

COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
NORTHERN DIVISION CIVIL ACTION DOCKET NO. 01-33-B-H

DEBORAH HENDERSON, MEG PETERSON,)
SUSAN HART and BETH CONNOR, o/b/o)
THEMSELVES and ALL OTHER SIMILARLY)
SITUATED INDIVIDUALS,)

Plaintiffs)

vs.)

COMPLAINT

G. STEVEN ROWE, in his official capacity as)
Attorney General for the State of Maine;)
MICHAEL E. POVICH, in his official capacity)
as District Attorney for Prosecutorial District)
VII; MICHAEL P. CANTARA, in his official)
capacity as District Attorney for Prosecutorial)
District I; STEPHANIE P. ANDERSON, in her)
official capacity as District Attorney for)
Prosecutorial District II; NORMAN R. CROTEAU)
in his official capacity as District Attorney for)
Prosecutorial District III; DAVID W. CROOK,)
in his official capacity as District Attorney for)
Prosecutorial District IV; R. CHRISTOPHER)
ALMY, in his official capacity as District)
Attorney for Prosecutorial District V;)
GEOFFREY A. RUSHLAU, in his official capacity)
as District Attorney for Prosecutorial District VI;)
NEALE T. ADAMS, in his official capacity as)
District Attorney for Prosecutorial District VIII;)

Defendants.)

NOW COME Deborah Henderson, Meg Peterson, Susan Hart, and Beth Connor,
on behalf of themselves and all other similarly situated individuals, by and through their
attorneys, Sandra Hylander Collier and Catherine L. Haynes, and state as follows:

I. JURISDICTION

1. Plaintiffs allege violation of their First and Fourteenth Amendment rights pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983 et. seq.
2. Jurisdiction is conferred upon the Court pursuant to Title 28 U.S.C. §1343, et. seq.

II. PARTIES

3. Plaintiffs are women participating in a voluntary association known as A Woman's Project. Plaintiff Deborah Henderson is a resident of Lowell, Penobscot County, Maine. Plaintiff Meg Peterson is a resident of Brooks, Waldo County, Maine. Plaintiff Susan Hart is a resident of Belfast, County of Waldo, Maine and Plaintiff Beth Connor is a resident of Washington, County of Kennebec, Maine. Plaintiffs intend to petition the Court for class action certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.
4. Defendants are the Attorney General for the State of Maine, and the eight prosecutors of the eight prosecutorial districts within and for the State of Maine, who are subject to the authority of the Attorney General for the State of Maine.

III. STATEMENT OF FACTS

5. Plaintiffs hereby repeat and reallege the allegations stated in paragraphs 1 through 4 above.
6. A Woman's Project is a voluntary association of women who meet for the purpose of gifting parties, also known as dinner parties.

7. The participants in the association known as A Woman's Project each make an initial gift of \$5,000.00 to another participant who has reached the dessert level of the dinner table.
8. Plaintiffs have joined the association for a variety of different reasons, including helping others, personal empowerment, giving to favorite charities and the like.
9. When a participant reaches the dessert level, she receives from \$30,000.00 to \$40,000.00 in gifts, and she then leaves the dessert position.
10. Any participant in the voluntary association who requests the return of her \$5,000.00 gift will be gifted \$5,000.00 by the next gifting member.
11. Any participant in the voluntary association is free to leave the association at any time without penalty.
12. All monies given in the context of the voluntary association are gifts from individuals to other individuals, and are not fees or dues or compensation.
13. There is no contract (written or oral) among the participants in the voluntary association that requires any participant to act in any certain way.
14. No participant is required to recruit additional participants in order to progress to the dessert position of the dinner table.
15. No participant is required personally to gift her own money; sponsorships are available, and many participants have sponsored new participants to join a dinner table.

16. Plaintiffs believe that their activities do not violate any statute or law, and that they have a constitutional right to associate for the purposes stated above.
17. G. Steven Rowe, the Attorney General for the State of Maine, Michael Povich, Attorney for Prosecutorial District No. 7 and on information and belief other prosecutors within and for the State of Maine, are threatening to prosecute Plaintiffs, or any of them, for allegedly violating Title 17 M.R.S.A. §2305, which reads as follows:

“The organization of any multi-level distributorship arrangement, pyramid club or other group, organized or brought together under any plan or device whereby fees or dues or anything of material value to be paid or given by members thereof are to be paid or given to any other member thereof who has been required to pay or give anything of material value for the right to receive such sums, with the exception of payments based exclusively on sales of goods or services to persons who are not participants in the plan and who are not purchasing in order to participate in the plan, which plan or device includes any provision for the increase in such membership through a chain process of new members securing other new members and thereby advancing themselves in the group to a position where such members in turn receive fees, dues or things of material value from other members, is declared to be a lottery, and whoever shall organize or participate in any such lottery by organizing or inducing membership in any such group or organization shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$5,000.00 or by imprisonment for not more than 11 months, or by both.”

IV. STATEMENT OF CLAIMS

18. Plaintiffs hereby repeat and reallege the allegations stated in paragraphs 1 through 17 above, as if more fully stated herein.

19. The above stated facts give rise to a violation of the Plaintiffs' constitutional rights to freedom of association and freedom of speech under the First and Fourteenth Amendments.
20. The above stated facts give rise to a violation of Plaintiffs' rights under Title 42 U.S.C. §1983.

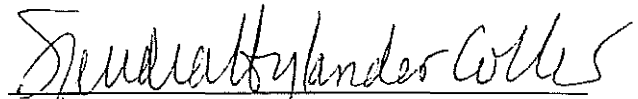
V. PRAYER FOR RELIEF

21. Plaintiffs hereby repeat and reallege the allegations stated in paragraphs 1 through 20 above.


WHEREFORE, Plaintiffs pray for Judgment as follows:

1. For a Preliminary Injunction prohibiting the Defendants, or any of them, their officers, agents or employees from charging or prosecuting any of the Plaintiffs for their participation in the voluntary association known as A Woman's Project;
2. For a Permanent Injunction prohibiting the Defendants, or any of them, their officers, agents or employees from charging or prosecuting any of the Plaintiffs for their voluntary association in A Woman's Project;
3. For a Declaratory Judgment pursuant to Title 28 U.S.C. §2201 and §2202, that the activities of the Plaintiffs in their association in A Woman's Project do not violate Title 17 M.R.S.A. §2305, or any other statute.
4. For an Order of Attorney's Fees and Costs;
5. For whatever further and additional relief shall appear just and proper in the premises.

Dated: February 13, 2001


Sandra Hylander Collier
Attorney at Law, State Bar No. 1828
P.O. Box 1391, 121 Main Street
Ellsworth, Maine 04605
207/667-6417

Dated: February 13, 2001


Catherine L. Haynes
Attorney at Law, State Bar No. 8423
P.O. Box 1391, 121 Main Street
Ellsworth, Maine 04605
207/667-6417

COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
NORTHERN DIVISION CIVIL ACTION DOCKET NO. 01-33-B-H

DEBORAH HENDERSON, MEG PETERSON,)
SUSAN HART and BETH CONNOR,)

Plaintiffs)

vs.)

AMENDED
COMPLAINT

G. STEVEN ROWE, in his official capacity as)
Attorney General for the State of Maine;)
MICHAEL E. POVICH, in his official capacity)
as District Attorney for Prosecutorial District)
VII; MICHAEL P. CANTARA, in his official)
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GEOFFREY A. RUSHLAU, in his official capacity)
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NEALE T. ADAMS, in his official capacity as)
District Attorney for Prosecutorial District VIII;)

Defendants.)

NOW COME Deborah Henderson, Meg Peterson, Susan Hart, and Beth Connor,
on behalf of themselves, by and through their attorneys, Sandra Hylander Collier and
Catherine L. Haynes, and state as follows:

I. JURISDICTION

1. Plaintiffs allege violation of their First and Fourteenth Amendment rights pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983 et. seq.
2. Jurisdiction is conferred upon the Court pursuant to Title 28 U.S.C. §1343, et. seq., and Title 28 U.S.C. §§2201-2202.

II. PARTIES

3. Plaintiffs are women participating in a voluntary association known as A Woman's Project. Plaintiff Deborah Henderson is a resident of Lowell, Penobscot County, Maine. Plaintiff Meg Peterson is a resident of Brooks, Waldo County, Maine. Plaintiff Susan Hart is a resident of Belfast, County of Waldo, Maine and Plaintiff Beth Connor is a resident of Washington, County of Kennebec, Maine. *Deleted language concerning class action certification*
4. Defendants are the Attorney General for the State of Maine, and the eight prosecutors of the eight prosecutorial districts within and for the State of Maine, who are subject to the authority of the Attorney General for the State of Maine.

III. STATEMENT OF FACTS

5. Plaintiffs hereby repeat and reallege the allegations stated in paragraphs 1 through 4 above.
6. A Woman's Project is a voluntary association of women who meet for the purpose of gifting parties, also known as dinner parties.

7. The participants in the association known as A Woman's Project each make a gift of \$5,000.00 to another participant who has reached the dessert level of the dinner table.
8. Plaintiffs have joined the association for a variety of different reasons, including but not limited to, helping others, personal empowerment, and giving to favorite charities and the like.
9. When a participant reaches the dessert level, she receives from \$30,000.00 to \$40,000.00 in gifts, and she then leaves the dessert position.
10. Any participant in the voluntary association who requests the return of her \$5,000.00 gift will be gifted \$5,000.00 by the next gifting member.
11. Any participant in the voluntary association is free to leave the association at any time without penalty.
12. All monies given in the context of the voluntary association are gifts from individuals to other individuals, and are not fees or dues or compensation.
13. There is no contract (written or oral) among the participants in the voluntary association that requires any participant to act in any certain way.
14. No participant is required to recruit additional participants in order to progress to the dessert position of the dinner table.
15. No participant is required personally to gift her own money; sponsorships are available, and many participants have sponsored new participants to join a dinner table.

16. Plaintiffs believe that their activities do not violate any statute or law, and that they have a constitutional right to associate for the purposes stated above and as protected and guaranteed by the First Amendment of the United States Constitution.

17. G. Steven Rowe, the Attorney General for the State of Maine, Michael Povich, Attorney for Prosecutorial District No. 7 and on information and belief other prosecutors within and for the State of Maine, are threatening to prosecute Plaintiffs, or any of them, for allegedly violating Title 17 M.R.S.A. §2305, which reads as follows:

“The organization of any multi-level distributorship arrangement, pyramid club or other group, organized or brought together under any plan or device whereby fees or dues or anything of material value to be paid or given by members thereof are to be paid or given to any other member thereof who has been required to pay or give anything of material value for the right to receive such sums, with the exception of payments based exclusively on sales of goods or services to persons who are not participants in the plan and who are not purchasing in order to participate in the plan, which plan or device includes any provision for the increase in such membership through a chain process of new members securing other new members and thereby advancing themselves in the group to a position where such members in turn receive fees, dues or things of material value from other members, is declared to be a lottery, and whoever shall organize or participate in any such lottery by organizing or inducing membership in any such group or organization shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$5,000.00 or by imprisonment for not more than 11 months, or by both.”

18. “A Women's Project” has been intentionally labeled and publicized as “illegal” by the Attorney General and at least one prosecutor in the media, including but not limited to The Bangor Daily News and The Ellsworth American and in statements to television stations which have aired

throughout Downeast Maine and in other places across the state in 2000, and continuing up to and including the week of February 19, 2001.

19. As a direct and proximate result of the Defendants' actions, each of the Plaintiffs feels threatened, intimidated and chilled in her exercise of her right to association as protected and guaranteed by the First Amendment of the United States Constitution.
20. There is presently no known State prosecution pending of any participant in the association.

IV. STATEMENT OF CLAIMS

21. Plaintiffs hereby repeat and re-allege the allegations stated in paragraphs 1 through 20 above, as if more fully stated herein.
22. The above stated facts give rise to a violation of the Plaintiffs' constitutional rights to freedom of association and freedom of speech under the First and Fourteenth Amendments.
23. The above stated facts give rise to a violation of Plaintiffs' rights under Title 42 U.S.C. §1983.

V. PRAYER FOR RELIEF

24. Plaintiffs hereby repeat and re-allege the allegations stated in paragraphs 1 through 23 above.

WHEREFORE, Plaintiffs pray for Judgment as follows:

1. For a Preliminary Injunction prohibiting the Defendants, or any of them, their officers, agents or employees from charging or

prosecuting any of the Plaintiffs for their participation in the voluntary association known as A Woman's Project;

2. For a Permanent Injunction prohibiting the Defendants, or any of them, their officers, agents or employees from charging or prosecuting any of the Plaintiffs for their voluntary association in A Woman's Project;
3. For a Declaratory Judgment pursuant to Title 28 U.S.C. §2201 and §2202, that the activities of the Plaintiffs in their association in A Woman's Project do not violate Title 17 M.R.S.A. §2305, or any other statute.
4. For an Order of Attorney's Fees and Costs under Title 42 U.S.C. §§1983 and 1988 *(proceeding in vindication of civil rights)*
5. For whatever further and additional relief shall appear just and proper in the premises.

(deprivation of rights, privileges or immunities secured by the Constitution)

Dated: March ^{4th} 6, 2001

Sandra H. Collier
Sandra Hylander Collier
Attorney at Law, State Bar No. 1828
P.O. Box 1391, 121 Main Street
Ellsworth, Maine 04605
207/667-6417

Dated: March 6, 2001

Catherine L. Haynes
Catherine L. Haynes
Attorney at Law, State Bar No. 8423
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FA H v R file

G. STEVEN ROWE
ATTORNEY GENERAL



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April 20, 2001

Gail Creath
United States District Court
P.O. Box-1007
Bangor, ME 04402-1007

Re: *Deborah Henderson, et al. v. G. Steven Rowe, et al.*
Docket No. CIV-01-33-B-H

Dear Ms. Creath:

Enclosed for filing please find the Defendants' Motion to Dismiss in the above-captioned matter. Please do not hesitate to contact me if you have any questions.

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "James McKenna".

James A. McKenna
Assistant Attorney General

JAM/sp

cc: Sandra Hylander Collier, Esquire
Catherine L. Haynes, Esquire
Jeffrey A. Thaler, Esquire

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DEBORAH HENDERSON, MEG PETERSON,)
SUSAN HART and BETH CONNOR,)

Plaintiffs.)

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G. STEVEN ROWE, in his official capacity as)
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GEOFFREY A. RUSHLAU, in his official capacity)
as District Attorney for Prosecutorial District VI;)
NEALE T. ADAMS, in his official capacity as)
District Attorney for Prosecutorial District VIII,)

Defendants)

Civil Action No. 01-33-B-H

DEFENDANTS' MOTION TO DISMISS

I. Introduction

As argued below, the Defendants seek to dismiss the Plaintiffs' 42 U.S.C. 1983 action for the following reasons: the Plaintiffs' Complaint fails to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6).

It is the Defendants' position that the Plaintiffs have incorrectly cast their claim in First Amendment terms and therefore should not be heard in Federal Court. The Plaintiffs were free to have brought a Declaratory Judgment action in State Court, pursuant to 14 M.R.S.A. §§5951-5963, but chose not to do so.¹ As part of its Answer to the Plaintiffs' Complaint, the Defendants have filed a counterclaim charging that the Plaintiffs' participation in A Woman's Project constitutes a violation of the Maine Unfair Trade Practices Act (5 M.R.S.A. § 207). If the Defendants' Motion to Dismiss is granted, the Defendants request that this matter be removed to the Maine Superior Court in Kennebec County for a trial of this counterclaim.²

II. A Woman's Project

Based on the Statement of Facts in the Plaintiffs' Complaint, the Plaintiffs are members of a multi-level pyramid club that calls itself "A Woman's Project." The "Project" it promotes is the opportunity for new members of A Woman's Project to each donate \$5,000 to another Project member who has already risen to the top of the pyramid, thereby providing that member with \$30,000 to \$40,000. These new members, assuming additional recruits become available, will then also have an opportunity to receive \$30,000 to \$40,000.

The Plaintiffs' Complaint only provides a shorthand description of this pyramid but the actual steps of similar "dinner party" pyramids are well known.³ At the base of the typical

¹ The Plaintiffs' Prayer for Relief seeks a federal Declaratory Judgment:

For Declaratory Judgment, pursuant to Title 28 U.S.C. §2201 and §2202, that the activities of the Plaintiffs in their association in A Woman's Project do not violate Title 17 M.R.S.A. § 2305, or any other statute.

² Pursuant to 5 M.R.S.A. § 209, an Unfair Trade Practice action is properly brought in the Superior Court of Kennebec County.

³ For example, a Missouri state decision in *State of Missouri v. Staci Lynn Baska, et al.* (Circuit Court of Clay County, CV 100-3675 CC, December 14, 2000) provides a typical description:

The Court concludes as a matter of law that WEN [Women's Empowerment Network] or the Original Dinner Party as it is also known, is a pyramid sales scheme under Section

dinner party pyramid are eight women who are represented as “appetizers,” above them are four women who are called “soups and salads,” and above them are two women who are designated “main courses.” At the top of this pyramid is the woman named the “dessert,” who will be the beneficiary of that particular dinner party. Women who enter at the “appetizer” level typically give (or “gift”) \$5,000 to the woman at the “dessert” level. After the “dessert”

407.400(5) which defines such a scheme as:

Any plan or operation for the sale or distribution of goods, services or other property wherein a person for a consideration acquires the opportunity to receive pecuniary benefit, which is not primarily contingent on the volume or quantity of goods, services or property sold or distributed ... and is based upon the inducement of addition of persons by himself or herself or others, regardless of number, to participate in the same plan or operation....

The Court finds that WEN operates in the following manner. It is structured in the form of a dinner party, and the charts upon which names are placed are called “trees.” Eight persons are recruited to fill the bottom row of each tree. Each of these eight spots is called an “appetizer.” In order to have her name placed in an appetizer spot, a woman or her benefactor must agree that either she or someone on her behalf will pay \$5,000 to the person at the top of the tree, known as the “dessert” spot, when the appetizer row is completely filled. When the bottom appetizer row is filled, the tree monitor (the person in charge of placing names on trees and monitoring positions of the women on trees as they advance towards the top) notifies each appetizer person that it is time to pay the dessert person. The tree monitor also notifies the dessert person at the top that she is now entitled to receive money. The top (dessert) person then is paid up to \$40,000 from the persons at the bottom (appetizers) and vacates the top position. Receiving such payment from those in the bottom row [is] called “birthdaying.” When the bottom row is filled and the top position has “birthdayed,” the tree then splits into two trees, and those originally in the bottom (appetizer) row then move up to higher positions on the new trees - - called “soup and salad” and “entrée” - - until they too, reach a top (dessert) position and are entitled to receive payment upon the appetizer rows being filled with more people.

The Court finds that WEN falls within the statutory definition of a pyramid scheme because it is a plan or operation for the sale or distribution of property - - a spot on a WEN tree - - whereby, for a payment of \$5,000, a participant acquires the opportunity to receive a pecuniary benefit - - payments totaling as much as \$40,000 from those who have joined after her - - that is not contingent on the sale of any goods, services, or other property and is based on the inducement of additional persons, by herself or others, to participate.

....

The Court is aware that the monetary payments in WEN were called “gifts” by WEN participants. However, it clear from the undisputed evidence that regardless of what they were called, the payments were made in order to receive the opportunity for pecuniary gain from those who were subsequently induced to participate in the scheme and as such were not gifts. Moreover, the Court finds that because intent is not an element of a violation under Section 407.405, what the payments were called does not in any way affect or negate the finding that Defendants violated the statute.

woman receives her \$40,000, the pyramid splits, with the two “main course” women becoming the “dessert” in their own pyramids. Everyone moves up a level and the women must now find eight new “appetizers” for each of the two new pyramids.

III. A Woman’s Project Pyramid Scheme.

The underlying issue in the Plaintiffs’ Complaint is whether its fundraising efforts violate the Maine prohibition against pyramid schemes. This law is found at 17 M.R.S.A. § 2305 and reads as follows:

§2305. Multi-level distributorships, pyramid clubs, etc., declared a lottery; prohibited; penalties

The organization of any multi-level distributorship arrangement, pyramid club or other group, organized or brought together under any plan or device whereby fees or dues or anything of material value to be paid or given by members thereof are to be paid or given to any other member thereof who has been required to pay or give anything of material value for the right to receive such sums, with the exception of payments based exclusively on sales of goods or services to persons who are not participants in the plan and who are not purchasing in order to participate in the plan, which plan or device includes any provision for the increase in such membership through a chain process of new members securing other new members and thereby advancing themselves in the group to a position where such members in turn receive fees, dues or things of material value from other members, is declared to be a lottery, and whoever shall organize or participate in any such lottery by organizing or inducing membership in any such group or organization shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine or not more than \$5,000 or by imprisonment for not more than 11 months, or by both.

A violation of this section shall constitute a violation of Title 5, Chapter 10, Unfair Trade Practices Act.

The Plaintiffs' Complaint, while quite sketchy in describing its fundraising activities, provides the details of an illegal pyramid:

A Woman's Project

17 M.R.S.A. § 2305

- | | |
|---|--|
| 1. A Woman's Project is a voluntary association of women who meet for the purpose of gifting parties, also known as dinner parties. Complaint ¶6. | 1. "The organization of any multi-level distributorship arrangement, pyramid club, or other group, organized or brought together under any plan or device" |
| 2. The participants in the association known as A Woman's Project each make a gift of \$5,000 to participant who has reached the dessert level of the dinner party. Complaint ¶7. | 2. "... whereby fees or dues or anything of material value to be paid or given by members thereof are to be paid or given to any other member thereof who has been required to pay or give anything of material value for the right to receive such sums...." |
| 3. When a participant reaches the dessert level, she receives \$30,000 to \$40,000 in gifts, and she then leaves the dessert position. Complaint ¶9. | 3. "... which plan or device includes any provision for the increase in such membership through a chain process of new members securing other new members and thereby advancing themselves in the group to a position where such members in turn receive fees, dues or things of material value from other members, is declared to be a lottery...." |

This introduction to A Woman's Project and the Maine anti-pyramid law is not an attempt to answer the Plaintiffs' claim that their activities do not violate the statute. The Plaintiffs' Complaint makes additional factual assertions and it is the Plaintiffs' position that their activities do not fall within the ambit of 17 M.R.S.A. § 2305. But it is this dispute - - whether the Plaintiffs' activities violate 17 M.R.S.A. § 2305 and the Maine Unfair Trade Practices Act - - which the Defendants believe should be resolved in Kennebec County Superior Court in a trial of the Defendants' counterclaim. While the Plaintiffs may ultimately

be successful in their efforts to have their fundraising activities declared legal, they have improperly commenced their quest in Federal Court.

VI. The Plaintiffs' Complaint Fails To State A Claim Upon Which Relief Can Be Granted.

The Plaintiffs' First Amendment allegations fail to allege a legal theory that is cognizable in federal court. F.R. of Civ. P. 12(b)(6). Even if their legal claim is theoretically sound, they fail to plead sufficient facts to support that theory. *Smilecare Dental Group v. Delta Dental Plan*, 88 F.3d 780, 783 (9th Cir. 1996), *cert. denied*, 519 U.S. 1028 (1996) (court may dismiss complaint as matter of law for (1) lack of cognizable legal theory or (2) insufficient facts under cognizable legal claim).

VII. Enforcement Of The State's Anti-Pyramid Statute Does Not Violate The Plaintiffs' First Amendment Rights.

The basis for the Plaintiffs' 42 U.S.C. 1983 request that this matter be heard in Federal Court is found in Complaint ¶19:

As a direct and proximate result of the Defendants' actions, each of the Plaintiffs feels threatened, intimidated and chilled in their exercise of her right to associate as protected and guaranteed by the First Amendment of the United States Constitution.

The "Defendants' actions" complained about by the Plaintiffs are public press releases by the Attorney General and at least one District Attorney. These press releases described several groups (including A Woman's Project) that Maine law enforcement believed were conducting the women-only "dinner party" pyramids. The purpose of these press releases was

to warn Maine citizens that an illegal pyramid scheme was spreading through the state and would result in many persons losing their money. Here are excerpts from two such warnings:

**Attorney General Andrew Ketterer Warns Against
Women Only Pyramid Scheme**

Maine Attorney General Andrew Ketterer announced today that his office has been receiving complaints from around the State that a pyramid scheme limited only to women has invaded Maine. This pyramid scheme appears to be going under such different names as "A Women's Project," "Women Helping Women," and "Wild Women." In most cases, the pyramid scheme involves mock "dinner" meetings in which participants are urged to bring new recruits. Women who enter the pyramid at the lowest level are characterized as an "appetizer" dish and are asked to recruit other women who are willing to donate \$5,000 to the person at the top of the pyramid. The women advance from the appetizer stage until eventually they reach the dessert stage, at which point they hope to receive \$35,000. Women are urged not to tell their husbands they are participating in this scheme.

"From all reports, the Women Helping Women scheme certainly appears to be an illegal pyramid," said Attorney General Ketterer. "The Maine law is very clear: pyramids are both civil and criminal offenses and should be stopped immediately." Attorney General Ketterer urged participants in the Women Helping Women scheme to immediately return all monies they have solicited. Pyramid clubs are declared both crimes and unfair trade practices in 17 M.R.S.A. §2305.

As an example of why almost everyone loses their money in pyramid schemes, if one person recruits 6 people and those 6 people have to recruit 6 new people, and so on, after only 13 levels the number of new recruits needed exceeds the total population of the United States. "Except for the people at the very top of the pyramid, the great majority of participants will lose all their money," said Attorney General Ketterer. "That's why pyramids are illegal. It becomes impossible to obtain new recruits. The sooner Women Helping Women is stopped, the fewer Maine women will lose their money." The Attorney General urged any person who cannot get back their money from Women Helping Women to make a formal complaint to the Attorney General's Public Protection Division.⁴

⁴ This excerpt is from an Attorney General Press Release dated May 24, 2000.

Michael E. Povich, District Attorney
For Immediate Press Release
January 26, 2001

Contact: Michael Povich, District Attorney

Friends:

An illegal pyramid scheme is loose in our community. Before it runs its course, many people will lose money, families and friends will be divided, and a few people may even get prosecuted. I am writing to try and convince those of you in this scheme already to get out and to convince anyone approached about joining not to join.

As I understand the current scheme, each member is asked to donate \$5,000 in the expectation of receiving \$40,000 once eight new members have paid their \$5,000. At various points the scheme has been called "Women Helping Women," "A Dinner Party" or "A Birthday Party" or the like. At some point women were invited to join but told not to tell their husbands. I understand now that this scheme is more public, women are not being asked to keep it a secret. Initially recruits were told they could only join by invitation, and now the recruiting process is getting more open. Whatever form it currently takes, fundamentally it will be the same: you give \$5,000 now and when you recruit eight friends to join (and they pay their \$5,000) you will get paid \$40,000.

According to Maine law, 17 M.R.S.A. § 2305, such a scheme is illegal.

....

These groups are called pyramid schemes because of the shape of a pyramid: a triangle. The result of all pyramid schemes is inevitably the same: a few people walk away with money while most lose the money they put into the pyramid. These schemes are illegal because they are based on fraud. The recruit is told that for their donation and the recruiting of a set number of people they will receive a higher sum of money. They are not illegal because they involve recruiting other people to recruit other people: that is done in a lot of businesses. They are not illegal because they involve giving money to others: giving money away is perfectly legal. They are illegal because they deceive people into giving money: that is the definition of fraud.

Let me suggest you look at it this way. For the scheme I described above to work, the first person only made money if she got eight others to join. Those eight people only received the amount they were promised if they each

get eight new people to join. Those 64 people only get their money if they each get eight people to join. Quickly the numbers involved look like this:

1
8
64
512
4,096
32,768
262,144
2,197,152

By the way, the population of Calais is about 4,400; the population of Ellsworth is about 6,000; the population of Washington County is about 36,000; the population of Hancock County is about 47,000; and the population of the State of Maine is near 1.6 million. That is why this scheme is a fraud: there is no possible way to recruit enough new members to keep the scheme honest.⁵

It is such press releases that the Plaintiffs claim have chilled the exercise of their First Amendment right to free association. But the only “right” being chilled by these press releases is the right to violate 17 M.R.S.A. § 2305 and that right does not exist.

17 M.R.S.A. § 2305 does not ban clubs, it does not ban women-only clubs, it does not ban women-only clubs that are devoted to discussing ways to “empower” women by giving gifts. But it does ban pyramid clubs and “whoever shall organize or participate in any such lottery by *organizing or inducing membership* in any such group or organization.” (Emphasis added.) In effect, the only speech prohibited by 17 M.R.S.A. § 2305 would be the following:

We want you to join our group and give \$5,000 to the person at the dessert stage. If we all recruit sufficient new members, you also will eventually reach the dessert stage and receive \$40,000.

⁵ Excerpts from a Press Release distributed by the Office of District VII District Attorney, Michael E. Povich, dated January 26, 2001.

Of course, such conduct is not protected speech. *See Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2nd Cir. 1992) (no First Amendment right to be free from “criminal prosecution supported by probable cause that is in reality an unsuccessful attempt to deter or silence criticism of the government”); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (book-selling in an establishment used for prostitution does not confer First Amendment protection).

Any speech related to organizing and recruiting members to invest \$5,000 in an illegal pyramid is, at least, commercial speech. It is without ideological content. For such speech to be protected by the First Amendment it at least must concern lawful activity and not be misleading. *Central Hudson Gas & Elec. Corp. v. Public Service*, 447 U.S. 557, 566 (1980). But pyramids in violation of 17 M.R.S.A. § 2305 are not only crimes but also unfair and deceptive. The Legislature has declared such pyramids to be an illegal lottery and also declared them to be *per se* violations of the Maine Unfair Trade Practices Act, 5 M.R.S.A. § 207 (“unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful”). The constitutional freedom of speech does not extend its immunity to those seeking to profit from an illegal pyramid. *See Giboney v. Empire Storage & Inc. Co.*, 336 U.S. 490, 504 (1949) (picketing in support of an illegal restraint of trade not protected by First Amendment).

The Defendants do not seek to restrain members of A Woman’s Project from meeting and discussing gift giving or, for that matter, discussing 17 M.R.S.A. § 2305 and why it may be ill conceived or unnecessary. Such speech does not violate the Maine pyramid statute. *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1966) (“[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to

discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment”). But 17 M.R.S.A. § 2305 does prohibit efforts to organize and recruit members to an illegal pyramid. How the Plaintiffs plan to use the money raised from their pyramid, whether it be selfish or altruistic, is irrelevant as to whether they have violated 17 M.R.S.A. § 2305.

If the Plaintiffs believe that their activities do not violate 17 M.R.S.A. § 2305 then they should have tested that conviction in State Court and requested a Declaratory Judgment pursuant to 14 M.R.S.A. §§5951-5963. But they do not possess a First Amendment claim and therefore they cannot seek a declaratory judgment pursuant to 28 U.S.C. §2201. The Plaintiffs’ Complaint should be dismissed and the matter removed to the Maine Superior Court, Kennebec County. There the parties can proceed to trial on the Defendants’ Unfair Trade Practice Act counterclaim.

Even if the Plaintiffs’ Complaint states a cognizable First Amendment legal theory, the Plaintiffs do not allege sufficient facts to support that theory.

The Plaintiffs do not claim that any Plaintiff has been personally named in a State press release or related newspaper story. Indeed, the Plaintiffs admit at ¶20 of their Complaint: “There is presently no known State prosecution pending of any participant in the association.” Further, the Plaintiffs make no claim that the Defendants’ press releases were in any way “motivated by a desire to harass or ... conducted in bad faith” or that 17 M.R.S.A. § 2305 was “flagrantly and patently violative of express constitutional prohibitions....” *Huffman v. Pursue, Ltd.*, 95 S. Ct. 1200, 1206 (1975) (due to pending state civil proceeding, comity and federalism required the court to abstain). The Plaintiffs’

First Amendment claims are too slight and implausible to be accorded weight. As the First Circuit stated in *Sullivan v. Carrick*, 888 F.2d 1 (1st Cir. 1989):

Where a chilling effect is speculative, indirect or too remote an abridgment of First Amendment rights is unfounded. *United States v. Harriss*, 347 U.S. 612, 626 74 S. Ct. 808, 816-17, 98 L. Ed. 989 (1954).

Id. at 4.

No doubt the Plaintiffs do indeed feel discomfort from the Defendants' press releases announcing that their club is involved in an illegal pyramid. Perhaps such discomfort is unavoidable if the State is going to warn its citizens about pyramids it has concluded violate its laws. As the U.S. Supreme Court stated in *Younger v. Harris*, 91 S. Ct. 746 (1971):

Moreover, the existence of a "chilling effect," even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but - - while regulating the subject within the state's power - - tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. . . . Just as the incidental "chilling effect" of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the state from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the state believes in good faith to be punishable under its laws and the Constitution.

Id. at 754.⁶

⁶ *Younger v. Harris* is an "abstention" case. The Defendants' civil Unfair Trade Practice Act counterclaim is mandatory. F.R. of Civ.P. 13. This Court should view Maine's counterclaim as, in effect, a pending state action and grounds for the Court's abstention. *Juidice v. Vail*, 97 S. Ct. 1211, 1216-17 (1977) (state civil action to abate the showing of an allegedly obscene movie).

The Plaintiffs' claims deal with a state statute designed to protect Maine citizens from illegal and deceptive pyramids. This matter is most properly decided in a Maine state court.

Respectfully submitted,

Office of the Attorney General
G. STEVEN ROWE

Dated: April 20, 2001

BY: James McKenna
JAMES A. MCKENNA
Assistant Attorney General
Maine Bar No. 1735
Attorney for the Defendants

CERTIFICATE OF SERVICE

I, James A. McKenna, attorney for Defendants, certify that on April 20, 2001 I mailed Defendants' Motion to Dismiss to the U.S. District Court and to counsel listed below, by United States Mail, first-class, postage prepaid, addressed as follows:

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Dated: April 20, 2001



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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

U.S. DISTRICT COURT
PORTLAND, MAINE
RECEIVED AND FILED

2001 AUG 31 7 12 11

BY _____ CC: CNSL
DEPUTY CLERK

DEBORAH HENDERSON, ET AL.,)
)
 PLAINTIFFS)
)
 v.)
)
 MAINE ATTORNEY GENERAL,)
 ET AL.,)
)
 DEFENDANTS)

CIVIL No. 01-33-B-H

MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS
AND PLAINTIFFS' MOTION TO AMEND COMPLAINT

The plaintiffs are members of an organization called "A Woman's Project." They claim that the Maine Attorney General and various district attorneys are violating their First Amendment rights to associate by threatening to prosecute them under the Maine law prohibiting pyramid schemes. 17 M.R.S.A. § 2305. The prosecutors have moved to dismiss the complaint, arguing that the First Amendment does not protect the plaintiffs from engaging in illegal fundraising efforts. They have filed a counterclaim that seeks a declaration that A Woman's Project does in fact violate Maine's pyramid scheme law, as well as damages for the plaintiffs' alleged unfair trade practices. In response, the plaintiffs have moved to amend their complaint to add a section 1983 claim for retaliation (because the prosecutors filed the counterclaims) and to allege more explicitly that the prosecutors' statements to the press and threats of prosecution have chilled

their First Amendment rights. Because the lawsuit is in its early stages, I **GRANT** the motion to amend. However, I **DISMISS** the Amended Complaint.¹ I conclude that the prosecutors have not violated the plaintiffs' First Amendment rights.

I. BACKGROUND

According to the Second Amended Complaint, A Women's Project is a voluntary association of women who meet for what they refer to as gifting parties or dinner parties. Second Am. Compl. ¶ 6. The group attracts women members for a variety of reasons, including helping others, empowering themselves, discussing women's issues and giving to favorite charities. *Id.* ¶ 7. To join, each new member makes an initial gift of \$5,000 to a member who has previously proceeded through the stages of the organization and reached the top ("dessert level"). *Id.* ¶ 8. As a result, that member receives \$30,000 to \$40,000 upon reaching the highest level of the organization and then leaves this dessert level, *id.* ¶ 9, although everyone is assured that there is no guarantee of this occurring. *Id.* ¶¶ 8, 12.

Participation in A Woman's Project is voluntary. *Id.* ¶ 6. All members are entitled to leave the association at any time; no members are required to recruit other members; members are permitted to have a sponsor for their initial gift; and there are no oral or written contracts between the members. *Id.* ¶¶ 11; 13-15. In addition, any member who requests the return of her initial gift receives a refund

¹ In light of these rulings, the plaintiffs' motion for summary judgment on the defendants' counterclaims is **MOOT**.

from the next gifting member. *Id.* ¶ 10.

During 2000 and 2001, A Woman's Project came under public scrutiny from the Attorney General of Maine and several district attorneys. *Id.* ¶¶ 17, 19. These officials issued press releases that certain organizations within Maine, including A Woman's Project, appeared to be illegal pyramid schemes under Maine law and urged any women victimized by such groups to make a formal complaint. *Id.* The members of A Woman's Project who filed this claim under 42 U.S.C. § 1983 for injunctive and declaratory relief assert that these threats of prosecution and statements to the press violated their First Amendment rights to freedom of association, *id.* ¶ 33, and that the prosecutors' counterclaim under the Maine statute is designed to and has had the effect of chilling their right of free access to the courts. ¶¶ 29, 32, 34. As of March 6, 2001, no participants from A Woman's Project had been prosecuted for their participation. *Id.* ¶ 23. The plaintiffs claim that their activities in the project in fact do not violate the Maine anti-pyramid statute. ¶ 18.

II. DISCUSSION

A. Prosecutors' Threats as First Amendment Violations

In order to state a section 1983 claim, the plaintiffs must allege that (1) the prosecutors' actions (here, threats of prosecution) were committed under color of state law and (2) the threats worked a denial of rights secured by the Constitution. See Collins v. Nuzzo, 244 F.3d 246, 250 (1st Cir. 2001). The prosecutors concede

that the first requirement is met. But they contend that their press releases about A Woman's Project do not improperly chill the plaintiffs' First Amendment rights.

First, the prosecutors argue that the plaintiffs' activities in A Woman's Project do in fact violate 17 M.R.S.A. § 2305 and therefore do not deserve any First Amendment protection. Defs.' Obj. to Pls.' Mot. to Amend and Supplement Compl. at 1. The prosecutors have not presented a factual record to support their assertion that Maine law has been violated, however. On a motion to dismiss I must take the plaintiffs' allegations as true. The plaintiffs maintain that their activities in A Woman's Project do not violate 17 M.R.S.A. § 2305 or any other Maine statute. Second Am. Compl. ¶ 18.

Instead, they claim that the prosecutors' threats and statements to the press—in the absence of any illegal conduct on the plaintiffs' part—chill their First Amendment rights to freedom of association. *Id.* ¶ 30. They appear not to be contesting the constitutional validity of 17 M.R.S.A. § 2305, either facially or as applied, and they do not assert bad faith on the part of the prosecutors, but merely a lack of probable cause to prosecute and a lack of reasonable investigation to support the truth of the prosecutors' assertions. *Id.* ¶¶ 20-21.

Informal methods of enforcing the law, like a prosecutor's statements to the press that he/she considers particular conduct illegal, do not violate First Amendment rights. State Cinema of Pittsfield, Inc. v. Ryan, 422 F.2d 1400, 1402 (1st Cir. 1970) (affirming motion to dismiss where the "essence of plaintiff's

complaint seems to be that this [good faith attempt by the police and prosecutor to enforce state law] was done in an informal manner. . . . [i]n our view this is not actionable, absent bad faith”). In order to state a constitutional claim for the prosecutors’ statements and threats alone, the plaintiffs would have to plead that these threats and statements amounted to a scheme to squelch First Amendment rights without using the ordinary criminal prosecution process in the courts—an “effective state regulation superimposed upon the State’s criminal regulation [of pyramid schemes] and making such regulation largely unnecessary and obviating the need to employ criminal sanctions.” Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 69 (1963); State Cinema, 422 F.2d at 1401 (“Bantam Books held unconstitutional the creation and practice of a state commission which passed on the acceptability of literature, publicly denounced as objectionable materials which failed to meet with its approval, and threatened distributors of the materials with prosecution—though the commission had no prosecutorial powers.”). Prosecution threats or statements are actionable only if they amount to an informal system of censorship of First Amendment activities independent of the criminal statutes. Bantam Books, 372 U.S. at 71; see also State Cinema, 422 F.2d at 1402 (“The record in this case shows no more than a good faith attempt by the police and prosecutor to enforce state law, the validity of which has not been called into question.”); Hammerhead Enter., Inc. v. Brezenoff, 707 F.2d 33, 39 (2d

Cir. 1983) (statements not actionable where no evidence that communications were part of an informal system of censorship).

The plaintiffs have not alleged anything close to the censorship scheme the Supreme Court struck down in Bantam Books, 372 U.S. at 70-71. The plaintiffs have alleged only that the prosecutors made prosecution threats and statements to the press that A Woman's Project was illegal. Second Am. Compl. ¶¶ 17, 19. There is no separate regulatory scheme apart from the pyramid statute. The plaintiffs have not alleged that the prosecutors were engaged in an informal system of censorship, attempting to stop the plaintiffs from supporting the social and economic issues of women, or that the prosecutors were acting in bad faith. The plaintiffs are complaining merely that the prosecutors are trying to enforce the law informally before proceeding through the legal process, and that the law is ultimately inapplicable to them. As alleged, the claims under section 1983 are not actionable.

In fact, the Supreme Court has noted that informal contact between prosecutors and potential law violators is proper. The Court stated that

We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws...Where such consultation is genuinely undertaken with the purpose of aiding the [violator] to comply with such laws and avoid prosecution under them, it need not retard the full enjoyment of First Amendment freedoms.

Bantam Books, 372 U.S. at 71-72. What the plaintiffs have pleaded here sounds just like what the Supreme Court described as constitutionally sound in Bantam

Books, 371 U.S. at 71-72: the plaintiffs have not alleged that the prosecutors were doing anything more than advising them and the public that in their view A Woman's Project violates 17 M.R.S.A. § 2305.

B. Retaliation

The allegations supporting the plaintiffs' section 1983 retaliation theory are not sufficient to state a claim. The retaliation claim is based upon the assertion that the plaintiffs' right of free access to the courts is illegally chilled or discouraged by the fact that the prosecutors filed a counterclaim seeking a declaration that the plaintiffs have in fact violated the pyramid scheme statute, as well as damages for the plaintiffs' alleged unfair trade practices. Second Am. Compl. ¶¶ 29, 32, 34.

By definition, counterclaims in a lawsuit are retaliatory in nature, but this does not make them illegal. The plaintiffs have not presented any case authority that states that a counterclaim in an existing lawsuit may be illegal retaliation under section 1983. Counterclaims can, of course, be dismissed if appropriate, but here the plaintiffs have not sought *any* such relief (not dismissal on the merits, not dismissal as frivolous, not sanctions under Rule 11, nor any damages). They have continued to pursue their original suit. They have not been deterred in the exercise of their right of access to the courts by the defendants' counterclaims.

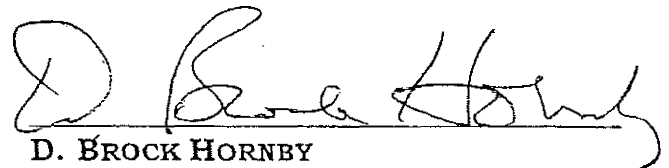
In short, there is no basis for a claim of illegal retaliation. (Indeed, according to the plaintiffs, they too want a judicial declaration concerning the lawfulness of their activities. Id. ¶ 24.)

III. CONCLUSION

The plaintiffs' motion to amend complaint is **GRANTED**. The defendants' motion to dismiss is **GRANTED**. The defendants' counterclaim is **DISMISSED WITHOUT PREJUDICE** because I decline to assert jurisdiction under 28 U.S.C. § 1367(c)(3). If there is a legitimate question concerning the statute's application to A Woman's Project, it should be resolved in the state courts.

SO ORDERED.

DATED THIS 31st DAY OF AUGUST, 2001.


D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE

U.S. District Court
District of Maine (Bangor)
Civil Docket For Case #: 01-CV-33

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MEG PETERSON
SUSAN HART
BETH CONNOR

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v.

ATTORNEY GENERAL, MAINE

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PROSECUTORIAL DISTRICT VII

DISTRICT ATTORNEY FOR
PROSECUTORIAL DISTRICT I

DISTRICT ATTORNEY FOR
PROSECUTORIAL DISTRICT II

DISTRICT ATTORNEY FOR
PROSECUTORIAL DISTRICT III

DISTRICT ATTORNEY FOR
PROSECUTORIAL DISTRICT IV

DISTRICT ATTORNEY FOR
PROSECUTORIAL DISTRICT V

DISTRICT ATTORNEY FOR
PROSECUTORIAL DISTRICT VI

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