

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLSTATE TRANSPORTATION CO., INC. : CIVIL ACTION  
: :  
Plaintiff : :  
: :  
v. : :  
: :  
SOUTHEASTERN PENNSYLVANIA : :  
TRANSPORTATION AUTHORITY : :  
: : No. 97-1482  
Defendant : :

**MEMORANDUM AND ORDER**

**I. INTRODUCTION**

The instant action has been brought by Allstate Transportation Co, Inc. ("Allstate") against Southeastern Pennsylvania Transportation Authority ("SEPTA") alleging various constitutional, statutory, state contract and state tort claims surrounding SEPTA's administration of its ParaTransit services. Defendant has filed a Motion for Partial Judgment on the Pleadings. For the reasons which follow, I will grant the Motion in part, and deny it in part.

**II. FACTS AND HISTORY**<sup>1</sup>

The following facts are undisputed. Since the early 1980's, the Commonwealth of Pennsylvania, through the Pennsylvania Department of Transportation ("PennDOT"), funded the §203 Program to offer reduced cost transportation fares to senior citizens,

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<sup>1</sup> The exact factual history of this matter is somewhat cloudy due to the numerous contradictory allegations by both parties. The following account represents only those facts on which both parties agree - the specific allegations are addressed as necessary within the discussion of the individual counts.

both ambulatory and non-ambulatory, throughout the Commonwealth under mandate from the Americans with Disabilities Act, 42 U.S.C. §12101 et. seq. (1988 ed., Supp. V) (ADA). By the late 1980's, PennDOT delegated its actual operating functions in the §203 Program to a subcontractor who was, in turn to contract directly with certificated carrier subcontractors to perform the actual transportation services. This new system became known as the Shared Ride Program.

Following contracts with both KETRON, Inc. and The Bionetics Corporation, PennDOT hired the Southeastern Pennsylvania Transportation Authority (SEPTA), defendant in this matter, as the new subcontractor in charge of the Shared Ride Program. SEPTA, a state agency responsible for the mass transit system in Philadelphia, Bucks, Chester, Delaware and Montgomery Counties, has operated its ParaTransit Services program since 1992, funded in part with money from PennDOT and from federal sources.

Plaintiff, Allstate Transportation Co., Inc. ("Allstate"), is a Pennsylvania corporation which has been providing ParaTransit transportation services to aged and infirm customers in Philadelphia since 1988. Due to its African-American ownership, Allstate was certified as a Disadvantaged Business Enterprise (DBE) contractor by SEPTA for the period of April 1993 to April 1996.

In 1992-1993, SEPTA solicited bids for new three year contracts in Philadelphia under the ADA Services program, with the contract award to go to the lowest responsible bidder.

Allstate submitted a low bid on this work and received no preferences in the award of the bid. Other, non-DBE ParaTransit contractors were performing substantially similar Shared Ride services at higher rates which had been reached under negotiated, rather than low-bid, contracts. SEPTA awarded a portion of the work to Allstate and a portion to these other non-DBE carriers. The SEPTA and Allstate contract for ParaTransit services ran for the period of July 1, 1993 through June 30, 1996. Despite the fact that Allstate bid for work utilizing vans, sedans and lift-vans, only the work involving the lift-vans was allocated to Allstate.

In late 1995 to early 1996, SEPTA elected to discontinue the centralized reservation and scheduling operation. As a replacement, it proposed a new, decentralized system for reservations and scheduling containing a "Rider Choice" component, in which the carriers were to compete for all ParaTransit customers. SEPTA informed carriers who were awarded work under the decentralized system that they should be prepared to service a certain estimated, maximum number of trips at the start-up of the decentralized system in mid-1996.

Although Allstate submitted a bid, SEPTA did not award it contract in the Rider Choice program and, instead, elected three other competing carriers. However, pursuant to an option in the original SEPTA-Allstate contract, SEPTA unilaterally extended that contract to June 30, 1997. The purchase order amount was increased by \$1,124,700, but all other terms and conditions were

maintained, particularly Allstate's continued payment on an hourly basis. Plaintiff was to be eligible for overflow work generally consisting of rides which could not be immediately handled/scheduled by the three participating carriers. SEPTA printed marketing brochures for use by ParaTransit riders which listed the numbers for the three competing ParaTransit carriers as well as SEPTA's customer service number, but contained no number for Allstate as the "overflow" carrier.

On October 22, 1996, Walsh Cab Company t/a Access ParaTransit ("Access"), one of the three carriers, filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of Pennsylvania, giving up the work allocated to it by SEPTA. The Bankruptcy Court approved a release of Access from all responsibility for default on its SEPTA contract and on its performance bond. Access also released SEPTA from all responsibility for Access's failure. Instead of awarding the work to Allstate, SEPTA took over Access's then-existing tours itself on a "emergency basis" and now operates under an entity known as Freedom Paratransit. Funding for the transaction came out of SEPTA's operating budget which is comprised in part with federal funds.

At the present time, SEPTA handles reservations, scheduling and assignments of Allstate's work. Allstate, however, rests on the verge of bankruptcy.

In early April, 1996, SEPTA notified Allstate regarding the DBE recertification process, but sent no additional, related

correspondence, during the period between May, 1996 through February 27, 1997. Allstate filed the instant suit on February 27, 1997 alleging unlawful racial discrimination in violation of federal civil rights statutes <sup>2</sup> and the U.S. Constitution, as well as state contractual and tort claims, surrounding the original contract and the 1996 RFP Bidding and Award. <sup>3</sup> On February 28, 1997, one day later, SEPTA sent a letter to Allstate requesting additional information for the recertification and, since that date, has requested other related documents and information.

Following the filing of suit, SEPTA issued, in May of 1997, a Request for Proposals ("1997 RFP") for all of the ParaTransit work that Allstate was then performing for SEPTA, as well as the ParaTransit work awarded to Access in 1993 and taken over by SEPTA/Freedom after Access filed for bankruptcy. The deadline, which was originally June 16, 1997, was extended to July 11, 1997. The performance bonding requirement associated with this RFP increased from the \$100,000 required in previous ParaTransit contracts to the full amount of the contract.

On or about July 7, 1997, Allstate amended its Complaint to include three new claims related to the activities surrounding its recertification and the 1997 RFP. Specifically, Allstate charged that SEPTA engaged in a campaign to retaliate against it

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<sup>2</sup> These statutes include 42 U.S.C. §§ 1981, 1983, 1985 and 2000d(1994).

<sup>3</sup> SEPTA, responded by way of Answer, Affirmative Defenses and Counterclaim on April 30, 1997.

for filing this action, adopted limitations and specifications in its 1997 RFP that prevented small businesses from submitting proposals, and intentionally interfered with Allstate's contractual and business relationships. SEPTA entered its Answer to the Amended Complaint on July 21, 1997.

Through the instant Motion for Partial Judgment on the Pleadings, submitted on July 25, 1997, defendant seeks dismissal of ten of plaintiff's seventeen counts, and of plaintiff's seventeen separate requests for punitive damages. Each of these counts is discussed separately infra.

### III. LEGAL STANDARD

A Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure is treated under the same standard as a motion to dismiss pursuant to Rule 12(b)(6). DeBraun v. Meissner, 958 F.Supp. 227, 229 (E.D. Pa. 1997). In a Motion for Judgment on the Pleadings, this Court will accept as true all well-pleaded allegations in the complaint and draw all inferences in favor of the non-moving party. Pennsylvania Nurses Ass'n v. Pa. State Educ. Ass'n, 90 F.3d 797, 799-800 (3d Cir.1996). Judgment will not be granted unless the movant clearly establishes that there is no material issue of fact to be resolved and that he is entitled to judgment as a matter of law. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 290 (3d Cir.1988). In addition, the court may consider matters of public record, orders and exhibits attached to the complaint. See Oshiver v. Levin, Fishbein, Sedran &

Berman, 38 F.3d 1380, 1384 n.2 (3d Cir.1994). However, the court is not required to accept legal conclusions either alleged or inferred from the pleaded facts. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). To survive a motion to dismiss, the plaintiff must set forth facts, and not mere conclusions, which state a claim as a matter of law. Sterling, 897 F. Supp. at 895 (E.D. Pa. 1995). Where appropriate, the court may grant a Rule 12(c) motion for judgment on the pleadings in part, and deny it in part. See, e.g., Society Hill Civic Ass'n v. Harris, 632 F.2d 1045 (3d Cir.1980).

#### IV. DISCUSSION

##### A. COUNT ONE - ALLSTATE'S DUE PROCESS AND EQUAL PROTECTION CLAIMS

Count One of the Amended Complaint seeks relief for alleged racial discrimination by defendant in violation of both the Due Process Clause and the Equal Protection Clause under the Fifth and Fourteenth Amendments to the U.S. Constitution. In opposition, defendant contends that plaintiff cannot maintain both a constitutional claim and a claim under 42 U.S.C. §1983 (1994), alleged in Count Three

When a proper claim 42 U.S.C. §1983 (1994)<sup>4</sup> is alleged, a plaintiff cannot proceed under the federal Constitution as a

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<sup>4</sup> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured. . ." 42 U.S.C. §1983 (1994).

separate count, if both depend on the same action. White v. Salisbury Twp. School Dist., 588 F. Supp. 608, 610, n.2 (E.D. Pa. 1984). In such a situation, the Constitutional claim is "wholly subsumed" by the §1983 claim. Id. The Fourth Circuit addressed the interplay between these two sources of legal rights and explained that a claim under the Fourteenth Amendment "merges into [a] §1983 claim because §1983 merely creates a statutory basis to receive a remedy for the deprivation of a constitutional right." Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995) cert. denied, 116 S. Ct. 190 (1995). See also Maxey v. Thompson, 680 F.2d 524, 526 (7th Cir. 1982) (Posner, J.) ("A violation of the Fourteenth Amendment is also alleged, but we treat it as merged into the §1983 allegation); Rogin v. Bensalem Twp., 616 F.2d 680, 686 (3d Cir. 1980) cert. denied, Mark-Garner Assoc., Inc. v. Bensalem Twp., 450 U.S. 1029 (1981) ("Indeed, §1983 was designed to afford plaintiffs a cause of action for constitutional violations on the part of local governmental bodies and other state officials.").

Plaintiff has, in Counts One and Three of its Amended Complaint, asserted both a direct cause of action under the Fifth and Fourteenth Amendments and a claim under §1983 based on the alleged discriminatory behavior by SEPTA. Because our precedents make clear that a separate constitutional claim is "wholly subsumed" by a §1983 cause of action, count I of the Amended Complaint must be dismissed.

B. COUNTS TWO, THREE AND FOUR - ALLSTATE'S CLAIMS UNDER 42

U.S.C. §§ 1981, 1983 AND 42 U.S.C. §2000d (TITLE VI) AND  
DEPARTMENT OF TRANSPORTATION REGULATIONS PROMULGATED  
THEREUNDER REGARDING THE 1996 BIDDING AND AWARD.

Counts Two through Four of the Amended Complaint allege that defendant violated three anti-discrimination statutes, 42 U.S.C. §§ 1981, 1983 and 2000(d) (1994), by intentionally underpaying Allstate for the value of its performance, reducing the number of trips it handles, refusing to schedule customer trips for Allstate, refusing to promote Allstate's services to the public through advertisements for the ParaTransit program and not allowing Allstate to participate in the competitive "Rider Choice" work while allowing all other non-minority contractors to do so. Defendant asserts, in response, that plaintiff fails to state a claim upon which relief can be granted with respect only to its allegations surrounding the award of the 1996 "Rider Choice" contracts.

As noted above, in order to sustain a motion for judgment on the pleadings, the court must "accept as true all well-pleaded allegations in the complaint" and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief. Pennsylvania Nurses Ass'n., 90 F.3d at 799-800. However, the Third Circuit has found that the "dual policy concerns" of shielding state officials from frivolous claims and providing these officials with sufficient notice to respond require that, for §1983 claims, the "complaint contain a modicum of factual specificity, identifying the particular conduct of

defendants that is alleged to have harmed the plaintiffs.”<sup>5</sup> Colburn v. Upper Darby Twp., 838 F.2d 663, 666 (3d Cir. 1988) aff'd 946, F.2d 1017 (3d Cir. 1991) citing Ross v. Meagan, 638 F.2d 646, 650 (3d Cir. 1981). Nonetheless, this standard remains far from a bright-line rule and the sufficiency of a complaint must be judged on a case-by-case basis. Frazier v. Southeastern Pennsylvania Transp. Auth., 785 F.2d 65, 67 (3d Cir. 1986). The crucial questions are “whether sufficient facts are pleaded to determine that the complaint is not frivolous, and to provide defendants with adequate notice to frame an answer.” Id. Notably, this standard does not place unreasonable expectations on the plaintiff. As the Third Circuit stated:

[A] court cannot expect a complaint to provide proof of plaintiffs’ claims, nor a proffer of all available evidence. In civil rights cases . . . much of the evidence can be developed only through discovery. While plaintiffs may be expected to know the injuries they allegedly have suffered, it is not reasonable to expect them to be familiar at the complaint stage with the full range of the defendants’ practices under challenge.

Id. To require more at this stage of the proceedings imposes an “impossible burden of knowledge on the plaintiffs.” District Council 47, AFL-CIO v. Bradley, 795 F.2d 310, 314 (3d Cir. 1986).

Generally, §1983 has two requirements: (1) the conduct complained of must be committed by a person acting under color of state law; and (2) the conduct complained of must have deprived

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<sup>5</sup> Although this section of the opinion deals with 42 U.S.C. §§ 1981, 1983, and 2000d, the discussion focuses on §1983 since the standards are similar. See, e.g., Collins v. Chichester School Dist., 1997 WL 411205 (E.D. Pa. July 22, 1997)(Discussing all three statutes under the same standards).

the plaintiff of a right or privilege secured by the Constitution or the laws of the United States. Section 1983 does not by itself confer any substantive rights. Rather, it is a remedial provision to be employed only in the event of the deprivation of some right, privilege, or immunity guaranteed by the Constitution or laws of the United States. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979). Because the "state action" element is not at issue, I move directly to this second factor which requires plaintiff to identify a statutory or constitutional right.

Plaintiff asserts the equal protection issues of disparate treatment and disparate impact and a due process claim as bases for its §1983 claim. Each of these is discussed in turn.

(1) Disparate Treatment

In the seminal McDonnell Douglas Corp. v. Green case, 411 U.S. 792 (1973), the Supreme Court set forth a four step methodology for evaluating evidence in cases alleging purposeful discrimination where direct proof of intent is lacking.<sup>6</sup> While neither the Third Circuit, nor any other circuit, has used this identical methodology in the context of alleged discrimination in bidding for a public contract, the First Circuit, in T & S Service Associates, Inc. v. Crenson, 666 F.2d 722 (1981), has

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<sup>6</sup> The prima facie case is established by showing: (1) plaintiff belongs to a racial minority; (2) plaintiff applied and was qualified for the job at issue and employer was seeking applicants; (3) plaintiff was rejected despite his qualifications; and (4) after rejection, the position remained open and employer sought applicants with the same qualifications. McDonnell, 402 U.S. at 802.

suggested a persuasive modification of the McDonnell test for such a situation.<sup>7</sup> The Court stated that the plaintiff, a qualified minority firm whose bid on a public contract was rejected, must prove a prima face case by showing that:

(1) T & S is a minority-owned firm; (2) T & S's bid met the specifications required of those competing for the contract; (3) the T & S bid was significantly more advantageous to the Committee than the bid actually awarded, whether in terms of price or some other relevant factor; and (4) the Committee selected another contractor.

Id. at 725. Upon a showing of these elements, an inference arises that the bid was not awarded to the complaining party on the basis of race. Id.

In the case at bar, defendant asserts that plaintiff failed to state facts sufficient to infer a prima facie case of racial discrimination in the failure to award a public contract. While defendant is justified in questioning the shaky grounds alleged as a basis for this claim, it demands too much proof from simply the Amended Complaint. Unlike T&S, this case is still at the pleading stage and only requires the plaintiff to allege claims with a certain "modicum of factual specificity" so as to put the defendant on notice and to establish that the claim asserted is not frivolous.

Under the T&S framework, plaintiff's discrimination claim

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<sup>7</sup> While the Court in T & S Service Associates decided the case under 42 U.S.C. §1981 instead of §1983, as in the instant case, it noted that the principles set forth "would seem equally applicable under either provision." Id. At 724, n.2.

has undoubtedly satisfied factors one, two and four.<sup>8</sup> The third element, however, which requires plaintiff to show that its bid was "significantly more advantageous" than the bid actually awarded, has not been satisfied with similar clarity. The Amended Complaint states that "SEPTA management knew that Allstate's bid was a more than reasonable, appropriate and legitimate bid for the 'Rider's Choice' work being offered it," and Allstate's receipt of the bid would have satisfied SEPTA's affirmative action obligations, but SEPTA "simply disqualified Allstate altogether as a competitor" while allowing "all other non-minority competitors to so compete." Amended Complaint, ¶¶53,92,99. Defendant's challenge to the sufficiency of these blanket statements certainly has merit, however this challenge ignores two factors. First, as emphasized before, unlike T&S, this case is only at the pleading stage and plaintiff has not had the benefit of time or discovery to make an honest, factual statement that its bid was more advantageous than the others. To require more imposes on plaintiff an "impossible burden of knowledge" of the other bids submitted. Second, the T&S standard is by no means rigid or binding on this court. Hence, looking beyond the four elements to the other allegations of racial

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<sup>8</sup> Under the first element, the Amended Complaint states that Allstate's owner, Jerome Henderson, is an African-American and that Allstate had been certified by SEPTA as a minority business enterprise. Amended Complaint, at ¶¶ 4,6,7. Second, plaintiff alleges that its bid was "appropriate and legitimate" and did indeed satisfy SEPTA's requirements as set forth in the 1996 Rider's Choice Request For Proposals. Amended Complaint, at ¶ 92. The fourth element is satisfied by the plaintiff's allegation that Access and two other non-minority companies were allowed to compete, to the exclusion of Allstate, in the 1996 Rider's Choice program. Amended Complaint, at ¶¶ 48,61.

discrimination within the Amended Complaint, there are sufficient factual pleadings to make, at least, a tenuous inference that the awarding of the bid was indeed motivated by racial concerns since Allstate, the only DBE, was the sole bidding carrier to be denied participation in the program. Moreover, unlike T&S where the bid was the only action at issue, the failure to award the contract in this matter is merely an example of the alleged on-going discrimination.<sup>9</sup> To separate this one incident from the others would be premature at this time and may be better reserved for a motion for summary judgment.

(2) Disparate Impact

While plaintiff's disparate treatment claims manage to attain the standard of satisfactory notice pleading, its allegations that defendant's practices have a disparate impact on minorities fail to even get to the starting gate. "[C]laims that stress 'disparate impact' involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." Hazel Paper Co. v. Biggins, 507 U.S. 604, 609 (1993). Plaintiffs can show a prima facie case under Title VII, and survive this motion for summary judgment, if they show that there is (1) a specific employment practice of the

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<sup>9</sup> As stated supra, Allstate also alleged that SEPTA racially discriminated against it by intentionally underpaying Allstate for the value of its performance, reducing the number of trips, refusing to schedule customer trips for Allstate and refusing to promote Allstate's services to the public through advertisements for the ParaTransit program.

City that (2) creates a disparate impact, shown by statistical evidence. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 657 (1989); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 993-95 (1988). Disparate impact cases typically focus on statistical disparities between members of the protected and unprotected classes. DiBiase v. SmithKline Beecham Corp., 48 F.3d 719, 730 (3d Cir. 1995) cert. denied, 116 S. Ct. 306 (1995).

The Amended Complaint alleges no facts whatsoever which would even begin to constitute a claim for disparate impact. Plaintiffs only claims are that it was the only disadvantaged business enterprise ("DBE") participating in SEPTA's ParaTransit program. Amended Complaint, at ¶¶33,37. This statement alone does not point to any policies, practices, regulations, conduct or rules of SEPTA that have "squeezed out" minorities from participation in the program. As such, this claim should be dismissed.<sup>10</sup>

### (3) Procedural Due Process

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<sup>10</sup> Although irrelevant once the disparate impact claim has been dismissed, both parties argue about whether Title VI prohibits only intentional discrimination and the proper reading of Guardians Assoc. v. Civil Service Comm'n, 463 U.S. 582 (1982). Well-established precedent clearly states that Title VI does prohibit only claims of intentional discrimination and that disparate impact allegations could be redressed only through "agency regulations designed to implement the purposes of Title VI." Alexander v. Choate, 469 U.S. 287, 292-293 (1985). See also Chester Residents Concerned for Quality Living v. Seif, 944 F. Supp. 413, 416 (E.D. Pa. 1996)("[i]nterpreting Alexander, [w]e thus find that by alleging only discriminatory effect rather than discriminatory intent, plaintiffs failed in their complaint to allege a violation of Title VI.").

Plaintiff, in Count One of its Complaint, alleges violation of the Due Process Clause resulting from defendant's failure to award it the 1996 RFP.<sup>11</sup>

The Supreme Court set forth the boundaries of the Fourteenth Amendment procedural due process protection for property interests in Board of Regents v. Roth, 408 U.S. 564 (1972), noting that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. At 577. In Independent Enterprises, Inc. v. Pittsburgh Water and Sewer Authority, 103 F.3d 1165, 1176 (3d Cir. 1997), the Third Circuit held that the plaintiff, a low bidder on a public contract whose bid was rejected, could not pursue its procedural due process claims against the City "unless 'an independent source such as state law' affords it a 'legitimate claim of entitlement' to be awarded a municipal contract for which it was the lowest responsible bidder." Pennsylvania cases, interpreting Pennsylvania statutes, have long demonstrated that one who bids on a public contract has no legitimate expectation of receiving it until the contract is actually awarded. See R.S. Noonan, Inc. V. School Dist. Of York, 400 Pa. 391, 162 A.2d 623 (1960); J.P. Mascaro & Sons, Inc. V. Township of Bristol, 95 Pa. Commw. 376 (1986). See also ARA Servs., Inc. V. School Dist. Of Phila., 590

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<sup>11</sup> Because Count I has been subsumed into the §1983 assertion, this claim must be discussed at this junction.

F. Supp 622, 629 (E.D. Pa. 1984). Hence, until the bid is awarded, no procedural due process rights are at stake.

Plaintiff alleges that its property entitlement to the 1996 Rider Choice RFP was based on its status as the "only responsible MBE/DBE carrier that had submitted a bid for this RFP."

Memorandum in Opposition to Defendant's Motion for Partial Judgment on the Pleadings ("Response"), at 5. It further asserts that the affirmative action policies of Title VI and the regulations implementing it require that at least some of the award should have gone to it because of its minority status. This argument, however, does not rise to the level of a protectable property interest since plaintiff could not reasonably assert that it had a legitimate expectation of receiving this contract. While SEPTA's motivations for denying the bid may remain a question of fact, they are irrelevant since the affirmative action policies do not guarantee that the contract be awarded to Allstate. Because Allstate cannot therefore allege a protectable property interest, this claim is dismissed on the pleadings.

C. COUNT SIXTEEN - ALLSTATE'S CLAIMS UNDER §§1981 AND 1983; AND 42 U.S.C. §2000D (TITLE VI) AND DEPARTMENT OF TRANSPORTATION REGULATIONS PROMULGATED THEREUNDER REGARDING THE 1997 RFP BONDING REQUIREMENT

Counts Fifteen and Sixteen of the Amended Complaint direct the court's attention to SEPTA's actions subsequent to the filing of this lawsuit. Plaintiff alleges, in Count Fifteen, that defendant discriminatorily retaliated against plaintiff by

failing to recertify it as a DBE, by spreading false and misleading information about plaintiff and by designing the 1997 Request for Proposals in such manner as to preclude plaintiff from being able to bid. Specifically, the Amended Complaint refers to the fact that the performance bonding requirement was set so high as to deny a small firm, such as Allstate, the chance to compete for the contract. Count Sixteen incorporates the allegations of the previous Count and asserts that the limitations and specifications contained in the 1997 RFP precluded small, minority/disadvantaged business enterprises from participating in the bid process. Defendant's only challenge to these allegations concerns the claims of discriminatory impact in Count Sixteen and, hence, I address only the sufficiency of that Count.

As addressed supra, disparate impact cases typically focus on statistical disparities between members of the protected and unprotected classes. DiBiase, 48 F.3d at 730. A prima facie case of disparate impact alleges(1) a specific employment practice of the City that (2) creates a disparate impact, shown by statistical evidence. Wards Cove, 490 U.S. at 657; Watson v. Fort Worth Bank & Trust, 487 U.S. at 993-95.

In the context of public contracts, bonding requirements have been deemed non-discriminatory. In rejecting a city's racial quota for public projects, the Supreme Court held that bonds are "nonracial factors which would seem to face a member of any racial group attempting to establish a new enterprise," and

therefore cannot be deemed discriminatory. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989). See also Taylor v. City of St. Louis, 702 F.2d 695, 697 aff'd 702 F.2d 695 (8th Cir. 1983) ("The [10% bid bond], neutral on its face and serving ends otherwise in the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another . . . Here, the bid bond requirement insures that only financially stable contractors will participate in the food service programs.")(citations omitted).

In the instant matter, defendant increased the performance bond requirement from the \$100,000 required in previous ParaTransit contracts to the full amount of the contract.<sup>12</sup> Aside from its claim that this requirement was included specifically to prevent Allstate from bidding on the contract, plaintiff asserts that it has a disparate impact on all minority contractors. While the former assertion may in fact have merit and is not challenged in the present motion by defendants, the latter claim falters under current precedent. Any small business is affected by such a steep bond requirement - nothing in the Amended Complaint explains how this has a greater effect on minorities. Nor does plaintiff allege any demonstrated impact on other DBEs aside from broad legal conclusions that minorities

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<sup>12</sup> Plaintiff alleges that the 1997 contract was awarded for \$32.7 million. Response, at 17, n.7.

were excluded.<sup>13</sup> Therefore, Count Sixteen, to the extent it states a claim for disparate impact, must be dismissed.

D. COUNTS THIRTEEN AND FOURTEEN - ALLSTATE'S ALLEGATIONS OF UNLAWFUL CONSPIRACIES UNDER 42 U.S.C. §1985.

As part of its Complaint, plaintiff alleges that defendant conspired with Access, a non-DBE ParaTransit Company awarded a contract under the 1996 RFP, and Local 234 of the Transportation Workers Union ("Local 234"), for the purpose of depriving it of equal protection and due process rights. Defendant submits that plaintiff's allegations fail to assert any racial motivation behind these actions - an essential element of a 42 U.S.C. §1985 (1994).

In order to state a cause of action for violation of 42 U.S.C. §1985, the following must be alleged: (1) a conspiracy by the defendants; (2) designed to deprive plaintiff of the equal protection of the laws or equal privileges and immunities; (3) the commission of an overt act in furtherance of that conspiracy; (3) a resultant injury to person or property or a deprivation of any right or privilege of citizens; and (5) defendants' actions were motivated by a racial or otherwise class-based invidiously

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<sup>13</sup> Plaintiff repeatedly refers to the various "preclusive" specifications and limitations in the 1997 RFP of which the bonding requirement is just one example. Response, at 16. It argues that it is not obligated to utilize a "laundry list" style of pleading. *Id.* at 17. While the Federal Rules of Civil Procedure do not require detailed pleading, plaintiff must at least set forth the requirements which it is challenging. Sterling v. Southeastern Pennsylvania Transportation Authority, 897 F. Supp. 893, 895 (E.D. Pa. 1995)(To survive a motion to dismiss, the plaintiff must set forth facts, and not mere conclusions, which state a claim as a matter of law.). Therefore, I cannot consider these alleged "specifications and requirements" in ruling on this particular Count.

discriminatory animus. Litz v. Allentown, 896 F. Supp. 1401, 1414 n.14 (E.D. Pa. 1995) citing Griffin v. Breckenridge, 403 U.S. 88, 102-103 (1983).

The element of racial animus is essential to a proper §1985 claim. Robison v. Canterbury Village, Inc., 848 F.2d 424, 430 (3d Cir.1988); Pratt v. Thornburgh, 807 F.2d 355, 357 (3d Cir. 1986) cert. denied 484 U.S. 839 (1987)("[a]s to the claim founded on 42 U.S.C. S 1985(3), we need only say that it was properly denied since it is not alleged that the conspiracy involved in that count was motivated by a racial or class-based animus."). Section 1985(3) does not prohibit conspiracies motivated by economic or commercial animus. United Brotherhood of Carpenters and Joiners of America v. Scott, 463 U.S. 825, 838 (1983). As the Court stated in Scott, "[e]conomic and commercial conflicts, we think, are best dealt with by statutes, federal or state, specifically addressed to such problems, as well as by the general law proscribing injuries to persons and property." Id. at 839.

The Amended Complaint contains no indications that the alleged conspiracies between SEPTA and Access and between SEPTA and Local 243 were prompted by any form of racial discrimination. Plaintiff asserts that "Allstate properly alleged §1985(3) claims by incorporating within each Count the preceding allegations of the Amended Complaint which plainly describe SEPTA's acts of discrimination against Allstate motivated by race." Response, at 15-16. However, not only does this attempted "incorporation"

fail to satisfy the specificity required for a federal civil rights claim, but plaintiff's own words in the Amended Complaint contradict its assertion that the conspiracies were motivated by racial animus.

With respect to the alleged conspiracy between SEPTA and Access, the Amended Complaint continuously refers to SEPTA's decision to favor Access above all other carriers, giving it a competitive advantage in the competition for "Rider Choice." Amended Complaint, at ¶¶48,50,159. These statements suggest, not racial animus, but economic animus, since the other, non-minority carriers, were similarly injured. While plaintiff does assert that giving Access control of the majority of the ParaTransit business worked "to the particular detriment of Allstate," this is a broad, conclusory allegation supported by no factual assertions.<sup>14</sup> Amended Complaint, at ¶159 In light of the

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<sup>14</sup> Although not asserted by the defendant, the §1985 claim for the alleged conspiracy between SEPTA and Access fails for another reason. Under basic legal terminology, a "conspiracy" requires some showing of agreement between two or more parties. Ianelli v. U.S., 420 U.S. 770, 777 (1975)(Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act.). Moreover, under §1985, the agreement must have been entered into for the purpose of denying equal protection of the laws. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 275-276 (1993)(conspiracy is not 'for the purpose' of denying equal protection simply because it has an effect upon a protected right. The right must be 'aimed at'") Because, §1985 claims must be pled with factual specificity, not mere conclusory allegations that a conspiracy existed, . D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1346, 1377 (3d Cir. 1992) cert. denied 506 U.S. 1079 (1993) (citations omitted), the complaint must establish an agreement with the common objective of denying equal protection.

In the instant case, plaintiff has failed to plead anywhere in their Amended Complaint that the alleged conspiracy between SEPTA and Access was the result of any agreement to deprive Allstate of equal protection of the laws. Plaintiff asserts that "SEPTA management had first decided among themselves" how much equipment to allocate to each carrier and that Allstate's share should go to Access." Amended Complaint, at ¶48 (emphasis added). Additionally, the Complaint says that "SEPTA management unilaterally . . . and without notice to any of the bidders" decided to favor Access in the "Rider Choice" program. Amended Complaint, at ¶50 (emphasis added). Moreover,

foregoing, Count 13 must be dismissed.

Regarding the alleged SEPTA/Local 234 conspiracy, paragraph 68 of the Amended Complaint explains that:

The illegal agreement was thus designed to accomplish mutually beneficial goals, through illegal and improper means. The first goal (for SEPTA) was to make SEPTA a competitor in the private sector, ParaTransit marketplace without the objection of PennDOT, which had never authorized such a role. The second goal (for Local 234) was to save the union the loss in membership dues resulting from the Access employee-union members becoming unemployed.

Amended Complaint, at ¶68.<sup>15</sup> Only later does the Complaint state that "[the purpose of this conspiracy . . . was to deprive Allstate of equal protection and privileges due it under the law and the terms of the Federal contracts in the competition for and the performance of ParaTransit work." Amended Complaint at ¶170. Again, this broad, conclusory statement cannot support a §1985 count. See Ostrer v. Aronwald, 567 F.2d 551, 553 aff'd 567 F.2d 551 (2d Cir.1977)(Complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of

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Plaintiff's allegations refer to "SEPTA's decision to promote Access above all others," not just above Allstate. Amended Complaint at 63 (emphasis added). The first mention of any "conspiracy" appears in statements made within Count Thirteen which are conclusory and allege no specific factual claims aside from the broad statement that "SEPTA conspired with Access to favor Access when developing its plans for promoting the 'Rider Choice' program" and "SEPTA further conspired with Access to control the majority of the ParaTransit work . . . to the particular detriment of Allstate." Amended Complaint, at ¶¶ 156, 159. These blanket statements simply do not permit any inference of a conspiracy between Access and SEPTA since such claims appear to be unilateral actions by SEPTA.

<sup>15</sup> The Amended Complaint also states that the agreement was "designed to defeat the lawful seniority rights of SEPTA's own employees." Amended Complaint, at ¶68.

general conclusions that shock but have no meaning.) Because the factual basis for this claim sounds in economic and commercial, not racial, animus, Count Fourteen does not state conduct which is actionable under §1985(3).

E. COUNT SEVENTEEN - ALLSTATE'S CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACTUAL AND BUSINESS RELATIONSHIPS

Count Seventeen of the Amended complaint sounds in tort as plaintiff alleges interference with both existing and prospective business relations caused by defendant's actions following the commencement of this lawsuit.

To state a claim for tortious interference with contractual relations or prospective contractual relations, under Pennsylvania law, the complaint must allege the following elements: (1) a contractual or prospective relationship between the plaintiff and third parties; (2) a purpose or intent to harm the plaintiff by interfering with the contractual relationship or preventing the contractual relationship from accruing; (3) the absence of a privilege or justification on the part of the defendant; and (4) the occurrence of actual harm or damage to the plaintiff as a result of defendant's conduct. Fluid Power, Inc. v. Vickers, Inc., 1993 WL 23854, \*3 (E.D. Pa. Jan. 28, 1993). See also Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 208, 412 A.2d 466, 471 (1979). If existing contracts were interfered with, the complaint should be able to allege what contracts or types of contracts they are. Centennial School Dist. v. Independence Blue Cross, 885 F. Supp. 683 (E.D. Pa. 1994).

Proof of a claim of tortious interference with prospective contractual relations requires a showing of the existence of prospective contracts. Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1014 (3d Cir. 1993) cert. denied, National Decorating Products Ass'n, Inc. v. Alvord-Polk, Inc., 514 U.S. 1063 (1995). "A prospective contract 'is something less than a contractual right, something more than a mere hope'" (citations omitted). The Third Circuit has held that the Pennsylvania Supreme Court requires that there be an objectively reasonable probability that a contract will come into existence, Schulman v. J.P. Morgan Inv. Management, Inc., 35 F.3d 799, 808 (3d Cir.1994). Such an expectation may arise from an unenforceable express agreement or an offer. U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 925 (3d Cir. 1990) cert. denied 498 U.S. 816 (1990). It exists if there is a reasonable probability that a contract will arise from the parties' current dealings. Glenn v. Point Park college, 441 Pa. 474, 272 A.2d 895, 898-899 (1971). Under Pennsylvania law, merely pointing to an existing business relationship or past dealings does not reach this level of probability. See General Sound Telephone Co., Inc., v. AT & T Communications, Inc., 654 F. Supp. 1562, 1565 (E.D. Pa. 1987) (opportunity to bid on a contract is insufficient to establish the existence of a prospective contract under Pennsylvania law which requires considerably more than a reasonable probability of a chance to obtain a contract); Thompson Coal Co. v. Pike Coal Co., 488 Pa.

198, 412 A.2d 466 (1979) (Existing year-to-year lease on certain property did not amount to a reasonable probability of renewal, despite the existing business relationship).

Plaintiff first contends that defendant interfered with its existing contractual relationships. Amended Complaint, at ¶199. However, as defendant correctly notes, plaintiff failed to identify which existing contracts were hindered. While the Federal Rules of Civil Procedure do not require complainant to set forth in detail the facts upon which the claim is based, the "short and plain statement of the claim" must be sufficient to give the defendant notice of the claim and the grounds upon which it is based. Breslin v. Vornado, Inc., 559 F.Supp. 187, 191 (E.D. Pa.1983). Plaintiff's allegations state that SEPTA's actions have interfered with "Allstate's present contract and business relationships with third parties, including essential subcontractors of Allstate" and "Allstate's other ParaTransit business relationships." Amended Complaint, at ¶¶ 199, 201. Contrary to plaintiff's argument, this broad statement does not give any notice even as to the types of contracts involved. Instead, it suggests that the claim encompasses every possible contract into which Allstate would enter.<sup>16</sup>

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<sup>16</sup> Plaintiff's reliance on Fluid Power, Inc. v. Vickers, Inc., 1993 WL 23854, at \*4 (E.D. Pa. Jan. 28, 1993) is misplaced. The Court noted that, because plaintiff specified at least one existing contract and gave to defendant a customer list identifying the other existing and prospective customers, defendant had notice of plaintiff's claim. Id. Plaintiff, in this case, asserts that it submitted information to SEPTA in its 1996 Rider Choice RFP which listed Allstate's subcontractors and other ParaTransit programs. Response, at 20. While plaintiff was not required to list each name within its complaint, proper notice pleading would have at least referred to this RFP and the names within it. A mere allegation that includes all business

Similarly, with respect to the allegations of interference with prospective business relations, plaintiff has failed to identify with sufficient precision which prospective contracts they would have entered into but defendant's alleged interference. Again, the general allegation of interference with "Allstate's future contract and business relationships with third parties, including essential subcontractors of Allstate" is far too over-inclusive to provide any sufficient notice. Amended Complaint, at ¶203. Moreover, these contracts are far from reasonably probable. Plaintiff states only that "[b]ased on Allstate's previous contracts with such essential subcontractors and other ParaTransit business relationships, future contractual relationships were reasonably probable." Amended Complaint, at ¶203. However, as noted above, under Pennsylvania law, prior or existing business relationships, standing alone, do not suffice for a claim of interference with prospective business relationships. As such, Count 17, alleging a claim of tortious interference with contracts, must be dismissed on the pleadings.

F. COUNT FIVE - ALLSTATE'S CLAIM UNDER 49 U.S.C. §306

Defendant vigorously argues that plaintiff's claim under 49

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relationships with third parties, subcontractors and other ParaTransit business relationships does not satisfy the requirement of notice.

U.S.C. §306 (1996)<sup>17</sup> must fail because: (1) this statute does not create a private cause of action; and (2) even if it does, plaintiff has failed to exhaust its administrative remedies. I address each of these declarations in turn.

(i) Private Right of Action

In Cort v. Ash, 422 U.S. 66, 78 (1975), the United States Supreme Court set forth four factors which must be analyzed in determining whether a private right of action exists.<sup>18</sup> However, the Court has repeatedly emphasized that the focus of the inquiry is on the intent of Congress. Touche Ross & Co. V. Redington, 442 U.S. 560 (1979); Merrill, Lynch, Pierce, Fenner & Smith, Inc. V. Curran, 456 U.S. 353 (1982). See also State of New Jersey Department of Environmental Protection and Energy v. Long Island Power Authority, 30 F.3d 403, 421 (3d Cir. 1994). "The intent of Congress remains the ultimate issue, however, and 'unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply

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<sup>17</sup> Section 306(b) states: "A person in the United States may not be excluded from participating in, be denied the benefits of, or be subject to discrimination under, a project, program, or activity because of race, color, national origin or sex when any part of the project, program, or activity is financed through financial assistance under section 332 or 333 or chapter 221 or 249 of this title, section 211 or 216 of the Regional Rail Reorganization Act of 1973 . . . or title Vi of the Railroad Revitalization and Regulatory Reform Act of 1976 . . ."

<sup>18</sup> The four factors are: (1) whether plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any implicit/explicit legislative intent to create or deny such a remedy; (3) whether such a remedy is consistent with the underlying purposes of the legislative scheme; and (4) whether this cause of action is one traditionally relegated to state law so that it would be inappropriate to infer one based solely on federal law. Cort, 422 U.S. at 78.

does not exist.'" Thompson v. Thompson, 484 U.S. 174, 179 (1988) quoting Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 94 (1981).

Defendant contends that "there is absolutely no indication in the language or history of 49 U.S.C. § 306 that Congress intended to create a private cause of action." Motion for Partial Judgment on the Pleadings, at 24. However, defendant ignores the history behind the creation of this statutory provision. The Railroad Revitalization and Regulatory Reform Act ("4-R Act") of 1976, 45 U.S.C. §821 et seq. (1987), contained within its provisions, specifically §905, an almost mirror image anti-discrimination provision.<sup>19</sup> However, Congress repealed §905 and replaced it with a "nearly identical provision," codified in 49 U.S.C. §306(b). Organization of Minority Vendors, Inc. v. Illinois Central Gulf Railroad, 579 F. Supp. 574, 581 (N.D. Ill. 1983). "The non-discrimination and affirmative action regulations promulgated under §803 . . . have remained in effect. None of these statutory revisions appears to affect any of the plaintiffs' substantive rights." Id. See also Act of Dec. 13, 1982, Pub. L. No. 97-449, 1982 U.S.C.C.A.N. (96 Stat.) 4220 ("The statute is intended to remain substantively unchanged.").

Section 905 of the 4-R Act, which contained the anti-

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<sup>19</sup> This provision states: "No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, or denied the benefits of, or be subjected to discrimination under, any project, program, or activity funded in whole or in part through financial assistance under this Act." 45 U.S.C. §905 (1987).

discrimination provision, has been deemed to create a private right of action. Mikkilineni v. United Engineers and Constructors, 485 F. Supp. 1292, 1297 (E.D. Pa. 1980) ("We, therefore, hold that the Railroad Revitalization and Regulatory Reform Act of 1976 does imply a private cause of action in favor of plaintiff."). See also Organization of Minority Vendors, 579 F. Supp. at 592 ("There can be little doubt that §905 of the 4-R Act creates an implied private right of action in favor of these plaintiffs . . . congressional silence on the existence of a private remedy under the 4-R Act indicates only that Congress felt no need to stress the availability of such a right of action."). Because no substantive changes were made between the repeal of the anti-discrimination provision of the 4-R Act and the codification of 49 U.S.C. §306, it is a logical conclusion that §306 does contain a private cause of action.

(ii) Exhaustion of Administrative Remedies

Federal regulations promulgated pursuant to the now-repealed 45 U.S.C. §803 provided that disputes under this statute, "shall be resolved by informal means whenever possible." 49 C.F.R. §256.21(d)(1) (1997). This court recognized the requirement of exhaustion of administrative remedies in Mikkilineni v. United Engineers and Constructors, 485 F. Supp. at 1297 (holding that, even though the 4-R contains a private right of action, the court cannot reach the claim because plaintiff has not exhausted all administrative remedies as required by the act).

Although defendant argues that this necessarily means a

plaintiff must exhaust administrative remedies under 49 U.S.C. §306, this argument makes too great a leap. The texts of the two anti-discrimination provisions are similar and, therefore, it is easy to infer that the implication of a private right of action in one creates a private right of action in the other. The same logic is not possible with respect to the administrative remedies. The regulations referred to in Mikkilineni and cited in defendant's memorandum apply only to federal railroad programs. See 49 C.F.R. §265.3 (1997)<sup>20</sup> A thorough review of case law and legislative history reveals nothing that would indicate that the required exhaustion of administrative remedies in the 4-R Act applies to 49 U.S.C. §306. As such, defendant's motion to dismiss Count Five is denied.

G. COUNT TWELVE - ALLSTATE'S CLAIM FOR BREACH OF THE DOCTRINE OF NECESSARY IMPLICATION

Counts Ten and Eleven of the Amended Complaint allege breach of contract by defendant based on defendant's failure to assign a sufficient amount of ParaTransit work to plaintiff. Plaintiff sets forth a separate cause of action, based on the same conduct, under the doctrine of necessary implication.

The doctrine of necessary implication serves to "allow the

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<sup>20</sup> "This part [including §265.21] applies to any project, program, or activity funded in whole or in part through financial assistance provided under the Act, and to any activity funded under any provision of the Regional Rail Reorganization Act of 1973, as amended (45 U.S.C. 701 et seq.) or the Rail Passenger Service Act, as amended (45 U.S.C. 501 et seq.) amended by the Act including the financial assistance programs listed in Appendix A. It applies to contracts awarded to implement the Northeast Corridor Project and to financial assistance programs administered by the United States Railway Association." 49 C.F.R. §265.3 (1997)

court to enforce the clear intentions of the parties and avoid injustice" in order to carry out the purpose for which the contract was made. Slater v. Pearle Vision Center, 376 Pa. Super 580, 586, 546 A.2d 676, 679 (1988). Thus, the Court will imply an obligation that was within the contemplation of the parties when the contract was drafted or is necessary in order to insure the intention of the parties will be carried out. Doylestown Associates, L.P. v. Street Retail, Inc., 1996 WL 601679 (E.D. Pa. Oct. 18, 1996). Even when a contract is not ambiguous, a court may utilize the doctrine of necessary implication to "avoid injustice" Barmaster's Bartending School, Inc. v. Authentic Bartending School, Inc., 931 F. Supp. 377 (E.D. Pa. 1996). Hence the doctrine is utilized in conjunction with a breach of contract action to protect the parties to that contract. See Gallagher v. Upper Darby Township, 114 Pa. Commw. 463, 473, 539 A.2d 463, 467 appeal denied, 554 A.2d 513 (Pa. 1988)("where an obligation was within the contemplation of the parties when making the contract or is necessary to carry out their intention, the law will imply that obligation and enforce it even though it is not specifically and expressly set forth in the written contract").

Plaintiff alleges that SEPTA breached its contract with Allstate under the doctrine of necessary implication. Amended Complaint at ¶152. However, instead of using the doctrine to support its contract claims set forth in Counts Ten and Eleven, plaintiff asserts it as a separate count. While defendant does not dispute the sufficiency of these contract claims, it does

properly note that the doctrine of necessary implication does not support a separate count within the complaint for the identical conduct described in other counts. Hence, Count Twelve is dismissed on the pleadings.

H. ALLSTATE'S DEMAND FOR PUNITIVE DAMAGES

In each of its seventeen separate counts, plaintiff demands punitive damages. Defendant, however, submits that SEPTA is similar to a municipal corporation and therefore maintains immunity against such damages.

Well-established precedent states that a municipal corporation is immune from punitive damages. City of Newport v. Fact Concerts, Inc., 453 U.S. 247,259 (1981). In City of Newport, the Supreme Court noted that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill." Id. at 267. Nothing in any legislative history indicates that Congress wanted to abolish this doctrine in the creation of §1983. Id. at 259. Justice Blackmun considered the history and policies behind §1983 and the fact that civil/constitutional rights are at stake, but he ultimately held that neither the retributive nor preventative purpose of punitive damages is advanced by exposing municipalities to such damages. Id. at 268. Hence, the common law absolute immunity for municipalities in §1983 actions against them continues to apply. Id. at 269.

In Bolden v. Southeastern Pennsylvania Transportation

Authority, 953 F.2d 807 (1991) cert. denied, 112 S. Ct. 2281 (1992), the Third Circuit concluded that "SEPTA, like a municipal corporation is immune from punitive damages under §1983 . . . [i]n view of the many characteristics that SEPTA shares with federal, state, and local agencies." Id. at 829. The immunity enjoyed by all of the levels of government supports the notion of granting SEPTA the same immunity. Id. Additionally, the same considerations of policy surrounding municipal immunity advocate in favor of treating SEPTA similarly since "[a]warding punitive damages against SEPTA might result in increased taxes or fares and thus punish taxpayers and users of mass transportation who cannot be regarded, except perhaps in an indirect and abstract sense, as bearing any guilt for constitutional violations that SEPTA may commit." Id. at 830. See also Feingold v. SEPTA, 512 Pa. 567, 580, 517 A.2d 1270, 1277 (1986) (Pennsylvania Supreme Court concludes that it would be inappropriate to assess punitive damages against SEPTA given its status as a commonwealth agency).

In light of the above, plaintiff's demands for punitive damages from SEPTA lack in legal support. This Circuit has expressly granted immunity to SEPTA from punitive damages.

Plaintiff's rebuttal to these cases stands on especially tenuous grounds. First, plaintiff, relying on Justice Blackmun's footnote in Newport, contends that this is the "extreme situation" constituting an exception to the generalized municipal immunity from punitive damages. Newport, at 267, n. 29. This contention misreads Justice Blackmun, who wrote:

It is perhaps possible to imagine an extreme situation where the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights. nothing of that kind is presented by this case. Moreover, such an occurrence is sufficiently unlikely that we need not anticipate it here.

Nowhere in the Amended Complaint, Response to defendant's Motion or Reply does plaintiff attempt to show that SEPTA's policies are the result of decisions made directly by the elected representatives of the citizens. Nowhere does plaintiff demonstrate why the taxpayers, who took no part in the alleged constitutional violations of the defendant, should bear the burden of this windfall to the plaintiff.

Moreover, plaintiff advances the untenable argument that because SEPTA is using federal monies, rather than simply state funds, they accepted federal duties and obligations. It asserts that there are totally different issues of public policy in this case, particularly "the federal power to remedy the historical injustice of racial discrimination." Response, at 27. Additionally, it claims that neither the Supreme Court in Newport, nor the Third Circuit in Bolden dealt with the situation of a state entity grossly misusing substantial federal funds. Even if these allegations are true, though, none of this justifies the increased taxes or fares that would be imposed on users of mass transportation.<sup>21</sup> Because plaintiff's arguments

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<sup>21</sup> Plaintiff further contends that if it sued SEPTA officials in their individual capacities, it could get punitive damages and those damages may be indemnified by SEPTA itself. As support for this argument, though, plaintiff cites the dissent of a Third Circuit case which discusses the general rule of indemnification as a reason not to impose punitive damages on even officials that are sued as individuals and actually lends credence to the defendant's

fail to refute the well-established immunity granted to municipalities, Allstate's seventeen demands for punitive damages are dismissed.

#### V. CONCLUSION

In light of the foregoing, defendant's Motion for Partial Judgment on the Pleadings is granted with respect to Counts One, Twelve, Thirteen, Fourteen, Sixteen, Seventeen, and the demand for punitive damages. The Motion is denied with respect to Counts Two, Three, Four and Five.

An appropriate order follows.

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claim that punitive damages be denied in this matter. Judge Higginbotham, in his partial dissent in Keenan v. City of Philadelphia, 983 F.2d 459 (3d Cir. 1992) wrote:

Whereas one of the purposes of punitive damages is punishment, giving a punitive damage award in any amount to a plaintiff where the individual defendant does not pay fails to punish that individual defendant . . . The case at bar demonstrates my concern for the illogic of punitive damages when the municipality, not the employees, becomes the entity totally 'footing the bill.' Although a city would not be directly liable for any punitive damages awards in a §1983 case, Philadelphia is obligated to indemnify the individual defendants for their punitive damage liability.

Id. at 480-481 (citations omitted).