STATE OF VERMONT
SUPERIOR COURT
CIVIL DIVISION

Katherine Baker, **Ming-Lien Linsley**,
Plaintiffs,
and
Vermont Human Rights Commission,
Plaintiff-Intervenor

Caledonia Unit
Docket No. 183-7-11 CACV

v.

Wildflower Inn a/k/a DOR Associates LLP,
Defendant

Plaintiffs' Opposition To Motion To Dismiss
And Motion For Leave To Amend

Plaintiffs initiated this litigation to vindicate their rights under the Vermont Fair Housing and Public Accommodations Act, Vt. Stat. Ann. tit. 9, § 4500, *et seq.* ("FHPA") and redress the "stigmatizing injury" and "deprivation of personal dignity" that Plaintiffs experienced as a result of the Wildflower Inn's discrimination against same-sex couples. *Human Rights Comm'n v. Benevolent and Protective Order of Elks*, 176 Vt. 125, 131 (2003) (internal quotation marks omitted). Defendant admits it has a discriminatory so-called "deferral" policy that is designed to deter same-sex couples from having wedding or civil union receptions at the Wildflower Inn. (Answer to Second Amended Compl. ¶ B.) Plaintiffs allege they were directly and proximately harmed by this underlying policy even if it was carried out by an employee in a slightly different manner than the owners of the Wildflower Inn preferred. (Second Am. Compl. ¶¶ 24-26.) "If one intends a particular result to follow from his conduct and the result follows, it is immaterial that the particular way in which it is accomplished was unintended." Restatement (Second) Agency § 212 cmt. a. In bringing claims for nominal damages and declaratory relief, Plaintiffs thus seek to hold the Wildflower Inn directly liable for the results of its own admitted

discriminatory "deferral" policy, not vicariously liable for an unauthorized act of an employee. (Second Am. Compl. ¶¶ 24-26, 40-41, B, C.)

The Defendant's offer to pay $1.00 in nominal damages and have judgment entered based on vicarious liability does not make this case moot because it does not provide Plaintiffs with the relief they requested and are entitled to under Vermont law. The owners of the Wildflower Inn seek to insulate their longstanding discriminatory policies from review by offering to pay $1.00 in nominal damages as *respondeat superior* liability for the actions of a purported "rogue employee," while continuing to assert the Wildflower Inn's right to discriminate under a so-called "deferral" policy. Entering liability on this basis would not address Plaintiffs' allegations that they were directly and proximately harmed by the Wildflower Inn's own misconduct. "[D]irect liability requires fault on the part of the principal whereas vicarious liability does not require that the principal be at fault." *See generally* Restatement (Third) Agency § 7.03 cmt. b. Allowing the owners of the Wildflower Inn to insulate their discriminatory policy from review and blame Plaintiffs' injuries on a "rogue employee" would not serve the remedial purposes of the FHPA and would not meaningfully redress the "stigmatizing injury" and "deprivation of personal dignity" Plaintiffs suffered as a direct and proximate result of the Wildflower Inn's own actions. *Benevolent and Protective Order of Elks of the U.S.*, 176 Vt. at 131 (internal quotation marks omitted).[1]

In addition, Plaintiffs move to amend the complaint to add a specific request for punitive damages as authorized by Vt. Stat. Ann. tit. 9, § 4506(a). Even if Defendant's offer to settle based on vicarious liability were sufficient to address Plaintiffs' claim for nominal damages and declaratory relief, it would not provide the punitive damages requested in Plaintiffs proposed

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1 In addition, as explained *infra* note 4, Defendant's voluntary cessation from holding wedding receptions does not moot claims for prospective injunctive relief.

amendments to the complaint. Defendant's motion to dismiss based on its purported offer of judgment should accordingly be denied.[2]

I. History of Wildflower Inn's Discriminatory Policies and Practices.

The Wildflower Inn admits that it has a so-called "deferral" policy that treats same-sex couples seeking to have wedding or civil union receptions differently than heterosexual ones. (Answer to Second Am. Compl. ¶ B.) Because Defendant has not yet submitted for any depositions, Plaintiffs do not yet know the full scope of how this discriminatory policy has been applied over the years. But the following facts are known based on the Wildflower Inn's own admissions and the testimony of Susan Parker and Amalia Harris.

On January 14, 2005, Susan Parker and her same-sex partner contacted Jim O'Reilly, one of the owners of the Wildflower Inn, to inquire about holding a civil union ceremony at the facility. (Pls' Motion to Compel App. B (Parker Aff.) ¶ 2.) In response, Mr. O'Reilly told her that the Wildflower Inn "was not seeking out civil union reception business" because they were not "compatible with the Inn's family atmosphere." (*Id* at ¶ 3.) Mr. O'Reilly told Ms. Parker that "if we had our hearts set on holding the reception there, then he would sit down and talk to us about it, but that he would not put his heart into the reception and that he didn't think that we would want that." (*Id* at ¶ 5.) Mr. O'Reilly said that "other inns and resorts in Vermont would host our civil union reception, and that my partner and I should try contacting one of those places." (*Id* at ¶ 7.)

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2 Finally, as explained *infra* in Section IV, Defendant's November 3, 2011 settlement proposal cannot extinguish Plaintiffs' right to recover attorneys' fees because it was presented as a "draft" proposal, not a formal offer of judgment, and the settlement proposal did not include several key terms contained in the January 26, 2012 letter. Moreover, the January 26, 2012 letter did not constitute a valid offer of judgment because its terms were vague and ambiguous, and Defendant refused to clarify it despite Plaintiffs' request for Defendant to do so.

Ms. Parker filed a complaint with the Vermont Human Rights Commission alleging that the Wildflower Inn's actions in turning her away violated the FHPA. (Def. Opp. to Motion to Compel ¶ 26 & Ex. B.) The Human Rights Commission declined to bring litigation on Ms. Parker's behalf, and Ms. Parker did not bring an independent lawsuit against the Wildflower Inn. (*Id.*)

Based on this experience, the Wildflower Inn takes the position that it can discourage and deter same-sex couples from holding wedding or civil union receptions at the facility without violating the FHPA as long as it does not explicitly "refuse" service. Even in this litigation, when Plaintiffs presented Ms. Parker's affidavit as evidence of the Wildflower Inn's longstanding discriminatory policy, the Wildflower Inn stated that the actions described in Ms. Parker's affidavit were perfectly legal because "[n]owhere in the Parker Affidavit is it even alleged that the Defendant ever refused a same-sex ceremony nor does it even claim that Defendant said that it had a policy of doing so." (Def. Opp. to Motion to Compel ¶ 26.) Plaintiffs do not yet know how many other same-sex couples the Wildflower Inn discriminated against between 2005 and May 2010, when they hired Amalia Harris as Meeting & Events Director.

When Jim and Mary O'Reilly interviewed Ms. Harris for the position of Meeting and Events Director in May 2010, Jim O'Reilly told her: "I just wanted you to know that we do not host gay weddings here." (App. A (Harris Dep.) 30:25-31:1.) Mary O'Reilly then added: "[W]e were sued in the past and we won the lawsuit and we don't have to host gay weddings." (*Id.* at 2-3.) Without presenting any testimony under oath, the owners of the Wildflower Inn assert in their answer that Ms. Harris "was never authorized to reject requests from same sex couples; rather, she was to inform the Owners of the Inn, who would then speak with the couple."

(Answer to Second Am. Compl. ¶ B.) In contrast, Ms. Harris testified that the O'Reillys never provided any instruction about how she should respond to requests from same-sex couples. They simply told her that the resort does not hold gay receptions. Contrary to Defendant's assertion that Ms. Harris "never told the Owners" about Plaintiffs' inquiries (Answer to Second Am. Compl. ¶ B), Ms. Harris testified that after receiving the inquiry from one of the Plaintiffs' mothers, Ms. Harris went back to Mr. O'Reilly and asked if the Wildflower Inn could host the event. (App. A (Harris Dep.) 32:10-23.) Ms. Harris testified that Mr. O'Reilly said "no"; he never asked her to refer the inquiry to him and never asked her to turn them away in a particular manner. (*Id.* at 32:21-1; 182:11-183:3.)

As a direct and proximate result of the Wildflower Inn's so-called "deferral" policy, Ms. Harris told one of the Plaintiffs' mothers that "due to their personal feelings, [the owners of the Wildflower Inn] do not host gay receptions at our facility." (Second Am. Compliant ¶ 23.) After the initial complaint was filed in this action, the owners of the Wildflower Inn issued a statement to the press in which they stated that "our Wedding Coordinator did not handle the couple's request *in the manner* that it should have been," but the owners of the Wildflower Inn reaffirmed that "[w]e do not . . . feel that we can offer our personal services wholeheartedly to celebrate the marriage between same sex couples because it goes against everything that we as Catholics believe in." (*Id.* at ¶ 29 (emphasis added).)

II. Because Plaintiffs Seek To Hold The Wildflower Inn Directly Liable, An Offer To Settle Based On Vicarious Liability Does Not Provide All The Relief Requested.

Because a settlement offer based on vicarious liability does not provide all relief requested in Plaintiffs' claims for nominal damages and declaratory relief, this case is not moot. Having failed to show that "it is beyond doubt that there exist no facts or circumstances that

would entitle the nonmoving party to relief," as it must to prevail on a motion to dismiss, *Samis v. Samis*, 2011 VT 21, ¶ 9, Defendant's motion must be denied.

Plaintiffs seek to hold the Wildflower Inn directly liable for the injuries they sustained as a direct and proximate result of the owners' policies. The facts recounted above establish that the owners of the Wildflower Inn have a policy of discriminating against same-sex couples and that Plaintiffs were directly and proximately harmed by the discriminatory policies put in place by the owners – not by the unauthorized actions of a rogue employee. Under the Defendant's own version of events, the owners of the Wildflower Inn put in place an unequal "deferral policy" that was designed to deter same-sex couples from having wedding or civil union receptions at the Wildflower Inn. (Answer to Second Am. Compl. ¶ B.) Heterosexual couples could book their wedding or civil union receptions through the meeting and events coordinator, but the meeting and events coordinator was required to refer same-sex couples directly to Mr. or Mrs. O'Reilly who would discourage them from using the facilities.

Plaintiffs allege that they were directly and proximately harmed by this policy. The owners of the Wildflower Inn assert that Plaintiffs do not have standing to challenge their actual discriminatory policy because Ms. Harris turned the Plaintiffs away instead of referring them to the O'Reillys. But because the discriminatory "deferral" policy was the proximate cause of the discrimination Plaintiffs suffered, Plaintiffs can challenge that policy even if the policy was implemented in a different manner than the O'Reillys preferred. "If one intends a particular result to follow from his conduct and the result follows, it is immaterial that the particular way in which it is accomplished was unintended." Restatement (Second) Agency § 212 cmt. a. *See also* Restatement (Second) Torts § 877 cmt. a ("If he intends the result, it is immaterial that the tortious means used are not those originally contemplated, provided the defendant's order or

inducement is one of the contributing factors."). Whether they call it a "deferral" policy or a "refusal" policy, the goal of the owners of the Wildflower Inn was to deter same-sex couples from using the facilities for wedding or civil union receptions – and deterring customers from using a public accommodation on the basis of their sexual orientation violates the FHPA. Because the Wildflower Inn's own policies were intended to discriminate against same-sex couples and proximately caused the discrimination Plaintiffs experienced, it is immaterial that the discrimination was accomplished in a slightly different manner than the O'Reillys would have preferred.

Defendant's admission of vicarious liability "based on the legal concept of *Respondeat Superior*" does not address the substance of Plaintiffs' claims. (Def. Mot. to Dismiss at ¶ 7.) Plaintiffs are bringing claims directly against the Wildflower Inn as a result of the Wildflower Inn's own admitted policies and practices – not a claim for vicarious liability through *respondeat superior*. "[I]t is black letter law that a principal's liability under a *respondeat superior* theory of vicarious liability for acts of an agent has nothing to do with a principal's direct liability." *McGraw v. Wachovia Sec., L.L.C.*, 756 F. Supp. 2d 1053, 1066 (N.D. Iowa 2010). As the Restatement on Agency explains, "[s]ignificant consequences may follow from the distinction between direct and vicarious liability." Restatement (Third) Agency § 7.03 cmt. b. "In most cases, direct liability requires fault on the part of the principal whereas vicarious liability does not require that the principal be at fault." *Id. See also McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1137 n.4 (10th Cir. 2006) ("Direct liability, unlike vicarious liability, is premised on a party's own malfeasance."). A judgment based on direct liability necessarily requires a finding that the owners of the Wildflower Inn are at fault for violating Plaintiff's rights under the

FHPA. In contrast, a judgment based on vicarious liability would not establish the Wildflower Inn itself engaged in any misconduct.

The difference between direct liability and vicarious liability is particularly important in this case because Plaintiffs seek to vindicate dignitary rights that cannot be easily monetized. "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986) (plurality). "The primary purpose of nominal damages in these cases is thus to guarantee that a defendant's breach of these duties will remain actionable regardless of their consequences in terms of compensable damages." *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 318 (2d Cir. 1999). "By making the deprivation of [certain] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). An award of nominal damages and declaratory relief holding Defendant directly liable would ameliorate the effect of the stigmatizing injury Plaintiffs suffered by making clear they have the same right as a straight couple to use public accommodations and by deterring the Defendant from continuing its discriminatory practices. *Cf. Anderson v. Johnson*, 2011 VT 17, ¶ 11 (explaining that in civil rights context, nominal damages may serve the "broader 'public purpose' underlying the legislation by exposing . . . 'lawless conduct' or deterring future misconduct.'"); *Farrar v. Hobby*, 506 U.S. 103, 121 (1992) (O'Connor, J., concurring) ("[A]n award of nominal damages can represent a victory in the sense of vindicating rights even though no actual damages are proved.").

The resolution proposed by the Wildflower Inn would frustrate the purpose of a nominal damages award. Instead of vindicating Plaintiffs' right to equal treatment, the Wildflower Inn's

proposal would actually insulate the owners' discriminatory policy from review. Indeed, even as they seek dismissal of Plaintiffs' compliant, the owners of the Wildflower Inn continue to assert that they have a constitutional right to discriminate against Plaintiffs and other same-sex couples. (Answer to Second Am. Compl. ¶¶ C-E.) The purpose of a claim for nominal damages is to hold the defendant accountable for its own actions and redress the dignitary and stigmatizing harms of discrimination, not to provide the Defendant with the opportunity to pay $1.00 and blame the discrimination on someone else.

For the same reasons that Defendant's offer does not satisfy Plaintiffs' claims for nominal damages, it also does not satisfy Plaintiffs' claims for retrospective declaratory relief.[3] Plaintiffs seek a declaration that the policies of the Wildflower Inn – which directly and proximately led to the harm Plaintiffs suffered – violated Plaintiffs' rights under the FHPA. As explained above, a judgment based on Defendant's vicarious liability for the act of an employee, would not satisfy Plaintiffs' request for a declaratory judgment with respect to Defendant's own direct misconduct.

Because a settlement offer based on vicarious liability does not provide all the relief requested in Plaintiffs' claims for nominal damages and declaratory relief, this case is not moot and Defendant's motion to dismiss must be denied.[4]

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3 The Vermont Supreme Court has explained that declaratory judgments serve "dual purposes" and can be used to grant retrospective relief based upon past violations. *All Cycle, Inc. v. Chittenden Solid Waste Dist.*, 164 Vt. 428, 434 (1995) ("[P]laintiff's request for declaratory relief was not moot because of the retrospective purpose of a declaratory judgment."). When a plaintiff requests damages, the retrospective declaratory judgment establishes the predicate for issuing a damages award. *See id.*; *PeTA v. Rasmussen*, 298 F.3d 1198, 1202 n.2 (10th Cir. 2002) ("[W]e consider declaratory relief retrospective to the extent that it is intertwined with a claim for monetary damages that requires us to declare whether a past constitutional violation occurred."). Accordingly, the Vermont Supreme Court and the federal courts have held that even when plaintiffs do not have standing to seek prospective relief, they do have standing to bring claims for retrospective declaratory relief in connection with their claims for damages. *See All Cycle, Inc.*, 164 Vt. at 434-35 (holding that plaintiff's claim for injunctive relief was moot but not retrospective claim for declaratory judgment); *Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974) (same); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-22 (1974) (same).

4 In addition to Plaintiffs' retrospective claims for nominal damages and declaratory relief, Plaintiffs' claims for injunctive relief are also not moot because a defendant cannot moot a case based on voluntary

III. The Court Should Grant Plaintiffs Leave To Amend To Add A Specific Request For Punitive Damages.

Under Vermont Rule of Civil Procedure 15(a), a party may amend its pleading at any time with leave of the Court, and "leave shall be freely given when justice so requires." "Both the Vermont rules of civil procedure and the common law tradition of this state encourage liberality in allowing amendments to pleadings where there is no prejudice to the other party." *Bevins v. King*, 143 Vt. 252, 254 (1983). "When there is no prejudice to the objecting party, and when the proposed amendment is not obviously frivolous nor made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny the motion." *Id.* at 254-55. One of the principal reasons for this liberal amendment policy is "to provide maximum opportunity for each claim to be decided on its merits rather than on a procedural technicality." *Id.* at 225; *accord Lillicrap v. Martin* 156 Vt. 165, 170-71 (1989) ("In short, the purpose of Rule 15 is to facilitate the disposition of litigation on the merits and to subordinate the importance of pleadings." (internal quotation marks omitted)).

Plaintiffs seek leave to amend to their complaint to add a specific request for punitive damages. The testimony provided by Ms. Harris at her February 2, 2012 deposition indicates that the discriminatory policies of the Wildflower Inn have affected at least six same-sex couples during an 11-month period. If a comparable number of same-sex couples were discriminated against in previous years, then the Wildflower Inn's discrimination over the years will have

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cessation of its illegal activities. "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant free to return to his old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (internal quotation marks, brackets, and ellipses omitted). The Defendant's statement that it no longer holds wedding receptions does not stop Defendant's from resuming such receptions as soon as this litigation is over. In any event, Plaintiffs have alleged that Defendant continues to host receptions in concert with its affiliated business at the Stepping Stone Spa. (Second Am. Compl. ¶¶ 30-32.) Defendant asserts that Stepping Stone Spa is not a party in this action, but Plaintiffs are not bringing claims against Stepping Stone Spa. Rather, Plaintiffs allege that the Wildflower Inn's coordination with the Stepping Stone Spa demonstrates the Wildflower Inn's own continuing efforts to evade the FHPA.

injured more than 50 different couples and their families. The scope of the discrimination makes punitive damages particularly appropriate to deter the Wildflower Inn from continuing its discriminatory practices. *See Sweet v. Roy*, 173 Vt. 418, 446 (2002) ("The purpose of punitive damages is to deter misconduct, and thus, courts can consider 'the possible harm to other victims' that might result if similar behavior is not deterred."). In addition, while Plaintiffs have explained above why their claims for declaratory relief and nominal damages are not moot, Plaintiffs' request for punitive damages provides an additional reason why Defendant's motion to dismiss must be denied.

Granting leave to amend the complaint would be in the interest of justice because it would help effectuate the remedial purposes of the FHPA. "As a remedial statute, the FHPA must be liberally construed in order to suppress the evil and advance the remedy intended by the Legislature." *Benevolent and Protective Order of Elks*, 176 Vt. at 131 (internal quotation marks omitted). The Vermont Legislature passed the FHPPA to protect against "stigmatizing injury" and "deprivation of personal dignity that surely accompanies denials of equal access to public establishments." *Id.* (internal quotation marks omitted). In order to enforce these protections, the legislature provided that victims of discrimination may bring "an action for injunctive relief and compensatory and punitive damages and any other appropriate relief." Vt. Stat. Ann. tit. 9 § 4506(a). By providing a specific remedy of punitive damages, the Vermont legislature made clear that such damages would sometimes be necessary to fulfill the remedial purpose of the statutory scheme. *Cartwright v. Regents of Univ. of Cal.*, No. 2:05-cv-02439, 2009 WL 2190072, at *12 (E.D. Cal. July 22, 2009) ("Since deterrence is one of the chief objectives of punitive damages, they will be necessary in some cases to ensure that the objectives of the civil rights statutes are fully accomplished." (citation omitted)).

Moreover, granting leave to amend will not unfairly result in any prejudice or surprise for the Defendant. *See In re Horizon Cruises Litig.*, 101 F. Supp. 2d 204, 215 (S.D.N.Y. 2000) ("[D]elay alone without some showing of bad faith or prejudice is not a sufficient basis for denying leave to amend."). This case is at the beginning of discovery, and Defendants will have ample opportunity to develop any facts relevant to the issue of punitive damages. Indeed, because Plaintiffs cited the statutory provision referencing punitive damages in a prior version of their complaint, Defendants have already addressed the issue of punitive damages in their Amended Answer. *See* (Answer to Second Am. Compl. ¶49 (stating that Plaintiffs "are adding a request for punitive damages.").) Allowing Plaintiffs to amend in these circumstances would therefore create no prejudice for the defendants and would serve the interests of justice and the remedial intent of the Vermont legislature.

IV. Defendant Has Not Submitted A Valid Offer Of Judgment

Neither Defendant's informal settlement proposal on November 3, 2011 (attached as App. B) nor its letter dated January 26, 2012 (attached as App. C) constitute valid offers of judgment under Vermont Rule of Civil Procedure 68.

There is no merit to Defendant's argument that by making a settlement offer on November 3, 2011, Defendant extinguished Plaintiffs' right to recover attorneys' fees and costs after that date. "[M]ere settlement negotiations may not be given the effect of a formal offer of judgment." *Clark v. Sims*, 28 F.3d 420, 424 (4th Cir. 1994). The settlement proposed on November 3, 2011, was labeled by Defendant as a "DRAFT Settlement Agreement," and did not purport to be a binding offer of judgment. (App. B). The courts have repeatedly held that a settlement offer that does comply with the requirements of Rule 68 cannot be used a basis for cutting off Plaintiffs' right to recovery fees. *See Ortiz v. Regan*, 980 F.2d 138, 141 (2d Cir. 1992)

("Absent a showing of bad faith, a party's declining settlement offers should [not] operate to reduce an otherwise appropriate fee award." (internal quotation marks omitted)); *Cooper v. State of Utah*, 894 F.2d 1169, 1172 (10th Cir. 1990) (because no formal offer of judgment was made "the court's downward adjustment of fees based on settlement negotiations is not well-founded"); *Rozell v. Ross-Holst*, 576 F. Supp. 2d 527, 543 (S.D.N.Y. 2008) ("[A]part from the operation of Rule 68 itself, the parties' positions during settlement should have no bearing on the Court's assessment of the degree of success or any other element of the fee award that the plaintiff may be entitled to.").[5]

Defendant's attempt to back-date its January 26, 2012 purported offer of judgment to November 3, 2011, also ignores several differences between the two settlement offers. The November settlement offer included declaratory relief in the form of an acknowledgment that Ms. Harris's conduct violated the FHPA, but did not include any payment of Plaintiffs' costs and attorneys' fees and would have required Plaintiffs' to waive liability against all "all affiliated and related entities." (App. B.) In contrast, the January 26, 2012 offer provided for the recovery of some of Plaintiffs' costs and attorneys' fees but did not include any admission of liability and did not require Plaintiffs to waive claims against "all affiliated and related entities." (App. C.) In addition, the November offer stated that Defendant would "agree and stipulate that it would neither enact nor enforce" a "no gay receptions policy" (App. B), but the January offer changed

5 In support of its argument, Defendant misleadingly cites to an unpublished decision in *Neronsky v. Sutowski*, No. 2002-106, 2002 WL 34422308 (Vt. Dec. 2002) (mem.). In that decision, the defendant made a formal offer of judgment that complied with Rule 68, not an informal settlement offer. *Id.* at *1. The issue in *Neronsky* was whether the plaintiff's rejection of the offer of judgment, not only required plaintiff to pay defendant's fees, but also cut off her right to recover her own costs and fees after that date. Even though Rule 68 does not specifically state that the plaintiff may not continue to recover fees, the court held that limiting recovery would be consistent with the spirit of Rule 68. *Id.* at *3. *Neronsky* has no bearing on whether a settlement offer can be used to limit a plaintiff's right to recover fees when the offer is not a formal offer of judgment.

the wording from a "no gay receptions policy" to an injunction prohibiting Defendant "from refusing to host Wedding Receptions for same-sex couples," (App. C).

In any event, whether or not it is back-dated, the January 26, 2012 offer is also not a valid offer for judgment because it does not provide the requisite clarity required by Rule 68. "[A]mbiguous offers should be clarified or stricken to further the purposes of Rule 68 and to protect the ability of parties to make reasonable decisions regarding the conduct of litigation." *Boorstein v. City of New York*, 107 F.R.D. 31, 34 (S.D.N.Y. 1985). "[T]he offeree must know what is being offered in order to be responsible for refusing the offer." *Arkla Energy Resources v. Roye Realty and Developing, Inc.*, 9 F.3d 855, 867 (10th Cir. 1993) "Ambiguity in an offer of judgment is to be construed against the defendant that makes the offer; a plaintiff should not be left in the position of guessing what a court will later hold the offer means." *Harbor Motor Co., Inc. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 647-48 (7th Cir. 2001) (internal quotation marks omitted).

Defendant's January 26, 2012 offer does not satisfy these standards. After receiving the purported offer of judgment, Plaintiffs sought clarification about two issues. *See* (App. D.) First, Plaintiffs asked whether the offered "injunction prohibiting Defendant from refusing to host wedding reception for same-sex couples" would also prohibit Defendant from engaging in the types of discriminatory discouragement described in the Second Amended Complaint. Second, Plaintiffs asked whether the offer, which purported to provide all the relief requested by Plaintiffs, would include declaratory relief in the form of an admission of direct liability. It was particularly important to clarify these two components of the January 26, 2012 offer because they represented material changes from the informal offer Defendant's made on November 3, 2011. Defendant never responded to Plaintiffs' request for clarification, leaving the terms of the offer

unclear and rendering the ambiguous offer invalid and unenforceable. *See Basha v. Mitsubishi Motor Credit of Am.*, 336 F.3d 451, 455 (5th Cir. 2003) (holding that "vague offer of judgment did not provide [plaintiff] with a clear baseline to evaluate the risks of continued litigation" and was therefore invalid); *Catanzano v. Doar*, 378 F. Supp. 2d 309, 316 (W.D.N.Y. 2005) ("The State's offer was ambiguous about the terms of the proposed 'permanent injunction and declaratory relief.' Because the State did not spell out those terms, and never responded to plaintiffs' counteroffer, plaintiffs could not have made an informed choice whether to accept the offer.").

Conclusion

For the foregoing reasons, the Court should deny Defendant' motion to dismiss and grant Plaintiff's motion to amend the complaint.

___________/s/___________

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Certificate of Service

I hereby certify that on March 5, 2012, I served the plaintiffs' motion to compel discovery responses, and its attached exhibits, by means of postage-prepaid first class mail upon:

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Appendix A

Excerpts of Amalia Harris Deposition

1 the supposition of the question as to three
2 conversations. I don't believe that's-- I know
3 it certainly wasn't in response to my
4 examination.
5 MR. BLOCK: It was in response to her
6 own Counsel's examination.
7 MR. SIMMONS: I understand.
8 MR. BLOCK: She said one, two, three.
9 So whatever she was referring to then.
10 A. Um hum.
11 Q. So the second conversation, when you talked
12 to Jim after you turned away Channie and Kate and
13 Ming, could you just say one more time what you
14 said to Jim then?
15 A. I asked him, I said, I received an inquiry
16 for two women to have their wedding reception
17 here, can we host this event, and he said, No.
18 Q. Did he ask to speak with them?
19 A. No.
20 Q. Did he say, Well, you're supposed to tell
21 me about these so I can talk with them?
22 A. He said, No.
23 Q. And you understood, did you-- Did you
24 understand him to be telling you to turn them
25 away when he said no?

1 A. Yes.
2 Q. Did he say how you should turn them away?
3 A. No.
4 Q. Then when you talked to Jim at the time
5 that you resigned, you said that one of the
6 reasons was-- When you talked to him at the time
7 you resigned, you told him that you were doing it
8 because of having to turn away same sex couples?
9 A. That was one of the reasons why I no longer
10 felt comfortable working for him.
11 Q. And do you remember just how you expressed
12 that when you were, what words you used to
13 describe it in that conversation?
14 A. Somewhat tearfully, and that I apologized
15 for not telling him sooner, but that I was not
16 happy working for him, and that this was one of
17 the reasons, I did not feel comfortable
18 continuing this practice, and I apologized for
19 not being honest with him earlier, and that I no
20 longer wanted to work for him.
21 Q. And during that conversation, did you
22 reference the fact that you had turned away same
23 sex couples?
24 A. No. We were only, you know, specific to
25 this situation, you know. The same sex couple

1 She said that they were advertising on Craigs
2 List. And I think it was Dan that called me.
3 You know, she gave him my phone number. And I
4 believe it was Dan. It might have been Jim that
5 called me to set up an interview. I don't
6 remember exactly. And so I went to the inn with
7 my resume and had an interview with them.
8 Q. And was that the only interview you had?
9 A. Yes.
10 Q. So who was present for the interview?
11 A. Mary and Dan and Jim.
12 Q. And where did the interview occur?
13 A. In the front area, where you enter the
14 building. You see the front desk, and then
15 there's a small living room to the right.
16 Q. And was this in May, 2010?
17 A. It was in April of 2010.
18 Q. And so during this interview, did they say
19 anything with respect to weddings and receptions
20 for same sex couples?
21 A. Yes, it was-- As the interview had gone on,
22 it became, well, I believe it became clear to me
23 that we were going, that they were going to hire
24 me, and they, I believe it was Jim that said,
25 We-- I just wanted you to know that we do not

1 host gay weddings here. And I believe Mary said,
2 We won-- We were sued in the past and we won the
3 lawsuit and we don't have to host gay weddings.
4 And I said, That is not my personal or
5 professional belief, but if I work for you, then
6 I will uphold your policy.
7 Q. Did Dan say anything in the conversation?
8 A. I don't remember.
9 Q. After you said, I will uphold your policy,
10 did they say anything in response?
11 A. I don't remember. It was-- My recollection
12 is it was near the end of the interview. It was
13 kind of like, Okay, let's, let's see how this
14 goes.
15 Q. So what did they say you should do if you
16 received an inquiry from a same sex couple?
17 MS. COOKSON: Object to the form.
18 Q. So during this conversation, did they talk
19 at all about what protocol you should follow if
20 an inquiry came from a same sex couple?
21 A. No.
22 Q. At any time after this conversation did
23 they talk to you about the protocol you should
24 follow if an inquiry came in from a same sex
25 couple?

1 A. No.
2 Q. Did you ever have any discussions with them
3 after this conversation about the inn's policy
4 with respect to same sex couples?
5 MS. COOKSON: Object to the form.
6 Q. Did you ever have any conversations with
7 them while you were employed at the Wildflower
8 Inn after this conversation about same sex
9 couples?
10 A. One time I asked Jim if we could host a
11 wedding reception for two women, and he said no.
12 Q. When was this?
13 A. It was in reference to these girls. It was
14 a couple of weeks after. So I believe I spoke
15 with Channie in October and November, so it was
16 sometime after that.
17 Q. So do you remember where this conversation
18 occurred?
19 A. It was in his office.
20 Q. And what did you say?
21 A. I said, Jim, we had a request from two
22 women to do their wedding reception. Is this
23 something that you can do? And he said, No.
24 Q. Was there any more to the conversation
25 after that?

Appendix B

Defendant's November 3, 2011 Settlement Proposal

From: John Anthony Simmons, PLLC
To: Dan Barrett
Subject: 11-03-11: Wildflower Inn
Date: 2011-11-03 2:53PM

Dear Dan,

I thank you for the extension on discovery until Monday, November 7 by agreement.

Not to confuse the issues, but I was hoping to present you with a settlement offer, have you consider it with your clients, and, if it fails, come up with another deadline for discovery if it is needed. However, I did not want to waste valuable resources on either side if you felt that we could find middle ground.

As such, my DRAFT Settlement Agreement is as follows:

This Settlement Agreement of the ___ day of ____, 2011 between the above named Plaintiffs and the above named Defendant is made in recognition of the parties' desire to resolve the legal dispute between them that arise out of the incidents described in the complaint and the answer filed in the above captioned matter.

NOW, therefore, in consideration of the mutual promises contained herein it is agreed as follows:

1. The Defendant maintains that its employee's conduct was not according to company policy and was not authorized by the Defendant. Defendant acknowledges and concedes that its employee's conduct violated the Fair Housing and Public Accommodations Act, 9 V.S.A section 4500, et seq.

2. While, Defendant maintains that it does not have a "no gay reception" policy, defendants agree and stipulate that it will neither enforce nor enact such a policy.

3. Plaintiffs agrees to discontinue this action with prejudice and to release and forever discharge all claims, demands, requests, or causes of actions, known or unknown, now existing or hereafter arising, whether presently asserted or not, which relate in any way to the subject matter of this action, and further to discontinue and/or not to commence, move or pursue in any court, arbitration or administrative proceeding any litigation or claims whether for damages, declaratory, costs, or any other kind of relief based upon the facts of this claim, the circumstances or instances that give rise to the claim, the litigation itself, this agreement or any results of the aforementioned facts, circumstances, claim or action against the defendant, all affiliated and related entities, their employees, successors, heirs, or assigns, attorneys, officers, and agents.

4. Plaintiffs are awarded $1.00 in damages.

Please consider this and discuss it with your clients. I look forward to your response.

Best Regards,
John Anthony

Appendix C

January 26, 2012 Letter from Defendant

NORMAN C. SMITH, ESQ.
76 Lincoln Street
P.O. Box 24
Essex Junction, Vermont 05453-0024
Telephone (802) 288-9088
Facsimile (802) 879-9640

RECEIVED
JAN. 27, 2012

January 26, 2012

Via e-mail and First-Class Mail

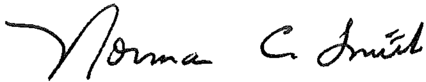
Dan Barrett, Esq.
ACLU Foundation of Vermont
137 Elm St
Montpelier, VT 05602

Re: Re: Baker/Linsley v. Wildflower Inn

Dear Dan:

Enclosed is an Offer of Judgment I am sending to you pursuant to Rule 68.

Very truly yours,



Norman C. Smith

Enclosure

c: James and Mary O'Reilly
John Anthony Simmons, Esq.

VERMONT SUPERIOR COURT
CALEDONIA UNIT

CIVIL DIVISION
DOCKET NO. 187-7-11 CACV

KATHERINE BAKER and
MING-LIEN LINSLEY
Plaintiffs

v.

WILDFLOWER INN a/k/a DOR ASSOCIATES LLP
Defendant

OFFER OF JUDGMENT PURSUANT TO CIVIL RULE 68

Defendant hereby offers to allow entry of judgment to be taken against them pursuant to Rule 68 of the Vermont Rules of Civil Procedure as follows:

A. An award of nominal damages in the amount of one dollar ($1.00);

B. An injunction prohibiting Defendant from refusing to host wedding receptions for same-sex couples at the Wildflower Inn.

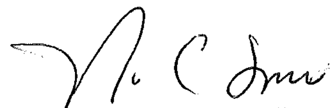
C. An award of Plaintiffs' reasonable costs and attorneys' fees, incurred prior to November 3, 2011 (the date of Defendant's original offer to settle) pursuant to 9 V.S.A. §4506(b) as determined by the Court.

If Plaintiffs do not accept this offer, they may become obligated to pay Defendant's costs incurred after the making of this offer.

To accept this offer, Plaintiffs must serve written notice of acceptance thereof within ten (10) days of the date this offer is made.

This offer is not an admission of liability by the Defendant, but rather is made solely for the purpose of compromising a disputed claim.

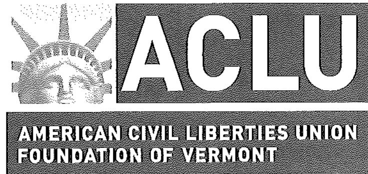
Dated at Essex Junction, Vermont this 26th day of January, 2012.



Norman C. Smith, Esq.
Local Counsel for Defendant
76 Lincoln Street
P.O. Box 24
Essex Junction, VT 05453-0024
802-288-9088

Appendix D

Plaintiffs' Request for Clarification of Jan. 26th Letter



Norman Smith
Norman Smith, P.C.
P.O. Box 24
Essex Junction, VT
05453-0024

February 3, 2012

AMERICAN CIVIL
LIBERTIES UNION FOUNDATION
OF VERMONT
137 ELM STREET
MONTPELIER, VT 05602
(802) 223-6304 (v/f/TTY)
info@acluvt.org
www.acluvt.org

Re: *Baker v. Wildflower Inn*, No. 183-7-11 CACV: your Jan. 27th letter

Dear Norm:

Thanks for your January 27th letter conveying what you describe as an offer of judgment to my clients in this litigation. I regret that the information that you have tendered is quite vague and too short of details to function as an offer of judgment, because my clients are unable to assess the relative merits of accepting or rejecting it. Therefore, I would be obliged if you would respond to the following two questions as soon as you can so that my clients can respond to the substance of your letter in a timely fashion:

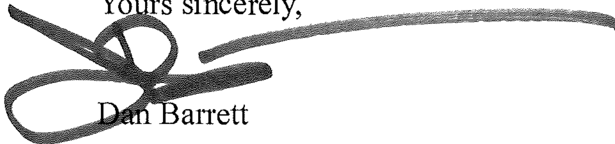
(1) Your letter states simply that the defendant would agree to have "[a]n injunction prohibiting Defendant from refusing to host wedding receptions for same-sex couples at the Wildflower Inn" entered against it. However, in its filings with the Court, the defendant has denied that discouraging same-sex couples from holding receptions at the Inn constitutes prohibited refusal to do so. Moreover, in her deposition yesterday, the defendant's former events manager, Amalia Harris, testified that one of the Inn's co-owners told her during her job interview that the Inn had been sued in the past over its discouragement of same-sex couples and had "won" permission to continue doing so.

In order to give the plaintiffs a clear understanding of whether the injunction that you have described actually provides the relief that they seek, please specify whether or not the injunction that you have offered to have entered against the defendant would prohibit discouraging same-sex couples from having wedding or civil union receptions at the facility, not returning the inquiries of such couples, and/or stating that it will not provide those couples with equal services.

(2) Your letter makes no mention of the declaratory relief that my clients have requested from the Court. You will recall that they seek a declaration that the defendant violated the Fair Housing and Public Accommodations Act by, among other things, discouraging same-sex couples from holding wedding or civil union receptions at the facilities, telling same-sex couples that the Wildflower Inn is unable to provide the same quality of services it would provide to different-sex customers, and refusing to return phone calls or other inquiries from prospective customers seeking to hold wedding or civil union receptions for same-sex couples at the resort. *See* Second Amended Compl. ¶ B. Please specify whether your client would agree to have this relief entered against it.

Without these details, the information in your letter is too ambiguous to give my clients an adequate basis to decide whether the items mentioned would represent a better or worse outcome than that which they could reasonably expect to obtain through continued litigation. I look forward to your response.

Yours sincerely,



Dan Barrett

cc: John Anthony Simmons / John Anthony Simmons P.L.L.C.
Robert Appel / Vermont Human Rights Commission