

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

CARLY GRAFF, et. al.,

Plaintiffs,

v.

ABERDEEN ENTERPRIZES II, INC., et al.,

Defendants.

Case No. 4:17-CV-606-TCK-JFJ

**PLAINTIFFS' OPPOSITION TO DEFENDANT 51 COUNTY SHERIFFS'
PERSONAL-CAPACITY MOTION TO DISMISS**

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INTRODUCTION

This class action lawsuit challenges a systemic extortion scheme whereby local officials, in concert with a for-profit company, Aberdeen Enterprizes II, Inc. (“Aberdeen”), use both the threat of arrest and actual incarceration to extract money from indigent Oklahomans who owe court debt. Defendants employ these coercive tactics against members of the putative class despite the absence of any mechanism to assess their ability to pay the fines levied against them. Plaintiffs, all of whom owe fines and fees to the court system, are threatened, arrested, and imprisoned when they cannot pay, even though their non-payment is not because of any willful refusal, but solely due to their indigence. As a result of this scheme, tens of millions of dollars—squeezed from Oklahoma’s poorest citizens, who sacrifice basic necessities of life in an attempt to avoid being thrown in jail—flow to Aberdeen Enterprizes II, Inc., a private debt-collection company; to the Oklahoma Sheriffs’ Association (“OSA”), a private lobbying organization; to dozens of county sheriffs’ offices; and to the Oklahoma court system. Plaintiffs’ suit challenges the operation of this scheme, which violates the federal Constitution, Oklahoma law, and the Racketeer Influenced and Corrupt Organizations Act (“RICO”).

Defendant Sheriffs of 51 Oklahoma counties (“the County Sheriffs”) are sued here in their individual and official capacities. Each of them authorized the OSA to contract with Aberdeen for debt-collection services on their behalf. Doc. 212 (Second Amended Complaint, “SAC”) ¶ 30. The County Sheriffs also have authority under Oklahoma law to execute lawful arrest warrants, and each has a policy and practice of arresting and confining individuals on debt-collection arrest warrants issued based on unsworn statements, without inquiry into the individual’s ability to pay or any other pre-deprivation process, and on the basis of warrant applications that no reasonable person could believe were sufficient to justify arrest. *Id.* Each County Sheriff is also responsible

for operating the county jail in the Sheriff's jurisdiction except where a County has charged a Jail Trust Authority with that responsibility. *Id.*

The terms of the County Sheriffs' agreement with Aberdeen to collect court debts leave Aberdeen with an impermissible and unconstitutional financial bias.¹ In practice, their scheme results in nearly unfettered authority for Aberdeen to maximize profit rather than further the ends of justice, as the County Sheriffs execute warrants that Aberdeen seeks with a shared purpose of creating in debtors a credible fear that they will be arrested if they do not pay. Thus, the County Sheriffs play a crucial role in Defendants' unconstitutional scheme by executing debt-collection arrest warrants—an action that is not required by any law or court and is thus fully within the County Sheriffs' discretion. These arrests and subsequent detention subject those too poor to pay, including Plaintiffs, to onerous debt collection enforcement methods not experienced by those who are able to pay court debts in violation of the Fourteenth Amendment.

Plaintiffs sue the County Sheriffs under Count One, for their part in the RICO enterprise's a pattern of extortionate activity; under Count Six, for their use of Aberdeen, an enforcement actor with an unconstitutional financial conflict of interest; and under Count Seven, for their use of Aberdeen and assistance in its unconstitutionally onerous collection practices.

¹ Although the County Sheriffs themselves are not parties to the contract between OSA and Aberdeen, the decision to enter into the contract was made by each sheriff on a county-by-county basis. SAC ¶ 30. A number of sheriffs in Oklahoma have decided not to contract with Aberdeen, and at least one county (Tulsa County) terminated its contract with Aberdeen after the filing of this lawsuit. *Id.* ¶ 124.

ARGUMENT

I. The County Sheriffs Do Not Enjoy Absolute Immunity

Defendants County Sheriffs argue that they are entitled to absolute, quasi-judicial immunity for executing the unlawfully issued arrest warrants challenged by Plaintiffs, on the ground that the warrants are facially valid judicial orders akin to traditional bench warrants. *See* Doc. 239 at 10–13. For the reasons explained in Plaintiffs’ Opposition to the Rogers County Sheriff’s personal-capacity motion to dismiss, Br. D, Section II, pp. 7-15, that argument fails. Per the Court’s order to avoid duplicative briefing, Plaintiffs incorporate those arguments here by reference.

Moreover, Plaintiffs’ claims against the County Sheriffs do not exclusively rely on their execution of warrants. Rather, the claims against the County Sheriffs for participation in a RICO enterprise under Count One, and for onerous debt collection under Count Seven, pertain mostly to their decision to use Aberdeen and assist in its debt-collection activities, with full knowledge of its extortionate conduct.² *See* SAC ¶ 81. Thus, even if the County Sheriffs were correct that they are entitled to quasi-judicial absolute immunity for executing unlawful warrants (which they are

² Plaintiffs also bring a claim against the County Sheriffs for their use of Aberdeen to collect debts, where Aberdeen has an unconstitutional financial conflict of interest (Count Six). This claim, like Counts One and Seven, pertains to the County Sheriffs’ decisions to contract with Aberdeen in their respective counties, and does not rely on their execution of warrants. However, it is unnecessary to discuss immunities with regard to Count Six, as Plaintiffs recognize that the legal basis for that claim is one of first impression. *See* Plaintiffs’ Opposition to Aberdeen’s Motion to Dismiss, Br. E, Section I.E., p. 17. As a result, Plaintiffs acknowledge that qualified immunity may shield the County Sheriffs from damages liability for Count Six. Neither qualified immunity nor absolute immunity protect them from equitable relief, *see* Plaintiffs’ Opposition to Rogers County Sheriff’s Individual Capacity Motion to Dismiss, Br. D, Section III, p. 13, and Plaintiffs make no concessions regarding Count Six for the private entity defendants (for whom absolute immunity and qualified immunity do not apply), or the remaining claims against the County Sheriffs.

not), they would still be liable for the claims against them based on their use of, and assistance to, Aberdeen.

The County Sheriffs make no argument that their decision to use Aberdeen and assist in its debt-collection activities by methods other than execution of warrants—namely, by “select[ing] cases to refer to Aberdeen,” SAC ¶ 57, or providing the company with “debtor information” it collects, SAC ¶ 60—is protected by quasi-judicial immunity, and the defense is therefore waived. Even if they did make such an argument, however, it would be misplaced, as the acts of contracting with Aberdeen, referring cases, and providing debtor information are not done pursuant to a judicial order or part of the performance of a judicial function. Contracting with Aberdeen is a discretionary administrative action by each County Sheriff as a municipal policy maker.³ Although execution of warrants is one of the methods by which each County Sheriff contributes to the onerous collection Plaintiffs face as indigent debtors, the principal harm occurs as a result of their use of and assistance to Aberdeen, which causes a 30% surcharge to Plaintiffs’ debts, and results in Aberdeen threatening and harassing Plaintiffs and their family members. As a result, even if their argument were valid, the County Sheriffs would not enjoy quasi-judicial immunity for the claims Plaintiffs make against them.

II. Qualified Immunity Does Not Shield Defendant Sheriffs

Qualified immunity protects government officials from liability for civil damages only insofar as their conduct does not violate clearly established rights of which a reasonable person

³ If the County Sheriffs were to claim that in contracting with Aberdeen they are simply following an order of the Oklahoma Supreme Court, as do other Defendants, this would provide no defense, for the reasons addressed in Plaintiffs’ opposition to the Former Rogers County Clerk, Br. C, Section II, pp. 6-9. The state Supreme Court’s order is directed at the district courts, not the sheriffs, and is administrative (rather than judicial) in nature.

would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The County Sheriffs contend that they enjoy qualified immunity because the rights asserted by Plaintiffs against them were not clearly established at the time of the alleged violations. Doc. 239 at 13–16. But again, the County Sheriffs only claim qualified immunity for their actions executing warrants. For the reasons stated in Plaintiffs’ Opposition to the Rogers County Sheriff’s Personal-Capacity Motion to Dismiss, Br. D, Section III, pp. 11-13, their arguments to that effect are mistaken, and Plaintiffs’ hereby incorporate by reference that portion of the brief.

By failing to claim qualified immunity for the actions underlying Counts One and Seven of the Second Amended Complaint—contracting with Aberdeen and assisting in its collection activities—the County Sheriffs have waived that defense. Had they raised such a defense, it would have failed, because the rights violated by Defendants through the RICO enterprise and by inflicting onerous collection mechanisms are well established in law.

The County Sheriffs attempt to bolster their qualified immunity argument by misrepresenting the case law, stating incorrectly that “[f]or a law to be ‘clearly established,’ there must be a Supreme Court or Tenth Circuit decision on point.” Doc. 239 at 14 (citing *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)). What *Medina* actually says is that “ordinarily” courts require either such a decision “or [that] the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.” 960 F.2d at 1498 (emphases added) (citing *Stewart v. Donges*, 915 F.2d 572, 582–83 & n.14 (10th Cir. 1990)). As the Supreme Court recently affirmed, “[i]t is not necessary, of course, that the very action in question has previously been held unlawful. That is, an officer might lose qualified immunity even if there is no reported case directly on point.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866–67 (2017) (citations and quotation marks omitted). Defendants would have this Court believe otherwise.

As alleged in Count Seven, the County Sheriffs have violated Plaintiffs' clearly established procedural due process right to be free from onerous debt collection under *James v. Strange*, 407 U.S. 128 (1972). The legal basis for this claim is set out in detail in Plaintiffs' Opposition to Tulsa County Sheriff's Individual Capacity Motion to Dismiss, Br. J, pp. 16-17, and in Part IV below. The County Sheriffs have violated this right by contracting with Aberdeen, assisting in its debt-collection efforts by selecting cases to refer to Aberdeen and providing it with debtor information, and by executing the unlawful warrants that issued at Aberdeen's request. None of these actions merit qualified immunity. Nor can the County Sheriffs claim that by using Aberdeen with full knowledge of its illegal activities, they have merely been "follow[ing] state law." See Doc. 239 at 16. While Oklahoma statutes permit each County Sheriff to contract with a private debt collector, they do not mandate the use of any individual company or sanction assistance in unlawful methods. State law provides no shield of immunity to these Defendants.

The County Sheriffs also claim that qualified immunity protects their activities as part of the RICO enterprise alleged by Plaintiffs in Count One. Doc. 239 at 16. Again, they only make this argument regarding the execution of warrants, which only constitutes one part of the Sheriffs' participation in the RICO enterprise. The merits of Plaintiffs' RICO claim are set forth in their Opposition to the Rogers County Sheriff's Personal-Capacity Motion to Dismiss, Br. D, Section IV, pp. 13-25, and in Part III below. Although some courts have held that qualified immunity may apply to a RICO claim, where they have done so, courts have typically resolved the issue according to whether a RICO claim has been stated at all, rather than whether the right to be free from extortion or other predicate acts has been clearly established. This is understandable, because the right to be free from extortion by a RICO enterprise is clearly established by the RICO statute itself and by the statutes prohibiting its predicate acts. See, e.g., *Robbins v. BLM*, 252 F. Supp. 2d

1286, 1294–45 (D. Wyo. 2003) (denying qualified immunity because, under the Hobbs Act and state law, “a person’s right to be free from extortion is clearly established” for purposes of RICO liability).

The doctrine of qualified immunity balances “the need to hold public officials accountable” with “the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine is intended to “give[] government officials breathing room to make reasonable but mistaken judgments about open legal questions.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Unlike a constitutional issue, which may be subject to judicial interpretation and more amenable to “reasonable but mistaken judgments” necessitating the protections of qualified immunity, the question whether the County Sheriffs have participated in the RICO enterprise does not rest on open legal questions—it is factual. If they wish to deny any of Plaintiffs’ factual RICO allegations—that they have contracted with Aberdeen, that Aberdeen has extorted money from Plaintiffs, that they have assisted Aberdeen in its extortionate activities, or that Plaintiffs have suffered injury to their property, for example—they may do so after discovery has concluded. At this stage, the allegations in the Second Amended Complaint must be taken as true, and Plaintiffs have clearly pled both the County Sheriffs’ participation in a RICO enterprise and their conspiracy to do the same. They should not be granted qualified immunity on Count One.

Finally, regardless of whether the County Sheriffs can claim qualified or quasi-judicial immunity, Plaintiffs’ claims for injunctive relief against them should go forward. Immunity applies only to damages claims if at all.

III. Defendants Are Liable Under the RICO Act

The County Sheriffs argue that the Second Amended Complaint does not adequately plead

their involvement in the RICO enterprise, their commission of predicate acts, their engagement in a pattern of racketeering activity, or their conspiracy to commit these acts. Doc. 239 at 17–22. For the reasons explained below, the Complaint successfully states a RICO claim against the County Sheriffs. Many of the County Sheriffs’ arguments mirror those of the similarly situated Rogers County Sheriff in his individual capacity. Accordingly, Plaintiffs incorporate their responses to his arguments here. *See* Br. D, Section IV, pp. 13-25.

The Second Amended Complaint states a valid claim under the RICO Act, 18 U.S.C. §§ 1961-68. In Count One, Plaintiffs allege that the County Sheriffs in their individual capacities, together with Aberdeen, Jim and Robert Shofner (the Shofners), the OSA, and the Tulsa and Rogers County Sheriffs in their individual capacities (collectively, “RICO Defendants”), are members of an enterprise that uses the threat of arrest and incarceration in order to extort millions of dollars in payments from thousands of impoverished debtors, in violation of 18 U.S.C. § 1962(c) & (d). SAC ¶¶ 274–317. It is unlawful for any person associated with any enterprise, the activities of which affect interstate commerce, to participate in the conduct of the enterprise’s affairs through a pattern of racketeering activity. *Id.* § 1962(c). It is also unlawful “to conspire to violate” the RICO statute. *Id.* § 1962(d). Here, what might otherwise be a legitimate purpose has become corrupted by the pattern of extortion carried about by the enterprise through Aberdeen, and enabled by the remaining RICO participants. “The elements of a civil RICO claim are (1) investment in, control of, or conduct of (2) an enterprise (3) through a pattern (4) of racketeering activity.” *Tal v. Hogan*, 453 F.3d 1244, 1261 (10th Cir. 2006). The Amended Complaint pleads every element of civil RICO for each of the RICO defendants, including the County Sheriffs.

A. The County Sheriffs Have Participated in the RICO Enterprise

The County Sheriffs argue that they cannot be held liable for the activities of the RICO enterprise, claiming that their only involvement in the enterprise's affairs was compliance with the statutory duty to serve warrants. Serving such warrants, they claim, constitutes a "regular service[]" performed in the regular course of business. Doc. 239 at 18. The County Sheriffs' RICO arguments, like their immunity arguments, rest on the mistaken premise that all of the allegations against them stem from their execution of unlawful warrants. But this misreads the Complaint. The County Sheriffs have participated in the RICO enterprise in multiple ways.

First, the County Sheriffs are members of the OSA, which has acted "as the agent of [the County Sheriffs] and on [their] behalf" concerning the agreement with Aberdeen. SAC ¶ 29. As members of the OSA, they "authorized the Sheriffs' Association to enter into the Agreement for debt collection services on [the Sheriffs'] behalf." *Id.* Moreover, under state law, each sheriff is empowered to make an individualized decision regarding whether and how to contract for debt-collection services in his or her particular county. These sheriffs choose individually to "assign their right to contract to the statewide association administering the provisions of this contract," Okla. Stat. tit. 19, § 514.4(E), knowing that the OSA contracts with a company that engages in unlawful activity. Each of the County Sheriffs are responsible for using Aberdeen in their respective counties on an ongoing basis and for authorizing multiple renewals of the agreement, with "full knowledge" of the misconduct. SAC ¶ 81. They are therefore implicated in OSA's participation in the enterprise.⁴

⁴ The Oklahoma County Sheriff's argument that membership in the OSA is not enough to establish RICO participation is based on *Board of County Comm'r's v. Liberty Group*, 965 F.2d 879, 886 n.4 (10th Cir. 1992). But that case simply states that the RICO "enterprise" and "person" must be

Second, each Defendant County Sheriff is authorized by the contract to “select cases to refer to Aberdeen.” SAC ¶ 57; *see also* Doc. 212-1 at 3. Each County Sheriff also provides Aberdeen with “debtor information” it collects through the OSA. SAC ¶ 60. Assigning the right to collect debt and providing information to assist a company that regularly threatens unlawful arrest to debtors who cannot pay is a singular, discretionary act for each sheriff, and is not part of the “goods and services” they provide in the “regular course of business” as described by the Tenth Circuit. *See Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 884 (10th Cir. 2017); *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1101 (10th Cir. 1999). In *BancOklahoma*, for example, the challenged conduct involved activities that the defendant title companies “would have performed in their normal course of business in dealing with all mortgage lenders.” *Id.* at 1102. Enabling and assisting Aberdeen’s extortion is not normal business activity. Importantly, the County Sheriffs are not “outsiders” merely providing services to the RICO enterprise; they are an integral part of the enterprise, and they decide individually whether to authorize Aberdeen’s operation in their respective counties. *See George v. Urban Settlement Servs.*, 833 F.3d 1242, 1251–52 (10th Cir. 2016).

Finally, the County Sheriffs “routinely arrest[] and jail[] individuals pursuant to . . . debt-collection arrest warrants that are based solely on nonpayment.” SAC ¶ 10. Once a person is arrested for nonpayment, even if she is indigent and unable to pay, the County Sheriffs will not release her unless a sum of money is paid. *Id.* This is the sole form of participation that Defendants challenge in their brief. But their objections are unavailing. The County Sheriffs claim this

distinct. *Id.* at 885. Here, the enterprise comprises multiple persons and organizations. The Oklahoma County Sheriff’s argument is thus unsupported and incorrect.

constitutes “regular services.” Doc. 239 at 18. But there is nothing regular about the Sheriffs’ use of the unconstitutional warrants. Even if signed by a judge, the warrants are obviously invalid, as they are issued without the process required by state law and without an affidavit supporting probable cause. “[W]here the issuing magistrate wholly abandoned his judicial role . . . no reasonably well-trained officer should rely on the warrant.” *United States v. Leon*, 468 U.S. 897, 923 (1984). These illegal warrants are not part of the Sheriffs’ regular services for the same reason that their execution does not entitle the Sheriffs to absolute immunity. *See* Br. D, Section II, pp. 3-11.

Moreover, an officer does not demonstrate “good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.” *Id.* (citing *Brown v. Illinois*, 422 U.S. 590, 610–11 (1975) (Powell, J., concurring in part) (internal quotation marks omitted)). The County Sheriffs cannot reasonably claim that their “regular services” include executing and detaining people on warrants “not supported by oath or affirmation” or probable cause. SAC ¶ 336. The arrests contribute directly to the success of the RICO enterprise by making real Aberdeen’s threats of unlawful arrest. For that reason, the County Sheriffs’ argument that executing valid warrants cannot be considered racketeering activity under RICO, Doc. 239 at 21–22, misses the point. The arrests themselves are not predicate offenses, but evidence of participation in the activities of the RICO enterprise.

Finally, the County Sheriffs profit from the enterprise through the collection of Sheriff’s Fees, *see* SAC ¶ 149, and through participation in the OSA. *See id.* ¶ 105. Together, the allegations in the Second Amended Complaint establish the County Sheriffs’ intimate and frequent participation in the RICO enterprise through a variety of means, including, but not limited to, the

execution of unlawful warrants. The County Sheriffs' arguments do not address most forms of participation alleged by Plaintiffs, and therefore do not support dismissal, even if sound.

B. The Extortion Benefitted Private Corporate Entities as Well as Government Ones

The County Sheriffs also deny involvement in the predicate acts that constitute the RICO enterprise, on the alleged ground that an extortion claim cannot be based on the collection of money intended for the government. Doc. 239 at 19–21. This provides no defense here, as Aberdeen and the OSA are both private beneficiaries of the money extorted by the RICO enterprise. It is true that there can be no claim for extortion where the “sole” intended beneficiary is a governmental entity. *See Wilkie v. Robbins*, 551 U.S. 537, 564–65 (2007). But the Supreme Court in *Wilkie* expressly distinguished cases in which money was extorted to benefit both a private third party and a government actor. *See id.* at 565 (distinguishing *People v. Whaley*, 6 Cow. 661, 1827 WL 2284 (N.Y. 1827) from *Willett v. Devoy*, 170 App. Div. 203, 155 N.Y.S. 920 (1915)); *see also U.S. v. Renzi*, 861 F. Supp. 2d 1014, 1022 (D. Ariz. 2012), *aff'd* 769 F.3d 731 (9th Cir. 2014) (finding extortion where defendant facilitated a land deal between the federal government and a private investment group, which benefited the defendant as well as the government). In this case, the money is intended for both public *and* private benefit: the extortionate scheme has netted millions of dollars in profit for Aberdeen and the OSA, both private entities. *See, e.g.*, SAC ¶ 3. The fact that the money may be sent first to the counties, which then re-compensate the private entities from the same funds, does not remove its taint.

The County Sheriffs argue that this momentary, back-and-forth flow of money from private account to public account and swiftly back to private account, effectively launders the extortionate proceeds and shields Defendants from liability. Doc. 239 at 19–21. That is not the *Wilkie* rule. Again, *Wilkie* only exempts the extortion of money for the “*sole* benefit of the Government.” 551

U.S. at 564–65 (emphasis added); *see also Renzi*, 861 F. Supp. at 1023 (“The Supreme Court [in *Wilkie*] did not hold that as long as the action is taken ‘in part’ to benefit the government, it is not actionable under the Hobbs Act.”). In instances such as this one, where both public and private entities benefit from an extortionate scheme, *Wilkie* does not bar relief. The Second Amended Complaint clearly pleads the County Sheriffs’ participation in the RICO enterprise and their contribution to the predicate acts of extortion.

C. The County Sheriffs Engaged in a Pattern of Racketeering Activity

The County Sheriffs also argue that they have not engaged in a pattern of racketeering activity. *See Doc. 239 at 21–22.* Here they again mischaracterize the Second Amended Complaint as alleging only that they have executed unlawful warrants, which they claim Oklahoma law requires them to do. The same allegations in the Second Amended Complaint that establish the County Sheriffs’ participation in the RICO enterprise in multiple ways also demonstrate their participation in a pattern of racketeering activity. Although they deny that they had the criminal intent to engage in illegal acts, this is a factual question. The Second Amended Complaint clearly pleads that facts from which criminal intent can be inferred—the County Sheriffs assist Aberdeen in its collection activities by, *inter alia*, providing it with debtor information with “full knowledge” that it uses that information to violate the law. SAC ¶¶ 60, 81. As those allegations must be accepted as true at this stage, the Sheriffs’ argument fails.

D. Plaintiffs Have Engaged in a RICO Conspiracy

The County Sheriffs’ final RICO argument is that Plaintiffs have failed to plead predicate RICO acts, so that the conspiracy claim under § 1962(d) must fail as a matter of law. Given that Plaintiffs have alleged a violation under § 1962(c), *supra*, and given the “agreement” set forth in Plaintiffs’ Opposition to the Rogers County Sheriff’s Personal-Capacity Motion to Dismiss, Br.

D, Section IV, pp. 19-29, Plaintiffs have stated a claim under § 1962(d).

IV. Defendants Have Violated the Equal Protection Clause

Count Seven of the Second Amended Complaint alleges that the use of extreme threats and arrest warrants, and the additional 30% surcharge incurred in the process, denies indigent debtors equal protection as compared to wealthy debtors. Specifically, Defendants subject debtors who cannot pay to severe treatment while “allowing those who can afford to pay to be left alone.” SAC ¶ 361. This cause of action is rooted in longstanding Supreme Court precedent.

In *James v. Strange*, 407 U.S. 128, 138 (1972) , the Court held that government officials could not use “unduly harsh or discriminatory terms” to collect court costs owed from a criminal case, “merely because the obligation is to the public treasury rather than to a private creditor.” There, the Court struck down a Kansas recoupment statute that expressly denied indigent defendants who owed money to the State for indigent defense costs the basic wage garnishment exemptions available to judgment debtors in civil cases under Kansas law. *Id.* at 135–36, 141–42. It recognized that “state recoupment statutes” embody “legitimate state interests,” but reasoned that those interests “are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors.” *Id.* at 141. “For Kansas to deny” the basic wage exemptions at issue was for it “to risk denying” a debtor “the means needed to keep himself and his family afloat.” *Id.* at 136. The result was to “blight” in “discriminatory fashion the hopes of indigents for self-sufficiency and self-respect.” *Id.* at 141–42. For these reasons, the Court struck down Kansas’s “unduly harsh” debt-collection scheme. *Id.* at 138.

In this case, Defendants’ collective use of threats, harassment, arrest warrants, jailing, and detention under demand of payment singles out poor debtors for more extreme treatment than that given to those who can afford to pay. In Kansas, criminal defendants were merely barred from

claiming certain garnishment exemptions. Here, by contrast, the County Sheriffs have contracted with a company that threatens arrest and seeks arrest warrants, while they themselves arrest and imprison people without regard to their ability to pay and without following any of the required procedures for determining ability to pay, and then keep them there for days or weeks until they or their families bargain or pay. As a result of Defendants' use of Aberdeen, Plaintiffs have faced a 30% increase in the amount of debt owed, without any advance notice. Defendants, including the County Sheriffs, are not constitutionally permitted to enforce the law in a manner that would require indigent debtors to pay "the last dollar they have or can get, and thus make themselves and their dependents wholly destitute." *Adkins v. E.I. DuPont de Nemours*, 335 U.S. 331, 339 (1948).

But that is precisely what they do.

The County Sheriffs argue that Plaintiffs' equal protection claim must fail because it does not allege that Defendants "engaged in discriminatory conduct between similarly situated groups." Doc. 239 at 22. According to the Sheriffs, the government action Plaintiffs challenge—onerous debt-collection—"can by definition only apply to the indigent debtor group." *Id.* at 25; *see also id.* at 26 (citing *Cain v. City of New Orleans*, No. CV 15-4479, 2018 WL 3657447 (E.D. La. Aug. 2, 2018)). But unlike in *Cain*, where the plaintiffs, criminal judgment debtors, claimed similarity to civil judgment debtors over which the defendant did not have jurisdiction and to whom the challenged policies did not actually apply, 2018 WL 3657447, at *5, the two groups at issue here owe the same type of debt to the same entity (a greater degree of similarity than was present in *James*, where the two unequally treated groups owed debts to different types of creditors altogether). The only difference between them is that wealthier criminal judgment debtors can afford to purchase their freedom from threats, harassment, and imprisonment while poor ones, including Plaintiffs, cannot. The Equal Protection Clause does not permit such discrimination.

See, e.g., Fuller v. Oregon, 417 U.S. 40, 54 (1974) (upholding an Oregon scheme because it was “tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship”); *Olson v. James*, 603 F.2d 150, 154 (10th Cir. 1979) (“[S]uch a statute must not indiscriminately pursue the indigent as well as those who have acquired the means of repaying.”); *United States v. Bracewell*, 569 F.2d 1194, 1198–1200 (2d Cir. 1978) (discussing the need for individualized consideration of repayment so as not to require repayment that creates hardship in violation of *James* and *Fuller*).

V. Plaintiffs’ Allegations Are Consistent with Public Records

The County Sheriffs ask this Court to dismiss Plaintiffs claims because, they allege, judicially noticeable records in Plaintiff Kendallia Killman’s and Ira Lee Wilkins’ criminal and traffic cases in Oklahoma state courts “demonstrate that the only factual allegations made against these County Sheriffs are false.” Doc. 234 at 32; *see also id.* at 24–32; Doc. 239 at 28–30. There are multiple problems with the County Sheriffs’ theory.

First, the County Sheriffs are proper defendants regardless of any alleged inaccuracies in the allegations related to Ms. Killman or Mr. Wilkins. As explained above, Plaintiffs’ constitutional claims against the Sheriffs do not depend on the nuances of the allegations related to these two plaintiffs, but upon the core facts alleged by all class representatives, namely, that the County Sheriffs have authorized a company with a constitutionally impermissible financial bias (Aberdeen) to collect court debt, and that the Sheriffs themselves engage in unconstitutionally onerous methods of debt collection. As for Plaintiffs’ RICO claims, the County Sheriffs are part of the RICO conspiracy and thus liable to all Plaintiffs, not just Ms. Killman and Mr. Wilkins. *See*

Br. I (Plaintiffs' Opposition to Defendant 51 County Sheriffs' Official-Capacity Motion to Dismiss), Section VI, pp. 34-37.

Second, there is no actual conflict between Plaintiffs' allegations and the public record. As the County Sheriffs acknowledged in a Notice of Correction they filed after submitting their motion, two of the purported conflicts they identified focused on allegations not made in the Second Amended Complaint. Doc. 243. Although the County Sheriffs spend pages restating the public dockets in Ms. Killman's and Mr. Wilkins' cases, they appear to identify only two other "inconsistencies," and both are illusory. With respect to Ms. Killman, the County Sheriffs argue that she "complain[s] that the courts have failed to provide her an opportunity to appear at a Rule 8 Hearing when her records make clear that she has repeatedly been given that chance." Doc. 234 at 31. However, the Second Amended Complaint nowhere alleges Ms. Killman was not afforded such an opportunity. With respect to Mr. Wilkins, the County Sheriffs contend that the Second Amended Complaint falsely states that Aberdeen "exercised control over the recall of [his] bench warrants" because it is actually, according to the County Sheriff's interpretation of the public docket, the Wagoner County Court that exercises such control. *Id.* at 32. But the Second Amended Complaint alleges only that an Aberdeen employee told Mr. Wilkins' fiancée that Aberdeen exercised such control. *See SAC ¶¶ 197–98.* The County Sheriffs were not party to that conversation and the public docket sheds no light on it.⁵

Third, to the extent there is any inconsistency, it is Plaintiffs' complaint, rather than the public docket, that controls. The County Sheriffs' argument to the contrary rests on a

⁵ The Second Amended Complaint does contain one typographical error. It alleges that Mr. Wilkins' fiancée spoke with the Aberdeen employee in November 2017. SAC ¶ 197. It should say October 2017. (The County Sheriffs argument does not depend on, or even mention, this date.)

misunderstanding of how judicial notice operates on a 12(b)(6) motion. A court may take judicial notice of matters of public record on a motion to dismiss. *Tal v. Hogan*, 453 F.3d 1244, 1265 n.24 (10th Cir. 2006). But taking judicial notice of such records does not license the Court to *accept the truth* of the statements appearing in such records. *See, e.g., Duran v. Muse*, No. 16-cv-717, 2017 WL 5985568, at *3 (N.D. Okla. Dec. 1, 2017) (Kern, J.) (“For the purpose of Defendants’ motion to dismiss, the Court may take judicial notice of the existence of the 4/20/15 Order, without taking its contents as true.”). Rather “the documents may *only* be considered to show their contents, not to prove the truth of matters asserted therein.” *Tal*, 453 F.3d at 1265 n.24 (quotation marks omitted) (emphasis added) (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

Thus, to the extent that the contents of the public records, if accurate, would undermine Plaintiffs’ allegations in the Second Amended Complaint, the latter must still be taken as true for purposes of a motion to dismiss. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (reversing dismissal of complaint where district court accepted the truth of a judicially noticed document rather than “draw all reasonable inferences” in the plaintiffs’ favor).

This rule accords with *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276 (10th Cir. 2004), on which the County Sheriffs rely. *See* Doc. 234 at 25–26; Doc. 239 at 28–29. In *Grynberg*, a *qui tam* suit, the Tenth Circuit took judicial notice of the fact that another case raised the same issue as that raised in the case before the court. Because a *qui tam* plaintiff cannot recover on the basis of misconduct that was the subject of a prior lawsuit, the plaintiff’s claim was barred by the existence of the earlier case. *See Grynberg*, 390 F.3d at 1279. But it was only the existence of that other suit, not the truth (or falsity) of the allegations in the other suit that justified dismissal in *Grynberg*. Thus, even if there were some conflict between Plaintiffs’ allegations and the public

records (which there is not, as explained below), it would not provide a basis for dismissing Plaintiffs' complaint or any claims therein at this stage.

Fourth, even if the Court credits the County Sheriffs' misguided argument related to judicial notice, Ms. Killman's and Mr. Willkins' claim for injunctive relief against the Wagoner County Sheriff would still survive.⁶ Ms. Killman and Mr. Wilkins both continue to owe court debt, are indigent, and, as a result, remain "trapped in a cycle of mounting debts, arrest, and incarceration." SAC ¶¶ 22, 24, 67. Put differently, they are still subjected to, or at imminent risk of being subjected to, not only the Sheriff's own onerous debt-collection methods, but also the harms caused by Aberdeen's impermissible financial bias, which the Wagoner County Sheriff enables by authorizing the contract with Aberdeen. Thus, Ms. Killman and Mr. Wilkins have stated a valid claim for forward-looking equitable relief against that Sheriff.

VI. Plaintiffs Allege the Sheriffs' Personal Involvement and Plead Sufficient Facts to Provide Notice of Their Claims

The County Sheriffs contend that the Second Amended Complaint fails to show that they were "personally involved in any constitutional violation" because it purportedly does not allege "that any Sheriff did anything to anyone at all." Doc. 239 at 31. To the contrary, the Complaint is clear about the nature of their participation in the alleged violations. It alleges that they are liable (1) under Count Six, for "authoriz[ing] the [OSA] to enter into the contract" with Aberdeen and renew that contract despite their knowledge of the company's impermissible financial bias,⁷

⁶ Mr. Wilkins also has court debt from cases in Tulsa County and so his claim against the Tulsa County Sheriff would survive as well. The Tulsa County Sheriff, however, does not rely on the contents of the dockets in those cases to argue that Mr. Wilkins' claims should be dismissed.

⁷ The County Sheriffs have full knowledge of Aberdeen's challenged financial incentive and even go so far as to argue that it is impossible for a debt collector to lack such an incentive. *See* Doc. 234 at 11–12. They therefore cannot escape liability on the ground that the OSA is the entity that

and (2) under Count Seven, for their practice of enforce court debts through the power of arrest. SAC ¶¶ 30, 356, 361. This satisfies the personal participation element and exceeds the “deliberate indifference” standard that the County Sheriffs claim must be met to establish their liability. *See Doc. 239 at 32; Dodds v. Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010) (holding that liability extends to the “defendant-supervisor who creates, promulgates, implements, or *in some other way possesses responsibility for the continued operation of a policy*” that injures the plaintiff (emphasis added)); *Wilson v. Montano*, 715 F.3d 847, 858 (10th Cir. 2013) (finding sheriff liable where he was “deliberately indifferent to the ongoing constitutional violations which occurred under his supervision”). To the extent that their argument is based on the Second Amended Complaint’s failure to identify the individual debtors harmed by their conduct, such specificity is not required in a class action of this nature. *See Br. I, Section IV, pp. 34-37.*

In a related argument, the County Sheriffs assert that the Second Amended Complaint amounts to a “shotgun pleading” and uses “collective allegations” that fail to provide fair notice of the challenged wrongful conduct. Doc. 234 at 34–35. That is incorrect. Plaintiffs have pled that each Defendant Sheriff has the same unlawful policy. *See SAC ¶ 30* (alleging that “[e]ach Defendant Sheriff’s office authorized the Sheriffs’ Association to enter into the contract for debt collection services with Aberdeen, Inc. on the Sheriff’s behalf” and that “each of the Sheriff Defendants” uses the power of arrest to collect court debts). It is not improperly “collective” to plead that multiple defendants have engaged in the same type of unconstitutional conduct. Nothing in Rule 8’s notice requirement demands that Plaintiffs list allegations against each defendant in

actually signed and now administers the Agreement with Aberdeen. That would be akin to saying that a police department is not liable for maintaining a policy of using excessive force because it is individual officers who actually use the excessive force.

separate paragraphs. At the end of the day, the County Sheriffs undermine their own claim of lack of notice in stating, that “as pled, it cannot be the ‘policy and procedure’ of any Defendant (*besides these County Sheriffs*) to execute warrants.” Doc. 234 at 34–35 (emphasis added). Just so.

VII. This Court Has Jurisdiction and May Not Abstain

Adopting and incorporating arguments in their official-capacity motion to dismiss and in the Oklahoma County Sheriff’s motion to dismiss regarding the applicability of the *Rooker-Feldman*, *Younger*, and *Heck* doctrines to this case, the County Sheriffs assert that this Court lacks subject-matter jurisdiction to hear Plaintiffs’ claims. *See* Doc. 239 at 33 (citing Docs. 215, 234). For the reasons explained in Plaintiffs’ Opposition to the Sheriffs’ Official Capacity Motion to Dismiss, those doctrines do not bar this Court from deciding Plaintiffs’ claims. *See* Br. I, Section V, pp. 23-34.

CONCLUSION

For the reasons set forth above, Plaintiffs ask the Court to deny the County Sheriffs’ motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November, 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to all ECF registrants who have appeared in this case.

/s/ Seth Wayne