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 OKLAHOMA SHERIFFS' ASSOCIATION MOTION TO DISMISS

BRIEF G

Jill Webb, OBA #21402
J Webb Law Firm PLLC
P.O. Box 1234
Tulsa, OK 74101
Tel: 918-346-5664
jill.webb@gmail.com

Katherine Hubbard (admitted *Pro Hac Vice*)
California Bar No. 302729
Ryan Downer (admitted *Pro Hac Vice*)
D.C. Bar No. 1013470
Marco Lopez* (admitted *Pro Hac Vice*)
California Bar No. 316245
Tara Mikkilineni (admitted *Pro Hac Vice*)
D.C. Bar No. 997284
Civil Rights Corps
910 17th Street NW, Suite 200
Washington, DC 20006
Tel: 202-599-0953
Fax: 202-609-8030
katherine@civilrightscorps.org
ryan@civilrightscorps.org
marco@civilrightscorps.org
tara@civilrightscorps.org

*Admitted solely to practice law in California; not admitted in the District of Columbia. Practice is limited pursuant to D.C. App. R. 49(c)(3).

Daniel Smolen, OBA #19943
Donald E. Smolen, II, OBA #19944
Robert M. Blakemore, OBA #18656
Smolen, Smolen & Roytman
701 South Cincinnati Avenue
Tulsa, OK 74119
Tel: 918-585-2667
Fax: 918-585-2669

Douglas N. Letter (admitted *Pro Hac Vice*)
D.C. Bar No. 253492
Robert Friedman (admitted *Pro Hac Vice*)
D.C. Bar No. 1046738
Seth Wayne (admitted *Pro Hac Vice*)
D.C. Bar No. 888273445
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
Tel: 202-662-9042
Dl1016@georgetown.edu
rdf34@georgetown.edu
sw1098@georgetown.edu

Attorneys for the Plaintiffs

Index of Plaintiffs' Opposition Briefs

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

Brief A: 51 County Sheriff Defendants, Individual Capacity (Doc. 239)

Brief B: Rogers County Defendants, Official Capacity (Doc. 226)

Brief C: Kim Henry, Former Court Clerk of Rogers County, Individual Capacity (Doc. 227)

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

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

Brief F: Jim and Rob Shofner (Doc. 231)

Brief G: Oklahoma Sheriffs' Association (Doc. 232)

Brief H: Defendant Judges (Doc. 233)

Brief I: 51 County Sheriff Defendants, Official Capacity (Doc. 234)

Brief J: Vic Regalado, Sheriff of Tulsa County, Individual Capacity (Doc. 235)

Brief K: Don Newberry, Court Clerk of Tulsa County, Individual Capacity (Doc. 236)

Brief L: Darlene Bailey, Cost Administrator of Tulsa County, Individual Capacity (Doc. 237)

Brief M: Tulsa County Defendants, Official Capacity (Doc. 238)

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

LAW AND ARGUMENT 3

I. Plaintiffs' Claims Are Not Barred by Abstention Doctrines 3

A. Plaintiffs' Claims Are Not Barred by *Younger*, *Rooker-Feldman*, or *Heck* 3

B. Plaintiffs' Claims Are Not Barred by *Pullman* or *Burford* Abstention 4

II. OSA Has Participated in the Unlawful Activity Detailed in the Second Amended Complaint 5

III. OSA's Illegal Actions Occurred Under Color of State Law 11

IV. OSA Is Liable for Plaintiffs' State Law Claims 17

V. Plaintiffs Have Pled OSA's Participation in Violations of the RICO Act 20

A. Participation in the RICO Enterprise 20

B. Participation in RICO Conspiracy 24

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 13
Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584 (10th Cir. 1999) 13
Baldonado v. Chavez, No. 14cv382 WJ/CG, 2015 WL 13650071 (D.N.M. Nov. 24, 2015) 18
BancOklahoma Mortg. Corp. v. Capital Title Co., 194 F.3d 1089 (10th Cir. 1999) 23
Boyle v. United States, 556 U.S. 938 (2009) 25
Campbell v. City of Spencer, 682 F.3d 1278 (10th Cir. 2012) 4, 19
Coleman v. Turpen, 697 F.2d 1341 (10th Cir. 1982) 13
Cty. Line Inv. Co. v. Tinney, No. 88-C-550-E, 1989 WL 237380 (N.D. Okla. June 15, 1989) 19
D.T. ex rel. M.T. v. Indep. Sch. Dist. No. 16, 894 F.2d 1176 (10th Cir. 1990) 11
Dodds v. Richardson, 614 F.3d 1185 (10th Cir. 2010) 6, 7, 8
Dopp v. Loring, 54 F. App'x. 296 (10th Cir. 2002) 23
Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518 (D.N.J. 1998) 23
Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003) 11
Durkee v. Minor, 841 F.3d 872 (10th Cir. 2016) 6
Ellison v. Garbarino, 48 F.3d 192 (6th Cir. 1995) 15
Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005) 4
Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442 (10th Cir. 1995) ..... passim
George v. Urban Settlement Servs., 833 F.3d 1242 (10th Cir. 2016) 21, 24
Hamilton v. Suntrust Mortg. Inc., 6 F. Supp. 3d 1312 (S.D. Fla. 2014) 19
Heck v. Humphrey, 512 U.S. 477 (1994) ..... ii, 3
In re S & S Indus., 37 B.R. 838 (Bankr. E.D. Mich. 1984) 19
Jackson v. Metro. Edison Co., 419 U.S. 345 (1974) 13
Jatoi v. Hurst-Euless-Bedford Hosp. Auth., 807 F.2d 1214 (5th Cir. 1987) 17
Johnson v. Rodrigues, 226 F.3d 1103 (10th Cir. 2000) 5
Kan. Judicial Review v. Stout, 519 F.3d 1107 (10th Cir. 2008) 5
Loubser v. Thacker, 440 F.3d 439, 442 (7th Cir. 2006) 3
Marth v. Kingfisher Commercial Club, 144 P. 1047 (Okla. 1914) 18
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 13
Nasik Breeding & Research Farm Ltd. V. Merck & Co., 165 F. Supp. 2d 514 (S.D.N.Y. 2001) 23
NCAA v. Tarkanian, 488 U.S. 179 (1998) 12
New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) 5
Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783 (6th Cir. 2012) 24
Owens v. City of Barnsdall, No. 13-CV-749-TCK-PJC, 2014 WL 2197798 (N.D. Okla. May 27, 2014) 10
Perino v. Mercury Fin. Co. of Ill., 912 F. Supp. 313 (N.D. Ill. 1995) 23
Resolution Trust Corp. v. Stone, 998 F.2d 1534 (10th Cir. 1993) 22
Reves v. Ernst & Young, 507 U.S. 170 (1993) 20, 21
Robbins v. Oklahoma, 519 F.3d 1242 (10th Cir. 2008) 10
Safe Streets Alliance v. Hickenlooper, 859 F.3d 865 (10th Cir. 2017) 21
Smith v. Cochran, 339 F.3d 1205 (10th Cir. 2003) 17
Snell v. Tunnell, 920 F.2d 673 (10th Cir. 1990) 18
Spurlock v. Townes, 661 F. App'x 536 (10th Cir. 2016) 17
Tal v. Hogan, 453 F.3d 1244 (10th Cir. 2006) 22
Tonkovich v. Kan. Bd. of Regents, 159 F.3d 504 (10th Cir. 1998) 24

United States v. Harris, 695 F.3d 1125 (10th Cir. 2012) 25
United States v. Onque, 169 F. Supp. 3d 555 (D.N.J. 2015) 9
United States v. Smith, 413 F.3d 1253 (10th Cir. 2005) 25
West v. Atkins, 487 U.S. 42 (1988) 15, 17
Williams v. Wells Fargo Bank, N.A., No. 11-21233-CIV, 2011 WL 4901346 (S.D. Fla. Oct. 14, 2011) 19
Wilson v. Montano, 715 F.3d 847 (10th Cir. 2013) 6, 8
Wittner v. Banner Health, 720 F.3d 770 (10th Cir. 2013) 15, 16, 17
Younger v. Harris, 401 U.S. 37 (1971) ..... ii, 3

Statutes

18 U.S.C. §§ 1961–68 ..... passim
42 U.S.C. § 1983 ..... 6, 11, 12
Okla. Ct. Crim. App. R. 8.4 4
Okla. Stat. tit. 19, § 514.4 ..... 1, 13
Okla. Stat. tit. 19, § 514.5 19
Okla. Stat. tit. 21, § 1481-83 4
Okla. Stat. tit. 22, § 983 4

The Court should deny the motion of Defendant the Oklahoma Sheriff's Association (Doc. 232). The Oklahoma Sheriffs' Association, Inc. ("OSA") has contracted with Aberdeen Enterprizes II, Inc. (Aberdeen) and continues to contract with Aberdeen, knowing of its extortionate activities, because of the enormous financial benefit that OSA has received. Under the contract, OSA actively assists in the unlawful collection of court debt, including by enlisting government actors to refer cases to Aberdeen, and provides that company with debtor information. As the vehicle that enables Aberdeen, and connects the county sheriffs to this debt-collection company and its threats of unlawful arrest, OSA forms the linchpin of the entire unconstitutional and extortionate scheme challenged in this lawsuit.

STATEMENT OF THE CASE

OSA is an ostensibly private Oklahoma corporation that represents all of the county sheriffs in Oklahoma (including each Sheriff Defendant) as a lobbying organization. *See* Plaintiffs' Second Amended Complaint, Doc. 212 ("SAC"), ¶ 29. After heavy lobbying, OSA secured amendments to Oklahoma law to provide the organization with an enormous financial windfall. As of 2010, the law allows county sheriffs to make contracts with private entities to "locate and notify persons of their outstanding . . . failure-to-pay warrants[,]" and gives OSA the exclusive right to administer those warrants. *Id.* ¶ 54; Okla. Stat. tit. 19, § 514.4. Any time a debtor's case gets sent to a private company, a 30% penalty surcharge is added by law, and OSA is paid a portion of that money. SAC ¶ 55. The same year that the law was amended, OSA contracted with Aberdeen on behalf of the Sheriff Defendants. *Id.* ¶ 56. Empowered by the contract with OSA, Aberdeen embarked on its campaign of unlawful extortion, threats, and incarceration, squeezing as much money as possible from court debtors by using threats of arrest and incarceration. *See id.* ¶¶ 66 *et seq*. Aberdeen paid, and continues to pay OSA a portion of the unlawfully obtained

money, and OSA has profited enormously as a result. From 2009 (the year prior to the contract with Aberdeen), to 2016, OSA's assets increased from approximately $50,000 to over $3,000,000. *Id.* ¶ 105. In 2016 alone, OSA made over $800,000 from its warrant collection program. *Id.* ¶ 105.

To maintain this untrammeled flow of income, OSA is incentivized to aid and encourage Aberdeen's aggressive pursuit of profit, and the contract provides for just that. Pursuant to the contract, OSA enlists the various county sheriffs and court clerks to obtain debtor information and pass it to Aberdeen through OSA. *Id.* ¶ 60. Although Aberdeen is ostensibly prohibited by the contract from engaging in unlawful collection activities, it routinely and openly violates that provision, with the knowledge and informal agreement of OSA. *Id.* ¶ 81. Despite this knowledge, OSA has renewed the contract with Aberdeen multiple times, and continued to knowingly benefit and assist in its extortionate activities. *Id.* ¶ 282. The pursuit of money over the rights of individuals underlies Plaintiffs' claims against OSA. OSA has played a key role in contributing to the proliferation of debtor imprisonment in Oklahoma, one of the reasons the state now boasts one of the highest incarceration rates in the country. *Id.* ¶ 142.

In the Second Amended Complaint, Plaintiffs make claims against OSA in Count One (RICO violations and RICO conspiracy); Count Two (for OSA's role enabling the seeking, issuing, and executing debt-collection arrest warrants without inquiry into ability to pay, in violation of the Fourteenth Amendment); Count Three (for OSA's role enabling the seeking, issuing, and execution of debt-collection arrest warrants based on unsworn allegations, in violation of the Fourth Amendment); Count Five (for enabling the jailing of debtors without notice and a hearing, in violation of state-created liberty interests); Count Six (for enabling a system where public debt is collected by an entity with an impermissible direct financial stake in extracting money from

debtors); Count Seven (for subjecting Plaintiffs to onerous debt collection); Count Eight (for participating in abuse of process); Count Nine (for contractual duress); and Count Ten (for unjust enrichment). Plaintiffs' claims are supported by law and the allegations in the Second Amended Complaint, and therefore cannot properly be dismissed.

LAW AND ARGUMENT

OSA's main defenses rest on an attempt to avoid the factual pleadings in the Second Amended Complaint, mischaracterization of its pivotal role in the extortionate scheme as that of a passive beneficiary, and a denial that their obvious activities as a state actor were under color of state law. None of these claims justify dismissal.

I. Plaintiffs' Claims Are Not Barred by Abstention Doctrines

A. Plaintiffs' Claims Are Not Barred by *Younger*, *Rooker-Feldman*, or *Heck*

OSA makes brief arguments that it can avoid liability for its illegal conduct under *Younger v. Harris*, 401 U.S. 37 (1971), the *Rooker-Feldman* doctrine, and *Heck v. Humphrey*, 512 U.S. 477 (1994). *See* Okla. Sheriffs' Assoc. Mot. to Dismiss Pls.' Second Am. Compl. ("Doc. 232") at 13 n.7, 21–22. Plaintiffs explain why many of OSA's arguments under these doctrines are flawed in their Opposition to the County Sheriffs' Motion to Dismiss in Their Official Capacity and respectfully refer the Court to that brief. *See* Br. I, Section V, pp. 22-34.

In addition to its codefendants' arguments, OSA adds its own assertion that Plaintiffs failed to raise their claims first in state court, which supposedly violates a non-existent exhaustion requirement under *Rooker-Feldman*. *See* Doc. 232 at 22. Simply put, "*Rooker-Feldman* does not impose a duty to exhaust judicial and administrative remedies before pursuing a federal civil rights suit." *Loubser v. Thacker*, 440 F.3d 439, 442 (7th Cir. 2006). Thus, even if Plaintiffs could have

raised their constitutional claims first in state court, they were not obligated to do so.[1] Moreover, in making its *Rooker-Feldman* argument, OSA relies on the "inextricably intertwined" standard, which has been explicitly rejected by the Tenth Circuit. *See Campbell v. City of Spencer*, 682 F.3d 1278, 1283 (10th Cir. 2012) (rejecting the "inextricably intertwined" standard as a result of *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), which held that an element of the claim must be that the state court wrongfully entered its judgment, *id.* at 284). OSA's argument is thus based on wrong and non-existent law, and should be rejected.

Nor are Plaintiffs' claims an indirect attack on Oklahoma's statutory framework, as OSA incorrectly argues. Doc. 232 at 21. The majority of Plaintiffs' claims challenge actions that Defendants took in *violation* of state law, including statutes requiring inquiry into ability to pay before jailing a court debtor for nonpayment, Okla. Stat. tit. 22, § 983, Okla. Ct. Crim. App. R. 8.4, and laws prohibiting extortion, Okla. Stat. tit. 21, §§ 1481-83. The fact that the act of contracting for court debt collection is allowable under state law in no way validates the unconstitutional activity that these Defendants, including OSA, have taken as a result of the contract.

B. Plaintiffs' Claims Are Not Barred by *Pullman* or *Burford* Abstention

OSA also briefly argues that *Pullman* and *Burford* abstention apply in this case. Doc. 232 at 24–25. No other Defendant has raised these rarely-applied doctrines, and for good reason, as they plainly lack merit. "*Burford* is concerned with protecting complex state administrative

[1] OSA's assertion that Plaintiffs could have raised these issues "when the fines were imposed in connection with their sentences" is mistaken because Plaintiffs' sentencing hearings occurred long before their cases were transferred to Aberdeen. Furthermore, the assertion that Plaintiffs could have raised these issues "at any other time they appeared in state court" is dubious because a court at a hearing for non-payment would be unlikely to entertain such constitutional challenges. *See* Doc. 232 at 23.

processes from undue federal interference" and avoiding "undermin[ing] the State's ability to maintain desired uniformity" in its processes. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 362–63 (1989). This case does not involve complex state administrative processes, and it does not affect Oklahoma's ability to maintain uniformity in any State processes. As in *Johnson v. Rodrigues*, the case at bar involves primarily federal law claims, which "ask[] the district court to act within its area of expertise" and does not provoke *Burford* abstention. 226 F.3d 1103, 1112 (10th Cir. 2000).

Pullman abstention applies where "(1) an uncertain issue of state law underlies the federal constitutional claim; (2) the state issues are amenable to interpretation and such an interpretation obviates the need for or substantially narrows the scope of the constitutional claim; and (3) an incorrect decision of state law . . . would hinder important state law policies." *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1118–19 (10th Cir. 2008) (alteration in original). *Pullman* is inapplicable because the case at bar neither challenges the constitutionality of a state statute nor involves an uncertain question of state law subject to narrowing by interpretation. Rather, this suit addresses actions that violate unambiguous state and federal law. OSA's invocation of *Burford* and *Pullman* abstention is meritless.

II. OSA Has Participated in the Unlawful Activity Detailed in the Second Amended Complaint

Other than the incorrect assertion that it is not acting under color of state law (addressed below, *see* Section III, *infra*), OSA's motion to dismiss Plaintiffs' constitutional claims relies on the theory that Plaintiffs have not sufficiently alleged causation and participation by OSA in the unlawful activities challenged in the Second Amended Complaint. OSA's argument demonstrates a misunderstanding of the law of causation in this context, and disregards the allegations in the

Second Amended Complaint, which clearly establish that OSA 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, *Dodds v. Richardson*, 614 F.3d 1185, 1202 (10th Cir. 2010), and "vicarious liability is inapplicable to . . . § 1983 suits," *id.* at 1198 (10th Cir. 2010). 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 (quoting *Fogarty v. Gallegos*, 523 F.3d 1147, 1162 (10th Cir. 2008)). 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").

OSA is clearly liable for the consequences of its decision to enlist public employees to retrieve debtor information and transmit that information to Aberdeen, SAC ¶ 282, and to renew the contract with Aberdeen year after year, both despite knowledge of that company's unconstitutional practices. *See* Section V, *infra*; SAC ¶ 81. This is not a "respondeat superior" theory of liability; it is direct.

As an initial matter, OSA—like Aberdeen—is a direct participant in the unconstitutional conduct challenged in Count Six, which alleges that Aberdeen has an impermissible financial bias. This bias is memorialized on the face of the Agreement with Aberdeen, *see* Doc. 212, Ex. A at 5–6 (providing that Aberdeen's share depends on how much it collects), and the unconstitutional arrangement took effect when OSA signed the Agreement, which OSA has administered and renewed multiple times since, *see* SAC ¶ 29. There is plainly a direct causal link between OSA's conduct—negotiating, signing, and administering a contract that creates an impermissible financial incentive—and the injuries suffered by Plaintiffs because of the biased administration of that contract.

In addition to Count Six, Plaintiffs have also named OSA as a defendant in Counts Two, Three, Five, and Seven.[2] These Counts all challenge OSA's role in knowingly assisting Aberdeen and enabling it to seek unconstitutional warrants, which, in turn, directly leads to warrants being issued and executed in violation of the Fourth and Fourteenth Amendments. Plaintiffs have alleged the requisite causal nexus with respect to these claims as well. *See id.* ¶¶ 89–95. Specifically, the Second Amended Complaint alleges that OSA enlists government entities to procure debtor information and relay it to Aberdeen. *Id.* ¶ 282. Moreover, despite OSA's knowledge of Aberdeen's misconduct, and contractual provisions that require Aberdeen to comply with the law, OSA not only let those provisions go unenforced,[3] but also renewed Aberdeen's contract multiple times. *See* SAC ¶¶ 29, 350; Doc. 212, Ex. A at 4. That "set in motion"—and demonstrated deliberate indifference towards—the continuation of Aberdeen misconduct. *See Dodds*, 614 F.3d

[2] OSA is not named in Count Four, which concerns post-arrest detention practices.

[3] OSA asserts that the contractual provisions requiring Aberdeen to comply with the law defeat Plaintiffs' claims. *See* Doc. 232 at 18. But this argument overlooks Plaintiffs' allegation that those provisions were "routinely and openly violate[d] . . . with the full knowledge and informal agreement of the [OSA]." SAC ¶ 81.

at 1195-96 (quoting *Poolaw v. Marcantel*, 565 F.3d 721, 732 (10th Cir. 2009)); *id.* at 1200 (quoting *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), for the proposition that a defendant will be liable for enabling an unconstitutional policy "express[ly] *or otherwise*" (emphasis added)).

OSA nonetheless asserts that it cannot be liable for establishing the unconstitutional debt-collection scheme because it does not personally seek, issue, or execute warrants. *See* Doc. 232 at 16–17. This argument lacks any foundation in case law: The Tenth Circuit explained in *Dodds* that personal participation "does *not* require *direct* participation." *Dodds*, 614 F.3d at 1195 (emphases added). There, the Court held that the defendant sheriff was liable even though he "may not have personally informed Plaintiff . . . that he could not post the preset bail until he had seen a judge" and even though the sheriff "may not have actually known of his subordinates' enforcement of these policies with regard to Plaintiff in particular." *Id.* at 1202–03. In fact, the sheriff did not even create the policy at issue. *Id.* at 1203. It was sufficient that, "under his watch, . . . the policies which caused Plaintiff's constitutional injury continued to operate." *Id*. *Dodds* thus forecloses OSA's argument that its lack of direct interaction with Plaintiffs (or their cases) precludes Plaintiffs' claims. *See also, e.g.*, *Wilson*, 715 F.3d at 858 ("That Wilson has not alleged he had any direct contact with Warden Chavez or that Warden Chavez actually knew of Wilson's specific circumstances is of no consequence.").

OSA also seeks dismissal on the ground that Second Amended Complaint's allegations of OSA's knowledge of Aberdeen's misconduct are conclusory. *See* Doc. 232 at 5. This, too, lacks merit. With respect to Count 6, OSA's knowledge cannot reasonably be disputed: Aberdeen's improper financial bias appears on the face of the Agreement between Aberdeen and OSA. *See* Doc. 212, Ex. A.

There is also ample support for Plaintiffs' allegations that OSA had knowledge of Aberdeen seeking arrest warrants—and thereby triggering arrests—without regard to debtors' ability to pay, which, as noted, forms the basis of Plaintiffs' remaining constitutional claims against OSA. In particular, the contract itself requires Aberdeen to regularly report to OSA about its "Collection Activity." *See* Doc. 212, Ex. A at 7. The agreement requires reports on a monthly, bi-monthly, and annual basis. *Id.* On an annual basis, Aberdeen is to provide a "summary report" of its collection activities to OSA. *Id.* By the terms of the contract itself, OSA receives regular reports and information on Aberdeen activities.

Plaintiffs have further alleged that, before OSA engaged Aberdeen, it had only $52,754 in assets, but by 2016, after using Aberdeen for five years, OSA's assets grew by more than 60 times that amount to $3,311,433. SAC ¶ 29. And with its newfound wealth, OSA greatly increased expenditures: For example, while in 2009 (pre-Aberdeen) OSA spent only $189 on "advertising in promotion," it expended $128,630 in 2015. *Id.* ¶ 106. "Knowledge may . . . be inferred from evidence of 'excessive financial gain,'" *United States v. Onque*, 169 F. Supp. 3d 555, 579 (D.N.J. 2015), *aff'd*, 665 F. App'x 189 (3d Cir. 2016) (quoting *United States v. Pearlstein*, 576 F.2d 531, 542 (3d Cir. 1978)), and it is simply not plausible that OSA enjoyed such exponential growth and took on hundreds of thousands of dollars in additional expenditures without knowledge of how its primary funder operated.

OSA's knowledge can also be inferred from its structure and purpose. OSA is a lobbying organization for, and its membership is made up of, county sheriffs throughout Oklahoma, including the dozens of Defendant Sheriffs here who use Aberdeen. SAC ¶ 29. As the County Sheriffs explain in their brief, "there is universal agreement among . . . law enforcement officials . . . that the number of persons who willfully refuse to pay debts is miniscule." Doc. 234 at 21

(quoting *Woods v. Oxford Law, LLC*, Civil Action No. 2:13-6467, 2015 WL 778778, at *6 (S.D.W.V. Feb. 24, 2015)). OSA represents and is composed of such "law enforcement officials"; per the terms of the Agreement, relayed debtor information collected by sheriffs and court clerks; knew that it was receiving millions of dollars taken from these debtors "universally" regarded as rarely willfully refusing to pay; and, by virtue of its membership and purpose, can fairly be inferred to have knowledge of the "tens of thousands of cases in Oklahoma with outstanding debt-collection arrest warrants," SAC ¶ 6, and the many people who are arrested (some of whom are Plaintiffs in this case) on such warrants.

At the pleadings stage, where the Court "[c]onstru[es] [a] Plaintiff's allegations in the light most favorable to her" and draws on its "'common sense,'" *Owens v. City of Barnsdall*, No. 13-CV-749, 2014 WL 2197798, at *5 (N.D. Okla. May 27, 2014) (Kern, J.) (quoting *SEC v. Shields*, 744 F.3d 633, 641 (10th Cir. 2014)), this is more than a sufficient factual basis to support Plaintiffs' allegations that OSA knew that Aberdeen collected court debt by seeking warrants and triggering arrests without regard to debtors' ability to pay. Plaintiffs' Complaint gives "reason to believe that [Plaintiffs] ha[ve] a reasonable likelihood of mustering factual support for the[ir] claims." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). That is all the knowledge Plaintiffs must plead against OSA for Counts Two, Three, Five, and Seven.

At a bare minimum, there are sufficient allegations to infer OSA's knowledge of Aberdeen's misconduct for purposes of injunctive relief. The initiation of this lawsuit—over a year ago—put OSA on notice of Aberdeen's misconduct. *See* Doc. 1. Yet, as of the filing of the Second Amended Complaint, OSA continues to retain Aberdeen and has declined to terminate the Agreement, despite that contract expressly providing procedures to do so. *See* SAC ¶ 29; Doc.

212, Ex. A at 2–3. There can thus be no doubt that OSA currently has knowledge of Aberdeen's misconduct and nonetheless continues to retain its services.

Finally, *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003), which OSA discusses at length, offers no support for its argument. *Dubbs* concerned a challenge to medical examinations performed at a pre-school without parental consent. According to OSA, *Dubbs* held that one defendant, K.D. Enterprises ("KD"), had not "participated" in the challenged conduct for purposes of § 1983, even though "two KD supervisors [were] told of concerns about . . . [obtaining parental] consent and KD [did] nothing to intervene." Doc. 232 at 21.

OSA's recounting of *Dubbs* is misleading and inaccurate. In *Dubbs*, the defendant, KD, "had *no* role in performance of the examinations or *in arranging for notice and consent*." 336 F.3d at 1217 (emphases added). And, the Tenth Circuit further explained, to the extent that KD played an "incidental role" in arranging medical examinations, it could rely on the representations from the responsible organization "that parental consent *had* been obtained." *Id.* (emphasis added). *Dubbs*, then, stands only for the common sense rule that an entity will not be liable for the misconduct of people whom the entity does not supervise, especially when the entity has reasonable assurance that the misconduct has not occurred. Here—unlike KD in *Dubbs*—OSA has both knowledge of Aberdeen's unlawful activities and control over its continued role (under the Agreement) in collecting debt.

III. OSA's Illegal Actions Occurred Under Color of State Law

Section 1983 allows suit for actions taken by private entities "under color of state law." *D.T. ex rel. M.T. v. Indep. Sch. Dist. No. 16*, 894 F.2d 1176, 1186 (10th Cir. 1990) (internal quotation marks omitted). OSA argues, in brief, that because it is a private entity and has a "private contract" with Aberdeen, it is not acting under the "color of state law." Doc. 232 at 14. OSA—

an organization that receives public funding, has a membership entirely of public servants for whom it serves as agent, occupies a special position under state law, and is intimately involved in the collection of public debt—cannot plausibly argue that it is not acting under color of law. Its argument must be rejected.

As an initial matter, the Oklahoma Attorney General has already determined that OSA is a "public body" for the purposes of the Oklahoma Open Meetings and Open Records Acts, as it "receive[s] a set portion of a statutorily-required fee" related to a motorist insurance plan. Okla. Att'y Gen. Op. 2017-18, at 3 (Dec. 27, 2017), *available at* https://perma.cc/NX9E-R4KB. According to the Attorney General, receipt of a portion of a statutory administrative fee constitutes "public fund[ing]," and as a publicly funded agency, OSA is to be considered a public body. *Id.* Similarly, here, OSA receives a portion of a statutorily-prescribed administrative fee extracted from debtors as a collateral result of their criminal or traffic sentences. SAC ¶ 5. This analogous opinion establishes that OSA is treated under state law not only as acting "under color of law," but as a public body in and of itself.

Even if it were to be considered a fully private body, OSA meets all the requirements that courts have set for the purposes of § 1983 liability. 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). Defendants are subject to a claim under § 1983 when they "represent [the state] in some capacity, whether they act in accordance with their authority or misuse it." *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1998) (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). An entity is considered to represent the state if it meets any one of various tests used by the courts. In this case, most relevantly, an entity acts under color of state law when (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) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)); (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. Metro. 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). OSA easily meets the requirements of each of these tests.

Joint Action. First, these Defendants meet the joint-action test. A private party acts under color of law if 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) (finding joint action where a private treatment center acted with the state to implement a policy resulting in illegal arrest and detention in treatment facilities); *see also Adickes*, 398 U.S. at 152 ("To act 'under color' of law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the State or its agents." (quoting *Price*, 383 U.S. at 794)); *Coleman v. Turpen*, 697 F.2d 1341, 1345 (10th Cir. 1982) (finding joint action when a private company "jointly participated" with state officials in seizure of a truck).

Here, a state statute delegates to OSA the exclusive power to administer contracts with debt-collection companies to collect *public* debt, as agent of *public employee* county sheriffs. Accordingly, OSA is specifically assigned a public function under state law. *See* Okla. Stat. tit. 19 § 514.4 (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).[4] Pursuant to this law, OSA, representing Defendant Sheriffs, has entered into a contract with Aberdeen to outsource collection of court debts, with each of the parties and the court clerk dividing the fees and 30% penalty surcharge. *See* SAC ¶¶ 53–59. Under the contract, OSA enlists government actors to participate in Aberdeen's collection of the debt by providing Aberdeen access to court files—and, in at least one county, editing privileges—and debtor information necessary to collect the warrant. SAC ¶¶ 60–61. In other words, by the terms of the contract itself, OSA, Aberdeen, and government entities work together to ensure collection of public debt. When a debtor does not pay the amount determined by Aberdeen, the company contacts the court clerk, who issues an arrest warrant. SAC ¶ 62.

In fact, the contract that OSA claims to this Court is merely an exclusively private agreement contains mandates for government actors to follow. For example, under the contract, 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 its designated representative or assignee." Doc. 212, Ex. A at 5. The contract also requires County Sheriffs and Court Clerks who use the state's electronic information system to furnish accounts to Aberdeen using that system. Doc. 212, Ex. A at 4. OSA has negotiated, signed, and administered a contract as an agent of public employees, that imposes obligations on public bodies. These practices represent "joint action."

Sufficiently Close Nexus. Second, OSA also satisfies the "nexus" test. A private entity acts under color of law if there is a "'sufficiently close nexus' between the government and the challenged conduct" such that the conduct "'may be fairly treated as that of the State." *Gallagher*, 49 F.3d at 1448 (quoting *Jackson*, 419 U.S. at 351). In "nexus" cases, the test is met when the

[4] Plaintiffs are aware of no statewide association of county sheriffs other than OSA. OSA is accordingly singled-out to fulfill a public duty by state statute.

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. Here, it is probative of the entanglement between the state and private actor, *see, e.g.*, *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."); *Gallagher*, 49 F.3d at 1445 (examining contractual language).

OSA, empowered by a statutory delegation from the state of Oklahoma and serving as an agent of public employees, contracted with Aberdeen to collect public court debts. Although OSA claims it "exercises no control over Aberdeen's work," Doc. 232 at 14, this assertion is belied by the contract itself, which mandates that Aberdeen follow specific procedures for debt collection, *see, e.g.*, Doc. 212, Ex. A at ¶ 2(a) ("Upon request by a County Sheriff or Court Clerk, Aberdeen *shall* immediately return to such County Sheriff of Clerk any account(s) referred to Aberdeen in error." (emphasis added)); *id.* at ¶ 2(e)(3) ("Aberdeen *shall* deposit all funds collected by Aberdeen hereunder in a trust account." (emphasis added)); *id.* at ¶ 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)). OSA receives regular reports on Aberdeen's activity, Doc. 212, Ex. A at 7, and as administrator of the contract, is empowered to revoke it, Doc. 212, Ex. A at 2-3, thereby inherently exercising control over Aberdeen's collection of public debt, which "may be fairly treated as that of the State." *Gallagher*, 49 F.3d at 1448 (quoting *Jackson*, 419 U.S. at 351.

Moreover, under the contract negotiated and administered by OSA, government officials (individual county sheriffs and court clerks) are responsible for transferring cases to Aberdeen,

effectively placing OSA in a position overseeing the actions of public entities. *See* Doc. 212, Ex. A at 3; SAC ¶ 60. In fact, the alleged "private" contract that OSA administers grants "private" entities the right to access state court documents. *Id.*

The facts alleged in the Second Amended Complaint also defeat the argument that OSA "exercises no control over Aberdeen's work." Doc. 232 at 14. As stated in Section IV, *infra*, OSA shares debtor information with Aberdeen, SAC ¶ 60, and assists Aberdeen "by enlisting government entities to procure debtor information and relay that information to Aberdeen." *Id.* ¶ 282. OSA has knowledge of Aberdeen's activities, *id.* ¶ 81, and the power to terminate the contract if Aberdeen does not comply with its requirements, Doc. 212, Ex. A at 2. OSA thus cannot plausibly argue that it exercises no control over Aberdeen or is uninvolved in the collection of court debt.

***Symbiotic Relationship*.** Third, OSA meets the "symbiotic relationship" test. A private entity acts under color of law if the state "has so far insinuated itself into a position of interdependence" with that entity that "it must be recognized as a joint participant." *Gallagher*, 49 F.3d at 1451 (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). Determining when the entity's operations become sufficiently commingled is a "matter[] of degree." *Id.* at 1452. OSA here acts under the color of law because "the state's relationship with the private actor goes beyond the 'mere private [purchase] of contract services.'" *Wittner*, 720 F.3d at 777–78 (alteration in original) (quoting *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 299 (2001)). The Oklahoma counties rely heavily on the collection of court debts by Aberdeen, and the partnership administered by OSA, to run their judicial systems. The fines collected as a result of OSA's contract 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 ¶ 112. The fees even pay for salaries of judges and certain members of their staff. *Id.* ¶¶ 114–15. This heavy dependence on OSA-administered fee collection illustrates the interdependence between OSA and the state. *See Jatoi v. Hurst-Euless-Bedford Hosp. Auth.*, 807 F.2d 1214, 1221 (5th Cir. 1987) (finding a symbiotic relationship where the state relied on a private company to satisfy its financial obligations, such as mortgages or bonds). This Defendant has clearly acted under the color of law as determined by any of these tests.[5]

IV. OSA Is Liable for Plaintiffs' State Law Claims

OSA seeks dismissal of Plaintiffs' State Law Claims in Counts Eight, Nine, and Ten of the Second Amended Complaint under a "lack of direct participation" theory similar to what they assert for Plaintiffs' constitutional claims. *See* Doc. 232 at 19–21. The validity of these claims on their merits is set forth primarily Plaintiffs' Opposition to Defendants Jim Shofner and Robert Shofners' Motion to Dismiss. *See* Br. F, IV, pp. 20-25. Plaintiffs here explain why OSA is liable as well and address the additional arguments it makes.

With regard to Count Eight, challenging Defendants' abuse of process, OSA's administration of the contract, renewal, and assistance and empowering of Aberdeen lie at the center of Plaintiffs' claim. The Second Amended Complaint alleges that OSA enlists public actors to provide debtor information to Aberdeen, SAC ¶ 282, and has "full knowledge" of Aberdeen's

[5] OSA also likely exercises powers "traditionally . . . [and] exclusively reserved to the State." *Wittner*, 720 F.3d at 777. By overseeing the collection of criminal court debt, OSA falls within the traditional government category of administering judicial and correctional functions. *See West*, 487 U.S. at 54–56 (physician under contract with prison to provide medical services to inmates); *Spurlock v. Townes*, 661 F. App'x 536, 539 n.2 (10th Cir. 2016) (unpublished) (private prison facility); *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, because these Defendants clearly meet the "joint action," "nexus," and "symbiotic relationship" tests.

unlawful activities and allows them to continue through "informal agreement," SAC ¶ 81.[6] Then, with knowledge of Aberdeen's unlawful activities, OSA continued to renew Aberdeen's contract. *See* SAC ¶ 29. This assistance and approval of Aberdeen's methods set in motion the tortious conduct that caused Plaintiffs' injuries, and that renders OSA liable. *See, e.g.*, *Baldonado v. Chavez*, No. 14cv382 WJ/CG, 2015 WL 13650071, at *4 (D.N.M. Nov. 24, 2015) ("Defendant could nevertheless be found liable . . . under state tort law if she was a moving force that set in motion a series of events Defendant knew or reasonably should have known would cause others to commit or join in the tort . . . ."); *Marth v. Kingfisher Commercial Club*, 144 P. 1047, 1049–50 (Okla. 1914) ("[I]f [defendants] as promoters participated in the arrangement of such program, they would be liable for such torts as were committed in the carrying out of such program."); *cf. also Snell v. Tunnell*, 920 F.2d 673, 700 (10th Cir. 1990).

With regard to Count Ten for unjust enrichment, OSA raises the same defense as Aberdeen and the Shofners that their receipt of the money is justified as it is authorized under state law. This argument fails for the reasons set forth in Plaintiffs' Opposition to Defendants Jim Shofner and Robert Shofners' Motion to Dismiss. *See* Br. F, IV.C, p. 25.

OSA raises three additional reasons why the Court should dismiss Plaintiffs' unjust enrichment claim. All of them lack merit. First, OSA asserts that Plaintiffs' claim fails because they "do not allege that OSA has collected *any* monies *directly* from Plaintiffs." Doc. 232 at 20 (second emphasis added). Multiple courts have rejected this inference, reasoning that "[i]t would not serve the principles of justice and equity to preclude an unjust enrichment claim merely because the 'benefit' passed through an intermediary before being conferred on a defendant."

[6] Such knowledge, moreover, may be reasonably inferred from Aberdeen reporting to OSA, OSA's years-long relationship with Aberdeen, the substantial financial benefits OSA has reaped from that relationship, and OSA's relationship with its sheriff members. *See* Section II, *supra*; SAC ¶ 29.

Hamilton v. Suntrust Mortg. Inc., 6 F. Supp. 3d 1312, 1317 (S.D. Fla. 2014) (alteration in original) (quoting *Williams v. Wells Fargo Bank, N.A.*, No. 11-21233-CIV, 2011 WL 4901346, at *5 (S.D. Fla. Oct. 14, 2011)); *see also Campbell v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 130 F. Supp. 3d 236, 256–57 (D.D.C. 2015) (collecting cases).

Second, OSA asserts that Plaintiffs have not alleged that they paid any money that "they do not in fact owe." Doc. 232 at 20. That claim is legally incorrect, as Plaintiffs explained in demonstrating that they have suffered a RICO injury. *See* Pls.' Opp. to Rogers County Sheriff's Mot. to Dismiss in His Individual Capacity, Br. D, Section IV.A, pp. 14-17.

Third, OSA contends that, because the operative statute provides that a portion of the 30% penalty "shall be distributed" to OSA, Okla. Stat. tit. 19, § 514.5, that entity's receipt of the money falls within the rule that a party "is not unjustly enriched . . . by retaining benefits involuntarily acquired which law and equity give him absolutely without any obligation on his part to make restitution." Doc. 232 at 20 (quoting *Am. Biomedical Grp., Inc. v. Techtrol, Inc.*, 374 P.3d 820, 828 (Okla. 2016)). That rule applies when the defendant "never requested or authorized [the] [p]laintiff[] to take any action or expend any amounts on his behalf." *Cty. Line Inv. Co. v. Tinney*, No. 88-C-550-E, 1989 WL 237380, at *2 (N.D. Okla. June 15, 1989); *see also In re S & S Indus.*, 37 B.R. 838, 841–42 (Bankr. E.D. Mich. 1984).

OSA cannot escape liability under this theory for their unjust enrichment. First, the applicable statute states that the fees collected "shall be distributed to the third-party contractor," *i.e.*, Aberdeen, but a portion of those fees "may" be used to compensate OSA. Okla. Stat. tit. 19, § 514.5(B). Thus, OSA did not "involuntarily acquire" these funds, but negotiated to obtain them through the Agreement with Aberdeen. *See* Doc. 212, Ex. A. Second, Aberdeen here did far more than merely "request" the money paid: it demanded it through extortionate threats, and OSA

enabled it do so. Third, OSA's reliance on the statutory authorization is, again, misplaced, because the statute cannot be read to require the "distribution" in the case of *unconstitutional* warrants, which is what is at issue here.

V. Plaintiffs Have Pled OSA's Participation in Violations of the RICO Act

A. Participation in the RICO Enterprise

The Second Amended Complaint states a valid claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68, and properly sets forth that OSA participated in the RICO Enterprise. The merits of the civil RICO claim, which satisfies all of the elements for RICO liability, are set forth Plaintiffs' Opposition to the Rogers County Sheriff's Motion to Dismiss in His Individual Capacity. *See* Br. D, Section IV, pp. 13-25. OSA's Motion to Dismiss rests on the same theory that it sets forth for Plaintiffs' other claims—that it was a mere passive and innocent beneficiary of the unlawful activity, and is not alleged to have taken any direct action itself. *See* Doc. 232 at 7–9. This argument can succeed only by improperly ignoring the allegations in the Second Amended Complaint.

Specifically, OSA argues that it did not itself use threats of force or other criminal means to obtain property, and it did not direct the affairs of the enterprise by participating in its "operation or management." Doc. 232 at 8–11 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993)). But the Second Amended Complaint squarely alleges that OSA contracted—and continues to renew its contract—with Aberdeen, SAC ¶ 29; provides key debtor information essential to collection activity and otherwise assists Aberdeen with debt collection, SAC ¶ 282; shares in the enterprise's considerable profits, SAC ¶¶ 105–06; and continues to tolerate Aberdeen's criminal activity despite full knowledge of the same and control over the contractual relationship, SAC ¶ 81. That is obviously more than sufficient for purposes of RICO liability.

The statutory "participation" standard for RICO liability is whether OSA "participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs," 18 U.S.C. § 1962(c), and the Supreme Court has held that this provision imposes liability on any individual who has participated in the "operation or management" of the RICO enterprise, *Reves*, 507 U.S. at 183. Significantly, "operation or management" is not limited to "upper management" or even those with a "formal position"; it includes "lower rung participants in the enterprise" or "others 'associated with' the enterprise" who exert some form of control over it. *Id.* at 179, 184. The Tenth Circuit has ruled that "a plaintiff can easily satisfy *Reves*' operation and management test by showing that an enterprise member played some part—even a bit part—in conducting the enterprise's affairs." *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 884 (10th Cir. 2017) (quoting *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1252 (10th Cir. 2016)).

The "operation or management" test plainly encompasses OSA's role in contracting with Aberdeen, contributing to its extortionate debt collection efforts, overseeing and renewing the contract, and profiting from its activities. These allegations and the supporting documentation show that OSA participated in the conduct of the RICO enterprise and played far more than a "bit part" in its affairs.

It is legally irrelevant that OSA has not itself made threats to debtors because it has participated in the predicate acts by directly assisting with Aberdeen's unlawful debt-collection activities.[7] Among other things, as stated in Section III, *supra*, OSA has actually obligated government entities, including its county sheriff members and court clerks, to take specific actions that assist Aberdeen in its extortionate activities.

[7] Even if OSA had not participated in any predicate acts, it would still be liable for conspiracy under § 1962(d). *See* section V.B, *infra*; *Salinas v. United States*, 522 U.S. 52, 63 (1997) (RICO conspirator need not commit or agree to commit predicate acts).

Plaintiffs have pled that "Aberdeen routinely and openly" violates the contractual provision that prohibits the company from breaking the law or "harass[ing] or exert[ing] undue pressure on delinquent debtors or employ[ing] any procedure that would cast discredit upon [OSA]," Doc 212, Ex. A at 4, in the course of its daily activities, "with the full knowledge and informal agreement of [OSA] and the Defendant Sheriffs," SAC ¶ 81. Accordingly, as pled, OSA knew that Aberdeen violated the law and/or engaged in misconduct when collecting debt. Despite this knowledge, OSA renewed the Agreement "multiple times, most recently on January 1, 2017." SAC ¶ 29. This contract also gives OSA discretion to terminate the Agreement for "neglect," including a broad list of activities, such as "failure to provide required standards of service" and "failure to act consistently with the spirit of the applicable debt collection provisions of the FDCPA and FCRA under the Federal guidelines for collections," or for the material breach of any obligations. Doc. 212, Ex. A at 2.

OSA has knowingly allowed the RICO enterprise to continue its extortionate activities for years, while profiting greatly from the misconduct. Further, it cannot be forgotten that ***Aberdeen directly pays OSA a percentage of the money it extorts***. SAC ¶ 29. These payments totaled millions of dollars and contributed to a sixty-fold increase in OSA's assets. *Id*. The exchange of information and mutual financial benefit demonstrates a "close relationship" that establishes participation in the RICO enterprise. *See Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1542 (10th Cir. 1993) (citing evidence of significant payments from fraudulent sales along with contracts sufficient to support inference that defendant was participating in RICO enterprise).

The cases relied on by OSA do not support dismissal and none involves, as here, a contract between the parties. For example, OSA cites *Tal v. Hogan*, 453 F.3d 1244 (10th Cir. 2006), in which the court found that the defendants did not participate in the RICO enterprise. But there,

the defendants allegedly had made misrepresentations *to* the enterprise to defraud it, which did not constitute "operation or management." *Id*. at 1270. That situation is obviously different from the allegations here that, pursuant to a contract signed and renewed several times, OSA actually participated in and oversaw the enterprise's activities.

Similarly, in another cited case, *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1102 (10th Cir. 1999), no participation was found for title companies that performed activities they "would have performed in their normal course of business" with everyone, not just the enterprise. That scenario is not relevant here, because OSA's relationship with Aberdeen is not the traditional business activity of a company—it is specific to the activities of the enterprise, as laid out in the terms of their contract.

OSA also cites *Dopp v. Loring*, 54 F. App'x. 296 (10th Cir. 2002) (unpublished), in which a *pro se* plaintiff sued prosecutors, judges, clerks, and private individuals alleging a RICO conspiracy. The court there held that Dopp's suit against individual defendants did not establish a RICO enterprise "which had an existence and purpose *distinct from any one of them*." *Id.* at 298 (emphasis in original) (citing *Bd. Of Cty. Comm'rs v. Liberty Grp.*, 965 F.2d 879, 885 (10th Cir. 1992). *Dopp* was therefore not about whether a particular entity participated in the conduct of the enterprise, but whether there was an enterprise at all. This case is clearly distinct from *Dopp*; here, Aberdeen and OSA have collaborated and mutually benefitted from extracting money from indigent defendants by threats, pursuant to a signed Agreement.[8]

[8] The other cited cases are similarly inapposite. Neither *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 3 F. Supp. 2d 518 (D.N.J. 1998), nor *Perino v. Mercury Fin. Co. of Ill.*, 912 F. Supp. 313 (N.D. Ill. 1995) addresses the question of "participation" in a RICO enterprise. And the quoted holding in *Nasik Breeding & Research Farm Ltd. V. Merck & Co.*, 165 F. Supp. 2d 514 (S.D.N.Y. 2001), that knowledge and financial benefit alone do not provide grounds for liability in the absence of an agreement, was about the standard for *conspiracy*, not enterprise participation.

OSA's "categorical[] deni[al]s" that it has ever known of Aberdeen's activities are legally meaningless. Doc. 232 at 9. At this stage, Plaintiffs allegations that OSA, *inter alia*, "receives and reviews regular reports regarding Aberdeen Inc.'s collection activities," SAC ¶ 282, must be taken as true. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 510 (10th Cir. 1998); *see also George*, 833 F.3d at 1253 (allegations of facts establishing participation in RICO enterprise that "may require fleshing out at the discovery stage" can be "sufficient to withstand dismissal"); *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 793 (6th Cir. 2012) (even though differences in capacities "may ultimately impact the determination of whether a particular Defendant only participated in his own affairs[,] . . . that is a matter to be fleshed out in discovery"). Although the full extent of OSA's participation in the RICO enterprise will be revealed through discovery and at trial, at this stage of the case, the Second Amended Complaint and the Agreement amply state a claim that OSA participated in the "operation or management" of the enterprise as that term has been defined by the courts.

B. Participation in RICO Conspiracy

In addition to a claim under 18 U.S.C. § 1962(c), the Second Amended Complaint states a claim of conspiracy to violate § 1962(c) pursuant to § 1962(d) (prohibiting conspiring to violate other provisions of RICO act) on the part of OSA.[9] In a footnote, OSA argues that it did not "adopt[] the goal of furthering or facilitating the criminal endeavor," and therefore did not conspire, because mere knowledge is not sufficient to show a conspiracy. Doc. 232 at 12 n.6

These are two entirely separate concepts, and irrelevant here, given the signed Agreement between OSA and Aberdeen

[9] OSA argues that Plaintiffs have not pled a viable claim under section 1962(c), and therefore that the conspiracy claim fails as a matter of law. *See* Doc. 232 at 12. For the reasons stated in this brief, Plaintiffs have pled a viable claim, and Defendants' argument is unavailing.

(quoting *United States v. Harris*, 695 F.3d 1125, 1133 (10th Cir. 2012)). In this case, Plaintiffs have more than adequately pled that the RICO defendants conspired to violate Section 1962(c).

"RICO conspiracy . . . is even more comprehensive than the general conspiracy offense," because it requires no overt act. *Harris*, 695 F.3d at 1133. It does not require that a defendant have "committed or agreed to commit the predicate acts." *Id.* It need not even be shown that an alleged enterprise actually existed. *Id.* at 1132. Although it is *sufficient* under *Salinas* to show that a defendant "adopt[ed] the goal of furthering or facilitating the criminal endeavor," 522 U.S. at 65, showing "adoption" is not necessary; all that is required for a § 1962(d) conspiracy is that the defendant "knew about or agreed to facilitate the commission of acts sufficient to establish a § 1962(c) violation," *United States v. Smith*, 413 F.3d 1253, 1265 (10th Cir. 2005), *overruled on other grounds by Boyle v. United States*, 556 U.S. 938 (2009).

That test is easily satisfied here, where the contract itself, approved by OSA and its member county sheriffs, provides for OSA to facilitate the collection of debt, which, as pled, was a criminal endeavor as undertaken by Aberdeen. *See, e.g.*, Doc. 212, Ex. A at 7–8 (describing the "collective efforts of each County Sheriff's office" to provide debtor information to Aberdeen through OSA). As pled, OSA had "full knowledge" of Aberdeen's misconduct, SAC ¶ 81, and knowingly and wilfully took actions in furtherance of that misconduct, including renewing and administering the contract on an ongoing basis. *Id.* ¶ 29. Whether or not each individual sheriff member of OSA personally "adopted the goal" of the endeavor is irrelevant to whether OSA agreed to facilitate the acts of the RICO enterprise, which it undeniably did on the face of the Agreement.

CONCLUSION

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

Dated: November 30, 2018

Respectfully submitted,

/s/Jill E. Webb
Jill Webb, OBA #21402
J Webb Law Firm PLLC
P.O. Box 1234
Tulsa, OK 74101
Tel: 918-346-5664
jill.webb@gmail.com

/s/ Daniel E. Smolen
Daniel Smolen, OBA #19943
Donald E. Smolen, II, OBA #19944
Robert M. Blakemore, OBA #18656
Smolen, Smolen & Roytman
701 South Cincinnati Avenue
Tulsa, OK 74119
Tel: 918-585-2667
Fax: 918-585-2669

/s/ *Katherine Hubbard*
Katherine Hubbard (admitted *Pro Hac Vice*)
California Bar No. 302729
Ryan Downer (admitted *Pro Hac Vice*)
D.C. Bar No. 1013470
Marco Lopez* (admitted *Pro Hac Vice*)
California Bar No. 316245
Tara Mikkilineni (admitted *Pro Hac Vice*)
D.C. Bar No. 997284
Civil Rights Corps
910 17th Street NW, Suite 200
Washington, DC 20006
Tel: 202-599-0953
Fax: 202-609-8030
katherine@civilrightscorps.org
ryan@civilrightscorps.org
marco@civilrightscorps.org
tara@civilrightscorps.org

*Admitted solely to practice law in California; not admitted in the District of Columbia. Practice is limited pursuant to D.C. App. R. 49(c)(3).

/s/ *Seth Wayne*
Douglas N. Letter (admitted *Pro Hac Vice*)
D.C. Bar No. 253492

Robert Friedman (admitted *Pro Hac Vice*)
D.C. Bar No. 1046738
Seth Wayne (admitted *Pro Hac Vice*)
D.C. Bar No. 888273445
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
Tel: 202-662-9042
dl1016@georgetown.edu
rdf34@georgetown.edu
sw1098@georgetown.edu

Attorneys for the Plaintiffs

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