

STATE OF MICHIGAN
COURT OF CLAIMS

GALBRAITH PROPERTIES, LLC,
a Michigan company doing business
under an assumed name as
THE LANDINGS ON INDIAN RIVER,

Case Number: 16 - - MZ

Hon.

Plaintiff,

v

INDIAN RIVER AREA TOURIST BUREAU,
a Michigan nonprofit corporation,

and

STEVE ARWOOD,
in his official capacity as President of the Michigan Strategic Fund,

Defendants.

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for Plaintiff
140 West Main Street
Midland, MI 48640
(989) 631-0900

COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or
occurrence as alleged in the complaint.

Now comes Plaintiff, GALBRAITH PROPERTIES, LLC, operating under the assumed name of THE LANDINGS ON INDIAN RIVER, and for its Complaint, states the following:

BACKGROUND

The Plaintiff, GALBRAITH PROPERTIES, LLC operating under the assumed name of THE LANDINGS ON INDIAN RIVER (“THE LANDINGS”) rents cottages on the Indian River. The State of Michigan, pursuant to the Community Convention or Tourism Marketing Act, PA 395 of 1980, MCL 141.871 *et seq.*, has authorized the creation of certain regional entities to promote regional tourism and to fund themselves through the imposition of a room tax on rented rooms at facilities within the region. Defendant, INDIAN RIVER AREA TOURIST BUREAU, is such an entity. Defendant STEVE ARWOOD is the president of the Michigan Strategic Fund and, under the Community Convention or Tourism Marketing Act, is the state official who approves actions taken under that Act. The purpose of this room tax is promote tourism by paid advertising and promotion. However, this paid advertising and promotion is a form of compelled speech. Our United States Supreme Court has held that a person cannot be compelled to pay for speech against his will, regardless of the message, except under certain circumstances which do not apply here. For this reason, the imposition of this room tax is unconstitutional as an imposition on free speech under the Michigan and United States Constitutions, and the Community Convention or Tourism Marketing Act is unconstitutional.

THE PARTIES, VENUE AND JURISDICTION

1. The Plaintiff, , GALBRAITH PROPERTIES, LLC operating under the assumed name of THE LANDINGS ON INDIAN RIVER (“THE LANDINGS”), is a limited liability company under the laws of Michigan.
2. THE LANDINGS has a registered office in Cheboygan, Michigan.

3. The Defendant, INDIAN RIVER AREA TOURIST BUREAU (“IRATB”), is a Michigan nonprofit corporation, and is recognized as a tax exempt 501(c)(6) under the federal tax code.
4. IRATB maintains an office and does business in Indian River, Michigan.
5. Defendant, STEVE ARWOOD is an individual acting as president of the Michigan Strategic Fund.
6. The matter at issue here is the constitutionality of a statute authorizing a tax and seeks a declaratory ruling and damages; therefore, under MCL 600.6419, this court has jurisdiction to hear and decide this dispute.
7. This matter includes a claim for relief under 42 USC 1983 of the federal code, which this state Court of Claims has jurisdiction over pursuant to the Supremacy Clause of Art VI of the United States Constitution. See *Felder v Casey*, 487 US 131, 108 SCt 2302 (1988)

COUNT 1 – MICHIGAN CONSTITUTIONAL FREE SPEECH VIOLATION

8. The Plaintiff incorporates the preceding paragraphs as if restated fully herein.
9. Const 1963, Art I, § 5 guarantees “Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.”
10. Using the power of the government to compel speech is a violation of the liberty of speech.
11. The Defendant IRATB monetarily assesses the Plaintiff based on its room rentals.
12. The statutory basis of Defendant IRATB’s room rental assessment is found in the Community Convention or Tourism Marketing Act, Public Act 395 of 1980, MCL 141.871 *et seq.* (hereafter, the “Act”).

13. Defendant IRATB's assessments are used to fund speech that advertises tourism in the region.
14. Defendant IRATB's assessments fund no other action other than speech promoting regional tourism.
15. Defendant IRATB's tourism message is not effectively controlled by Michigan's government.
16. Defendant IRATB's tourism message is developed by the Defendant IRATB in the form of a marketing program.
17. Defendant IRATB's tourism message is not created by the president of the Michigan Strategic Fund, Defendant STEVE ARWOOD.
18. Defendant IRATB's tourism message is not created or developed by any State of Michigan government agency.
19. Upon information and belief, Defendant STEVE ARWOOD and his predecessors as presidents of the Michigan Strategic Fund have never disapproved a tourism marketing program created by Defendant IRATB.
20. Upon information and belief, Defendant STEVE ARWOOD and his predecessors as presidents of the Michigan Strategic Fund have never altered a proposed tourism marketing program created by Defendant.
21. The president of the Michigan Strategic Fund's statutory duty, in regards to the tourism marketing message, is confined to approval or disapproval of Defendant IRATB's marketing plan. See MCL 141.873a.
22. The president of the Michigan Strategic Fund does not participate in any meetings held by the Defendant IRATB.

23. The largest expenditure by Defendant IRATB funded by assessments is a webpage.
24. Defendant IRATB's webpage does not state that its message is that of the State of Michigan.
25. Defendant IRATB's webpage does not state that its message is that of the Michigan Strategic Fund.
26. Defendant IRATB's webpage prominently features Plaintiff and other room renters in its top left corner.
27. Defendant IRATB's webpage appears to the reasonable viewer to be the speech and message of Plaintiff and other room renters in the district.
28. The State of Michigan does not appoint any of Defendant IRATB's principals or officers.
29. The Michigan Strategic Fund does not appoint any of Defendant IRATB's principals or officers.
30. The rights to free speech under the Michigan and federal constitutions are coterminous. See, e.g., *Up & Out of Poverty Now Coalition v Michigan*, 210 Mich App 162, 168 (1995). Thus, federal authority construing the First Amendment may be used in construing Michigan's constitutional free speech rights. See *id.* at 168–169.
31. Our United States Supreme Court has ruled that compelled marketing like that conducted by the Defendant IRATB violates the First Amendment. See *USDA v United Foods*, 121 SCt 2334 (2001).
32. A statute that violates the liberty of speech protected by Const 1963, Art I, § 5 is invalid.

COUNT 2 – U.S. CONSTITUTIONAL FIRST AMENDMENT VIOLATION

33. Plaintiff hereby incorporates the preceding paragraphs as though fully restated herein.

34. The First Amendment to the U.S. Constitution states: “Congress shall make no law ... abridging the freedom of speech.”
35. For all of the reasons given in Count 1, the Defendant IRATB’s assessments levied against Plaintiff violates Plaintiff’s freedom of speech under the United States Constitution by compelling Plaintiff to fund speech it chooses not to engage in.
36. Michigan’s courts can hear and adjudicate claims based on USCA Const Amend 1. See, for example, *Mich State AFL–CIO v MERC*, 453 Mich 362 (1996).
37. 42 USC 1983 provides injured parties with jurisdiction to challenge the denial of their constitutional rights by a public official acting under the color of law.
38. In this action Plaintiff is not seeking retroactive relief.
39. As described above, conduct by Defendants deprived Plaintiff of its constitutional rights under the First Amendment to the United States Constitution.
40. Defendants’ said deprivation of Plaintiff’s rights occurred under color of state law.
41. Defendant STEVE ARWOOD in his official capacity is a “person” for the purposes of 42 USC 1983 where the relief sought is proscriptive. See, *Smith v DPH*, 428 Mich 540 (1987).
42. Plaintiffs who prevail in cases brought under 42 USC 1983 may be awarded reasonable attorney’s fees under 42 USC 1988(b).

RELIEF REQUESTED

Plaintiff requests that this court declare that the room-rental assessment found in the Community Convention or Tourism Marketing Act, PA 395 of 1980, MCL 141.871 *et seq.* violates the free speech rights of the Plaintiff where it performs no other function that to compel Plaintiff to fund speech it does not want to fund; and for nominal damages. In addition, Plaintiff requests any other relief, including but not limited to reasonable attorney’s fees and

court costs under 42 USC 1988(b) or any other applicable law, in law or equity, this court finds to be appropriate as justice requires.

Dated: June 29, 2016

Derk. A. Wilcox
MACKINAC CENTER LEGAL FOUNDATION
Attorneys for Plaintiff