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 DEFENDANTS JIM SHOFNER AND ROBERT SHOFNER'S MOTION TO DISMISS

BRIEF F

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INTRODUCTION

Aberdeen Enterprizes II, Inc. ("Aberdeen") is a for-profit corporation that, through a lucrative contract with the lobbying organization for Oklahoma sheriffs, is empowered to collect court debts owed in criminal and traffic cases arising in counties throughout Oklahoma. This agreement is the foundation of an extortionate and illegal scheme whereby Aberdeen uses the threat of arrest to coerce payments from indigent debtors. Aberdeen regularly threatens to obtain new arrest warrants or to refuse to remove old ones unless the impoverished court debtors make payments that they cannot afford and must forego basic necessities to make. Further, Aberdeen *seeks* and *procures* warrants, and, on the basis of those warrants, and with the assistance of the Sheriff Defendants who execute them, Aberdeen has Plaintiffs actually arrested and detained solely for nonpayment. 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 the Shofners maintain. Doc. 231 at 2. Rather, Aberdeen, at the direction of the Shofners, threatens debtors with arrest if they do not pay, selectively files arrest warrant applications if they do not, and works in concert with court clerks, cost administrators, and sheriffs to ensure the non-paying debtors it targets are sent to jail.

Defendant Jim D. Shofner is an officer and manager of Aberdeen. His son, Defendant Robert "Rob" Shofner, is a director of Aberdeen. Plaintiffs' Second Amended Complaint ("SAC"), Doc. 212, ¶ 100 n.25. The Shofners are responsible for establishing and implementing all of Aberdeen's collection practices, including the policies that govern when Aberdeen seeks a new arrest warrant and the amount that a debtor must pay to have a warrant recalled. The Shofners also jointly monitor, supervise, and control all aspects of the collection process, including by listening

to subordinates' phone calls to ensure that the subordinates comply with company policies and procedures.

Plaintiffs, all impoverished debtors suffering under this systemic extortion scheme, have sued the Shofners 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. The Shofners argue that as a private company they are not acting "under color of state law"; but also argue in the alternative that they are entitled to absolute and qualified immunity because they are not responsible for the violations of Plaintiffs' constitutional rights. Doc. 231 at 11. But the Shofners throughout their Motion to Dismiss mischaracterize Aberdeen's activities and the degree to which it works on behalf of and coordinates with law enforcement, judges, and the court clerks. Indeed, thanks to Aberdeen's discretionary power to seek arrest warrants and have debtors thrown in jail, it is the prime mover of the unconstitutional scheme. The Shofners also incorrectly argue that Plaintiffs have not adequately pled their state law claims. This court should disregard the Shofners' attempts to deny the factual allegations and their misapprehension of the relevant law, and deny their motion to dismiss.

RELEVANT BACKGROUND

Aberdeen is a private, for-profit debt collection company that has contracted with the Oklahoma Sheriffs Association to collect court debts. SAC ¶ 5. Plaintiffs' brief in opposition to Aberdeen's Motion to Dismiss lays out the relevant background to Aberdeen's operation as an agent of law enforcement in Oklahoma. *See* Plaintiffs' Opposition to Aberdeen Enterprizes II, Inc.'s Motion to Dismiss (Brief E). But it must be noted here the particular ways in which the Shofners establish company policy and direct collection activities.

The Shofners have personally instructed and trained Aberdeen employees on how to

obtain payment from debtors and what minimum payment amounts to demand. SAC ¶ 100. The Shofners routinely listen in during phone calls between Aberdeen, Inc. employees and debtors; if one of the Shofners believes that a debt collector has not been effective or has been insufficiently aggressive in seeking payment, he will reprimand or fire the employee. SAC ¶ 101. Indeed, Rob Shofner verbally berates employees who do not follow the debt collection policies that he dicates. SAC ¶ 28. The Shofners routinely base decisions about whether to terminate an employee on how much money the employee is able to collect. SAC ¶ 101. The Shofners also financially incentivize their employees to extract as much money as possible from debtors without regard for their ability to pay. SAC ¶ 102. As directed by the Shofners, the amount of Aberdeen employees' compensation is affected by the amount of money they are able to collect, and the Shofners stage competitions to see which employees can collect the most money, with the winner receiving a financial reward. *Id*.

The Shofners do not train or instruct employees on constitutional or statutory requirements that prohibit imprisoning debtors for nonpayment unless the nonpayment was willful. SAC ¶ 103. Rather, they affirmatively train employees to coerce payments without providing basic notice or information concerning federal and state legal rights and instruct employees that they "are to ***NEVER*** refer any defendant to call the court clerks." SAC ¶¶ 83, 103.

LAW AND ARGUMENTS

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

A. The Shofners Have Acted Under Color of Law

The Shofners argue that, because Aberdeen is a private entity and the Shofners are merely officers of Aberdeen, it is not a state actor or otherwise acting "under color of law," and thus not subject to suit under § 1983. *See* Doc. 231 at 11.

The Shofners' arguments on this point are virtually identical to those of Aberdeen, *See* Doc. 230 at 12, and Plaintiffs' response to Aberdeen—including the discussion of the applicable legal standards—is incorporated here in relevant part, *see* Brief E. But the Shofners additionally posit that whether or not Aberdeen is acting under color of law, the Shofners cannot be found to be "state actors by extension." Doc. 231 at 12. They cite *Schaffer v. Salt Lake City Corp*., 814 F.3d 1151, 1156 (10th Cir. 2016), to argue that the "mere fact that a person is an employee of a state entity does not, by itself, warrant a conclusion that the person was acting under color of state law." *Id*. But Plaintiffs do not contend otherwise. Plaintiffs did not name the Shofners as defendants in this lawsuit merely because Aberdeen employs them.

Schaffer establishes that employee "conduct may be fairly attributed to the state" where there is "a real nexus between the employee's use or misuse of their authority as a public employee, and the violation allegedly committed by the defendant." *Id.* at 1156. In *Schaffer* itself, there was no such nexus. The constitutional violations the defendant parking enforcement officers in that case were accused of—lying in witness statements and at the probable cause hearing—did not bear the requisite relationship to their authority to write parking tickets and impound vehicles. *Id*. That is, in that context "the parking enforcement officers exercised no power possessed by virtue of state law and made possible only because [the parking officers were] clothed with the authority of state law." *Id*. (internal citations and quotation marks omitted).

What was missing in *Schaffer* is ever-present here. There is a clear causal relationship between the authority to collect debt for nonpaying debtors exercised by the Shofners and the harm suffered by Plaintiffs. And the ultimate source of that authority is a contract created by Oklahoma statute. SAC ¶¶ 53-57. Pursuant to this statute, the Shofners, the executive officers of Aberdeen, have contracted with the OSA, to which the statute specifically assigned the public function of

outsourcing collection of court debts. Contrary to the Shofners puzzling assertion that Plaintiffs have "failed to allege any specific conduct of the Shofners' purported misuse of state authority," Doc. 231 at 12, the Second Amended Complaint vividly illustrates how that contract has created the interwoven relationship between government officials and the Shofners. Under the contract, government actors must assist in Aberdeen's collection of the debt by providing its employees access to court files—and, in at least one county, editing privileges—and debtor information necessary to collect the warrant. SAC ¶¶ 60–61. The contract delegates a crucial law enforcement function—the seeking of arrest warrants—to Aberdeen and provides its employees the discretion as to when and against whom to seek those warrants. SAC ¶¶ 60-62. In Tulsa County, Aberdeen employees appear to have a special authority to issue such warrants, pursuant to an instruction by the Tulsa clerk that warns "DO NOT ISSUE WARRANT UNLESS CONTACTED BY ABERDEEN." SAC ¶ 62. Finally, it is on the basis of these unsworn arrest warrants that the Sheriff defendants incarcerate indigent debtors. SAC ¶ 65. The Shofners plainly possess "power. . . by virtue of state law and made possible only because [they are] clothed with the authority of state law," *Schaffer*, 814 F.3d at 1156—and thus they are liable as state actors under 42 U.S.C. § 1983.

B. Plaintiffs' Claims Do Not Depend on Vicarious Liability, and Defendants Are Liable for Their Own Misconduct

The Shofners argue that Plaintiffs' § 1983 claims against them should be dismissed because Plaintiffs have failed to allege their personal participation in the misconduct causing Plaintiffs' injuries and instead allege vicarious liability. Doc. 231 at 13. Defendants' arguments misunderstand the law of causation in this context and disregard the allegations in the Second Amended Complaint, which establish that each defendant played an active role in inflicting Plaintiffs' injuries.

Section 1983 imposes liability on a state actor who "subjects[] or causes [an individual] to be subjected" to a deprivation of her constitutional rights. 42 U.S.C. § 1983. Put differently, there must be a "direct causal link" between the defendant's conduct and the plaintiff's injury, *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1318 (10th Cir. 2002), and "vicarious liability is inapplicable to . . . § 1983 suits." *Dodds v. Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010) (internal quotation marks omitted). But liability under § 1983 does not require "direct participation" in the infliction of the injury and "is not limited solely to situations where a defendant violates a plaintiff's rights by [for example] physically placing hands on him." *Id.* at 1195 (internal quotation marks omitted). Liability also extends to the "defendant-supervisor who creates, promulgates, implements, or *in some other way possesses responsibility for the continued operation of a policy*" that, when enforced "by the defendant-supervisor *or her subordinates*," injures the plaintiff. *Id.* at 1199 (emphases added). Indeed, it is enough if the supervisor is deliberately indifferent to the maintenance of a practice carried out by subordinates that causes the plaintiff's injury. *Durkee v. Minor*, 841 F.3d 872, 877 (10th Cir. 2016); *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").

The Shofners assert that Plaintiffs seek to hold them liable based on their "mere capacities as officers of Aberdeen" and that "Plaintiffs have failed to identify any exercise of control or direction . . . which can be attributed to any proposed constitutional violation." Doc. 231 at 15. This argument ignores the numerous paragraphs in the Second Amended Complaint, including an entire section titled "Aberdeen's Predatory Behavior is Company Policy *Established by Defendants Jim Shofner and Rob Shofner*." SAC ¶¶ 100-07 (emphasis added).

Plaintiffs have alleged that the Shofners created and now enforce each of Aberdeen's collection practices challenged as unconstitutional in the Second Amended Complaint. Counts Two, Three, and Five[1] assert (among other things) that Aberdeen's practices of disregarding a debtor's to ability to pay, deliberately omitting such information when requesting warrants, and requesting such warrants without sworn oath or affirmation, violate the Fourth and Fourteenth Amendments. Plaintiffs have alleged that the Shofners established these practices. *See, e.g.*, SAC ¶¶ 27–28, 92. Count Six challenges Aberdeen's improper financial incentives in collecting debt on behalf of Defendant Sheriffs; it is obvious that the two people in charge of running the company caused the company to enter into the impermissible contract, as illustrated by the fact that Rob Shofner signed the contract on behalf of Aberdeen. *See* SAC, Ex. A at 18. Finally, Count Seven challenges the onerous methods used to collect debt, and Plaintiffs have alleged that the Shofners are responsible for setting Aberdeen's practices regarding and have "personally instructed and trained Aberdeen employees on how to obtain payment," including demanding arbitrary lump sums, seeking warrants, and threatening arrest. SAC ¶ 101. Indeed, the Second Amended Complaint alleges that the Shofners "listen[] to subordinates' phone calls to ensure" compliance

[1] The Shofners assert that Count Five, which invokes the Fourteenth Amendment's Due Process Clause, either seeks to enforce state law or is duplicative of Count Two, which also invokes the Due Process Clause, and Count Three, which invokes the Fourth Amendment. Doc. 231 at 20. That is incorrect. It is obvious that Count Five is not redundant of Plaintiffs' Fourth Amendment claim advanced in Count Three. As for Count Two, "[t]he first step in assessing a claimed procedural due process violation is to identify a constitutionally protected liberty or property interest." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012) Count Two grounds that interest in federal law, whereas Count Five grounds it in state law, and so there is no duplication. *Cf. Boutwell v. Keating*, 399 F.3d 1203, 1212 (10th Cir. 2005) ("A liberty interest may inhere in the Due Process Clause or it may be created by state law.") (internal quotation marks and alterations omitted).

with company policy; reprimand and fire employees who do not comply; and offer financial incentives to employees to encourage compliance. SAC ¶¶ 27–28, 100–01.

Hence, there can be no doubt that the Shofners set in motion, and are therefore liable for, the constitutional violations at issue in this case.

C. The Shofners' Pre-Arrest Policies and Practices Violate the Fourth and Fourteenth Amendments

The Shofners' arguments regarding their liability under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and under the Fourth Amendment are no different from the arguments made by Defendant Aberdeen, *see* Doc. 230 at 16-23. In response, and per the Court's instruction to avoid duplicative arguments, Plaintiffs incorporate by reference Plaintiffs' Brief in Opposition to Aberdeen's Motion to Dismiss, Brief E, Sections III-VI, pp. 13-21.

II. The Shofners Are Profit-Seeking Actors Not Entitled to Any Form of Immunity

A. Absolute Immunity Does Not Shield the Shofners

The Shofners claim they are quasi-judicial officers entitled to absolute immunity. Doc. 231 at 16. This argument is incorrect and Shofners cannot meet their burden. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993) ("The proponent of a claim to absolute immunity bears the burden of establishing the justification for such immunity."). First, quasi-judicial immunity does not extend to "private for-profit actor[s]." *Rodriguez v. Providence Community Corrections, Inc.*, 191 F. Supp. 3d 758, 767 (M.D. Tenn. 2016). And second, the Shofners—who work for a private, profit-seeking entity that works for its own bottom line—do not perform quasi-judicial functions.

"Quasi-judicial immunity is a deliberately cabined doctrine that is only extended when it would further the public interest." *Rodriguez*, 191 F. Supp. 3d at 767–68. Here, "the public interest

would be disserved by immunizing a profit-driven corporation because such immunity would enable the corporation to prioritize pennies over [debtors] without fear of accountability." *Id.* (holding that quasi-judicial immunity does not extend to a private probation company that was hired mainly to collect court debts). This is because in the case of a for-profit corporation hired to perform a public function, "there is an increased risk that the corporation's actions will diverge from the public interest" and because, "unlike public officials, corporate employees always are compelled to make decisions that will benefit their shareholders, without any direct consideration for the best interest of the public." *Id.* at 768. "The perverse policy incentives attendant to immunizing private for-profit ventures is alone enough to deny the application of quasi-judicial immunity." *Id*. For this reason, no court on record has squarely held that quasi-judicial immunity can apply to a private actor.

The Shofners are also not entitled to quasi-judicial immunity for the simple reason that they do not perform any quasi-judicial functions. As alleged, the Shofners' function is to oversee the collection of debts and the seeking of arrest warrants for those who cannot pay. Plaintiffs challenge the manner in which the Shofners pursue those extra-judicial duties, "not individualized judicial or quasi-judicial decision-making." *Ray v. Judicial Corr. Servs*., 2013 WL 5428395, at *9 (N.D. Ala. 2013) (denying immunity for private probation officers); *see also Mee v. Ortega*, 967 F.2d 423, 428 (10th Cir. 1992) (holding that probation and parole officers are not entitled to absolute immunity for supervisory/investigatory tasks because those are not adjudicatory).[2]

[2] *See also Galvan v. Garmon*, 710 F.2d 214, 215-16 (5th Cir. 1983) (state probation officer who mistakenly caused the arrests and incarceration of a probationer not entitled to absolute immunity); *Wilson v. Rackmill*, 878 F.2d 772, 776 (3d Cir. 1989) (district court erred in finding parole examiners who performed "executive and investigative functions" in addition to adjudicatory duties were entitled to absolute immunity).

Nothing about what the Shofners do or their company does bears any resemblance to a judicial process or has any of the indicia of a court proceeding.[3]

B. Jim and Rob Shofner May Not Seek the Protection of Qualified Immunity

Defendants Jim and Rob Shofner are directors of Aberdeen. They are responsible for establishing Aberdeen's collection practices and monitoring and supervising all aspects of the collection processes. SAC ¶¶ 27, 28. They claim that they are entitled to qualified immunity with respect to their "individual" and "supervisory" capacities.[4] Doc. 231 at 15-17. But the Supreme Court's ruling in *Richardson v. McKnight*, 521 U.S. 399 (1997) clearly precludes the application of qualified immunity here.

In *McKnight*, the Supreme Court concluded that qualified immunity should not be granted to employees of a private company operating a state prison pursuant to a business contract. 521 U.S. at 412. The Court explained that immunity was not needed because the "organizational structure is one subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide—pressures not necessarily

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[3] *See Cleavinger v. Saxner,* 474 U.S. 193, 202 (1985) (enumerating factors reflective of a judicial process entitled to absolute immunity, including, *inter alia*, the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; the importance of precedent; the adversary nature of the process; and the correctability of error on appeal); *Reid v. Pautler*, 36 F. Supp. 3d 1067, 1181 (D.N.M. 2014), (applying the *Cleavinger* factors to hold that preparing an order for extending probation is not a function that qualifies for absolute immunity because it "is more akin to a law enforcement function—such as submitting an application for a warrant to a court—than to a judicial function"). Indeed, the Shofners' "function in this context is more akin to that of a police officer in deciding whether there is probable cause for an arrest" and, of course, "officers have never been granted an absolute immunity in making the decision to arrest." *Ray v. Pickett*, 734 F.2d 370, 373 (8th Cir. 1984) (holding that a probation officer is not entitled to absolute immunity for reporting a violation and seeking a warrant).

[4] The Shofners' argument regarding qualified immunity appears alongside its argument regarding vicarious liability; Doc. 231 at 15, but should be considered separately. Plaintiffs respond to the vicarious liability argument in Section II(B), *infra*.

present in government departments. *Id.* In a later case, the Court expanded on that reasoning, observing that the circumstances there—*i.e.*, "a private firm, systematically organized to assume a major lengthy administrative task . . . with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"—combined to mitigate any concerns about withholding governmental immunity. *Filarsky v. Delia*, 566 U.S. 377, 393 (2012).

McKnight's analysis controls here. There, as here, there is no "firmly rooted" historical tradition of immunity for the private actor, namely, privately employed debt collectors. *Id*. at 404–05. Not even the Shofners contend that there is. Here also, the denial of qualified immunity is unlikely to deter the government from being able to collect court debts and, because of the financial incentives involved, it is not even likely to deter qualified firms from contracting with the state to collect court debts. *Id.* at 409, 411. Aberdeen is a private firm, contracted by a non-profit statewide association representing Sheriffs, "systematically organized to assume a major lengthy administrative task" (collecting court debts) with limited direct supervision by the government, and is undertaking that task for profit and in competition with other firms. *Filarsky*, 566 U.S. at 393. Jim and Rob Shofner, through their control of Aberdeen, are thus "using the mechanisms of government to achieve their own ends," *id* at 392, and no reasonable reading of *McKnight* and *Filarsky* could support granting qualified immunity to the Shofners in this case.

Finally, even if qualified immunity were available to the Shofners, they would not be shielded by it because, as discussed *supra*, Plaintiffs' rights under the Fourth and Fourteenth Amendments are well established, and qualified immunity would not apply to the intentional misconduct addressed in Plaintiffs RICO and state law claims.

III. The Plaintiffs Have Validly Pled a Claim Under RICO.

The Shofners raise a number of arguments challenging Plaintiffs' RICO claims in Count One. Many of the Shofners arguments are identical to arguments raised by the Rogers County Sheriff and the 51 County Sheriffs in their individual capacities. Per the Court's order to avoid duplicative briefing, Plaintiffs hereby incorporate their Oppositions to these Defendants' Motions to Dismiss. *See* Brief D, Section IV, pp. 17-29; Brief A, Section III. Contrary to the Shofners' arguments, the Second Amended Complaint satisfies every element of civil RICO for the Shofners. The Shofners do raise some arguments not set forth by other Defendants, which are addressed below.

A. The RICO Enterprise Has a Common Purpose

Plaintiffs have plead the existence of an association-in-fact RICO enterprise, which requires pleading "a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981).[5] The Shofners argue that the Second Amended Complaint does not adequately plead that the enterprise had a "common purpose," because court debt and the 30% penalty surcharge are assessed by the courts and set by statute. Doc. 231 at 7. But though the amounts *assessed* are set by the courts and by statute, this is distinct from the nefarious and extortionate conduct of RICO defendants aimed at maximizing the amounts *collected*.

No statute requires that the Shofners use extortionate methods to collect court debt, and there is no guarantee that an assessed court debt will be collected in full; indeed, the facts pled demonstrate that many people are unable to comply with the payments that the courts demand. *See, e.g. S*AC ¶ 107 (despite increased court debt, collections have decreased). The RICO

[5] As the SAC alleges multiple participants in the RICO Enterprise, the Shofners' claim that it "does not appear that Plaintiffs' 'enterprise' extends beyond Aberdeen itself" is not based in reality. *See* Doc. 231 at 7 n. 6.

Defendants work together to ensure that these debts are collected, and profit from the collection, thereby achieving, at a minimum, "the common purpose of making money." *Williams v. Mohawk Indus.*, 465 F.3d 1277, 1284 (11th Cir. 2006); *see also United States v. Johnson*, 440 F.3d 932, 940 (6th Cir. 2006) ("The common purpose of making money can support the enterprise element of a RICO conviction."). The fact that there is state involvement in the assessment of court debt does not negate the common purpose, for such purpose need not be inherently unlawful or divorced from governmental activity. For example, municipal entities can be included within association-in-fact enterprises. *See United States v. Cianci*, 378 F.3d 71, 83 (1st Cir. 2004).

Aberdeen's related contention that its "entire purpose and profit-making potential" relies on keeping people out of jail, Doc. 230 at 9, but that is irrelevant to the question of whether or not there exists an association-in-fact enterprise, and does not negate the Second Amended Complaint's allegation that "[a]s a matter of policy and practice, to coerce payments and increase profits, Aberdeen . . . threatens to issue a debt-collection arrest warrant if a debtor fails to make ongoing payments after a warrant has been recalled." SAC ¶ 68. The contract itself identifies its purpose as the provision of "provid[ing] certain collection services[,]" Doc. 212-1 at 1; Aberdeen and its officers the Shofners, as well as OSA are connected through, and have periodically renewed, the contract, SAC ¶ 350; and each of the 54 sheriffs has authorized OSA to enter into the contract and use Aberdeen to collect money in his or her county. SAC ¶ 65. These facts establish an association-in-fact enterprise with a specific common purpose.

B. The RICO Enterprise Affected in Interstate Commerce

In addition to the arguments refuted in Plaintiffs' Opposition to the Rogers County Sheriff (Brief D), the Shofners offer additional flawed reasons why Plaintiffs have not alleged a valid effect on interstate commerce. First, citing *Waucaush v. United States*, 380 F. 3d 251, 258 (6th Cir. 2004), the Shofners argue that Plaintiffs have not made "any specific allegations to describe

how [their] activities have transcended state lines" and therefore fail establish "sufficient connection" to interstate commerce. Doc. 231 at 5-6. But the "substantial effect" standard applied in *Waucausch*, the court explained, applies only when the enterprise's activities are wholly non-economic, not where, as here, it engages in economic activity through extortion. *See id*. at 255-56 (distinguishing cases involving "quintessential illegal economic activities" such as "extortion"). In *United States v. Garcia*, the Tenth Circuit emphasized the importance of this distinction in rejecting an argument similar to the one Aberdeen and the Shofners now make and, instead, reaffirmed that an economic enterprise must only have "minimal effects" on interstate commerce. *See* 793 F.3d at 1210.

Relatedly, Aberdeen asserts, without basis, that the Court should simply disregard Plaintiffs' allegations concerning interstate communications and collection of debt. It contends that doing so is justified because those allegations are purportedly inconsistent with Plaintiffs' assertion that the proposed class would be "limited in geographic scope (unlike a nationwide . . . class)." Doc. 230 at 6. This argument is nonsense. The residents of Oklahoma are, of course, all in Oklahoma (and thus limited geographically), but the enterprise's debt-collection efforts extend well beyond the borders of the state, and beyond membership in the putative class, including threats to family members. *See* SAC ¶¶ 76, 96, 281. Moreover, these efforts, cumulatively, have a substantial effect on interstate commerce. That is what matters for purposes of determining if a valid cause of action has been stated in the Second Amended Complaint under 18 U.S.C. § 1962(c), and it has been.

C. Pattern of Racketeering Activity

1. The RICO Enterprise Engaged in a Pattern of Activity

In addition to the arguments refuted in Plaintiffs' Oppositions to the Rogers County Sheriff and 51 County Sheriffs, *see* Brief D, Section IV, pp. 17-29; Brief A, Section III, the Shofners argue

that Plaintiffs have not satisfied RICO's requirement of alleging a pattern of racketeering activity because the Second Amended Complaint only alleges a "single scheme." Doc. 231 at 8. This claim mischaracterizes both the facts alleged and the law.

To show a "pattern" of racketeering activity for the purposes of § 1962(c), Plaintiffs need only show "at least two acts of racketeering activity, . . . which occurred within ten years of each other." *Tal v. Hogan*, 453 F.3d 1244, 1267 (10th Cir. 2006) (internal quotation marks omitted) (citing 18 U.S.C. § 1961(5)). "Racketeering activity," encompasses "dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act 'indictable' under specified federal statutes[.]" *Safe Sts. All. v. Hickenlooper*, 859 F.3d 865, 882 (10th Cir. 2017). "[T]he term pattern itself requires the showing of a relationship between the predicates and the threat of continuing activity, so that it is *continuity plus relationship* which combines to produce a pattern." *United States v. Knight*, 659 F.3d 1285, 1288 (10th Cir. 2011) (internal quotation marks omitted) (emphasis in original), citing *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 250 (1989) (Scalia, J., concurring). "[T]he threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *Hickenlooper*, 859 F.3d at 884, quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249 (1989). And predicate acts are related if they "have the same or similar purposes, results, participants, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events." *Id.* at 2901.

The Second Amended Complaint alleges multiple incidents of extortion over the course of years, comprising a pattern. *See, e.g.* SAC ¶¶ 2, 8 (detailing Aberdeen's threats towards indigent debtors). The complaint sets out numerous acts of racketeering activity that occurred within ten years of each other, including the extortion of payments from both Mr. Smith and Mr.

Choate by threats of unlawful arrest. SAC ¶¶ 20, 23, 58. It is alleged that these separate acts have the same or similar purposes, results, participants, victims, and methods of commission and are in no way isolated events. These are merely two incidents out of thousands that have been inflicted on the putative class; a clear "pattern" of activity that comprises the RICO enterprise's regular way of doing business. Whether or not the Shofners attempt to frame these ongoing state-wide extortionate actions as a single "scheme" is immaterial. The Amended Complaint clearly and adequately makes out a "pattern" of activity that satisfies the requirements of RICO.[6]

2. The Second Amended Complaint Adequately Pleads the Predicate Offense of Extortion Under the Hobbs Act, Travel Act, and State Law

In addition to arguments refuted in Plaintiffs' Opposition to the Rogers County Sheriff (Brief D), the Shofners claim that Defendants have not extorted Plaintiffs, because threats of arrest are not unlawful where "arrest is a statutory repercussion available for a person's failure to comply. . . ." Doc. 231 at 9. But arrest of a person known to be indigent and unable to pay is *not* a statutory repercussion for a person's nonpayment of court debt. *See* Okla. Ct. Crim. App. Rule 8.5 (requiring relief from fine and fee payments due to inability to pay); Okla. St. tit. 22, § 983(A);

[6] The 30-year-old district court case cited by the Shofners to make its claim does not, in fact, support its contention that multiple "schemes" are required to show a pattern of racketeering activity. In that case, a *pro se* suit alleging a number of vague fraudulent misdeeds against a single person, the court found that the plaintiff had not met the specificity requirements of Rule 9(b). *See Creech v. Federal Land Bank*, 647 F. Supp. 1097, 1100–01 (D. Colo. 1986). As Plaintiffs' RICO claims are not based on the predicate act of fraud, the Rule 9(b) heightened pleading standards do not apply here. *See Robbins v. Wilkie*, 300 F.3d 1208, 1211 (10th Cir. 2002) ("Defendants confuse the requirement to plead with particularity RICO acts *predicated upon fraud* pursuant to Rule 9(b) with Rule 8's more general notice pleading typically required of all litigants.") (emphasis added); *Advanced Optics Elecs., Inc. v. Robins*, 633 F. Supp.2d 1237, 1254 (D.N.M. 2008) ("The Tenth Circuit has applied rule 9(b) only to RICO cases where the underlying racketeering acts were themselves acts of fraud.") (citations omitted). The mention in *dicta* that "multiple criminal episodes or schemes" are required to show a pattern of activity actually supports Plaintiffs' claims here, where the Amended Complaint pleads a pattern of extortion that spans years and thousands of criminal episodes against thousands of indigent victims.

Bearden v. Georgia, 461 U.S. 660 (1983) (prohibiting incarceration for nonpayment due to inability to pay). Aberdeen did not have a rightful claim to payments by indigent debtors. *See* Brief D, Section IV(A), pp. 18-20. But even if it did, it used wrongful means to obtain them and thus violated prohibitions on extortion under the Hobbs Act, Travel Act, and state law. That is because "a lawful right to property or lawful authority to obtain property is not a defense to extortion: rather, if an official obtains property that he has a lawful authority to obtain, but does so in a wrongful manner, his conduct constitutes extortion under the Hobbs Act." *Robbins v. Wilkie*, 433 F.3d 755, 769 (10th Cir. 2006), *rev'd and remanded on other grounds*, 551 U.S. 537 (2007); *see also United States v. Warledo*, 557 F.2d 721, 729-30 (10th Cir. 1977) ("pursuit of an allegedly valid claim" against railroad not a defense to Hobbs Act extortion); *United States v. Zappola*, 677 F.2d 264, 268-69 (2d Cir. 1982) (". . . Congress meant to punish as extortion any effort to obtain property by inherently wrongful means, such as force or threats of force . . . regardless of the defendant's claim of right to the property."). Significantly, "[t]he existence of this element of wrongfulness is a question of fact for the fact finder." *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 579 (S.D.N.Y. 2014).

3. The Second Amended Complaint Adequately Pleads the Predicate Offense of Extortionate Extension of Credit

In addition to allegations of extortion, the Second Amended Complaint pleads that Aberdeen and the Shofners, as its officers, on behalf of the RICO enterprise, committed the predicate offense of extortionate credit transactions under 18 U.S.C. §§ 891–94. Unlike the Hobbs Act and Travel Act, these statutes expressly do not require a connection to interstate commerce. *See Perez v. United States*, 402 U.S. 146, 154 (1971). 18 U.S.C. § 894(a) prohibits the "use of any extortionate means (1) to collect or attempt to collect any extension of credit, or (2) to punish any person for the nonrepayment thereof[.]"

The Shofners argue that there was no extortionate extension of credit because it was not alleged that Aberdeen "extended credit" or that Aberdeen used "extortionate means" to collect. Doc. 231 at 10. Contrary to their claims, "extend credit" is broadly defined, encompassing "enter[ing] into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred." 18 U.S.C. § 891(1). To "collect an extension of credit" is defined as "induc[ing] in any way any person to make repayment thereof." 18 U.S.C. § 891(5).

Plaintiffs allege that Aberdeen and the Shofners enter into repayment agreements with indigent debtors regarding the satisfaction of debt. *See, e.g.* SAC ¶¶ 77–79. Defendants' contention that the moneys are not "debts owed" to Aberdeen but are "amounts due to the county/state," Doc. 231 at 10, is both wrong and irrelevant. The Shofners undeniably profit from the collected money, SAC ¶ 107, and the statute applies to "any debt." The law extends to the use of extortionate means to collect "*any* extension of credit." *United States v. Enriquez*, No. 96-6185, 1997 U.S. App. LEXIS 1421, at *4 (10th Cir. Jan. 28, 1997) (unpublished). The money owed does not have to be a traditional loan, *United States v. Stauffer*, 922 F.2d 508, 512 (9th Cir. 1990), and is "not limited to attempts to collect illegal or illegitimate extensions of credit." *United States v. Goode*, 945 F.2d 1168, 1169 (10th Cir. 1991). An agreement to accept deferred payments to satisfy a civil judgment debt constitutes an extension of credit within the meaning of Section 891(1). *Id.* at 1171. The Shofners negotiate with debtors about payments, deferred payments and payment plans; accept payments pursuant to those plans; and profit from the money paid. They have undeniably extended credit under the meaning of the statute.

Defendants have also used extortionate means to collect on the extensions of credit. Extortionate means is defined as "any means which involves . . . an express or implicit threat of

use of violence or other criminal means to cause harm to the person, reputation, or property of any person." 18 U.S.C. § 891(7). The essence of the statute is "the use of force or threats for the purpose of extorting money." *United States v. Briola*, 465 F.2d 1018, 1022 (10th Cir. 1972). "Acts or statements constitute a threat under 18 U.S.C. § 891(7) if they instill fear in the person to whom they are directed *or are reasonably calculated to do so in light of the surrounding circumstances*." *United States v. Natale*, 526 F.2d 1160, 1168 (2d Cir. 1975), *cert denied* 425 U.S. 950 (1976) (internal quotation marks and citation omitted) (emphasis in original). Even vague, implicit threats can satisfy the language of section 891(7). *See United States v. Analetto*, 807 F.3d 423, 428 (1st Cir. 2015) (finding that voicemail stating "start doing the right thing or … 2012 isn't going to be too good for you" conveyed a sufficient threat to support conviction); *United States v. Serrantonio*, 1998 U.S. App. LEXIS 22301 at *3–4 (2d Cir. 1998) (statements "I'm not somebody you want as your enemy" and "[if] you do the right thing, everything will be okay and nobody will do anything" were extortionate).

In this case, the Second Amended Complaint states throughout that Aberdeen, directed by the Shofners, uses threats of unlawful arrest and employs collection tactics virtually identical to those of traditional loan sharks. *See, e.g.*, SAC ¶ 75 ("[A]n Aberdeen, Inc. employee passed the phone to a person who purported to be a law enforcement officer, who stated that he would come and immediately arrest the debtor if the debtor did not pay enough money to Aberdeen, Inc."). For that reason, the Shofners' reliance on *United States v. Pacione*, 738 F.2d 567, 572-73 (2d Cir. 1984) is misplaced. Doc. 231 at 10. In that case, the Second Circuit held that "extortionate means" must include some element of violence, which was absent in that case where the defendant threatened to record a false mortgage deed. *Id*. Here, Aberdeen does not merely make threats of "the use of legal proceedings" as they characterize, Doc. 231 at 10, but actual "threats of arrest."

SAC ¶¶ 2, 20, 76. Physical arrest is a violent act; recording a mortgage deed is not. The Amended Complaint thereby establishes that Aberdeen, on behalf of the RICO enterprise, committed the predicate offense of extortionate credit transactions.

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

A. Plaintiffs Have Properly Pled Abuse of Process

Under Oklahoma law, "[t]he elements of an abuse of process claim are (1) the improper use of the court's process (2) primarily for an ulterior or improper purpose (3) with resulting damage to the plaintiff asserting the misuse." *McGinnity v. Kirk*, 362 P.3d 186, 203–04 (Okla. 2015). In seeking to dismiss Plaintiffs' abuse of process claims, the Shofners address only the first and second elements and do not challenge that Plaintiffs have alleged injury.[7] *See* Doc. 231 at 24. Their arguments fail.

As to the first element, Plaintiffs' allegations regarding the extortionate use of warrants demonstrate that the Shofners have engaged in "improper use of the court's process." An arrest warrant, when lawfully used, is intended solely to facilitate an arrest for a violation of the law. *Cf. Paez v. Mulvey*, No. 15-20444-CIV, 2016 WL 6092597, at *16 (S.D. Fla. Oct. 19, 2016) ("[T]he process—i.e., the arrest warrant—was never used to accomplish the result for which it was created—i.e., Anterio's arrest."). Of course, failing to pay a court debt because of indigence is not even a violation of law, but even if it were, the Shofners, as principals of Aberdeen, would still be liable for their improper use of arrest warrants. Contrary to their claim that it is "unclear how" they "'misuse[]' a warrant," Doc. 231 at 24, the Second Amended Complaint explains that rather than use a warrant to accomplish a lawful arrest, the Shofners, through Aberdeen, (1) repeatedly

[7] Regardless, Plaintiffs have alleged injury stemming from anxiety caused by Defendants' improper use of warrants and payments made because of the extortionate exploitation of warrants. *See, e.g.*, SAC ¶ 20.

threaten people owing court debt that they will be arrested pursuant to a warrant if they do not pay sums they cannot afford, and (2) then condition the recall of the debtor's warrant on the debtor making lump sum payments arbitrarily set in the hundreds of dollars (that is, above the amount of the court-ordered installment payments). *See, e.g.*, SAC ¶¶ 7, 19, 20, 22, 24, 80.[8] In other words, as the Complaint puts it, Aberdeen, at the Shofners' direction and as a result of policy they have set, "exploit[s] the threat of an arrest warrant to obtain as much money as possible." SAC ¶ 80. Plainly, the use of a warrant as a tool of extortion to extract unlawful payments from indigent debtors without means to pay is not a "proper use" of that warrant.

Other courts have recognized abuse of process claims in similar circumstances. For instance, in *Donohoe v. Burd*, the Southern District of Ohio found abuse of process when a creditor "refused to accept time payments and insisted on full payment in exchange for dismissal of the charges." 722 F. Supp. 1507, 1522 (S.D. Ohio 1989). The Shofners' determination that Aberdeen should refuse to accept anything less than the arbitrarily set lump sums in exchange for recall of the warrant is no different than the misconduct in *Donohoe*. *See* SAC ¶ 165 (alleging that Aberdeen demanded $250 from Plaintiff Randy Frazier and refused to accept two $125 payments); *see also, e.g.*, *Hoppe v. Klapperich*, 224 Minn. 224, 239 (1947) (holding liable a sheriff who used "a warrant of arrest . . . in an attempt to extort certain property" and "for a purpose for which it was not designed"); *Huggins v. Winn-Dixie Greenville, Inc.*, 153 S.E.2d 693, 696 (S.C. 1967) (holding that defendant would be liable if "criminal process of the court was used for the ulterior

[8] The Shofners' determination that Aberdeen should conduct business in this manner is also inconsistent with what Oklahoma law authorizes the company to do: "locate and notify" persons of their warrants, not repeatedly threaten the execution of such warrants and the obtainment of new ones. 19 Okla. Stat. § 514.4(A).

purpose of coercing the plaintiff into paying ten dollars" instead of "the sole purpose for which it could properly have been intended, viz., to punish the plaintiff for 'shoplifting'").

For similar reasons, Plaintiffs have adequately alleged the second element of the abuse of process claim, as the Shofners use the warrants "primarily" for an improper purpose. This is not a case where use of the court's process has the mere "collateral effect of exerting pressure for collection of a debt." *Bank of Oklahoma, N.A. v. Portis*, 942 P.2d 249, 255 (Okla. Civ. App. 1997). Rather, Aberdeen, pursuant to the Shofners' established policies, *repeatedly* raises the threat of a warrant when speaking with debtors, and conditions the recall of warrants on the payment of arbitrary lump sums precisely to exploit the extortionate potential of the warrants. *See, e.g.*, SAC ¶¶ 7, 19, 20, 22, 24, 80. None of this has to do with the proper purpose for which the warrants issued (enabling an arrest). Indeed, Aberdeen admits that its "profit-making potential focuses on keeping persons such as Plaintiffs *out of jail*." Doc. 231 at 9. That concession proves that Aberdeen's frequent use of warrants does not advance the warrants' intended purpose.

B. Plaintiffs Have Properly Pled Duress

Plaintiffs have also stated a valid claim for duress. "[T]he relief of voiding or rescinding a contract executed under duress or restoring money paid under duress is codified in [Oklahoma's] contract statutes." *Cimarron Pipeline Const., Inc. v. U.S. Fid. & Guar. Ins. Co.*, 848 P.2d 1161, 1164 (Okla. 1993); *see also* Okla. Stat. tit. 15 §§ 51–55. A contract is executed under duress when consent is induced through "threats regarding the safety or liberty of a person, or his or her family or property, which are so oppressive as to deprive the person of the free exercise of his or her will and prevent a meeting of the minds necessary to a valid contract." *Id.* When one party pays money pursuant to a contract agreed to under duress, that party can later sue to recover the amount paid. *See, e.g.*, *Hubbard v. Jones*, 229 P. 516, 518 (Okla. 1924); *Union Cent. Life Ins. Co. v. Erwin*, 145 P. 1125, 1127 (Okla. 1914).

Plaintiffs Smith, Choate, Meachum, and Holmes' claims of duress fit squarely within this doctrine. Aberdeen, pursuant to policy set by the Shofners, threatened to have each of these Plaintiffs arrested (or, in the case of Meachum, to continue her detention) if they did not agree to pay Aberdeen money, even though each of these Plaintiffs was indigent at the time (and remains so) and therefore could not lawfully have been compelled to pay. Nonetheless, each of these Plaintiffs agreed to pay, and did pay, out of fear of unlawful confinement and deprivation of liberty. *See* SAC ¶¶ 172–73, 179, 193, 203. Their payment consummated a contract formed under duress, and they now have a right to recover the sums paid. *Hubbard*, 229 P. at 518; *Union Cent. Life Ins. Co. v. Erwin*, 145 P. at 1127.

The Shofners oppose this claim on the ground that duress "is not an independent tort under Oklahoma law." Doc. 231 at 24. But as Plaintiffs explained in the briefing on their motion for leave to amend the complaint, *see* Doc. 210 at 8, and as this Court recognized in granting leave, *see* Doc. 211 at 14, Plaintiffs are advancing a contract claim of the type the Oklahoma Supreme Court has recognized, *see, e.g.*, *Hubbard*, 229 P. at 518, not a tort claim.

The Shofners also contend that they are not responsible for any duress because state law permits arrests for non-payment. Doc. 231 at 25. As an initial matter, state law only permits arrest for nonpayment found to be willful after an inquiry, Okla. Stat. tit. 22, § 983, and the Shofners' policies ignored pleas that Plaintiffs were indigent and could not afford to pay. Regardless, even if state law permits the arrest of indigent debtors (it does not), it does not extortionate threats of "pay or get arrested," which is what Plaintiffs have alleged. Thus, it was the Shofners' policies, not state law, that coerced Plaintiffs.

C. Plaintiffs Have Properly Pled Unjust Enrichment

The Shofners also err in contending that Plaintiffs have not stated a claim for unjust enrichment. "Unjust enrichment is a condition which results from the failure of a party to make

restitution in circumstances where not to do so is inequitable, *i.e.*, the party has money in its hands that, in equity and good conscience, it should not be allowed to retain." *Oklahoma Dep't of Sec. ex rel. Faught v. Blair*, 231 P.3d 645, 658 (Okla. 2010). These Defendants' conduct easily satisfies this standard.

Aberdeen's revenue is drawn from a 30% penalty added to a debtor's outstanding debt when a warrant issues and a case is referred to the company. *See* 19 Okla. Stat. §§ 514.4–5. Because these penalty-triggering "warrants" issue without probable cause and not on the basis of oath or affirmation, *see* Brief E, Section I(D), pp. 18-20, a violation of the law underpins the money the Shofners, through Aberdeen, receive. Retention of that money therefore constitutes unjust enrichment. *See City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 282 Neb. 848, 866 (2011) ("[I]t is a bedrock principle of restitution that unjust enrichment means a 'transfer of a benefit *without adequate legal ground*.'" (quoting Restatement (Third) of Restitution and Unjust Enrichment § 1, cmt. a)) (emphasis added). Moreover, the Shofners collect money—sometimes in amounts greater than court-ordered installment payments—through Aberdeen's extortionate and unlawful threats of arrest. In this situation, "equity and good conscience" demand that the money be returned. "A transfer induced by duress is subject to rescission and restitution . . . to avoid unjust enrichment." *See generally* Restatement (Third) of Restitution and Unjust Enrichment § 14.

The Shofners' efforts to avoid this straightforward conclusion fall flat. They contend that Aberdeen's receipt of the money is equitable because it is authorized by an Oklahoma statute. *See* Doc. 231 at 25. Although Oklahoma law authorizes the assessment of the 30% penalty when "warrants [are] referred," Okla. Stat. tit. 19 § 514.5, "warrants" obviously means lawful warrants. "[W]arrants," as that term is used in Oklahoma law, thus should not be read to extend to ones that

issue without probable cause and not on the basis of oath or affirmation, which is what Plaintiffs' claims concern. Okla. Const. art. II, § 30 ("[N]o warrant shall issue but upon probable cause supported by oath or affirmation."). Defendants' retention of Plaintiffs' money on the basis of unlawful "warrants," therefore, is not equitable.

The Shofners also argue that Plaintiffs' claims should be dismissed because Plaintiffs are not paying Aberdeen a "fee" but merely making payment related to their "criminal sentences *through Aberdeen*." Doc. 231 at 25 (emphasis in original). This argument—which suggests that the Shofners or Aberdeen have not been enriched *at all*, justly or unjustly—is simply false. Aberdeen retains a portion of Plaintiffs' payments, *see* SAC ¶ 26, and the Shofners and Aberdeen are therefore enriched by those payments.[9]

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

The Shofners' arguments regarding *Heck v. Humphrey*, *Rooker-Feldman*, and *Younger* are no different than those made by Defendant Aberdeen. *See* Doc. 231 at 3-5. Plaintiffs thus incorporate by reference Brief E, Section VIII, pp. 23-24.[10]

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

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[9] The Shofners have not argued in their motion to dismiss that they are not liable as officers of Aberdeen, and any such argument is therefore waived. Such an argument would also be meritless, as it settled that to hold a corporate officer liable for a tort, a plaintiff must show only "some form of participation by the officer in the tort, or at least . . . that the officer directed, controlled, approved, or ratified the decision that led to the plaintiff's injury." See 3A Fletcher Cyc. Corp. § 1135. As explained above, *see supra* Section I(A)-(B), it is the Shofners' policies that "led to" Plaintiffs' injuries.

[10] Plaintiffs' brief in opposition to Aberdeen's Motion to Dismiss in turn incorporates the *Heck v. Humphrey*/*Rooker-Feldman* discussion from Brief I, except for an independent argument Aberdeen makes regarding Oklahoma's Uniform Post-Conviction Procedure Act ("OCPA"). The Shofners make a virtually identical OCPA argument; thus, Plaintiffs' incorporate by reference Aberdeen's brief, which responds to that point at n.8.

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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