VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.** **And** **MERCURY GROUP, INC.** **Defendants.**	**Case No. CL19001757, CL19002067**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S DEMURRERS IN CL19001757 (Filed June 13, 2019 Pre-Consolidation) AND 19002067 (Filed July 12, 2019 Post-Consolidation)

NATIONAL RIFLE ASSOCIATION OF AMERICA

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Plaintiff National Rifle Association (the "NRA") submits this memorandum of law in support of its demurrer to Defendants' Counterclaim in CL19001757 ("First Action") and its demurrer to Defendants' Counterclaim in CL19002067 ("Second Action") (together, "Actions"), as follows:

I.

INTRODUCTION

Defendants Ackerman McQueen, Inc. and Mercury Group, Inc. (together, "AMc" or "Defendants") filed Counterclaims in the First and Second Actions against Plaintiff NRA, including Count II for Breach of Contract (breach of the implied duty of good faith and fair dealing) and Count III for Abuse of Process. Count II and Count III of AMc's Counterclaims in both Actions fail to state a claim upon which relief can be granted. The NRA, therefore, filed a demurrer in the First Action on June 13, 2019, and the Second Action on July 12, 2019, and submits this memorandum of law in support of its demurrers.

As demonstrated below, AMc's Counterclaims for breach of the implied duty of good faith and fair dealing fail as a matter of law because the claims are an improper attempt to have the Court rewrite the parties' written agreement. Based on established precedent, AMc may not now use the implied duty of good faith and fair dealing to create contractual terms that simply do not exist.

AMc's Counterclaims for abuse of process also fail as a matter of law. AMc erroneously contends that the NRA's initiation of these two lawsuits, a motion to amend the complaint in the First Action, a motion to stay and for discovery regarding the NRA's stolen property in the First Action, and the issuance of certain subpoenas in the Second Action constitute abuse of process. As a matter of law, the filing of an initial complaint commencing an action cannot be an abuse of

process. Further, Defendants' claims are barred by the litigation privilege because they are based on communications made in the course of judicial proceedings.

The NRA respectfully requests that its demurrers be sustained and Counts II and III of the Counterclaims in both the Actions be dismissed with prejudice.

II.

APPLICABLE LEGAL STANDARDS

"A demurrer tests the legal sufficiency of the facts alleged in pleadings" and "will be sustained when the pleading it challenges lacks sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Mark Five Constr., Inc. ex. rel. Am. Econ. Ins. Co. v. Castle Contractors*, 274 Va. 283, 287-88, 645 S.E.2d 475 (Va. 2007). "Despite the liberality of presentation which the court will indulge, the [pleading] must state a cause of action." *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122, 624 S.E.2d 1 (Va. 2006).

AMc's Counterclaims for Breach of Contract (Count II) and Abuse of Process (Count III) do not "allege sufficient facts to constitute a foundation in law for the judgment sought" and must therefore be dismissed with prejudice. *Id.*

III.

ARGUMENT

A. Defendants' Claims For Breach Of The Implied Duty Of Good Faith And Fair Dealing Must Be Dismissed With Prejudice.

In Count II of their Counterclaims to these Actions, Defendants purport to assert a claim for "Breach of the Implied Covenant of Good Faith and Fair Dealing." *See* First Counterclaim at ¶¶ 74-86, pp. 38-40; Second Counterclaim at ¶¶ 74-87, pp. 31-33. This claim must be dismissed because it has no legal or factual merit.

1. **The implied duty applies only to contracts governed by the UCC, and the UCC does not apply to the Services Agreement.**

In Count II of their Counterclaims, Defendants cite Section 8.1A-304 of the Virginia Code for the supposed proposition that every contract under Virginia law contains an implied duty of good faith and fair dealing. Such a sweeping contention is squarely rejected by the law. Section 8.1A-304 is the Virginia version of Section 1-304 of the Uniform Commercial Code (the "UCC"). That provision is inapplicable here because the UCC does *not* apply to a contract whose predominate purpose is the provision of services. *See, e.g., Pain Ctr. of SE Ind., LLC v. Origin Healthcare Solutions LLC*, 893 F.3d 454, 459-60 (7th Cir. 2003) (attached at Ex. A). Defendants have attached a copy of the parties' Services Agreement extensively referenced in Plaintiff's Complaints and the Defendants' Counterclaims, thereby making it appropriate for consideration on a demurrer. *See Flipp v. F & L Land Co.*, 241 Va. 15, 17, 400 S.E.2d 156 (1991) ("On demurrer, a court may examine not only the substantive allegations of the pleading attacked but also any accompanying exhibit mentioned in the pleading"). Even a cursory review of the Services of Agreement makes clear that its predominate purpose is not the provisions of tangible goods (subject to the UCC), but instead the provision of public relations services. Accordingly, the plain language of the relevant statute and the Services Agreement leaves no doubt that the UCC has no application here.

This straightforward conclusion is reinforced by myriad decisions from the courts of Virginia. In particular, several Virginia courts have determined that an implied duty of good faith and fair dealing does not exist under Virginia law other than in (1) contracts for goods governed by the UCC an (2) certain insurance contracts given the special relationship between an insured and its insurer. *See So. Bank & Trust Co. v. Woodhouse*, Nos. CL15009939-00, CL15009939-01, 92 Va. Cir. 402 (Va. Cir. Ct. Norfolk May 26, 2016) ("The Court concludes that Virginia does not

recognize an independent action for breach of the implied covenant in cases that are not governed by the UCC, including this one") (citing multiple Virginia Circuit Court decisions holding that a separate action for breach of the implied duty does not exist in Virginia, subject to exceptions not applicable here); *see also Harrison v. U.S. Bank Nat'l Ass'n*, No. 3:12-CV-00224, 2012 WL 2366163, at *2 (E.D. Va. June 20, 2012) ("Virginia . . . does not recognize an implied duty of good faith and fair dealing outside those governed by the Uniform Commercial Code.") (and decisions cited therein); *Burke v. Nationstar Mortgage, LLC*, Civil Action No. 3:14-CV-337, 2015 WL 4571313, at *6-8 (E.D. Va. July 8, 2013) (same); *Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 251 Va. 28, 33, 466 S.E.2d 382, 385 (Va. 1996) (finding no independent tort cause of action for breach of implied duty).[1]

It should be noted that least one court has suggested that "Virginia law on the implied duty of good faith and fair dealing is not exceptionally clear." *Stoney Glenn, LLC v. S. Bank and Trust Co.*, 944 F. Supp. 2d 460, 465 n. 6 (E.D. Va. 2013). Any potential ambiguity, however, does not alter the outcome of Plaintiffs' demurrer. The NRA has *not* uncovered any decision of the Virginia Supreme Court adopting an implied duty of good faith and fair dealing *outside* the context of certain insurance contracts and contracts governed by the UCC.[2] Moreover, a number of courts in Virginia have concluded that there is no implied duty of good faith and fair dealing in employment contracts. *See Devnew v. Brown & Brown, Inc.*, 396 F. Supp. 2d 665, 671 (E.D. Va. 2005); *Evans*

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[1] Certain other courts disagree with these authorities. *See, e.g., Morris v. Wilmington Savings Fund Society*, 360 F. Supp. 3d 363, 369-70 n. 6 (W.D. Va. 2018); *Stoney Glen, LLC v. Southern Bank and Trust Co.*, 944 F. Supp. 2d 460, 465-67 (E.D. Va. 2013), and other decisions, including decisions from the United States Court of Appeals for the Fourth Circuit.

[2] *See Levine v. Selective Ins. Co. of Am.*, 250 Va. 282, 286-87, 462 S.E.2d 81, 84 (Va. 1995) (insurance contract); *see also TIG Ins. Co. v. Alfa Laval, Inc.*, Civil Action No. 3:07CV683, 2008 WL 639894, at *3 (E.D. Va. March 5, 2008) (insurance contract).

v. Fairfax County Pub. Sch. Bd., Case No. CL-2017-3884, 97 Va. Cir. 192, 2017 WL 10900175, at *5-6 (Va. Cir. Ct. Nov. 21, 2017) (same).

Notably, at least one court that rejected the existence of an implied duty beyond the terms of a written contract agreed to by sophisticated parties relied on language from the Virginia Supreme Court, which held that "when parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379, 385, 493 S.E.2d 516, 520 (Va. 1997). *See also Evans v. Fairfax County Pub. Sch. Bd.*, Case No. CL-2017-3884, 97 Va. Cir. 192, 2017 WL 10900175, at *5-6 (Va. Cir. Ct. Nov. 21, 2017) (same). The existence of a claim for implied duty of good faith and fair dealing, as asserted here by Defendants, is inconsistent with the NRA's valid and binding rights under the parties' contract and Virginia law that limits such extra-contractual claims to limited categories of contracts that are not present here.[3]

For these reasons, the NRA's demurrer as to Count II of the First Counterclaim and its demurrer as to Count II of the Second Counterclaim should be granted and those claims dismissed with prejudice.

2. AMc's implied duty claim in the First Action does not allege that the NRA prevented AMc from performing their contractual obligations – an essential element of the claim.

Under Virginia law, the "implied covenant of good faith and fair dealing 'simply bars a party from 'acting in such a manner as to prevent the other party from performing his obligations under the contract.'" *Middle E. Broad. Networks, Inc. v. MBI Global, LLC*, No. 1:14-cv-01207-6B2-IDD, 2015 WL 4571178, at *5 (E.D. Va. July 28, 2015) (quoting *DeVera v. Bank of Am.,*

[3] The decision of the Virginia Supreme Court in the *Brauer* case is inapposite because it was decided under the UCC. *See Charles E. Brauer Co. v. NationsBank of Virginia*, 251 Va. 28, 466 S.E.2d 382 (Va. 1996).

N.A., No. 2:12-cv-17, 2012 WL 2400627, at *3 (E.D. Va. June 25, 2012)). In Count II of their Counterclaims, Defendants do not allege that the NRA has prevented them from performing their obligations under the Services Agreement. Thus, the NRA's demurrer as to Count II of the Counterclaims should be sustained.

3. The demurrers should be sustained because AMc improperly seeks to rewrite the parties' written agreement.

a. The NRA owes no implied duty of confidentiality to AMc.

Defendants allege that "[p]ursuant to the Services Agreement, Section IV, 'Confidentiality,' and Section VIII, 'Examination of Records,' the governing contract imposes confidentiality restrictions on AMc and allows NRA to review the books and records of AMc." *See* First Counterclaim, at ¶ 76, p. 38; Second Counterclaim, at ¶ 77, p. 32. In contrast, Defendants also contend that the "Services Agreement is silent and does not provide any guidance on how the NRA must treat AMc's confidential proprietary information that it receives from AMc under the 'Examination Records' clause." *See id.* Nevertheless, Defendants contend that a "good faith reading of the Services Agreement does not authorize the NRA to disclose AMc proprietary and confidential information that it gains from the Examination of Records Clause," *see id.*, at ¶ 77, p. 38, and that the "NRA used its contractual rights under the Services Agreement to gain proprietary information about AMc's business, including information about its contract with Lt. Col. Oliver North," *see id.*, at ¶ 78, p. 38.

Of course, the fact that the Services Agreement provides certain confidentiality rights to the NRA, but not to Defendants, demonstrates that Defendants do not have any rights to confidentiality under the Services Agreement, and the Services Agreement does not impose any confidentiality obligations on the NRA. And, under Virginia law, the implied duty of good faith cannot be used to create any such rights or obligations – especially when doing so would be

contrary to the express terms of the Services Agreement. *See Ward's Equip., Inc. v. New Holland N. Am. Inc.*, 254 Va. 379, 381-84, 493 S.E.2d 516, 518-20 (1997) ("[W]hen parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights"); *id.* at 385 (implied duty of good faith and fair dealing "cannot be the vehicle for rewriting an unambiguous contract in order to create duties that do not otherwise exist."); *Great Am. Ins. Co. v. GRM Mgmt., LLC*, No. 3:14CV295, 2014 WL 6673902, at *9 (E.D. Va. Nov. 24, 2014) ("an implied duty of good faith and fair dealing must yield to the express terms of the contract when the latter might be conceived as inconsistent with the former.") (discussing *Ward's Equip., Inc.*, 493 S.E.2d at 520); *Sun Hotel, Inc. v. SummitBridge Credit Invs. III, LLC*, 86 Va. Cir. 189 (Va. Cir. Ct. Fairfax Jan. 23, 2013) ("an obligation cannot be implied when it would be inconsistent with the express terms of the contractual relationship"); *see also NationsBank of Va., N.A. v. Mahoney*, No. 119920, 1993 WL 662334, at *3 (Va. Cir. Ct. Fairfax Dec. 6, 1993), *aff'd*, 249 Va. 216, 455 S.E.2d 5 (1995) ("This Court holds that § 8.1-203's good faith term cannot be implied to essentially negate or materially alter the Note and Guaranty Agreement's aforementioned express terms.").

Thus, the NRA could not violate any implied duty of good faith merely by relying on its express contractual rights under the Services Agreement to obtain AMc's purported confidential information. *See Skillstorm, Inc. v. Elec. Data Sys., LLC*, 666 F. Supp. 2d 610, 620 (E.D. Va. 2009) ("Likewise, a party does not breach implied duties where it exercises its rights created under the contract."); *Hershberger v. Bank of Am., N.A.*, No. CL130270, 92 Va. Cir. 470, 2013 WL 12237927, at *2 (Va. Cir. Ct. Caroline Cnty. Sept. 13, 2013) ("no implied duty exists because all of the rights and remedies are contained within the contract.").

Similarly, Defendants erroneously contend that the "NRA compounded its bad faith and unfair dealing by requiring that AMc remain silent in the aftermath of the false and misleading statements made about its contract with Oliver North." *See* First Counterclaim, at ¶ 83, p. 33; Second Counterclaim, at ¶¶ 74 to 87, pp. 31-33. Again, Section IV of the Services Agreement entitled "Confidentiality," imposes clear and unambiguous duties of confidentiality on AMc but imposes no such duties on the NRA.

In essence, Defendants are asking the Court to rewrite the Services Agreement to provide them with confidentiality rights not contained in the parties' written contract, something the Court does not have the power to do. *See Dominick v. Vassar*, 235 Va. 295, 300, 367 S.E.2d 487, 489 (Va. 1988). Accordingly, the NRA's demurrer as to Defendants' confidentiality allegations in Count II should be sustained.

b. <u>The NRA owes no implied duty to use AMc's services.</u>

Defendants contend that the NRA has transferred substantial amounts of AMc's services to a third party while still operating under the Services Agreement that prevented AMc from representing any other entity in public relations services directly competitive with the NRA. *See* First Counterclaim at ¶ 81, p. 39. Defendants also contend that the NRA has provided AMc's proprietary information to an AMc competitor knowing that the competitor intended to use it for its advantage against AMc and also to disclose that proprietary information in a manner harmful to AMc. Based on those allegations, Defendants contend that the NRA has breached its implied contractual duty of good faith and fair dealing. *See id.*, at ¶ 82, p. 39.

These allegations do not state a claim for breach of the implied duty of good faith and fair dealing because they have no connection to the Services Agreement. They are not based on any provisions or rights set forth in the Service Agreement, nor does the Services Agreement prohibit any of the alleged conduct in question. In particular, the Services Agreement does not prohibit the

NRA from transferring business to another party or provide Defendants with the exclusive right to perform media and public relations services for the NRA. In addition, as previously discussed, the NRA owes no duty of confidentiality to AMc. Thus, Defendants' allegations do not state a claim for breach of the implied duty of good faith and fair dealing.

c. The NRA cannot breach the implied duty when its alleged breaches are based on express terms in the parties' written agreement.

First, Defendants contend that the NRA breached its implied duty of good faith and fair dealing because it has failed to make payments in connection with certain invoices. *See* Second Counterclaim, at ¶ 85, p. 33. This allegation must be struck because it is duplicative of Defendants' claim for breach of contract in the First Counterclaim. *See id.*, at ¶¶ 74-86, pp. 38-40; *Charles E. Brauer Co.*, 466 S.E.2d at 385 (affirming dismissal of the debtor's breach of the implied covenant of good faith and fair dealing claim as duplicative of the breach of contract claim. "The breach of the implied duty under the U.C.C. [§ 8.1-203] gives rise only to a cause of action for breach of contract."); *Rogers v. Deane*, 992 F. Supp. 2d 621, 633 (E.D. Va. 2014) ("Where there is a claim for breach of contract, the inclusion of a claim for breach of the implied covenant of good faith and fair dealing as a separate claim is duplicative of the breach of contract claim; it does not provide an independent cause of action."), *aff'd* 594 F. App'x 768 (4th Cir. 2014).

Second, Defendants contend that the NRA breached its implied duty of good faith and fair dealing because it has "taken steps to interfere with AMc's ability to wind down the Services Agreement during the 90-day termination period following AMc's notice of termination pursuant to Section XI.B. of the Services Agreement." *See* Second Counterclaim, at ¶ 83, p. 33. This allegation cannot support a claim for breach of the implied duty of good faith and fair dealing. The principle that a contracting party may not interfere with the other party's performance is based on the premise that the party cannot take such action and then complain about the other party's lack

of performance. Here, Defendants initiated the termination; thus, they cannot complain that the NRA is interfering with that termination. In any event, the Services Agreement contains terms that expressly govern the termination process. Therefore, there can be no breach of an implied duty of good faith.

Third, Defendants erroneously contend that "[i]nstead of negotiating 'in good faith' the termination fees that are owed by the NRA under Section XI.F. of the Services Agreement, the NRA has ceased making payments of invoices that are now past due." *See id.*, at ¶ 84, p. 33. Defendants ignore that section XI.F. of the Services Agreement further provides that "[s]uch termination fees shall be negotiated *in good faith* by the parties." (emphasis added). Thus, the implied duty of good faith and fair dealing is irrelevant to this allegation because section XI.F. expressly states that the parties shall negotiate in "good faith." Accordingly, this allegation of Count II must be struck because the language of the parties' contract governs this issue.

For all the foregoing reasons, the NRA's demurrer as to Count II of the First Counterclaim and Count II of the Second Counterclaim should be sustained because they fail to state claims as a matter of law.

B. Defendants' Claims For Abuse Of Process Must Be Dismissed With Prejudice.

1. The commencement of litigation cannot be an abuse of process.

Defendants contend that the commencement of the Actions constitutes an abuse of process. *See* First Counterclaim at ¶¶ 99-100, pp. 42-43; Second Counterclaim at ¶ 92, p. 34. These allegations fail to state a claim because, as a matter of law, the commencement of a lawsuit cannot serve as the basis for an abuse-of-process claim.

This fundamental principle is universally applied to prevent interference with the right under the First Amendment to the United States Constitution to petition the Courts and to avoid conflict with the more stringent requirements of the tort of malicious prosecution. *See Donohoe*

Constr. Co. v. Mount Vernon Assocs., 235 Va. 531, 540, 369 S.E.2d 857, 862 (Va. 1988) ("The gravamen of the tort lies in the abuse or the perversion of the process after it has been issued. Consequently, it is not necessary to allege or prove that the process was maliciously issued.") (internal quotations omitted); *Triangle Auto Auction, Inc. v. Cash*, 238 Va. 183, 186, 380 S.E.2d 649 (Va. 1989); *7600 Ltd. P'ship v. QuesTech, Inc.*, No. 19 Cir. L148381, 39 Va. Cir. 268, 1996 WL 34384553, at *2 (Va. Cir. Fairfax May 22, 1996) ("Under Virginia law, an abuse of process can only apply after process has been issued, i.e., after a case has been initiated. Initiating and prosecuting a baseless suit or splitting claims to initiate and prosecute separate suits . . . cannot constitute abuse of process."). Claims for abuse of process are, therefore, disfavored and strictly construed. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 936 (10th Cir. 2015) ("This tort [of abuse of process] should be construed narrowly in order to protect the right of access to the courts and as such it is disfavored in the law") (internal quotations omitted) (attached at Ex. B); *United States v. Pendergraft*, 297 F.3d 1198, 1206 (11th Cir. 2002) ("These sanctions include tort actions for malicious prosecution and abuse of process, and in some cases recovery of attorney's fees, but even these remedies are heavily disfavored because they discourage the resort to courts.") (attached at Ex. C).

Based on all these established authorities, Defendants' claims for abuse of process must be dismissed to the extent they are based on the filings of the Complaint and Amended Complaint in the First Action and the filing of the Complaint in the Second Action. *See Berry v. Clark,* 42 Va. Cir. 1, 1997 WL 1070609, at *2 (Va. Cir. Ct. Richmond June 3, 1997) (abuse of process claim failed where party "failed to allege any wrongful act . . . after the original pleadings were filed"); *Seeber v. Martin*, 1992 WL 884593, at *1 (Va. Cir. Ct. Fairfax Mar. 20, 1992); *see also*

RESTATEMENT (THIRD) OF TORTS: LIABILITY OF ECONOMIC HARM § 26, Tentative Draft (2018); *Tibbetts v. Yale Corp.*, 47 F. App'x 648, 654 (4th Cir. 2002).

In addition, Defendants contend that their abuse-of-process claims are based on the NRA's filing of its Motion for Leave to File Amended Complaint (the "Motion"). *See* First Counterclaim at ¶¶ 91-95, 97-98, pp. 41-42. As a matter of law, the filing of a motion for leave to file an amended complaint cannot be an abuse of process because it is not "process." *See Ubl v. Kachouroff*, 937 F. Supp. 2d 765, 770-72 (E.D. Va. 2013) (attorney's execution of declaration was not "process."); *see also* Ronald Mallen, *1 Legal Malpractice § 6:47* (2019 ed) ("A motion for leave to file a complaint or for admission of an attorney to a court to argue an appeal is not such a process.") (footnotes omitted). Thus, Defendants' abuse-of-process claims based on the Motion fail to state a claim for relief.

2. <u>The litigation privilege bars AMc's abuse-of-process claims.</u>

Under Virginia law, the "litigation privilege" is an established defense. *See Mansfield v. Bernabei*, 284 Va. 16, 727 S.E.2d 69 (Va. 2012); *Watt v. McKelvie*, 219 Va. 645, 651, 248 S.E.2d 826 (1978) (third-party statements made during the course of a judicial proceeding and relevant to the subject matter of the litigation are absolutely privileged and "may not be used to impose civil liability upon the origination of the statements."); *Lockheed Info. Mgmt. Sys., Co. v. Maximus, Inc.*, 259 Va. 92, 101, 524 S.E.2d 420 (2000); *Ranney v. Nelson*, No. 218653, 65 Va. Cir. 31, 2004 WL 1318882, at *2 (Va. Cir. Ct. Fairfax Apr. 20, 2004). The Virginia Supreme Court has stated that "the maker of an absolutely privileged communication is accorded complete immunity from liability even though the communication is made maliciously and with knowledge that it is false." *Lindeman v. Lesnick*, 268 Va. 532, 537-38, 604 S.E.2d 55 (Va. 2004); *see also Massey v. Jones*, 182 Va. 200, 204, 28 S.E.2d 623, 626 (Va. 1944); *Boyce v. Pruitt*, No. LH05-3315, 80 Va. Cir. 590, 2010 WL 7375630, at *4 (Va. Cir. July 28, 2010) ("One who speaks or writes with absolute

privilege does so with impunity, free from risk of liability, even for malicious statements or knowing falsehoods.").

First, Defendants contend that the "NRA used this Court's public proceeding as a vehicle to defame AMc and its employee, Lt. Col. Oliver North, and to accomplish other ulterior purposes," by filing its motion to amend. *See* First Counterclaim, at ¶ 98, p. 42. In addition, Defendants contend that the "proposed Amendment was intended to serve an ulterior motive of spreading false statements about the North-AMc Contract . . . ." *See id.*, at ¶ 92, p. 41. As a matter of law, these alleged bases for Defendants' abuse-of-process claims are barred by the litigation privilege because they are based on the communicative nature of the actions in question. *See EMI Sun Village, Inc. v. Catledge*, No. 16-11841, 2019 WL 2714325, at *6 (11th Cir. June 28, 2019) (attached at Ex. D); *Ritchie v. Sempra Energy*, 703 F. App'x 501, 504-05 (9th Cir. 2017) (attached at Ex. E).

Moreover, this aspect of Defendants' claims is barred by the doctrines of waiver and forfeiture because they consented to the relief requested in the Motion and the filing of the Amended Complaint.

Second, Defendants contend that on May 24, 2019, the NRA "compounded its abuses of the procedures of this Court by filing a pleading entitled Plaintiff's Emergency Motion for Entry Of An Order Staying This Action So That Plaintiff May Conduct Limited Discovery Into Defendants' Theft Of Plaintiff's Property." *See* Second Counterclaim, at ¶¶ 101-104, pp. 36-37. Defendants contend that "[t]his 'Emergency' pleading was disclosed to the public and the press as part of the NRA's smear tactic directed against AMc, seeking to implicate AMc in a criminal act without any basis in fact." *See id.*, at ¶ 103, p. 36. Defendants then allege that this situation resulted in an "outrageous libel." *See id.*, at ¶ 104, p. 37. This aspect of Defendants' abuse-of-

process claims is barred by the litigation privilege because it attacks the communicative nature of the conduct in question. The litigation privilege, therefore, bars any recovery for this so-called "outrageous libel." *See id.*

Third, as the final aspect of its abuse-of-process claims in its Second Counterclaim, Defendants allege that "the NRA issued subpoenas for high profile depositions of NRA Board Members . . . ." *See id.*, at ¶¶ 105-106, p. 37. Defendants contend that the subpoenas were issued to these individuals "to issue a public warning to the NRA's own board members . . . ." *See id.*, at ¶ 107, p. 38. This aspect of their abuse-of-process claims is barred by the litigation privilege because, once again, Defendants are attacking the communicative nature of the conduct in question. *See Northern Virginia Real Estate, Inc. v. Martins*, 283 Va. 86, 111-12, 720 S.E.2d 121 (Va. 2012) (litigation privilege "safeguards include such things as the power to issue subpoenas.")

Finally, in both the First Counterclaim and the Second Counterclaim, Defendants accuse the NRA of acting with evil motives. The Counterclaims are littered with invective, inappropriate, and improper *ad hominem* attacks. Nonetheless, for purposes of the NRA's demurrers, the important point is that allegations of improper motives are irrelevant to the application of the litigation privilege because, again, "the maker of an absolutely privileged communication is accorded complete immunity from liability even though the communication is made maliciously and with knowledge that it is false." *Lindeman*, 268 Va. at 537-38.

IV.

CONCLUSION

For all the foregoing reasons, the Court should sustain the NRA's demurrers and dismiss with prejudice Counts II and III of Defendants' Counterclaims in the Actions, and grant the NRA such other and further relief as justice may require or allow.

Dated: September 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2019, I caused the foregoing to be served via electronic mail and first-class mail upon:

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EXHIBIT A

893 F.3d 454
United States Court of Appeals, Seventh Circuit.

PAIN CENTER OF SE INDIANA LLC, the Pain Medicine and Rehabilitation Center P.C., and Anthony Alexander, M.D., Plaintiffs-Appellants,
v.
ORIGIN HEALTHCARE SOLUTIONS LLC, SSIMED LLC, Origin Holdings, Inc., John Does (1–50) inclusive, and John Does (1–100) inclusive, Defendants-Appellees.

No. 17-1276
|
Argued September 6, 2017
|
Decided June 20, 2018

Synopsis

Background: Healthcare clinic brought action against provider of billing services and associated entities, asserting claims for breach of contract, breach of warranty, breach of implied duty of good faith, and various tort claims under Indiana law. The United States District Court for the Southern District of Indiana, No. 1:13-cv-00133-RLY-DKL, Richard L. Young, J., granted defendants' motion for summary judgment. Clinic appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

predominant thrust of two agreements between clinic and provider was medical billing and information technology (IT) services, rather than sale of goods, and

clinic's fraud claim accrued, and six-year statute of limitations began to run, on date that clinic discovered that provider's software was cause of its billing problems.

Affirmed in part, reversed in part, and remanded.

***456** Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:13-cv-00133-RLY-DKL—**Richard L. Young**, *Judge*.

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Before Wood, Chief Judge, and Rovner and Sykes, Circuit Judges.

Opinion

Sykes, Circuit Judge.

In June 2003 Pain Center of SE Indiana contracted with a company called SSIMED LLC for medical-billing software and related services. In June 2006 the parties entered into a second contract, this time for records-management software and related services. Almost seven years later—in January 2013—Pain Center sued SSIMED raising multiple claims for relief, including breach of contract, breach of warranty, breach of the implied duty of good faith, and four tort claims, all arising out of alleged shortcomings in SSIMED's software and services.

The district judge found the entire suit untimely and entered summary judgment for SSIMED. We affirm on all but the claims for breach of contract. The judge applied the four-year statute of limitations under Indiana's Uniform Commercial Code ("UCC"), holding that the two agreements are mixed contracts for goods and services, but the goods (i.e., the software) predominate. We disagree. Under Indiana's "predominant thrust" test for mixed contracts, the agreements in question fall on the "services" side of the line, so the UCC does not apply. The breach-of-contract claims are subject to Indiana's ten-year statute of limitations for written contracts and are timely. The suit may go forward only on those claims.

I. Background

The plaintiffs are Pain Center of SE Indiana LLC, a clinic serving patients who suffer from chronic pain; its founder and sole member, Dr. Anthony Alexander; and its corporate successor, The Pain Medicine and Rehabilitation Center P.C. We refer to the plaintiffs

collectively as "Pain Center." The defendants are SSIMED LLC; Origin ***457** Healthcare Solutions LLC, the corporation that acquired SSIMED LLC in 2005; and Origin Holdings, Inc., its indirect parent corporation. We refer to them collectively as "SSIMED." The suit also names 150 John Does as defendants, but as we explain later, these nominal placeholders can be disregarded.

SSIMED provides billing services to healthcare providers through proprietary billing and records-management software. Its software line includes Practice Manager, a billing program that functions as a platform for submitting claims to SSIMED for transmission to insurers, and EMRge, a records-management software that works in conjunction with Practice Manager. On June 18, 2003, Pain Center entered into an agreement with SSIMED to purchase the Practice Manager software and related services, including ongoing billing services, IT support and electronic claim-submission services, and five days of initial training in how to use the software.

Filing claims using SSIMED's billing system involves several steps. First, at the end of each day, the healthcare provider enters into the Practice Manager program the relevant claim information for all reimbursable healthcare services performed that day. The software then transmits the daily closing files to SSIMED in a zip file, and SSIMED generates claim files from the daily closing information and sends claims to insurers for payment.

Claim processing can fail at any step of this process. Certain data-entry errors by the healthcare provider may prevent successful transmission of daily closing files to SSIMED. Other errors would not impede transmission to the insurer but can result in nonpayment of the claim. The healthcare provider can track the status of its claims using a software tool called the Client Center. Claims with errors at any step of the process remain in the Client Center until corrected and resubmitted.

Dr. Alexander testified in deposition that Pain Center experienced problems with Practice Manager "[a]lmost from the beginning." More specifically, Dr. Alexander noticed "[p]roblems with accuracy in the amounts that were sent," "[p]roblems with dates missing," and "entire transmissions that had been resent [and then were] missing." Dr. Alexander confronted SSIMED about these problems in 2003, and SSIMED told him that the insurers were to blame for any unpaid claims. Dr. Alexander testified that Pain Center followed up with health insurers "on numerous occasions," but the insurers reported that they never received the claims. Soon after implementing Practice Manager, Dr. Alexander noticed that Pain Center was "losing money like crazy." But he insists that he did not realize until much later that SSIMED's software and services were to blame for his cash-flow problems.

Despite these concerns, Pain Center entered into a second contract with SSIMED on June 28, 2006—this time for a software program called EMRge that worked in conjunction with Practice Manager to facilitate patient records management and billing reimbursement. Like the first contract, this one included the software, five days of initial training in its use, ongoing billing services, and IT support. Dr. Alexander thought that implementing EMRge would resolve the payment losses his clinic was suffering. But just as with Practice Manager, he experienced problems with EMRge "[a]lmost from the beginning."

In October 2011 Pain Center hired Demetria Hilton Pierce, a billing specialist, and she immediately noticed that some of Pain Center's claims were going unpaid. Pierce asked SSIMED about the unpaid claims. SSIMED directed her to log in to the Client Center. When she did so, she discovered ***458** that the Client Center had not been opened in about 18 months. Thousands of unpaid claims had piled up in the meantime. For many of these claims, the deadline for submission to the insurer had passed. Pain Center made an effort to recover payment, but the insurers refused to pay the stale claims. Dr. Alexander maintains this was the first time he learned of the Client Center and how it functioned.

On January 24, 2013, Pain Center filed suit against SSIMED alleging that its Practice Manager and EMRge software and related billing services caused these losses. As relevant here, the complaint raised several contract-based claims (breach of contract, breach of warranty, and breach of the implied duty of good faith and fair dealing) and four tort claims (tortious interference with business relations, fraud, fraud in the inducement, and fraudulent misrepresentation).

On cross-motions for summary judgment, the judge concluded that the statute of limitations for each claim had long since expired. The judge ruled that all of Pain Center's claims accrued soon after the execution of the two agreements in 2003 and 2006, respectively, because Dr. Alexander admitted that he was aware of problems with SSIMED's billing system "[a]lmost from the beginning." Under Indiana law, fraud claims are subject to a six-year statute of limitations, so this accrual ruling meant that all three fraud-based claims were time-barred. The tortious-interference claim was likewise untimely under the applicable two-year limitations period. The judge also concluded that all of the contract-based claims are governed by the UCC because the agreements in

question were predominantly for the sale of goods—that is, the software. Indiana UCC claims are subject to a four-year statute of limitations, so the judge held that these claims too were untimely. Finally, the judge rejected Pain Center's argument that equitable tolling saved its claims.

II. Discussion

Before turning to the merits of the judge's timeliness rulings, we pause to address a lingering doubt about subject-matter jurisdiction. As we've explained, the operative complaint names as defendants John Does 1–100 (identified only as shareholders, promoters, or subscribers of Origin Holdings, Inc.) and John Does 1–50 (identified only as individuals, corporations, or associations that are somehow responsible for Pain Center's damages). The parties do not mention the John Does in their jurisdictional statements, but we have an independent duty to verify subject-matter jurisdiction. *Dexia Crédit Local v. Rogan*, 602 F.3d 879, 883 (7th Cir. 2010).

The jurisdictional basis for this suit is diversity of citizenship, *see* 28 U.S.C. § 1332, which requires complete diversity between the parties.[1] All of the plaintiffs are citizens of Indiana, and the complaint alleges "upon information and belief" that the John Does are *not* citizens of Indiana. But without knowing who or what the John Does might be, their citizenship remains a mystery. Because the prerequisites for diversity jurisdiction must be proved and not presumed, John Doe defendants are ordinarily forbidden in federal diversity suits. *Howell ex rel. Goerdt v. Tribune Entm't Co.*, 106 F.3d 215, 218 (7th Cir. 1997).

***459** An exception applies when the John Does are nominal parties—nothing more than placeholders "in the event that during discovery [the plaintiff] identifie[s] any additional defendants he wishe[s] to add to the suit." *Moore v. Gen. Motors Pension Plans*, 91 F.3d 848, 850 (7th Cir. 1996). We've held that "the citizenship of such defendants can be disregarded for diversity jurisdiction." *Dalton v. Teva N. Am.*, 891 F.3d 687, 689 (7th Cir. 2018) (citing *Moore*, 91 F.3d at 850); *see also Howell*, 106 F.3d at 218. The 150 John Does are mere placeholders, so we can safely ignore them for purposes of diversity jurisdiction. Complete diversity otherwise exists, so our jurisdiction is secure.

With that preliminary matter resolved, we proceed to the merits. We review the summary-judgment order de novo, construing the evidence and drawing inferences in Pain Center's favor. *Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am.*, 849 F.3d 355, 361 (7th Cir. 2017).

A. Contract-Based Claims

1. *Breach of Contract*

The timeliness of Pain Center's claims for breach of contract depends on whether the contracts fall within the UCC. If the contracts are for the sale of goods and the UCC applies, then the claims are subject to a four-year limitations period, *see* IND. CODE § 26-1-2-725(1), which expired long before Pain Center filed suit. If the UCC does not apply, then the claims are subject to Indiana's ten-year statute of limitations for written contracts and are timely.[2] *See id.* § 34-11-2-11.

The judge held that the UCC's four-year limitations period applies, reasoning that the agreements in question are mixed contracts for goods and services in which goods predominate. The judge correctly identified the test used in Indiana for resolving a question like this but erred in its application.

Where a contract involves the purchase of a "preexisting, standardized software," Indiana courts treat it as a contract for the sale of goods governed by the UCC. *Olcott Intern. & Co. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063, 1071 (Ind. Ct. App. 2003). On the other hand, where a contract calls for the design of software to meet the buyer's specific needs, Indiana treats it as a services contract. *Data Processing Servs., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 318–19 (Ind. Ct. App. 1986), *rev'd on other grounds*, *Insul–Mark Midwest, Inc. v. Modern Materials, Inc.*, 612 N.E.2d 550, 554 (Ind. 1993). For example, in *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*, 906 N.E.2d 805, 812 (Ind. 2009), the court held that the UCC does not apply where one party hires the other to design a custom website and provide webhost services.

Here it's clear that Pain Center licensed SSIMED's preexisting, standardized software. SSIMED's sales representative Joy Deckard testified in deposition that the licensing agreements involved "standardized," ***460** "out-of-the-box-type software." She also explained that SSIMED does not design custom software to meet the

needs of individual healthcare providers. She acknowledged that a healthcare provider could make minor changes to the standardized software, but she did not elaborate on the precise extent of this capability.

In response Pain Center points to evidence that it asked for (and obtained) minor modifications within the confines of the standardized software. Dr. Alexander testified that he asked SSIMED to add a question to a patient survey and SSIMED did so. Pain Center's billing specialist testified that at her request SSIMED arranged for the payment amounts associated with certain billing codes to automatically populate in the software. Setting up field auto-population and adding a single survey question to a preexisting, standardized software program does not convert it into custom software designed specifically for a particular purchaser.

Pain Center also seizes on one of SSIMED's interrogatory answers stating that it "created [p]laintiffs' database from the ground up." But as SSIMED explains, this meant only that it used its standardized software to create a database with Pain Center's information: provider names, referring physicians, and procedure codes. That is, SSIMED used its preexisting, standardized software to serve Pain Center's objectives; it did not design a new, customized software program for its client.

Finally, Pain Center relies on contract language contemplating the possibility of purchasing custom programming services. But there's no evidence that Pain Center ever purchased these services or that SSIMED ever offered them. In sum, because the Practice Manager and EMRge programs were preexisting and standardized, we agree with the district judge that the software should be treated as a good. And because the two software programs are properly classified as goods, the contracts between SSIMED and Pain Center are appropriately characterized as mixed contracts for both goods and services.

To determine whether the UCC applies to a mixed contract for both goods and services, Indiana uses the "predominant thrust test." *Insul–Mark Midwest*, 612 N.E.2d at 554. Indiana courts ask whether the predominant thrust of the transaction is the performance of services with goods incidentally involved or the sale of goods with services incidentally involved. *Id.* To determine whether services or goods predominate, the test considers (1) the language of the contract; (2) the circumstances of the parties and the primary reason they entered into the contract; and (3) the relative costs of the goods and services. *Id.* at 555.

Here the language of the contracts is largely a neutral factor, though in some limited respects it points toward a conclusion that services predominate. Each agreement is a single double-sided sheet of paper: the front is a simple order form; the back supplies the terms and conditions of the agreement. The front also identifies services (e.g., "Monthly Services & Support," "On-site training") as well as software ("SSIMED EMRge" and "SSIMED Practice Manager Suite"). Pain Center paid for monthly billing services and IT support for the life of the contracts; the services are described on the back page as including "telephone support," "on-line support," and "electronic claim submission." The back of the Practice Manager contract also lists the various software modules incorporated in the Practice Manager software, including modules for collections, appointment scheduling, and electronic-claim submission, among others. In short, the language of the contract provides ***461** slight support for a conclusion that the predominant focus of these agreements was ongoing billing and IT services and that the software was a tool that allowed SSIMED to perform those services.

The next step in the predominant-thrust test asks us to examine the parties' circumstances to determine whether their primary reason for entering the contract was the goods or the services component. Pain Center argues that its primary reason for executing these agreements was to obtain SSIMED's billing services and that the software was merely a conduit to transfer claims data to SSIMED to allow it to perform those services. SSIMED counters that the parties' focus was software—not services—because Pain Center used the software day in and day out; it points out that the initial training on the programs lasted a total of only ten days.

Pain Center has the better of this debate. SSIMED overlooks that Pain Center received monthly billing and IT services for the life of both contracts. In fact, Deckard testified that SSIMED licensed its software *only* when purchased in conjunction with billing and support services. Pain Center used the software to input its daily insurance claims and transmit the data via zip file to SSIMED's billing system. After receiving a zip file from Pain Center, SSIMED generated claims files and submitted them to insurers. If the insurer refused to pay a claim due to an error, SSIMED placed them in the Client Center to be corrected. The software was merely the vehicle through which Pain Center communicated its claims information to SSIMED in order to access its billing and collection services. This second factor weighs heavily in favor of a conclusion that services predominate and that the goods were incidental.

The third and final factor—the relative cost of the goods and services—also points toward that conclusion. As the Indiana Supreme Court has explained, "[i]f the cost of the goods is but a small portion of the overall contract price, such fact would increase the likelihood that the services portion predominates." *Insul–Mark Midwest*, 612 N.E.2d at 555. Under the Practice Manager agreement, Pain Center paid a one-time licensing fee of $8,000 for software; a one-time training fee of $2,000; and $224.95 each month for services and support for about nine years. Thus, for the life of the Practice Manager agreement, the services totaled approximately $26,294—more than three times the $8,000 licensing fee for the software. Under the EMRge agreement, Pain Center paid a one-time licensing fee of $23,275 for the software; a one-time training fee of $4,000; and $284 per month for services and support for about six years. Thus, the services totaled about $24,448—slightly more than the $23,275 software licensing fee. The relative-cost factor reinforces the conclusion that services predominate.

On balance, then, the predominant thrust of the two agreements is medical billing and IT services, not the sale of goods. So the UCC and its four-year limitations period do not apply. Instead, the breach-of-contract claims are subject to Indiana's ten-year statute of limitations for written contracts and are timely.

Before moving on, we take a moment to address SSIMED's argument that we should affirm on the alternative ground that Pain Center cannot show causation or damages. This requires only brief comment.

SSIMED's argument regarding causation is as follows: Pain Center's claims hinge on its assertion that a software defect caused its losses; expert testimony is required to show that a software defect caused the losses; and the judge ruled that ***462** Pain Center's proffered expert, Mark Anderson, can testify that the software's "poor functionality or interface" caused Pain Center's damages, but he is unqualified to testify that "software defects" caused Pain Center's damages—hence, the contract claims fail.

But the breach-of-contract claims do *not* hinge on a contention that a software defect caused the losses. Pain Center asserts that SSIMED failed to satisfy its contractual obligations and caused losses in a number of respects: it (1) inadequately trained Pain Center employees; (2) did not reliably submit claims to insurers; and (3) failed to notify Pain Center of problems with claims. Pain Center may prevail on its breach-of-contract claims without proving a particular defect in SSIMED's software.

Regarding damages, SSIMED argues that Pain Center's proffered expert testimony is entirely speculative. Because Pain Center has offered other evidence of damages—including Dr. Alexander's testimony that thousands of claims went unpaid by insurers—we do not need to wade into questions about the admissibility of the damages expert's testimony.

Pain Center mounts a halfhearted effort to convince us to find as a matter of law that SSIMED breached the contracts and is liable for $15 million in damages. That's a serious overreach. Many material factual disputes remain on the questions of breach, causation, and damages. Indeed, Pain Center's own expert could give only a loose range of the healthcare practice's damages from unpaid claims: somewhere between $7.2 million and $15 million. We hold only that the breach-of-contract claims are timely. On remand Pain Center will have to prove its entitlement to relief.

2. *Breach of Warranty*

Pain Center also raised claims for breach of the implied warranty of fitness for a particular purpose and the implied warranty of merchantability. These are UCC claims, *see* IND. CODE §§ 26-1-2-315, -314, and we've just explained why the UCC does not apply. The Indiana Supreme Court has declined to create a common-law equivalent of the UCC's implied-warranty cause of action in cases between merchants dealing at arm's length. *See Insul–Mark Midwest*, 612 N.E.2d at 556. Judgment for SSIMED on these claims was therefore appropriate, though on a different ground.

3. *Breach of Implied Covenant of Good Faith*

Pain Center's final contract-based claim is one for breach of the covenant of good-faith performance, which the UCC implies in every contract. *See* IND. CODE § 26-1-1-203. Because the UCC does not apply, this claim drops out too. We note for completeness that this section of the UCC "does not support an independent cause of action for failure to perform or enforce in good faith." *Id.* cmt. (West 2018). And in Indiana a common-law duty of good faith and fair dealing arises "only in limited circumstances, such as when a fiduciary relationship exists." *Del Vecchio v. Conseco, Inc.*, 788 N.E.2d 446, 451 (Ind. Ct. App. 2003). No fiduciary relationship exists

here. Finally, and in any event, such a claim is subject to a two-year limitations period, *id.* (citing IND. CODE § 34-11-2-4(2)), which has long since expired. The claim fails for a host of reasons.

B. Tort Claims

Pain Center's remaining claims sound in tort. The three fraud claims are subject to a six-year limitations period, *see* IND. CODE § 34-11-2-7(4), and here we agree with the district judge that they are clearly time-barred. Dr. Alexander testified unequivocally that (1) SSIMED's software and services ***463** did not function as promised "from the beginning"; (2) he promptly confronted SSIMED about these failures and was told that the insurers were to blame; and (3) he followed up with the insurers "on numerous occasions" and was told that they never received the claims. This testimony establishes that Dr. Alexander was well aware soon after implementing SSIMED's billing system in June 2003 and June 2006 that the SSIMED software and services were the source of his billing problems—not the insurance companies—and thus that potential claims for misrepresentation existed.

Pain Center contends that the fraud claims accrued anew each time SSIMED repeated the same alleged misrepresentations. But one of the essential elements of Indiana common-law fraud is that the misrepresentation "was rightfully relied upon by the complaining party." *Kesling v. Hubler Nissan, Inc.*, 997 N.E.2d 327, 335 (Ind. 2013). Once Pain Center was on notice that it had been bamboozled, it could not continue to rely on those same alleged misrepresentations when SSIMED repeated them.

Pain Center also seeks recovery for tortious interference with business relations. The theory underlying this claim is hazy, but the argument seems to be that SSIMED's inadequate software and services led to so many unpaid claims that Pain Center was unable to take advantage of business opportunities. This claim is subject to a two-year limitations period. IND. CODE § 34-11-2-4(a); *Miller v. Danz*, 36 N.E.3d 455, 457 (Ind. 2015). Here again, because Dr. Alexander knew in 2003 and 2006 that SSIMED's software and services were not performing as represented—and indeed, that his clinic was suffering obvious cash-flow problems during this period—this claim is plainly time-barred.

Pain Center makes a last-ditch plea for equitable tolling based on the doctrines of fraudulent concealment and "continuing wrong." Indiana recognizes that a defendant's fraudulent concealment of a cause of action tolls the statute of limitations. IND. CODE § 34-11-5-1. Moreover, under Indiana's continuing-wrong doctrine, when a wrong occurs outside the limitations period and closely related wrongs occur within the limitations period, the plaintiff can recover for all wrongs. *Marion County v. Indiana*, 888 N.E.2d 292, 299 (Ind. Ct. App. 2008). But neither doctrine tolls the statute of limitations if the plaintiff obtains information that should lead to the discovery of the cause of action. *Snyder v. Town of Yorktown*, 20 N.E.3d 545, 551 (Ind. Ct. App. 2014); *C & E Corp. v. Ramco Indus., Inc.*, 717 N.E.2d 642, 645 (Ind. Ct. App. 1999). Pain Center had actual knowledge of potential causes of action in 2003 and 2006, which is outside the statutory limitations period for all of the tort claims. Equitable tolling cannot save them.

Accordingly, we REVERSE the judgment only with respect to the claims for breach of contract and REMAND for further proceedings.[3] In all other respects, the judgment is AFFIRMED.

All Citations

893 F.3d 454, 96 UCC Rep.Serv.2d 66

Footnotes

1 The original complaint included a federal Lanham Act claim, but that claim dropped out early on; nothing in the record suggests that the judge opted to retain supplemental jurisdiction over the remaining state-law claims.

2 In an alternative ruling, the judge held that if the UCC does not apply, then the contract claims are subject to Indiana's six-year statute of limitations for "action[s] upon promissory notes, bills of exchange, or other written contracts for the payment of money." IND. CODE § 34-11-2-9. On this alternative view, the claims are also untimely. But as SSIMED conceded at oral argument, the judge's alternative ruling was incorrect. Indiana interprets "contracts for the payment of money" narrowly; this category includes only contracts that establish an obligation to pay money and excludes agreements to pay money in exchange for something else. *Folkening v. Van Petten*, 22 N.E.3d 818, 822 (Ind. Ct. App. 2014).

3 Pain Center asks us to reassign the case to a different judge pursuant to Circuit Rule 36. We see no reason to do so.

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EXHIBIT B

813 F.3d 912
United States Court of Appeals,
Tenth Circuit.

Phillip MOCEK, Plaintiff–Appellant,
v.
CITY OF ALBUQUERQUE; Albuquerque Aviation Police Department; Marshall Katz, in his official capacity as Chief of Police of the Albuquerque Aviation Police Department; Jonathan Breedon; Gerald Romero; Anthony Schreiner; Robert F. Dilley, also known as Bobby Dilley; Landra Wiggins; Julio De La Pena; Does 1–25, inclusive, Defendants–Appellees.

No. 14–2063.
|
Dec. 22, 2015.

Synopsis

Background: Arrestee brought § 1983 and *Bivens* claims and state-law malicious abuse of process claim against city, city's aviation police department, its chief of police and various police officers, and Transportation Security Administration (TSA) agents, alleging that defendants refused to permit him to record on video the official conduct of TSA agents at airport security screening checkpoint and arrested and prosecuted him for refusing to produce documentation of his identity. The United States District Court for the District of New Mexico, James O. Browning, J., 3 F.Supp.3d 1002, granted defendants' motion to dismiss for failure to state a claim. Arrestee appealed.

Holdings: The Court of Appeals, Tymkovich, Chief Judge, held that:

investigatory stop was supported by reasonable suspicion;

arresting officer had qualified immunity;

arresting officer did not violate a clearly established right to protection from First Amendment retaliation; and

arrestee failed to state a claim for malicious abuse of process.

Affirmed.

Attorneys and Law Firms

***919** Mary Louis Boelcke (William Simpich, Law Office of William Simpich, Oakland, CA, and James R. Wheaton, Cherokee Melton, First Amendment Project, Oakland, CA, with her on the briefs), Albuquerque, NM, for Appellant.

Jeffrey L. Baker, the Baker Law Firm (Renni Zifferblatt, The Baker Law Firm, with him on the brief), Albuquerque, NM, for City of Albuquerque Appellees.

Edward J. Martin, Senior Trial Attorney, Torts Branch (Joyce R. Branda, Acting Assistant Attorney General, Damon Martinez, United States Attorney, Rupa Bhattacharyya, Director, Torts Branch, Andrea W. McCarthy, Senior Trial Counsel, and H. Thomas Byron III, Appeals Counsel, with him on the brief) Civil Division, United States Department of Justice, Washington, D.C., for the Federal Appellees.

Before TYMKOVICH, Chief Judge, GORSUCH, and HOLMES, Circuit Judges.

Opinion

TYMKOVICH, Chief Judge.

Phillip Mocek was arrested for concealing his identity after filming airport security procedures and being questioned on suspicion of disorderly conduct. He then sued agents of the Transportation Security Administration, officers of the Albuquerque Aviation Police Department, and the City of Albuquerque for alleged constitutional violations. He asserted that he was arrested without probable cause and in retaliation for protected speech. He further contended that the officers and City abused process under New Mexico law.

The district court dismissed each of his claims. We conclude that the individual defendants are entitled to qualified immunity ***920** because a reasonable officer could have believed Mocek violated New Mexico law by failing to show identification during an investigative stop. In addition, it was not clearly established that a plaintiff could maintain a retaliatory arrest claim for an arrest arguably supported by probable cause. Mocek also fails to state claims for malicious abuse of process or municipal liability. We AFFIRM.

I. Background

Mocek has a practice of refusing to show his photo identification at airport security checkpoints. Prior to 2008, he was able to clear checkpoints by complying with alternative TSA identification procedures. In 2008, the TSA established a policy that those who "simply refuse[d] to provide any identification or assist transportation security officers in ascertaining their identity" would not be allowed past checkpoints, but that people whose I.D.s had been "misplaced" or "stolen" could get through if they cooperated with alternative procedures. App. 014.

A. The Arrest

In November 2009, Mocek arrived at the Albuquerque Sunport for a flight to Seattle. He gave his driver's license—his only form of photo I.D.—to a travel companion who then went through security. At the security podium Mocek gave the TSA agent his boarding pass, but told him he did not have identification. The agent then directed him to a different line, where another TSA agent began an alternative identification procedure. This entailed asking Mocek for other proof of identity, such as a credit card. When Mocek did not comply, the agent told him he would contact the TSA's Security Operations Center and that if the Center could not verify Mocek's identity, Mocek would not be allowed through the checkpoint.

Believing these procedures were atypical, Mocek began filming the encounter. The agent ordered him to stop recording. When Mocek persisted, the agent summoned the police for assistance. While the police were on their way, two other TSA agents appeared. One of them ordered Mocek to stop filming and apparently attempted to grab the camera out of his hand. Mocek remained calm, but continued to record and would not identify himself.

When the police arrived, the agents told them that Mocek was "causing a disturbance," would not put down his camera, and was "taking pictures" of all the agents. *Id.* at 018–19. One of the officers, Robert Dilley, warned Mocek that if he did not comply with the agents' instructions, he would be escorted out of the airport. Another officer threatened to arrest Mocek. But Mocek continued to film and insisted that he was in compliance with TSA regulations.[1] Officer Dilley eventually began ushering Mocek out of the airport, but having heard from another officer that Mocek refused to show his identification, he stopped and asked to see Mocek's I.D. Officer Dilley told Mocek that he could be arrested if he did not present identification. ***921** Mocek responded that he did not have any identification on him. Officer Dilley then said that Mocek was under investigation for disturbing the peace and was required to present identification. Mocek declared that he would remain silent and wanted to speak to an attorney. Officer Dilley arrested him. At some point, the police confiscated the camera and deleted the video recordings.

B. The Criminal Complaint and Trial

In the officers' incident reports, they stated that Mocek had caused a disturbance by yelling and had disobeyed an order to leave the airport. They ultimately charged him with disorderly conduct, concealing name or identity, resisting an officer's lawful command, and criminal trespass. Their criminal complaint alleged that he "was refusing [to comply] and began causing a disturbance, by yelling." *Id.* at 022 (internal quotation marks omitted). Mocek contends that the video recordings, which he recovered using forensic software, disprove these allegations. He introduced that footage at his criminal trial and was acquitted on all counts.

C. The District Court Proceedings

Mocek brought this action alleging First and Fourth Amendment violations and seeking damages under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), as well as declaratory relief. He contended that (1) the agents and officers violated the Fourth Amendment by arresting him without probable cause to believe he had committed a crime, and (2) the arrest was in retaliation for exercising his alleged First Amendment right to film at a security checkpoint. He additionally sued the officers and City for malicious abuse of process under New Mexico tort law, asserting they had arrested him for purely pretextual reasons and then filed a criminal complaint without probable cause.

The district court granted the defendants' Rule 12(b)(6) motions to dismiss for all claims.

II. Analysis

Mocek claims the district court should not have dismissed the complaint, contending he adequately pleaded that (1) it was clearly established that no probable cause existed to arrest him for concealing identity under New Mexico law, (2) it was clearly established that filming at the checkpoint was protected speech under the First Amendment, and (3) the officers and City maliciously abused the judicial process by filing a criminal complaint against him unsupported by probable cause.

We review the district court's grant of a Rule 12(b)(6) motion to dismiss de novo. *McDonald v. Wise,* 769 F.3d 1202, 1210 (10th Cir.2014). To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "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,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Thus, a plaintiff cannot rely on "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955. We accordingly "disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Khalik v. United Air Lines,* 671 F.3d 1188, 1191 (10th Cir.2012).

***922** We first discuss Mocek's constitutional claims as they pertain to the individual defendants. Next, we consider whether his constitutional claims can stand against the City. Finally, we review his tort claim for malicious abuse of process against the police defendants and the City.

A. Constitutional Claims Against the Individual Defendants

1. Qualified Immunity Standard

Individual government actors are immune from suit under § 1983 and *Bivens* unless a plaintiff demonstrates "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al–Kidd,* 563 U.S. 731, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011) (internal quotation marks omitted). For a violation to be clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Morris v. Noe,* 672 F.3d 1185, 1196 (10th Cir.2012). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al–Kidd,* 131 S.Ct. at 2083. Our inquiry is whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Morris,* 672 F.3d at 1196 (internal quotation mark omitted) (quoting *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). An officer is therefore immune for a reasonable mistake of law, reasonable mistake of fact, or a reasonable mistake "based on mixed questions of law and fact." *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (internal quotation mark omitted).

2. Fourth Amendment Claims

Mocek's first claim is that the defendants violated his Fourth Amendment rights by arresting him without a warrant. The district court held there was probable cause to arrest Mocek for concealing his identity when he did not produce an I.D. after the officers requested it. Mocek argues it was clearly established that Officer Dilley had insufficient evidence to arrest him for that crime or any other.

As a general matter, a warrantless arrest is consistent with the Fourth Amendment when there is probable cause to believe the arrestee has committed a crime. *Stearns v. Clarkson,* 615 F.3d 1278, 1282 (10th Cir.2010). In New Mexico, it is a misdemeanor to "conceal[ ] one's true name or identity ... with intent to obstruct the due execution of the law or with intent to intimidate, hinder, or interrupt any public officer or any other person in a legal performance of his duty." N.M. Stat. Ann. § 30–22–3. But an officer may not arrest someone for concealing identity without "reasonable suspicion of some predicate, underlying crime." *Keylon v. City of Albuquerque,* 535 F.3d 1210, 1216 (10th Cir.2008) (citing *Brown v. Texas,* 443 U.S. 47, 52, 99 S.Ct. 2637, 61

L.Ed.2d 357 (1979)). During an investigative stop supported by reasonable suspicion of a predicate, underlying crime, "it is well established that an officer may ask a suspect to identify himself." *Hiibel v. Sixth Judicial Dist. Court,* 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004). A state may criminalize the suspect's failure to comply. *Id.* at 188, 124 S.Ct. 2451.

Thus, to determine whether Mocek's arrest comported with the Fourth Amendment, we must first consider whether there was reasonable suspicion to stop him and request his identity. If there was, we next must determine whether probable cause existed to believe he concealed his ***923** identity. Although we hold the investigative stop was justified by reasonable suspicion of disorderly conduct, we doubt that there was probable cause to arrest Mocek merely for failing to show documentation proving his identity in this case. Nonetheless, the officers are entitled to qualified immunity because even assuming they misinterpreted New Mexico law, their mistake was reasonable.

a. Reasonable Suspicion

We look to the "totality of the circumstances" to determine whether there was reasonable suspicion of wrongdoing. *United States v. Arvizu,* 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). "[T]he likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *Id.* The question is "whether the facts available to the detaining officer, at the time, warranted an officer of reasonable caution in believing the action taken was appropriate." *United States v. Winder,* 557 F.3d 1129, 1134 (10th Cir.2009) (internal quotation marks omitted) (quoting *Terry v. Ohio,* 392 U.S. 1, 21–22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). And "reasonable suspicion may exist even if it is more likely than not that the individual is not involved in any illegality." *United States v. McHugh,* 639 F.3d 1250, 1256 (10th Cir.2011) (internal quotation marks omitted).

The district court held the facts known to the officers justified stopping Mocek on reasonable suspicion of disorderly conduct. We agree. Under New Mexico law, disorderly conduct consists of conduct that (1) is "violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly" and (2) tends to disturb the peace. *Fogarty v. Gallegos,* 523 F.3d 1147, 1156 (10th Cir.2008); *see also* N.M. Stat. Ann. § 30–20–1(A). "Conduct which tends to disturb the peace is that conduct which is inconsistent with the peaceable and orderly conduct of society." *State v. Correa,* 147 N.M. 291, 222 P.3d 1, 7 (2009) (internal quotation marks omitted). This includes an act that "disturbs the peace and tranquility of the community." *Id.* at 9 (internal quotation marks omitted).

Mocek argues that he was calm throughout the ordeal and did not disturb other travelers. But the complaint alleges that when police arrived, the TSA agents told them he had been "causing a disturbance," refused orders to put down his camera, and was filming the agents. App. 018–19. Officer Dilley, the arresting officer, was entitled to rely in good faith on these representations of Mocek's earlier conduct. *Albright v. Rodriguez,* 51 F.3d 1531, 1536 (10th Cir.1995) (holding an officer's reasonable-suspicion determination could rely on border patrol agent's representations of events that occurred before the officer arrived); *see also Foote v. Spiegel,* 118 F.3d 1416, 1424 (10th Cir.1997) ("Officers may rely on information furnished by other law enforcement officials to establish reasonable suspicion and probable cause for an arrest."). In addition, the officers witnessed at least three TSA agents attending to the situation, having left behind other duties. These sorts of disruptions at TSA checkpoints are especially problematic.[2] Consequently, the officers ***924** had grounds to suspect Mocek had engaged or was engaged in disorderly behavior that would tend to disturb the peace at an airport security checkpoint. The fact that bystanders were undisturbed did not eliminate reasonable suspicion. Culpable conduct need not actually disturb the peace, but merely must be of the sort that *tends* to disturb the peace. *State v. James M.,* 111 N.M. 473, 806 P.2d 1063, 1066 (Ct.App.1990).

In concluding there was reasonable suspicion of disorderly conduct, we emphasize the uniquely sensitive setting we confront in this case. *See Correa,* 222 P.3d at 9 (suggesting the "time, place, and manner" of the defendant's conduct influences whether it "disturb[s] the tranquility of the community"); *cf. United States v. Guardado,* 699 F.3d 1220, 1223 (10th Cir.2012) (holding the location of an investigative stop is "a factor that contributes to an officer's reasonable suspicion"). Order and security are of obvious importance at an airport security checkpoint. *See Corbett v. TSA,* 767 F.3d 1171, 1180 (11th Cir.2014), *cert. denied,* —— U.S. ——, 135 S.Ct. 2867, 192 L.Ed.2d 897 (2015); *United States v. Hartwell,* 436 F.3d 174, 179 (3d Cir.2006); *United States v. Marquez,* 410 F.3d 612, 618 (9th Cir.2005); *United States v. Yang,* 286 F.3d 940, 944 n. 1 (7th Cir.2002). As a result, conduct that is relatively benign elsewhere might

work to disturb the peace at these locations. Many travelers are tense, no one enjoys the screening process, and people are in various states of disrobing and adjusting clothing without a modicum of privacy.

From a reasonable officer's perspective, Mocek's filming may have invaded the privacy of other travelers or posed a security threat, insofar as it could have been used to circumvent or expose TSA procedures. The possibility that he had malign intentions raised the likelihood that his conduct would compromise orderly operations at the checkpoint. So did the chance that he was violating TSA regulations against interfering with security systems or personnel. *See* 49 C.F.R. §§ 1540.105(a), 1540.109. Mocek had been resisting the agents' attempts to identify him, and it was clear that passengers who "simply refuse [d] to provide any identification or assist transportation security officers in ascertaining their identity" would not be allowed past checkpoints. App. 014.

Based on the face of the complaint, the information available to Officer Dilley indicated that Mocek had distracted multiple TSA agents, persistently disobeyed their orders, already caused a "disturbance" (according to the agents on the scene), and potentially threatened security procedures at a location where order was paramount. Under these circumstances, a reasonable officer would have had reason to believe, or at least investigate further, that Mocek had committed or was committing disorderly conduct.

Accordingly, Officer Dilley was justified in stopping Mocek and asking him to identify himself as part of the investigation. *Hiibel,* 542 U.S. at 186, 124 S.Ct. 2451.

b. Probable Cause

Our next inquiry is whether there was probable cause, or at least arguable probable cause, to arrest Mocek for concealing name or identity under N.M. Stat. Ann. § 30–22–3. *See Cortez v.* ***925** *McCauley,* 478 F.3d 1108, 1120, 1120 n. 15 (10th Cir.2007) (en banc) (explaining that a reasonable belief in probable cause, sometimes referred to as "arguable probable cause," confers qualified immunity). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *York v. City of Las Cruces,* 523 F.3d 1205, 1210 (10th Cir.2008) (internal quotation marks omitted). This is true regardless of the officer's subjective intent. *Apodaca v. City of Albuquerque,* 443 F.3d 1286, 1289 (10th Cir.2006) ("The constitutionality of an arrest does not depend on the arresting officer's state of mind."); *see also Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

Mocek argues there was no probable cause to arrest him for concealing name or identity under § 30–22–3 because (1) Officer Dilley never even asked for Mocek's name;[3] (2) although Officer Dilley did ask for Mocek's I.D., he did not ask for other identifying information; and (3) the statute does not criminalize the mere failure to produce physical documentation of identity.[4] Mocek may be correct that Officer Dilley misinterpreted the statute. But even if he did, he at least had arguable probable cause to arrest Mocek because any mistake of law on his part was reasonable.

To view the statute in context, we must first consider the Supreme Court's decision in *Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). In that case, California had criminalized the failure to furnish "credible and reliable" identification upon request during an investigative stop. *Id.* at 356, 103 S.Ct. 1855. This meant "identification carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.* at 357, 103 S.Ct. 1855 (internal quotation marks omitted). The Court held the statute was unconstitutionally vague because the "credible and reliable" requirement was too indefinite and "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ... satisfied the statute." *Id.* at 358, 103 S.Ct. 1855.

In New Mexico, where the statute prohibits "concealing one's true name *or* identity," N.M. Stat. Ann. § 30–22–3 (emphasis added), "name" and "identity" are not synonymous. *State v. Andrews,* 123 N.M. 95, 934 P.2d 289, 291 (Ct.App.1997). But courts have not precisely defined what it means to furnish "identity," except to say that suspects must "provide police officers the minimal, essential information regarding identity so that they can perform their duties." *Id.* In at least some contexts, this requires documentation or the information contained therein. *Andrews* upheld the conviction of a defendant who gave his name ***926** during a traffic stop but failed to provide his driver's license or equivalent information. *Id.* at 292. The court relied in part on testimony that "this information is necessary for officers to verify a driver's

license and otherwise perform their lawful duties." *Id.* In addition, the holding was grounded in the court's view that there was no vagueness concern under *Kolender* because New Mexico drivers, already on notice that they must carry driver's licenses, could easily discern that the statute required production of a driver's license or the information therein during a traffic stop. *Id.* at 293. Likewise, there was no risk of arbitrary enforcement. *Id.* Nonetheless, the court expressly declined to "specify[ ] what identifying information might be appropriate in all situations." *Id.* at 292.

In light of that careful limitation, we doubt that § 30–22–3 criminalizes the mere failure to produce documentation during a stop for suspicion of disorderly conduct. It is entirely unclear what type of identification a suspect would need to show during such a stop. Nothing on the face of Mocek's complaint or in case law indicates that any particular document is necessary for the officers to perform their investigative duties, although it is obvious that a person intending to clear security screening and board a plane may need some form of identification.[5] Other states' "stop and identify"[6] statutes also suggest that mere failure to produce documentation is not illegal, as most jurisdictions do not compel suspects to furnish documentation outside the context of traffic violations.[7]

***927** In any event, New Mexico law is not entirely clear on whether someone in Mocek's shoes might be required to answer basic questions about his identity, such as a request for his address. But Officer Dilley's *only* request was for documentation, and failing to show documentation, in isolation, during an investigative stop for disorderly conduct might not amount to concealing one's identity.

Nonetheless, Officer Dilley is entitled to qualified immunity. A reasonable mistake in interpreting a criminal statute, for purposes of determining whether there is probable cause to arrest, entitles an officer to qualified immunity. *See Pearson,* 555 U.S. at 231, 129 S.Ct. 808 (holding officials are entitled to qualified immunity for reasonable mistakes of law); *Fogarty,* 523 F.3d at 1159 (resolving qualified immunity question by reviewing whether state law under which suspect was arrested was ambiguous). Here, New Mexico courts had explicitly held "[i]dentity is not limited to name alone" and "failing to give either name or identity may violate the statute." *Andrews,* 934 P.2d at 291. They had also held that at least during traffic stops, the statute requires a driver to produce a driver's license or the information therein upon request. *Id.* at 292. Although the court declined to "specify[ ] what identifying information might be appropriate" outside the driving context, *id.,* it nowhere foreclosed the possibility that documentation is required elsewhere. Thus, a reasonable officer could have believed that an investigative stop for disorderly conduct at an airport security checkpoint required the production of some physical proof of identity. And Mocek provided none.

An officer also could have reasonably determined that Mocek intended "to obstruct the due execution of the law or ... to intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty." N.M. Stat. Ann. § 30–22–3. Suspects must "furnish identifying information *immediately upon request* or, if the person has reasonable concerns about the validity of the request, so soon thereafter as not to cause any substantial inconvenience or expense to the police." *State v. Dawson,* 127 N.M. 472, 983 P.2d 421, 424 (Ct.App.1999) (emphasis added). Mocek did not present identification immediately upon request. When asked a second time, he announced that he would remain silent. Given Mocek's continued refusal to show identification and resolution to remain silent, a reasonable officer could have thought he was intentionally hindering investigative efforts. *See Albright,* 51 F.3d at 1537 (implying that persistent refusal to identify oneself supports inference of intentionally hindering investigation); *see also Hiibel,* 542 U.S. at 186, 124 S.Ct. 2451 ("Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."). Thus, in these circumstances, an officer who reasonably believed identification was required could have also believed that Mocek's ongoing failure to show it violated the statute.

Mocek's responses are unavailing. First, he contends that *Kolender* clearly establishes that suspects have no duty to provide physical identification upon request. But *Kolender* is not on point because it nowhere considered a Fourth Amendment claim. That case merely struck down another state's statute for vagueness under the Fourteenth Amendment, 461 U.S. at 353, 103 S.Ct. 1855, while Mocek does not challenge the constitutional validity of § 30–22–3. At any rate, the validity of the statute is hardly relevant to the probable cause determination ***928** because officers generally may presume that statutes are constitutional until declared otherwise. *See Michigan v. DeFillippo,* 443 U.S. 31, 38, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979) ("Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence

would be bound to see its flaws."); *see also Vives v. City of New York,* 405 F.3d 115, 117–18 (2d Cir.2004) (applying same reasoning to qualified-immunity determination); *Risbridger v. Connelly,* 275 F.3d 565, 573 (6th Cir.2002) (same). Although future courts might limit the scope of *Andrews* more explicitly, police officers are not required to anticipate such limitations.

Even if the validity of § 30–22–3 were relevant to the probable cause determination, Mocek has not shown that the defendants' broad construction of the statute would render it vague. Unlike the California statute in *Kolender,* the New Mexico statute provides that a suspect is only liable if he intends "to obstruct the due execution of the law or ... to intimidate, hinder, or interrupt any public officer or any other person in a legal performance of his duty." N.M. Stat. Ann. § 30–22–3. The Sixth Circuit held a disorderly conduct ordinance using similar language[8] was not vague under *Kolender. Risbridger,* 275 F.3d at 574. The plaintiff had been arrested under the ordinance for refusing to present identification when requested. *Id.* at 567–68. He argued that the ordinance was vague as applied. *Id.* at 572. The court disagreed, holding there was no risk of arbitrary or unfettered enforcement because "it is the hindering or obstructing of an officer in the performance of his duties that constitutes a misdemeanor," rather than declining to present identification in and of itself. *Id.* In light of that persuasive reasoning, there is no clearly established violation here. Reading § 30–22–3 to prohibit a suspect from concealing physical identification would not necessarily make the statute vague.

Next, Mocek points out that he truthfully told Officer Dilley he did not have identification with him (even though his friend apparently had the driver's license). He asserts that Officer Dilley violated his duty to reasonably investigate before making an arrest. *See Romero v. Fay,* 45 F.3d 1472, 1476–77 (10th Cir.1995) ("[T]he Fourth Amendment requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention."). But Officer Dilley did investigate sufficiently. Another officer had told him, "He don't want to show his I.D." App. 019. Officer Dilley could rely on a fellow officer's representation in finding probable cause. *Foote,* 118 F.3d at 1424. He could also find that testimony more credible than Mocek's own story that he had no I.D. *Baptiste v. J.C. Penney Co.,* 147 F.3d 1252, 1259 (10th Cir.1998) ("[O]fficers may weigh the credibility of witnesses in making a probable cause determination."); *Munday v. Johnson,* 257 Fed.Appx. 126, 134 (10th Cir.2007) ("[P]olice officers are not required to forego making an arrest based on facts supporting probable cause simply because the arrestee offers a different explanation.").

***929** Further, the complaint indicates that Officer Dilley asked Mocek for identification at least twice, explaining that he was under investigation for disturbing the peace and could be arrested if he did not obey. As discussed above, Mocek not only failed to immediately furnish identification, but also impeded any further inquiry by resolving to remain silent. This was ample evidence and time for a reasonable officer to ascertain probable cause. *See Dawson,* 983 P.2d at 424 ("[W]e find ... support for a rule that permits one a few moments to consider the consequences of refusal to identify oneself. But that period would have to be brief.... Any delay in identifying oneself would 'hinder' or 'interrupt' law enforcement officers."). And once probable cause is established, "officers are not required to do a more thorough investigation." *Cortez,* 478 F.3d at 1116 n. 7.

Next, Mocek makes two challenges based on Officer Dilley's alleged ulterior motives. Mocek first argues that asking for identification exceeded the scope of the investigation for disorderly conduct and that Officer Dilley used § 30–22–3 as an excuse to arrest him where there were no other grounds for doing so. He relies on Supreme Court language explaining that the request for identification must be "reasonably related to the circumstances justifying the stop" and "not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence." *Hiibel,* 542 U.S. at 189, 124 S.Ct. 2451. But the request for Mocek's identification was a "commonsense inquiry" meant to gather basic information about a suspect, which has "an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop." *Id.* Mocek's refusal to cooperate interfered with these efforts to investigate possible disorderly conduct.

Second, Mocek argues the arrest was a mere pretext for seizing his camera and destroying his recordings of the security checkpoint. He cites our holding that police cannot use an administrative search as an excuse to enter a building to seize suspected contraband. *See Winters v. Bd. of Cty. Comm'rs,* 4 F.3d 848, 854 (10th Cir.1993). To hold otherwise, we explained, would allow police "to seize evidence of criminal activity without a warrant when the officer has a particularized suspicion regarding that evidence." *Id.* Mocek similarly cites *United States v. Pearl,* 944 F.Supp. 51, 52–54 (D.Me.1996), in which the court granted a criminal defendant's motion to suppress where an officer stopped him without reasonable suspicion and later fabricated evidence to justify the stop.

Winters and *Pearl* are inapposite. In those cases police clearly lacked probable cause and devised a subterfuge for avoiding the requirement altogether. But it was not clear that Officer Dilley lacked probable cause, and he did not use any artifice to circumvent the law. Moreover, it is beyond debate that an officer's subjective intent is irrelevant to the probable cause determination. *See Apodaca,* 443 F.3d at 1289.

We therefore hold Officer Dilley is entitled to qualified immunity on Mocek's Fourth Amendment claim. Mocek also asserts Fourth Amendment claims against the other officers and the TSA agents on the theory that they acted in concert with Officer Dilley. His brief advances no theory as to how they could be liable where the arresting officer had arguable probable cause—at worst, based on a reasonable mistake of law—in choosing to arrest him.[9] ***930** Accordingly, we hold that all of the individual defendants are entitled to qualified immunity.

3. First Amendment Claims

Mocek next contends that he had a First Amendment right to film at the security checkpoint. He asserts that the defendants unconstitutionally retaliated against his exercise of that right when they arrested him for doing so. The district court dismissed this claim after finding it was reasonable to restrict filming at an airport security checkpoint, a nonpublic forum. The defendants add that they are entitled to qualified immunity because they reasonably believed they had probable cause to arrest Mocek, and at the time of the arrest, it was not clearly established that plaintiffs could maintain retaliation claims for arrests supported by probable cause. We agree.

To state a First Amendment retaliation claim, a plaintiff must allege "(1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." *Nielander v. Bd. of Cty. Comm'rs,* 582 F.3d 1155, 1165 (10th Cir.2009).

Recognizing his threshold problem under this standard, Mocek asks us to rely on cases from other circuits holding there is First Amendment protection for creating audio and visual recordings of law enforcement officers in public places. *See ACLU v. Alvarez,* 679 F.3d 583, 595 (7th Cir.2012); *Glik v. Cunniffe,* 655 F.3d 78, 82 (1st Cir.2011); *Smith v. City of Cumming,* 212 F.3d 1332, 1333 (11th Cir.2000); *Fordyce v. City of Seattle,* 55 F.3d 436, 439 (9th Cir.1995). *But see Gericke v. Begin,* 753 F.3d 1, 7–8 (1st Cir.2014) (holding the right to film an officer at a traffic stop was not unlimited); *Kelly v. Borough of Carlisle,* 622 F.3d 248, 262 (3d Cir.2010) (holding there was no clearly established "right to videotape police officers during a traffic stop"); *McCormick v. City of Lawrence,* 130 Fed.Appx. 987, 988–89 (10th Cir.2005) (holding it was not clearly established that police violated the First Amendment by destroying recordings of police activity at roadside sobriety checkpoints); *Szymecki v. Houck,* 353 Fed.Appx. 852, 853 (4th Cir.2009) (holding the right to record police activity on public property was not clearly established). Mocek further argues his arrest was substantially motivated by his recording and would have chilled a person of ordinary firmness from continuing to film.

As an initial matter, an airport is a nonpublic forum, where restrictions on expressive activity need only "satisfy a requirement of reasonableness." *Int'l Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672, 683, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992). Mocek argues that forum analysis and time, place, and manner ***931** analysis do not apply in determining whether his conduct was "protected speech" for purposes of a retaliation claim, such that any government conduct intended to stop activity that is *sometimes* protected by the First Amendment is unconstitutional retaliation. But most other circuits have applied forum and time, place, and manner analyses to retaliation claims. *See Gericke,* 753 F.3d at 7–8 (holding, for purposes of a retaliation claim, "[r]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them," including "[t]he circumstances of some traffic stops"); *Dean v. Byerley,* 354 F.3d 540, 552 (6th Cir.2004) (holding, for purposes of a retaliation claim, "*[b]ecause Michigan has not passed an applicable time, place, or manner restriction,* Dean had a constitutionally protected right to engage in peaceful targeted picketing in front of Byerley's residence" (emphasis added)); *Abrams v. Walker,* 307 F.3d 650, 654 (7th Cir.2002) (rejecting argument that sometimes-protected speech can always support a retaliation claim), *abrogated on other grounds by Spiegla v. Hull,* 371 F.3d 928 (7th Cir.2004); *Blomquist v. Town of Marana,* 501 Fed.Appx. 657, 659 (9th Cir.2012) (holding plaintiffs could not maintain a retaliation claim where they "lacked a First Amendment right to picket or otherwise occupy" a nonpublic forum); *Olasz v. Welsh,* 301 Fed.Appx. 142, 146 (3d Cir.2008) (holding, for purposes of a retaliation claim, "restricting ... disruptive behavior constitutes the type of time, place,

and manner regulation that survives even the most stringent scrutiny for a public forum"); *cf. Carreon v. Ill. Dep't of Human Servs.*, 395 F.3d 786, 796–97 (7th Cir.2005) (rejecting, in an employment-termination context, a retaliation claim premised on freedom of association where restrictions on association were reasonable in a nonpublic forum).

Thus, even if we agreed there is a First Amendment right to record law enforcement officers in *public,* we would still need to determine whether that conduct is protected at an airport security checkpoint. But we need not answer this question because Mocek cannot satisfy the third prong of a retaliation claim: that the government's actions were substantially motivated in response to his protected speech. When Mocek was arrested, it was not clearly established that a plaintiff could show the requisite motive where his arrest was arguably supported by probable cause. Mocek has not addressed Tenth Circuit or Supreme Court precedent compelling that conclusion.

It is true that in *DeLoach v. Bevers,* 922 F.2d 618 (10th Cir.1990), we held an arrest "taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." *Id.* at 620. This might have implied that plaintiffs could maintain retaliatory arrest claims even where probable cause existed. But the Supreme Court in a case after *DeLoach* held a plaintiff stating a retaliatory *prosecution* claim must show there was no probable cause to support the indictment. *Hartman v. Moore,* 547 U.S. 250, 265–66, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006). Addressing the question of whether *Hartman* abrogated *DeLoach,* we held in 2011 that *Hartman* 's rule for retaliatory prosecution claims did *not* apply to "ordinary retaliation cases," so that a retaliatory arrest claim could lie notwithstanding probable cause. *Howards v. McLaughlin,* 634 F.3d 1131, 1148–49 (10th Cir.2011). The Supreme Court reversed. *Reichle v. Howards,* —— U.S. ——, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). The Court held the ***932** law had not been clearly established in the Tenth Circuit at the time of the arrest at issue (June 2006) because "reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests." *Id.* at 2095. The Court declined to answer the question on the merits.

Mocek was arrested in November 2009. Because the law was not clearly established in June 2006, and because no Supreme Court or Tenth Circuit decision between then and November 2009 clarified the law, the law was not clearly established at the time of Mocek's arrest. Regardless of Officer Dilley's motivations, he could have reasonably believed he was entitled to arrest Mocek as long as he had probable cause. And, as discussed above, he could have reasonably believed he had probable cause.

Accordingly, the defendants are entitled to qualified immunity on Mocek's First Amendment retaliation claim.

4. Declaratory Relief

In addition to damages, Mocek seeks declaratory relief against the defendants in their official capacities. As an initial matter, the district court properly dismissed the claim against the TSA defendants for lack of jurisdiction because Mocek's pleadings never identified a federal waiver of sovereign immunity. A suit against a government agent in his official capacity is treated as a suit against the government, *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985), and the federal government may only be sued where it has waived sovereign immunity, *Wyoming v. United States,* 279 F.3d 1214, 1225 (10th Cir.2002). Further, a complaint must state the jurisdictional basis for all of the claims alleged therein. Fed.R.Civ.P. 8(a)(1); *Weaver v. United States,* 98 F.3d 518, 520 (10th Cir.1996) ("[Plaintiff's] pleadings offer no grounds for finding an express waiver of immunity over any of the claims in question and, therefore, no proper grounds for jurisdiction in federal court."); *see also Celli v. Shoell,* 40 F.3d 324, 327 (10th Cir.1994) ("Federal courts are courts of limited jurisdiction, and the presumption is that they lack jurisdiction unless and until a plaintiff pleads sufficient facts to establish it."). Because Mocek has not disputed the district court's conclusion that none of the statutes alleged in his complaint waive sovereign immunity, we find no error.

As for the claims against the police defendants in their official capacities, Mocek challenges only the denial of declaratory relief for his First Amendment claim. "In a case of actual controversy within its jurisdiction," a district court may declare the parties' "rights and other legal relations" even where other relief is unavailable. 28 U.S.C. § 2201(a). In making this determination, the district court must consider two questions. First, it must decide whether a case of actual controversy exists. *Surefoot LC v. Sure Foot Corp.,* 531 F.3d 1236, 1240 (10th Cir.2008). We review that issue de novo to the extent that it "implicates purely legal issues and goes to the courts' subject matter jurisdiction" and for clear error to the extent that it turns on factual conclusions. *Id.* at 1240, 1240 n. 1. If a case of actual controversy exists, the

court should then weigh case-specific factors in deciding whether to exercise its authority to grant declaratory relief. *Id.* at 1240. We review that consideration for abuse of discretion. *Id.*

The district court held there was no case of actual controversy because Mocek had not stated a claim for a First Amendment violation. It also noted that even had he stated a claim, there would be no case of actual controversy because if there was any ongoing policy of violating the First Amendment at TSA checkpoints, ***933** the TSA itself would likely be responsible for that policy, and not the police. Thus, it found there was no likelihood that the officers would repeat their alleged violation. Mocek asserts that he need not allege a likelihood of recurrence because he has shown that the past injury has continuing, present adverse effects. After thoroughly reviewing the complaint, we hold Mocek has not sufficiently alleged that his past injury resulted in continuing, present adverse effects.

"[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (internal quotation marks omitted). Mocek relies on *Meese v. Keene,* 481 U.S. 465, 107 S.Ct. 1862, 95 L.Ed.2d 415 (1987), in which the Supreme Court held a filmmaker maintained a case of actual controversy where a statute threatened to categorize three of his films as "political propaganda." *Id.* at 473–74, 107 S.Ct. 1862. But the Court also held a plaintiff must demonstrate more than a mere "subjective chill." *Id.* at 473, 107 S.Ct. 1862 (internal quotation marks omitted). Thus, although the plaintiff in *Meese* alleged a risk of injury with evidence indicating the statute would harm his career, the Court noted that "[i]f [he] had merely alleged that the appellation deterred him by exercising a chilling effect on the exercise of his First Amendment rights, he would not have standing to seek its invalidation." *Id.* Mocek has not alleged any injury beyond a subjective chilling effect. His complaint simply states that he "fears he is now and will again be subjected to such unlawful and unconstitutional actions," App. 410, and his only argument on appeal is that "where police conduct deters expressive activity protected by the First Amendment, a 'continuing, present adverse effect' is shown," Aplt. Br. at 54. This ignores the plain language of *Meese,* which indicates that a merely subjective chill is not enough.

Moreover, we find no clear error in the district court's factual conclusion that any policy of violating the First Amendment would be administered by the TSA, rather than the police. Nor does Mocek argue for clear error. Accordingly, the district court correctly dismissed his claim for declaratory relief.

B. Constitutional Claims Against the City

Mocek next contends that even if the individual defendants are immune, the City is liable under § 1983 because it caused his injuries through unconstitutional policies and practices. The district court properly denied these claims because the complaint does not plausibly allege that Mocek's injuries were caused by a deliberate municipal policy or custom.

A municipality is not liable solely because its employees caused injury. *Graves v. Thomas,* 450 F.3d 1215, 1218 (10th Cir.2006). Rather, a plaintiff asserting a § 1983 claim must show "1) the existence of a municipal policy or custom and 2) a direct causal link between the policy or custom and the injury alleged." *Id.* Through "its *deliberate* conduct," the municipality must have been the "moving force" behind the injury. *Bd. of Cty. Comm'rs v. Brown,* 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) (internal quotation marks omitted).[10]

***934** Mocek's complaint states that the City had a policy and custom of prohibiting lawful photography at the airport, retaliating against those who filmed at the airport, and failing to train its employees properly. It also asserts that these practices were the "moving force" behind Mocek's injuries and that the City was deliberately indifferent to the risks they posed. But it cites no particular facts in support of these "threadbare recitals of the elements of a cause of action." *Iqbal,* 556 U.S. at 678, 129 S.Ct. 1937. Aside from conclusory statements, no allegations in the complaint give rise to an inference that the municipality itself established a deliberate policy or custom that caused Mocek's injuries. Consequently, the complaint "stops short of the line between possibility and plausibility of entitlement to relief." *Twombly,* 550 U.S. at 557, 127 S.Ct. 1955 (brackets and internal quotation marks omitted).

C. Malicious Abuse of Process

Mocek's last substantive argument is that the district court erred in dismissing his state-law malicious abuse of process claim.

1. Jurisdiction

As a threshold matter, we must address the district court's suggestion that it might not have had subject-matter jurisdiction to hear Mocek's state-law claim for malicious abuse of process. The court reasoned that after dismissing all federal causes of action against Mocek, the only basis for hearing the claim would be diversity jurisdiction. And it doubted that there was diversity jurisdiction because Mocek's complaint did not allege that the amount in controversy exceeded $75,000. Nonetheless, without clarifying the basis for its jurisdiction, the court considered the claim and granted the municipal defendants' motion to dismiss.

Because we "have an independent obligation to determine whether subject-matter jurisdiction exists" that extends to "any stage in the litigation," *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 506, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006), we must resolve the potential jurisdictional issue before reaching the merits. We hold the claim is properly before us either through diversity jurisdiction or through the district court's unchallenged exercise of supplemental jurisdiction.

A federal court has diversity jurisdiction in suits between citizens of different states where the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a)(1). The complaint alleges that Mocek is from Washington and the defendants are all from New Mexico, but does not identify a specific amount in controversy. The only dollar amounts it identifies are $34,000 in legal costs to defend against the criminal charges and $1000 in bail money. Because these total to less than half of the jurisdictional requirement, the district court questioned whether the requirement was met. But a complaint need not allege a specific sum in order to assert diversity jurisdiction. *Adams v. Reliance Standard Life Ins. Co.,* 225 F.3d 1179, 1183 (10th Cir.2000). Although "[t]he amount claimed by the plaintiff in its complaint generally controls and alone can be sufficient to support subject matter jurisdiction," *Marcus Food Co. v. DiPanfilo,* 671 F.3d 1159, 1171 (10th Cir.2011) (internal quotation marks omitted), a complaint that does not specify an amount must merely allege facts sufficient "to convince the district court that recoverable damages will bear a reasonable relation to the minimum jurisdictional floor," *Adams,* 225 F.3d at 1183 (internal quotation mark omitted). If the amount in controversy is challenged, the party asserting jurisdiction has the burden to show "that it is not legally certain ***935** that the claim is less than the jurisdictional amount." *Woodmen of the World Life Ins. Soc'y v. Manganaro,* 342 F.3d 1213, 1216 (10th Cir.2003).

Here, the complaint states that the alleged harms not only resulted in legal costs, but also "financial and emotional distress." App. 028. In his prayer for relief, Mocek requests "compensatory, nominal, and special damages, in an amount according to proof, and to the extent permitted by law," as well as "such other relief as is just and proper." *Id.* at 033–34. Thus, it is not clear that the amount in controversy is limited to the dollar sums mentioned in the complaint. And no hearing has been held to determine whether Mocek can satisfy his burden of proving jurisdiction. Accordingly, it is premature to conclude that the district court had no diversity jurisdiction over the malicious abuse of process claim.

But even if it had no diversity jurisdiction, the district court was not necessarily barred from hearing the malicious abuse of process claim. A federal court has supplemental jurisdiction to hear any state-law claim that is "so related to" any claims within the court's original jurisdiction as to "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Exercising this jurisdiction is discretionary; the court may decline to hear a supplemental claim in enumerated circumstances, including where it "has dismissed all claims over which it has original jurisdiction." *Id.* § 1367(c).

The district court suggested it could not hear the claim under supplemental jurisdiction because it had already dismissed the related federal-question claims. But the fact that the district court could decline to exercise jurisdiction does not mean there was no jurisdiction. *See Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 349, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (recognizing "a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power"); *Moody v. Great W. Ry. Co.,* 536 F.3d 1158, 1166 (10th Cir.2008) (distinguishing between a remand to state court for lack of federal subject-matter jurisdiction and a "discretionary remand based on a refusal to exercise supplemental jurisdiction").

Thus, there are two possible jurisdictional bases for the district court's resolution of the malicious abuse of process claim. Either (1) there was diversity jurisdiction, in which case the district court correctly heard the claim under § 1332(a)(1); or (2) there was no diversity jurisdiction, but the district court chose to exercise its supplemental jurisdiction under § 1367(a). In the first scenario, we would reach the merits. In the second

scenario, we would also reach the merits because, although we ordinarily review for abuse of discretion the decision of whether to exercise supplemental jurisdiction, *Koch v. City of Del City,* 660 F.3d 1228, 1248 (10th Cir.2011), we decline to do so because neither party has asserted that the district court abused its discretion.[11] We have jurisdiction on appeal because the claim remains pending unless and until the district court remands it to state court. *Lapides v. Bd. of Regents of Univ. Sys. of* ***936** *Ga.,* 535 U.S. 613, 618, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002).

2. Merits

Mocek asserts that the police officers and the City are liable for malicious abuse of process under New Mexico tort law. The district court construed Mocek's argument to rely upon a theory that the officers knowingly filed a complaint against him without probable cause. Accordingly, it dismissed the claim after holding there was probable cause to arrest and charge Mocek for concealing name or identity. On appeal, Mocek challenges the conclusion that there was probable cause to file charges. In addition, he claims the court overlooked his alternative argument that the arrest itself was based on a fabricated pretext. Mocek fails to state a claim under either of these theories.

New Mexico combines the torts of "abuse of process" and "malicious prosecution" into one tort called "malicious abuse of process." *Durham v. Guest,* 145 N.M. 694, 204 P.3d 19, 24–25 (2009). The elements of the combined tort are "(1) the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge; (2) a primary motive in the use of process to accomplish an illegitimate end; and (3) damages." *Id.* at 26. This tort "should be construed narrowly in order to protect the right of access to the courts," *id.,* and as such it "is disfavored in the law," *Fleetwood Retail Corp. v. LeDoux,* 142 N.M. 150, 164 P.3d 31, 37 (2007).

Two ways exist to establish an improper use of process in a judicial proceeding. The first is to show that the defendant "fil[ed] a complaint without probable cause." *Durham,* 204 P.3d at 26. The second, the so-called "procedural impropriety" theory, *see Fleetwood,* 164 P.3d at 36, is to show "an irregularity or impropriety suggesting extortion, delay, or harassment, or other conduct formerly actionable under the tort of abuse of process," *Durham,* 204 P.3d at 26 (brackets and internal quotation marks omitted).

Mocek asserts both theories, and we consider them in turn.[12]

a. Absence of Probable Cause

Mocek contends that the defendants abused process by filing a criminal complaint against him without probable cause, citing what he describes as false statements in the complaint. Specifically, the officers wrote that he had caused a disturbance by raising his voice and refused to obey a criminal trespass order—statements Mocek claims are contradicted by the recovered video footage and the fact that he was acquitted after trial. He further suggests that the officers were motivated by the illegitimate end of harassment, as evidenced by their deletion of his recordings.

"Probable cause in the malicious abuse of process context is defined as a reasonable belief, founded on known facts established after a reasonable pre-filing investigation that a claim can be established to the satisfaction of a court or jury. *The lack of probable cause must be manifest.*" *Fleetwood,* 164 P.3d at 35 (emphasis added) (internal quotation marks omitted). The question is not whether there is probable cause for each and every claim in the complaint, but whether "the complaint as a whole" is justified by probable cause. *Id.* at 37.

***937** Mocek claims that there was no probable cause, but his cursory arguments cannot establish that a lack of probable cause was "manifest" on the criminal complaint as a whole. He simply reasserts that there was no probable cause to *arrest* him.[13] But because there was at least arguable probable cause to arrest him for concealing identity, we cannot conclude that any lack of probable cause was manifest. In addition, even if there was no probable cause for the other three charges,[14] he nowhere argues that they rendered the complaint *as a whole* obviously devoid of probable cause. Likewise, he does not explain how the inclusion of the allegedly false statements vitiated probable cause for the entire complaint. His failure to develop an argument is especially fatal to a claim for a tort disfavored by the law. Because "[w]e will not manufacture arguments for an appellant," *Craven v. Univ. of Colo. Hosp. Auth.,* 260 F.3d 1218, 1226 (10th Cir.2001), we find no error in the district court's conclusions.

b. Procedural Impropriety

Next, Mocek argues that the arrest itself was a malicious abuse of process because Officer Dilley's grounds for arrest were mere pretext for harassing him. Under this "procedural impropriety theory," a plaintiff can abuse legal process even in a meritorious case. *Fleetwood,* 164 P.3d at 38. But "improper motive by itself cannot sustain a malicious abuse of process claim." *LensCrafters, Inc. v. Kehoe,* 282 P.3d 758, 766 (N.M.2012). A plaintiff must also show "the use of process in a judicial proceeding that would be improper in the regular prosecution or defense of a claim or charge." *Id.* at 767 (internal quotation marks omitted). "A use of process is deemed to be irregular or improper if it (1) involves a procedural irregularity or a misuse of procedural devices such as discovery, subpoenas, and attachments, or (2) indicates the wrongful use of proceedings, such as an extortion attempt." *Durham,* 204 P.3d at 26.

Mocek identifies no misuse of procedure. He simply relies on a case in which the New Mexico Court of Appeals found that an arrest motivated by "revenge" could support a claim for malicious abuse of process. *See Santillo v. N.M. Dep't of Pub. Safety,* 143 N.M. 84, 173 P.3d 6, 14 (Ct.App.2007). But *Santillo* raised numerous procedural improprieties in addition to the improper motive: the nature and timing of the arrest (which involved handcuffing a business-owner in front of her customers and confiscating the business's money and records, despite "ample testimony" from undercover officers that would have sufficed to prove that she made unlicensed sales), the fact that no bond was set, and the prosecution's "[f]ailure to provide case materials for an extended period of time." *Id.* at 14. Because Mocek's brief does not point to anything procedurally improper, he has not shown that the arrest abused process.

D. Request for Leave to Amend the Complaint

Finally, Mocek asks for permission to amend his complaint. In the district court he sought to add claims against the police defendants under the Fifth and Sixth Amendments of the federal Constitution. Although his request was procedurally ***938** improper, the court effectively permitted the amendment and ruled on the merits of the claims. Since there was no denial of a motion to amend in the district court, there is nothing to appeal. Of course, Mocek cannot ask us in the first instance for permission to amend the complaint; that must be done in district court. *See* Fed.R.Civ.P. 15(a)(2)

III. Conclusion

For the foregoing reasons, we AFFIRM the district court's 12(b)(6) dismissal of Mocek's claims. We DISMISS Mocek's request to amend the complaint for lack of jurisdiction.

All Citations

813 F.3d 912

Footnotes

1 According to the complaint, a TSA blog post stated that photography and filming were generally allowed at airport security checkpoints as long as they did not capture the TSA's monitors, but that state and local restrictions might still apply. Before arriving at the Albuquerque Sunport, Mocek contacted a local TSA official to inquire about restrictions. The official told him there were no state or local prohibitions against photography or film, but that "advance coordination would need to be made" with the TSA. App. at 016. When Mocek followed up to ask why coordination was necessary, the official explained that it was "a local practice and not available in writing" and that her instruction was "a recommendation." *Id.*

2 The Department of Transportation has advised,

> A screener encountering [interference with procedures] must turn away from his or her normal duties to deal with the disruptive individual, which may affect the screening of other individuals. The disruptive individual may be attempting to discourage the screener from being as thorough as required. The screener may also need to summon a checkpoint screening supervisor and law enforcement officer, taking them away from other duties. Checkpoint disruptions potentially can be dangerous in these situations.

Civil Aviation Security Rules, 67 Fed. Reg. 8340, 8344 (Feb. 22, 2002) (codified at 49 C.F.R. § 1540.109).

3 Mocek additionally alleges that he in fact revealed his name because it was printed on the boarding pass he gave to the TSA agents, though the complaint does not indicate that Officer Dilley knew about the boarding pass.

4 Although there was reasonable suspicion of disorderly conduct, the district court did not find, and the defendants do not argue, that there was probable cause to arrest Mocek for that misdemeanor. Nor do they argue that there was probable cause to arrest him for resisting an officer's lawful command, *see* N.M. Stat. Ann. § 30–22–1(D), or criminal trespass, *see* N.M. Stat. Ann. § 30–14–1, though he was also charged with those offenses.

5 Federal regulations applicable at the time of Mocek's arrest tell us that passengers may need specific documentation to board an airplane. *See* 49 C.F.R. §§ 1540.107(c) (requiring a "verifying identity document ... when requested for purposes of watch list matching under § 1560.105(c), unless otherwise authorized by TSA on a case-by-case basis"), 1560.105(c)-(d) (requiring aircraft operators to request verifying identity documents from passengers when necessary for watch list matching purposes), 1560.3 (defining "verifying identity document" in detail). And Mocek's own complaint alleges that starting in 2008, "passengers who willfully refused to show I.D. would not be allowed past their checkpoint." App. 014.

6 The Supreme Court has referred to these types of statutes, including New Mexico's law, as "stop and identify" statutes. *See Hiibel,* 542 U.S. at 182, 124 S.Ct. 2451.

7 There seem to be two exceptions: Colorado, *see* Colo.Rev.Stat. § 16–3–103(1) (an officer may require a suspect to divulge "his name and address, identification if available, and an explanation of his actions"), and Delaware, *see* 11 Del.Code Ann. § 1321(6) (an officer who suspects a person of loitering may "request [ ] identification and an explanation of the person's presence and conduct"). In contrast, in many states officers may only request name, address, and an explanation of the suspect's actions. *See* Ala.Code § 15–5–30; 725 Ill. Comp. Stat. 5/107–14; Kan. Stat. Ann. § 22–2402(1); La.Code Crim. Proc. Ann. art. 215.1; 14 La.Rev.Stat. § 108(B)(1)(c) (also requiring an arrested or detained suspect to "make his identity known"); Mont.Code Ann. § 46–5–401(2)(a); Neb.Rev.Stat. § 29–829; N.Y.Crim. Proc. Law § 140.50(1); N.D. Cent.Code § 29–29–21; Utah Code Ann. § 77–7–15; Wis. Stat. § 968.24. Similarly, some states allow officers to request name, address, business abroad, and destination. *See* Mo.Rev.Stat. § 84.710(2) (applying only to Kansas City); N.H.Rev.Stat. Ann. §§ 594:2, 644:6 (also requiring a suspect to provide an account of his or her conduct when suspected of loitering or prowling); R.I. Gen. Laws § 12–7–1. The remaining "stop and identify" laws also appear not to require documentation. *See* Ariz.Rev.Stat. Ann. § 13–2412; Ark.Code Ann. § 5–71–213(a)(1); Fla. Stat. §§ 856.021(2), 901.151(2); Ga.Code Ann. § 16–11–36(b); Ind.Code § 34–28–5–3.5 (a stopped suspect must provide *either* a "name, address, and date of birth" *or* a driver's license, if available, when stopped for an infraction or ordinance violation); Nev.Rev.Stat. § 171.123(3); Ohio Rev.Code Ann. § 2921.29; Vt. Stat. Ann. tit. 24, § 1983. Note that not all states explicitly criminalize non-compliance.

8 The ordinance in that case made "it a misdemeanor to assault, obstruct, resist, hinder, or oppose any member of the police force in the discharge of his/her duties as such." *Risbridger,* 275 F.3d at 568 (alterations and internal quotation marks omitted).

9 Mocek's claim against the TSA agents relies on *Tobey v. Jones,* 706 F.3d 379 (4th Cir.2013). In that case, a divided Fourth Circuit panel held that by calling the police to deal with a disruptive traveler, TSA agents could incur liability for a resulting unconstitutional arrest. *Id.* at 386. The Third Circuit expressly disagreed with *Tobey* that an arrest is "an undoubtedly natural consequence of reporting a person to the police." *George v. Rehiel,* 738 F.3d 562, 583 (3rd Cir.2013). A circuit split will not satisfy the clearly established prong of qualified immunity.
But even if we were persuaded by *Tobey,* Mocek has made no compelling argument as to why its logic should apply here. Officer Dilley arrested him only after he refused to show identification, which occurred well after the agents had called Officer Dilley to the scene. Officer Dilley exercised his own judgment, and even if he was mistaken in his probable cause determination, a reasonable officer could have believed there was probable cause to arrest Mocek for concealing identification.

10 Although qualified immunity shields municipal employees where the law is not clearly established, this defense does not apply to municipalities themselves. *Cordova v. Aragon,* 569 F.3d 1183, 1193 (10th Cir.2009).

11 Although the issue of subject-matter jurisdiction cannot be forfeited or waived, *Gad v. Kan. State Univ.,* 787 F.3d 1032, 1035 (10th Cir.2015), the question of whether a court should choose to decline its jurisdiction is separate, *see Carnegie–Mellon,* 484 U.S. at 349, 108 S.Ct. 614; *Moody,* 536 F.3d at 1166. We need not address the latter when the parties do not raise it. *Cf. Guillemard–Ginorio v. Contreras–Gomez,* 585 F.3d 508, 517 (1st Cir.2009) ("[A]bstention is a waivable defense.").

12 The district court also discussed the possibility that the officers are absolutely immune under New Mexico law from a claim for malicious abuse of process, *see* N.M. Stat. Ann. §§ 41–4–4, 41–4–12, but the officers and City do not advance this theory on appeal.

13 Mocek's briefing for malicious abuse of process simply refers to his Fourth Amendment section and states, "These facts also support Plaintiff's claim for abuse of process." Aplt. Br. at 46.

14 The other charges were resisting an officer's lawful command, disorderly conduct, and criminal trespass.

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EXHIBIT C

297 F.3d 1198
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
James Scott PENDERGRAFT, Michael Spielvogel, Defendants–Appellants.

No. 01–13057.
|
July 16, 2002.

Synopsis
Defendants were convicted in the United States District Court for the Middle District of Florida, No. 00-00021-CR-OC-10, Wm. Terrell Hodges, J., of attempted extortion, mail fraud and conspiracy, and they appealed. The Court of Appeals, Cox, Circuit Judge, held that: (1) threat to sue county unless it settled was not "extortion" under Hobbs Act; (2) attachment of false affidavits to motion mailed to opponent, as part of alleged plan to coerce settlement, did not constitute scheme to "defraud," within meaning of mail fraud statute; (3) double jeopardy did not bar retrial on conspiracy to commit perjury charge; and (4) prosecutorial did not affect defendants' substantial rights.

Affirmed in part; reversed and rendered in part; vacated and remanded in part.

Attorneys and Law Firms

***1199** Lucinda M. Finley, Buffalo, NY, Daniel N. Brodersen, Miller, South & Milhausen, P.A., Winter Park, FL, Bruce Rogow, Beverly A. Pohl, Bruce S. Rogow, P.A., Fort Lauderdale, FL, for Defendants–Appellants.

Charles L. Truncale, Jacksonville, FL, for Plaintiff–Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before TJOFLAT, RONEY and COX, Circuit Judges.

Opinion

***1200** COX, Circuit Judge:

James Scott Pendergraft and Michael Spielvogel were convicted, following a jury trial, for (1) attempted extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951, (2) mail fraud, in violation of 18 U.S.C. § 1341, and (3) conspiracy to commit extortion, mail fraud, and perjury, in violation of 18 U.S.C. § 371. Spielvogel was also convicted of filing a false affidavit, in violation of 18 U.S.C. § 1623, and making a false statement to the Federal Bureau of Investigation, in violation of 18 U.S.C. § 1001. Pendergraft and Spielvogel appeal, challenging their convictions and sentences.

The charges against Pendergraft and Spielvogel arose out of their threat to seek damages in a lawsuit against Marion County, Florida, and to use false evidence in support of the lawsuit. Because we conclude that their threat was neither "wrongful" within the meaning of the Hobbs Act nor a "scheme to defraud" within the meaning of the mail-fraud statute, we reverse the attempted extortion and mail-fraud convictions, and we vacate the conspiracy convictions. However, we affirm Spielvogel's convictions for perjury and making false statements.

I. BACKGROUND

A. FACTS

Pendergraft is a physician specializing in maternal-fetal medicine.[1] As part of his practice, he performs abortions, including late-term, or "partial-birth," abortions. He opened the Orlando Women's Center in Orlando, Florida, in 1996. In 1997, seeking to expand his Florida practice, Pendergraft purchased a medical building in Ocala, Florida, for about $200,000.

Ocala is the county seat of Marion County. In 1989, an abortion clinic in Ocala, the All Women's Health Center, was destroyed by an arsonist, and Ocala had not had an abortion clinic since. Pendergraft had performed many abortions on Ocala residents in his Orlando clinic and believed he could profit by opening a clinic in Ocala.

Pendergraft's presence in Ocala sparked a lot of controversy. During a meeting of the Marion County

Board of Commissioners in October 1997, Steve Klein, a resident of Ocala, proposed that the Board write a letter to Pendergraft asking him to reconsider opening his Ocala clinic. The Board unanimously supported Klein's proposal, and Larry Cretul, the Chairman of the Board, wrote and signed the letter and sent it to Pendergraft. The letter asked Pendergraft to reconsider his plans because of the controversy the clinic would bring to Ocala. Pendergraft received many other letters from concerned citizens of Marion County.

Pendergraft received the Board's letter and, after a few days, showed it to Michael Spielvogel, a business associate whose wife, Mary, worked for Pendergraft as an office administrator. In late October, Spielvogel called Cretul to discuss the possibility of Pendergraft withdrawing from Ocala if the County would purchase the clinic building for a good price.

Immediately after his discussion with Spielvogel, Cretul called the county sheriff's office and expressed some concern that he was being asked to pay for peace. The sheriff's office relayed Cretul's concern to FBI Special Agent Pamela Piersanti, and the FBI opened an investigation. As part of the investigation, the FBI recorded Cretul's subsequent conversations with Spielvogel. During one of the ***1201** conversations, Spielvogel implied that Pendergraft would sell the clinic building for between $350,000 and $500,000.

On January 29, 1998, a bomb exploded at the New Woman All Women Health Care Center, an abortion clinic in Birmingham, Alabama, killing an off-duty police officer and injuring a chief nurse. That evening, Cretul and Spielvogel spoke by telephone. Following their conversation, Spielvogel called the FBI and reported that Cretul had threatened him. Specifically, Spielvogel reported that Cretul had said that the Alabama bombing was nothing compared to what would happen to the Ocala clinic. Because the FBI was monitoring Cretul's conversations with Spielvogel, it knew that Spielvogel's allegation was false. The FBI declined to investigate the alleged threat and told Spielvogel of its declination in late February.

On February 24, Pendergraft wrote identical letters to Cretul and several other Ocala citizens who had previously written letters to Pendergraft. In this letter, Pendergraft articulated his reasons for opening the Ocala clinic and acknowledged that he would perform abortions. At the end of his letter, he intimated that he would entertain other plans for the facility, including a sale of it, and asked potential offerors to contact Spielvogel.

At the FBI's request, Cretul called Pendergraft and finally got in touch with him on March 26, 1998. Cretul told Pendergraft that he was worried about the potential controversy and violence that the Ocala clinic would bring, but Pendergraft denied that he wanted or caused violence. Cretul asked Pendergraft how much money it would take to keep him out of Ocala. Pendergraft said that he would stay away three years for $550,000, five years for $750,000, and forever for $1,000,000. Cretul told Pendergraft that his offer felt like extortion, but Pendergraft denied any such intent and offered to cease negotiations. On April 8, the FBI told Cretul to call off negotiations, and thereafter the investigation of Pendergraft was closed.

In July 1998, the Ocala clinic opened amid much controversy. Protestors consistently blocked the driveway to the clinic and harassed those who entered the building. Pendergraft asked the City of Ocala and the Marion County Sheriff's Department if he could hire off-duty law enforcement officers to protect his clinic. Though such requests were routinely granted to other businesses, Pendergraft's request was denied.

Pendergraft and the Ocala Women's Center filed a federal lawsuit in December 1998, naming Marion County, the City of Ocala, and several individual protestors as defendants. It sought injunctive relief against Marion County that would permit Pendergraft to hire off-duty law enforcement officers.

Marion County retained Virgil Wright to defend the suit. Wright contacted Roy Lucas, Pendergraft's lawyer, and told Lucas that, since the Sheriff's Department was not controlled by Marion County, Marion County should not be a party to the suit. Lucas responded on March 15, 1999, with a letter stating that Cretul's threats, as reported by Spielvogel, violated the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248, and exposed the County to actual and punitive damages as well as litigation fees and expenses. Lucas threatened to file an amended complaint that would seek damages against the County and add Spielvogel, Spielvogel's wife, and the Ocala clinic administrator as plaintiffs. Attached to the letter were two unsigned affidavits, one by Spielvogel and one by Pendergraft.

Spielvogel's affidavit reported Cretul's threat and said that Pendergraft witnessed Spielvogel's reaction to the threat when it was made. Pendergraft's affidavit said ***1202** that he believed Spielvogel's report that Cretul made threats because of Spielvogel's reaction when he was on the phone with Cretul.

When Wright received Lucas's letter, he contacted Cretul, who told Wright that the FBI taped the phone call during which Cretul was alleged to have made the threat. Wright agreed to assist the FBI in the investigation of Pendergraft and Spielvogel by holding a settlement conference with them. Wright and Lucas agreed to hold a settlement conference on March 22. In a letter confirming the time the conference was scheduled, Lucas said that he would bring a copy of a proposed amended complaint but that he might not need to file it, depending on the discussion.

On March 19, Pendergraft and Spielvogel filed a motion for partial summary judgment in their federal lawsuit. The motion sought to enjoin the protestors from harming clinic workers and to allow Pendergraft to hire off-duty officers. In support of the motion, Pendergraft and Spielvogel filed, among other things, the affidavits they sent to Wright regarding Cretul's threats. These affidavits were signed, dated, and notarized. Pendergraft and Spielvogel mailed a copy of this motion to Wright.

On March 22, Wright, Lucas, Spielvogel, and Pendergraft attended the settlement conference, and the FBI captured it on videotape. At the conference, Spielvogel again asserted that Cretul had threatened him, and Pendergraft claimed that he was present when Spielvogel received the threatening phone call. While Spielvogel expressed his desire for an immediate settlement, Pendergraft made it clear that he wanted to go to trial. Lucas and Pendergraft informed Wright that the lawsuit could bankrupt Marion County based on prior verdicts in similar cases. Wright told them he would report to Marion County and ask the county what it would like to do.

On April 12, Piersanti, the FBI agent, confronted Spielvogel with evidence that his allegations against Cretul were false, and she asked Spielvogel to cooperate in an investigation of Pendergraft. Spielvogel declined this offer and instead informed Pendergraft of the investigation.

On August 4, 1999, an amended complaint was filed in Pendergraft's lawsuit. It did not add Spielvogel or his wife as plaintiffs. It did not add Larry Cretul as a defendant. Instead of adding a claim for damages against Marion County, it dropped Marion County from the suit entirely. Nevertheless, a grand jury investigation of Pendergraft and Spielvogel was initiated.

B. PROCEDURAL HISTORY

1. The Indictment

On June 13, 2000, the grand jury indicted Pendergraft and Spielvogel. Count One charges that they conspired to commit extortion under 18 U.S.C. § 1951, perjury under 18 U.S.C. § 1623, and mail fraud under 18 U.S.C. § 1341.

Count Two charges Pendergraft and Spielvogel with the substantive offense of attempted extortion for using false affidavits and statements in an attempt to obtain a monetary settlement from Marion County. The indictment alleges that Pendergraft and Spielvogel authored false affidavits accusing Cretul of threatening them and attached these affidavits to a letter sent to Wright. Based on these false affidavits, they threatened, in the letter, to file an amended complaint seeking damages against Marion County. According to the indictment, they then arranged a settlement conference with Wright during which they threatened a multi-million dollar suit unless Marion County settled.

***1203** In Count Three, Pendergraft and Spielvogel are charged with mail fraud. Their alleged scheme to defraud was the use of false statements about Cretul's threats to obtain a settlement from Marion County. In furtherance of this scheme, they mailed copies of their motion for partial summary judgment, to which the allegedly false affidavits were attached, to Wright and other lawyers in the civil case.

Counts Four and Five charge only Spielvogel with perjury and making a false statement to the FBI. These charges arose out of Spielvogel's accusation, which he included both in his affidavit and in his report to the FBI, that Cretul threatened the Ocala clinic while on the phone with him.

2. Motion to Dismiss the Indictment

Pendergraft and Spielvogel filed a consolidated motion to dismiss the indictment on several grounds. (R.1–26.) They argued, among other things, that Counts One, Two, and Three of the indictment violated Pendergraft's First and Fourteenth Amendment rights. Because he had a right to assert claims against the government, he and Spielvogel could not be charged with extortion for their actions in connection with a lawsuit against the

government. Furthermore, they argued, the indictment imperiled the privacy rights of Pendergraft and his patients because it endangered Pendergraft's ability to provide abortions.

Pendergraft and Spielvogel further argued that Counts One, Two, and Three were legally insufficient because a threat to file a lawsuit could never amount to extortion. They relied primarily on *I.S. Joseph Co. v. J. Lauritzen A/S,* 751 F.2d 265 (8th Cir.1984), where the Eighth Circuit held that a threat to sue, even if groundless and in bad faith, could not constitute extortion.

The district court declined to dismiss any of the counts, noting that the indictment tracked the statutory language. (R.1–32.)

3. Motions for Judgment of Acquittal

The case ultimately went to trial. At the close of the Government's case, Pendergraft and Spielvogel made an oral motion for judgment of acquittal. (R.25 at 128–71.) They argued, among other things, that their litigation activities did not constitute extortion for purposes of the Hobbs Act, that the evidence failed to demonstrate a conspiratorial agreement between Pendergraft and Spielvogel, and that there was no "scheme to defraud" for purposes of the mail-fraud statute. The court denied the motion, and Pendergraft filed a renewed motion in written form. (R.3–99.)

Both Pendergraft and Spielvogel testified in their own defense. Spielvogel admitted, on the stand, that he lied, both in his affidavit and to the FBI, about the content of Cretul's threats. (R.18 at 76–77.) He also testified that he staged the phone call about which Pendergraft testified in his affidavit and that Pendergraft did not find out about it until just before the trial. (R.18 at 78–82.) Pendergraft testified that he witnessed the staged phone call but did not, at that time, know it was staged. (R.17 at 145–46; R.15 at 8–10.) On cross-examination, the Government elicited testimony suggesting that Pendergraft did not, in fact, witness the staged phone call when he said he did. (R.15 at 70–76.) At the close of all the evidence, the court deemed as restated all motions for judgment of acquittal made during the trial and denied them all. (R.19 at 401–06.)

During closing argument, the Government focused on the credibility of Pendergraft and Spielvogel. It argued that, because *1204 Pendergraft and Spielvogel were liars, the jury could conclude that they engaged in the conduct alleged in the indictment. The jury convicted them as charged on every count.

After the verdict, Pendergraft and Spielvogel filed separate renewed motions for judgment of acquittal or, in the alternative, for a new trial. In addition to the grounds raised previously, they argued that the prosecutor had made improper statements in his closing arguments, including his statement that Pendergraft "shucked and jived" on the witness stand.

The district court summarily denied the renewed motions for judgment of acquittal and refused to grant a new trial. (R.4–140.) Pendergraft was sentenced to 46 months in prison and two years of supervised release. He was also fined $25,000. Spielvogel was sentenced to 41 months in prison and three years of supervised release. He was not fined.

II. ISSUES ON APPEAL

Pendergraft and Spielvogel raise the following issues on appeal:[2] (1) whether the district court erred by denying their motion to dismiss the indictment and their motions for judgment of acquittal because the conduct at issue was legally insufficient to support convictions for extortion or mail fraud; (2) whether the district court erred by denying their motions for judgment of acquittal because there was insufficient evidence of an illegal conspiracy; (3) whether the district court erred by denying their motions for a new trial because the prosecutor introduced racial prejudice by accusing Pendergraft of "shucking and jiving."[3]

III. STANDARDS OF REVIEW

We review the district court's denial of a motion to dismiss the indictment for abuse of discretion, *see United States v. Pielago,* 135 F.3d 703, 707 (11th Cir.1998), but the sufficiency of an indictment is a legal question that we review de novo. *See United States v. Steele,* 178 F.3d 1230, 1233 (11th Cir.1999). We review the denial of a motion for judgment of acquittal de novo. *See United States v. Hansen,* 262 F.3d 1217, 1236 (11th Cir.2001). In the absence of a contemporaneous objection, we review

the district court's failure to correct an improper closing argument for plain error. *See United States v. Newton,* 44 F.3d 913, 920–21 (11th Cir.1994). We review the denial of a motion for a new trial for abuse of discretion. *See United States v. Ward,* 274 F.3d 1320, 1323 (11th Cir.2001).

IV. DISCUSSION

A. LEGAL SUFFICIENCY OF THE INDICTMENT

Pendergraft and Spielvogel assert error in the district court's denial of their motion to dismiss the indictment and their motions for judgment of acquittal. In their motions and on appeal, they challenge ***1205** Counts One, Two, and Three on the ground that the extortion and mail-fraud charges are legally insufficient and that the Government failed to offer sufficient evidence of an illegal conspiracy. Because we conclude that there was evidence to support the extortion and mail-fraud allegations in the indictment, we will examine those allegations to determine whether they are legally sufficient to charge an offense.[4]

1. Extortion (Counts One & Two)

The Hobbs Act imposes criminal sanctions on those who affect interstate commerce by extortion. *See* 18 U.S.C. § 1951(a) (2000). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). In this case, the indictment alleges that Pendergraft and Spielvogel conspired to extort money from Marion County by threatening to file an amended complaint, supported by false affidavits, unless Marion County settled with them. Pendergraft and Spielvogel argue that such threats are not criminal under the Hobbs Act.

Several courts have held that a threat to file a lawsuit, even if made in bad faith, is not "wrongful" within the meaning of the Hobbs Act. *See Vemco, Inc. v. Camardella,* 23 F.3d 129, 134 (6th Cir.1994); *First Pacific Bancorp, Inc. v. Bro,* 847 F.2d 542, 547 (9th Cir.1988); *I.S. Joseph Co. v. J. Lauritzen A/S,* 751 F.2d 265, 267–68 (8th Cir.1984); *G–I Holdings, Inc. v. Baron & Budd,* 179 F.Supp.2d 233, 259 (S.D.N.Y.2001); *Heights Cmty. Cong. v. Smythe, Cramer Co.,* 862 F.Supp. 204, 207 (N.D.Ohio 1994); *Am. Nursing Care of Toledo, Inc. v. Leisure,* 609 F.Supp. 419, 430 (N.D.Ohio 1984). All of these cases have arisen in the civil RICO[5] context where litigants have included a threat to file a lawsuit as the predicate act of extortion. By rejecting such threats as predicate acts, these courts have implicitly held that threats to sue cannot constitute criminal extortion. Most of these courts have recharacterized the extortion charges as actions for malicious prosecution and have held that malicious prosecution is not a RICO predicate act.

Because an action for malicious prosecution is a civil matter, we are reluctant to recharacterize the criminal extortion charges in this case as actions for malicious prosecution. Instead, we must analyze the Hobbs Act to determine whether it criminalizes the bad-faith threat to sue that is alleged in this case.

We begin, of course, by examining the text of the statute. *See Adams v. Fla. Power Corp.,* 255 F.3d 1322, 1324 (11th Cir.2001). To commit extortion, a person's actions must, in some sense, be "wrongful." *See* 18 U.S.C. § 1951(a) (2000). In *United States v. Enmons,* 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), the Supreme Court interpreted "wrongful," within the meaning of the Hobbs Act, to consist of using a wrongful means to achieve a wrongful objective. *See id.* at 399–400, 93 S.Ct. at 1009.

To show a wrongful objective, the Government must show that Pendergraft and Spielvogel had no lawful claim to the money they sought. *See id.* at 400, 93 S.Ct. at 1009–10; *United States v. Nell,* 570 F.2d 1251, 1258 (5th Cir.1978). Pendergraft and Spielvogel sought settlement money from Marion County based on threats allegedly ***1206** made to Spielvogel by a county commissioner. The indictment alleges that these threats never actually occurred. This allegation, if true, shows that Pendergraft and Spielvogel had no lawful claim to the settlement money they sought. The wrongful-objective element of extortion is therefore satisfied.[6]

Regarding the wrongful-means element, the question presented is whether their threat to file the lawsuit was "wrongful." The indictment alleges that the defendants unlawfully used false affidavits and made false statements "in an effort to induce the payment of money by the Marion County government through the fear of economic

loss." (R.1–1 at 7.) The use of fear can be a wrongful means under the Hobbs Act, and fear includes the fear of economic loss. But the fear of economic loss is an "animating force of our economic system," *United States v. Sturm,* 671 F.Supp. 79, 84 (D.Mass.1987), *vacated and remanded,* 870 F.2d 769 (1st Cir.1989), and, therefore, is not inherently wrongful. *See Hall Am. Ctr. Assocs. Ltd. P'ship v. Dick,* 726 F.Supp. 1083, 1095 (E.D.Mich.1989). We must determine whether the use of economic fear in this case was "wrongful" within the meaning of the Hobbs Act.

The indictment alleges that Pendergraft and Spielvogel produced perjured affidavits that described threats by Larry Cretul, the Chairman of the Marion County Board of Commissioners. Based on the information in these affidavits, Pendergraft and Spielvogel threatened to amend an existing legitimate lawsuit to include a claim for damages against Marion County. The threat of this additional claim, backed by fabricated evidence, put Marion County in fear of economic loss, and Pendergraft and Spielvogel sought to exploit this fear by obtaining a settlement from Marion County. The bad-faith threat of litigation, according to the indictment, was reasonably calculated to cause fear of economic loss and therefore "wrongful."

A threat to litigate, by itself, is not necessarily "wrongful" within the meaning of the Hobbs Act. After all, under our system, parties are encouraged to resort to courts for the redress of wrongs and the enforcement of rights. *See Boothby Realty Co. v. Haygood,* 269 Ala. 549, 114 So.2d 555, 559 (1959); 54 C.J.S. *Malicious Prosecution* § 4 at 525 (1987). For this reason, litigants may be sanctioned for only the most frivolous of actions. These sanctions include tort actions for malicious prosecution and abuse of process, and in some cases recovery of attorney's fees, but even these remedies are heavily disfavored because they discourage the resort to courts. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247, 95 S.Ct. 1612, 1617, 44 L.Ed.2d 141 (1975); *Kelly v. Serna,* 87 F.3d 1235, 1241 (11th Cir.1996); *Mims v. Teamsters Local No. 728,* 821 F.2d 1568, 1570 (11th Cir.1987); *Delchamps, Inc. v. Bryant,* 738 So.2d 824, 832 (Ala.1999); *Cate v. Oldham,* 450 So.2d 224, 225–26 (Fla.1984); *Day Realty Assocs., Inc. v. McMillan,* 247 Ga. 561, 277 S.E.2d 663, 664 (1981).

History has taught us that, if people take the law into their own hands, an endless cycle of violence can erupt, and we therefore encourage people to take their problems to court. We trust the courts, and their time-tested procedures, to produce reliable results, separating validity from invalidity, honesty from dishonesty. While our process is sometimes expensive, and occasionally inaccurate, we have confidence in it. When a citizen avails himself ***1207** of this process, his doing so is not inherently "wrongful."

Moreover, in this case, we are not dealing with a typical threat to litigate. Instead, we are dealing with a threat to litigate against a county government. The right of citizens to petition their government for the redress of grievances is fundamental to our constitutional structure. *See* U.S. Const. amend. I.[7] A threat to file suit against a government, then, cannot be "wrongful" in itself.

But, in this case, we have an allegation that Pendergraft and Spielvogel fabricated evidence to support their suit. The fabrication of evidence is certainly not "rightful." The question is whether the fabrication of evidence makes a threat to sue a government "wrongful."

We recognize that the fabrication of evidence is criminalized by the perjury statute. While the same conduct can violate several statutes, we do not think that Pendergraft and Spielvogel's conduct does. The law jealously guards witnesses who participate in judicial proceedings; witnesses should be "unafraid to testify fully and openly." *See Charles v. Wade,* 665 F.2d 661, 667 (5th Cir. Unit B 1982). Because the rigors of cross-examination and the penalty of perjury sufficiently protect the reliability of witnesses, *see Butz v. Economou,* 438 U.S. 478, 512, 98 S.Ct. 2894, 2914, 57 L.Ed.2d 895 (1978); *Charles,* 665 F.2d at 667, courts have been unwilling to expand the scope of witness liability, since, by doing so, " 'the risk of self-censorship becomes too great.' " *Charles,* 665 F.2d at 667 (quoting *Imbler v. Pachtman,* 424 U.S. 409, 440, 96 S.Ct. 984, 999, 47 L.Ed.2d 128 (1976) (White, J., concurring)).

Criminalizing false testimony via the Hobbs Act would expand the scope of witness liability. Witnesses might decline to provide affidavits in questionable lawsuits against a government, fearing that they could be charged with conspiracy to commit extortion if the lawsuit fails. Such a possibility is unsettling, and we do not believe that Congress intended to expand the scope of witness liability in this way. The fabrication of evidence, then, does not make a threat to sue a government "wrongful" within the meaning of the Hobbs Act.

While the case before us involves a threat to sue a government, we are troubled by *any* use of this federal criminal statute to punish civil litigants. Sanctions for filing lawsuits, such as malicious prosecution, lead to collateral disputes and "a piling of litigation on litigation without end." *Boothby Realty Co.,* 114 So.2d at 559.

Allowing litigants to be charged with extortion would open yet another collateral way for litigants to attack one another. The reality is that litigating parties often accuse each other of bad faith. The prospect of such civil cases ending as criminal prosecutions gives us pause.

Moreover, this addition to the federal criminal arsenal would have other disconcerting implications in the civil arena. As we have noted, the cases rejecting extortion for threats to litigate arise in the civil RICO context when parties attempt to graft a RICO claim on their claims for malicious prosecution. In those cases, the ***1208** courts express concern about transforming a state common-law action into a federal crime. We share this concern.

Nevertheless, our holding is a narrow one. We hold that Pendergraft and Spielvogel's threat to file litigation against Marion County, even if made in bad faith and supported by false affidavits, was not "wrongful" within the meaning of the Hobbs Act. Thus, we conclude that the allegations in the indictment for conspiracy to commit extortion and for the substantive offense of attempted extortion fail to charge offenses as a matter of law.

2. Mail Fraud (Counts One & Three)

The indictment also charges Pendergraft and Spielvogel with mail fraud and conspiracy to commit mail fraud. When Pendergraft and Spielvogel filed their motion for a preliminary injunction with the district court, they attached their false affidavits in support. A copy of the motion was served by mail on Marion County's attorney, Virgil Wright, and two other lawyers in the case. To commit mail fraud, a person must (1) intentionally participate in a scheme to defraud and (2) use the mails in furtherance of the scheme. *See* 18 U.S.C. § 1341 (2000); *United States v. Smith,* 934 F.2d 270, 274 (11th Cir.1991). The indictment alleges that Pendergraft and Spielvogel intentionally participated in a scheme to extort a monetary settlement from Marion County and mailed the motion with the attached false affidavits in furtherance of that scheme. Pendergraft and Spielvogel argue that their alleged scheme to obtain a settlement did not constitute a "scheme to defraud" for purposes of the mail fraud statute.

Serving a motion by mail is an ordinary litigation practice. A number of courts have considered whether serving litigation documents by mail can constitute mail fraud, and all have rejected that possibility. *See Daddona v. Gaudio,* 156 F.Supp.2d 153, 162–64 (D.Conn.2000); *Auburn Med. Ctr., Inc. v. Andrus,* 9 F.Supp.2d 1291, 1300 (M.D.Ala.1998); *von Bulow v. von Bulow,* 657 F.Supp. 1134, 1142–46 (S.D.N.Y.1987); *Paul S. Mullin & Assocs., Inc. v. Bassett,* 632 F.Supp. 532, 540 (D.Del.1986); *Am. Nursing Care of Toledo, Inc. v. Leisure,* 609 F.Supp. 419, 430 (N.D.Ohio 1984). As in the Hobbs Act context, these courts have rejected this mail-fraud theory on policy grounds, recognizing that such charges are merely "artfully pleaded claims for malicious prosecution." *Auburn Med. Ctr., Inc.,* 9 F.Supp.2d at 1297. Again, prosecuting litigation activities as federal crimes would undermine the policies of access and finality that animate our legal system. Moreover, allowing such charges would arguably turn many state-law actions for malicious prosecution into federal RICO actions.

But, as always, we are primarily concerned with the language of the statute, not its policy implications. While both the mail-fraud and wire-fraud statutes use the phrase "scheme to defraud," neither statute defines what a "scheme to defraud" is. *See Weiss v. United States,* 122 F.2d 675, 681 (5th Cir.1941); *United States v. Lemire,* 720 F.2d 1327, 1335 (D.C.Cir.1983). Instead, the meaning of "scheme to defraud" has been judicially defined. *See Lemire,* 720 F.2d at 1335. Courts have defined the phrase broadly, allowing it to encompass deceptive schemes that do not fit the common-law definition of fraud. *See Hammerschmidt v. United States,* 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924); *United States v. Brown,* 79 F.3d 1550, 1557 (11th Cir.1996). Nevertheless, Congress did not strip the word "defraud" of all its meaning, *see Brown,* 79 F.3d at 1557; the word still signifies "the deprivation of something of value by trick, deceit, chicane, or overreaching." ***1209** *See Hammerschmidt,* 265 U.S. at 188, 44 S.Ct. at 512.

There are limits to the types of schemes that the mail-fraud statute encompasses. *See Brown,* 79 F.3d at 1556. Indeed, it has long been recognized that, "broad as are the words 'to defraud,' they do not include threat and coercion through fear or force." *Fasulo v. United States,* 272 U.S. 620, 628, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926); *see also Hammerschmidt,* 265 U.S. at 188, 44 S.Ct. at 512 ("[The words 'to defraud'] do not extend to theft by violence."); *Naponiello v. United States,* 291 F. 1008, 1010 (7th Cir.1923) ("[T]hreats which the victim believes will be carried into execution unless he acquiesces in the demands are not deceits."); *United States v. McKay,* 45 F.Supp. 1007, 1011 (E.D.Mich.1942) ("[R]egardless of how broad an interpretation is put upon the words 'to defraud' they do not include threats and coercion through fear or force.")

In this case, the indictment alleges that Pendergraft and Spielvogel sought to extort money from Marion County by exploiting their fear of economic loss. This fear was caused by Pendergraft and Spielvogel's threat to sue and was aggravated by their production of false affidavits. Once Pendergraft and Spielvogel filed these documents with the court, as attachments to their motion for a preliminary injunction, and served Marion County with the motion, Marion County knew that their threats to lie were serious. The possibility of an unfavorable verdict, based on perjurious testimony, may have caused Marion County to fear the lawsuit. But fear is different from fraud. A scheme to frighten is simply not criminalized by the mail-fraud statute.

However, the use of fear does not immunize particular actions from mail-fraud charges; if deceit, as well as fear, is intended, then the actions may be criminal. *See Huff v. United States,* 301 F.2d 760, 765 (5th Cir.1962). In support of their suit against Marion County, Pendergraft and Spielvogel authored affidavits that falsely accused Cretul of making threats. Such falsity might have deceived some, but it could not deceive Marion County. Cretul, after all, was the Chairman of the Marion County Board of Commissioners, and Pendergraft and Spielvogel were aware of Cretul's position. They knew that Cretul would deny making these threats, and they knew that their affidavits would not trick Cretul into admitting otherwise. If they knew that they could not deceive Marion County, then they could not have had an intent to deceive. *See Pelletier v. Zweifel,* 921 F.2d 1465, 1499 (11th Cir.1991) ("A defendant cannot possibly intend to deceive someone if he does not believe that his intended 'victim' will act on his deception."); *Norton v. United States,* 92 F.2d 753, 755 (9th Cir.1937) ("There can be no intent to deceive where it is known to the party making the representations that no deception can result.").

Since there was no intent to deceive, there was no "scheme to defraud," and we hold that Pendergraft and Spielvogel's mailing of litigation documents, even perjurious ones, did not violate the mail-fraud statute. The allegations in the indictment for conspiracy to commit mail fraud and for the substantive offense of mail fraud therefore fail to charge offenses as a matter of law.

3. Multiple–Object Conspiracy (Count One)

The indictment also alleges, in Count One, that Pendergraft and Spielvogel agreed to author perjured affidavits testifying to threats made by Cretul. They both, in fact, submitted affidavits: Spielvogel's claims that he received a threatening phone call in Pendergraft's presence, and ***1210** Pendergraft's claims that he witnessed Spielvogel receiving the phone call. The indictment alleges that this threatening phone call never, in fact, occurred. These allegations, if true, can support a conviction for conspiracy to commit perjury.

However, in Count One, the indictment charges conspiracy to commit extortion and mail fraud along with conspiracy to commit perjury, and the jury returned a general verdict of guilty. When a jury returns a general verdict of guilty in a multiple-object conspiracy, the verdict may be set aside if one of the conspiracy theories is contrary to law. *See Griffin v. United States,* 502 U.S. 46, 59, 112 S.Ct. 466, 474, 116 L.Ed.2d 371 (1991); *Yates v. United States,* 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957). Therefore, because two of the theories asserted in Count One, conspiracy to commit extortion and conspiracy to commit mail fraud, were legally insufficient, we vacate the conviction on Count One.

We must nevertheless determine what the disposition of Count One should be. If the Government presented sufficient evidence of a conspiracy to commit perjury, we must remand this charge for a new trial. However, if the Government failed to present sufficient evidence, the constitutional prohibition against double jeopardy prevents a retrial on this charge. Therefore, we must determine whether the Government presented sufficient evidence of a conspiracy to commit perjury to support a conviction.

To prove a conspiracy, the Government must show (1) the existence of an agreement among two or more persons, (2) that the defendant knew the general purpose of the agreement; and (3) that the defendant knowingly and voluntarily participated in the agreement. *See United States v. Simpson,* 228 F.3d 1294, 1298 (11th Cir.2000). In this case, the Government's conspiracy theory was that Pendergraft and Spielvogel agreed to author perjured affidavits to provide evidence in pursuit of a settlement with Marion County. These affidavits would state that Spielvogel received threats from Cretul over the telephone and that Pendergraft was present and observed Spielvogel's fear after receiving these threats.

When reviewing the sufficiency of the evidence, we are obligated to draw inferences in the Government's favor. *See United States v. Perez–Tosta,* 36 F.3d 1552, 1556 (11th Cir.1994). While the Government presented no

direct evidence of an agreement, there was circumstantial evidence from which a jury could infer an agreement.

During the Government's case, it introduced the affidavits and statements of Spielvogel and Pendergraft. These statements indicated that Cretul threatened Spielvogel on January 29 and that Pendergraft observed Spielvogel receiving these threats. The Government offered evidence that Cretul did not, in fact, make the threats on January 29. Cretul testified that he never made the threats asserted by Spielvogel, and, on the FBI tapes of Cretul's conversations with Spielvogel, Cretul never made the threats that Spielvogel asserted in his affidavit. This demonstrated that Spielvogel's statements were false. Furthermore, Spielvogel was at home when he spoke with Cretul on January 29. The Government and Pendergraft stipulated that Pendergraft was not at Spielvogel's home during Spielvogel's conversation with Cretul on January 29. This was evidence that Pendergraft did not observe what he said he observed. From this circumstantial evidence, the jury could infer that Pendergraft and Spielvogel agreed to fabricate the threats and Pendergraft's observation of the threats.

***1211** And there was further evidence from which a jury could infer an agreement. Spielvogel testified that he staged the phone call with Cretul and pretended to be afraid so that Pendergraft would believe that Cretul made the threats. Pendergraft testified that he witnessed Spielvogel's fear and did not know that the phone call was staged. During cross-examination, the Government raised some doubt regarding whether Pendergraft could have observed Spielvogel's staged phone call when he said he did. Furthermore, both Pendergraft and Spielvogel testified that there was no agreement. When a defendant testifies, the jury is allowed to disbelieve him and to infer that the opposite of his testimony is true. *See United States v. Allison,* 908 F.2d 1531, 1535 (11th Cir.1990). There was sufficient evidence to support a conviction on the conspiracy to commit perjury charge.

Since there was sufficient evidence to support a conviction for conspiracy to commit perjury, this part of Count One is remanded for a new trial.[8]

B. SHUCK & JIVE

Pendergraft and Spielvogel also argue that the prosecutor injected racial prejudice into his closing argument by twice stating that Pendergraft, who is black, "shucked and jived" on the witness stand.[9] (R.25 at 472 & 486.) Since Pendergraft was convicted on legally insufficient charges, this issue is moot regarding his convictions. However, since Spielvogel was also convicted on Counts Four and Five, and these charges were not legally insufficient, we must determine whether this comment entitles him to a new trial on these counts.

Since neither party made a contemporaneous objection to the "shuck and jive" statements, we review this issue for plain error. To constitute plain error, the comment must be an error that is plain and affects substantial rights. *See United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508 (1993). We have discretion to correct such errors only when the error seriously affects the fairness, integrity, or public reputation of the judicial proceeding. *See id.*

We believe there may have been error. "Shuck and jive" is a phrase with racial origins. *See Smith v. Farley,* 59 F.3d 659, 664 (7th Cir.1995). It began as slang adopted by American blacks to describe a situation where blacks lie to whites to stay out of trouble. *See* 15 *Oxford English Dictionary* 388 (2d ed.1989). There is some debate regarding whether this slang has crossed over into mainstream usage. *See Smith,* 59 F.3d at 664. However, even if the phrase is not entirely of a racist character, it is not the sort of characterization that should be employed by an assistant United States Attorney, ***1212** whose interest is not that he "shall win a case, but that justice shall be done." *Berger v. United States,* 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935); *see also Handford v. United States,* 249 F.2d 295, 296 (5th Cir.1957).

Nevertheless, despite the unsettling nature of the comment, we conclude that it did not affect Spielvogel's substantial rights. First, it was used in reference only to Pendergraft, not to Spielvogel, who is white. Pendergraft was not charged in Counts Four and Five, and any prejudice towards him would not have affected the jury's verdict on these counts. Second, Spielvogel admitted, on the stand, that he lied to the FBI and in his affidavit, and these lies provided the factual basis for the charges in Counts Four and Five. We find no plain error and no abuse of discretion in the denial of Spielvogel's motion for a new trial on Counts Four and Five.[10]

C. SENTENCING ERRORS

Pendergraft and Spielvogel also contend that the district court erred in sentencing on extortion by finding a demand amount from an event that occurred prior to the charged conspiracy. *See* United States Sentencing Commission, *Guidelines Manual,* § 2B3.3 (Nov. 2000). Because we set aside the sentences, we do not need to reach this issue.

However, we do note a technical error in the sentencing of Pendergraft and Spielvogel. Instead of imposing sentence on each count of conviction, the district court gave Pendergraft a single sentence of 46 months (R.21 at 91; R.5–151 at 2); similarly, the district court gave Spielvogel a single sentence of 41 months (R.21 at 91; R.5–152 at 2). When sentencing on multiple counts, the Sentencing Guidelines require the district court to divide the sentence among the counts and to specify whether the sentences on each count are to run consecutively or concurrently. *See* USSG § 5G1.2. This technical error is now moot with regards to Pendergraft, but the district court should re-sentence Spielvogel on Counts Four and Five once the conspiracy to commit perjury charge is finally resolved.

V. CONCLUSION

Pendergraft and Spielvogel were found guilty of conspiring to commit extortion, mail fraud, and perjury. Since both the extortion and mail-fraud charges were legally insufficient, we reverse the district court's denial of their motion for judgment of acquittal and vacate the Count One conspiracy convictions. We acquit Pendergraft and Spielvogel on the charges of conspiracy to commit extortion and mail fraud but remand the charge of conspiracy to commit perjury for a new trial.

Counts Two and Three charged Pendergraft and Spielvogel with attempted extortion and mail fraud respectively, and they were found guilty. Again, because these charges are legally insufficient, we reverse the district court's denial of their motions for judgment of acquittal, reverse the convictions, and enter a judgment of acquittal.

In Counts Four and Five, only Spielvogel was charged with perjury and making ***1213** a false report to the FBI. We affirm Spielvogel's convictions on these counts. However, because Spielvogel was not properly sentenced on these counts, we remand them for re-sentencing.

AFFIRMED IN PART; REVERSED AND RENDERED IN PART; VACATED AND REMANDED IN PART.

All Citations

297 F.3d 1198, 15 Fla. L. Weekly Fed. C 820

Footnotes

1 Because we are determining whether the actions of Pendergraft and Spielvogel are legally sufficient to support their convictions, we state the evidence in the light most favorable to the Government.

2 We have recharacterized some of the issues to focus on the rulings we are asked to review.

3 Pendergraft also raises the following issues on appeal: (1) whether the district court erred by denying his motion for a judgment of acquittal because there was evidence that he believed he had a valid claim-of-right against Marion County; (2) whether the district court abused its discretion by admitting a tape of a civil-suit settlement conference; (3) whether the prosecutor improperly vouched for Government witnesses during closing argument; (4) whether the district court erred by enhancing his sentence for extortion based on a monetary demand that was outside the scope of the charged acts; and (5) whether, if a new trial is granted, the trial should be held outside of Ocala. Spielvogel also raises one additional issue: whether the district court erred by precluding his diminished capacity defense. We review each of these issues as well.

4 Only Spielvogel was charged in Counts Four and Five, and he does not challenge the legal sufficiency of these substantive counts.

5 RICO is an acronym for the Racketeer Influenced and Corrupt Organizations Act, codified at 18 U.S.C. § 1961 et seq.

6 Because the jury, from evidence introduced at trial, could have rejected Pendergraft's claim-of-right defense, he was not entitled to judgment of acquittal on the basis of his claim-of-right defense.

7 The State of Florida provides extra security for this right by forbidding state officials or state entities from suing citizens for malicious prosecution. *See Cate v. Oldham,* 450 So.2d 224, 225–26 (Fla.1984). In Florida's view, such suits "can only result in self-censorship. Potential critics of official conduct would be foreclosed from bringing suit because of doubt that they would be permitted to, or could prove the facts, or for fear of the expense for having failed to do so." *Id.* at 227 (quoting *Board of Education v. Marting,* 7 Ohio Misc. 64, 217 N.E.2d 712, 717 (1966)).

8 Pendergraft and Spielvogel assert that the district court abused its discretion by admitting a videotape of the settlement negotiation in which they participated. Though this issue is moot with regard to the extortion and mail-fraud convictions, it is likely to arise again on the conspiracy-to-commit-perjury charge. Rule 408 makes evidence of settlement negotiations inadmissible only when it is offered to prove liability for, invalidity of, or amount of a claim. *See* Fed.R.Evid. 408; *CNA Fin. Corp. v. Brown,* 162 F.3d 1334, 1338 (11th Cir.1998). Since the videotape was offered as evidence of Pendergraft and Spielvogel's cooperation, and not for a purpose forbidden by Rule 408, the district court did not abuse its discretion by admitting it.

Furthermore, Pendergraft and Spielvogel request, on appeal, a prospective transfer of their proceedings from Ocala. This is an issue properly addressed to the district court on remand. *See* Fed.R.Civ.P. 21.

9 Pendergraft and Spielvogel further claim that the prosecutor vouched for the credibility of Government witnesses. We do not think these comments, read in context, rise to the level of plain error.

10 Spielvogel also contends that he should have been allowed to introduce evidence of his diminished capacity to negate his *mens rea.* Spielvogel offered the testimony of Dr. Glenn Ross Caddy, a forensic psychologist, to show that Spielvogel suffered from a personality disorder that made him easily intimidated. However, even if Spielvogel was truly afraid after his conversations with Cretul, this fear in no way shows that Spielvogel did not intend to lie when he made up details about Cretul's threats and reported them to the FBI and in his affidavit. The district court, then, did not abuse its discretion by barring Caddy's testimony. *See United States v. Cameron,* 907 F.2d 1051, 1067 (11th Cir.1990).

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EXHIBIT D

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Only the Westlaw citation is currently available.
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

EMI SUN VILLAGE, INC., a foreign corporation, Sun Village Juan Dolio, Inc., a foreign corporation, Emi Resorts (S.V.G.), Inc., a foreign corporation, Cofresco Holdings, Inc., a foreign corporation, Villa Santa Ponca, S.A., a foreign corporation, Inmobiliaria Moncey, S.A., a foreign corporation, Sun Village Juan Dolio Associates, LLC, a Delaware limited liability company, Frederick C. Elliott, Plaintiffs-Appellants,

v.

James B. CATLEDGE, Impact, Inc., a Nevada Corporation, Michael Diaz, Diaz Reus & Targ, LLP, a Florida limited liability partnership, Hilda Piloto, Defendants-Appellees.

No. 16-11841

(June 28, 2019)

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Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:13-cv-21594-KMM

Before ED CARNES, Chief Judge, ROSENBAUM, and DUBINA, Circuit Judges.

Opinion

PER CURIAM:

*1 In this appeal, Fred Elliott and several entities under his control challenge the district court's order setting aside the entry of default and dismissing one defendant, its order dismissing most of the claims in their complaint for failing to state a claim upon which relief can be granted, and its orders imposing sanctions.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

A. Facts

In 1987 Fred Elliott started recruiting investors to purchase and develop property in the Dominican Republic. He eventually brought his son, Derek, into the fold. In 2005 the Elliotts[1] entered into an agreement with James Catledge and Impact, Inc. (a company controlled by Catledge), under which Catledge and Impact sold fractional ownership and timeshare products in the Elliotts' properties. Shortly thereafter the Elliotts learned that Catledge and Impact were breaching certain aspects of the agreement. After trying to help Catledge and Impact cure their breaches, the Elliotts terminated the agreement in June of 2008. October the Elliotts sent a letter to Catledge and Impact demanding that they pay for the damages caused by their breaches.

That same month Catledge hired Michael Diaz and his law firm, Diaz Reus & Targ, LLP, to start a litigation campaign against the Elliotts. They began by joining with some of the Elliotts' investors, including David Rocheford, John Steve Thompson, and Klaus Hofmann, to form what they called the Elliott Client Committee. That committee then recruited some of the Elliotts' other investors to join (and help pay for) lawsuits against the Elliotts. The basic premise of those lawsuits was that the Elliotts had conducted a Ponzi scheme and otherwise defrauded their investors through various fractional

ownership and timeshare products — products that Catledge and Impact had marketed and sold. The Elliott Client Committee's litigation campaign included lawsuits filed in the Southern District of Florida, the Turks and Caicos Islands, and the Dominican Republic. The complaint in the present case alleges that the Elliott Client Committee's litigation strategy was to obtain ex parte temporary restraining orders freezing the Elliotts' assets in various jurisdictions in order to cripple them financially. The committee also conducted a public relations campaign about the litigation campaign.

The first two lawsuits in the litigation campaign were filed on March 3, 2009. One was a class action filed by Diaz in the Turks and Caicos Islands on behalf of many of the Elliotts' investors, including Rocheford, Thompson, and Hofmann.

The other lawsuit was filed by Hilda Piloto in the Southern District of Florida — Hofmann v. EMI Resorts, Inc., No. 1:09-cv-20526-ASG, 2009 WL 1612457 (S.D. Fla. filed Mar. 3, 2009) — on behalf of Hofmann. The complaint in the present case alleges that Diaz drafted the Hofmann complaint and used Piloto and her firm, Arnstein & Lehr LLP,[2] "as straw-men" to file it. The same day the Hofmann lawsuit was filed, Diaz filed a motion to intervene in that lawsuit on behalf of numerous other individuals — including Catledge — who claimed to have been defrauded by the Elliotts. Diaz and Piloto also jointly moved in it for a TRO.

***2** Both the Turks and Caicos Islands court and the Southern District of Florida court in the Hofmann lawsuit issued TROs[3] freezing the Elliotts' assets. The Turks and Caicos Islands court later discharged its TRO,[4] and in the Hofmann case the district court allowed its TRO to expire after declining to extend it. Each court expressed its unease with the way the plaintiffs before them — including the defendants in the present case — had conducted themselves.

Less than two weeks after Piloto filed the Hofmann lawsuit and after Fred Elliott declined an invitation to meet about settling it, Diaz filed a separate suit against the Elliotts in the Southern District of Florida: Aguilar v. EMI Resorts, Inc., No. 1:09-cv-20657-ASG, 2009 WL 1612265 (S.D. Fla. filed Mar. 13, 2009). The Aguilar lawsuit — which "simply parroted the Hofmann complaint" — was filed on behalf of Catledge and more than 400 individuals who were formerly employed by Impact as sales agents. Those plaintiffs also filed a motion to intervene in the Hofmann case, which was eventually granted.

In the months after the Hofmann lawsuit was filed, the defendants in the present case also sought and obtained TROs from two courts in the Dominican Republic freezing the Elliotts' assets. In doing so they allegedly misrepresented the status of their other lawsuits against the Elliotts.

During the course of the Hofmann litigation, the district court appointed Thomas Scott as a Special Master. Hofmann, No. 1:09-cv-20526-ASG (DE 348; DE 457). The court later made Scott a Special Monitor of the Elliotts' assets with the consent of the parties, as a result of which the Elliotts could not make any transactions without Scott's approval. Hofmann, No. 1:09-cv-20526-ASG (DE 528). Based on a report from Scott, the court referred the subject matter of the Hofmann and Aguilar litigation to authorities, including the U.S. Securities and Exchange Commission, for potential criminal and civil investigations. The SEC launched an investigation and later filed an enforcement action against Catledge, Derek Elliott, and some of the Elliott entities (three of which are plaintiffs in the present case). See SEC v. Catledge, No. 2:12-cv-00887-JCM-NJK, 2012 WL 1913762 (D. Nev. filed May 24, 2012). Derek Elliott entered into a cooperation agreement with the SEC in which he admitted that he had violated the Securities Act of 1933 and the Securities Exchange Act of 1934.

Eventually the defendants voluntarily dismissed all of the actions they had brought against the Elliotts. According to the allegations in the present lawsuit, however, the Elliotts suffered $160 million worth of damages because of the defendants' litigation campaign.

B. Procedural History

The Elliott group brought this diversity action in the Southern District of Florida. (Derek Elliott is absent from this lawsuit.) The group named ten defendants in its complaint: (1) Catledge; (2) Impact; (3) Diaz; (4) Diaz's law firm; (5) Piloto; (6) Arnstein & Lehr; (7) Rocheford; (8) Smith; (9) Thompson; and (10) Hofmann. It pleaded separate abuse of process claims and malicious prosecution claims against most of the defendants,[5] a single civil conspiracy claim against every defendant except Impact, and a breach of contract claim against Catledge and Impact. Each claim was brought under Florida law.

*3 Diaz and his law firm jointly filed a motion to dismiss, as did Piloto and Arnstein & Lehr. Hofmann later joined both motions; Rocheford and Smith joined only Piloto and Arnstein & Lehr's motion.

The district court granted the motions to dismiss. It found that the Elliott group's abuse of process claims failed because the underlying conduct was protected by Florida's litigation privilege. It also found that the malicious prosecution claims failed because the defendants "had ample probable cause" to bring the litigation underlying those claims. And the court found that the civil conspiracy claim necessarily failed because it depended on the abuse of process claims and malicious prosecution claims. As a result, the court dismissed with prejudice all of the abuse of process claims, all of the malicious prosecution claims, and the civil conspiracy claim against every defendant named in each of those claims — including Thompson and Catledge, even though they had not filed or joined a motion to dismiss. The court noted, however, that it had not dismissed the breach of contract claim against Catledge and Impact.

The following week Piloto and Arnstein & Lehr filed a motion for sanctions against the Elliott group and its counsel under Rule 11 of the Federal Rules of Civil Procedure. Diaz and his law firm filed a similar motion a couple of days later. The district court granted the motions in part and denied them in part. It found that the abuse of process claims, malicious prosecution claims, and civil conspiracy claim generally were not objectively frivolous (either legally or factually) and thus did not warrant sanctions.

But the court found that the Elliott group's factual allegations about the $160 million in damages it claimed were objectively frivolous and did warrant sanctions. The court also found that the malicious prosecution claims brought by one of the Elliotts' LLCs — Sun Village Juan Dolio Associates, LLC— were objectively frivolous and thus warranted sanctions because that LLC was not a party defendant in any of the allegedly malicious prosecutions. After ordering additional briefing, the district court sanctioned all of the plaintiffs and their counsel for the damages claims, as well as the Elliotts' LLC and its counsel for the malicious prosecution claim, and ordered all of the plaintiffs to jointly and severally pay the defendants' reasonable attorney's fees and costs stemming from the plaintiffs' sanctioned conduct.

Before the court entered an order setting the amount of legal fees the Elliott group owed the defendants, Diaz and his law firm settled with the group and filed a joint stipulation of dismissal. The court dismissed Diaz and his firm, and it later awarded Piloto and Arnsten & Lehr $5,632 in legal fees as a sanction for the damages claims and $2,000 as a sanction for the Elliotts' LLC's malicious prosecution claim.

Shortly before the district court granted the motions to dismiss, the clerk of court entered defaults against Impact and Catledge. Upon Catledge's motion, the district court later quashed the service of process on Catledge, vacated the entry of default against him, dismissed him from the case, and closed the case. It also denied without prejudice the Elliott group's motion for default judgment against Impact and the Elliott group's renewed motion for default judgment against Impact. The court ultimately dismissed Impact with prejudice after resolving the sanctions issues because the Elliott group had failed to file another motion for default judgment.

*4 This is the Elliott group's appeal.

II. STANDARDS OF REVIEW

We review only for an abuse of discretion both a district court's ruling on a motion to set aside an entry of default,[6] EEOC v. Mike Smith Pontiac GMC, Inc., 896 F.2d 524, 528 (11th Cir. 1990), and a district court's decision to impose sanctions under Rule 11, Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1294 (11th Cir. 2002).

"We review de novo the district court's grant of a motion to dismiss under 12(b)(6) for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." Butler v. Sheriff of Palm Beach Cty., 685 F.3d 1261, 1265 (11th Cir. 2012) (quotation marks omitted). "The plaintiff's factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (quotation marks and brackets omitted). "To survive a motion to dismiss, the plaintiff must plead a claim to relief that is plausible on its face." Id. (quotation marks omitted).

III. DISCUSSION

Although the Elliott group brought a total of sixteen

claims against ten defendants, most of those claims and defendants are not before this Court. The group stipulated to the dismissal of its claims against Diaz and his law firm. And in this appeal, it has represented to this Court that Rocheford, Smith, Thompson, and Hofmann are not parties to the appeal. And it has not offered any argument that Impact was wrongly dismissed. So the Elliott group has abandoned its claims against Impact, Rocheford, Smith, Thompson, and Hofmann. See Sapuppo v. Allstate Floridian Ins. Co., 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority."); AT&T Broadband v. Tech Commc'ns, Inc., 381 F.3d 1309, 1320 n.14 (11th Cir. 2004) ("Issues not raised on appeal are considered abandoned.").

That leaves only Piloto, Arnstein & Lehr, and Catledge. The Elliott group's briefing focuses primarily on Catledge (together with Diaz and his law firm), so we will start with the Elliott group's challenge to the district court's order quashing service on Catledge, setting aside the entry of default against Catledge, and dismissing him from the case. We will then turn to the district court's dismissal of the Elliott group's abuse of process claims, malicious prosecution claims, and civil conspiracy claim. Lastly we will address the sanctions orders.

A. Setting Aside the Entry of Default Against Catledge

A district court "may set aside an entry of default for good cause," Fed. R. Civ. P. 55(c), such as insufficient service of process, see Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434, 435 (5th Cir. 1981) ("In the absence of valid service of process, proceedings against a party are void."). The Elliott group had the burden of proving that its service of process on Catledge (who has not participated in this appeal) was sufficient. Id. ("When service of process is challenged, the party on whose behalf it is made must bear the burden of establishing its validity.").

***5** The district court found that the Elliott group "failed to meet [its] burden to demonstrate that service did occur." On that basis the district court granted Catledge's motions to quash the service of process on him and set aside the entry of default against him. It also dismissed the claims against him.

The Elliott group suggests that determining whether Catledge was served comes down to a swearing match by affidavit pitting his word against the word of Roger Arreola, one of the Elliott group's process servers. Arreola swore that he served Catledge when he just happened to run into Catledge at a fruit stand near a country club where Catledge had a midafternoon tee time with a friend. Catledge swore that he has never been to that fruit stand, that he did not run into Arreola on the day in question, and that he did not have a tee time on that day.

But it is not just Catledge's word against Arreola's. Catledge also submitted affidavits from four other people: a golf pro at the country club, Catledge's golf partner, a business associate who had lunch with Catledge on the day in question, and Catledge's wife. The golf pro swore in his affidavit that according to the country club's records, Catledge did not have a tee time or play golf on the day in question. He also swore that the country club has a strict policy against revealing to the public information about its members, including their tee times. Catledge's golf partner swore in his affidavit that he did not have a tee time with Catledge on the day in question, that he did not see Catledge on the golf course that day, and that Catledge's usual attire and vehicle do not match Arreola's descriptions of Catledge's attire and vehicle. Catledge's business associate who had lunch with him on the day in question swore in his affidavit that Catledge was not wearing golf clothes at lunch and that, as far as he knew, Catledge did not golf or plan to golf on the day in question. And Catledge's wife swore in her affidavit that she and Catledge left their house together on the day in question shortly after the tee time Arreola claimed Catledge had scheduled. Taken together, those affidavits refute Arreola's story.

The only other proof the Elliott group submitted to show that it had served Catledge was affidavits from five other process servers. But four of them simply swore they were unable to serve Catledge and did not provide any information about whether anyone else had done so. The fifth process server also did not serve Catledge, but he hired Arreola and corroborated some of the broad details of Arreola's story — that Catledge liked to golf, that he usually played at a particular country club with one of his friends, and that friend had a midafternoon tee time on the day Arreola says he ran into Catledge. But the fifth process server failed to corroborate the crucial (and most improbable) part of Arreola's story, which is that Arreola just happened to stop at a particular fruit stand at the same time that Catledge just happened to stop there.

In light of the evidence presented to it, the district court

did not clearly err or abuse its discretion in finding that the Elliott group had not served Catledge. Based on that finding, the district court had good cause to set aside the entry of default against Catledge, see Fed. R. Civ. P. 55(c), and dismiss the claims against him.[7]

B. The Elliott Group's Abuse of Process Claim

*6 Although it appears that the Florida Supreme Court has not addressed the elements of an abuse of process claim, the Florida District Courts of Appeal have articulated three elements for such a claim: "(1) the defendant made an illegal, improper, or perverted use of process; (2) the defendant had an ulterior motive or purpose in exercising the illegal, improper or perverted process; and (3) the plaintiff was injured as a result of defendant's action." Hardick v. Homol, 795 So. 2d 1107, 1111 n.2 (Fla. 5th DCA 2001) (citing Thomson McKinnon Sec., Inc. v. Light, 534 So. 2d 757, 760 (Fla. 3d DCA 1988) (citing Della-Donna v. Nova Univ., Inc., 512 So. 2d 1051 (Fla. 4th DCA 1987))).

The district court ruled that the Elliott group's abuse of process claims were barred by Florida's litigation privilege. Under that doctrine, "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior ..., so long as the act has some relation to the proceeding." Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994). The litigation privilege applies to actions for abuse of process. LatAm Invs., LLC v. Holland & Knight, LLP, 88 So. 3d 240, 242 (Fla. 3d DCA 2011).[8]

*7 The defendants' conduct during and in relation to the Hofmann and Aguilar litigation as well as the judicial proceedings in the Turks and Caicos Islands and the Dominican Republic is protected by the litigation privilege. See Levin, 639 So. 2d at 608. Even assuming the defendants' submissions and representations to courts in those cases were fraudulent or "involve[d] a defamatory statement or other tortious behavior," that conduct still occurred during "a judicial proceeding" in those courts and "ha[d] some relation to th[ose] proceeding[s]." Id.

To be fair, not all of the conduct that the Elliott group alleges was an abuse of process is protected by the litigation privilege. But the defendants' alleged conduct that is not protected by the litigation privilege — forming the Elliott Client Committee, recruiting the Elliotts' investors to join the committee and the litigation, and conducting a public relations campaign based on the litigation — was not a "use of process." Hardick, 795 So. 2d at 1111 n.2; see Peckins v. Kaye, 443 So. 2d 1025, 1026 (Fla. 2d DCA 1983) ("In an abuse of process action, process may mean an action that is initiated independently such as the commencement of a suit, or one initiated collaterally, such as an attachment.").

In short, the alleged conduct that was a use of process is protected by the litigation privilege, and the alleged conduct that is not protected by the litigation privilege was not a use of process. As a result, the Elliott group's abuse of process claims fail because the allegations are not sufficient to establish the first element of such a claim, which is that "the defendant made an illegal, improper, or perverted use of process." Hardick, 795 So. 2d at 1111 n.2.[9]

C. Malicious Prosecution

Under Florida law:

> In order to prevail in a malicious prosecution action, a plaintiff must establish that: (1) an original criminal or civil judicial proceeding against the present plaintiff was commenced or continued; (2) the present defendant was the legal cause of the original proceeding against the present plaintiff as the defendant in the original proceeding; (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was malice on the part of the present defendant; and (6) the plaintiff suffered damage as a result of the original proceeding. The failure of a plaintiff to establish any one of these six elements is fatal to a

claim of malicious prosecution.

***8** Alamo Rent-a-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1355 (Fla. 1994) (citations omitted).

The district court dismissed the Elliott group's malicious prosecution claims upon finding that the defendants "had ample probable cause to bring the underlying litigation based on the evidence of a fraudulent scheme." The district court later found (when addressing the motions for sanctions) that the malicious prosecution claims brought by one of the plaintiffs — one of the Elliotts' LLCs — failed because that plaintiff was not a party to the allegedly malicious prosecutions. That finding is enough to affirm the district court's dismissal of the LLC's malicious prosecution claim. See Big Top Koolers, Inc. v. Circus-Man Snacks, Inc., 528 F.3d 839, 844 (11th Cir. 2008) ("[W]e can affirm [the district court's decision] on any ground that finds support in the record.") (quotation marks omitted).

Not only that, but the Elliott group stipulated to the dismissal of its claims against Diaz and Diaz's law firm; it has abandoned its malicious claims against Impact, Rocheford, Smith, Thompson, and Hofmann; and its malicious prosecution claim against Catledge was properly dismissed due to insufficient service of process. So the Elliott group's malicious prosecution claims against Piloto and Arnstein &Lehr are the only two remaining.

However, the Elliott group failed to argue in its briefing to this Court that Piloto and Arnstein & Lehr maliciously prosecuted the Elliotts. In its opening brief it focused exclusively on its malicious prosecution allegations against Catledge, Diaz, and Diaz's law firm. The only argument the Elliott group offered that there was any malicious prosecution by Piloto and Arnstein & Lehr was that they "agreed to conspire with Catledge and the Diaz Defendants to maliciously prosecute the Elliotts and that they took overt acts in furtherance of that conspiracy." But that argument supports only the Elliott group's civil conspiracy claim, not its claims for malicious prosecution against Piloto and Arnstein & Lehr. The Elliott group has thus abandoned its malicious prosecution claims against Piloto and Arnstein & Lehr. See Sapuppo, 739 F.3d at 681.

D. Civil Conspiracy

Under Florida law:

> A civil conspiracy claim requires: (1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to plaintiff as a result of the acts done under the conspiracy.

Philip Morris USA, Inc. v. Russo, 175 So. 3d 681, 686 n.9 (Fla. 2015).

The district court dismissed the Elliott group's civil conspiracy claim because it was contingent on the abuse of process and malicious prosecution claims. We affirm the dismissal of the civil conspiracy claim to the extent it relies on the abuse of process claims or the malicious prosecution claims against Piloto and Arnstein & Lehr, or both, because those underlying claims fail for the reasons we have already discussed.

Evaluating the Elliott group's civil conspiracy claim to the extent it relies on the malicious prosecution claims against defendants other than those three requires some additional analysis. Although the Elliott group is no longer pursuing its malicious prosecution claims against Diaz and his law firm, and although the malicious prosecution claim against Catledge was properly dismissed by the district court due to insufficient service of process, Piloto and Arnstein & Lehr could still be liable for their co-defendants' allegedly malicious prosecution of the Elliott group under the civil conspiracy claim. See Lorillard Tobacco Co. v. Alexander, 123 So. 3d 67, 80 (Fla. 3d DCA 2013) ("[T]he law regarding conspiracy [in Florida] is well-settled, and provides that an act done in pursuit of a conspiracy by one conspirator is an act for which each other conspirator is jointly and severally liable. Conspiracy is not a separate or independent tort but is a vehicle for imputing the tortious acts of one coconspirator to another to establish joint and several liability.") (citation and quotation marks omitted).

***9** But that would work for the Elliott group only if it had sufficiently alleged its malicious prosecution claims against Diaz, his law firm, and Catledge. It has not. The district court found that all of the defendants "had ample

probable cause to bring the underlying litigation." The Elliott group now argues that three defendants — Diaz, Diaz's law firm, and Catledge — lacked probable cause to file the Aguilar lawsuit because Catledge and his agents were culpable for the tortious conduct they attributed to the Elliotts.[10] But Diaz and his law firm had probable cause to file the Aguilar lawsuit on behalf of most of the Aguilar plaintiffs.

As the Elliott group acknowledges in its complaint, the district court in the Hofmann and Aguilar litigation referred Special Monitor Scott's report "to the appropriate authorities" to investigate the potentially criminal activities detailed in the report. 1:09-cv-20526-ASG (DE 956 at 33). Based on that referral, the SEC began an investigation and later filed an action against Catledge, Derek Elliott, and some of the Elliott entities that are plaintiffs in this action. The Elliott group attached to its complaint in the present case the cooperation agreement Derek Elliott entered into with the SEC in which Derek Elliott admitted that he violated the Securities Act of 1933 and the Securities Exchange Act of 1934. So not only did the Hofmann and Aguilar plaintiffs have probable cause for a tort suit against the Elliotts, but the SEC also had probable cause for an investigation of — and ultimately an enforcement action against — them. Because Diaz and his law firm had probable cause to file the Aguilar lawsuit on behalf of the Aguilar plaintiffs,[11] the Elliott group's malicious prosecution claim against Diaz and his law firm fails. See Alamo Rent-a-Car, Inc., 632 So. 2d at 1355 (noting that one of the elements of a malicious prosecution claim is that "there was an absence of probable cause for the original proceeding").

That does not necessarily mean that there was probable cause for Catledge to sue the Elliott group in the Aguilar lawsuit or for Diaz and his law firm to include Catledge as one of the plaintiffs in that lawsuit. But even if Catledge himself did not have probable cause to sue, he was just one of the more than 400 plaintiffs in Aguilar, and we have already concluded that the other Aguilar plaintiffs had probable cause to bring the lawsuit. The Elliott group's allegations fail to show the damages it suffered were the result of Catledge being one of the Aguilar plaintiffs and not the result of the claims brought by the 400-plus other Aguilar plaintiffs. So the Elliott group's malicious prosecution claims fail to the extent they are based on Catledge being one of the plaintiffs in the Aguilar lawsuit. See id. (noting that one of the elements of a malicious prosecution claim is that "the plaintiff suffered damage as a result of the original proceeding").

As a result, the Elliott group has not sufficiently alleged a malicious prosecution claim against Diaz, his law firm, or Catledge. That means the Elliott group has not sufficiently alleged an underlying unlawful act, so its civil conspiracy claim against Piloto and Arnstein & Lehr fails as well. See Russo, 175 So. 3d at 686 n.9.

E. Sanctions

***10** Rule 11 requires district courts to impose appropriate sanctions, after notice and a reasonable opportunity to respond, where an attorney or party submits a pleading to the court that: (1) is not well-grounded in fact, i.e., has no reasonable factual basis; (2) is not legally tenable; or (3) is submitted in bad faith for an improper purpose. The objective standard for assessing conduct under Rule 11 is reasonableness under the circumstances and what it was reasonable to believe at the time the pleading was submitted. Sanctions are warranted when a party exhibits a deliberate indifference to obvious facts, but not when the party's evidence to support a claim is merely weak.

Riccard, 307 F.3d at 1294 (brackets, quotation marks, and citations omitted).

The district court sanctioned one of the plaintiffs — one of the Elliotts' LLCs — because its malicious prosecution claim was objectively frivolous. The first element of a malicious prosecution claim is that the plaintiff was a defendant in an allegedly malicious prosecution. Mancusi, 632 So. 2d at 1355. Because the Elliott LLC was not a defendant in the allegedly malicious prosecutions, which of course means that it was not maliciously prosecuted, the district court concluded that the Elliott LLC's claims were objectively frivolous and for that reason it sanctioned the Elliott LLC. That sanction was not an abuse of discretion.

The district court also sanctioned all of the Elliott group plaintiffs because their damages claims were objectively frivolous. The Elliott group argues that the district court's findings were based on "a clearly erroneous reading of the evidence" that "constitute[d] an abuse of discretion." Attwood v. Singletary, 105 F.3d 610, 612 (11th Cir. 1997). Under the clearly erroneous standard, "we may not reverse just because we would have decided the matter differently. A finding that is plausible in light of the full record — even if another is equally or more so — must govern." Cooper v. Harris, —— U.S. ——, 137 S. Ct. 1455, 1465, 197 L.Ed.2d 837 (2017) (brackets, quotation marks, and citation omitted).

The Elliott group claimed in its complaint that the defendants' alleged abuses of process, malicious prosecutions, and civil conspiracy prevented the group from selling some properties and taking actions to avoid the foreclosure of two other properties, causing the group to incur damages in excess of $160 million. The district court noted that the Elliott group was not, as its complaint implies, wholly barred from making any transactions involving his properties. The group could have conducted sales and other transactions involving its properties so long as each sale or transaction was approved by Scott, the special monitor appointed in the Hofmann and Aguilar litigation. And as the district court emphasized, the Elliott group consented to the appointment of a special monitor.

The Elliott group never presented to Scott "for approval any proposed sale, refinance, or other transaction." As a result, the district court concluded that "the losses [the Elliott group] complain[s] of can only be described as losses [it] consented to or losses [it] chose not to avoid." Bringing a lawsuit for those losses, the court continued, "is absurd and amounts to a deliberate indifference of obvious facts" sufficient to warrant the imposition of sanctions. (Quotation marks omitted.)

In its response to the sanctions motions, the only argument the Elliott group offered on the damages issue is that its damages were not "a result of [its] consent to have ... Scott appointed as a receiver" but were instead caused by "the events set in motion by Defendants' malicious actions, including the foreign restraining orders and the bad publicity generated as a result thereof." After the district court rejected that argument and sanctioned the Elliott group for its damages claims, the group offered some additional arguments[12] in support of its motion to reconsider and in its briefing to this Court.

***11** The Elliott group could have made those arguments in response to the sanctions motions, but it did not. So those arguments were not properly before the district court on a motion to reconsider. See Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949, 957 (11th Cir. 2009) ("A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment. This prohibition includes new arguments that were previously available, but not pressed.") (citation and quotation marks omitted). And they are not properly before this Court. See Juris v. Inamed Corp., 685 F.3d 1294, 1325 (11th Cir. 2012) ("[I]f a party hopes to preserve a claim, argument, theory, or defense on appeal, she must first clearly present it to the district court, that is, in such a way as to afford the district court an opportunity to recognize and rule on it.") (quotation marks omitted); Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1352 (11th Cir. 2009) (Where "[t]he district court did not consider [an] argument because it was not fairly presented ... we will not decide it."); Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1292 (11th Cir. 2003) (per curiam) ("As a general rule, we do not consider arguments raised for the first time on appeal.").

The Elliott group's only argument on this issue that is properly before this Court is that some of its damages were set in motion before Scott's appointment. The district court found that the group could have avoided those damages had it pursued transactions and submitted them to Scott for approval, which means the defendants did not proximately cause the Elliott group's damages because the group either "consented to" the losses it suffered or otherwise "chose not to avoid" them. Given that those findings are plausible, the district court did not abuse its discretion in imposing sanctions on the Elliott group for claiming $160 million in damages.

AFFIRMED.

All Citations

--- Fed.Appx. ----, 2019 WL 2714325

Footnotes

1 For ease of reference, in Part I.A of this opinion we will use "the Elliotts" to refer to Fred and Derek Elliott as well as the various entities under their control that are also plaintiffs in this action. Because Derek Elliott is not a party to this action, in Part I.B and Part III we will use the term "the Elliott group" to refer to Fred and the various entities under the Elliotts' control, but not Derek.

2 Arnstein & Lehr is now known as Saul Ewing Arnstein & Lehr LLP, but we will refer to the firm by its earlier name.

3 Technically, the Turks and Caicos Islands court issued a Mareva injunction, which appears to be the British equivalent to a certain type of a TRO. For ease of reference, we will refer to the Mareva injunction as a TRO. That court also appointed a receiver.

4 And revoked its appointment of a receiver.

5 Specifically Catledge, Diaz, Diaz's law firm, Piloto, Arnstein & Lehr, Thompson, and Hofmann.

6 Catledge actually moved to set aside a default judgment against him under Rule 60(b) of the Federal Rules of Civil Procedure. But the district court never entered a default judgment against Catledge, so the court properly construed Catledge's motion as a motion to set aside an entry of default under Rule 55(c).

7 The district court cited a "lack of jurisdiction with respect to Defendant James B. Catledge" when it dismissed the Elliott group's claims against him. The dismissal would have been proper under Rule 12(b)(5) (which Catledge cited in his motion) or under Rule 4(m) of the Federal Rules of Civil Procedure, or both, so we affirm based on those rules. See Big Top Koolers, Inc. v. Circus-Man Snacks, Inc., 528 F.3d 839, 844 (11th Cir. 2008) ("[W]e can affirm [the district court's decision] on any ground that finds support in the record.") (quotation marks omitted).

8 The Florida Supreme Court has held that the "litigation privilege applies across the board to actions in Florida, both to common-law causes of action, those initiated pursuant to a statute, or of some other origin." Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007). The court walked that holding back to some extent in Debrincat v. Fischer, 217 So. 3d 68 (Fla. 2017), by holding that the litigation privilege does not apply to at least some malicious prosecution claims. See id. at 69–71; see also Inlet Beach Capital Invs., LLC v. The Enclave at Inlet Beach Owners Ass'n, Inc., 236 So. 3d 1140, 1141 (Fla. 1st DCA 2018). In light of Debrincat, we recently concluded that Florida's litigation privilege does not "offer[ ] per se immunity against any and all causes of action that arise out of conduct in judicial proceedings." Sun Life Assurance Co. of Can. v. Imperial Premium Fin., LLC, 904 F.3d 1197, 1219 (11th Cir. 2018). When the Florida courts have not addressed whether the litigation privilege applies to a particular cause of action, we must assess the privilege's applicability to it "in light of the specific conduct for which the defendant seeks immunity" by asking whether applying the privilege "would meaningfully serve the aims of the privilege" or "eviscerate long-standing sources of judicially available recovery." Id. (quotation marks omitted); see also id. at 1218–20.
We do not conduct that analysis here because Florida's Third District Court of Appeal held that the litigation privilege applies to abuse of process claims in LatAm Investments, LLC v. Holland & Knight, LLP, 88 So. 3d 240. Id. at 242. The Florida Supreme Court did not address LatAm in Debrincat, nor has the court addressed it since, so LatAm appears to still be good law. See Pace v. Bank of N.Y. Mellon. Tr. Co. Nat'l Ass'n, 224 So. 3d 342, 343 n.2 (Fla. 5th DCA 2017) (citing LatAm after Debrincat was issued for the proposition that the litigation privilege applies to abuse of process claims); see also, e.g., Pardo v. State, 596 So. 2d 665, 665 (Fla. 1992) ("This Court has stated that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.") (quotation marks and brackets omitted). As a result, we must apply the litigation privilege to abuse of process claims. See Fla. Family Policy Council v. Freeman, 561 F.3d 1246, 1256 (11th Cir. 2009) ("We are, of course, bound to follow Florida appellate court decisions interpreting that state's law."). The Elliott group has not argued that the litigation privilege does not apply to abuse of process claims.

9 There was much discussion at oral argument about whether Florida's litigation privilege applies (and whether it should apply) to conduct during and in relation to judicial proceedings in foreign jurisdictions. But we will assume that it does apply for the purposes of this appeal based on the Florida Supreme Court's articulation of the privilege, see Levin, 639 So. 2d at 608 (holding that the litigation privilege applies to conduct during and in relation to "a judicial proceeding" generally without any hint of a geographic limitation), and because the Elliott group did not clearly raise an argument to the contrary in the district court or in its briefing to this Court (and it resisted almost every opportunity to do so at oral argument), see Juris v. Inamed Corp., 685 F.3d 1294, 1325 (11th Cir. 2012) ("If a party hopes to preserve a claim, argument, theory, or defense on appeal, she must first clearly present it to the district court, that is, in such a way as to afford the district court an opportunity to recognize and rule on it."); United States v. Willis, 649 F.3d 1248, 1254 (11th Cir. 2011) ("A party seeking to raise a claim or issue on appeal must plainly and prominently so indicate.... Where a party fails to abide by this simple requirement, he has waived his right to have the court consider that argument.") (brackets and quotation marks omitted).

10 The Elliott group has focused its arguments in support of its malicious prosecution claims on the Hofmann and Aguilar lawsuits to the exclusion of the litigation in the Turks and Caicos Islands and the Dominican Republic. It has thus abandoned any malicious prosecution claims based on the litigation in the Turks and Caicos Islands and the Dominican Republic. See Sapuppo, 739 F.3d at 681.

11 The Elliott group alleges that Diaz and his law firm had "obvious conflicts" of interest in representing the Aguilar plaintiffs. Even if they did, they still had probable cause to file the Aguilar lawsuit.

12 The two primary arguments the group added are that some of the damages were suffered before Scott's appointment and that the banks trying to foreclose on some of the Elliott group's properties refused to negotiate with Scott.

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EXHIBIT E

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This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Ramon Eugenio Sanchez RITCHIE, Plaintiff-Appellant,
v.
SEMPRA ENERGY, Defendant-Appellee.

No. 15-56512
|
Argued and Submitted March 7, 2017 Pasadena, California
|
Filed July 7, 2017

Synopsis
Background: Owner of real property in Mexico that abutted site of proposed power plant filed suit against builder of the plant, alleging malicious prosecution premised on a Mexican criminal court proceeding against owner, and asserting claims for trespass, conversion, intentional interference with prospective economic advantage, unjust enrichment, imposition of a constructive trust, abuse of process, and unfair business practices. The United States District Court for the Southern District of California, Cathy Ann Bencivengo, J., granted builder summary judgment on claim for malicious prosecution, 2012 WL 12919148, and dismissed all other claims, 2015 WL 12910748. Property owner appealed.

Holdings: The Court of Appeals held that:

district court failed to provide notice and time to respond before granting summary judgment, sua sponte, on other grounds; but

any error was harmless, given lack of evidence supporting malicious prosecution claim;

local action doctrine barred Mexican property owner's California claims based on real property; but

California's litigation privilege applied to tort actions stemming from post-judgment enforcement of preliminary order of eviction; and

local action doctrine did not bar claim for conversion of personal property.

Affirmed in part and reversed in part.

***502** Appeal from the United States District Court for the Southern District of California, Cathy Ann Bencivengo, District Judge, Presiding, D.C. No. 3:10-cv-01513-CAB-KSC

Attorneys and Law Firms

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Before: PAEZ, BERZON, and CHRISTEN, Circuit Judges.

MEMORANDUM*

Ramon Eugenio Sanchez Ritchie appeals the district court's grant of summary judgment ***503** to defendant Sempra Energy ("Sempra") on Claim 7 of his Second Amended Complaint ("SAC"), alleging malicious prosecution. Sanchez Ritchie also appeals the district court's dismissal of Claims 1—6 and 8 of his SAC alleging state law claims for trespass, conversion, intentional interference with prospective economic advantage, unjust enrichment, imposition of a constructive trust, abuse of process, and unfair business practices in violation of California Business & Professions Code § 17200 *et seq.* We affirm in part and reverse in part.

1. The district court erred in prematurely granting summary judgment to Sempra based on its *sua sponte* observation that Sanchez Ritchie had failed to allege that Sempra was responsible for the acts of its subsidiary Energia Costa Azul ("ECA"). Sanchez Ritchie did not

prove, or even allege, that ECA was the alter ego of Sempra, beyond a bare allegation in the SAC that Sempra "controlled" ECA. But Sempra did not raise the alter ego issue in its motion for summary judgment or its motion to dismiss; it only argued broadly that Sempra was "Not Liable for Malicious Prosecution," a generic statement insufficient to raise the discrete alter ego issue.

Federal Rule of Civil Procedure 56(f) requires the court to give the parties "notice and a reasonable time to respond" if the court intends to grant summary judgment on grounds not raised by any party. The district court did not do that. It first raised the issue in its "tentative ruling" issued on September 1, 2015. That was just two days before the scheduled hearing on Sempra's motion for summary judgment and three days before the district court issued its order granting summary judgment. That abbreviated time period was not sufficient to allow Sanchez Ritchie to address the complex factual and legal issue of whether ECA was the corporate alter ego of Sempra. Sanchez Ritchie's attorney stated at the summary judgment hearing that "I think that Rule 56 would require us to be allowed to meet [the corporate identity] question since it wasn't presented by Sempra in its motion, and accordingly, we would have sufficient time in which to respond." He also asked for a continuance to pursue evidence that Sempra controlled ECA "on a day-to-day basis." The district court erred in granting summary judgment to Sempra on the corporate identity theory without granting Sanchez Ritchie's requests for additional time to rebut it.[1]

2. We conclude, however, that the district court's procedural error on the alter ego issue was harmless, because the court correctly held in the alternative that no genuine issue of material fact existed regarding the merits of Sanchez Ritchie's malicious prosecution claim.

To prevail in a malicious prosecution action, a plaintiff must prove that: (1) the defendant commenced a prior action, or directed its commencement, and pursued the action to a termination favorable to the plaintiff; (2) the defendant lacked probable cause to pursue the action; and (3) the defendant initiated the action with malice. *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 292, 46 Cal.Rptr.3d 638, 139 P.3d 30 (2006) (citing *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 871, 254 Cal.Rptr. 336, 765 P.2d 498 (1989)). Sanchez Ritchie does not contest that a February 2007 order from the Second ***504** Criminal Court in Ensenada, Mexico, finding probable cause that Sanchez Ritchie had committed the crime of dispossession of real property ("*despojo*"), would ordinarily immunize Sempra from a malicious prosecution claim. He nevertheless proposes that the February 2007 order and earlier interim orders were obtained by "fraud or perjury," and therefore do not signify probable cause. *See Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 817, 123 Cal.Rptr.2d 19, 50 P.3d 733 (2002).

In support of his fraud arguments, Sanchez Ritchie argues first that Sempra was aware as early as 2001 that he, as opposed to the sellers from whom Sempra purchased the property, was the rightful possessor of the property. For that proposition, Sanchez Ritchie relies on the factual findings from the March 10, 2010 Resolution of the Tenth District Court of Baja California. This argument fails. The findings suggest at most that Sempra knew there were two factions—one led by the sellers, Luis Armando Navarro Peña and Elodia Gomez Castañon, and the other led by Sanchez Ritchie himself—each claiming ownership and possession of the property. "A litigant or attorney who possesses competent evidence to substantiate a legally cognizable claim for relief does not act tortiously by bringing the claim, even if also aware of evidence that will weigh against the claim." *Wilson*, 28 Cal. 4th at 822, 123 Cal.Rptr.2d 19, 50 P.3d 733.

Sanchez Ritchie next proposes that Sempra was aware of Gomez Castañon's death at the time ECA pursued criminal charges against Sanchez Ritchie in 2006, and therefore was also aware that ECA's purchase of Fraccion A was bogus. Sanchez Ritchie offers no admissible support for this allegation. The declaration from Sanchez Ritchie's expert witness states only that ECA *should* have been aware of Gomez Castañon's untimely death, had the company done due diligence. If credited, that declaration proves at most that ECA was negligent in its title search, not that ECA actually discovered Gomez Castañon's death before filing its criminal complaint.[2]

Finally, Sanchez Ritchie proposes that Sempra knew that Navarro Peña and Gomez Castañon had unsuccessfully filed for a court order in 1999 seeking a declaration that they were the rightful possessors of Lot A-3, and that Sempra withheld such information from the attorney general's office. But Sanchez Ritchie's sole evidence that Sempra withheld knowledge of that unsuccessful application is that a document referencing the application was in Sempra's "business files" as of *2014*, when it was produced in this litigation. Sanchez Ritchie provides no evidence that Sempra knew of the order *in 2006*, when the criminal complaint was filed.

In sum, the evidence presented by Sanchez Ritchie is insufficient to create a genuine issue of material fact as to whether the interim orders issued in ECA's favor by the Mexican courts were obtained by fraud or perjury. We

therefore affirm the district court's grant of summary judgment on Claim 7 of the SAC.

3. The district court did not err in dismissing Claims 1, 3, 4, 5, and 6 of the SAC based on the local action doctrine. Nor did the district court err in dismissing Claim 8 based on the litigation privilege conferred by California Civil Code § 47(b). The district court erred, however, in dismissing ***505** Claim 2 of the SAC, alleging conversion of Sanchez Ritchie's personal property.

The local action doctrine "vests exclusive jurisdiction over specified types of actions involving real property in the forum where that property is located." *Eldee-K Rental Props., LLC v. DIRECTV, Inc.*, 748 F.3d 943, 946 (9th Cir. 2014). "Under California law, there are three broad categories of local actions: (1) actions to recover or determine rights or interests in real property; (2) actions to remedy injuries to real property; and (3) actions to foreclose on liens and mortgages on real property." *Id.* at 950; *see also* Cal. Civ. Proc. Code § 392. With the exception of Claim 2, all of Sanchez Ritchie's first through sixth claims rest on his claim to ownership or possession of real property in Baja California and on Sempra's allegedly unlawful possession of that property.

Moreover, the bulk of Sanchez Ritchie's claims (including Claim 8, for abuse of process) are also barred by California Civil Code § 47(b), which provides that communications in any "(1) legislative proceeding, (2) judicial proceeding, [or] (3) in any other official proceeding authorized by law" are privileged. That privilege extends to post-judgment acts necessarily related to the enforcement of an order procured by an allegedly wrongful communicative act. *See Rusheen v. Cohen*, 37 Cal. 4th 1048, 1063, 39 Cal.Rptr.3d 516, 128 P.3d 713 (2006). As most of the torts alleged by Sanchez Ritchie arise out of ECA's attempted post-judgment enforcement of a September 2006 preliminary order of eviction, they are barred by the litigation privilege.

Claim 2, however, is not barred by either the local action doctrine or the litigation privilege. Conversion of personal property, when stated as an independent cause of action, is generally considered a transitory rather than local action. *See Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107–08, 15 S.Ct. 771, 39 L.Ed. 913 (1895); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 450 (2d Cir. 2000). And although ECA secured a court order in September 2006 evicting Sanchez Ritchie from the property, Sanchez Ritchie alleged in the SAC that the order did *not* authorize the taking of his personal property. We conclude that the district court erred in dismissing Sanchez Ritchie's claim for conversion and therefore remand on this claim alone.[3]

For the foregoing reasons, we affirm the district court's grant of summary judgment to Sempra on Sanchez Ritchie's malicious prosecution claim, affirm the district court's dismissal of Claims 1, 3–6, and 8 of the SAC, and reverse the district court's dismissal of Sanchez Ritchie's claim for conversion.

AFFIRMED IN PART, REVERSED IN PART, and **REMANDED.** Each party shall bear its own costs on appeal.

All Citations

703 Fed.Appx. 501

Footnotes

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1 To be clear, we express no opinion on whether Sempra is, in fact, liable for the alleged tortious acts of its subsidiary. We hold only that Sanchez Ritchie was entitled to a sufficient opportunity to prove that Sempra is so liable.

2 Moreover, ECA purchased Fraccion B from Navarro Peña, not from Gomez Castañon. ECA therefore had an independent basis for pursuing *despojo* charges for trespasses occurring on Fraccion B, even if it had reason to know it did not have good title to Fraccion A.

3 Sempra requests that we affirm the district court's dismissal of Claims 1–6 and 8 of the SAC on two alternative grounds, raising the Act of State Doctrine and the *Noerr-Pennington* Doctrine as affirmative defenses. As the district court did not rule on either of these defenses, we decline to reach them. Sempra may raise either or both of these defenses on remand.

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