



jurisdiction and state a cause of action upon which this federal court may grant relief.

2. Defendant did not plead sufficient facts to support his counterclaims against the United States Attorney General. To survive a Rule 12(b)(6) motion, a counterclaim must contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” Id. A pleading must state facts that are sufficient to “state a claim to relief that is plausible on its face.” Id. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). Defendant’s counterclaims as pled in paragraphs 30 and 31 of Defendant’s Original Answer and Jury Demand do not contain the necessary factual content to reasonably infer that the United States Attorney General violated the Defendant’s constitutional rights. In fact, the Defendant’s counterclaims state no facts at all. To be sure, the only fact one can infer from the Defendant’s pleading is the fact that the United States Attorney General filed a Complaint against the Defendant alleging a violation of the Freedom of Access to Clinic Entrances (“FACE”) Act of 1994, 18 U.S.C. § 248. This fact alone does not, in any way, give rise to a cause of action against the United States Attorney General. The Defendant’s counterclaims are speculative conclusions and fall far short of the pleading standards set forth in Twombly and Iqbal. As such, the Defendant’s counterclaims must be dismissed by this Court.

3. Defendant’s counterclaims against the United States Attorney General are barred because the United States has not waived its sovereign immunity from suit for damages

that are based on a federal official's violation of the Constitution.

(A) Standard of Review: "Sovereign immunity is jurisdictional in nature."

Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 475 (1994). Defendant has the burden of proving this Court's jurisdiction over his counterclaims. Boudreau v. United States, 53 F.3d 81, 82 (5th Cir. 1995). In contrast, in the Rule 12(b)(6) context, the Court must accept all well-pleaded facts in the complaint as true and view those facts in the light most favorable to the plaintiff. Capital Parks, Inc. v. Southeastern Advertising & Sales Systems, Inc., 30 F.3d 627, 629 (5th Cir. 1994). When the relief sought is barred by an affirmative defense, such as sovereign or absolute immunity, a complaint may be dismissed for failure to state a claim. See Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982).

(B) Sovereign Immunity: Defendant's counterclaims seek damages from the United States Attorney General for alleged violations of the Defendant's constitutional rights. The United States Attorney General, however, brings this civil FACE action against defendant in his official capacity pursuant to 18 U.S.C. § 248(c)(2). It is the filing of this civil FACE action by the United States Attorney General in his official capacity that forms the basis of the Defendant's counterclaims. As such, the Defendant's counterclaims are barred by the doctrine of sovereign immunity. Federal Deposit Insurance Corp., 510 U.S. at 483-486. The Supreme Court has stated that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." Kentucky v. Graham, 473 U.S. 159, 166 (1985). Thus, a suit against a federal official in his official capacity is a suit against the United States. Id.; Brandon v. Holt, 469 U.S. 464, 471-72 (1985). "Absent a waiver, sovereign immunity shields the Federal

Government and its agencies from suit.” Federal Deposit Insurance Corp., 510 U.S. at 475; see also Boudreau, 53 F.3d at 83 (recognizing that “no action lies against the United States unless the legislature has authorized it”). The Defendant’s counterclaims against the United States Attorney General are barred because the United States has not waived its sovereign immunity from suit for damages that are based on a federal official’s violation of the Constitution. Federal Deposit Insurance Corp., 510 U.S. at 483-486. Accordingly, Defendant’s counterclaims must be dismissed for lack of subject matter jurisdiction.

4. Paragraph 32 of the Defendant’s Original Answer and Jury Demand requests a trial by jury. As this Court should dismiss Defendant’s counterclaims stated in paragraphs 30 and 31 of the Defendant’s Original Answer and Jury Demand pursuant to Rules 12(b)(1) and 12(b)(6), so too should this Court dismiss the Defendant’s request for a jury trial.

WHEREFORE, the United States Attorney General respectfully requests this Court to issue an Order granting Plaintiff’s motion to dismiss Defendant’s counterclaims as stated in paragraphs 30 and 31 of the Defendant’s Original Answer and Jury Demand.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10<sup>th</sup> day of September 2010 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Allan E. Parker, The Justice Foundation, 8122 Datapoint Drive, Suite 812, San Antonio, Texas 78229;

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I hereby certify that on this 10<sup>th</sup> day of September 2010 a true and correct copy of the foregoing was served via first-class US Mail on the following:

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