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 ABERDEEN ENTERPRIZES II, INC. MOTION TO DISMISS

BRIEF E

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For ease of reference, each of Plaintiffs' opposition briefs has been labeled by letter according to the motion to dismiss to which it responds, listed below.

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D. Scott Walton, Sheriff of Rogers County, Individual Capacity (Doc. 228)

E. Aberdeen Enterprizes II, Inc. (Doc. 230)

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INTRODUCTION

Aberdeen Enterprizes II, Inc. ("Aberdeen") is a for-profit Oklahoma corporation that, through a lucrative contract with numerous sheriffs of Oklahoma counties, is empowered to collect court debts owed in criminal and traffic cases arising in counties throughout Oklahoma. This agreement is the foundation of an illegal extortionate scheme whereby Aberdeen uses the threat of arrest to coerce payments from indigent debtors. Aberdeen regularly threatens to obtain new arrest warrants or refuses to remove old ones unless the impoverished court debtors make payments that they cannot afford. Further, Aberdeen seeks and procures warrants, and with the assistance of the Sheriff Defendants who execute them, Aberdeen has Plaintiffs actually arrested and detained solely for nonpayment.

This scheme generates tens of millions of dollars collected on the backs of Oklahoma's poorest, trapping them in an endless cycle of debt and incarceration. This illegally obtained revenue flows to Aberdeen, its officers (Jim and Rob Shofner), the Oklahoma Sheriffs Association (OSA), the sheriffs' offices themselves, and the Oklahoma court system.

Plaintiffs, all impoverished debtors suffering under this systemic extortion scheme, have sued Aberdeen and the other Defendants in this case under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. §§ 1961-1968), the United States Constitution, and Oklahoma law. Even as it has partnered with the key government actors in Oklahoma's criminal legal system to leverage the threat of arrest and incarceration to extract debt payments, Aberdeen disingenuously underplays its authority and behavior. At the same time, it asserts that it is a 'for profit" corporation unfettered by the legal principles that bind those state actors. Aberdeen is wrong as a matter of fact and law. The agreement with the sheriffs effectively deputizes Aberdeen, giving it law enforcement authority and discretion to seek arrest warrants, and simultaneously allows the company to maximize its profit from those decisions. Indeed,

Aberdeen's exclusive and discretionary power to seek arrest warrants and have debtors thrown in jail for nonpayment makes it a moving force behind the violations of Plaintiffs' constitutional rights. This court should disregard Aberdeen's attempts to deny the factual allegations and its misapprehension of the relevant law, and deny its Motion to Dismiss.

RELEVANT BACKGROUND

Aberdeen is a private, for-profit debt collection company that has contracted with OSA, the Defendant Sheriffs' agent, to collect court debts. Second Amended Compl. ¶ 5. Aberdeen assumes control of debt collection for a specific case after a court clerk seeks, and a district court issues, a debt-collection arrest warrant against the individual owing debt, and a court clerk decides to transfer the case to Aberdeen. SAC ¶ 50.

Each of the counties in which the Sheriff Defendants operate have contractually delegated to Aberdeen the responsibility to collect court debts. SAC ¶ 51. This includes delegating to Aberdeen the authority to use its discretion to determine payment plans for the payment of court debts, monitor debtors' compliance with those plans, control when to request the recall of warrants, and determine when to request that new arrest warrants issue. *Id*. Once Aberdeen takes control of a debt-collection case, it engages in threats and extortion to extract as much money as possible from the debtor, without regard to the debtor's ability to pay or the person's need to obtain the basic necessities of life. *Id*. ¶ 52.

When Aberdeen seeks an arrest warrant, it routinely and deliberately omits information that is material and relevant to the issuance of an arrest warrant, including that a debtor is unable to pay. *Id*. ¶ 63, 89. There is no question that Aberdeen routinely possesses such information but chooses not to share it with the issuing authority. *See, e.g.*, *id*. ¶¶ 184, 198, 204, 211. Aberdeen does not have the formal legal power to unilaterally recall or issue arrest warrants by itself, but regularly misrepresents to Plaintiffs and members of the proposed classes that it has that power.

Id. ¶ 69. Aberdeen's employees tell people with active arrest warrants that Aberdeen can recall the arrest warrants if a certain amount is paid; they also tell people who have had their arrest warrants recalled that if they fail to make continuing payments in amounts prescribed by the company, Aberdeen will secure new warrants for their arrest. *Id*. Aberdeen demands payment on threat of arrest from people who its employees know to be indigent, including those who were found indigent for the purposes of their previous case; those who tell Aberdeen that they are destitute; and those whose only form of income is Supplemental Security Income (SSI) disability payments. *Id.* ¶ 82. If a person who has entered into a payment plan with Aberdeen falls behind on payments and is not able to comply with Aberdeen's demands for additional money, Aberdeen will unlawfully seek a warrant for arrest. *Id.* ¶ 88. These arrest warrant applications are not based on any factual allegations sworn by oath or affirmation. *Id.* ¶ 90. Aberdeen does not give debtors notice or an opportunity to be heard on their ability to pay. *Id.* ¶ 93.

Aberdeen has no revenue source other than payments by court debtors. *Id.* ¶ 107. The amount of Aberdeen employees' compensation is affected by the amount they collect. *Id.* ¶ 102. Aberdeen also stages competitions to see who can collect the most money, with the winner receiving a financial reward. *Id*.

As a result of Aberdeen's predatory behavior, Plaintiffs, all of whom are indigent, have suffered serious, persistent and ongoing harm. For example, Aberdeen has repeatedly threatened Plaintiff Carly Graff with arrest; she lives in fear of such arrest, and leaves her home only to walk her children to school. *Id.* ¶¶ 159-60. Aberdeen threatened not only Plaintiff Randy Frazier, a veteran with serious health issues—issues of which Aberdeen is well aware—but also his daughter, telling her that if money was not paid in her father's case he would be arrested. *Id.* ¶ 166-67. Plaintiff David Smith, under threat of arrest, was forced to forego basic necessities and his child

support payment in order to pay Aberdeen, costing him visitation with his son. *Id.* ¶ 173. Plaintiff Kendallia Killman, whose only income is a disability payment that must go to her intellectually disabled son, has been arrested twice as a result of warrants related to her court debt, and Aberdeen continues to demand a lump sum payment to recall those warrants, threatening her with jail if she does not pay. *Id.* ¶¶ 182, 184. And Plaintiff Melanie Holmes— after suffering near-daily threats of arrest by Aberdeen, one actual arrest on a debt-collection warrant, a weeklong detention due to her inability to pay for release, eviction, and homelessness—ultimately was forced to move to Oregon to live with her youngest daughter. *Id.* ¶¶ 204-212. She is afraid to return to Oklahoma because of her debt-collection arrest warrants. *Id.* ¶ 213.

ABERDEEN'S FACTUAL MISCHARACTERIZATIONS

Violating the basic and indisputable rule that a plaintiff's allegations must be taken as true at the motion to dismiss stage, Aberdeen simply ignores those allegations in order to mischaracterize its primary function and the degree to which it works on behalf of and coordinates with law enforcement, judges, and the court clerks. The Court must disregard these factual misstatements, which are at the heart of this case and plainly contradicted by the Second Amended Complaint. *See Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) ("[F]or the purposes of resolving a Rule 12(b)(6) motion, we accept as true all well-pled factual allegations in a complaint and view these allegations in the light most favorable to the plaintiff.").

Most glaringly, Aberdeen states that it "does not seek. . . or recall warrants." Defendant Aberdeen Enterprizes' Motion to Dismiss Plaintiffs' Second Amended Complaint and Brief in Support ("Doc. 230") at 2. To the contrary, Plaintiffs specifically allege that Aberdeen has been given "the function of determining when to seek a new arrest warrant. . . after a case has been transferred to the company for collection," and that Aberdeen has "discretion to determine the amount of money a debtor must pay, the deadline for making the payment, and when to seek a

warrant for nonpayment." SAC ¶ 62. Critically, "If a debtor does not pay the amount Aberdeen, Inc. requires by the deadline the company sets, then Aberdeen Inc. contacts the court clerk to seek an arrest warrant for nonpayment of court debts." *Id*. To seek this arrest warrant, Aberdeen "does not swear under oath or affirmation to any factual allegations establishing probable cause. It merely sends a message that contains an unsworn allegation that the debtor has not made payments." *Id*. ¶ 63. In at least one county, the court clerk annotates case dockets in a way that illustrates Aberdeen's exclusive authority, specifically warning, "DO NOT ISSUE WARRANNT UNLESS CONTACTED BY ABERDEEN." *Id*. ¶ 62. And Plaintiffs allege that "[a]s a matter of policy and practice, to coerce payments and increase profits, Aberdeen, Inc. promises to recall an active debt-collection arrest warrant if a debtor makes the payment the company demands, and threatens to issue a debt-collection arrest warrant if a debtor fails to make ongoing payments after a warrant has been recalled." *Id*. ¶ 68.

These allegations stand in stark contrast to Aberdeen's claim that it "does nothing but supply information of nonpayment that another entity may then use in seeking a warrant." Doc. 230 at 19. Rather, Aberdeen aggressively threatens debtors and their families in order to extract debt payments—including using such techniques as following a company script that states "I would not want you get picked up on this warrant and not be there for your kids," and passing the phone to a person purporting to be law enforcement who stated that he would come and immediately arrest debtor if the debtor did not pay enough money to Aberdeen. SAC ¶¶ 74-75. And, as stated, if the debtor is unable to pay, Aberdeen *itself*, on its own authority, can and frequently does decide to seek an arrest by "send[ing] a boilerplate application to the court clerk's office requesting that a warrant be issued." *Id.* at ¶ 89.

Perhaps most outrageously, Aberdeen claims that "[a]t best, Aberdeen tries to assist persons with outstanding failure-to-pay warrants by accepting amounts less than that already due per their criminal sentence *in order to help them avoid arrest*." Doc. 230 at 23 (emphasis omitted and emphasis addeed). As the Second Amended Complaint lays out in detail, Aberdeen decides arbitrarily and on a case-by-case basis what amount it will attempt to extract from the debtor, and if that debtor does not pay, ***decides on its own to seek that debtor's arrest***. Aberdeen does not help debtors avoid arrest; Aberdeen uses its power to seek arrest to extort from debtors money they do not have. SAC ¶¶ 66, 88.

Ultimately, Aberdeen does not merely "use[ ] its best efforts to collect amounts already owed. . . and note[ ] whether a person has or has not paid amounts due," as it maintains. Doc. 230 at 2. Rather, Aberdeen threatens debtors with arrest if they do not pay, exercises discretion to file arrest warrant applications when debtors do not pay, and works in concert with the Sheriffs to ensure the non-paying debtors Aberdeen chooses are sent to jail. Plaintiffs have squarely pled these facts, the Court must accept them, and any dispute over those facts must be resolved at trial.

LAW AND ARGUMENT

I. Plaintiffs Have Stated Claims Pursuant to 42 U.S.C. § 1983.

A. Plaintiffs Have Pled That Aberdeen Acts Under Color of Law.

Aberdeen argues that, because it is a private entity and because the contract is authorized under state law, it is not a state actor or otherwise acting "under color of law," and thus not subject to suit under § 1983. *See* Doc. 230 at 12-15. This argument is wrong.

As discussed in Plaintiffs' Opposition to Defendant Oklahoma Sheriffs' Association's Motion to Dismiss, Brief G, Sec. III, pp. 16-22, where the applicable legal standards are laid out at length (and thus not repeated in whole here), courts employ a "flexible approach" to determine whether a private entity is acting under color of state law when it engages in unconstitutional

conduct. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995). An entity acts under color of state law if it meets one of the following tests: (1) it is "a willful participant in joint activity with the State or its agents," *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (internal quotation omitted); (2) "there is a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action . . . may be fairly treated as that of the State itself[,]" *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *or* (3) there is a "symbiotic relationship" between the State and the private party. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972). Only one of these tests is required; Aberdeen easily meets the requirements of all.[1]

Aberdeen meets the joint-action test because it "is a willful participant in joint action with the state or its agents . . . in effecting a particular deprivation of constitutional rights." *Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584, 596 (10th Cir. 1999) (quoting *Gallagher*, 49 F.3d at 1453). As Plaintiffs allege, pursuant to a contract blessed by Oklahoma law, Aberdeen and government entities work together to ensure collection of public debt. *See* Okla. Stat. tit. 19 § 514.4 (2010) (mandating that "a statewide association of county sheriffs" administer contract with debt-collection company, and allowing county sheriffs to assign their right to contract to the association). Under the contract, government actors must assist in Aberdeen's collection of the

[1] These Defendants also likely exercise powers that are a "traditional and exclusive function of the state." *Wittner v. Banner Health*, 720 F.3d 770, 776-77 (10th Cir. 2013) (citing *Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 157-58 (1978)). By collecting criminal court debt, they fall within the traditional government category of administering correctional functions. *See Spurlock v. Townes*, 661 F. App'x 536, 539 n.2 (10th Cir. 2016) (unpublished) (private prison facility); *West v. Atkins*, 487 U.S. 42, 54-57 (1988) (physician under contract with prison to provide medical services to inmates); *accord Smith v. Cochran*, 339 F.3d 1205, 1215–16 (10th Cir. 2003) ("[P]ersons to whom the state delegates its penological functions . . . can be held liable for violations of the Eighth Amendment."). However there is no need to reach this stricter test, as Defendants clearly meet any of the "joint action," "nexus," or "symbiotic relationship" tests.

debt by providing it access to court files—and, in at least one county, the ability to actually *edit* materials in individual case files—and debtor information necessary to collect the warrant. *Id*. ¶¶ 60–61. When a debtor does not pay the amount determined by Aberdeen, the company contacts the court clerk, who requests an arrest warrant that, once issued by a judge, is then executed by the sheriff, who arrest debtors based solely on Aberdeen's unsworn statements that the debtor has not made payments. *Id*. ¶ 62, 65. Aberdeen, the courts, and the sheriffs combine to arrest and incarcerate indigent persons who do not pay enough to Aberdeen. *Id*. ¶ 88-99. These practices represent "joint action" under any definition.

Aberdeen also satisfies the "nexus" test, which is met when the state acts "coercively" on the private actor, *Wittner v. Banner Health*, 720 F.3d 770, 775 (10th Cir. 2013), often in the form of a "state regulation or contract." *Ellison v. Garbarino*, 48 F.3d 192, 195 (6th Cir. 1995). It is not the fact of a contract alone which creates the nexus, but that the contract imposes mandatory obligations on both the private actor and the state, and creates a coercive relationship where governmental entities oversee Aberdeen as their enforcement agent. Aberdeen makes much of characterizing the relationship as a mere "private corporation" fulfilling a role as an "independent contractor" pursuant to a "private contract," Doc. 230 at 13, but this misses the point. The contract is probative of entanglement between the state and the private actor. And the relationship created between the State and the contracted entities satisfies the nexus test. *Cf. West v. Atkins*, 487 U.S. 42, 54–56 (1988) ("Whether the physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner.").

Here, Aberdeen has contracted with OSA, the agent for the Sheriff Defendants, who are obviously state actors, and is empowered by Oklahoma state law to collect public court debts. The contract mandates that Aberdeen follow specific procedures for debt collection. *See, e.g.*, Doc.

212, Ex. A at 3, ¶ 2(a) ("Upon request by a County Sheriff or Court Clerk, Aberdeen *shall* immediately return to such County Sheriff or Court Clerk any account(s) referred to Aberdeen in error.") (emphasis added); *id.* at 5, ¶ 2(e)(3) ("Aberdeen *shall* deposit all funds collected by Aberdeen hereunder in a trust account.") (emphasis added); *id.* at 5, ¶ 2(e)(3)(C) ("Aberdeen, within fifteen (15) days of the receipt of any funds . . . , *shall* distribute to the Association [redacted] of that amount.") (emphasis added). The contract also imposes obligations on public actors. *See*, *e.g.*, Doc. 212, Ex. A at 5 (it is "understood and agreed that each Court Clerk of the County that has issued a warrant and collected the funds . . . shall then, in turn, pay [OSA], or [Aberdeen]"); Doc. 212, Ex. A at 4 (County Sheriffs and Court Clerks who use the state's electronic information system must furnish accounts to Aberdeen using that system). This lack of discretion on the part of both the state and its contractor is an indication that Aberdeen's collection of court fees "may be fairly treated as that of the state." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1143 (10th Cir. 2014) (internal quotation marks omitted). Moreover, under the contract, government officials (individual county sheriffs and court clerks) determine which cases to transfer to Aberdeen, effectively controlling the scope of Aberdeen's business and activities, and assist them in their collection efforts. *See* Doc. 212, Ex. A at 2, ¶ 2(a) (cases are referred to Aberdeen at the county sheriff or court clerk's "sole discretion"); SAC ¶ 60 (county sheriffs and court clerks are to make "collective efforts" to obtain debtor information which OSA then provides to Aberdeen). In fact, the alleged "private" contract grants Aberdeen the right to access state court documents. *Id.* And OSA—acting as the agent of the Sheriffs and a state actor itself, *see* Brief G, Sec. III, pp. 16-22—shares debtor information with Aberdeen, *id.* SAC ¶ 60, and assists Aberdeen "by enlisting government entities to procure debtor information and relay that information to Aberdeen," SAC ¶ 282.

Finally, the "symbiotic relationship" test is satisfied here because the state "has so far insinuated itself into a position of interdependence" with Aberdeen that "it must be recognized as a joint participant." *Gallagher*, 49 F.3d at 1451 (internal quotation omitted). Determining when the entity's operations become sufficiently commingled is a "matter[] of degree." *Id.* at 1452. Aberdeen here acts under the color of law because "the state's relationship goes beyond the 'mere private [purchase] of contract services.'" *Wittner*, 720 F.3d at 777–78 (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 299 (2001)). The Oklahoma counties rely heavily on Aberdeen's collection of court debts to run their judicial systems. The debts collected by Aberdeen are deposited into the "Court Fund," which is used to pay for compensation, juror fees, witness fees, transcripts, and indigent defendant services, among other things. SAC ¶ 111. The money Aberdeen collects also pays for public employees' salaries. *Id.* ¶ 114. This heavy dependence on Aberdeen's debt collection illustrates the interdependence between defendants and the state. *See Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1221-22 (5th Cir. 1987) (finding state action where state relied on private company to satisfy its financial obligations, such as mortgages or bonds). Aberdeen has clearly acted under the color of law as determined by any of these tests.[2]

B. Plaintiffs Have Pled an Unconstitutional Policy or Custom

Aberdeen's claim that Plaintiffs have not "identif[ied] an unconstitutional policy or custom of Aberdeen" is equally mistaken. Doc. 230 at 16. Section 1983 imposes liability on a municipal

[2] Aberdeen additionally argues that Aberdeen's furnishing of information to law enforcement cannot form the requisite state action, Doc. 230 at 15, citing several cases involving individuals reporting crimes to police. But these case are of course inapplicable to a situation where a private corporation has a contractual arrangement with a public entity, and works in concert with court officials and law enforcements to carry out its statutorily authorized contractual obligation to collect *public debt*. Additionally, Aberdeen's assertion that it is only "furnishing . . . information" once again contradicts the allegations in the Second Amended Complaint.

corporation for, among other things, policies and "decisions of employees with final policymaking authority" that cause constitutional injuries. *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010) (quotation marks omitted). "[P]rinciples of § 1983 'policymaker' liability" are "equally applicable to a private corporation," like Aberdeen, "acting under color of state law." *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 729 (4th Cir. 1999); *see also, e.g.*, *Williams v. Miller*, 14-cv-61, 2015 WL 1207011, at *19 (W.D. Okla. Mar. 12, 2015) (denying motion to dismiss in suit against private corporation CCA based on decisions of employee "charged with the policy and ultimate decision-making responsibilities at CCA's prison").

Here, Plaintiffs have alleged that the Shofners are principals of Aberdeen, Inc. with final policymaking authority. *See* SAC ¶¶ 27-28. Plaintiffs seek to hold Aberdeen liable for the unconstitutional policies the Shofners have established and implemented. This is not an allegation of "vicarious liability," as Aberdeen contends, *see* Doc. 230 at 15, but a straightforward application of settled principles of corporate liability under § 1983.

Aberdeen also argues that its "policies and customs of contacting persons such as Plaintiffs for the purposes of collecting a debt and alleged advising of the possibility of arrest for failure to pay are not unconstitutional," and that Aberdeen may not be held liable for the conduct of its employees that "exceed[s] the Agreement or other permissible debt-collection efforts[.]" Doc. 230 at 16. This appears to be an argument that the threats and extortionate conduct alleged by Plaintiffs can only be attributed to individual rogue employees, and not to Aberdeen itself. But Plaintiffs have specifically alleged that Aberdeen's leveraging of Oklahoma's law enforcement apparatus to unconstitutionally extract debt from those who cannot pay is, in fact, official company policy and, indeed, the entire basis for its business model. To wit, Plaintiffs have alleged that:

- In its guidance to employees, Aberdeen encourages the collection of money from indigent people with disabilities because of their steady stream of government income and provides a sample script for a conversation with a person receiving SSI disability benefits, SAC ¶ 82;
- Aberdeen forbids its employees from informing people of their legal rights and actively attempts to prevent debtors from learning of other lawful avenues of paying court debts, including in its guidelines the directive, "You are to ***NEVER*** refer any defendant to call the court clerks," *id*. ¶ 83;
- In Aberdeen's training materials, it expressly instructs its employees to "overcome" any objections to payment based on inability to pay, including the fact that a person cannot get a job or is on a fixed income, *id*. ¶ 86;
- Aberdeen's sample script for communicating with debtors instructs employees to threaten debtors with separation from their families by stating, "I would not want you get picked up on this warrant and not be there for your kids," *id*. ¶ 74;
- Aberdeen instructs employees to warn debtors that, when an account is 60 days delinquent, a new debt-collection arrest warrant may issue if the debtor does not make a payment equivalent to the monthly payment plus half the amount of missed payments. These amounts and policies are determined by Aberdeen and inconsistent with state and federal law, *id*. ¶ 87;
- Aberdeen employees are financially incentivized to extract as much money as possible from debtors without regard for their ability to pay, and their compensation is affected by the amount of money they collect. Aberdeen even stages competitions to see who can collect the most money, financially rewarding the winner, *id*. ¶ 102; and

- Aberdeen employees, as a matter of policy, do not share information about a debtor's indigence when requesting a warrant and do not swear to the factual allegations that form the basis of their warrant request, *id*. ¶¶ 89-90.

Plaintiffs have thus clearly alleged the facts to support that Aberdeen has formal policies and practices that act to deprive Plaintiffs of their constitutional rights.

C. Aberdeen's Policies and Practices Violate the Fourteenth Amendment

1. Aberdeen's Practices Implicate Bearden

As a matter of policy and practice, Aberdeen violates the Equal Protection and Due Process clauses by seeking arrest warrants solely based on nonpayment without regard to ability to pay. SAC ¶ 89. At no point prior to seeking an arrest warrant, or the actual arrest of a court debtor does Aberdeen, or any other Defendant provide the protections that the Supreme Court and Oklahoma law have mandated: an opportunity to be heard, consideration of ability to pay and alternatives to incarceration, and findings concerning willfulness.

As described at length in Plaintiffs' Brief-in-Opposition to Defendant Sheriff Vic Regalado's Individual Capacity Motion to Dismiss (Brief J), Section III(A), pp. 14-18, it is well-established that the Equal Protection and Due Process Clauses prohibit arresting and jailing a person solely because she cannot afford to pay an amount of money. Aberdeen cites the wrong standard applicable to evaluating a hybrid Due Process/Equal Protection claim under *Bearden*, arguing that "no plausible substantive due process claim against Aberdeen exists because Plaintiffs have failed to present any allegations of conscience-shocking conduct on behalf of Aberdeen." Doc. 230 at 18. But the "conscience-shocking" test is not implicated here, where procedural due process is at issue—as explained in Brief J, *Bearden* creates a substantive right to be free from arrest based solely on inability to pay, and *Turner v. Rogers* sets out the procedures required to

ensure that right. *Id*. at Sections III(A)-(B), pp. 14-20. Here, there is no dispute that Plaintiffs did not receive the procedures they were due as required by *Bearden* and *Turner*.

But, more to the point, Aberdeen does not contest that Equal Protection and Due Process are implicated here. Rather, Aberdeen argues that "no policy or custom of Aberdeen has been identified which infringes upon any connected due process protections," because "the determination as to ability to pay is entrusted to the state trial court and the issuance and execution of warrants are entrusted to the state judges and law enforcement officers, respectively." Doc. 230 at 18. Aberdeen misapprehends the applicable law and how it applies.

2. Aberdeen's Practices Caused Plaintiffs' Injuries

Section 1983 imposes liability on a state actor where there is a "direct causal link" between the defendant's conduct and the plaintiff's injury. *Dodds v. Richardson*, 614 F.3d 1185, 1202 (10th Cir. 2010). As alleged, Aberdeen's threats and seeking of debt-arrest warrants are the direct cause of the constitutional violations, and as described above and in detail in the Second Amended Complaint, Plaintiffs have pointed to several formal policies and customs of Aberdeen that directly contribute to the fact that they are not given the ability-to-pay determinations to which they are entitled. *See* Section (I)(B), *supra*. The scheme to extort debt payments from Plaintiffs relies on Aberdeen—empowered by state law and by contract with the sheriffs' agents—as the primary mover, and indeed, in practice, as the *only* mover in deciding whether a debt-arrest warrant should issue at all. *See e.g.*, SAC ¶ 62 ("Court clerks also delegate the function of determining when to seek a new arrest warrant for nonpayment to Aberdeen, Inc. after a case has been transferred to the company for collection.").

Aberdeen separately complains that Count Five of the Second Amended Complaint, which alleges that Defendants' jailing of debtors without notice and a hearing violates Plaintiffs' state-created liberty interests, is either duplicative of Count Two or an improper attempt to seek redress

directly under Oklahoma law. Doc. 230 at 19-20. It is neither. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word "liberty," . . . or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin,* 545 U.S. 209, 221 (2005). Whereas Count Two grounds Plaintiffs' liberty interest in federal law (the constitutional entitlement under *Bearden*), Count Five grounds it in state law, and so there is no duplication. Specifically, Oklahoma law provides every person owing court debt with an affirmative right to be free from imprisonment in the absence of proof that the person has willfully refused to pay her court debt. *See* Okla. Stat. tit. 22, § 983(A); Oklahoma Court of Criminal Appeals Rule 8.4. This right creates a liberty interest that the Fourteenth Amendment's Due Process Clause protects. Under both theories, Plaintiffs are entitled to a particular process that ensures that they will not be jailed solely for being indigent. Because of Aberdeen's policy and practices, Plaintiffs do not receive that process to which they are due.

D. Aberdeen Violates the Fourth Amendment by Seeking Arrest Warrants

Aberdeen also violates the Fourth Amendment because it seeks arrest warrants unsupported by sworn factual allegations; the warrant applications omit material facts as a matter of policy; and seeks warrants where there is no probable cause that the alleged nonpayment was willful. *See* Named Plaintiffs Carly Graff and Randy Frazier's Motion for a Temporary Restraining Order and Preliminary Injunction and Memorandum in Support Thereof, Doc. 77 at 16–21; *see also*, *e.g.*, *Dow v. Baird*, 389 F.2d 882, 884 (10th Cir. 1968) (finding an affidavit that was signed but not sworn under oath "clearly and obviously invalid"); *Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990) (holding it unconstitutional to intentionally or recklessly omit material information from a warrant application); *Poolaw v. Marcantel*, 565 F.3d 721, 733 (10th Cir. 2009) (denying qualified immunity to officers who requested, but did not execute, warrant that lacked probable cause).

Again, Aberdeen does not seriously contest the principles at issue. Instead, Aberdeen contends that Plaintiffs' Fourth Amendment claim must fail because there is no "specific allegation" that it provides "false information" to serve as a basis for the warrants. Doc. 230 at 18–19 (emphasis omitted). But that argument misses the point.

As a matter of policy and practice, when employees of Aberdeen seek debt-collection arrest warrants, they omit the debtor's reasons for nonpayment. SAC ¶¶ 63, 322, 332, 334, 336. Specifically, even though Aberdeen typically knows when the reason for nonpayment is the debtor's indigence, it does not communicate that fact to the warrant-issuing authority. *See, e.g.*, *id.* ¶ 204 ("Ms. Holmes repeatedly explained to Aberdeen, Inc. that she could not afford to pay."); *id.* 207 (alleging that Aberdeen nonetheless requested a warrant against Ms. Holmes); *accord id*. at ¶¶ 184, 192, 198, 204, 211 (similar allegations). It is not enough that the information Aberdeen *does* provide may be truthful, as Aberdeen claims, Doc. 230 at 19, because government officials violate the Fourth Amendment when they, knowingly or recklessly make "material omissions, as well as affirmative falsehoods" in their warrant applications. *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997) (quoting *Stewart*, 915 F.2dat 582. By omitting material information about ability to pay that *they clearly know because debtors tell them*, Defendants violate the Fourth Amendment rule that "law-enforcement officers must not 'disregard facts tending to dissipate probable cause.'" *Harte v. Bd. of Commissioners of Cty. of Johnson, Kansas*, 864 F.3d 1154, 1182 (10th Cir. 2017) (quoting *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005)).

In disputing that it has violated the Fourth Amendment, Aberdeen also mischaracterizes Plaintiffs' allegations, stating that the facts as alleged support only that it "does nothing but supply information of nonpayment that another entity may then use in seeking a warrant." Doc. 230 at 19. But of course, as explained above, Plaintiffs have alleged it is *Aberdeen*, and not any other

actor, that exercises discretion as to whom will be subject to debt-collection arrest warrants, based on whether the debtor has submitted to Aberdeen's threats. This is pure law enforcement discretion—not merely the "begin[ning] of the warrant process," *id*. at 19, and, given the rubber-stamp approval by clerks and judges, the only event that determines whether an arrest warrant is issued. *See, e.g.*, SAC ¶¶ 126, 138. As such, it is the direct cause of the violation of Plaintiffs' Fourth Amendment rights.

E. Defendants' Scheme Violates Due Process Because Aberdeen, Inc. Has Conflicting Loyalties to Money and Justice

A long line of cases establishes that law enforcement officials may not have a significant financial interest in the outcome of the cases they pursue. Although the privatized debt-collection scheme created by Defendants is a relatively new invention, it suffers from the same constitutional infirmities. As such, the question of whether Aberdeen's financial conflict of interest offends due process neutrality principles, while one of first impression, should pose little difficulty for the Court to resolve under the facts presented here. Plaintiffs' due process claim in Count Six challenges this scheme on the ground that those enforcing the law have a personal financial interest in every decision that they make. SAC at ¶¶ 354-59. Aberdeen, which explains that it is a "private, for profit business [that] receives compensation for its services" in extracting money from Plaintiffs under the imprimatur of law enforcement, Doc. 230 at 21, effectively concedes the point.

As explained in Plaintiffs' opposition to the County Sheriff Defendants' Official Capacity Motion to Dismiss, Brief I, Section I, pp. 6-10, the Supreme Court has long held that judges and other neutral decision-makers must be free from such financial conflicts of interest. Aberdeen's pecuniary interest violates the neutrality required by *Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Aberdeen is not a typical debt collector; rather, it is an enforcement agent that by virtue of its

activities is subject to the requirements of the Due Process Clause. Unlike a typical debt-collection arrangement in which a government contracts with a company to collect court debts, Defendants have abdicated to Aberdeen control over certain law enforcement and investigative functions. Aberdeen determines the amount of money people should pay and then, once the terms of those payment plans have been violated, determines when arrest warrants should issue. SAC ¶¶ 79, 88-89. And, critically, the course of action the company pursues as to each debtor that it supervises determines how much profit it makes. *See id*. ¶ 107 (collection of court debts is the only revenue source for Aberdeen). *Jerrico* warned of "serious" constitutional concerns with conflicts of interest because of the burdens that enforcement decisions carry, but only civil regulatory penalties were at stake there. 446 U.S. at 240, 249-50. Here, fundamental bodily liberty is at stake—the decisions of Aberdeen result in people going to jail. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (freedom from physical restraint is a fundamental right); *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (same).

Aberdeen has clear financial incentives that create far more than a "realistic possibility" of distortion of its enforcement activities. Aberdeen makes *100%* of its profits through the self-serving debt-collection practices—including setting payment plans and collecting money through threats of arrest—challenged in this case. SAC ¶ 107. And Aberdeen's enforcement decisions directly affect how much money it makes. The factual allegations in the Second Amended Complaint reveal how these financial incentives operate. A few examples drawn from the Second Amended Complaint illustrate:

- Aberdeen controls when payments are due and how much of a payment the company chooses to accept so that it will not seek an arrest warrant or will seek recall of an existing arrest warrant. *Id*. ¶ 7-8. This pecuniary incentive to manipulate due dates

and amounts acceptable to avoid arrest is not controlled by any court or mandated by the contract —these decisions are made in Aberdeen's *discretion*. *Id.* ¶ 9.

- Aberdeen represents to debtors that it has the power to have them arrested and otherwise has an incentive to misrepresent its legal authority under Oklahoma and federal law. *Id.* ¶ 69. Similarly, the company is able to use the threat of arrest warrants and its ability to provide misleading information in warrant applications to create a credible (but legally mistaken) fear of jailing. This enables the company to credibly threaten debtors and their loved ones to pay money that they otherwise would have devoted to the basic necessities of life and that would be exempt from collection under Oklahoma and federal law absent the company's coercion. *Id.* ¶¶ 46, 52. These incentives actually led the company to create a training manual instructing employees how to use the threat of jailing to emphasize to debtors that, if they did not pay the company, they would lose their children. *Id.* ¶ 74.
- Aberdeen omits from its arrest warrant applications material information that, if presented, would result in a court not issuing arrest warrants. Aberdeen then uses these warrants and the threat of arrest to leverage payments. *Id.* ¶¶ 7, 63, 89. Aberdeen also benefits from new warrants because additional fees are imposed each time a warrant is referred to the company. *Id.* ¶ 137.
- Aberdeen misleads debtors about their rights and protections available under Oklahoma and federal law, and omits relevant legal and factual background in its interactions with debtors. *Id.* ¶ 83, 93. For example, the company had a policy to never allow any of its employees to inform debtors that they could make payments to court clerks instead of

to the company, and instructed its employees to prevent debtors from even contacting the courts. *Id*. ¶ 83.

- And the company never informs people of their right to a hearing prior to arrest under Oklahoma law, instead misleading debtors' by telling them that the only lawful way to avoid arrest is to make a payment to Aberdeen that the company deems sufficient. *Id.*

Aberdeen performs all of these functions with the aim of making a financial profit—and indeed, Aberdeen emphasizes that it is a "***private for profit business***" Doc. 230 at 21 (emphasis in original). Aberdeen's arrangement is thus problematic in every way identified by *Jerrico* and its progeny. This incentive arrangement goes far beyond creating a "realistic possibility" that financial interests will shape enforcement decisions—it purposefully assures it. . *Jerrico*, 446 U.S. at 250; *see also Developments in the Law*, 128 Harv. L. Rev. 1723, 1737-38 (2015) ("When a private probation company decides which violations to enforce based on financial motives, 'a direct, personal, substantial, pecuniary interest' is the whole reason the arrangement exists." (quoting *Ward*, 409 U.S. at 60, and *Tumey*, 273 U.S. at 523)).

Aberdeen does not move to dismiss Count Six on these grounds and thereby effectively concedes its viability. Instead, Aberdeen attempts to distinguish its profitmaking scheme from those found unconstitutional in *Tumey*, *Ward*, and *Jerrico*, by once again arguing that their system of extorting debt payments upon threat of arrest is not "conscience-shocking." Doc. 230 at 20-21. But the "conscience-shocking" standard is not the test that applies to whether the *Tumey-Ward-Jerrico* Due Process mandate has been violated. In support of this cursory argument, Defendants appear to invoke substantive due process principles, and puzzlingly cite a case about "conscience-shocking" behavior in the school discipline context. Doc. 230 at 20-21 (citing *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 791 (10th Cir. 2013)). The Supreme Court, however, has made

clear that the neutrality requirement is a safeguard of *procedural* due process under the 14th Amendment. *Jerrico*, 446 U.S. at 242. The "conscience-shocking" cases are simply not relevant to Plaintiffs' claims.

F. Aberdeen Violates Plaintiffs' Rights Under 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, Aberdeen and the other 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, as discussed in Plaintiffs' Opposition to County Sheriff Defendants Individual Capacity Motion to Dismiss, Brief A, Section IV, pp 14-16 (and hereby incorporated).

Aberdeen argues that Plaintiffs' equal protection claim must fail because "[p]ersons with limited or no financial means to pay fees, costs, and/or fines connected to their criminal sentences," such as Plaintiffs, "are simply not 'similarly situated' to persons with such means," citing *Cain v. City of New Orleans* for this dubious proposition. Doc. 230 at 22 (citing 2018 WL 3657447 (E.D. La. August 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. The only difference between them is that wealthier criminal judgment debtors can afford to purchase their freedom while poor ones cannot. The Equal Protection Clause does not admit of such distinctions. *See, e.g.*, *Fuller v. Oregon*, 417 U.S. 40, 47 (1974) (upholding 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 it."); *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*).

Puzzlingly, Aberdeen also cites *State v. Ballard*, for the proposition that the Oklahoma Court of Criminal Appeals has rejected this type of Equal Protection challenge. The court there did find the fine-imposing statute at issue constitutional, but only because the law featured a protection that is conspicuously absent here. It provided, as the court noted, that "[i]f a defendant cannot pay the assessment because he is without means to do so, he is not thrown into prison or otherwise punished." 868 P.2d 738, 741 (Ok. Ct. Crim. App. 1994). This provision alone "enable[d] the assessment to withstand a constitutional challenge by an indigent on equal protection grounds." *Id*. Defendants' scheme offers no such protection and, in fact, purposefully uses the threat of incarceration to compel indigent debtors to pay. In other words, by *Ballard*'s logic, it is unconstitutional.

Aberdeen also argues that Plaintiffs' allegation that the company "forces them to pay arbitrary and unachievable amounts to have a warrant recalled," SAC ¶ 361, is untrue because Aberdeen does not set the amounts connected with Plaintiffs' criminal sentences, or the 30% administrative fee that is tacked on top, which is set by Oklahoma statute. Doc. 230 at 23. But, as alleged, Aberdeen has the sole discretion to decide *payment amounts*—that is, the amount a debtor owes on a monthly basis or to get a warrant recalled—and the sole discretion to seek arrest when debtors cannot pay the amounts it sets. *See, e.g.*, SAC ¶ 7. It is thus the sole arbiter of

whether a debtor is jailed on the basis of his income. As such, Aberdeen has clearly violated Plaintiffs' Equal Protection rights.

II. Aberdeen Cannot Evade Liability for its Unlawful Conduct by Incorrectly Claiming that It Is Entitled to Any Form of Immunity

Aberdeen claims to be entitled to quasi-judicial immunity, because, as it argues, it is "only performing a purely ministerial act of locating and attempting to collect orders issued from a court." Doc. 230 at 16. This argument fails on its face because an entity cannot claim quasi-judicial immunity. *See Gallegos v. Bernalillo Cty. Bd. of Cty. Commissioners*, 278 F. Supp. 3d 1245, 1271 (D.N.M. 2017) (holding quasi-judicial immunity "protects people and not entities") (citing *Valdez v. City and Count of Denver*, 878 F.2d 1285, 1287 (10th Cir. 1989)). The cases that Aberdeen cites in its brief, Doc. 230 at 16, are therefore inapposite, as all three addressed the immunity claims of *individuals*. *See Duba v. McIntyre*, 501 F.2d 590, 591 (8th Cir. 1974) (addressing immunity of Justice of the Peace, City Attorney, and Chief of Police); *Henry v. Farmer City State Bank*, 808 F.2d 1228, 1238-39 (2d Cir. 1986) (addressing immunity of Chief of Police, State's Attorney, and Sheriff); *Valdez*, 878 F.2d at 1289 (addressing immunity of administrative supervisor of jail and police officer). In any event, as explained in Plaintiffs' opposition to the Shofners' motion to dismiss, even an individual in Aberdeen's situation has no right to immunity here. *See* Plaintiffs' Opposition to Defendants Jim and Rob Shofner's Motion to Dismiss, Brief F, Section II, pp. 8-11.

III. Because Plaintiffs Do Not Challenge Their State Court Convictions or Sentences, *Heck v. Humphrey* and *Rooker-Feldman* Do Not Bar Relief

Aberdeen's argument that judgment in Plaintiffs' favor would invalidate or impermissibly modify state court rulings are no different from the arguments made by County Sheriff Defendants' in their official capacity. In response to Aberdeen's arguments regarding *Heck v Humphrey* and *Rooker-Feldman*, per the Court's instruction to avoid duplicative arguments, Plaintiffs incorporate

by reference Plaintiffs' Opposition to County Sheriff Defendants' Official Capacity Motion to Dismiss, Brief I, Section V, pp. 27-33.

The only argument Aberdeen makes that is independent of any other Defendant is, citing *Dutton v. City of Midwest City*, 2014 WL 348982 (W.D. Okla. Jan. 31, 2014), that *Heck* applies because plaintiffs could seek redress under Oklahoma's Uniform Post-Conviction Procedure Act ("OPCPA"). Dkt. No. 230 at 4. But that is simply not so. In *Dutton*, the court's finding that *Heck* barred relief under section 1983 was premised upon the fact that the plaintiff there sought to invalidate his convictions, claiming that he had been arrested and prosecuted without probable cause, that he had been denied assistance of counsel, and that he had been falsely imprisoned. *Id.* at *1. Despite the fact that he had already been released from prison, the court recognized that the *Dutton* plaintiff had an available state remedy in the form of the OPCPA, which permits a person "who has been convicted of, or sentenced for a crime" and who claims that that conviction or sentence is invalid, to institute a proceeding to challenge the conviction or sentence. Okla. Stat. tit. 22, § 1080. Plaintiffs here have no such claim because they do not challenge their conviction or sentence—only the method of its execution. OPCPA does not provide relief for such claims.[3]

IV. Plaintiffs Have Stated a Valid RICO Claim Against Aberdeen

Aberdeen's argument that judgment in Plaintiffs' favor would invalidate or impermissibly modify state court rulings are no different from the arguments made by Defendants Jim and Rob Shofner in their Motion to Dismiss. *See* Doc. 231 at 5. In response to Aberdeen's arguments

[3] In a footnote, Aberdeen raises *Younger* abstention "to the extent any of the Plaintiffs' concerns relate to enjoining or otherwise aking declarations with respect to ongoing state proceedings." Doc. 230 at 5 n.3. Plaintiffs have briefed the *Younger* argument at length in response to other Defendants, and hereby incorporate by reference Plaintiffs' Opposition to the County Sheriffs' Motion to Dismiss in Their Official Capacity, Br. I, Section V.B, pp. 28-34.

regarding RICO, per the Court's instruction to avoid duplicative arguments, Plaintiffs incorporate by reference Section Brief F, Section III, pp. 12-20.

V. This Court Has Jurisdiction Over Plaintiffs' Adequately Pled State Law Claims

Aberdeen's argument that judgment in Plaintiffs' favor would invalidate or impermissibly modify state court rulings are no different from the arguments made by Defendants Jim and Rob Shofner in their Motion to Dismiss. *See* Doc. 231 at 24. In response to Aberdeen's arguments regarding Plaintiffs' state law claims, per the Court's instruction to avoid duplicative arguments, Plaintiffs incorporate by reference Brief F, Section IV, 26-31.

CONCLUSION

For all the reasons stated above, the court should deny Aberdeen's motion to dismiss.

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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