



Count II must also be dismissed. This Count, which appears only to allege a conspiracy among the Defendants in violation of 42 U.S.C. § 1983, is completely devoid of any substance. Plaintiff has not provided any factual support for its bald allegation of a conspiracy among any of the Defendants. The Court of Appeals of the Third Circuit has made clear that a Plaintiff asserting a § 1983 conspiracy claim must “provide some factual basis to support the existence of the elements of a conspiracy.” *Capgrosso v. Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir. 2009) (quoting *Crabtree v. Muchmore*, 904 F.2d 1475, 1481 (10th Cir. 1990)). Further, Plaintiff’s conspiracy claim fails because Courts in this Circuit have routinely held, under the “intracorporate conspiracy doctrine,” that an entity such as SEPTA cannot conspire with its officials acting in their official capacities.

Finally, Plaintiff’s claims for punitive damages must be dismissed as against SEPTA. SEPTA is immune from claims for punitive damages.

## **II. Relevant Factual and Procedural Background<sup>1</sup>**

In November of 2009, Plaintiff, the Transport Workers Union of Philadelphia, Local 234 (“Local 234”), entered into a new labor agreement with SEPTA (the “Labor Agreement”). *Amended Complaint* ¶ 9. Shortly thereafter, SEPTA announced plans to increase its fares in 2010. *Id.* The fare increases are scheduled to go into effect on July 1, 2010. *Amended Complaint* ¶ 10. SEPTA held public hearings to discuss the fare increases on April 14, 15, 16, 19 and 20, 2010, in Montgomery, Chester, Delaware, Philadelphia, and Bucks Counties, respectively. *Amended Complaint* ¶ 11.

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<sup>1</sup> Defendants rely on the facts as alleged in Local 234’s Amended Complaint, which must be accepted as true on a motion to dismiss. *Davis-Heep v. City of Philadelphia*, No. 09-5619, 2010 U.S. Dist. LEXIS 39023, at \*5 (E.D. Pa. Apr. 19, 2010) (citations omitted). Defendants reserve the right to deny any and all allegations in their subsequent filings, including their Answer.

This dispute centers around a notice issued by SEPTA on April 15, 2010 (the “Notice”) purporting to ban the donning of all pin emblems or insignias that are not identified in the existing Labor Agreement. *Amended Complaint* ¶ 1. Local 234 alleges that Defendants issued the Notice to prevent its members from donning pins bearing the message “Keep Fares Affordable - - - - Protect The Riding Public.” *Amended Complaint* ¶¶ 1, 23. The Notice, according to Local 234, infringes upon the free speech rights of the union and its members as guaranteed by Article I, § 7 of the Pennsylvania Constitution. *Amended Complaint* at Count I. Local 234 also claims that Defendants conspired to deprive Plaintiff and its members of their rights under the United States Constitution in violation of 42 U.S.C. § 1983. *Amended Complaint* at Count II. There is no allegation that any members of Local 234 have been disciplined or terminated for violating the Notice.

This civil action was initiated against Defendants in the Court of Common Pleas of Philadelphia County on April 27, 2010. The original complaint did not allege any causes of action under the federal Constitution or the treaties and laws of the United States. On June 4, 2010, however, Plaintiff filed an Amended Complaint in response to Defendants’ Preliminary Objections, alleging causes of action under Article I, § 7 of the Pennsylvania Constitution and under 42 U.S.C. § 1983. Defendants removed the action to this Court on June 23, 2010.

### **III. Argument**

#### **A. Standard on Rule 12(b)(6) Motions.**

“A motion to dismiss for failure to state a claim serves to test the sufficiency of a complaint.” *Loftus v. Southeastern Pennsylvania Transp. Auth.*, 843 F. Supp. 981, 984 (E.D. Pa. 1994). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “The

plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949. “[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.” *Twombly*, 550 U.S. at 555. “[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (citations omitted).

**B. Article I, § 7 of the Pennsylvania Constitution Does Not Create a Private Right of Action.**

In Count I of its Amended Complaint, Local 234 seeks relief for Defendants’ alleged violation of the free speech rights of its members. *Amended Complaint* at Count I. The only authority relied on by Plaintiff is Article I, § 7 of the Pennsylvania Constitution. But that section of the Pennsylvania Constitution does not provide a private right of action, and Local 234 does not identify any other statutory or common law right that could provide relief. Because it does not state a claim, Count I must be dismissed.

Article I, § 7 of the Pennsylvania Constitution “contains no provision, express or implied, which creates a private right of action for violations of an individual’s right to free speech.” *Sabatini v. Reinstein*, No. 99-2393, 1999 U.S. Dist. LEXIS 12820, at \*6-7 (E.D. Pa. Aug. 20, 1999) (citing *Pendrell v. Chatham College*, 386 F. Supp. 341, 344 (W.D. Pa. 1974) (“Article I, Section 7 . . . imposes a limitation upon the power of the State to interfere with freedom of the press and freedom of speech, but contains no self-executing private cause of action, express or implied.”)). The Pennsylvania Supreme Court has explained that a provision in the Constitution is self-executing only where the Constitution itself explicitly provides enforcement mechanisms. *Commonwealth v. Nat’l Gettysburg Battlefield Tower*, 311 A.2d 588, 591 (Pa. 1973) (citing

*O'Neill v. White*, 22 A. 2d 25 (Pa. 1941)). Absent explicit enforcement language, “[a] Constitution is primarily a declaration of principles of the fundamental law. Its provisions are usually only commands to the legislature to enact laws to carry out the purposes of the framers of the Constitution, or mere restrictions upon the power of the legislature to pass laws.” *Gettysburg Battlefield Tower*, 311 A.2d at 591 (citing *O'Neill*, 22 A. 2d 25).

Article I, § 7 of the Pennsylvania Constitution is not “self executing.” *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 485 A.2d 1, 5 (Pa. Super. 1984). It contains no language concerning the enforcement of the rights it purports to grant. The full text of Article I, § 7 is as follows:

The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Pa. Const. Art. 1, § 7 (2010). Thus, courts have routinely dismissed claims brought solely under Article I, § 7 of the Pennsylvania Constitution. *Dooley v. City of Philadelphia*, 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001) (dismissing plaintiff’s claim under Article I, § 7 because Article I, § 7 is not self-executing and “Pennsylvania has no statute akin to 42 U.S.C. § 1983 that authorizes lawsuits based on violations of the Pennsylvania Constitution”), *vacated in part on other grounds by Dooley v. City of Philadelphia*, 161 F. Supp. 2d 592 (E.D. Pa. 2001); *Sabatini v. Reinstein*, No. 99-2393, 1999 U.S. Dist. LEXIS 12820, at \*6 (E.D. Pa. Aug. 18, 1999); *Holder v. City of Allentown*, No. 91-240, 1994 U.S. Dist. LEXIS 7220, at \*11 (E.D. Pa. May 19, 1994);

*Lees v. West Greene School Dist.*, 632 F. Supp. 1327, 1335 (W.D. Pa. 1986); *Pendrell v. Chatham College*, 386 F. Supp. 341, 344 (W.D. Pa. 1974). Count I of the Amended Complaint must be dismissed for the same reason.

**C. SEPTA and its Officials are Entitled to Sovereign Immunity From Plaintiff's Claim Under Article I, § 7.**

Even if Plaintiff had a right of action under Article I, § 7, which it does not, SEPTA and its officials would be immune from such a claim because it does not fall within one of the exceptions enumerated in the Pennsylvania Sovereign Immunity Act. *McCree v. Southeastern Pennsylvania Transp. Auth.*, No. 07-4908, 2009 U.S. Dist. LEXIS 4803 (E.D. Pa. Jan. 23, 2009); *Davis v. Southeastern Pennsylvania Transp. Auth.*, 980 A.2d 709 (Pa. Cmwlth. 2009).

In Pennsylvania the Commonwealth and its officials and employees acting within the scope of their duties are entitled to sovereign immunity. 1 Pa.C.S. § 2310 (2010). It is well-settled that SEPTA “is an agency of the Commonwealth of Pennsylvania that is generally entitled to sovereign immunity under the Sovereign Immunity Act.” *McCree*, 2009 U.S. Dist. LEXIS 4803, at \*10 (citing 74 Pa.C.S. §§ 1711(a), 1711(c)(3)); *Jones v. Southeastern Pennsylvania Transp. Auth.*, 772 A.2d 435 (Pa. 2001) (holding that SEPTA is immune in a tort case pursuant to the Sovereign Immunity Act except to the extent specifically authorized by limited statutory exceptions). SEPTA’s employees are also entitled to sovereign immunity. *See* 42 Pa.C.S. § 8501 (2010) (defining “Commonwealth Party” under Sovereign Immunity Act as “[a] Commonwealth agency and any employee thereof”). Sovereign immunity in Pennsylvania “is only waived as a bar to suit against a Commonwealth Party ‘for damages arising out of a negligent act’ in the specific instances enumerated as exceptions to the statute.” *Davis*, 980 A.2d at 714 (quoting 42 Pa.C.S. § 8522(a)). Thus, Local 234 can maintain its state law claim against SEPTA only if the claim falls into one of the nine exceptions to sovereign immunity. It does not.

The nine exceptions to sovereign immunity are: (1) vehicle liability; (2) medical-professional liability; (3) care, custody or control of personal property; (4) Commonwealth real estate highways and sidewalks; (5) potholes and other dangerous conditions on highways; (6) care, custody and control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines. 42 Pa.C.S. § 8522(b). Because Local 234's claim under Article I, § 7 does not fall into any of these, SEPTA and its officials are entitled to sovereign immunity as to Count I, and it must be dismissed.

**D. Plaintiff's Civil Rights Conspiracy Claim Must be Dismissed.**

1. Plaintiff Has Failed to Allege Any Factual Underpinnings to Support the Claim.

Count II appears to be based solely on an alleged conspiracy between all Defendants.<sup>2</sup> Local 234 alleges that Defendants conspired to "violate the constitutional rights of the Union and its members." *Amended Complaint* at ¶ 62. Yet it offers no factual allegations to support this claim, relying instead on a conclusory recitation of the elements of a conspiracy claim. This is insufficient as a matter of law, and Count II must be dismissed as to all Defendants.

In *Twombly*, the United States Supreme Court rejected the argument that allegations of parallel conduct were sufficient to maintain a conspiracy claim under Section 1 of the Sherman Act. *Id.* 550 U.S. at 556-57. In doing so the Court explained that "[w]hile 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." *Id.* at

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<sup>2</sup> It is unclear whether Plaintiff is attempting to allege claims other than conspiracy under 42 U.S.C. § 1983. The Amended Complaint fails to specify any other theories that would give rise to liability under 42 U.S.C. § 1983. Even if Local 234 is in fact asserting additional theories of liability, it has failed to specify who the culpable Defendants are, what their specific acts were, and how Local 234 was harmed.

555 (citations omitted). The Court expanded on this in *Iqbal*, stating that a complaint must offer more than “a sheer possibility that a defendant has acted unlawfully.” *Id.* 129 S. Ct. at 1949. Thus, a plaintiff seeking to maintain a conspiracy claim must do more than simply allege conspiracy and agreement. “Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions taken to achieve that purpose, will be deemed sufficient.” *Loftus v. Southeastern Pennsylvania Transp. Auth.*, 843 F. Supp. 981, 987 (E.D. Pa. 1994) (quoting *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989)).

Courts in this Circuit have routinely dismissed § 1983 conspiracy claims where the plaintiff offered nothing more than a conclusory recitation of the elements of a conspiracy. *Loftus v. Southeastern Pennsylvania Transp. Auth.*, 843 F. Supp. 981, 987 (E.D. Pa. 1994) (“mere incantation of the words ‘conspiracy’ or ‘acted in concert’ does not talismanically satisfy [Rule 8’s] requirements.”); *Davis-Heep v. City of Philadelphia*, No. 09-5619, 2010 U.S. Dist. LEXIS 39023, at \*21 (E.D. Pa. Apr. 19, 2010); *Cunningham v. North Versailles Township*, No. 09-1314, 2010 U.S. Dist. LEXIS 7005, at \*15 (W.D. Pa. Jan. 27, 2010) (“a complaint that alleges conspiracy must be pled with particularity”); *Walsh v. Quinn*, C.A. 07-328 E, 2008 U.S. Dist. LEXIS 67587, at \*10 (W.D. Pa. Aug. 8, 2008) (“However, the rule is clear that allegations of conspiracy must provide some factual basis to support the existence of the elements of a conspiracy.”)

*Davis-Heep* is particularly instructive because the plaintiff there made substantially the same § 1983 conspiracy allegations as Local 234 has made here. Specifically, plaintiff alleged:

[T]he conduct of the defendants were by agreement to derive [sic] Plaintiff of his [sic] civil rights. In furtherance of the agreement of the Defendants’ acts, actions and conduct were continuing conduct, which was done in and to achieve a common plan or agreement. Which plan was put in motion by word or deed, as

pleaded above, to deprive the Plaintiff of her property, employment and constitutional rights, and to retaliate against Plaintiff for exercising free speech or petition clause activity rights, or because of her race.

*Davis-Heep*, 2010 U.S. Dist. LEXIS 39023, at \*20-21. These allegations were deemed insufficient by the District Court for the Eastern District of Pennsylvania, which dismissed plaintiff's § 1983 conspiracy claim for failing to "provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action." *Id.* at \*20 (quoting *Capogrosso v. Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir. 2009)).

Local 234 has failed to offer any substantive factual allegations concerning the alleged conspiracy in this case. It has not alleged which specific Defendants conspired together, when or how such Defendants met and agreed to conspire, what the purpose of the alleged conspiracy was, or what the nature of the agreement was. And it has not alleged a single specific act that the Defendants took in furtherance of their alleged conspiracy. The only allegation that might possibly relate to the alleged conspiracy is the allegation that Defendants Hanratty and Liberi issued the notice that is the subject of Local 234's Amended Complaint. *Amended Complaint* ¶ 23. This allegation is, at best, an allegation of parallel conduct, but it is hardly an allegation sufficient to establish a conspiracy. *Twombly*, 550 U.S. 544 ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."); *Loftus*, 843 F. Supp. at 987; *Davis-Heep*, 2010 U.S. Dist. LEXIS 39023, at \*21. Therefore, Plaintiff's conspiracy claims must be dismissed as to all Defendants.

2. The Intracorporate Conspiracy Doctrine Bars Plaintiff's Civil Rights Conspiracy Claims Against SEPTA and its Officials Acting in Their Official Capacities.

It is well-settled that SEPTA cannot conspire with its officials acting in their official capacities, nor can SEPTA's officials, acting in their official capacities, conspire with each other.

*Poli v. Southeastern Pennsylvania Transp. Auth.*, No. 97-6766, 1998 U.S. Dist. LEXIS 9935 (E.D. Pa. July 7, 1998) (dismissing conspiracy claim under “intracorporate conspiracy doctrine” where alleged conspirators were SEPTA officers acting in their official capacities). Therefore, Plaintiff’s conspiracy claims as to SEPTA and its officials acting in their official capacities must be dismissed.

Under the intracorporate conspiracy doctrine, “an entity cannot conspire with one who acts as its agent.” *Gen. Refractories Co. v. Fireman’s Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003). Within this Circuit “the intracorporate conspiracy doctrine applies to claims of federal civil rights conspiracy.” *Shingara v. Skiles*, 274 F. App’x 164, 168 (3d Cir. 2008). For example, in *Poli*, a case directly on point here, the court applied the intracorporate conspiracy doctrine to dismiss plaintiff’s civil rights conspiracy claim against several SEPTA officers. *Poli*, 1998 U.S. Dist. LEXIS 9935. Specifically, the *Poli* court held: “a corporation cannot conspire with its own officers while the officers are acting in their official capacities . . . [t]he Court will dismiss the conspiracy claim against the individual Defendants in their official capacities.” *Id.* at \*45. The same result is required here, where Plaintiff has alleged a conspiracy among all “Defendants,” which includes SEPTA and its officials acting in their official capacities.

**E. SEPTA is Immune From Claims for Punitive Damages Under § 1983.**

The Court of Appeals for the Third Circuit has explicitly held that SEPTA, “like a municipality, is immune from punitive damages under Section 1983.” *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 830 (3d Cir. 1991). This holding has been applied numerous times in the Eastern District of Pennsylvania to bar claims against SEPTA for punitive damages under § 1983. *Poli*, 1998 U.S. Dist. LEXIS 9935, at \*47 (“SEPTA is . . . immune from punitive damages under section 1983.”); *Allstate Transp. Co., Inc. v. Southeastern Pennsylvania Transp. Auth.*, No. 97-1482, 1998 U.S. Dist. LEXIS 1740 (E.D. Pa. Feb. 13, 1998) (demand for

punitive damages brought against SEPTA under section 1983 dismissed). Accordingly, Plaintiff's claim for punitive damages must be dismissed.

**IV. Conclusion**

For the foregoing reasons, Defendants respectfully request that this Court dismiss the Amended Complaint under Rule 12(b)(6) for failure to state a claim.

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