appeals to the ZBA and CRB, Sheba filed another action in the DeKalb County Superior Court, this time against the ZBA and the County. *Sheba Ethiopian Rest., Inc. v. DeKalb Cty.*, Case No. 17-CV-7588-9 ("*Sheba II*"). In that case, Sheba sought a writ of certiorari and, in the alternative, mandamus and declaratory relief; it also asserted a claim for due process violations under Georgia's constitution. [Doc. 26-6]. Sheba voluntarily dismissed the petition for a writ of certiorari, the declaratory relief claim, and the due process claim. [Doc. 26-7]. The superior court dismissed the mandamus petition with prejudice. [Doc. 26-8].

Procedural History

Sheba filed the instant action in the United States District Court for the Northern District of Georgia approximately seven months after it filed *Sheba II* and four months before all the claims in *Sheba II* were dismissed. In this action, Sheba

initially sought a declaratory judgment, mandamus and injunctive relief, and damages for violations of its constitutional rights. [*See* Doc. 1].

The Defendants moved to dismiss the initial complaint in this case, arguing that res judicata barred Sheba from bringing its claims anew in federal court. [*See* Doc. 28]. Sheba moved to amend the complaint, seeking to supplement its allegations of collusion between a DeKalb County resident (Martha Gross) and various County officials. [*See* Doc. 37]. This Court found that res judicata barred Sheba from litigating its claims and that the proposed amendment to the complaint would have been futile. [*See* Doc. 50]. After the Court denied Sheba's motion to amend and dismissed the complaint, Sheba appealed. [*See* Doc. 52].

On appeal, the Eleventh Circuit affirmed in part this Court's decision to dismiss four of the claims brought by Sheba.[1] *See Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Ga.*, 820 Fed. Appx. 889 (11th Cir. 2020). However, the Eleventh Circuit determined that the remaining two claims, those brought under § 1981 and § 1985(3), were not precluded by res judicata. Accordingly, the Eleventh Circuit

[1] The dismissed claims are as follows: (1) Count I: claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Georgia Constitution; (2) Count II: 42 U.S.C. § 1983 claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Georgia Constitution; (3) Count III: claim under the First Amendment to the United States Constitution and corresponding provisions of the Georgia Constitution; and (4) Count VI: Writ of Mandamus claim under O.C.G.A. § 9-6-20 against Adams to grant Sheba's building permit application.

reversed in part and remanded those claims, along with Sheba's motion to amend its complaint, to this Court for reconsideration.

On remand, the Court allowed Sheba to file an Amended Complaint [*see* Doc. 78; Doc. 80]. Defendants' Motion to Strike and Motion to Dismiss the Amended Complaint [Doc. 82] are now before the Court.

III. DISCUSSION

A. Motion to Dismiss

In addressing the current motion to dismiss, the Court notes that the boomerang it is catching on remand is not the same one it cast into the air two years ago. The causes of action are narrower, yet, some of the arguments have changed. There is a dispute between the parties as to whether Sheba, as a corporate entity, can have a racial identity for the purposes of asserting a § 1981 claim. Also, an issue has been raised as to whether the alleged violation of § 1981 can serve as the basis for the § 1985(3) claim against the individual Defendants, particularly where Sheba's other claims have been effectively dismissed.

As an initial matter, the Court notes that § 1985(3) provides no substantive rights itself. *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979). "It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined

by the section." *Novotny*, 442 U.S. at 376. The Supreme Court has further explained, "[t]he language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

In *Jimenez v. Wellstar Health Sys.*, 596 F.3d 1304 (11th Cir. 2010), the Eleventh Circuit held:

> [B]ecause conspiracies to violate rights protected by Title VII cannot form the basis of § 1985(3) suits, and because the Supreme Court has been conservative in designating which rights litigants may enforce against private actors under § 1985(3), we hold conspiracies to violate rights protected under § 1981 are likewise insufficient to form the basis of a § 1985(3) claim.

Jiminez, 596 F.3d at 1312 (11th Cir. 2010) (citing *Novotny*, 442 U.S. at 378). However, *Jimenez* involved a § 1983(3) claim against a private actor. The "action at law" provided by § 1983 for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" provides the federal damages remedy for the violation § 1981 when the claim is asserted against governmental actors, such as the Defendants. *See Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989). Thus, the Court finds that the alleged § 1981 violations committed by the individual Defendants, as public actors, adequately serve as the basis for the § 1985(3) conspiracy claim.

1. Qualified Immunity

In support of their motion to dismiss Plaintiff's § 1985(3) conspiracy claim, the individual Defendants assert a qualified immunity defense. Government officials sued in their individual capacities are entitled to qualified immunity if "their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Thomas v. Roberts*, 261 F.3d 1160, 1170 (11th Cir.2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Defendants argue (1) that it is not clearly established that § 1981 protects against discrimination based on national origin; (2) the pleadings suggest a reasonable actor in their position could have harbored lawful motives; and (3) the alleged misconduct does not establish that each Defendant entered a conspiracy based on racial animus.

Here, Plaintiff has alleged that the discrimination against Ethiopian restaurants implicates race. [Doc. 80 at 43 ¶ 129, 45 ¶ 136]. Indeed, Sheba has alleged that it is a closely held corporation that is owned and operated by a black man from Ethiopia, that its customers are predominately Ethiopians, Eastern-African nationals, or African-American, and that Sheba is located in a District with a large percentage of white residents. [Doc. 80 at 2 ¶ 3, 13 ¶ 32, 14 ¶ 34, 16 ¶ 45, 30 ¶ 93]. As will be discussed more fully in Section III(A)(2)(a) and (b) of this Order, the Court finds that Sheba implicates race because Sheba has alleged facts to show that

it has a racial identity. It is clearly established that § 1981 covers racial discrimination. 42 U.S.C. § 1981.

Still, the issue of qualified immunity employs an objective standard. *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). The operative question is: "Could a reasonable officer have believed that what the defendant did might be lawful in the circumstances and in the light of the clearly established law?" *Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996). Defendants believe that this "reasonable officer" objectivity shields them from litigation. Based on the above-referenced facts, the Court is not persuaded by Defendants' argument that a reasonable officer in individual Defendants' position could have believed that the alleged policy of targeting Sheba and other Ethiopian restaurants for heightened enforcement was not race-based.

However, the individual Defendants' other argument, that a reasonable officer in the circumstances could have been motivated by something other than racial animus, deserves more investigation.

The Eleventh Circuit has considered the delicate balance between subjectivity and objectivity in addressing qualified immunity at the summary judgment stage in mixed motive cases involving intentional discrimination. In *Foy*, the Eleventh Circuit reasoned that when an adequate lawful motive is present, an official is entitled to qualified immunity "[u]nless it, as a legal matter, is plain under the

specific facts and circumstances of the case that the [official's] conduct—despite his having adequate lawful reasons to support the act—was the result of his unlawful motive[.]" *Foy*, 94 F.3d at 1534-35. Thus, under *Foy* and its progeny, plaintiffs suing public officials for discrimination in mixed motive cases have a high hurdle to clear in order to avoid summary judgment on the basis of qualified immunity.

At the motion to dismiss stage, however, the Court must construe the pleadings in the light most favorable to the plaintiff. In its Amended Complaint, Sheba has alleged that the individual Defendants had "agreed that the Ethiopian restaurants in District 2 should not be allowed to operate after 12:30 a.m., if at all." [Doc. 80 at 41 ¶ 120]. Sheba has further alleged that Defendants' decision to target Sheba for heightened scrutiny and penalties were initially motivated solely by discriminatory intent. [*Id*. at 45 ¶ 136]. As Sheba concedes that it was operating in violation of some code provisions, however, Defendants argue that the violations entitle them to qualified immunity for their actions under *Foy*.

The problem for Defendants, however, is the timing of the alleged discriminatory intent. Sheba alleges that when Defendant Jewett arrived to inspect its premises, Jewett told Sheba's manager that he was there to find a way to shut Sheba down. [Doc. 80 at 20 ¶ 57]. Although the violations that were discovered were not fabricated, the pertinent question is why the decision to target Sheba for heightened inspections and penalties was made in the first place. Why was the

inspector there to "find a way" to shut Sheba down? Why, after eight years of operating as a legal nonconforming LNE, was Plaintiff subject to the LOE and the heightened scrutiny? Defendants may argue that their actions were warranted because Sheba had changed its use or that the inspections were part of a normal or random procedure, but the allegations of the Amended Complaint raise an inference that discrimination was the motive behind the decision to target Sheba for the heightened scrutiny. These are all questions that may be addressed on motion for summary judgment, after the benefit of discovery. At the motion to dismiss stage, however, the Court is constrained to consider the pleadings alone. Therefore, Defendants are not entitled to qualified immunity at this stage of the proceedings.

2. 42 U.S.C. § 1981 Claim

Section 1981 prohibits discrimination on the basis of race in the making and enforcement of private contracts. Specifically, § 1981 states that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. To bring a §1981 claim, a plaintiff must allege: "(1) he is a member of a racial minority, (2) the defendant intended to racially discriminate against him, and (3) the discrimination concerned one or more of the activities

enumerated in the statute." *Jimenez*, 596 F.3d at 1308 (citation omitted). To plead a § 1981 claim against a municipality, the racial discrimination must be caused by a policy or custom of racial discrimination. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735-36 (1989).

Defendants put forth several arguments in support of their motion to dismiss the § 1981 claim. Defendants argue that: (a) Sheba, as a corporate entity, is not a member of a racial minority and therefore lacks standing to bring suit; (b) Sheba failed to allege that the County had a policy that involved racial discrimination; (c) Sheba failed to sufficiently allege that County officials would not have taken the same actions "but for" the purported policy; and (d) Sheba failed to allege a viable harm (interference with contractual rights) under § 1981.

a. Standing

In its Amended Complaint, Sheba alleges that it "is a closely-held corporation, owned and operated by its shareholder, Solomon Abebe, who is black and from Ethiopia." [Doc. 80, at 2, ¶ 3]. Sheba contends that these facts are sufficient to render its corporate identity as "a member of a racial minority" for purposes of its § 1981 claim.

Whether a corporation can have a racial identity and can file a lawsuit based on racial discrimination is an issue that federal circuit courts have wrestled with over

the past several decades. The issue in this case is not Article III standing, but rather prudential standing.

The Defendants contend that Sheba, as a corporate entity, has no racial identity and thus cannot be subject to racial discrimination. To support their argument, the Defendants cite to *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), where the Supreme Court stated: "As a corporation, MHDC has no racial identity and cannot be a direct target of … racial discrimination." *Arlington Heights*, 429 U.S. at 263. Many circuit courts, however, have interpreted this language from *Arlington Heights* as dicta and have allowed corporations to assert § 1981 claims.[2] Furthermore, there appears to be some indication from the Supreme Court that the circuit courts' conclusions on this issue are sound. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 n.1 (2006)

[2] *See, e.g., White Glove Staffing, Inc. v. Methodist 2 Hosps. of Dallas,* 947 F.3d 301 (5th Cir. 2020) (§ 1981 claim); *Body By Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381 (5th Cir. 2017) (§ 1981 claim); *Woods v. City of Greensboro*, 855 F.3d 639 (4th Cir. 2017) (§ 1981 claim); *McClain v. Avis Rent A Car Sys., Inc.*, 648 F. App'x 218, 222 n.4 (3d Cir. 2016) (§ 1981 claim); *Carnell Construction Corp. v. Danville Redevelopment & Housing Authority*, 745 F.3d 703 (4th Cir. 2014) (Title VI claim); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004) (§ 1981 claim); *Oti Kaga, Inc. v. S.D. Hous. Dev. Auth.*, 342 F.3d 871, 882 (8th Cir. 2003) (Fair Housing Act claims); *Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.,* 295 F.3d 1065, 1072 (10th Cir. 2002) (§§ 1981 and 1982 claims); *Gersman v. Grp. Health Ass'n*, 931 F.2d 1565, 1568 (D.C. Cir. 1991) (§ 1981 claim), vacated on other grounds, 502 U.S. 1068 (1992); *Triad Assocs., Inc. v. Chi. Hous. Auth.*, 892 F.2d 583, 591 (7th Cir. 1989) (§ 1983 claim), abrogated on other grounds, *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996); H*udson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) (Title VI claim); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 13-14 (1st Cir. 1979) (§ 1981 claim).

("[T]he Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims"); *see also Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1013 (2020) (considering a § 1981 claim from a black-owned corporation without questioning its standing to bring suit).

The Court notes that, in addressing the somewhat comparable issue of free exercise of religion, the Supreme Court determined that a corporation can have religious beliefs that are subject to constitutional protections. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). In so holding, the Supreme Court reasoned that "the purpose of extending rights to corporations is to protect the rights of people associated with the corporation, including shareholders, officers, and employees. Protecting the free-exercise rights of closely held corporations thus protects the religious liberty of the humans who own and control them." *Hobby Lobby*, 573 U.S. at 683-684, 707. Thus, it appears that a closely held corporation may assume the identity of those who own and control it, and that it may file suit to enforce or protect rights that are typically afforded to that identity.

If a corporation can have a "religious" identity, logic suggests that a corporation, such as Sheba, can assume the "racial" identity of the people who own and control it. Therefore, the Court finds that Sheba has alleged sufficient facts to establish standing to assert its § 1981 claim in this case.

b. Policy of Discrimination

To bring suit against a governing entity such as a county or municipality, a plaintiff must allege that the entity "had a policy, custom, or practice" that caused the harm. *Jett*, 491 U.S. at 735–36 (1989); *Hoefling v. City of Miami*, 811 F.3d 1271, 1279 (11th Cir. 2016); *City of Canton v. Harris*, 489 U.S. 378, 385 (1989. Here, Defendants argue that: (i) there was no cognizable policy that caused the alleged harm; (ii) none of the named Defendants were acting with final policymaking authority—nor did any final policymaker ratify Defendants' alleged discriminatory actions; and (iii) if there was a policy that caused Sheba's harm, it was a lawful one.

In *Hoefling*, the plaintiff alleged that City of Miami marine patrol officers seized his sailboat and destroyed it pursuant to a city policy. *Hoefling*, 811 F.3d at 1274, 1280. The plaintiff further alleged that "local mariners told him, and that he was independently aware, that others have fallen victim to similar conduct," and that the city was engaged in the "systemic roundup and destruction of ugly boats in its waters" as a "cleanup." *Hoefling*, 811 F.3d at 1280. The Eleventh Circuit held that these allegations were sufficient to plausibly allege that plaintiff's harm had been caused by a city policy.

By way of contrast, in *Gurrera v. Palm Beach Cty. Sheriff's Office*, 657 Fed.Appx. 886, 893 (11th Cir. 2016), the Eleventh Circuit affirmed the dismissal of the plaintiff's § 1983 claim where the plaintiff had alleged only that there was "a

pattern and practice of engaging in false arrests, imprisonment" within the county sheriff's office, without alleging any specific examples of that behavior "beyond his own arrest." *Gurrera*, 657 Fed. Appx. at 893; *see also Craig v. Floyd Cty., Ga.*, 643 F.3d 1306, 1311-12 (11th Cir. 2011) (finding that plaintiff failed to establish a custom or policy sufficient to impose municipal liability when he relied solely on his own experience).

Here, Sheba's pleadings are more analogous to the pleadings at issue in *Hoelfing*. Sheba has alleged that several other members of its protected class in like circumstances have been subjected to heightened scrutiny and harm as a result of the County's policy. [Doc. 80 at 35 ¶ 107]. Sheba also alleges with specificity that the actions taken against the other Ethiopian LNEs in District 2 are in accordance with that policy. [*Id*. at 30-35 ¶¶ 93-107]. Further, Sheba alleges that other licensed establishments operating in District 2 which cater to predominately white late-night clientele have not been subjected to the same heightened scrutiny and penalties. [Id. at 36-37 ¶¶ 109-112]. The Court finds that Sheba has adequately alleged that the County had a policy of targeting Ethiopian establishments for heightened scrutiny and that this policy was the cause of its harm.

Defendants argue that Sheba has not properly identified one of the named Defendants as a final policymaker or alleged that any final policymaker adopted their discriminatory decision. In response, Sheba argues that Defendants Gannon and

Rader, as County Commissioners, were both acting as final policymakers when they initiated the alleged campaign to target Ethiopian LNEs. In *Hoefling*, the Eleventh Circuit decided that the issue of pin-pointing a final policy maker is better suited for the summary judgment stage:

> We therefore believe that identifying and proving that a final policymaker acted on behalf of a municipality is "an evidentiary standard, and not a pleading requirement." Although [the plaintiff] may ultimately have to identify (and provide proof concerning) a single final policymaker in order to survive summary judgment or prevail at trial, we do not think that he had to name that person in his complaint in order to survive a Rule 12(b)(6) motion. All he needed to do was allege a policy, practice, or custom of the [County] which caused the [harm].

Hoefling, 811 F.3d at 1280 (internal citations omitted). As Sheba has adequately alleged that there was a policy which caused its harm, the Court finds that Sheba has met its burden at this stage at this stage of the proceedings.

Even if the alleged discriminatory actions were taken pursuant to a cognizable policy, Defendants further argue that the discrimination against Ethiopians is not unlawful under § 1981. In an unpublished opinion, the Eleventh Circuit indicated that "[b]y its very terms, § 1981 applies to claims of discrimination based on race, not national origin." *Tippie v. Spacelabs Medical, Inc.*, 180 Fed. Appx. 51, 56 (11th Cir. 2006).[3] Relying on *Tippie*, Defendants argue that Sheba's allegation of

[3] While not dispositive here, it is worth noting that the Supreme Court has interpreted the term "race," as used in § 1981, broadly to encompass "ancestry or ethnic characteristics." *See Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) ("[W]e have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of

discrimination is based on its status as an Ethiopian-owned business, not as a black-owned one, and it therefore does not come within the ambit of § 1981. As the Court has acknowledged earlier in this Order, however, Sheba has alleged that it is owned and operated by a black man from Ethiopia, that its customers are predominately Eastern-African (black), and that Sheba is located in a District with a large percentage of white residents. [Doc. 80 at 2 ¶ 3, 13 ¶ 32, 14 ¶ 34, 16 ¶ 45, 30 ¶ 93]. Thus, the alleged discrimination implicates race. This is particularly so where, as here, "[t]he line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible." *Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. 1981) ("The line between national origin discrimination and racial discrimination is an extremely difficult one to trace").[4] As Sheba has alleged facts to show that it has a racial identity that is associated with a racial minority, the Court finds that Sheba's allegations of discrimination fall within the ambit of § 1981.

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persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory").

[4] Also, the nature of the alleged discrimination in *Tippie* was more clear. In *Tippie*, the plaintiff claimed discrimination based on national origin where the defendant employer gave a management position to another candidate over the plaintiff because the other candidate was "[n]ative in Spanish language" and the plaintiff spoke "some basic Spanish but is not native." *Tippie*, 180 Fed. Appx. at 53. *Tippie* was plainly focused on national origin not on race.

c. Causation

In support of its § 1981 claim, Sheba must allege facts to show that the County officials would not have taken the same actions "but for" the County's purported policy. *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1013 (2020). However, a plaintiff can establish an inference of causation if it can show that a valid comparator (i.e., a non-minority business that is similarly situated) was treated more favorably than the plaintiff. *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1224 (11th Cir. 2019) (finding that the proper standard for comparator evidence requires the comparators be "similarly situated in all material respects"). Although Sheba has identified non-minority businesses in District 2 to serve as its comparators, Defendants contend that the purported comparators are not similarly situated.

In support of their argument, Defendants rely on *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250 (11th Cir. 2004). In *Jackson*, the plaintiffs "failed to identify *any* specific nonminority employees . . . who were treated differently in other similar cases." *Jackson*, 372 F.3d at 1274 (emphasis in original). Instead, the plaintiffs in *Jackson* simply alleged that the defendants' treatment of the plaintiffs "differ[ed] markedly from their treatment of Caucasian plaintiffs," without offering any specific examples or any basis for that assertion. *Jackson*, 372 F.3d at

1272. This Court agrees that such generalized, conclusory statements are insufficient to state a claim relying on comparator evidence.

Here, however, Sheba alleges that it and the identified non-minority comparators were each operating as LNEs in District 2, and that Sheba was targeted for heightened scrutiny and enforcement while the comparators were not. Further, Sheba has alleged that one of the comparators had comparable code violations, but was not subjected to the same severe enforcement penalties as Sheba.[5] Sheba has also buttressed its comparator allegations by providing several accounts of other Ethiopian LNEs which, like Sheba, have been subject to heightened scrutiny and enforcement. *See Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) ("A plaintiff may raise a reasonable inference of the employer's discriminatory intent through various forms of circumstantial evidence"). To the extent that Defendants move to dismiss Sheba's claim for failure adequately to plead comparators, Defendants' motion is denied.

[5] The Court does not find it fatal to Sheba's claim that the primary comparator, "Benchwarmers," was operating with a SLUP. [Doc. 80, at 36-37, ¶ 111]. Under the applicable ordinance, Sheba was not required to apply for a SLUP. Plaintiff has not conceded that it has changed its use such that it should be subject to the SLUP requirement. Additionally, the fact that Sheba's comparators were not required to sign a LOE while Sheba and the other Ethiopian establishments were "randomly" chosen to sign an LOE is a factual distinction that creates an inference of disparate treatment. These issues may be more appropriately addressed upon further development of the record.

d. Interference with Contractual Rights

"Any claim brought under § 1981 . . . must initially identify an impaired 'contractual relationship,' § 1981(b), under which the plaintiff has rights. Such a contractual relationship need not already exist, because § 1981 protects the would-be contractor along with those who already have made contracts." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). In its Amended Complaint, Sheba alleges that there are three contractual relationships which have been impaired by the discriminatory behavior of Defendants: a contractual relationship with the County via its business and alcohol license; a contractual relationship with its landlord via a commercial lease; and future contractual relationships with customers. Defendants argue that Sheba cannot state a viable claim under § 1981 because it has no rights under the existing (or proposed) contracts.

In support of their argument, Defendants' contend that Sheba lost any rights it may have had under its alcohol license by operating in violation of fire safety codes, and that the loss of Sheba's legal nonconforming status and licenses divest Sheba of any right to contract with future customers. [Doc. 82 at 20]. However, that logic is circular. The seminal issue in this case is not whether Plaintiff violated fire codes; it is whether Defendants improperly targeted Plaintiff for heightened scrutiny on the basis of race, ultimately discovering those fire code violations as a result of their discriminatory campaign. Defendants' argument would require the Court to

ignore the alleged discrimination that led to the loss of those contractual rights. Although Sheba will bear a substantial evidentiary burden in proving that the Defendants' investigation and enforcement actions would not have taken place but-for their discriminatory motives, s*ee Comcast Corp.*, 140 S. Ct. at 1019 (2020), the difficulty of that burden does not demand dismissal under 12(b)(6).

Further, the furnishing of a license to sell alcohol can confer rights in a protectable property interest. For instance, in *Goldrush II v. City of Marietta*, 267 Ga. 683 (Ga. Sup. Ct. 1997), the Georgia Supreme Court held that a city code's liquor licenses provisions can create a protectable property interest in a liquor license where the licensing authority "sets forth the criteria which, if met, results in the issuance of a license, and specifies that a liquor license issued by the city can be suspended or revoked only upon a showing of cause." *Goldrush II*, 267 Ga.695-696. Here, Sheba has alleged that DeKalb County's Alcohol Code provides that "no license or permit ... shall be denied, suspended or revoked without the opportunity for a hearing," and that "[a]ny applicant or licensee who is aggrieved or adversely affected by a final action of the issuing department may have a review thereof by appeal to the alcoholic beverage review board." [Doc. 80 at 7 ¶ 22]. Thus, it appears that Sheba had a protectable property interest in its alcohol license.

Although Sheba had an opportunity to avail itself of those rights, the issue in this case is not whether Sheba's due process rights were violated. The pivotal issue

is whether Defendants improperly targeted Sheba for heightened scrutiny on the basis of race and whether the alleged discriminatory campaign (which led to the discovery of the code violations) interfered with its ability to maintain its alcohol license. The same focus applies to Sheba's commercial lease agreement with its landlord, which Sheba plausibly alleges has been interfered with as a result of Defendant's discriminatory campaign.

To the extent that Defendant moves to dismiss Plaintiff's § 1981 claim for failure to plead a plausible interference with contractual rights, the Court denies the motion.

3. 42 U.S.C. § 1985(3) – Conspiracy

To state a claim under § 1985(3), "a plaintiff must allege: (1) defendants engaged in a conspiracy; (2) the conspiracy's purpose was to directly or indirectly deprive a protected person or class the equal protection of the laws, or equal privileges and immunities under the laws; (3) a conspirator committed an act to further the conspiracy; and (4) as a result, the plaintiff suffered injury to either his person or his property, or was deprived of a right or privilege of a citizen of the United States." *Jimenez*, 596 F.3d at 1312 (citing *Johnson v. City of Fort Lauderdale*, 126 F.3d 1372, 1379 (11th Cir. 1997)).

Defendants contend that Sheba's § 1985(3) claim should be dismissed for failure to state a claim. In support of their contention, Defendants argue that: Sheba,

as a corporation, is not protected by § 1985(3); and Sheba failed to allege plausibly that each Defendant personally harbored racial animus.

The Court is not persuaded by Defendants' argument that Sheba, as a corporation, is not a "citizen" entitled to the "privileges and immunities" afforded by § 1985(3). As noted in Section III(A)(2)(a) and (b) of this Order, the Court finds that Sheba has sufficiently alleged that it has a racial identity that is associated with a racial minority and, thus, has standing to bring suit under § 1981. The Court finds that the same rationale applies to Sheba's § 1985(3) claim as well.

In support of their argument that Sheba has failed to "plausibly establish that each Defendant personally harbored racial animus," Defendants cite to Third Circuit precedent. *Clark v. Clabaugh*, 20 F.3d 1290, 1298 (3d Cir. 1994). While the Court agrees that Plaintiff must allege that each Defendant intentionally participated in the alleged conspiracy, the Court disagrees with the Defendants' framing of this issue. Instead, the Court applies the standard set forth in *Jimenez* – to state a claim under § 1985(3), a plaintiff must allege each defendant engaged in the conspiracy and that "*the conspiracy's purpose* was to directly or indirectly deprive a protected person or class the equal protection of the laws, or equal privileges and immunities under the laws." *Jiminez*, 596 F.3d at 1312 (emphasis added). *See also Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) ("The conspiracy . . . must aim at a deprivation of the equal enjoyment of rights secured by the law to all"). Therefore, to survive Defendant's

motion to dismiss, the Amended Complaint must sufficiently allege that the conspiracy itself was based on a discriminatory motive and that the individual Defendants were intentionally engaged in that conspiracy.

Jeff Rader, DeKalb County Commissioner

Sheba alleges that Commissioner Rader was at the helm of the alleged conspiracy. The Amended Complaint alleges that:

> Commissioner Rader has effectively commandeered the County's planning and zoning departments, requiring directors and staff in those departments (and related departments) to carry out Martha Gross's directives, which include (1) targeting Ethiopian and Eritrean restaurants that offer Hookah service for heightened and arbitrary code enforcement, (2) removing grandfather status of such restaurants to operate during late night hours, and (3) denying SLUP applications to such restaurants.

[Doc. 80, at 41, ¶ 121]. In support of these allegations, Sheba provides a variety of excerpts of emails to Rader and other county officials from Martha Gross, as well as Gross's social media posts, indicating plausible animus toward Sheba and other Ethiopian businesses. [Doc. 80 at 18-23 ¶¶ 51-68, 27 ¶¶ 79-82, 39-40 ¶ 117-119]. Considered collectively, these allegations suggest that Defendant Rader participated in the alleged discriminatory conspiracy that Gross allegedly propagated.

Kathie Gannon, DeKalb County Commissioner

The allegations against Commissioner Gannon resemble the allegations against Commissioner Rader. Sheba alleges that in 2015, Gross and Gannon were already collaborating in an effort to have Ethiopian LNEs shut down. [Doc. 80 at 19

¶ 55]. Sheba also alleges that Gannon was included in several email exchanges between Gross and public officials regarding the campaign to shut down Ethiopian LNEs. [*Id*. at 26 ¶¶ 77-78, 38 ¶ 113, 40 ¶ 119]. When considered collectively, these allegations suggest that Gannon participated in the alleged discriminatory conspiracy allegedly initiated by Gross.

Joseph Cox, DeKalb County Fire Marshal

The averments of the Amended Complaint indicate that it was Cox that issued the "Notice of Fire Hazard" that required Sheba to shut down. [Doc. 80 at 21 ¶ 61]. This notice, Sheba alleges, was based on "petty code infractions" which were "promptly corrected by Sheba." [*Id.* at 19-20 ¶ 57, 21 ¶ 63, 45 ¶137]. Sheba also alleges that Cox was involved in the decision to delay approval of Sheba's building permit application and sprinkler plans. [*Id.* at 25 ¶ 74].

As with Rader and Gannon, the allegations include Cox in certain email exchanges with Martha Gross involving Gross's alleged campaign against Ethiopian LNEs. In one instance, Gross emailed Cox to discuss plans to prevent reissuance of Sheba's business license after the successful appeal to the CRB. [Doc. 80 at 28 ¶ 83] ("It is a shame that the County lawyer who handled the appeal bungled it so badly ... I only hope we can somehow prevail on the COO to deny them a new business license, even though the county lawyers seem to think they have to issue it. . . It will be much easier to get them NOT to issue the business license than to try to get it

revoked once it is issued"). Cox was also allegedly involved in an email exchange discussing possible violations by another Ethiopian LNE in the area, Aroma, as part of Gross's alleged scheme to target Sheba and other Ethiopian LNEs in District 2. [*Id.*, at 34-35 ¶ 105-106]. When considered together, the Court finds that these allegations, which indicate that Gross coordinated with Cox and other public officials to target and investigate Sheba and other Ethiopian businesses, create an inference that Cox's actions in regard to Sheba were, at least in part, motivated by discriminatory intent. Therefore, the Court finds that Sheba has adequately plead that Defendant Cox participated in the alleged discriminatory conspiracy initiated by Gross.

John Jewett, Inspector for DeKalb County Fire Marshal Division

As with Cox, the averments of the Amended Complaint implicate Defendant Jewett in the code enforcement actions taken against Sheba. Sheba alleges that, on January 27, 2017, Jewett arrived at Sheba to perform an inspection and told the manager he was there to "find a way" to shut Sheba down. [Doc. 80 at 19-20 ¶ 57]. Also, Jewett (along with Cox) received an email from Martha Gross involving a plan to interfere with the re-issuance of Sheba's business license [*id.* at 28 ¶ 83], as well as an email exchange involving Gross's attempt to have another Ethiopian business in the area shut down. [*Id.* at 34-35 ¶105-106]. Lastly, according to Sheba, Jewett treated comparator businesses less severely despite similar code violations. [*Id.* at

36-37 ¶ 111]. When considered collectively, the Court finds that these facts plausibly allege that Defendant Jewett participated in the alleged discriminatory conspiracy initiated by Gross.

Andrew Baker, Director of Department of Planning and Sustainability

According to Sheba, Defendant Baker was involved in the administrative decisions to revoke Sheba's Certificate of Occupancy, to revoke Sheba's 2016 business license and reject its 2017 business license application, and to revoke Sheba's grandfathered status as a legal nonconforming LNE. [Doc. 80 at 23-24 ¶ 69]. Baker is also included in the email exchange between Gross and Gannon agreeing to work on amending the County's late-night ordinance to target certain LNEs. [*Id.* at 26 ¶ 78]. Following Gross's request to scrutinize the legal compliance of Aroma, another Ethiopian LNE in District 2, Baker instructed his staff to investigate the matter before Aroma's next license application. [*Id*. at 33 ¶ 99]. After Baker's staff determined that Gross's allegations against Aroma were meritless, Baker instructed his staff to "continue to be on 'alert' should Aroma make[] application for any type of business or alcohol license." [*Id.* at 34 ¶ 102]. Gross also copied Baker (along with the Defendants Rader and Gannon) on a celebratory email shortly after Sheba's closure: "At our immediate intersection, we shut down 6 LNEs (talk about proliferation!)" [*Id.* at 22-23 ¶ 67].

According to Sheba, the decision to revoke Sheba's business license and Certificate of Occupancy was made despite the fact that "no other business in the County's history had been shut down by revoking its business license based on alleged code violations." [*Id.* at 25, ¶ 75]. Considering the fact that the CRB reversed the County's decision to revoke Sheba's business license, the Court finds that the above correspondence between Baker, Gross, and the other Defendants plausibly suggest that Defendant Baker participated in the alleged discriminatory conspiracy initiated by Gross.

David Adams, Chief Building Officer for DeKalb County

Plaintiff vaguely alleges that Defendant Adams "refused to reasonably process the building permit application and the sprinkler plans … in a coordinated effort to prohibit Sheba from operating." [Doc. 80 at 25 ¶ 74]. Without any other facts, however, the Court finds that this singular allegation to be insufficient to state a § 1985(3) conspiracy claim against Adams. The other individual Defendants that have been implicated in the alleged conspiracy allegedly coordinated with Martha Gross in her purported mission to shut down Ethiopian LNEs in District 2 and/or acted in furtherance of that mission. Here, there are no meaningful allegations that Adams communicated or coordinated with Gross or any of the other individual Defendants. The only alleged communication between Gross and Defendant Adams is an email that Gross sent to Adams to request Sheba's business license history. [*Id.*

at 29 ¶ 87]. In sum, Sheba has failed to allege sufficient facts to indicate that Adams was a party to the alleged conspiracy. Accordingly, the Court GRANTS Defendants' motion to dismiss as to Defendant Adams for failure to state a claim.

Zachary Williams, Chief Operations Officer for DeKalb County

As with Defendant Adams, Sheba has failed to allege in the Amended Complaint how Defendant Williams is implicated in the alleged conspiracy. Although Sheba alleges that, after its successful appeal to the CRB, Martha Gross emailed Williams a list of reasons for refusing to issue the license to Sheba [Doc. 80 at 27 ¶ 79], Sheba concedes its business license was eventually re-issued. [*Id*. at ¶ 76]. Thus, it is apparent that Williams did not act on Gross's email. In sum, there are no allegations that Williams took any action that would suggest participation in the alleged conspiracy. Accordingly, the Court GRANTS Defendants' motion to dismiss as to Defendant Williams for failure to state a claim.

B. Motion to Strike Certain Allegations

In light of the Eleventh Circuit's decision to affirm the dismissal of certain claims from this case, Defendants ask the Court to strike five paragraphs from the Amended Complaint which Defendants contend would confuse the issues. [Doc. 82 at 9-11]. Specifically, the paragraphs at issue are:

41.

Under Ordinance 08-23, Sheba is a legal prior non-conforming use, grandfathered pursuant to its provisions with a vested right to

continue operating a restaurant with alcohol, music and live entertainment after 12:30 a.m.

73.

In the same letter where Baker revoked the C.O. (¶ 60), the County denied Sheba's business license for 2017 because, it said, that Sheba had changed its use. This was a deliberate misrepresentation; Sheba had not changed its use.

122.

The malleable and vague criteria laid out in the County's SLUP process, coupled with the vague and overbroad definitions of restaurant and nightclub, give the defendants limitless latitude to act in an arbitrary and purposefully discriminatory manner.

138.

Sheba has been deprived of its constitutional rights in freedom of speech and expression, due process, equal protection and freedom from discrimination based on race.

139.

Each defendant is jointly and severally liable by virtue of his or her failure to intervene to stop known violations of Sheba's First and Fourteenth Amendment rights by other county actors when the defendant had a reasonable opportunity to do so.

[Doc. 80 at 15, 24, 41-42, 45-46].

In response, Sheba states that it is willing to withdraw paragraphs 41 and 73 from the Amended Complaint. [Doc. 83 at 3]. Accordingly, the Court finds that paragraphs 41 and 73 of the Amended Complaint shall be stricken.

Further, Sheba states that it is willing to withdraw the portions of paragraphs 138 and 139 that directly reference Due Process and the First Amendment, as those claims have been effectively dismissed. [*Id.* at 3-4]. As for paragraph 138, specifically, Sheba states that it is willing to limit this allegation to state: "Sheba has been deprived of its constitutional rights in equal protection and its right to freedom from discrimination based on race." The Court finds that this proposed redacted version would eliminate the First Amendment and due process issues, while leaving the equal protection bases for the § 1981 and § 1985(3) claims. Accordingly, Defendants' Motion to Strike is GRANTED in part as to paragraphs 41, 73, 138, and 139, as proffered by Sheba.

As for paragraph 122 of the Amended Complaint, Defendant's Motion to Strike is DENIED. Although the vagueness of the SLUP standard cannot itself be challenged under the precluded causes of actions, the Court finds that Sheba is entitled to allege that the ordinance provisions are vague enough to allow for haphazard or pretextual enforcement on the basis of race.

IV. CONCLUSION

For the foregoing reasons, it is hereby ORDERED that Defendants' Motion to Dismiss [Doc. 82] is **GRANTED in part** as to Defendants Adams and Williams for failure to state a claim and **DENIED in part** as to the remaining Defendants. It

is further ORDERED that Defendants' Motion to Strike is **GRANTED in part** and **DENIED in part**.

IT IS SO ORDERED, this 25th day of August, 2021.

William M. Ray II

WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE