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IN THE FRANKLIN COUNTY MUNICIPAL COURT  
CIVIL DIVISION 2015 JUL 15 PM 12:25

VERONICA WAGNER COVATCH,  
et al.,

FRANKLIN COUNTY  
MUNICIPAL COURT  
LORI M. TYACK

Plaintiffs,

Case No. 2014-CVF-024571

v.

JUDGE BRANDT

CENTRAL OHIO SHELTYE RESCUE,  
Inc., et al.,

PLAINTIFFS' MOTION TO STRIKE  
AND/OR DISMISS COUNTERCLAIMS  
AND FOR SANCTIONS

Defendants.

Now come plaintiffs, by and through counsel, and submit the following as their Motion to Strike the Counterclaims of Defendants, Central Ohio Sheltie Rescue, Inc., and Penny Sanderbeck, Against Plaintiffs, Veronica Covatch and Michelle Wilson, which Counterclaims should be stricken, or in the alternative the claims set forth therein dismissed for good cause, as set forth in the following Memorandum In Support attached hereto and incorporated herein as if fully rewritten. Further, based upon the frivolous nature of said Counterclaims, sanctions should be awarded against Counterclaimants and/or their counsel.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND FACTS

This action was filed on **July 28, 2014** to seek return of a show dog, Piper, which is alleged to be wrongfully in the possession of Counterclaimants.

Defendants Central Ohio Sheltie Rescue, Inc. (COSR) and Penny Sanderbeck filed their Answer on **September 2, 2014**. They also filed their motion for judgment on the pleadings on October 14, 2014, which motion was denied by Entry filed **November 18, 2014**. With leave of Court, plaintiffs filed their Amended Complaint on **December 24, 2014**. Defendants COSR and Sanderbeck filed their Answer to the Amended Complaint on **January 29, 2015** and their Amended Answer on **February 5, 2015**. On **June 18, 2015**, almost one year after the Complaint was filed and almost six months after the Amended Complaint was filed, without leave of Court, said defendants filed their instant Counterclaims against plaintiffs.

A review of the Counterclaims demonstrate that the allegations set forth therein are directly related to the allegations set forth in plaintiffs' Complaint and Amended Complaint and clearly arise out of the occurrence that is the subject of the Complaint/Amended Complaint. In fact, Counterclaimants state that they are raising claims of interference with contractual and/or advantageous relations [Counts One and Two), defamation [Count Three], invasion of privacy [Count Six], burglary, theft and criminal damaging

[Count Five] and injunctive relief [Count Four], all as relates to Piper, a show dog who is the subject of the Complaint/Amended Complaint in this case and alleged attempts by plaintiffs and/or unknown persons sympathetic to plaintiffs' position to obtain return of Piper from Counterclaimants.

The Counterclaims are untimely filed, are without merit, and should be stricken and/or dismissed.

## II. LAW AND ARGUMENT

### A. The Counterclaims should be stricken as being untimely filed.

As set forth foregoing, Counterclaimants filed their Counterclaims without motion or leave of Court on June 18, 2015, over nine months after they filed their Answer to the Complaint, seven months after their Motion for Judgment on the Pleadings was denied, and approximately five months after they served their Answer and then their Amended Answer to the Amended Complaint.

Ohio Rule of Civil Procedure 12(B) requires that every defense to a claim for relief in a pleading shall be asserted in the responsive pleading thereto.

Civ.R. 13(A) requires that "a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . ."

A compulsory counterclaim must be raised in an answer or it is considered waived. See, Quintus v. McClure, 41 Ohio App. 3d 402 (1987). A two-prong tests exists for whether a counterclaim is compulsory. The first prong is whether the claim exists at the time of service of the pleading. Rettig Enterprises, Inc. v. Koehler, 68 Ohio St. 3d 274 (1994), Geauga Truck & Implement Co. v. Juskiewicz, 9 Ohio St. 3d 12 (1984). The second prong is whether the claim arises out of the transaction or occurrence that is the subject matter of the opposing claim or is logically related thereto. *Id.*

It cannot be disputed that the claims alleged by Counterclaimants existed at the time of the service of their Answer and Amended Answer in January and February, 2015. Not only are all of the actions in the Counterclaims alleged to have occurred in 2014, but counsel for Counterclaimants has raised the allegations set forth therein at each and every pretrial attended by the undersigned in this case.

A review of the Counterclaims in this case also clearly indicates that the allegations therein largely mirror the matters set forth in plaintiffs' Complaint and Amended Complaint, such that the Counterclaims should have been raised in Counterclaimants' Answer.

Absent leave of Court to amend their Amended Answer to include the Counterclaims, the same should be stricken.

B. The Counterclaims fail to state claims for relief against Plaintiffs such that they should be dismissed.

Without waiving the foregoing, the Counterclaims must be dismissed pursuant to Civ.R. 12.

It is well-settled that in ruling on a motion to dismiss, the pleadings must be construed liberally and in a light most favorable to the party against whom the motion is made. Further, every reasonable inference in favor of the party against whom the motion is made should be indulged. Case Western Reserve Univ. v. Friedman, 33 Ohio App. 3d 347 (1986); Vaught v. Vaught, 2 Ohio App. 3d 264 (1981), Peterson v. Teodosio, 34 Ohio St. 2d 161 (1973)

The Court cannot, however, accept as true unsupported legal conclusions in the counterclaims. See, Hodge v. Cleveland, 1998 WL 742171, Eichenberger v. Petree, 76 Ohio App. 3d 779 (1992).

Applying these standards to the facts of this case, it is clear that the Counterclaims filed by defendants COSR and Sanderbeck fail to state claims upon which relief may be granted and must be dismissed.

A review of the Counterclaims at issue herein establish that the Counterclaimants cannot present any facts to legally support the claims for relief presented therein; accordingly, pursuant to Civ.R.12(B)(6), they must be dismissed. See State ex rel. Hanson v. Guernsey Cty. Bd. Of Commrs., 65 Ohio St. 3d 545 (1992), Morrow v. Reminger & Reminger Co., L.P.A., 2009 WL1608823 (Ohio App. 10

Dist.), 2009-Ohio-2665 [A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient.]

- 1) A claim which is time barred does not state a claim upon which relief can be granted.

It is well settled that an action for defamation or defamation per se shall be commenced within one year after the cause of action accrued. R.C. 2305.11. A cause of action for defamation accrues when the words are published or spoken rather than when the claimant becomes aware of them. Slngh v. ABA Publishing Am. Bar Assn, 2003 WL 21027897 (Ohio App. 10 Dist.), 2003-Ohio-2314. Likewise, claims for "false light" invasion of privacy which are based upon the same facts as the defamation claim share the same statute of limitations. See Lusby v. Cincinnati Monthly Publishing Corp., 904 F. 2d 707, (6<sup>th</sup> Cir. 1990) The action which the Counterclaims at issue allege to have occurred are stated to have occurred in April, May, and June 12, 2014, save two alleged internet postings described in paragraphs 65 and 66. The dates alleged are well over the one year statute of limitations for filing a defamation claim as set forth in the Counterclaims filed June 18, 2015. Accordingly, Counts Three and Six of the Counterclaims fail to state a claim upon which relief can be granted and should be dismissed.

- 2) Claims for criminal acts must be filed by the prosecuting attorney or by affidavit pursuant to R.C. 2935.09.

It is well settled that criminal acts must be prosecuted through affidavit and/or grand jury indictment. See R.C. Section 2935.09. Neither is contained in the Counterclaims. Accordingly, the claims set forth in Count Five of the Counterclaims fail to invoke the jurisdiction of this Court and fail to state a claim upon which relief can be granted.

Count Five of the Counterclaims must therefore be dismissed.

3) Counterclaimants' Counts for interference with contract and interference with advantageous relationship are stated identically and fail to state a claim upon which relief may be granted.

A claim for tortious interference with contract arises when one party to a contract is induced to breach the contract by the malicious acts of a third person who is not a party to the contract and who lacks justification for his acts. Charter Broadcast Group, Ltd. V. K-Country, Inc., 2005-Ohio-168, Escape Ent., Ltd. v. Gosh Ent., Inc., 2005-Ohio-2637, Knox Mach., Inc. v. Doosan Mach., USA, Inc., 2002-Ohio-5147.

Likewise, interference with advantageous relationships requires that a business relationship exists, that the tortfeasor knows of same, an intentional interference causing termination of the relationship and damages resulting therefrom. Diamond Wine & Spirits, Inc., v. Dayton Heidelberg Dist. Co., 2002-Ohio-3932, DK Prods., Inc. v. Miller, 2009-Ohio-436. Bare assertions that a party has intentionally interfered with such relations are not

sufficient to state a claim. See Hillstreet Fund III, L.P. v. Bloom, 2010-Ohio-2961

Counts One and Two of the Counterclaims are stated identically at paragraphs 91-94 of the pleading. Further, the claims as relate to interference with contract and/or contractual relations must also fail because no alleged contract(s) was/were attached to the Counterclaims. See Civ.R. 10(d)(1) [when any claim is founded on an account or written instrument a copy of same must be attached to the pleading]

Based upon the foregoing and upon applicable law, Counts One and Two of the Counterclaims fail to state a claim for relief and must be dismissed.

- 4) A claim for injunctive relief cannot stand without an underlying claim upon which it is based.

R.C. Section 2727.02 authorizes temporary injunctive relief when it appears by the petition that the plaintiff [counterclaimants herein] are entitled to the relief demanded.

And relevant law confirms that it is well settled that one of the prongs required for injunctive relief pursuant to R.C. Section 2727.02 is that there be a substantial likelihood of success on the merits of a claim. TGR Enterprises, Inc. v. Kozhev, 2006-Ohio-2915, Coleman v. Wilkinson, 2002-Ohio-2021.



As set forth foregoing, should Counterclaimants' claims be dismissed, there would be no likelihood of success. Accordingly, Count Four of the Counterclaims must be dismissed.

C. This Court lacks jurisdiction of the claims of Counterclaimants.

A Municipal Court has jurisdiction of claims which do not exceed \$15,000. R.C. Section 1901.17. Counterclaimants seek damages in amounts up to \$25,000.00. [Counterclaims at ¶89, 90 and at page 21, ¶A and page 22, ¶B, C, D, F, G]. Obviously the damages sought are far more than the jurisdictional amount, such that this Court does not have jurisdiction of the Counterclaims.

D. Sanctions should be awarded against Counterclaimants and their counsel for frivolous conduct.

The Counterclaimants have no legitimate basis for the delay in the filing of their Counterclaims. Rather, the filing of the Counterclaims by defendants without leave of Court and months after the filing of their Answer and Amended Answer to plaintiffs' Amended Complaint must be presumed to be for the purpose of unduly delaying these proceedings, to avoid returning Piper to her lawful owners, and/or for other improper purpose and therefore is frivolous.

Further, the fact that the majority of the Counterclaims are claims for which the statute of limitations has run and others are criminal in nature, such that relief undisputedly cannot be granted by this Court also renders the filing of same frivolous.

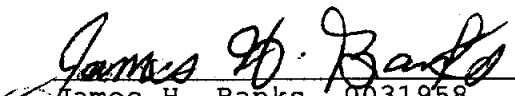
Finally, the fact that counterclaimants seek relief in amounts which exceed the jurisdictional limits of this Court and knew of the claims for over a year yet chose not to file them until this matter had been pending for almost one year supports a finding that the Counterclaims were filed for the purpose of delay, including but not limited to delay in returning Piper to plaintiffs.

Accordingly, this Court should find frivolous conduct in the filing of the Counterclaims in this case and should award appropriate sanctions.

### III. CONCLUSION

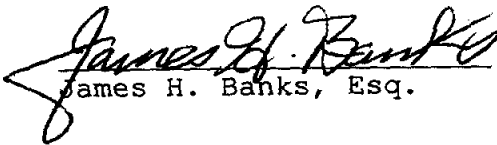
Based upon the foregoing, this Court should strike the Counterclaims of Defendants, Central Ohio Sheltie Rescue, Inc., and Penny Sanderbeck, Against Plaintiffs, Veronica Covatch and Michelle Wilson. Further, the Counterclaims should be dismissed and sanctions awarded for frivolous conduct in connection therewith.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing was duly served upon John A. Bell, Esq., P.O. Box 091022, Bexley, Ohio 43209 and Scott O. Sheets, Assistant Prosecuting Attorney, 373 South High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215, via ordinary U.S. Mail, postage prepaid, this 15<sup>th</sup> day of July, 2015.

  
James H. Banks, Esq.