CASE NO. 18-30327

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

GRIGSBY & ASSOCIATES, INC., Plaintiff-Appellant

VERSUS

CITY OF SHREVEPORT; OLIVER JENKINS; MICHAEL CORBIN; JEFF EVERSON; TERRI ANDERSON-SCOTT; JULIE GLASS,

Defendants-Appellees

[CORRECTED] ORIGINAL BRIEF OF PLAINTIFF-APPELLANT, GRIGSBY & ASSOCIATES, INC., IN APPEAL FROM THE FEBRUARY 14, 2018, MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION, CIVIL ACTION NO. 5.14-CV-02340,

THE HONORABLE MAURICE HICKS, PRESIDING

A CIVIL PROCEEDING

Respectfully submitted,
/s/*Calvin B. Grigsby*

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Dated: June 12, 2018

I. CERTIFICATE OF INTERESTED PERSONS

(1) Case No. 18-30327 Grigsby & Associates, Inc. v City of Shreveport, et al., USDC No. 14-cv-02340-SMH-KLH

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Defendant

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II. STATEMENT REGARDING ORAL ARGUMENT

This lawsuit follows a fairly elaborate conspiracy which integrated (1) what Defendants did behind the scenes of official legislative action with (2) Defendants' unmitigated violations of the City Charter (the "Charter") and State law to obstruct the Mayor's authority to administer financial advisory services in order to impair Plaintiff's performance of and enjoyment of benefits of a financial advisory contract awarded pursuant to a public bid by the City of Shreveport. Three City Councilmen, Oliver Jenkins, Michael Corbin and Jeff Everson, because of racial animus toward

Plaintiff, agreed to get rid of Plaintiff, which was the first and only black owned financial advisor to work as sole financial advisor in the State of Louisiana. (ROA.24-25).

Under section 4.26 the Charter, City Internal Auditor reports may be directed only by the City Council. Under Article 5 and 8 of the Charter, the City Attorney is a part of the executive branch and may only be directed by the Mayor in the enforcement of contracts. Under section 4.29 of the Charter the Defendant Councilmen had the authority to investigate "the *official conduct* of any office, department, commission, board or agency of the city government or of any officer or employee thereof," but contracts administered by the Mayor, were not subject to the investigatory power of 4.29. The Defendant Councilmen were prohibited to "intervene or interfere in any of the operations thereof, publicly or privately." (Charter Sec 4.26) (ROA.20-21,50;ROA.895-897)

The Mayor, whose job is was to administer the financial affairs of the City, was happy with the services of Plaintiff which completed 16 financings and restructurings over four and a half years from 2007 to 2011, saving the City upwards of $150 million from broken interest rate swaps and cross-default interest, executed by the prior administration, which unwound as a result of the 2008 financial crisis, and developed a creative General obligation bond structure to get voter approval of

$175 million needed infrastructure financing with no increase in *ad valorem* taxes. (ROA.17-22;1073-1089).

In early 2011, Councilman Michael Corbin, uniformly supported and seconded by Councilmen Oliver Jenkins and Jeff Everson, launched a two-year campaign, assisted by the City Attorney, to impair and take away the benefit of Plaintiff's financial advisory contract with the City, administered solely by the Mayor. (ROA.37-42;793) in derogation of City Charter Section 4.29 which made it expressly clear that the Council's legislative power did not include any right to investigate or otherwise interfere with the non-official duties of a particular professional services contractor who worked for the Mayor. (ROA.30-35;40-50; 964-965; Exhibit C to Motion for Judicial Notice). The three Councilmen retained first the Internal Auditor, and then an outside auditor, *to "audit" the Contract.* When neither auditor gave them the negative report on Plaintiff they wanted to use to, it is alleged, politically pressure the Mayor to get rid of Plaintiff because of its race (Exhibit A and B to Motion for Judicial Notice) (ROA.30-39;797-813), defendant Councilmen hired a law-firm to write "procedures" directed by Defendants to get forgone or preconceived negative answers they wanted to use to terminate Plaintiff's advisory contract. Only racial animus drove Defendants. No basis for all of the "reign of investigations" was ever articulated. Plaintiff had never worked for any of the

Defendants or failed to perform any job assigned by Defendants and most of Plaintiff's work was completed before Defendant Councilmen even took office. When neither the two auditors nor the law firm forensic investigations showed Plaintiff had failed to perform its contract (ROA. 792-813; Exhibit A to Motion for Judicial Notice; ROA.1021-1027)[1], these Councilmen then directed the City Attorney, outside of their City Charter legislative authority, to file a lawsuit against Plaintiff to collect what was called an "overcharge" on an already executed payment contract to create a litigation conflict after being advised that this conflict would bar the Mayor from giving Plaintiff any more work under its contract. (ROA.893-895;1054)

This entire cumulative "reign of investigations and usurpation of the Mayor's

[1] The third investigative report written by a law firm hired by defendants-Laborde and Neuner—claimed by defendants to be an "audit" included a report by an accounting firm who only answered forensic questions in the form of "procedures" posed by the law firm and was not based on any generally accepted accounting principles. The accounting firm stated in the first page of its report that it was not an audit (ROA.24) as follows:
"The scope and sufficiency of our procedures is solely the responsibility of L&N. Our procedures were limited to those that you have determined will best meet your informational needs and may not necessarily disclose all significant errors, frauds , illegal acts or other reportable matters that may exist. Consequently, we make no representation regarding the sufficiency of the procedures described within this report either for the purpose for which this report has been requested or for any other purpose . This report summarizes the procedures performed and the results of those procedures.
We were not engaged to, and did not conduct an audit, the objective of which would be the expression of an opinion on the accounting records of the City of Shreveport, the transactions between the City of Shreveport and Grigsby & Associates, Inc., or the contract between these parties. Accordingly , we do not express such an opinion." (ROA.822)

executive powers" (ROA.959-968) allegedly based on the racial animus of the three Councilmen and the City attorney accomplices, and without any objective legal reasonableness, concluded with wrongfully blaming Plaintiff for taking $677,000 of public money (ROA.1053) and filing a breach of contract suit on an *already* executed contract for payment to freeze-out any new work under the Contract. The new Chairman of the Council, after Corbin, who knew the four votes [including the three defendant Councilmen] were there to pass the third investigation resolution pretty much summed it up: "We never want to send or set a precedent or send a signal to persons who are doing business with the City of Shreveport they could be singled out or selectively investigated, unless there is a very good basis to do so." (Motion for Judicial Notice Exhibit A[2])

This summary is not designed to make the legal argument but to provide enough of a factual overview of the allegations to show how oral argument could help clarify the sublime, interwoven legal and Charter violations combined with factual allegations that show Defendants burst outside their "orbit of legislative activity" breaking the law, which negates the District Court's rulings that "quintessential

[2] "[w]hen reviewing a motion to dismiss, a district court 'must consider the complaint in its entirety, as well as other sources ordinarily examined when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Funk v. Stryker Corp., 631 F.3d 777, 783 (5th Cir. 2011)

legislative activity" resulted in absolute legislative and qualified immunity. No policy making or other legislative powers were exercised by Defendants lawfully or unlawfully, in this case. Every resolution or Ordinance passed was administrative. The Complaint alleges that Defendants' sublime pretense to make their conspiracy to violate Plaintiff's federal civil rights protections fit under the heading of immunity from "legislative activity" failed.

Plaintiff seeks a reversal of the District Court based upon the plausible credibility of the allegations made in addition to legal errors committed by the District Court. Few public officials discriminate openly or notoriously. The Defendants did not wear body cams. The understanding of the nuances of Defendants' violations of the City Charter and State laws by ***administrative activity***, misruled and mislabeled by the District Court to be ***legislative activity***, was improperly glossed over, in Plaintiff's opinion, by the District Court, and could therefore be greatly clarified with oral argument.

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V. JURISDICTION

A. District Court's Jurisdiction

The District Court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, 1332 and 1343 where §1331 grants the district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States" where defendants deprived plaintiff of its financial advisory contract awarded after a public bid without due process of law and contrary to the non-discrimination guarantees of federal law and the equal protection guarantees of the United States Constitution, and in deliberate and/or intentional violation of 42 U.S.C. §§ 1981 and 1981(b), 1983, and 1985(3); .jurisdiction under § 1332 where the amount in controversy "exceeds $75,000" and the parties are "citizens of different states," and jurisdiction under §1343 for any civil action commenced by Plaintiff to recover for violations by Defendants of section 1985 of Title 42 or to recover for Defendants' deprivation under color of State law and violation of the U.S. Constitution or any Act of Congress.

Plaintiff, Grigsby & Associates, Inc. ("GAI") is a California Corporation entitled to relief sustained as a result of the sustained multi- year conspiracy of Defendants Oliver Jenkins, Michael Corbin and Jeff Everson, who were City

Councilmen, which commenced in 2011 and continues until this day, acting in an executive/administrative capacity in micromanaging and impairing the ongoing performance of Plaintiff's contract, and Defendants Terri Anderson-Scott and Julie Glass in issuing fraudulent legal opinions, in violation the U. S. Constitution, Acts of Congress and sections 1985, 1983 and 1981 of 42 U.S.C. These violations were personally perpetuated by Councilmen Oliver Jenkins, Corbin and Everson's alleged direction to the City Attorneys to fraudulently restate their Bond closing legal opinion and direction to and consultation with the third investigator attorney to misstate and overstate billing and arithmetic errors of less than $50 in many instances--as Plaintiff's questionable wrongful taking of over $677,000 of public money through contrived "questionable expenses"-- to obstruct the Mayor's use of Plaintiff's financial advisory services because of racial animus. Plaintiff is claiming damages including attorneys' fees, costs, expenses and punitive and compensatory damages experienced as a result of Plaintiff's loss of business form its long endured reign of investigations and usurpation of the administrative and executive powers and duties of the Mayor of Shreveport by Defendants with respect to the City's management and administration, including the Mayor's exclusive authority to investigate nonperformance and/or failure to comply with the Contract, which deprived Plaintiff of its right to perform its Contract on the same basis as any white contractor which had a contract to provide or supply services to the City for compensation. (ROA.23-

42)

GAI worked for the Mayor on an "at will" basis--the Mayor had the contract right to terminate GAI's Contract at any time without cause. What is complained of here is not the termination under the terms of the Contract, to which Plaintiff willingly agreed could occur summarily, but the effective termination of the Contract by a conspiracy of Defendants against the wishes of the Mayor who hired Plaintiff and had the right to fire Plaintiff at any time without cause. This conspiracy was perpetuated through (1) a series of baseless, racially motivated investigations, lawsuits and legal opinions and Ordinances to appropriate money allowing Defendants the right buy the opinion they wanted after the City's internal auditor found some garden variety administrative oversights or mistakes which could be corrected, but no cause for the termination of Plaintiff (ROA.39-40), and (2) use of City appropriated funds to hire an attorney to prepare a case against Plaintiff, which included specified "accounting procedures," directed by Defendants and unrestrained by any regulation or limits from "Generally Accepted Accounting Principles." Defendants' scheme allowed the three Councilmen to work with a handpicked law firm to manufacture false allegations which forced the Mayor to suspend use of Plaintiff's services for two years giving Defendants *de facto administrative* authority and control over the Contract under color of law which they used to suspend

Plaintiff's work under the Contract in deprivation of its Civil Rights guaranteed by the U.S. Constitution and Acts of Congress.(ROA.38-41)

Defendant, the City of Shreveport, is a Louisiana municipality of which the Councilmen were officials, and which employed City Attorneys Anderson-Scott and Glass at all relevant times. The City is liable to plaintiff under Louisiana Civil Code Articles 2320 and 2315 under a theory of *respondeat superior* for the tortious actions of individual defendants under color of law and in violation of the law made in the course and scope of their official duties. All defendants are liable as co-conspirators for each other's unlawful actions under Louisiana Civil Code Article 2324. Federal jurisdiction over pendant state claims is governed by 28 U.S.C. § 1367, which states: "[I]n any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action ... that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

B. State Law Claims

A federal court may exercise supplemental jurisdiction over a plaintiff's state law claims when (1) federal question jurisdiction is proper, and (2) the state-law claims derive from a common nucleus of operative facts. 28 U.S.C. § 1367; see also Arena v. Graybar Elec. Co., Inc., 669 F.3d 214, 221 (5th Cir.2012).

C. Court of Appeal's Jurisdiction

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 because the judgment below is a final judgment of the United States District Court.

D. Timeliness of Appeal

The District Court judgment was executed and entered on February 14, 2018. Plaintiff filed the Notice of Appeal on March 9, 2018.

VI. STANDARD OF REVIEW

This Court reviews the District Court's grant of a motion to dismiss under FRCP 12(b)(6) de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." Toy v. Holder 714 F.3d 881,883 (citing Bustos v. Martini Club Inc., 599 F.3d 458, 461 (5th Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)) (internal quotation marks and citation omitted); see also Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

> "A motion to dismiss under rule 12(b)(6) is viewed with disfavor and is rarely granted. The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be taken as true. The district court may not dismiss a complaint under rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. This strict standard of review under rule 12(b)(6) has been summarized as follows: The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." (citations Internal Quotes Omitted)

Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 247 (5th Cir. Tex. 1997)

The *Lowrey* "no set of facts" language was clarified or distinguished or overruled depending on one's point of view by *Twombly* as follows: "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563. The Complaint goes well beyond that refined *Twombly* pleading standard and shows the actual, not just plausible, facts, complete with uncontestable, specific documentary and statutory allegations, that are consistent with the claimed violations of equal protections and deprivations of Plaintiff's civil rights and violations of State laws alleged therein.

VII. STATEMENT OF THE ISSUES

A. Issues relating to Ruling that Council Defendants have absolute immunity

1. Was the District Court in error when it summarily dismissed the Complaint, without leave to replead, ruling that the Defendant Councilmen were absolutely immune from liability for Federal constitutional and statutory civil rights violations including impairment of contract rights enjoyed by Plaintiff under, or deprivation of constitutional rights of equal protection and due process with respect to, its financial advisory contract when the Complaint

plausibly alleges that Defendants (1) instituted pretextual investigations and filed pretextual lawsuits, unlawful under the City Charter, that were ***administrative*** actions ***ultra vires*** *to their legislative powers* and (2) passed budget amendments taking away the Mayor's power to pay for financial advisory services ***in violation of state law prohibiting legislative interference with executive branch administration of budget expenditures and powers****?* (e.g., ROA. 44-46)

2. Was the District Court in error when it summarily dismissed the Complaint, without leave to replead, ruling that the Defendant Councilmen were absolutely immune from liability for Federal constitutional and statutory civil rights violations, including impairment of contract and employment rights enjoyed by Plaintiff or deprivation of constitutional rights of equal protection and due process, for their actions causing the Mayor's to lose the power to administer Plaintiff's financial advisory contract where the Complaint specifically alleges that the loss of the Mayor's powers were not attributable to voting on ordinances within their legislative powers but was caused directly or indirectly by undeniably plausible allegations of the cumulative damage of two years of Defendants' (a) pretextual investigations *where defendants worked behind the scenes to direct the wording of the investigatory reports*, and (b)

approval of administrative actions in derogation of the Mayor's authority to hire and fire financial advisors, administer the City's contracts, enforce contracts by lawsuits, and enforce all Ordinances relating to financings under Article 5 of the City Charter and under Council approved delegation of administrative authority under Ordinances 277 and 69 passed by the Council in public meetings? (ROA.44-47)

B. Issues relating to rulings that the Defendants have qualified immunity

1. Was the District Court in error when it ruled that the Defendants have qualified immunity from liability for Federal constitutional and statutory civil rights violations, including impairment of rights enjoyed by Plaintiff or deprivation of constitutional rights of equal protection and due process with respect to or under its financial advisory contract, when all of the actions of Defendants complained of by Plaintiff were specifically alleged to be administrative actions taken under the guise of legislative activity by the City Council and the City Attorney (which is a part of the executive branch) ? (ROA.37-42; 943-945)
2. Was the District Court in error when it ruled that the Defendants have qualified immunity from liability for Federal constitutional and statutory civil rights violations including impairment of rights enjoyed by Plaintiff or

deprivation of constitutional rights of equal protection and due process with respect to, or under its, financial advisory contract when the Complaint plausibly alleges factual matter showing Defendants' complained of actions were in violation of (1) the City Charter that mandates only the Mayor shall have the powers to sign, administer and enforce contracts and the Council may not interfere with these powers, and/or (2) State budgeting laws that provide, *inter alia* that:

> "the adopted budget and any duly authorized amendments required by this Section shall constitute **the *authority* of the chief executive or administrative officers of the political subdivision *to incur liabilities and authorize* expenditures** from the respective budgeted funds during the fiscal year." (Emphasis added) (La. R.S. 39:1311)?(ROA.44-47)

C. Issues Related to rulings that Plaintiff failed to allege sufficient facts, if taken as true, making out a plausible case of discrimination based on race from the suspect cumulative conduct of Defendants City of Shreveport, Oliver Jenkins, Michael Corbin, Jeff Everson, Terri Anderson-Scott and Julie Glass under 42 USCA § 1981, § 1983, and § 1985.

1. Allegations of Impairment of Contract under 1991 Amendments to § 1981 Civil Rights Act.

1. Was the District Court in error when it ruled that the Complaint failed to allege plausible factual content establishing a case for violation of §1981(b) and (c) when the legislative history of this 1991 addition to § 1981 provides:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity.

If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. (CIVIL RIGHTS ACT OF 1991, 137 Cong Rec S 15273)?

2. Allegations of deprivations of rights to equal protection and due process under § 1983

2. Was the District Court in error when it ruled that the Complaint failed to allege plausible factual content that Defendants deprived GAI of federal rights under the Fourteenth Amendment, §1981 and §1983(5) acting under color of state or territorial law? (*See*, ROA.29-52; 944-945)

3. Allegations of conspiracy among Defendants to deprive Plaintiff of equal protection under U.S. Const. Amend. XIV and La. Const. art. I, § 3 (ROA.51-52)

3. Was the District Court in error when it ruled that the Complaint failed to allege plausible factual content showing elements of a cause of action under 42 U.S.C.S. § 1985(3) which are: a complaint must allege that the defendants *(1) conspired to act (2) for the purpose of depriving, either directly or* indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws?

D. Issues Relating to State Law claims of damages for Breach of Contract, Fraud, Unfair Trade Practices and Malicious Prosecution and Defamation.

1. Breach of Contract

1. Was the District Court in error when it ruled that Plaintiff failed to allege a plausible factual issue of whether Defendants backed out of the Contract

awarded to Plaintiff after a public bid process by backing out of the payment of $166,000 the City agreed to and did pay for closing of the $81.5 million G.O. Bonds including three separately, voter approved Bond Proposition transactions two years after Defendants (a) issued a binding legal opinion from the City Attorneys that the $166,000 payment was a legal, valid and binding obligation on the part of the City that had received all legal and City Charter prior approvals required at many different levels of the City and (b) approved the payment after two public hearings where Plaintiffs invoice specifically set forth separate amounts for three separate bond proposition transactions? (ROA.52-78; 934)

4. Allegations of Fraud by the City Attorney

2. Was the District Court in error when it ruled that the Complaint failed to allege that Defendants Terri Anderson-Scott and Julie Glass were not guilty of fraud after knowingly falsifying a second legal opinion that the payment of $166,000 was *not* a binding obligation agreed to under the City Charter by multiple levels of the City bureaucracy after countless public bond funds and purchasers, the State Bond Commission the Bond Counsels and Plaintiff and the Mayor had relied on the first opinion in taking the $166,000 payment out of the publicly raised bond proceeds subject to SEC and IRS full disclosure

obligations of issuer counsel? (Id; ROA 36)

3. Allegations of violations of the Unfair Trade Practices Law

3. Was the District Court in error when it ruled that the Complaint failed to allege plausible factual content sufficient to show that the defendants as purchasers of financial advisory services, conspired to cause Plaintiff to lose its financial services contract so that the contract could be made available to a competitor more to Defendants liking by using investigations and lawsuits which violated the City Council's and City Attorney's authority under the City Charter thereby constituting unfair or deceptive trade practices under the Unfair Trade Practices and Consumer Protection Law (LUTPA), La. Rev. Stat. Ann. § 51:1401 *et seq*.? (ROA.36-42)

5. Allegations of Malicious Prosecution from the ultra vires Article 4.29 investigation and the ultra vires breach of contract lawsuit.

4. Was the District Court in error when it ruled that Plaintiff failed to allege a plausible factual issue of malicious prosecution from (a) the finally terminated (ROA. 1047-1054) investigations that were illegally outside the legislative powers of the City Council and/or (b) the commencement of a lawsuit which should be enjoined by this court as ***ultra vires under the City Charter,*** particularly after the Mayor issued a report under his

executive and administrative powers that the Defendants' $53,000 claimed overcharge to sell the bonds was a "wash" (ROA.1050) with billing of $53,000 for Special Services to secure the voter approval and State Bond Commission approval to conduct a referendum on three bond propositions before any Bonds existed? (ROA.1081;892-895;1044;1050;1066-1072)

6. Request for Injunctive Relief

5. Was the District Court in Error when it ruled that Plaintiff failed to allege grounds to have the *ultra vires* lawsuit enjoined? (*See*, ROA.945)

7. Allegations of Defamation, with malice

6. Was the District Court in Error when it ruled that Plaintiff failed to allege Defendants knowingly and maliciously accused Plaintiff of falsely billing the City of Shreveport for $677,000 of financial advisory services? (ROA.23-24; 32-47; 824; 863-866)

VIII. STATEMENT OF THE CASE

On July 19, 2014, Grigsby & Associates (the "Company") filed its complaint against the Defendants-- three members of the City Council, the City Attorney, the Assistant City Attorney, and the City of Shreveport. The Complaint was brought after

the City filed a pretextual lawsuit in State court for breach of an ***already executed*** contract payment to back out of $53,000 of the payment (ROA.27-33) the City had authorized, first by City Council [Resolution 277], then the State Bond Commission, then by the City Attorney, then by the Bond Attorneys, the Bond Trustee, and finally reauthorized by the City Council Resolution 69 (ROA.19-22)*;* and made two years before the State court lawsuit which Resolution met the requirements for a putative amendment to the Contract. The lawsuit was pretextual because its premise that Plaintiff owed the City of Shreveport a $53,000 refund for work on an already executed contract was contradicted by Defendants' final payment after Plaintiff had performed its job satisfactorily by (1) a unanimous resolution of the City Council after a public hearing, (2) a legal opinion from the City Attorney that the $53,000 payment was legal, valid and binding on the City, (3) a review of the Plaintiff's contract and invoice obligating the payment for three issues to be made and signed off by City officials and Finance Director as required by the City Charter prior to payment, and (4) an executive certification that the payment was due and owing was signed by the Mayor after he had been delegated discretionary authority to make the payment by the City Council. (ROA.17-28) The State court action was filed by the City Council pretextually to deprive the Company of its contract to do further business with the City by allowing the City to invoke, in bad faith, the City's Rule against continuing to do business with a counter litigation party. (ROA.28-42)

On January 13, 2016, the Company filed its Response to the Motion to Dismiss. (ROA.952-980). On January 19, 2016, Defendants filed an unauthorized Reply, without leave of court, in violation of Local Rules (ROA.982-991)). The Local Rules only provide for a Motion (LR 7.4) and Reply (LR 7.5). On February 18, 2016, the court issued its order denying the Company's Motion for Leave to File an Opposition and Sur-Reply to Defendants' irregular and unauthorized Reply. (ROA.1107-1108).

This case was brought in 2014. Several witnesses including two bond counsel firms on the $81.5 million financing will be called to testify that the Bond Indenture approved by the Council as Ordinance 69 *required the invoicing separately for three different transactions because that is how the State Bond Commission issued its approval. (ROA. 73,77) They are expected to further testify that the so called "overcharge" was simply manufactured two years after the deal and payments to the FA and other bond professionals were final, with the contract being fully executed, to give the Council something to continue to bar the work of an African American owned financial advisory firm after all of the investigations* found nothing but creative nitpicking of arithmetic errors. The bond counsel and the Executive Branch are expected to testify that, even though they cannot read minds, other than racial animus there was no basis for the Council to get out of their legislative "lane" or

powers to overtly disregard the Charter prohibiting the Council from getting involved in the day to day management of individual contractor issues. The Council has already invested more than $250,000 in outside counsel to substantiate its pretextual lawsuit for $53,000 where it is undisputed by the participants in the bond financing that the $53,000 was unquestionably, appropriately paid from the final closing proceeds based on full disclosure from Plaintiff's explicitly detailed invoice separating out the payment for three separate bond transactions.(ROA. 78) Common sense dictates that changing such an absolute certified payment, from proceeds of a publicly sold and approved bond issue with prior multilevel internal city approvals, two years after the fact, to collect an internally disputed (between the legislative branch and the executive branch (that has sole power to make the payment)) mere $53,000 out of $81.5 million in bond proceeds-- is incomprehensible absent racial discrimination. (ROA.25-27). The City Charter prohibited investigations or any other interference by the legislative branch with outside firms whose contracts could be enforced or terminated at will by the Mayor. The Charter and State law both prohibit the Council from administering its own budget as it relates to financial advisors. (ROA. 20,23,26,29,33-36). The Defendants' failure to proffer any justification for preemptive administrative actions, legally outside their legal authority, denying Plaintiff the benefits of its Contract, present more than a plausible case that their actions constituted a pretext for racial discrimination. (ROA.15,53-54).

GAI never alleged that any particular legislative Ordinance or voting activity deprived GAI of its constitutional right to equal protection or to keep its contract as suggested by the District Court. GAI factual allegations that Defendants' actions including directing attorneys to write fraudulent reversals of prior publicly issued legal opinions and to write forensic investigatory reports to reach negative conclusions manufactured by Defendants --personally "behind the scenes"-- were not "quintessentially legislative." (*cf.,* ROA.1140 (Memo. Ruling citing Bogan v Scott-Harris 523 U.S. 44[3] with, *e.g.,* factual allegations in Complaint at ROA.50-52).

GAI worked for the Mayor. If the Mayor had terminated the Contract, we would not be here. Like any other professional services contract, the Mayor had the right to terminate the contract at any time with or without cause. (ROA.904-905). All he had to do is send proper notice. (ROA.910). The point made by the Complaint is

[3] In *Bogan*, the act at issue involved the elimination of the plaintiff 's position as part of a larger, city-wide downsizing prompted by declining financial resources. This case, in contrast, alleges a decision to eliminate a particular City financial services contractor rather than the services that the firm happens to perform. Indeed, as the Court expressly noted in *Bogan*, the act at issue in that case
reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. *Bogan*, 523 U.S. at 55-56. Termination of a particular City contractor is an executive professional services decision that does not involve general policy making. Appellee's two years of public administrative and City charter violative administrative actions did not reach beyond "the particular occupant of the office" as in *Bogan*. Nor was their action an "integral step[] in the legislative process as was the case in *Bogan*.

that the City Council had no ""quintessentially legislative" right to administer, terminate, file a lawsuit to enforce or otherwise manage GAI's contractual relationship with the Mayor acting under his Charter and State law powers. Under the Contract, the City Charter, and State law, administration of the Contract was reposed, exclusively, in the executive branch. What is alleged is a "reign of actions outside the orbit of legislative activity" by Defendants which effectively terminated the Contract of the only black financial advisor that had ever served the City of Shreveport or anywhere else in the State of Louisiana.

Plaintiff, Grigsby & Associates, Inc. is the first African American owned firm to serve as sole financial advisor for any Louisiana City or other Municipal entity in the history of the State of Louisiana. (ROA.51). Over 4 years, GAI successfully completed 16 distinct financings as the City of Shreveport's financial advisor. These financings involved swap and adjustable rate bond restructuring and new money issues which saved or allowed the City's to avoid losses from adjustable rates as high as 12% and swap acceleration payments and other financial savings and benefits of $159 million. (ROA.15). Each of the 16 financings and the fees paid GAI were approved, by Charter, as to correctness by the City's Director of Finance, and then by the City Council in two readings in public meetings. (ROA. 17,18,21-23). In mid-2009, the City asked GAI to figure out how to raise about $175 million to fix the

city's crumbling infrastructure. After over a year of analysis, GAI concluded the only way to get that much money was to go to the voters—which given the existing recession—many thought was an impossible task. It had been several years since there had been any voter approved bond issue anywhere in the State of Louisiana, but GAI figured out a way to issue the bonds with a "fill-in" debt structure that did not increase ad *valorem taxes* and met with numerous neighborhood associations and voter groups to explain the benefits from the issuance. (ROA.1066-68). The final structure put three bond propositions before the voters in April 2011with the hope that at least one would pass. (Id) All three bond propositions passed but only a portion of the projects from each approved issue were "shovel ready" making the first tranche to be issued a total of $81.5 million all three propositions. When the issue closed, the City Shreveport received the lowest interest rate 3.9% and paid the lowest financial advisory fee $166,887.67, or .0207%, of any issue in the State of Louisiana including State of Louisiana issues. (ROA.5-22).

Paragraph 42 of the Complaint alleges: "42. The defendants were dissatisfied with the internal auditors report and then secured passage of a resolution to get an "outside" investigation team to be handpicked, without any competitive bid, by the individual defendants to investigate Grigsby." (ROA. 23). The Complaint does not mention the name of the investigation teams handpicked by defendants. The

Complaint further alleges: “88e. The independent defendants' direction to the handpicked accountants and lawyers was to review and negatively spin billing and personal issues relating to plaintiff once the findings showed the substantial amount of money GAI saved the City and the skill and acumen exhibited by the Financial Advisor in completing the 16 transactions they successfully closed for the City (ROA.38.) The memorandum opinion by Judge Hicks restates paragraph 42 as follows: “allegedly dissatisfied with the internal auditor’s report, the City Council Defendants passed a resolution in order to secure an outside firm to investigate GAI. See id. at ¶ 42. The law office of Laborde & Neuner was retained by the City Council.” The L&N report attached to the Motion to Dismiss allegedly misstates or shades the truth and was hotly contested by Plaintiff as inadmissible hearsay. (ROA.960-963; 1073-1089) Since Laborde & Neuner Report is not attached to the Complaint but relied on by the District Court in its ruling, ***Plaintiff has request judicial notice of Resolution 281 referred to in the first line of the L&N report as approving hiring Laborde & Neuner. (ROA.814).*** The first sentence of the report is an example of why this report was discredited by the Council’s own finance committee report (ROA.871-876) and was not adopted or used for anything except press stories. (ROA.24-35) The first sentence states: “Pursuant to Shreveport Council Resolutions 281 of 2011 and 71 of 2012” the Neuner firm was retained. However, it was not that simple. In order to correct the incomplete description of facts by the trial

court which are not taken from the four corners of the Complaint, Plaintiff asks this Court to take judicial notice of the resolution dated January 10, 2012, referred to in Complaint paragraph 42—***resolution 281 of 2011*** **(attached as Exhibit A to Motion for Judicial Notice)** ***which retained, not Laborde & Neuner Law firm, the Shreveport accounting firm of Cole, Evans and Peterson ("Jeff" Cole***). Judge Hicks factual summary misses this step of hiring the Cole accounting firm. Laborde & Neuner was not retained by Resolution 281. (ROA.1047-1054). It was hired 15 weeks later pursuant to Resolution 71 of 2012. (Exhibit B to Request for Judicial Admission) This sequence is important because of the allegations in the complaint that the impairment of Plaintiff's constitutional rights was not based on the passage of any Ordinance to hire a consultant but rather was based on the Councilmen personally directing that significant negative findings or "negative spin" against GAI be *reported by* the consultant. In short, the Complaint plausibly makes out a prima facie case that Councilman Corbin, with full agreement of the other two, shopped consultants until they found one who would write the negative "hit piece" they needed to force the Mayor to get rid of GAI. (ROA.24). The hiring of the second Consultant –Cole—followed the Council's displeasure with the lack of any finding of wrongdoing by GAI by the Internal Auditor, who was the first auditor assigned to review GAI. Then after three and a half months, Council Corbin appears to have dropped hiring an accountant and went shopping for -- a law-firm—for whom

"generally acceptable accounting principles' were no moment-- allegedly willing to spin the facts as Corbin directed. Whatever report, verbal or written prepared or expressed by the Cole accounting firm during the three and one-half months Resolution 281was effective has never surfaced. What is clear, however, is that the trial court's opinion talks only about Ordinances passed to hire the Consultants being subject to absolute immunity. It does not consider the allegations that the Councilmen directed what Laborde & Neuner wrote, which was not a legislative action, which was found by both the Mayor's report and the Council Finance Committee report to be largely overstated negative spins of harmless clerical omissions by GAI in billing which did distract from its competent job performance in managing the city's financings and credit (ROA.1021-1089) The complaint specifically alleges:

> 88. Individual defendants Oliver Jenkins, Michael Corbin, Jeff Everson, Terri Anderson-Scott and Julie Glass together with the City of Shreveport did maliciously act together, conspire, and assist each other in an effort on their part to terminate plaintiffs FA Contract and destroy plaintiffs business by appropriating the City's money and using the City Governmental machinery to make false and wantonly malicious statements about plaintiffs failure to perform the requirements of his FA Contract, in order to have the contract terminated and awarded to financial advisors acceptable to political supporters of individual defendants Jenkins, Corbin and Everson. In furtherance of this conspiracy said counter defendants took the following actions:

The Complaint then sets forth seventeen separate, specific factual allegations (88a-88q) of detailed steps taken by the Defendants in furtherance of their conspiracy. (ROA.37-41).

IX. SUMMARY OF THE ARGUMENT

The District Court opinion lays out the rules of *Twombly* and *Iqbal* but fails to apply these rules to any of the detailed allegations in the Complaint that state sufficient plausible facts far exceeding the requirements of those two U.S. Supreme Court decisions. The test is not whether the allegations irrefutably prove the case at the pleading stage. Here, however, the allegations go beyond the short and plain statement of the claim required by Rule 8(a) by being supported by public documents and State and City charter legal provisions on separation of powers. The Complaint contains facts showing undeniable violations of Plaintiff's constitutional and statutory civil rights through administrative actions and executive power takeovers by the Defendant Councilmen and City Attorney that make the District Court's rulings on Absolute "Legislative" Immunity or Qualified immunity unsupportable.[4]

In Shreveport, the City's Financial Advisor is selected by the Mayor and the contract relationship is managed or administered by the Mayor. Under the Charter if the Councilmen have a problem with firms the Mayor has the executive power to hire

[4] *See, e.g.*, Hughes v. Tarrant County, 948 F.2d 918, 921 ("Even though the decision concerned the allocation of county monies, it was not based on legislative facts; it was not based on general facts regarding any policy, but instead, it was based on specific facts of an individual situation related to the district court clerk. Furthermore, the action did not purport to establish a general policy; it was particular to Hughes. Because we find that the challenged conduct was not legislative, we hold that the commissioners are not entitled to absolute legislative immunity.")

and fire, they have to first take that problem up with the Mayor. (Charter Section 4.26) Because the councilmen did not want to go to the Mayor and say they had a problem with his minority-owned FA, they decided to sideswipe the FA to try and discredit it through their power to investigate official actions of City departments and offices and employees. There is certainly nothing unusual about having racial animus. But when that animus is used to deny minority-owned firms who are hired by the Mayor the same treatment as given to white firms under color of state law, it is a violation of both the Federal and Louisiana constitutions and subject to suit under §1983 for individual actors and entities and under 1985(3) for joint conspiratorial actors. The cases that define legislative activity show that the Defendants' activities alleged in the Complaint were administrative at best and simply illegal and subject to criminal penalties at worst. (ROA.50-51)

In the course of their concerted ongoing scheme to impair Plaintiff's Contract "from the side," the Defendants got involved in non-legislative actions of (1) breaking an executed agreement which paid out FA fees from bond proceeds based on Defendants' agreement after receiving their counsel's opinion that such fees were legal, valid and binding, (2) falsifying legal opinions which backed the commencement of a strategic breach of contract lawsuit, and (3) using reports that had been manufactured and orchestrated and tweaked by the personal involvement of

Councilman Michael Corbin, with the knowledge of councilmen Oliver Jenkins and Everson in their direction of the outcome of the investigation by a handpicked law firm, at a personal, individual, "interface with the law-firm attorney-client privileged level." (ROA.47). These behind the scenes actions have nothing to do with absolute immunity for *voting* on legislation. The Complaint alleges that the Council has no legislative authority under the Charter to investigate and block the employment of private contractors hired and managed by the Mayor as opposed to Departments and employees of the City. (ROA.50). Then there were the public claims that the reports showed Plaintiff had taken over $677,000 in public money when Defendants knew the report's conclusions to that effect were falsely stated at their request in the first place. (ROA.47) This is why we have the associated pendant state law claims for fraud, breach of contract, unfair trade practices, etc. Because of the slow pace of this case most of the injunctive relief sought is now moot.

X. ARGUMENT

A. GAI never alleged that any particular Ordinance Passed by the Council or Other Legislative Activity of the Council Deprived GAI of its Constitutional Right to Equal Protection or to Keep its Contract. GAI alleged that the defendants used the cumulative effect of the negative term "investigation," they coined, to cover up their bad faith attempt to terminate GAI. No white contractor of Shreveport had ever been subjected to similar serial investigations with similar manufactured findings directed by Defendants especially after the work assigned had been completed in exemplary fashion.

The District Court's memorandum ruling was based on the following misstatement about the allegations in the complaint. The District Court stated:

> GAI alleges that the Defendants violated the equal protection clause of the Fourteenth Amendment in passing legislation that would prohibit GAI, an African-American financial advisory firm, from continuing its contractual obligation with the City. See Record Document 1 at 41." (ROA.1136)
>
> And:
>
> In the present action, GAI is alleging that the ordinances (state/municipal law) passed by the City Council Defendants deprived GAI of its constitutional right of equal protection under the Fourteenth Amendment.
> (ROA.1138)

The general allegations verbatim from the Complaint include the allegations at ROA.52 that show GAI was subject to disparate treatment not resulting from the passage of Ordinances but form the implementation of the ever-increasing defamation, fraud, and manipulations impacting the Mayor's administrative authority to manage the contract. (Complaint par. 128-138, ROA.52-54)

The District Court simply disregarded the allegations in paragraphs above, and throughout the 43-page complaint that the "Negative spin" of the Laborde & Neuner Report was orchestrated and implemented by the Defendants working in concert with Laborde & Neuner to fashion a legal opinion from Laborde & Neuner containing a certain result (ROA.37-40) The facts alleged of Defendants' direction of investigators to write a report that was negative no matter what the report of the Internal Auditor

said, and direction and pressure on the City Attorney to change a publicly delivered legal opinion in a public offering regulated by the Securities and Exchange Commission, show in graphic factual detail that Defendants deprived plaintiff of its personal property without due process of law and contrary to the non-discrimination guarantees of Federal law and State law and the equal protection guarantees of the United States Constitution, and in deliberate and/or intentional and knowing violation of 42 U.S.C. §§ 1981, 1983, and 1985(3) as well as State laws that require elected Councilmen who have legislative powers to stay of the administrative and executive lane. (Id) As this Circuit stated in Hughes v. Tarrant County, 948 F.2d 918, 920-921:

> The courts have made a distinction between establishing a policy, act, or law and enforcing or administering it. In Cinevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th Cir. 1984), the court held that city council members were not protected by absolute immunity for their decision to deny rock groups access to the city amphitheater. The court held that the city was simply monitoring and administering the contract with the plaintiff which gave the plaintiff the right to promote live entertainment in the amphitheater. "Administration of a contract does not involve the formulation of a policy. . . . Rather, it is more the type of ad hoc decision making engaged in by an executive." Id. Absolute Legislative Immunity does not apply to legislators who usurp the administrative and executive powers that are not immune from suits or violation of U.S. Constitution and Acts of Congress protected civil rights.

This court further noted that attorneys in the position of the City Attorney and Laborde &Neuner do not have absolute immunity:

> The district attorney and his assistant are being sued because of their opinion letter to the commissioners stating that the Commissioners Court could not lawfully pay Hughes's legal expenses because it would violate the Local

> Government Code.***
> The Court's reasoning in Burns controls the case at hand. There is no historical or common law basis to extend absolute immunity to a district attorney when advising county officials. Hughes v. Tarrant County, 948 F.2d 918, 922-923.

Even the motion to dismiss acknowledges that Plaintiff argued that actions in filing suit were not legislative. (ROA.765). In Petroplex Int'l, LLC v. St. James Parish, 2015 U.S. Dist. LEXIS 141757 (E.D. La. Oct. 19, 2015)the Eastern District stated:

> Though the Fifth Circuit has declined to adopt a definitive test to determine if an action is legislative, it has considered the tests from other circuits in determining the nature of an official's action. Relevant considerations include whether the decision made involves formulation of a policy or ad hoc decision-making, whether the decision involves prospective, legislative-type rules or executive-type enforcement, and whether the facts underlying the decision are legislative facts (such as generalizations concerning a policy or the state of affairs) or facts that relate to particular individuals or situations (making the decision administrative).

Subjective intent on the issue of absolute immunity is not relevant. Unlike Bogan v Scott Harris, 523 U.S. 44, here there is no absolute immunity because the Councilmen and the City Attorneys were outside the "sphere of legislative activity" *even where their motives are not considered*, because their activities were in the administration of Plaintiff's contract where they had no legal authority to act. The *Bogan* Court stated:

> And the city council, in eliminating DHHS, certainly governed "in a field where legislators traditionally have power to act." Tenney, supra, at 379. Thus, petitioners' activities were undoubtedly legislative. * * * For the

foregoing reasons, the judgment of the Court of Appeals is reversed. Bogan v. Scott-Harris, 523 U.S. 44, 54-56, 118 S. Ct. 966, 972-973

In *Bogan,* a director of a city's social services department sued for discrimination after her position was eliminated from the budget. (Id. 966). The Court differentiated the decision from "the hiring or firing of a particular employee" since the elimination of a position in a budget "may have prospective implications that reach well beyond the particular occupant of the office." (Id.)." Employment decisions generally are administrative" except when they are "accomplished through traditional legislative functions" such as policymaking and budget restructuring, that "strike at the heart of the legislative process." Rateree v. Rockett, 852 F.2d 946, 950 (7th Cir. 1988). *See, also*, Canary v. Osborn, 211 F.3d 324, 329 (6th Cir. 2000) (differentiated "personalized assessments of individual employees" from "an impersonal budgetary analysis" in finding that School Board's employment decision was administrative); In re Montgomery County, 215 F.3d 367, 373 (3rd Cir. 2000) ("Firing a particular employee is a personnel decision that does not involve general policy making.")

This Circuit has applied guidelines borrowed from the First Circuit to determine if an act is legislative. *Hughes*, 948 F.2d at 921. The First Circuit examines the "nature of the facts used to reach the given decision," then "focuses on the particularity of the impact of the state of action." Cutting v. Muzzey, 724 F.2d 259,

261 (1st Cir. 1984) Applying these tests and other precedent as guidelines in Hughes, this Circuit held that a county commissioners court did not engage in a legislative act when it decided not to pay a court clerk's private attorney's fees in a contempt proceeding because such a payment violated local law. Craig v. Police Jury Grant Parish, 265 Fed. Appx. 185.

In Acevedo-Garcia 204 F.3d 1, the First Circuit goes into a detailed analysis that explains why, as here, (1) the Councilmen's direction to the City Attorney, which is a part of the Executive side, to sue to effectively cancel a specific contract, and (2) the direction and conspiracy to make a change in a legal opinion two years after the fact to support the position the Councilmen wanted to advance , and (3) tailoring the legal opinion of Laborde & Nuener which violated the Charter legislative power to only investigate City departments and employees and representing it to be an audit under generally accepted accounting principles, which it was not, are all targeted administrative actions, not legislative actions carrying absolute immunity. The First Circuit Stated:

> "Immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." Forrester, 484 U.S. at 227. ***Defendants' claim to absolute immunity hinges on whether the actions at issue here were legislative or administrative. Absolute immunity applies to "prospective, legislative-type rules" that are general in nature. Alexander v. Holden, 66 F.3d 62, 67 (4th Cir. 1995). "Employment decisions generally are administrative" except when they are "accomplished through traditional legislative functions" such as policymaking and budgetary restructuring that "strike at the heart of the

> legislative process." Rateree, 852 F.2d at 950-51.
> Voting for legislation, the introduction of budget plans, and signing an ordinance into law are "quintessentially legislative" functions. Bogan, 118 S. Ct. at 973.The defendants characterize their behavior, including the selective layoffs and restrictions on employees, as "integral steps in the legislative process" rather than "acts of implementation," and they rely on the holding in Bogan in support of this claim. See 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79. We are not persuaded. *** In the instant case, while the ordinances adopted by Adjuntas reflected discretionary, policymaking decisions, the defendants' alleged replacement of discharged NPP members with PDP contract workers and acts of political harassment did not. Similarly, the alleged acts of political discrimination were not "prospective"--that is, these acts did not "reach well beyond the particular occupant of the office," but instead targeted specific individuals affiliated with the NPP. Id. We draw support for these conclusions from a two-part analysis that we have adopted to determine whether an act is legislative or administrative. See Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984). First, if the facts underlying the decision are "generalizations concerning a policy or state of affairs," the decision is legislative. Id. If the decision stems from specific facts relating to particular individuals or situations, the act is administrative. Id. Second, the court must consider the "particularity of the impact of the state of action." Id. "If the action involves establishment of a general policy, it is legislative;" if it
> "singles out specifiable individuals and affects them differently from others," it is administrative. Id. *** Because the defendants' decisions stemmed from specific facts about the party affiliation of individuals and affected particular individuals differently from others, these actions were administrative rather than legislative. Legislative ratification does not shield the defendants from liability. Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1, 8-10

Here the Complaint alleges substantial acts of personal implementation and direction of the “in house” City Attorney and the second “outside” Attorney, Laborde & Neuner, who was picked 15 weeks after the first secondary investigator-- the accounting firm of Jeff Cole. Section 4.29 of the Charter under which Laborde purports to be hired only allows legislative power “to investigate the ***official conduct***

of any office, department, commission, board or agency of the city government or of any officer or employee thereof. (See, Exhibit C to Motion for Judicial Notice City Charter Section 4.29). Nothing in the Laborde report or the procedures given accounting firm had anything to do with the legislative power to investigate "official conduct." (ROA.823-836). The Contract did not contemplate any "official conduct" on the part of Plaintiff. A lot of "implementation" is shown when you go through three firms until you get the opinion you want. Also, the Ordinances allowing the Council to pick the financial advisor (ROA.44-46) were only approved for a single year and had no prospective application after Plaintiff had been sidelined with the strategic lawsuit. *See, also* Aponte v. Calderon, 176 F. Supp.2d 135, 152-153 ("The investigations carried out by the Blue Ribbon Commission and the subsequent public accusations of misconduct unquestionably single out specific individuals, including Plaintiffs, *** the creation and operation of the Blue Ribbon Commission is an administrative, not a legislative act, and that therefore Defendant Calderon is not entitled to absolute immunity.") Because there was no legislative power under the Charter (1) to conduct a targeted investigation of a professional services advisor hired by the Mayor or (2) to direct the City Attorney to file a lawsuit-- another Executive Branch employee-- Defendants actions were ***by force of law*** *ad hoc* administrative activity.

B. Qualified Immunity Does Not Apply

1. *Because their actions violate the City Charter, Defendants do not have the defense of Qualified Immunity based on objective legal reasonableness*

The protection afforded by this defense turns on the objective legal reasonableness of the defendant's conduct examined by reference to clearly established law. *(See, Pearson* v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808) All Councilmen can be presumed to be familiar with the separation of powers between the executive and legislative branches and judicial branches that we all learn in civics class in high school: The legislative branch would pass laws, the executive branch would execute them, and the courts would interpret them in individual cases. In this case the Councilmen Defendants had an identity crisis and decided based on unchecked racial animus to usurp the executive powers. Since the FA contract was terminable at will by the Mayor, the Councilmen could have just gone to the Mayor and explained the problem they had in Plaintiff's performance. Problem is the Defendants had no problem with whether Plaintiff had done its job since every financing completed and every fee paid had to first be approved by resolution of the Council after two hearings in the public on cable TV. Therefore, accepting as true all well pleaded allegations, the District Court should have ruled that Defendants as reasonable public officials would have understood that their actions violated appellant's clearly established constitutional right to be free from denial of equal protection under the Fourteenth Amendment and interference with their contract

under Section 1981, as amended by the 1991 Civil Rights Act. Similarly, reasonable officials would have understood that their actions were not authorized legislative powers under the City Charter or State law. Accordingly, the District Court erred by determining, at this stage in the litigation, that appellees, in their individual capacities, were entitled to qualified immunity. Rolf v. City of San Antonio, 77 F.3d 823, 828.

Resolution 281of 2011 on January 10, 2012 was moved by Corbin and seconded by Oliver Jenkins. (Motion for Judicial Notice, Exhibit A). On the record chairman Sam Jenkins stated: "I believe the resolution as written exceeds the authority that has been given to the Council under section 4.29 of the charter. **We never want to set or send a precedent or send a signal to persons who are doing business with the City of Shreveport they could be singled out or selectively investigated unless there is a very good basis to do so. ***Section 4.29 provides for the investigation of City entities. I felt the present resolution in its present language and content, to me does not meet the requirements of Section 4.29." (Id) If Defendants had not read Section 4.29 they got notice before they voted hire a law firm to investigate Plaintiff when their legislative power was limited to investigating "official conduct."

2. Qualified Immunity must be asserted as a defense in a

pleading not in a motion to dismiss.

Qualified immunity is asserted at the pleading stage." Pearson v. Callahan, 555 U.S. 223, 225. The trial court ruled that both the lawsuit filed under the executive power and the investigation which had no legal authority were both objectively reasonable and therefore qualified immunity did not apply. (ROA. 1143-44). However, because qualified immunity has to be asserted as a defense it has to come in a motion for summary judgment or an answer to the complaint and not a motion to dismiss. This defense cannot be granted in a motion to dismiss because no defense is necessary. "Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987) (citing Harlow, supra, at 819);*see also* Graham v. Connor, 490 U.S. at 397; Wilson v. Layne, 526 U.S. 603, 614. The legal rules are in the City Charter and clearly outline the division and separation of legislative and administrative powers violated here by Defendants.

3. Qualified Immunity is not available to the City of Shreveport

Qualified immunity is not available in suit against municipality or injunctive remedy against individuals in addition to damages. Pearson v. Callahan, 555 U.S.

223.

C. The City of Shreveport has no immunity because the decisions to file the lawsuit and conduct the targeted investigation were approved by official action of the Council

. The Supreme Court decision in Monell v. Department of Soc. Servs., 436U.S. 658, 690-91, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978) authorizes § 1983 relief against municipalities where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." The four legislative enactments by the City Council in instituting the second and third investigations, taking away the power of the Mayor for expenditures to pay financial advisors, and instituting the strategic, deprivation of contract lawsuit are all specific allegations of unlawful actions that constitute official policy. Here we have four separate policy making decisions where a single decision under similar circumstances is enough. As stated by the U.S. Supreme Court in Pembaur v. City of Cincinnati, 475 U.S. 469, 483-484, 106 S. Ct. 1292, 1300:

> Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, whether an official had final policymaking authority is a question of state law. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an

> application of the theory of respondeat superior than was holding the municipalities liable for the decisions of the City Councils in Owen and Newport. In each case municipal liability attached to a single decision to take unlawful action made by municipal policymakers. We hold that municipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. See Tuttle, supra, at 823 ("'policy' generally implies a course of action consciously chosen from among various alternatives").

Here Defendants took administrative actions without having any authority under any state law or Charter legislative enactment. Municipal liability attaches to four separate "decisions to take unlawful action made by Defendants in their official capacity as municipal policymakers."

D. Violations of 42 USCA §1981.

The purpose of the 1991 amendments to §1981 under which this claim is brought and the amendments to include §1981(b) and (c) are stated by Congress as follows:

> The purposes of this Act are to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);
> to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order

> to provide adequate protection to victims of discrimination.
> SEC. 4. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.
> Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended-by inserting "(a)" before "All persons within"; and by adding at the end, the following new subsections:
> "(b) For purposes of this section, the term `make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
> "(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."
> CIVIL RIGHTS ACT OF 1991, 137 Cong Rec S 15273, 15273.
>
> In *Griggs v. Duke Power Co,* the Supreme Court stated in part:
>
> What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

The actions of the Defendants to impair Plaintiff's Contract were a campaign not just a series of single acts. Defendants clearly acted beyond the orbit of legitimate legislative activity and impaired the continued performance by Plaintiff of its FA contract, caused the effective termination in violation of the terms of and in breach of the FA contract, and impaired and suspended and terminated Plaintiff's enjoyment of the benefits, privileges, terms, and conditions of the contractual relationship. The Supreme Court has recognized that Title VII and § 1981 embrace "parallel or overlapping remedies against discrimination." Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 & n. 7, 94 S. Ct. 1011, 1019, 39 L. Ed. 2d 147 (1973). . In the complaint, Appellant alleges that it entered into contracts with Shreveport to perform financial

advisory services. (ROA.1) Defendants obstructed the Mayor's use of that contract solely because of the race of the firm. (ROA.37-41). This prevented Plaintiff from honoring and performing the contract violation of 42 U.S.C. § 1981.

To establish a claim under § 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority;(2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerns one or more of the activities enumerated in the statute. *See* Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1087 (2d Cir.1993). The "enumerated activity" implicated in this case is the right to "make and enforce contracts. *See*, Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369, 383, 124 S. Ct. 1836, 1845-1846 §1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contacts," and that such right shall be "protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(a), (c). Plaintiff has alleged establish that: (1) it is a member of a protected class; (2) the Defendants intended to discriminate on the basis of his inclusion in that protected class; and (3) the defendant's racially discriminatory conduct abridged a right under § 1981. See Kinnon v. Arcoub, Gopman & Assocs., Inc., 490 F.3d 886, 891-92 (11th Cir. 2007); see also Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1235 (11th Cir. 2000). A plaintiff may establish that a

defendant intended to discriminate through either direct or circumstantial evidence. *Kinnon*, 490 F.3d at 891-93. Circumstantial evidence "suggests, but does not prove, a discriminatory motive." Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1236 (11th Cir. 2016) (quoting Wilson, 376 F.3d at 1086). Such evidence is analyzed under the burden-shifting framework set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See Howard v. BP Oil Co., Inc., 32 F.3d 520, 524-25 (11th Cir. 1994) (applying the burden-shifting framework of *McDonnell Douglas* to a § 1981 claim). Under this analytical scheme, a plaintiff must first establish a prima facie case of discrimination, thereby creating an inference of discrimination This case is similar to the facts in Moore v. True Temper Sports, Inc., 2011 U.S. Dist. LEXIS 111034, 7-8 (N.D. Miss. Sept. 27, 2011), where the Northern District of Mississippi, citing *Pegram*, stated:

> Accepting the well-pleaded facts in the complaint as true, the plaintiff's complaint states a claim for relief that is plausible on its face. Transfers, denials of paid leave, and suspensions can be ultimate employment actions. Pegram, 361 F.3d at 283 (transfer); Mota v. Univ. of Tex. Houston Health Sci. Ctr., 261 F.3d 512, 521 (5th Cir. 2001) (denial of paid leave); Polanco v. City of Austin, Tex., 78 F.3d 968 (5th Cir. 1996) (suspension); Mayberry v. Vought Aircraft Co., 55 F.3d 1086 (5th Cir. 1995) (suspension).

See also Gray v. City of Galveston, 2013 Tex. App. LEXIS 6197 (Tex. App. Houston 14th Dist. May 21, 2013), where, as alleged here, and distinguishing the summary judgment granted in *Pegram*, there was no "ultimate employment decision" just a series of reports by internal and external consultants hired by Defendants to

stall the Executive Department's use of Plaintiffs employment contract for financial advisory services. Here there is no ultimate employment decision. The contract has never been terminated by the Executive Branch which administers the contract—only "effectively" terminated by defendants.

E. The Complaint Alleges Violations of Constitutional Protections Under 1983

Plaintiff has alleged a clear violation against established statutory and constitutional rights in violation of §1983 which bars qualified immunity in this case. (ROA.3-28) The Supreme Court Harlow v. Fitzgerald, 457 U.S. 800, 819 (U.S. 1982) has ruled that such allegations provide the limit of qualified immunity for State actors:

> By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate.

Qualified immunity protects government officials who perform discretionary functions from civil liability unless their conduct violates a clearly established federal statutory or constitutional right of which a reasonable person would have known. Felton v. Polles, 315 F.3d 470, 477 (5th Cir. 2002).

To state a claim under §1983, first, the plaintiff must allege that some person

has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167, 171 (1961). Appellant has made both of the required allegations.

F. VIOLATIONS OF 1985(3)

To maintain a claim under section 1985(3), a plaintiff must allege that "(1) the Defendants conspired (2) for the purposes of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and (3) one or more of the conspirators committed some act in furtherance of the conspiracy; whereby (4) another person is injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States; and (5) the action of the conspirators is motivated by racial animus." Horaist v. Doctor's Hosp. of Opelousas, 255 F.3d 261, 270 n. 12 (5th Cir.2001) Plaintiff has alleged racial animus and that it is plausible that the intense cumulative attacks on Plaintiffs had no objective reasonableness. Plaintiff should be allowed to call witnesses and make its proof. There is no basis to dismiss these claims.

G. State Law Claims

1. Breach of Contract

Shreveport filed a lawsuit on an executed contract where payment had been made by a Bond Trustee from bond proceeds based on City Attorneys approving

legal opinion pursuant 2011 Ordinance 69 without alleging any type of fraud or oppressive conduct on the part of Plaintiff. (ROA.64-66) As the U.S. Supreme Court ruled: "Then the parties are in *pari delicto*, and the contract has been fully executed on the part of the plaintiff, by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. Thomas v. Richmond, supra; Ayerst v. Jenkins, L.R. 16 Eq. 275, 284."Harriman v. Northern Sec. Co., 197 U.S. 244, 296, 25 S. Ct. 493, 504. Regardless of what the City attorney thinks the agreement says in hindsight based on alleged pressure from the Councilmen to change her opinion (ROA.27, par. 65) because the payment initially made was agreed to by the parties, approved by the City Council and approved by a legal valid opinion of the City attorney, it is now a fully executed contract or amendment under the terms of the fully executed agreement. Section 14 [ROA.908] provides:

> "this Agreement may be modified if the modification is in writing executed by the City and Consultant, authorized, if necessary, by resolution of the City Council. and approved by the City Attorney as to form and legality."

Even if you assume the City Attorneys' fraudulently restated contract opinion of only one bond transaction is correct --this contract was amended by the agreement to pay, and payment of, fees for the three propositions. To the extent anyone might

argue that three bond issue transactions are on single transaction, this payment for three separate transactions under the contract accepted by both parties in *pari delicto* is the best evidence that the parties intended each proposition to be a separate transaction. The attempt to rescind this executed amendment is a contract breach and a further breach of covenant of good faith and fair dealing. La. C.C. Art. 1759. "Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation. La. C.C. Art. 1772 "Fault of a party: A condition is regarded as fulfilled when it is not fulfilled because of the fault of a party with an interest contrary to the fulfillment.". Making a payment voluntarily violates Civil Code Art 1772 because the condition not fulfilled [FA being overpaid] is the fault of the City for making the payment voluntarily after full notice that it was being charged. Numerous violations of the Charter, resulting breach of contract and the violation of good faith and fair dealing and other requirements of State contract law, have been pled in detail. (*See also* ROA.977-978

2. Fraud

The City Attorneys Terri Anderson-Scott and Julie Glass were guilty of fraud after falsifying a second legal opinion that the payment of $166,000-- previously ruled by them to be a binding obligation agreed to under the City Charter by multiple levels of the city bureaucracy in their first opinion issued in July 2011 on the closing

of the bond issue—was invalid. (ROA. 57-59). Countless public bond funds and purchasers, the State Bond Commission, the Bond Counsels and Plaintiff and the Mayor had relied on the first opinion in taking the $166,000 payment out of the publicly raised bond proceeds subject to SEC and IRS full disclosure obligations and legal opinion as to how the proceeds were to be used. (Id.) LA Civ Code 1953 provides that fraud may result from misrepresentation or from silence. Fraud is a misrepresentation, or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction. (*See also* Section VII. D. 2, above) "Attorneys are not protected from liability to non-clients for their actions when they do not qualify as 'the kind of conduct in which an attorney engages when discharging . . . duties to [a] client.'" For example, an attorney cannot avoid liability "for the damages caused by [the attorney's] participation in a fraudulent business scheme with [the] client. Kelly v. Nichamoff, 868 F.3d 371, 374. An attorney who pleads the affirmative defense of attorney immunity has the burden to prove that [the] alleged wrongful conduct . . . is part of the discharge of [the attorney's] duties to [the] client."). To meet this burden, the attorney must "conclusively establish that [the] alleged conduct was within the scope of [the attorney's] legal representation of [the] client.(Id). In this case the city Attorneys knew their second opinion issued at the direction of or pressure from the Council Defendants that Plaintiff had overcharged

the city and the filing of the strategic lawsuit was directly opposite to their first opinion issued at closing that the charges and payment were legal, valid and binding. The first opinion was issued not just to the City but to the Bond Purchasers who paid the Plaintiff's FA fee as "costs of issuance" as well.

3. Unfair Trade Practices

Plaintiff has alleged a conspiracy to deprive it of business to benefit competitors which could be picked by defendants. This is a garden variety business competition violation of the LUTPA. Strahan v. State ex rel. Department of Agric. & Forestry, 645 So. 2d 1162, 1163, (La.App. 1 Cir. 8/25/94). In Cheramie Services, Inc. v. Shell Deepwater Production, Inc., 35 So.3d 1053 (2009-1633 (La. 4/23/10)), after studying the wording of the statute and legislative intent, the Louisiana Supreme Court concluded that words of the statute were clear and unambiguous and did not limit its application to business competitors and consumers. Rather, held the court, LUTPA applies to "any person, natural or juridical, who suffers an ascertainable loss" as a result of an unfair trade practice. "Although business consumers and competitors are included in the group afforded this private right of action, they are not its exclusive members." Id.

4. Defamation

Plaintiff alleged Defendants knowingly and maliciously accused Plaintiff of

falsely billing the City of Shreveport for $677,000 of financial advisory services. (ROA.24-28,38,40) Also, the lawsuit was filed after the contract for payment of the $166,000 was an executed and amended contract by the parties agreement on the amount to be paid at the bond closing approved by the Council and City attorney. The filing of a lawsuit may give rise to an action for malicious prosecution or to an action for defamation, but not to an action for invasion of privacy. Kenner v. Cousin, 1927, 163 La. 624, 112 So. 508; Young v. Courtney, 1858, 13 La. Ann. 193, 195-196; Osborn v. Moore, 1857, 12 La. Ann. 714; Cade v. Yocum & Jones, 1853, 8 La. Ann. 477. Kihneman v. Humble Oil & Refining Co., 312 F. Supp. 34, 39, 1970

5. Request for Injunctive Relief

Plaintiff's request for injunctive relief appears to be moot as to amendments to the budget where the Councilmen took over the executive power to hire and fire financial advisors since these amendments only lasted for one fiscal year. However, the strategic lawsuit, after none of the "investigations" by hand-picked attorneys provided a basis for termination of the Contract for non-performance, is alleged to have been filed fraudulently to deprive Plaintiff of its contract rights based on racial animus with a remedy prayed for under §1983. Accordingly, this suit must be enjoined, and the Anti-Injunction act is not a bar to this requested injunction based on the outrageousness of Defendants conduct in fraudulently filing a lawsuit known to

be duplicitous and directly contrary to the City Attorneys' closing opinion that the payment of $166,000 from bond investor proceeds was valid. As such, as the Supreme Court stated in Mitchum v. Foster, 407 U.S. 225, 242, 92 S. Ct. 2151, 2162, this case falls within the "expressly authorized" exception of the Anti-Injunction law:

> Section 1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative, or judicial." In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress. And this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights. For these reasons we conclude that, under the criteria established in our previous decisions construing the anti-injunction statute, § 1983 is an Act of Congress that falls within the "expressly authorized" exception of that law. (Internal citations deleted)

The Memo Ruling (ROA.1153) cites to Texas Employers' Ins. Ass'n v. Jackson, 862 F.2d 491, 499 (5th Cir. 1988) to conclude that the Anti-Injunction act (28 U.S.C. § 2283) bars enjoining the State Court action. This case is not applicable to §1983 cases which are "expressly authorized" exceptions to the Anti-Injunction act. The facts alleged in this case must be reviewed to determine whether enjoining the State court action, which was filed based on fraud and without any legal authority, would prevent great, immediate, and irreparable loss of a Plaintiff's constitutional rights. (Id. Citing Ex Parte Young, 209 U.S. 123)

XI. CONCLUSION

For the reasons set forth above, the denial of the Motion to dismiss should be overruled. Defendants may have their right to summary judgment after the facts are more well developed and authenticated. However, none of the recitations of facts in the District Court's Ruling follow the allegations in the complaint. These allegations must be accepted as true for purposes of, and meet required facial specificity to defeat a claim under, Rule 12(b)(6). If the facts have not be adequately stated as required by Rule 8(a). Plaintiff should be given the opportunity to replead.

Dated: June 12, 2018

Respectfully submitted,

/s/*Calvin B. Grigsby*
Calvin B Grigsby, Attorney for Appellant

XII. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

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Dated June 12, 2018

XIII. CERTIFICATE OF COMPLIANCE WITH RULE 32

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements
This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because:

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/s/*Calvin B. Grigsby*
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Dated June 12, 2018