

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

<b>MUNICIPAL REVENUE SERVICES, INC.</b> :		<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
v.	:	
	:	
	:	
	:	
<b>JOHN P. MCBLAIN, <i>Individually and in</i></b>	:	
<b><i>his official capacity as Vice President of</i></b>	:	<b>NO. 06-4749</b>
<b><i>Aldan Borough, and ALDAN BOROUGH</i></b>	:	
	:	
<b>Defendants.</b>	:	
	:	

**DuBOIS, J.**

**MARCH 19, 2007**

**MEMORANDUM**

Plaintiff Municipal Revenue Services, Inc. (“MRS” or “plaintiff”) filed suit against defendants John P. McBlain and Aldan Borough. Plaintiff’s Complaint asserts various state and federal claims arising out of defamatory comments allegedly made by defendant McBlain both before and during a public meeting of the William Penn School District<sup>1</sup> on October 24, 2005. Presently before the Court is defendants’ Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow, the Motion to Dismiss is granted in part and denied in part.

**I. BACKGROUND**

Plaintiff is in the business of arranging for the purchase of delinquent tax liens by third parties. Compl. ¶ 2. Defendant McBlain is an elected member and Vice President of defendant

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<sup>1</sup>The Court takes judicial notice of the fact that Aldan Borough is one of six boroughs that comprise the William Penn School District.

Aldan Borough.

The William Penn School District scheduled a public meeting on October 24, 2005 “to undertake a key vote in support of conducting a tax lien sale transaction utilizing the services of MRS.” Id. ¶ 28. Prior to that meeting, on October 24, 2005, defendant McBlain allegedly spoke with various William Penn School Board members in an attempt to dissuade them from accepting MRS’s proposal. Id. ¶ 30. Later that evening, at the public meeting, McBlain referred to MRS as “loan sharks” and stated that the MRS proposal amounted to “loan sharking with attorneys fees” in an apparent attempt to “equate MRS’ business with illegal, mob-related activity.” Id. ¶ 33-34.

Plaintiff alleges that defendant McBlain’s statements on October 24, 2005 before and during the public meeting “were made to, *inter alia*, ensure that MRS would not siphon business away from those who support Defendants’ political interests, and who channel contributions to the political interests that support Defendant’s political interests, and who channel contributions to the political interests that support Defendant McBlain’s personal and pecuniary interests.” Id. ¶ 38. Plaintiff’s primary Pennsylvania competitor for the purchase of delinquent tax liens is Bear Stearns & Company, Inc (“Bear Stearns”). Compl. ¶ 14. According to plaintiff, Bear Stearns, its subsidiaries, and affiliated companies frequently use “influencers” in competing against MRS. “Specifically, in its efforts to unfairly compete against MRS in Delaware County [Pennsylvania], MRS’ competitor utilizes politically active consultants, lobbyists and law firms, aligned with Defendant McBlain.” Id. ¶ 15. Plaintiff further alleges that Bear Stearns has provided financial support to political allies of defendant McBlain. Id. ¶ 19.

In 2005, Bear Stearns was selected over MRS by the Chester Upland School District and

the City of Chester (“the Chester entities”) to structure the purchase and sale of those entities’ delinquent tax liens. Plaintiff alleges that political allies of defendant McBlain played “key roles” in the selection of Bear Stearns by the Chester entities, and that defendant McBlain personally was involved in structuring the sale of delinquent tax liens by the Chester entities. *Id.* ¶¶ 21-23. The sale of tax liens by the Chester entities closed on October 24, 2005, the same day as the William Penn School District meeting. The Complaint outlines various financial and political gains to defendant McBlain and his allies that resulted from the closing of the Bear Stearns deal.

Plaintiff filed the Complaint on October 23, 2006. Counts I-III of the Complaint assert various claims under 42 U.S.C. § 1983 against defendants McBlain and Aldan Borough. Specifically, in each of those Counts, plaintiff asserts procedural due process violations, substantive due process violations, arbitrary treatment and discrimination in violation of the Equal Protection Clause, and First Amendment retaliation. In Count IV, plaintiff asserts a claim for commercial disparagement against defendant McBlain.<sup>2</sup> On November 20, 2006, defendant filed the instant Motion to Dismiss.

## **II. DISCUSSION**

### **A. Legal Standard**

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The Court must

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<sup>2</sup>Plaintiff does not state whether Count IV is asserted against defendant McBlain in his official or individual capacity.

only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). A complaint should be dismissed if “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishin v. King & Spaulding, 467 U.S. 69, 73 (1984). Therefore, the facts alleged in plaintiff’s Complaint are accepted as true in deciding defendant’s motion.

### **B. High Public Official Immunity**

Defendants argue that defendant McBlain is entitled to immunity for any comments made at the October 24, 2005 public meeting, under Pennsylvania’s doctrine of absolute privilege for high public officials. See, e.g., Matson v. Margiotti, 88 A.2d 892, 895 (1952).<sup>3</sup> “The Supreme Court of Pennsylvania has held that ‘high public official immunity is an unlimited privilege that exempts high public officials from lawsuits for defamation, provided the statements made by the official are made in the course of his official duties and within the scope of his authority.’” Smith v. School Dist., 112 F. Supp. 2d 417, 425 (E.D. Pa. 2000) (quoting Lindner v. Mollan, 677 A.2d 1194 (Pa. 1996)); see also Montanye v. Wissachickon School District, 2003 U.S. Dist. LEXIS 15570, \*42-43 (E.D. Pa. Aug. 11, 2003).<sup>4</sup>

In response, plaintiff argues that the doctrine of high official immunity under

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<sup>3</sup>Defendants do not specify what claims should be barred by this immunity. See Def. Mot. 7.

<sup>4</sup>As a preliminary matter, plaintiff states that “whether McBlain was acting as a ‘high public official’ of Aldan Borough at the William Penn School District Meeting, requires a factual analysis and cannot be determined on a Rule 12(b)(6) motion.” Pl.’s Resp. 10 (citing Barber v. Lynch, 418 A.2d 749, 751-52 (Pa. Super. 1980)). Plaintiff’s argument is based on Pennsylvania state procedure, which is inapposite. To the contrary, the issue of high official immunity is properly raised by a 12(b)(6) motion. See, e.g., Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 638 (E.D. Pa. 2006); Smith, 112 F. Supp. 2d at 425.

Pennsylvania law does not shield officials from liability from suit for Constitutional violations, only from state law actions. See Hill v. Borough of Kutztown, 455 F.3d 225, 243-44 (3d Cir. 2006). Because Counts I through III of the Complaint allege Constitutional violations, it is plaintiff's position that high official immunity does not bar those claims. The Court agrees. "The doctrine of high official immunity under Pennsylvania law does not shield [a defendant] from suit under § 1983. That doctrine shields high officials from state law claims, not constitutional claims." Id. Therefore, defendants' motion to dismiss is denied to the extent it seeks to dismiss the constitutional claims under § 1983 in Counts I through III of plaintiff's Complaint.

With respect to Count IV, plaintiff's claim for commercial disparagement, plaintiff argues that defendant McBlain should not be shielded by high official immunity because he was acting outside of his jurisdiction as an official of Aldan Borough. According to plaintiff, both before and during the William Penn School District Board meeting, when making disparaging comments about plaintiff, McBlain acted in a capacity outside of his jurisdiction as an official of the Borough. See Pl.'s Resp. 10-15.

"Pennsylvania's doctrine of absolute privilege for high public officials 'is unlimited and exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, provided the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as is sometimes expressed, within his jurisdiction.'" Heller v. Fulare, 454 F.3d 174, 177 (3d Cir. 2006) (quoting Matson v. Margiotti, 88 A.2d 892, 895 (Pa. 1952)).

Plaintiff's Complaint alleges that defendant McBlain made his disparaging comments

outside the scope of his authority. Compl. ¶ 38. If proven, those allegations are not shielded by high official immunity. Thus, defendants' Motion to Dismiss as to Count IV is denied on this ground.<sup>5</sup>

### C. Section 1983 Claims

In their Motion to Dismiss, defendants broadly assert that plaintiff has failed to state a claim for a violation of constitutional rights under 42 U.S.C. § 1983. Def. Mot. 10. Defendants argue that because plaintiff cannot demonstrate that they were deprived of a federal right, there can be no actionable § 1983 claim. Because plaintiff's Complaint sets forth four separate § 1983 claims, the Court will address the viability of each of those claims in turn.

#### 1. Procedural Due Process

Plaintiff's procedural due process claim rests on the argument that "plaintiff was exposed to [defendant's] arbitrary, vindictive and discriminatory conduct without opportunity for any meaningful procedure that provided any redress or remedy from the Defendant Borough." Compl. ¶ 49.

"To state a claim under § 1983 for deprivation of procedural due process rights, a plaintiff must allege that (1) he was deprived of an individual interest that is encompassed within the

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<sup>5</sup>Plaintiff also argues that because defendant McBlain engaged in willful misconduct, Section 8500 of Pennsylvania's Tort Claims Act abrogates the common-law doctrine of high public official immunity. See 42 Pa. Const. Stat. § 8500. The Court notes that this argument is an incorrect statement of Pennsylvania law. The Third Circuit in Heller v. Fulare, 454 F.3d 174, 178 n.2 (3d Cir. 2006) criticized district courts in Pennsylvania that "expressed the view that the passage of the Pennsylvania Political Subdivision Tort Claim Act . . . abrogated high public official immunity" stating that those courts "misconstrued Pennsylvania's common law immunity. To the extent that the doctrine is applied to those designated as 'high public officials,' it has indeed survived despite the statute's limitations as to other employees."

Fourteenth Amendment's protection of 'life, liberty, or property,' and (2) the procedures available to him did not provide 'due process of law.'" Hill, 455 F.3d at 233-34 (citing Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000)). Plaintiff states that MRS was deprived of both a protected property and liberty interest without due process.

a. Property Interest

Plaintiff's property argument is that "MRS has a property interest in business, lost business, and lost business opportunities." Pl.'s Resp. 23. In the Complaint, plaintiff states that

Defendants' continuing misconduct is a substantial factor in directly and proximately causing Plaintiff's loss of the benefits of its business relations with William Penn School District; the lowering of its reputation; economic loss; damage to future earning capacity; substantial expense and expenditure of time both in obtaining new business, and in defending itself against widely disseminated false and malicious complaints; and impingement upon its right to pursue business interests.

Compl. ¶ 50.

"To 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." Board of Regents v. Roth, 408 U.S. 564, 577 (1972); see also Montanye, 2003 U.S. Dist. LEXIS 15570, at \* 26 ("An interest in property protected by procedural due process results from a 'legitimate claim of entitlement' created by sources such as state law and express or implied contracts."). This standard has not been met in the instant case. Based on the Complaint, the most tangible result of defendants' action was the loss of the benefits of plaintiff's business relations with the William Penn School District, and that is insufficient. The Third Circuit has held that under Pennsylvania law a bidder on a government contract does not acquire an enforceable property right to the benefit of the contract

until the bidder is awarded the contract. Allied Painting Inc. v. Delaware River Port Auth. of Pennsylvania and New Jersey, 2004 U.S. Dist. LEXIS 13994, \*7 (E.D. Pa. June 21, 2004) (citing Indep. Enters. v. Pittsburgh Water and Sewer Auth., 103 F.3d 1165, 1178 (3d Cir. 1997)).

Accordingly, plaintiff has not plead a protectable property interest. See also Hunter v. SEC, 879 F. Supp. 494, 497 n.3 (E.D. Pa. 1995) (“Plaintiff argues that his economic loss constitutes deprivation of a property interest protected by Pennsylvania law, however, he can cite no case in which an economic loss resulting from reputation harm was held to be property entitled to constitutional protection.”).

**b. Liberty Interest**

Plaintiff also asserts a liberty-based procedural due process claim. Specifically, plaintiff alleges that defendants damaged plaintiff’s liberty interest in its business reputation.

The Supreme Court has recognized a protectable liberty interest in one’s reputation. See Ersek v. Township of Springfield, 102 F.3d 79, 83 (3d Cir. 1996). Such reputational liberty interests are properly analyzed under the “stigma-plus” test established by the Supreme Court in Paul v. Davis, 424 U.S. 693, 701 (1976). The Third Circuit recently explained this test, stating that, “[t]o make out a due process claim for deprivation of a liberty interest in reputation, a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest.” Hill, 455 F.3d at 236. The Third Circuit has described this threshold analysis as a “formidable barrier,” and has emphasized “that reputation alone is not an interest protected by the Due Process Clause.” Clark v. Township of Falls, 890 F.2d 611, 619 (3d Cir. 1989).

A “stigma,” for the purpose of the Paul analysis, involves government action that infringes upon a person’s, or organization’s, “good name, reputation, honor or integrity.” Boone

v. Pennsylvania Office of Vocational Rehabilitation, 373 F. Supp. 2d 484, 497 (M.D. Pa. 2005) (quoting Roth, 408 U.S. at 573). To satisfy the “plus” requirement, a plaintiff must demonstrate that the alleged defamation harming plaintiff’s reputation “occurs in the course of or is accompanied by extinguishment of a right or status guaranteed by law or the Constitution.” Hill, 455 F.3d at 235. Mere economic harm accompanying the defamation is insufficient to satisfy this “plus” requirement. See, e.g., Kelly v. Borough of Sayreville, 107 F.3d 1073, 1078 (3d Cir. 1997) (“Even financial injury due solely to government defamation does not constitute a claim for deprivation of a constitutional liberty interest.”); Sturm v. Clark, 835 F.2d 1009, 1013 (3d Cir. 1987) (“[F]inancial harm resulting from government defamation alone is insufficient to transform a reputation interest into a liberty interest.”).

Although economic harm alone is insufficient to satisfy the “plus” requirement, a plaintiff need not demonstrate the loss of a property interest protected by state law. On this issue, the Third Circuit in Hill held that a public employee who is defamed and terminated incidental thereto can allege a procedural due process violation for those actions even though the employee may not have a state property right to that employment. 455 F.3d at 237-38. The Hill court ruled that the alteration in status resulting from the termination was sufficient to meet the stigma plus test. See id.

Plaintiff relies on Hill and Coleman & Williams, Ltd. v. Wisconsin Dept. of Workforce Development, 401 F. Supp. 2d 938, 944 (E.D. Wisc. 2005) to support the proposition that plaintiff’s economic harms were sufficient to meet the stigma plus test. In Coleman & Williams, the court held that plaintiff sufficiently alleged a liberty based procedural due process claim because defendants stigmatized plaintiff, and incidental thereto removed plaintiff from a list of

approved accountants and auditors, thereby foreclosing future government contracting. The court stated that “when a government contractor alleges that incidental to making a stigmatizing statement, a government official debarred or precluded it from further government work, the plaintiff alleges a tangible alteration of status.” Id. at 946.

Both Coleman & Williams and Hill are distinguishable from the instant case. In this case, plaintiff did not suffer a “tangible alteration of status”—plaintiff never had a formal prior relationship with defendants. Although the harm to plaintiff’s reputation may have had a negative impact on plaintiff’s business, this is still properly viewed as the “stigma” itself, not a change in status sufficient to establish the “plus.” See also D&D Associates, Inc. v. Board of Educ. of N. Plainfield, 2005 U.S. Dist. LEXIS 22881, \*13-14 (D.N.J. Sept. 30, 2005); cf. Clark v. Township of Falls, 890 F.2d 611, 620 (3d Cir. 1989) ([P]ossible loss of future employment opportunities is patently insufficient to satisfy the requirement imposed by Paul that a liberty interest requires more than mere injury to reputation.”).

c. Conclusion

The Complaint fails to state a viable claim of the loss of a property or liberty interest that is encompassed within the Fourteenth Amendment’s protection of “life, liberty, or property.” Thus, defendants’ Motion to Dismiss is granted as to plaintiff’s procedural due process claim.

2. Substantive Due Process

Plaintiff asserts a substantive due process claim based on the allegation that “defendants’ misconduct directed against plaintiff, as alleged, also targeted and singled plaintiff out for arbitrary treatment and discrimination not rationally related to any lawful aim or purpose, all in violation of the Due Process Clause.” Compl. ¶ 45. This claim is further explained in plaintiff’s

response to defendant's Motion to Dismiss—"the vindictive attempt by McBlain, using the aegis of Aldan Borough, arbitrarily to deprive plaintiff of its livelihood violated plaintiff's substantive due process rights." Resp. at 32 (citing Alder v. Montefiore Hosp. Assoc. of W. Pa., 453 Pa. 60, 71-72 (Pa. 1973)).

To state a claim for a deprivation of substantive due process, plaintiff must allege that defendant, acting under color of state law, interfered with a protected interest in life, liberty or property. Goodwin v. Moyer, 2006 U.S. Dist. LEXIS 18583, \*21-22 (M.D. Pa. Mar. 29, 2006). "The protected interest, in contrast to procedural due process, must be fundamental, it must be derived from the Constitution and its historical purposes and not from other sources of law such as state law." Id. (citing Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 140-41 (3d Cir. 2000)). If plaintiff does have a fundamental interest, "then substantive due process protects the plaintiff from arbitrary or irrational deprivation" of that interest. Nicholas, 227 F.3d at 142. "Only the most egregious official conduct can be said to be arbitrary in the constitutional sense." County of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998); United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 399 (3d Cir. 2003).

In a case similar to the instant case, the Third Circuit recently held that:

Equating a defamatory statement that leads to a third party's not extending a contract to a frustrated plaintiff with the deprivation of the plaintiff's legal right to engage in the common occupations of life in a manner protected by the Fourteenth Amendment goes too far. It is true that such an action has some effect on an individual's ability to navigate the often treacherous waters of government contracting, but to leap to the broad level of generality necessary to classify the harm in substantive due process terms would constitutionalize broad swaths of state tort law.

Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 404 (3d Cir. 2000).

Under Boyanowski, it is clear that plaintiff's claim that defendants' arbitrary action deprived plaintiff of "the right to pursue a field of endeavor and to earn a livelihood," is insufficient to state an actionable substantive due process claim. See also Hill, 455 F.3d at 235 n.12 (citing Boyanowski for the proposition that "defamatory statements that curtail a plaintiff's business opportunities do not suffice to support a substantive due process claim"). Accordingly the Court grants defendants Motion to Dismiss plaintiff's substantive due process claim.

### 3. Equal Protection

Plaintiff alleges that defendants' conduct targeted and singled out plaintiff for arbitrary treatment and discrimination not rationally related to any lawful aim or purpose in violation of the Equal Protection Clause. In other words, plaintiff asserts a "class of one" theory under Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam).

To state a claim under this theory, plaintiff must allege that "(1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment." Hill, 455 F.3d at 239. In the Complaint plaintiff alleges that (1) defendants treated MRS differently from Bear Stearns, a similarly situated competitor, see Compl. ¶¶ 35-36; (2) the defendants did so intentionally, see id. ¶¶ 38-40; and (3) the arbitrary treatment and discrimination was "not rationally related to any lawful aim or purpose." Id. ¶ 45. As such, plaintiff has sufficiently stated a "class of one" equal protection claim, and the Motion to Dismiss is denied as to this claim. See id; see also Montanye, 2003 U.S. Dist. LEXIS 15570, at \*41 ("A 'class of one' claim might be sufficient to withstand a motion to dismiss if, for example, a plaintiff were to allege that she had been intentionally treated differently from other persons 'similarly situated' - with no rational basis for

that different treatment.”).

#### 4. First Amendment Retaliation

Plaintiff alleges that defendants violated its First Amendment rights by defaming plaintiff because defendant McBlain’s attack “was unlawfully and outrageously in retaliation for the exercise of Plaintiff’s right of free expression and association.” Compl. ¶ 69.

There are three elements to a First Amendment Retaliation claim: (1) that plaintiff engaged in constitutionally protected activity; (2) that the government responded with retaliation; and (3) that the protected activity caused the retaliation. See Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282 (3d Cir. 2005); Sposto v. Borough of Dickson City, 2005 U.S. Dist. LEXIS 37437, \*2 (M.D. Pa. Dec. 6, 2005).

With respect to the first element, plaintiff’s Complaint states that: “Plaintiff advocated and supported ideas and principles which defendants selectively and invidiously opposed, when they conflicted with the business and political interests of persons who favored defendants’ political and economic interests, including plaintiff’s business of arranging for the purchase of delinquent tax liens by third parties.” Compl. ¶ 69(a). As to the second element, plaintiff argues that defendant McBlain’s public and private attack of plaintiff constituted a retaliatory action. See Pl.’s Resp. 28. Finally, as to the third element, the Complaint states that “defendants’ conduct directed against plaintiff, as alleged, was unlawfully and outrageously in retaliation for the exercise of plaintiff’s right of free expression and association and the right to petition government to redress grievances as guaranteed by the First Amendment of the United States Constitution.” Compl. ¶ 69.

On the basis of these allegations, the Court concludes that plaintiff has stated a claim of

First Amendment retaliation. Accordingly, defendants' motion to dismiss is denied as to plaintiff's First Amendment retaliation claim.

#### **D. Punitive Damages**

Defendants have also moved to dismiss claims for punitive damages against defendant Aldan Borough or against defendant McBlain in his official capacity. Plaintiff seeks an award of punitive damages against defendant McBlain in each of the four Counts of the Complaint, but does not seek such damages against defendant Aldan Borough.

Punitive damages are not available against municipalities or against an officer of a municipality being sued in his official capacity. See Watson v. Abington Township, 2002 U.S. Dist. LEXIS 16300, \*31-32 (E.D. Pa. Aug. 12, 2002), *vacated on other grounds*, 2007 U.S. App. LEXIS 3485 (3d Cir. Pa. Feb. 16, 2007). However, punitive damages are available against an officer of a municipality being sued in his *individual* capacity. Id. Accordingly, the Court grants Defendants' Motion to Dismiss to the extent that it seeks to dismiss plaintiff's claims for punitive damages against defendant McBlain in his official capacity, and denies the Motion to the extent that it seeks to dismiss plaintiff's claims for punitive damages against him in his individual capacity.

### **III. CONCLUSION**

For the foregoing reasons, defendants' Motion to Dismiss is granted in part and denied in part. Plaintiff's procedural and substantive due process claims are dismissed with prejudice. Defendants' Motion to Dismiss plaintiff's claims for punitive damages is granted insofar as plaintiff seeks punitive damages against defendant McBlain in his official capacity, and is denied to the extent that plaintiff seeks to dismiss punitive damages against him in his individual

capacity. Defendants' Motion to Dismiss is denied in all other respects. That leaves for adjudication plaintiff's equal protection claim, First Amendment retaliation claim, and commercial disparagement claim.

An appropriate Order follows

**IN THE UNITED STATES DISTRICT COURT  
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<b>MUNICIPAL REVENUE SERVICES, INC.</b> :		<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
v.	:	
	:	
	:	
	:	
<b>JOHN P. MCBLAIN, <i>Individually and in his official capacity as Vice President of Aldan Borough,</i> and ALDAN BOROUGH</b>	:	<b>NO. 06-4749</b>
	:	
<b>Defendants.</b>	:	
	:	

**ORDER**

**AND NOW** this 19th day of March, 2007, upon consideration of Defendant’s Motion to Dismiss Under FRCP 12(B)(6) (Document No. 10, filed November 20, 2006); and Plaintiff’s Response to Defendants’ Motion to Dismiss (Document No. 13, filed December 7, 2006); **IT IS ORDERED** that Defendants’ Motion to Dismiss Under FRCP 12(B)(6) is **GRANTED IN PART AND DENIED IN PART**, as follows:

1. Defendants’ Motion to Dismiss is **GRANTED** as to plaintiff’s procedural and substantive due process claims. Plaintiff’s procedural and substantive due process claims are **DISMISSED WITH PREJUDICE**.

2. Defendants’ Motion to Dismiss plaintiff’s claims for punitive damages is **GRANTED** insofar as plaintiff seeks punitive damages against defendant McBlain in his official capacity, and is **DENIED** insofar as plaintiff seeks punitive damages against defendant McBlain

in his individual capacity. Plaintiff's punitive damages claims against defendant McBlain in his official capacity are **DISMISSED WITH PREJUDICE**.

3. Defendants' Motion to Dismiss is **DENIED** in all other respects.

**BY THE COURT:**

/s/ Honorable Jan E. DuBois

**JAN E. DUBOIS, J.**