IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DÉJÀ VU OF NASHVILLE, INC., and THE PARKING GUYS, INC.,	§	
Plaintiffs,	§	
v.	§	Case No.: 3:18-cv-00511
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, *et al.*	§	Chief Judge Crenshaw
Defendants.	§	

MEMORANDUM IN SUPPORT OF DEFENDANT LINDA SCHIPANI'S MOTION TO DISMISS

I. Introduction and Summary of Argument

This case alleges that while testifying during an administrative hearing before a regulatory commission, and while providing other evidence to that commission, Linda Schipani engaged in a 42 U.S.C. § 1985 conspiracy to deny The Parking Guys its "civil right" to a valet permit to service Déjà Vu of Nashville, a local strip club.[1] To encourage witnesses like Mrs. Schipani to come forward, however, and to foreclose the possibility of retaliatory lawsuits like this one, Tennessee law affords witnesses absolute immunity for all statements made during the course of such proceedings. As such, Plaintiffs' claims against Mrs. Schipani must be dismissed with prejudice.

Critically, before denying The Parking Guys' permit application, Metro Nashville's Traffic and Parking Commission held multiple hearings, provided notice of those hearings to the public,

[1] *See* Doc. #1 (Complaint), PageID #12, ¶ 50 ("Schipani's testimony included knowingly false statements that were known to be false when made or that were made with reckless disregard to the truth . . . . "); PageID #20, ¶¶ 79-81 (setting forth 42 U.S.C. § 1985 claim). The governmental defendants have additionally been sued under 42 U.S.C. § 1983. *See id.* at ¶ 82. The Plaintiffs' § 1983 claim is not alleged against Mrs. Schipani or Defendant Molette. *See id.*

and afforded both The Parking Guys and interested local business owners an opportunity to be heard.[2] The Parking Guys also took full advantage of its opportunity to be heard by participating in the Commission's hearings and making the same arguments advanced in this lawsuit.[3]

After reviewing an extensive evidentiary record,[4] the Commission denied The Parking Guys' permit application on August 14, 2017.[5] Believing that the Commission's denial had been unfounded and was the product of an elaborate conspiracy, however, The Parking Guys petitioned the Davidson County Chancery Court for a writ of certiorari.[6] On July 6, 2018, the Chancery Court judge affirmed the Commission's denial in full.[7] Because that judgment is not yet final, however, the Plaintiffs' contention that The Parking Guys' valet permit application was unlawfully denied by the Traffic and Parking Commission remains pending in a parallel state proceeding.[8]

Nonetheless, the crux of Plaintiffs' case—that "there was and is no factual basis" for denying The Parking Guys a valet permit,[9] and that the denial at issue was "improper"[10]—has already been determined against The Parking Guys and is awaiting final judgment in state court.[11]

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[2] *See* Doc. #1-19 (Transcript of July 10, 2017 Metropolitan Traffic and Parking Commission Hearing), PageID ##104-05 ("I'm the owner of the Parking Guys, Nashville, Tennessee. . . . I'm here to get approval for our valet lane at Déjà Vu."); Doc. #1-25 (Transcript of August 14, 2017 Metropolitan Traffic and Parking Commission Hearing), PageID #156 ("I'm the owner of the Parking Guys. We have the operation there. In all fairness, I appreciate all the pictures that have been distributed and the opposition. But we're - - we're totally running our operation as we're supposed to.").

[3] *See, e.g.* Doc. #1-25, PageID ##156-58; Doc. #1-19, PageID ##104-05.

[4] Doc. #1-19 (Transcript of July 10, 2017 Hearing); Doc. #1-25 (Transcript of August 14, 2017 Hearing).

[5] Doc. #1 (Complaint), PageID #19, ¶¶ 74, 76.

[6] Doc. #1 (Complaint), PageID #19, ¶ 77; Doc. #1-26 (Petition for Writ of Certiorari). *See also* **Exhibit 2**, pp. 2, 20 (seeking certiorari based, *inter alia*, on the "improper influence" and "ulterior motives" involved).

[7] *See* **Exhibit 1** (Order Denying Certiorari).

[8] *See* Tenn. R. Civ. P. 59.04 ("A motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment.").

[9] Doc. #1 (Complaint), PageID #18, ¶ 69.

[10] Doc. #1 (Complaint), PageID #20, ¶¶ 79-81.

[11] **Exhibit 1** (Order Denying Certiorari)**.** The Chancery Court's Order will not become final until August 5, 2018. *See* Tenn. R. Civ. P. 59.04.

Because the viability of this lawsuit rests upon that claim, federal abstention pending the conclusion and appeal, if any, of Davidson County Chancery Court Case No. 17-970-II is appropriate under both the *Colorado River* and *Burford* abstention doctrines.

As to the merits of Plaintiffs' claims: They are lacking. Specifically, the Plaintiffs' lawsuit against Mrs. Schipani must be dismissed for each of the following reasons:

First, the Plaintiffs have failed to state any cognizable claim under 42 U.S.C. § 1985 because they have not alleged any class-based, invidiously discriminatory animus.

Second, Mrs. Schipani must be dismissed from this lawsuit because she had no authority to deny The Parking Guys' valet permit application and could not plausibly have produced the injury over which the Plaintiffs have sued.

Third, all claims filed by Déjà Vu of Nashville's must be dismissed for lack of standing, because Déjà Vu of Nashville has not suffered any injury and remains free to have valet services provided at its establishment by any qualifying vendor.

Fourth, despite the Plaintiffs' characterization of their claims, Mrs. Schipani has been sued for her speech. Accordingly, Plaintiffs' lawsuit must be treated as a defamation claim, and it must satisfy the heightened constitutional requirements that govern defamation claims. Because it cannot do so, however, their Complaint must be dismissed for failure to state a claim.

Fifth, the Plaintiffs' lawsuit must be dismissed for improper service of process.

Sixth, the Plaintiffs' lawsuit against Mrs. Schipani must be dismissed—and Mrs. Schipani is entitled to recover her reasonable attorney's fees and costs—because Mrs. Schipani is immune from this lawsuit under Tenn. Code Ann. § 4-21-1003(a).

II. Standard of Review

Mrs. Schipani's Motion to Dismiss is subject to familiar standards of review:

> For purposes of a motion to dismiss, the Court must take all of the factual allegations in the complaint as true. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). 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. *Id.* A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* at 1950. A legal conclusion couched as a factual allegation need not be accepted as true on a motion to dismiss, nor are recitations of the elements of a cause of action sufficient.

Stall v. Benningfield, No. 2:17-CV-0060, 2018 WL 3036312, at *1 (M.D. Tenn. June 18, 2018) (citing *Fritz v. Charter Township of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010)).

"[T]he Court may also consider other materials that are integral to the Complaint, are public records, or are otherwise appropriate for the taking of judicial notice." *Sullivan v. Benningfield*, No. 2:17-CV-0052, 2018 WL 3020461, at *1 (M.D. Tenn. June 18, 2018) (citing *Wyser-Pratte Mgmt. Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005)).

III. Argument

A. Mrs. Schipani is absolutely immune from this lawsuit based on the absolute privilege that applies to witness statements made during quasi-judicial and administrative proceedings.

Under federal law, "[i]t is well-settled that witnesses are granted absolute immunity from suit for all testimony provided in judicial proceedings." *Spurlock v. Satterfield*, 167 F.3d 995, 1001 (6th Cir.1999) (citing *Briscoe v. LaHue*, 460 U.S. 325, 330–31 (1983)). Tennessee law—which governs this action[12]—is equally clear on the matter. *Wilson v. Ricciardi*, 778 S.W.2d 450, 453 (Tenn. Ct. App. 1989) ("It is a well-settled proposition of law in [Tennessee] that the testimony of a witness given in a judicial proceeding is absolutely privileged."); *Jones v. State*, 426 S.W.3d 50, 57 (Tenn. 2013) ("[s]tatements made in judicial proceedings are absolutely privileged.").

Of note, the absolute witness privilege "also applies to statements made by witnesses ***in***

[12] *See infra*, Section III-C-4 (arguing that Plaintiffs' claims must be treated as state-law defamation claims).

the course of judicial proceedings." *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 159 (Tenn. Ct. App. 1997) (emphasis added). *See also Lambdin Funeral Serv., Inc. v. Griffith*, 559 S.W.2d 791, 792 (Tenn. 1978) (holding that the absolute privilege extends beyond testimony to statements made "in the course of a judicial proceeding that are relevant and pertinent to the issues involved . . . .").[13] Further, given Tennessee's strong public policy interest in having witnesses be able to speak freely without fear of retaliatory lawsuits like this one, Tennessee courts "extend the doctrine to communications ***preliminary to*** proposed or pending litigation" as well. *Myers*, 959 S.W.2d at 161 (emphasis added).

The Plaintiffs themselves allege that the statements over which they have sued Mrs. Schipani concerned The Parking Guys' valet permit application and were also made: (1) while testifying at a Traffic and Parking Commission hearing on The Parking Guys' permit application; (2) during the course of the Commission's proceedings on that application; or (3) preliminary to those proceedings.[14] Thus, the only remaining question is whether the Metro Nashville Traffic and Parking Commission's official proceedings qualify for the absolute witness privilege.

That question is easily answered in the affirmative. Under Tennessee law, both quasi-judicial proceedings and administrative proceedings clothe witnesses with absolute immunity from

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[13] The absolute privilege is commonly invoked in reference to defamation lawsuits. *See, e.g., Jones v. State*, 426 S.W.3d 50, 57 (Tenn. 2013) ("'It is generally recognized that statements made in the course of a judicial proceeding that are relevant and pertinent to the issues involved are absolutely privileged and cannot be the predicate for liability in an action for libel, slander, or invasion of privacy.'") (quoting *Lambdin Funeral Serv., Inc. v. Griffith*, 559 S.W.2d 791, 792). However, the Tennessee Supreme Court has "recognized the extension of the absolute privilege to causes of action other than actions for defamation, and cases from other jurisdictions support such an extension." *See Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 162 (Tenn. Ct. App. 1997). This extension includes conspiracy claims. *See Farley v. Clayton*, 928 S.W.2d 931, 935 (Tenn. Ct. App. 1996) (dismissing conspiracy claims based on "the witness immunity doctrine.").

[14] Doc. #1 (Complaint), PageID #9, ¶ 40 (referencing statements made "[p]rior to and at the meeting"); ¶ 41 (referencing statements made "to support the denial of this valet parking"); PageID ##10-11, ¶ 44 (referencing photographs sent in support of permit denial); PageID #12, ¶ 50 (referencing "testimony in opposition to the Parking Guys being granted a Valet Permit" that Mrs. Schipani provided "[a]t the Commission's July 10, 2017 Hearing"); PageID #16, ¶ 61 (referencing information presented "to the Commission" in order to support "denial of the requested Valet Permit"); ¶¶ 62-63 (referencing an email "requesting that the Commission deny the Parking Guys [the] requested Valet Permit" that purportedly contained false statements).

suit. *See Boody v. Garrison*, 636 S.W.2d 715, 716 (Tenn. Ct. App. 1981) ("[i]n this jurisdiction the absolute privilege [applies to] judicial and quasi-judicial proceedings"); *Lambdin*, 559 S.W.2d at 792 (holding that the absolute privilege applicable to witnesses "also holds true in administrative proceedings before boards or commissions . . . ."). Here, the Traffic and Parking Commission performed both a quasi-judicial function and conducted a formal administrative proceeding, bringing its proceedings within the ambit of the absolute witness privilege.

Tennessee law specifically provides that when a commission holds a hearing, applies law to fact to reach a decision, creates a record of the proceeding, and issues a determination without the need for approval from another governmental body, it performs a quasi-judicial function. *See McFarland v. Pemberton*, 530 S.W.3d 76, 104 (Tenn. 2017) ("The Commission applied existing law to the facts at hand to reach a decision, created a record of the proceeding, and issued a determination that authorized the Commission to certify the ballots without requiring approval of the board's decision from another government body. For these reasons, we find the hearing was quasi-judicial."). All of these actions occurred in the instant case.[15] Accordingly, the Commission's proceedings were quasi-judicial in character. *See id*. Moreover, even if the Commission's actions were considered purely administrative, the absolute privilege that applies to witness statements "holds true in administrative proceedings before boards or commissions" as well. *Lambdin*, 559 S.W.2d at 792.

Because the Traffic and Parking Commission's proceedings were both quasi-judicial and administrative, the absolute privilege applies to any statement made by Mrs. Schipani during the course of them. *Boody*, 636 S.W.2d; *Lambdin*, 559 S.W.2d at 792 ("The underlying basis for the grant of the privilege is the public's interest in and need for a judicial process free from the fear of

[15] Doc. #1-19 (Transcript of July 10 Hearing); Doc. #1-25 (Transcript of August 14 Hearing).

a suit . . . based on statements made in the course of a judicial or quasi-judicial proceeding."). *See also id.* (noting that the absolute privilege "'extends also to the proceedings of many administrative officers such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial, or 'quasi-judicial' in character.'" (quoting Prosser, Law of Torts, 3d Ed. 1964, 799). As such, Mrs. Schipani's statements are protected by absolute immunity, and the Plaintiffs' claims against her must be dismissed with prejudice.

B. This Court should decline to exercise subject matter jurisdiction pursuant to the *Colorado River* and *Burford* abstention doctrines.

This Court should independently decline to exercise its subject matter jurisdiction to adjudicate this case because an overlapping lawsuit based on the same essential facts and claims is currently pending in state court. The claims set forth in the Plaintiffs' Complaint turn upon their contentions that "there was and is no factual basis" for denying The Parking Guys a valet permit to service Déjà Vu[16] and that the Traffic and Parking Commission's denial was "improper."[17] If, however, the Traffic and Parking Commission instead denied The Parking Guys' valet permit application properly, then the instant lawsuit is not even theoretically sustainable. Critically, whether The Parking Guys' valet permit application was denied improperly and based on improper influence are also questions that have been adjudicated and are approaching final judgment in a parallel state court proceeding that is currently pending in Davidson County Chancery Court.[18]

The Parking Guys' initiating documents in Davidson County Chancery Court Case No. 17-970-II are appended as exhibits to the Plaintiffs' Complaint.[19] Its pleadings and briefing in

[16] Doc. #1 (Complaint), PageID #18, ¶ 69 ("The Minutes of the Meeting of the Traffic and Parking Commission for August 14, 2017 (Exhibit 22), demonstrate that there was and is no factual basis to deny the appeal.").

[17] Doc. #1 (Complaint), PageID #20, ¶¶ 79-81.

[18] *See* **Exhibit 1** (Order Denying Certiorari).

[19] Doc. #1-26 (Petition for Writ of Certiorari); Doc. #1-27 (Chancery Court Order providing for filing of administrative record); Doc. #1-28 (Amended Petition for Writ of Certiorari).

Davidson County Chancery Court Case No. 17-970-II also make clear that its state lawsuit is premised upon the same essential facts and claims alleged in the instant case.[20] The most recent hearing in Case No. 17-970-II was held on June 20, 2018.[21] On July 6, 2018, the Chancery Court affirmed the Commission's decision to deny The Parking Guys a valet permit in full.[22]

Given this context, abstention is appropriate under both the *Colorado River* and *Burford* abstention doctrines, and abstention will further the judiciary's interest in wise judicial administration. *Allen v. McCurry*, 449 U.S. 90, 101, n. 17 (1980) ("Abstention['s] . . . purpose is to determine whether resolution of the federal question is even necessary . . . . "). This Court should abstain from exercising its subject matter jurisdiction accordingly.

1. *Colorado River* Abstention

Pursuant to the "[Supreme] Court's decision in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), a federal court may, in certain limited circumstances, decline to adjudicate a claim that is already the subject of a pending state-court case." *RSM Richter, Inc. v. Behr Am., Inc.*, 729 F.3d 553, 556 (6th Cir. 2013). "Stay orders based on *Colorado River* effectively end the litigation in federal court, because the district court would be bound, as a matter of res judicata, to honor the state court's judgment." *Id.* (quotation omitted).

Under *Colorado River* abstention, "a court may stay a federal case 'due to the presence of a concurrent state proceeding for reasons of wise judicial administration.'" *Int'l Forest Prod. Corp. v. West*, No. 3:11-0120, 2011 WL 4056036, at *7 (M.D. Tenn. Aug. 8, 2011), *report and*

[20] *See generally* Doc. 1-26; **Exhibit 2** (The Parking Guys' Memorandum in Support of Petition for a Writ of Certiorari); **Exhibit 3** (The Parking Guys' Reply Brief).

[21] **Exhibit 4** (Hearing on The Parking Guys' Petition for a Writ of Certiorari).

[22] *See* **Exhibit 1** (Order Denying Certiorari).

recommendation adopted, No. 3:11-0120, 2011 WL 4063035 (M.D. Tenn. Sept. 13, 2011) (quoting *Colorado River*, 424 U.S. at 818). "Analysis under *Colorado River* is composed of two parts: first, the court must determine that the concurrent state and federal actions are actually parallel, and, second, the court must weigh the multiple factors identified by the Supreme Court in *Colorado River*, 424 U.S. at 818–19, and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23–26, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)." *Id.*

Here, the concurrent state and federal actions are indisputably parallel. Both lawsuits are presently pending, the claims in Davidson County Chancery Court Case No. 17-970-II are predicated upon the same allegations and the same material facts, the injuries alleged arise out of the very same administrative decision, and all parties to Davidson County Chancery Court Case No. 17-970-II are parties to this case.[23] *See Preferred Care of Delaware, Inc. v. VanArsdale*, 676 F. App'x 388, 393 (6th Cir. 2017) ("so long as 'the parties are substantially similar,' and the claims raised in both suits are 'predicated on the same allegations as to the same material facts,' the two actions will come close enough to count as parallel.") (quoting *Romine v. Compuserve Corp.*, 160 F.3d 337, 340 (6th Cir. 1998)). *Cf. Warner v. Greenebaum, Doll & McDonald*, 104 F. App'x 493, 496 (6th Cir. 2004). Accordingly, the two actions are "actually parallel." *Int'l Forest Prod. Corp.*, 2011 WL 4056036, at *7.

Turning to the second step of the analysis, all eight *Colorado River*/*Moses H. Cone* factors favor abstention. To determine whether to abstain, this Court considers:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's

[23] *See generally* **Exhibit 2** (The Parking Guys' Memorandum in Support of Petition for a Writ of Certiorari); **Exhibit 3** (The Parking Guys' Reply Brief). The Parking Guys' state proceeding similarly challenges the propriety of the Traffic and Parking Commission's decision as having been based on "improper influence" and "ulterior motives." **Exhibit 2**, pp. 2, 20.

rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

PaineWebber, Inc. v. Cohen, 276 F.3d 197, 206 (6th Cir. 2001) (cleaned up).

As to the first factor—whether the state court has assumed jurisdiction—Davidson County Chancery Court has plainly assumed jurisdiction over The Parking Guys' claim that its valet permit was denied unlawfully, and it has already ruled on it.[24]

With respect to the second factor—whether the federal forum is less convenient to the parties—the federal forum is significantly less convenient to the parties. Litigating in this forum will require unnecessary and inconvenient duplication of previously adjudicated issues of both law and fact—including but not limited to disputes regarding discovery.[25] As such, the second *Colorado River* factor favors abstention as well.

As to the third and "paramount" *Colorado River* factor—avoidance of piecemeal litigation—abstention will assuredly avoid piecemeal litigation. *See Preferred Care of Delaware*, 676 F. App'x at 395 ("The third and 'paramount' factor in *Colorado River*—avoiding piecemeal litigation—supports abstention here, because, without abstaining, the district court would necessarily have to litigate the same issue resolved by the state trial court and now under consideration by the state intermediate court"). If the Davidson County Chancery Court's ruling that The Parking Guys' valet permit was denied properly and was not the basis of any "improper influence" or conspiracy is affirmed,[26] then those findings will carry preclusive effect in the instant case.[27] *See George v. Hargett*, 879 F.3d 711, 718 (6th Cir. 2018) ("The preclusive effect of the

[24] Doc. #1-27 (Order Assuming Jurisdiction), PageID #189; **Exhibit 1** (Order Denying Certiorari).

[25] *See* **Exhibit 5** (Chancery Court Discovery Order). *See also* **Exhibit 1** (Order Denying Certiorari).

[26] *See* **Exhibit 2** (The Parking Guys' Memorandum in Support of Petition for a Writ of Certiorari), p. 2.

[27] The Parking Guys made an *England* reservation in state court. *See* **Exhibit 2**, pp. 2-3. Even if this reservation were read to foreclose claim preclusion, however, *see DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 (6th Cir. 2004), "issue

state court's decision in this federal litigation is governed by Tennessee law."); *Jackson v. Smith*, 387 S.W.3d 486, 491 (Tenn. 2012) (addressing collateral estoppel under Tennessee law). Alternatively, if an appeal results in a determination that The Parking Guys' valet permit was denied improperly, then that decision will bind the Traffic and Parking Commission and provide The Parking Guys a significant portion of the relief that they are seeking through the instant action.

Consequently, regardless of its ultimate ruling, the state proceeding will resolve—one way or another—The Parking Guys' essential claim that its valet permit application was subject to an "improper denial."[28] It is wholly unnecessary for this Court to duplicate that effort. Indeed, doing so would constitute "the very definition of creating piecemeal litigation—where 'different courts adjudicate the identical issue, thereby duplicating judicial effort and potentially rendering conflicting results[.]'" *Preferred Care of Delaware*, 676 F. App'x at 395 (quoting *Romine*, 160 F.3d at 341). Accordingly, the "paramount" third factor favors abstention as well. *Id.*

As to the fourth factor—the order in which jurisdiction was obtained—this factor heavily favors abstention as well. Jurisdiction was obtained in Davidson County Chancery Court Case No. 17-970-II on September 8, 2017.[29] By contrast, federal jurisdiction was not obtained until June 1, 2018—nearly nine (9) months later.[30] Consequently, this factor, too, favors abstaining pending the outcome of the state court proceeding.

Turning to the fifth factor—whether the source of governing law is state or federal—Plaintiffs themselves note that the source of governing law is "Chapter 12.41 of the Code of the

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preclusion ordinarily bars relitigation of an issue of fact or law raised and necessarily resolved by a prior judgment." *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016).

[28] Doc. #1 (Complaint), PageID #20, ¶¶ 79-81.

[29] Doc. #1-27 (Chancery Court Order Assuming Jurisdiction), PageID #189.

[30] Doc. #1 (Complaint).

Metropolitan Government of Nashville and Davidson County, Tennessee."[31] The Traffic and Parking Commission's decisions under Chapter 12.41 are also reviewable as a matter of right under state law; as the Plaintiffs correctly observe, the Commission's decision here is presently subject to review in state court "pursuant to T.C.A. § 27-9-101" based on "both a statutory and in the alternative a common law writ of certiorari."[32] Separately, this case also implicates state law principles of immunity and must be treated as a state-law defamation claim.[33] Consequently, the fifth *Colorado River* factor favors abstention as well.

The sixth factor—the adequacy of the state court action to protect the Plaintiffs' federal rights—also favors abstention. Tennessee's courts are fully empowered to review questions of federal law. *See Robinson v. Whisman*, No. M2011-00999-COA-R3CV, 2012 WL 1900551, at *5 (Tenn. Ct. App. May 24, 2012) (adjudicating claims filed "pursuant to 42 U.S.C. §§ 1983 and 1985(3)"). Further, given that the instant action alleges violations of administrative law, the Plaintiffs' federal rights arguably are not implicated. *See, e.g.*, *Occupy Nashville v. Haslam*, 769 F.3d 434, 445, n. 19 (6th Cir. 2014) ("To the extent the District Court may have considered a violation of state administrative law to amount to a constitutional violation under § 1983, *Occupy Nashville*, 949 F.Supp.2d at 797, such an analysis was improper. This Circuit has clearly stated that 'noncompliance with state laws and administrative procedures does not state a claim under § 1983,' because 'even if implemented in violation of state law, a policy may satisfy the dictates of the [Constitution].'") (alterations omitted) (quoting *Boswell v. Mayer*, 169 F.3d 384, 390 (6th Cir.1999)). Consequently, this factor favors abstention as well.

As to the seventh factor—the relative progress of the state and federal proceedings—this

[31] Doc. #1 (Complaint), PageID ##4-5, ¶¶ 13-19.

[32] Doc. #1-26 (Petition for Writ of Certiorari), PageID #170.

[33] *See supra*, Section III-A; *infra* Section III-C-4.

case is barely at its inception, while the state case is nearly final.[34] Accordingly, this factor, too, favors abstention.

Last, the eighth and final factor—the presence or absence of concurrent jurisdiction—favors abstention as well. "[S]tate courts retain concurrent jurisdiction with the federal courts over claims arising under federal law unless the United States Congress has withdrawn that jurisdiction with respect to a particular claim." *Vedder v. N. Am. Mortg. Co.*, No. M2003-01682-COA-R3CV, 2004 WL 2731823, at *2 (Tenn. Ct. App. Nov. 30, 2004). Both 42 U.S.C. § 1983 claims and 42 U.S.C. § 1985 claims are fully cognizable in Tennessee state court. *See Robinson*, 2012 WL 1900551, at *5 (adjudicating plaintiff's § 1983 and § 1985 claims). Tennessee's courts also have never hesitated to provide relief under federal law when such relief is appropriate. *See, e.g., Anderson v. Metro. Gov't of Nashville & Davidson Cty.*, Davidson Cty. Cir. Ct. Case No. 15C3212 (finding liability and awarding substantial fee award on § 1983 claim). Consequently, the final factor of the *Colorado River* analysis favors abstention as well.

In sum: there is a pending, parallel state proceeding involving consideration of the same facts and claims presented in the instant case, and all eight *Colorado River* factors favor abstention. As such, this Court should decline to exercise its subject matter jurisdiction, and Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(1). *See B.D. ex rel. S.D. v. Dazzo*, No. 11-15347, 2012 WL 2711457, at *7 (E.D. Mich. July 9, 2012).

2. *Burford* Abstention

Federal abstention is also appropriate pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention is implicated where review of administrative proceedings is available under state law, and where the exercise of federal review would interfere with state-level efforts

[34] *See* **Exhibit 1** (Order Denying Certiorari).

to establish coherent policies on matters of public concern. "The Supreme Court has [] summarized *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Saginaw Hous. Comm'n v. Bannum, Inc., 576 F.3d 620, 625–26 (6th Cir. 2009) (quoting *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989)).

Here, the second *Burford* prong is implicated and fully established. In filing this case, the Plaintiffs call upon this Court to sit in equity,[35] and they invite federal review of an administrative proceeding that is subject to timely and adequate state-court review.

Significantly, the local administrative proceeding that is the subject of state-court review also involves a matter of substantial and highly localized public concern: Traffic flow on public thoroughfares. It goes without saying that if every local permitting decision made by Metro Nashville's Traffic and Parking Commission were subject to federal review, then no coherent traffic and parking policy or city planning could ever take place. Accordingly, this case calls for the exercise of *Burford* abstention, this Court should decline to exercise its subject matter jurisdiction, and Plaintiffs' Complaint should be dismissed under Rule 12(b)(1).

C. Plaintiffs' claims against Linda Schipani must be dismissed pursuant to Rule 12(b)(6); Rule 12(b)(1); and Rule 12(b)(5).

1. The Plaintiffs have failed to state a claim under 42 U.S.C. § 1985 because they have not alleged any class-based, invidiously discriminatory animus.

The Plaintiffs' 42 U.S.C. § 1985 claim must be dismissed for failure to state a claim

[35] Doc. #1 (Complaint), PageID #21 (seeking, *inter alia*, declaratory relief and "[a]ll equitable and general relief to which the Plaintiffs are entitled").

because they have failed to allege a threshold element of a § 1985 claim: Class-based, invidiously discriminatory animus. As the Sixth Circuit has explained: "The Supreme Court requires that § 1985 claims contain allegations of 'class-based, invidiously discriminatory animus.'" *Webb v. United States*, 789 F.3d 647, 672 (6th Cir. 2015) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790 (1971)). Further, "[t]he class must be based upon race or other 'inherent personal characteristics.'" *Id.* (quoting *Browder v. Tipton*, 630 F.2d 1149, 1150 (6th Cir. 1980)). *See also Blankenship v. City of Crossville*, No. 2:17-CV-00018, 2017 WL 4641799, at *4 (M.D. Tenn. Oct. 17, 2017) ("the Sixth Circuit has repeatedly held that a plaintiff must also 'allege that the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus.' *Moniz v. Cox*, 512 Fed.Appx. 495, 499–500 (6th Cir. 2013) (collecting cases). Thus, '[t]o sustain a claim under section 1985(3), a claimant must prove both membership in a protected class and discrimination on account of it.'") (quoting *Smithers ex rel. Norris v. City of Flint*, 602 F.3d 758, 765 (6th Cir. 2010)).

The Plaintiffs' Complaint does not allege class-based, invidiously discriminatory animus.[36] Thus, in addition to several other glaring problems with Plaintiffs' 42 U.S.C. § 1985 claim,[37] this failure alone compels dismissal. *Id.* Accordingly, the Plaintiffs have failed to state a claim under 42 U.S.C. § 1985, and that claim—the only one asserted against Mrs. Schipani—must be dismissed with prejudice.

2. Mrs. Schipani did not produce and could not have produced the injury alleged.

Mrs. Schipani must also be dismissed from this lawsuit because she could not plausibly

[36] *See generally* Doc. #1 (Complaint).

[37] Given that Plaintiffs received both notice and a hearing, the basis for their claim that their procedural Due Process rights were violated is unclear. Further, because there is no constitutional right to operate a valet service at Déjà Vu of Nashville, the basis for Plaintiffs' substantive Due Process claim is a mystery.

have produced the injury over which the Plaintiffs have sued. The Plaintiffs allege that they were injured by *The Traffic and Parking Commission's* decision to deny The Parking Guys a valet permit.[38] Notably, the decision to approve or deny The Parking Guys' valet permit was also subject to the exclusive authority of that Commission and the Metropolitan Government generally.[39]

By contrast, *Mrs. Schipani* had no authority to adjudicate The Parking Guys' permit application whatsoever. Consequently, even taking the Plaintiffs' claims as true, their essential contention that "[i]n voting to deny The Parking Guys' requested permit, the Commission substituted the judgment of O'Connell, Schipani, and Molette for their own" does not give rise to any claim against Mrs. Schipani.[40] Significantly, the Davidson County Chancery Court has also held as much already. *See* **Exhibit 1** (Order Denying Certiorari), p. 20 ("the decision to deny this permit was made by the Commission and not by those who spoke against the permit, including Councilman O'Connell."). Mrs. Schipani must be dismissed from this lawsuit accordingly.

3. Déjà Vu of Nashville has not been injured.

Déjà Vu's claims must also be dismissed for lack of standing because Déjà Vu has not suffered an injury. Déjà Vu bears the burden of establishing standing to maintain this action. *See Lyshe v. Levy*, 854 F.3d 855, 857 (6th Cir. 2017) ("The plaintiff bears the burden of establishing standing."). To do so, Déjà Vu "must establish that: (1) [It] has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent rather than conjectural or hypothetical; (2) that there is a causal connection between the injury and the defendant's alleged wrongdoing; and (3) that the injury can likely be redressed." *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555,

[38] Doc. #1 (Complaint), PageID #21.

[39] *See, e.g.* Doc. #1-26 (Petition for Writ of Certiorari), Page ID #177-78. *See also* **Exhibit 2** (The Parking Guys' Memorandum in Support of Petition for a Writ of Certiorari), pp. 3-4.

[40] Doc. #1 (Complaint), PageID #19, ¶ 75.

560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). The absence of standing represents a defect of this Court's Article III subject matter jurisdiction that compels dismissal under Fed. R. Civ. P. 12(b)(1). *Id.*

Déjà Vu's claims must be dismissed for lack of standing because Déjà Vu has not suffered any cognizable injury. In the administrative proceedings at issue, The Parking Guys was the only entity whose permit application was considered and then ultimately denied by the Traffic and Parking Commission.[41] Déjà Vu, for its part, was not a party to that proceeding, and it is not a party to Davidson County Chancery Court Case No. 17-970-II as a result.[42] Further, as recently as June 20, 2018, Metro Nashville made clear that although *The Parking Guys'* specific valet permit application to service Déjà Vu had been denied, there is nothing whatsoever that prohibits *any other valet parking company* from applying to service Déjà Vu instead.[43]

As such, Déjà Vu's claims that it was injured by The Parking Guys' permit denial and that its First Amendment rights have been infringed are meritless. "Performance dance entertainment," to be sure, represents expressive conduct protected by the First Amendment.[44] *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) ("nude dancing of the type at issue here is expressive conduct, although we think that it falls only within the outer ambit of the First Amendment's protection."). However, the fact that the Traffic and Parking Commission denied The Parking Guys' permit application has no bearing whatsoever on *Déjà Vu's* right or ability to provide such "performance

[41] Doc. #1-19 (Transcript of July 10 Hearing), p.3, PageID #104 ("The next item on the agenda is a bill of the denial of the valet zone on the east side of 15th Avenue North, north of Charlotte Pike, requested by The Parking Company, Inc. [sic].").

[42] Doc. #1-28 (Amended Petition for Writ of Certiorari).

[43] **Exhibit 4** (Hearing on The Parking Guys' Petition for a Writ of Certiorari), p. 25, line 19–p. 26, line 2.

[44] Doc. #1 (Complaint), PageID #2, ¶ 2 ("Deja Vu is engaged in the presentation of female performance dance entertainment to the consenting adult public. Such are protected speech and expression under the First and Fourteenth Amendments of the United States Constitution.").

dance entertainment."[45] Consequently, Déjà Vu's employees remain free to exercise their First Amendment rights to pop it, lock it, roll it, and break it down to their hearts' content regardless of the Commission's decision on The Parking Guys' valet permit application. *See, e.g.*, T. Pain, *I'm 'n Luv (Wit a Stripper)* (Konvict/Jive/Zomba 2005), http://www.metrolyrics.com/im-in-love-with-a-stripper-lyrics-t-pain.html. Déjà Vu is also free to have valet services provided by any entity that actually satisfies the requirements of Metro Code § 12.41.030.[46] Thus, Déjà Vu has not been injured, and its claims must be dismissed for lack of standing.

4. The Plaintiffs' Complaint fails to satisfy the heightened constitutional requirements that govern defamation claims.

Despite the Plaintiffs' attempts to frame their lawsuit as a federal conspiracy claim, Mrs. Schipani has been sued for her oral and written speech based on factual allegations that are quintessentially representative of defamation claims. *See, e.g.*, Doc. #1 (Complaint), PageID #12, ¶ 50 (alleging that "Schipani's testimony included knowingly false statements that were known to be false when made or that were made with reckless disregard to the truth . . . ."). Accordingly, notwithstanding Plaintiffs' own characterizations of their claims, precedent compels this Court to treat Plaintiffs' lawsuit against Mrs. Schipani as a common defamation claim, and their Complaint must satisfy the heightened constitutional requirements that govern all defamation claims as a result. *See, e.g., Boladian v. UMG Recordings, Inc.*, 123 F. App'x 165, 169 (6th Cir. 2005) (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988) ("A party may not skirt the requirements of defamation law by pleading another, related cause of action.")); *Moldea v. New York Times Co.*, 22 F.3d 310, 319–20 (D.C. Cir. 1994) ("a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim."). *Cf. Klayman v. Segal*, 783 A.2d 607, 619

[45] *Id.*

[46] *See* **Exhibit 4**, p. 25, line 24 – p. 26, line 2.

(D.C. 2001). *Id.*

Defamation claims, of course, are governed by state law, which further calls this Court's jurisdiction into question. *See, e.g.*, *Perry v. Monroe Co.*, No. 2:16-CV-10764, 2016 WL 895072, at *2 (E.D. Mich. Mar. 9, 2016) ("Plaintiff's [§ 1983] claims for defamation and/or slander fail because they are state law claims and do not involve the violation of any rights secured by the federal Constitution or the laws of the United States."). Even if exercising federal jurisdiction were appropriate, however, the Plaintiffs' Complaint is both untimely and does not overcome the constitutional requisites of a defamation claim. It must be dismissed with prejudice as a result.

a. The claims against Mrs. Schipani for her spoken words are time-barred.

Plaintiffs' federal civil rights claims under § 1983 and § 1985 "are governed by the state personal injury statute of limitations." *Fox v. DeSoto*, 489 F.3d 227, 233 (6th Cir. 2007). As such, with respect to the purportedly "false" testimony that Mrs. Schipani gave on July 10, 2017, Plaintiffs' claims are time-barred by Tennessee's six-month statute of limitations governing torts premised upon spoken words. *See Cawood v. Booth*, No. E2007-02537-COA-R3-CV, 2008 WL 4998408, at *4 (Tenn. Ct. App. Nov. 25, 2008) ("if the actionable tort involves words, the statute of limitations is six (6) months"); Tenn. Code Ann. § 28-3-103; *Ali v. Moore*, 984 S.W.2d 224, 227, n. 6 (Tenn. Ct. App. 1998) ("The statute of limitations for slander is only six months and the discovery rule does not apply.").

The statute of limitations that applies to every verbal statement that Mrs. Schipani made on July 10, 2017 expired on January 10, 2018. *See id.* However, this lawsuit was not filed until June 1, 2018. *See* Doc. #1 ("Filed 06/01/18"). Accordingly, regardless of merit, all of the statements that Mrs. Schipani made at the Commission's July 10, 2017 hearing—in other words,

nearly all of the statements over which she has been sued[47]—are time-barred. *Cawood*, 2008 WL 4998408, at *4, n. 6. Further, because Tennessee has adopted the single publication rule, so, too, are all of her subsequent written statements repeating those statements. *See generally Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 503 (6th Cir. 2015) (citing *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 193–94 (Tenn. 1973)).

b. Mrs. Schipani's statements were constitutionally protected opinions that also could not have held the Plaintiffs up to public hatred, contempt or ridicule.

Plaintiffs' claims also fail to satisfy the constitutional requirements that govern defamation claims. "[T]he Supreme Court of the United States has constitutionalized the law of libel and [defamation]." *Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978). *See also Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 507 (6th Cir. 2015); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). As a result, defamation claims are subject to heightened pleading standards, and they present several threshold questions of law that do not require deference to Plaintiffs' characterizations of their own Complaint. *Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at *3 (Tenn. Ct. App. Apr. 10, 1997) ("If the [allegedly defamatory] words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation."). *See also Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012). Accordingly, "ensuring that defamation actions proceed only upon statements which may actually defame a plaintiff is an essential gatekeeping function of the court." *Pendleton v. Newsome*, 772 S.E.2d 759, 763 (Va. 2015) (internal quotation omitted).

With this "essential gatekeeping function" in mind, *see id.*, "the issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court

[47] *See* Doc. #1 (Complaint), PageID #12, ¶ 50.

to decide in the first instance . . . ." *Brown*, 393 S.W.3d at 708. *See also Revis v. McClean*, 31 S.W.3d 250, 253 (Tenn. Ct. App. 2000) ("Whether a communication is capable of conveying a defamatory meaning is a question of law."); *McWhorter v. Barre*, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003) (quoting *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978) ("The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is '*capable* of being so understood is a question of law to be determined by the court.'")). If an allegedly defamatory statement is *not* capable of being understood as defamatory as a matter of law, then a plaintiff's complaint must be dismissed for failure to state a claim. *Id.*

Further still, Tennessee has adopted several categorical bars that prevent claimed defamations from being actionable, at least two of which independently control this case. *First*, mere opinions enjoy constitutional protection under the First Amendment. *Stones River Motors, Inc. v. Mid-S. Pub.Cp.*, 651 S.W.2d 713, 722 (Tenn. Ct. App. 1983). As a result, "statements of opinion or intention are not actionable." *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982). *Second*, statements that are merely "annoying, offensive or embarrassing" are not actionable. *Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at *3 (Tenn. Ct. App. Sept. 30, 2015) (quotation omitted), *appeal denied* (Feb. 18, 2016). Based on these principles, none of the statements underlying Plaintiffs' Complaint states a plausible claim for defamation as a matter of law.

i. The Parking Guys is bound by its contention that Mrs. Schipani offered mere "opinions"—which are not actionable—rather than assertions of fact.

Despite materially altering its position for purposes of this lawsuit, The Parking Guys has repeatedly argued that Mrs. Schipani offered mere "opinions" when communicating with the

Traffic and Parking Commission—rather than asserting actionable statements of fact.[48] The Commission itself made the same finding.[49] Consequently, during its state court litigation, The Parking Guys seized upon and cited that finding as a basis for discounting the weight of Mrs. Schipani's statements.[50]

Significantly, despite adopting a materially different position in its federal Complaint in this case, **the Parking Guys also argued that Mrs. Schipani's statements were mere "opinions" during the pendency of this lawsuit** during oral argument at a hearing in state court as recently as June 20, 2018.[51] As a result, The Parking Guys' consistent contention that Mrs. Schipani offered mere "opinion" testimony constitutes a judicial admission by which The Parking Guys is conclusively bound. *See, e.g., Loftis v. Rayburn*, No. M2017-01502-COA-R3-CV, 2018 WL 1895842, at *11 (Tenn. Ct. App. Apr. 20, 2018) ("'a statement of counsel in pleadings or stipulation or orally in court is generally regarded as a conclusive, judicial admission . . . .'") (collecting cases). As such, dismissal follows as a matter of law, because "statements of opinion . . . are not actionable." *McElroy*, 632 S.W.2d at 130.

ii. No statement made by Mrs. Schipani can be construed as a "serious threat to the plaintiffs' reputation."

To provide substantial breathing room for free speech and unfettered commentary upon issues of public importance, statements that are merely "annoying, offensive or embarrassing" are

[48] *See, e.g.*, **Exhibit 3,** p. 7 (arguing that "[t]he opinions supplied by the Valet Permit opponents at the August 14, 2017 Commission meeting were no different in character from those presented at the July 20, 2017 meeting . . . ."); *id.* (arguing that "[c]itizen opinions, even where sincere, are not material evidence.")

[49] *See* Doc. # 1-25 (Transcript of August 14, 2017 Hearing), p. 7, Page ID#152.

[50] *See* **Exhibit 3**, p. 7 (emphasizing that "Chairperson Green characterized the opponents [sic] statements as 'opinions': 'Are you all interested in hearing additional opinions from folks that we heard at the last meeting?'" [Doc. # 1-25, p. 7, Page ID#152.] 'We heard a lot of opinions a month ago.'").

[51] *See* **Exhibit 4**, p. 8, lines 5-9 ("And the petitioner would characterize the testimony of the local business owners as 'opinion on the ultimate issue of whether the valet operation was causing traffic concerns.' And that's been recognized in the case law not being substantial or material evidence."). *Id.* at p. 8, lines 18-22.

not actionable. *Davis*, 2015 WL 5766685, at *3 (quotation omitted). Instead, "[f]or a communication to be [defamatory], it must constitute a serious threat to the plaintiff's reputation. A [defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element 'of disgrace.'" *Id.* (quoting *Davis v. The Tennessean*, 83 S.W.3d 125 (Tenn. Ct. App. 2001)).

The statements made by Mrs. Schipani over which she has been sued do not come close to satisfying these standards. The Plaintiffs specifically complain that Mrs. Schipani stated:

1. "The valet operation was parking vehicles on her property."[52]

2. "The valet operation [was] causing 'traffic up and down the street.'"[53]

3. "The valet operation [was] 'constantly' parking in a manner that impedes vehicular ingress and egress to her business's parking lot."[54]

4. "The neighborhood surrounding the valet permit operation 'continues to witness public safety hazards' associated with the Parking Guys' valet operation servicing Deja Vu;"[55]

5. "The Parking Guys' valet operation servicing Deja Vu was somehow associated with 'two pedestrians hit by cars in the past two months.'"[56]

6. "'The corner of Church Street and 15th is gridlock[ed] most nights.'"[57]

7. "[T]he [] gridlock at 15 Avenue North and Church Street was somehow associated with Parking Guys' valet operation servicing Deja Vu."[58]

[52] Doc. #1 (Complaint), PageID #12, ¶ 50(a).

[53] Doc. #1 (Complaint), PageID #12, ¶ 50(b).

[54] Doc. #1 (Complaint), PageID #12, ¶ 50(c).

[55] Doc. #1 (Complaint), PageID #16, ¶ 63(a).

[56] Doc. #1 (Complaint), PageID #16, ¶ 63(b).

[57] Doc. #1 (Complaint), PageID #16, ¶ 63(c).

8. "[The] Parking Guys' valet operation servicing Deja Vu was a cause of traffic backing up from 15th Avenue north to Church Street 'thus blocking the traffic light and no one can move . . . .'"[59] And:

9. "[P]hotographs attached to the email demonstrate traffic of safety concerns caused by the Parking Guys' valet operation servicing Deja Vu."[60]

Self-evidently, none of these statements presents a "serious threat to the plaintiff's reputation." *Davis*, 83 S.W.3d at 128 (quotation omitted). Not one can "'reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule.'" *Id.* at 130 (quoting *Stones River Motors*, Inc., 651 S.W.2d at 719). Rather, they are, at most, "'annoying, offensive, or embarrassing.'" *Davis*, 2015 WL 5766685, at *4 (citing Brown, 393 S.W.3d at 708 (quoting *Kersey*, 2006 WL 3953899, at *3)). Consequently, no statement uttered by Mrs. Schipani is capable of conveying a defamatory meaning as a matter of law, and the Plaintiffs' Complaint must be dismissed with prejudice for failure to state a claim. *See Brown*, 393 S.W.3d at 708. *See also Loftis*, 2018 WL 1895842, at *4-5.

D. The Plaintiffs' Complaint should be dismissed for improper service of process.

The Plaintiffs' Complaint must also be dismissed for improper service of process pursuant to Fed. R. Civ. P. 12(b)(5).[61] Plaintiffs' returned summons states—without any exhibit or additional detail to speak of—that service was effected "via certified mail receipt on June 4, 2018, signed on June 5, 2018 – received on June 11, 2018." *See* Doc. #8, p. 2, PageID #217. This

[58] Doc. #1 (Complaint), PageID #16, ¶ 63(d).

[59] Doc. #1 (Complaint), PageID #16, ¶ 63(e).

[60] Doc. #1 (Complaint), PageID #16, ¶ 63(f).

[61] "[A]ctual knowledge of a lawsuit is not a substitute for proper service of process under Fed. R. Civ. P. 4." *See Rankin v. Jackson Madison Cty. Gen. Hosp.*, No. 117CV01050STAEGB, 2018 WL 934932, at *2 (W.D. Tenn. Feb. 1, 2018), *report and recommendation adopted*, No. 17-1050-STA-EGB, 2018 WL 934874 (W.D. Tenn. Feb. 16, 2018) (citing *LSJ Investment Co., Inc. v. O.L.D., Inc.*, 167 F.3d 320, 322 (6th Cir. 1999)).

attempt at service does not comply with Fed. R. Civ. P. 4(e). *See id.* Plaintiffs also have the burden of proving that Mrs. Schipani has been properly served. *See Toncz v. Bank of Am., N.A.*, No. 3:12-1010, 2013 WL 1245746, at *4 (M.D. Tenn. Mar. 26, 2013), *report and recommendation adopted*, No. 3:12-1010, 2013 WL 1775505 (M.D. Tenn. Apr. 25, 2013) ("[T]he burden is on the Plaintiff to show either that she has properly served the Defendants with process or, pursuant to Rule 4(m), that there is good cause for her failure to serve the Defendants."). Because Plaintiffs have not served Mrs. Schipani properly and cannot meet their burden of establishing proper service, however, this Court should exercise its discretion to dismiss the Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(5). *See Toncz*, 2013 WL 1245746, at *4 ("Courts have broad discretion to dismiss an action that involves improper service.") (collecting cases).

E. Mrs. Schipani is immune from suit under Tenn. Code Ann. § 4-21-1003(a).

In addition to enjoying absolute witness immunity from this lawsuit, *see supra*, Section III-A, Mrs. Schipani is entitled to immunity pursuant Tenn. Code Ann. § 4-21-1003(a). Because Mrs. Schipani's eligibility for immunity requires factual determinations that are outside the four corners of the Plaintiffs' Complaint, however, Mrs. Schipani retains her right to a hearing on her eligibility for immunity under Tenn. Code Ann. § 4-21-1003(a) without converting the instant motion into a Motion for Summary Judgment. She also preserves her claim for attorney's fees and costs under Tenn. Code Ann. § 4-21-1003(c) in the event that this action is dismissed on other grounds.

IV. Conclusion

For the foregoing reasons, Mrs. Schipani's Motion to Dismiss should be **GRANTED**, the Plaintiffs' Complaint against her should be **DISMISSED WITH PREJUDICE**, and Mrs. Schipani should be awarded her attorney's fees and costs incurred in defending against this action pursuant to Tenn. Code Ann. § 4-21-1003(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2018, a copy of the foregoing was served via USPS mail, postage prepaid, emailed, and/or sent via CM/ECF, to the following parties:

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