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 ROB SHOFNER'S RENEWED MOTION TO DISMISS

BRIEF F

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

Seth Wayne (admitted *pro hac vice*)
D.C. Bar No. 888273445
Shelby Calambokidis (admitted *pro hac vice*)
D.C. Bar No. 1684804
Mary B. McCord (admitted *pro hac vice*)
D.C. Bar No. 427563
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
Tel.: 202-662-9042
sw1098@georgetown.edu
sc2053@georgetown.edu
mbm7@georgetown.edu

Ryan Downer (admitted *pro hac vice*)
D.C. Bar No. 1013470
Katherine Hubbard (admitted *pro hac vice*)
D.C. Bar No. 1500503
Marco Lopez (admitted *pro hac vice*)
D.C. Bar No. 888324793
Leonard J. Laurenceau (admitted *pro hac vice*)
D.C. Bar No. 90007729
Ellora Thadaney Israni (admitted *pro hac vice*)
D.C. Bar No. 1740904
Civil Rights Corps
1601 Connecticut Ave. NW, Suite 800
Washington, D.C. 20009
Tel.: 202-844-4975
ryan@civilrightscorps.org
katherine@civilrightscorps.org
marco@civilrightscorps.org
leo@civilrightscorps.org
ellora@civilrightscorps.org

Attorneys for the Plaintiffs

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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 court debtors. Aberdeen regularly threatens to obtain new arrest warrants or to refuses to remove old ones unless impoverished debtors make payments that they cannot afford and must forego basic necessities to make. Further, Aberdeen *seeks* and *procures* warrants, and with the assistance of the Sheriff Defendants who execute them, 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 in their motion to dismiss. Doc. 403 at 7. 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. Second Am. Compl. ("SAC"), Doc. 212, ¶ 27. His son, Defendant Robert "Rob" Shofner, is a director of Aberdeen. *Id.* ¶¶ 28, 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. *Id.* ¶¶ 27-28, 100. 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. *Id.* ¶¶ 27-28, 100-01.

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 officers of a private company, they are not acting "under color of state law," and alternatively are entitled to absolute and qualified immunity because they are not responsible for the violations of Plaintiffs' constitutional rights. Doc. 403 at 13-14, 18-20. But throughout their motion to dismiss, the Shofners mischaracterize Aberdeen's activities and the degree to which it works on behalf of and coordinates with law enforcement, judges, and 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 RICO and 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[1]

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

[1] This section includes allegations relevant to Plaintiffs' claims against the Shofners. For a summary of the allegations and claims against all Defendants, see *Graff v. Aberdeen Enterprizes, II, Inc.*, 65 F.4th 500, 509-14 (10th Cir. 2023).

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 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. *Id*. ¶ 101. Indeed, Rob Shofner verbally berates employees who do not follow the debt collection policies that he dictates. *Id*. ¶ 28. The Shofners routinely base decisions about whether to terminate an employee on how much money the employee is able to collect. *Id*. ¶ 101. The Shofners also financially incentivize their employees to extract as much money as possible from debtors without regard for their ability to pay. *Id*. ¶ 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. *Id*. ¶ 103. Rather, they affirmatively train employees to coerce payments without providing basic notice or information concerning federal and state legal rights, and they instruct employees that they "are to ***NEVER*** refer any defendant to call the court clerks." *Id*. ¶¶ 83, 103.

ARGUMENT

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

A. The Shofners Act Under Color of Law.

The Shofners argue that because Aberdeen is a private entity and because the Shofners are merely officers of Aberdeen, they are not state actors or otherwise acting "under color of law," and thus not subject to suit under 42 U.S.C. § 1983. *See* Doc. 403 at 14. This argument is wrong.

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 acts under color of state law if it meets just one of the following tests: (1) it is "a willful participant in joint activity with the State or its agents," *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (internal quotation mark omitted); (2) "there is a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action . . . may be fairly treated as that of the State itself," *Jackson v. 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). For the reasons discussed in Plaintiffs' opposition to Aberdeen's motion to dismiss, Aberdeen—acting at the direction of the Shofners—easily meets all three. *See* Br. E, Section I.A.

The Shofners also argue, however, that even if *Aberdeen* is acting under color of law, the Shofners cannot be found to be "state actors by extension." Doc. 403 at 15. They cite *Schaffer v. Salt Lake City Corp*., 814 F.3d 1151, 1156 (10th Cir. 2016), for the proposition 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." Doc. 403 at 15. But Plaintiffs do 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." 814 F.3d at 1156. In *Schaffer*, there was

no such nexus because the defendants "exercised no power possessed by virtue of state law and made possible only because [they were] clothed with the authority of state law." *Id*. (cleaned up).

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 authorized by Oklahoma statute and entered into by the Shofners. SAC ¶¶ 53-57. Contrary to the Shofners' puzzling assertion that Plaintiffs have "failed to allege any specific conduct of the Shofners' purported misuse of state authority," Doc. 403 at 15, 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. *Id.* ¶¶ 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." *Id.* ¶ 62. Moreover, the allegations are clear that the unconstitutional activities of Aberdeen's employees are the result of policy set by the Shofners. *See infra* Section I.B; *see, e.g.*, SAC ¶¶ 100-03; *see also Bishop v. Toys "R" Us-NY LLC*, 414 F. Supp. 2d 385, 397 (S.D.N.Y. 2006) (finding state action by private company's directors where it is alleged that "constitutional violations . . . were part and parcel of a [company] policy"). 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. Thus, they are liable as state actors under § 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. Doc. 403 at 15-18. In particular, the Shofners assert that Plaintiffs seek to hold them liable based on their "mere capacities as officers of Aberdeen," and that Plaintiffs have not identified "any exercise of [their] control or direction . . . which can be attributed to any proposed constitutional violation." *Id.* at 18. But this argument disregards numerous paragraphs in the complaint alleging exactly that, including an entire section titled "Aberdeen, Inc.'s Predatory Behavior is Company Policy *Established by Defendants Jim Shofner and Rob Shofner*." SAC ¶¶ 100-07 (emphasis added).

Although "vicarious liability is inapplicable to . . . § 1983 suits," *Dodds v. Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)), personal liability under § 1983 does not require "*direct* participation" in the infliction of an injury. *Id.* at 1195 (emphasis added). 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 (emphasis 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").

Here, 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 2, 3, and 5 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. SAC ¶¶ 322, 332, 347. Plaintiffs have alleged that the Shofners personally established these practices. *See, e.g.*, *id.* ¶¶ 27-28, 92. Count 6 challenges Aberdeen's improper financial incentives in collecting debt on behalf of the Defendant Sheriffs. These incentives stem from Aberdeen's contract with OSA that, by its plain language, created the improper financial incentive. And the two people running Aberdeen plainly caused the company to enter into the contract: Rob Shofner signed the contract on behalf of Aberdeen. *See* SAC Ex. A, Doc. 212-1, at 18. Finally, Count 7 challenges Aberdeen's onerous debt-collection practices, which Plaintiffs have alleged the Shofners are responsible for setting. Plaintiffs further allege that the Shofners "personally instructed and trained Aberdeen, Inc. employees on how to obtain payment" using these onerous methods, including demanding arbitrary lump sums, seeking warrants, and threatening arrest. SAC ¶ 100. Indeed, the complaint alleges that the Shofners go so far as to "listen[] to subordinates' phone calls to ensure" compliance with their policies; reprimand and fire employees who do not comply; and offer financial incentives to employees to encourage compliance. *Id.* ¶¶ 27-28, 100-01. Aberdeen's extortionate conduct—leveraging Oklahoma's law enforcement apparatus to unconstitutionally collect debts from those who cannot pay—is thus not attributable to rogue Aberdeen employees. It is official company policy, set and enforced by the Shofners, and the entire basis for Aberdeen's business model.

The causal connection here is obvious. The Shofners personally entered into a contract that, by its plain language, created an impermissible financial incentive for Aberdeen. Then, they created, promulgated, implemented and enforced policies requiring Aberdeen employees to engage in onerous debt-collection practices that injured the Plaintiffs. There is no doubt that the Shofners personally 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.

1. The Shofners Violate the Fourteenth Amendment by Seeking Arrest Warrants Based Solely on Nonpayment Without Regard for Ability to Pay.

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

Plaintiffs challenge this practice in Counts 2 and 5 of the Second Amended Complaint. Count 2 is based on the hybrid due-process and equal-protection framework articulated in *Bearden v. Georgia*, 461 U.S. 660 (1983). That framework prohibits the government from arresting and jailing a person solely because she cannot afford to pay an amount of money. *See* Pls.' Mot. for TRO & Prelim. Inj., Doc. 77, at 5-11 (citing cases including *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970), which held that imprisonment resulting "directly from an involuntary nonpayment of a fine or court costs" is "an impermissible discrimination that rests on ability to pay," and *Bearden*, 461 U.S. at 667-68, which similarly held that the state may not "imprison a person solely because he lacked the resources to pay" a fine or restitution). A debtor may only be jailed for

nonpayment found to be willful. *Bearden*, 461 U.S. at 672. Here, there is no dispute that Plaintiffs did not receive *any* process before suffering the challenged harms. Accordingly, Plaintiffs also challenges the Shofners' warrant practices under Count 5, which alleges that Defendants' jailing of debtors without notice and a hearing violates Plaintiffs' liberty interests created by state law that tracks *Bearden*'s constitutional requirements. *See* SAC ¶¶ 42-46, 347.

Like Aberdeen, the Shofners incorrectly allege the Plaintiffs need to show "conscience-shocking" behavior on their part to establish the violation alleged in Count 2. Doc. 403 at 21. As explained in Plaintiffs' opposition to Aberdeen's motion to dismiss, the "conscience-shocking" test and cases cited by the Shofners are irrelevant for a *Bearden* analysis. *See* Br. E at 9-10.

Next, the Shofners argue that they are not responsible for any due process violation because they neither conduct ability-to-pay determinations nor execute warrants. Doc. 403 at 21. This too is incorrect. Plaintiffs have pointed to several formal policies and customs of Aberdeen, set by the Shofners, which directly contribute to the fact that they are not given the ability-to-pay determinations to which they are entitled. *See supra* Section I.B.

Finally, just like Aberdeen, the Shofners seek dismissal of Count 5 on two grounds. The first disclaims responsibility for providing Plaintiffs' procedural protections, *see* Doc. 403 at 24, and fails for the same reasons stated with respect to Count 2. The second describes Count 5 as either duplicative of Count 2 or an improper attempt to seek redress directly under Oklahoma law. *Id.* It is neither. As Plaintiffs describe in their opposition to Aberdeen's motion to dismiss, Oklahoma's state-law guarantee that every person owing court debt will be free from imprisonment unless a court finds they willfully failed to pay, *see* Okla. Stat. tit. 22, § 983(A); Okla. R. Crim. App. 8.4, creates a constitutionally protected liberty-interest. *See* Br. E at 10-11 (citing *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) for the proposition that a constitutionally-

protected liberty interest "may arise from an expectation or interest created by state laws or policies"). This is distinct from the *Bearden* liberty-interest invoked in Count 2. Under both, Plaintiffs are entitled to a particular process that ensures that they will not be jailed solely for being indigent. *See generally Mathews v. Eldridge*, 424 U.S. 319 (1976). Because of Aberdeen's policy and practices, set by the Shofners, Plaintiffs do not receive that process.

2. The Shofners Violate the Fourth Amendment by Seeking Arrest Warrants Based on Unsworn Allegations Containing Material Omissions and Lacking Probable Cause.

As alleged in Count 3, the Shofners violate the Fourth Amendment because they seek arrest warrants unsupported by sworn factual allegations; omit material facts in those warrant applications as a matter of policy; and seek warrants where there is no probable cause that the alleged nonpayment was willful. *See generally* Doc. 77 at 11-15; *see also, e.g.*, *Dow v. Baird*, 389 F.2d 882, 884 (10th Cir. 1968) (finding an affidavit that was signed but not sworn under oath "clearly and obviously invalid"); *Stewart v. Donges*, 915 F.2d 572, 582-83 (10th Cir. 1990) (holding it unconstitutional to intentionally or recklessly omit material information from a warrant application); *Poolaw v. Marcantel*, 565 F.3d 721, 733 (10th Cir. 2009) (denying qualified immunity to officers who requested, but did not execute, warrant that lacked probable cause).

The Shofners contend this claim must fail because Plaintiffs do not allege that they provide "false information" to serve as a basis for the warrants. Doc. 403 at 22-23. But they do not need to provide false information to violate the Fourth Amendment: it is enough that they knowingly or recklessly make "material omissions" in their warrant applications. *United States v. Kennedy*, 131 F.3d 1371, 1376 (10th Cir. 1997) (quoting *Stewart*, 915 F.2d at 582); *see also Harte v. Bd. of Comm'rs of Cnty. of Johnson*, 864 F.3d 1154, 1182 (10th Cir. 2017) (Fourth Amendment requires that "law-enforcement officers must not 'disregard facts tending to dissipate probable cause'" (quoting *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005))). And here, as a

matter of policy and practice at the direction of the Shofners, when Aberdeen seeks debt-collection arrest warrants it omit the debtor's reasons for nonpayment, even when they know the reason is the person's indigence. SAC ¶¶ 63, 322, 332, 334, 336; *see, e.g.*, *id.* ¶¶ 204, 184, 207 (Aberdeen requested arrest warrants for Ms. Holmes and Ms. Killman even though they repeatedly informed the company that they could not afford to pay); *accord id*. ¶¶ 192, 198 (Aberdeen threatened to seek and/or refused to recall warrants against Mr. Wilkins and Mr. Choate despite knowing that they could not pay).

The Shofners actions are also the moving force behind this Fourth Amendment violation. Plaintiffs do not allege that they "do nothing but supply information of nonpayment that another entity may then use in seeking a warrant." Doc. 403 at 22. As explained above, Plaintiffs have alleged it is *Aberdeen*, and not any other actor, that exercises discretion as to whom will be subject to debt-collection arrest warrants, based on whether the debtor has acquiesced to Aberdeen's threats. The Shofners set those policies. This is pure law enforcement discretion—not merely the "begin[ning] [of] the warrant process." *Id*. at 17. Indeed, given the rubber-stamp approval by clerks and judges, it is the only event that determines whether an arrest warrant is issued. *See, e.g.*, SAC ¶¶ 126, 138. As such, they are the direct cause of the violation of Plaintiffs' rights.[2]

3. The Shofners Violate Equal Protection by Subjecting Indigent Criminal Court Debtors to Onerous Collection Methods.

Count 7 of the Second Amended Complaint alleges that the Shofners' use of extreme threats and arrest warrants, and the additional 30-percent surcharge incurred when a case is transferred to Aberdeen, denies indigent debtors equal protection as compared to other judgment debtors. SAC ¶ 361. The government may not use "unduly harsh or discriminatory terms" to

[2] To the extent Aberdeen and the Shofners claim Count 3 is also duplicative of Count 5, *see* Doc. 403 at 23; Doc. 404 at 19, that argument fails for the reasons discussed with respect to Count 2. A Fourth Amendment claim is different than a procedural due process claim.

collect court costs owed from a criminal case, "merely because the obligation is to the public treasury rather than to a private creditor." *James v. Strange*, 407 U.S. 128, 138 (1972). In *Strange*, the Court struck down a Kansas recoupment statute that expressly denied civil debt protections to former criminal defendants who owed money to the State for indigent defense. *Id.* at 135-36, 141-42. The Court reasoned that state interests "are not thwarted by requiring more even treatment of indigent criminal defendants with other classes of debtors," *id.* at 141, and denying them protections "embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law," *id.* at 142; *see also Fuller v. Oregon*, 417 U.S. 40, 47 (1974) (affirming that the Fourteenth Amendment protects government debtors from unduly harsh treatment as compared to people indebted to private creditors). Here, when Aberdeen receives a case, Plaintiffs are exposed to surcharges, threats, arrest warrants, and jailing in the pursuit of their county debts. Plaintiffs are thereby singled out through the use of extreme collection methods not available against other Oklahoma judgment debtors. *See generally* Oklahoma Uniform Consumer Credit Code, Okla. Stat. tit. 14A, §§ 1-101 *et seq.* The Equal Protection Clause does not permit such discrimination.

Like Aberdeen, the Shofners appear to argue that Plaintiffs cannot make out an equal protection claim because Oklahoma law already provides that people who are unable to pay criminal court debt receive the same protections as civil debtors. *See* Doc. 403 at 25 (citing *State v. Ballard*, 1994 OK CR 6, ¶¶ 6-7, 868 P.2d 738, 741). This argument is baseless, because Plaintiffs do not challenge that Oklahoma law—they challenge Defendants' practices, by which criminal court debtors are subjected to vastly different and much more punitive measures for nonpayment than civil judgment debtors, including threats of arrest from Aberdeen, actual arrest on a warrant requested by Aberdeen, and lengthy jailing. *See, e.g.*, SAC ¶ 46 (harms identified in lawsuit

resulted from the "collapse" of state law protections). These practices lack any statutory basis and discriminate against indigent criminal court debtors.[3] Moreover, by *Ballard*'s own logic, Defendants' scheme is unconstitutional. *See* 868 P.2d at 741 (upholding fine-imposing statute against equal protection challenge because the statute provided that "a defendant [who could not] pay the assessment because he [was] without means to do so . . . *[would] not [be] thrown into prison or otherwise punished*" (emphasis added)).

The Shofners also argue that Plaintiffs' allegation that Aberdeen "forces them to pay arbitrary and unachievable amounts to have a warrant recalled," SAC ¶ 361, is untrue because Aberdeen does not set the amounts due at the time of sentencing. Doc. 403 at 26. But, of course, these can both be true—Aberdeen does not set the amounts originally imposed, but then when a case is transferred, it sets the amount a person must pay to have a warrant recalled or avoid issuance of a new one. In any event, the Shofners' harsh methods only apply to criminal court debtors, making them liable under Count 7.

4. The Shofners Violate Due Process Because Aberdeen Has Conflicting Loyalties to Money and Justice.

Count 6 alleges that those enforcing the debt collection scheme have a personal financial interest in every decision that they make, in violation of Plaintiffs' due process right to a neutral decision maker. SAC at ¶¶ 354-59. The Shofners do not move to dismiss Count 6 on the grounds that they are not operating under an improper financial incentive. To the contrary, they readily concede that they run a "***private, for profit business*** [that] receives compensation for its services" in extracting money from Plaintiffs under the imprimatur of law enforcement, Doc. 403 at 25

[3] The sole exception is the 30-percent surcharge which, as Aberdeen notes, is authorized by statute, but even then only if a debtor's warrant has been referred to a third-party debt collector like Aberdeen, which is itself a discretionary act. *See, e.g.*, SAC ¶¶ 36, 37, 50.

(emphasis in original), effectively conceding the claim's viability. Instead, they once again erroneously argue that their system of extorting debt payments upon threat of arrest is not "conscience-shocking." Doc. 403 at 24. But, again, the "conscience-shocking" standard—governing some substantive due process analyses—is not the test that applies to whether the due process neutrality-mandate has been violated, which is a question of *procedural* due process. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

The Supreme Court has long held that judges and other neutral decision makers must be free from financial conflicts of interest. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876-78 (2009); *Connally v. Georgia*, 429 U.S. 245, 250 (1977); *Tumey v. Ohio*, 273 U.S. 510, 522 (1927).[4] These protections extend to all officials who perform law enforcement functions. *See Jerrico* 446 U.S. at 251 (noting that due process would be implicated if there were "a realistic possibility that the assistant regional administrator's judgment w[ould] be distorted by the prospect of institutional gain as a result of zealous enforcement efforts"); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803-05, 807-08 (1987) (finding structural error existed because of the mere "*potential* for private interest to influence" prosecutor's actions (emphasis in original)).

Here, Defendants have abdicated to Aberdeen control over certain law enforcement and investigative functions, including determining the amount of money people should pay and when arrest warrants should issue for nonpayment. SAC ¶¶ 79, 88-89. Aberdeen's enforcement decisions directly affect how much money it makes. *Id.* ¶ 107. This incentive arrangement goes

[4] *See also Merck Sharp & Dohme Corp. v. Conway*, 861 F. Supp. 2d 802, 812 (E.D. Ky. 2012); *State v. Eldridge*, 951 S.W.2d 775, 782 (Tenn. Crim. App. 1997); *State v. Culbreath*, 30 S.W.3d 309, 316, 318 (Tenn. 2000); *Bhd. of Locomotive Firemen v. U.S.*, 411 F.2d 312, 319 (5th Cir. 1969); *Ganger v. Peyton*, 379 F.2d 709, 713-14 (4th Cir. 1967); *State ex rel. Koppers Co. v. Int'l Union*, 298 S.E.2d 827, 831-32 (W.Va. 1982); *People v. Zimmer*, 414 N.E.2d 705, 707-08 (N.Y. 1980); *Cantrell v. Commonwealth*, 329 S.E.2d 22, 26-27 (Va. 1985).

far beyond creating a "realistic possibility" that financial interests will shape enforcement decisions—it purposefully assures it. *Jerrico*, 446 U.S. at 250; *see also Developments in the Law: Policing*, 128 Harv. L. Rev. 1723, 1737-38 (2015) ("[W]hen a private probation company decides which violations to enforce based on financial motives, 'a direct, personal, substantial, pecuniary interest' is the whole reason the arrangement exists." (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). No more is needed to establish a due process violation.

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

1. Absolute Immunity Does Not Shield the Shofners.

The Shofners claim they are entitled to absolute, quasi-judicial immunity from Plaintiffs' damages claims. Doc. 403 at 19-20. They are wrong. First, quasi-judicial immunity does not extend to "private for-profit actor[s]." *Rodriguez v. Providence Cmty. Corr., Inc.*, 191 F. Supp. 3d 758, 767 (M.D. Tenn. 2016). Quasi-judicial immunity is cabined by the public interest and, as is obvious in this case, "[t]he perverse policy incentives attendant to immunizing private for-profit ventures is alone enough to deny the application of quasi-judicial immunity." *Id* at 768.

Second, the Shofners do not perform quasi-judicial functions. As alleged, the Shofners "establish[] Aberdeen, Inc.'s collection practices" and "monitor[,] supervise[,] and control[] all aspects of the collection process." SAC ¶¶ 27-28; *see also id.* ¶¶ 100-03. Neither establishing debt collection practices, nor supervising employees engaged in such practices, involves "individualized judicial or quasi-judicial decision-making." *Ray v. Jud. Corr. Servs., Inc.*, No. 2:12–cv–02819, 2013 WL 5428395, at *9 (N.D. Ala. 2013) (denying immunity to private defendant that provided probation supervision and fee collection services to city); *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); *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 extending absolute immunity to parole examiners who performed "executive and investigative functions" in addition to adjudicatory duties).

Nothing the Shofners (or their company) do bears any resemblance to a judicial process or has any of the indicia of a court proceeding. *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, 374 (8th Cir. 1984) (holding that a probation officer is not entitled to absolute immunity for reporting a violation and seeking a warrant); *cf. Snell v. Tunnell*, 920 F.2d 673, 691 (10th Cir. 1990) (finding that that social workers "investigating claims of child abuse are analogous to law enforcement officers who are entitled only to qualified immunity"). As such, the Shofners are not entitled to quasi-judicial immunity from Plaintiffs' damages claims.

2. The Shofners May Not Seek the Protection of Qualified Immunity.

The Shofners next claim that they are entitled to qualified immunity with respect to their "individual" and "supervisory" capacities.[5] Doc. 403 at 18. The Supreme Court's ruling in *Richardson v. McKnight*, 521 U.S. 399 (1997) squarely precludes the application of qualified immunity to the Shofners.

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 because, unlike government actors, private actors are "subject to the ordinary competitive pressures that normally help private firms adjust their behavior in response to the incentives that tort suits provide." 521 U.S. at 412; *see also Filarsky v. Delia*, 566 U.S. 377, 393 (2012) (withholding governmental immunity from private actors operating for profit). There, as here, there is no "firmly rooted" historical tradition of immunity for privately employed debt collectors. *McKnight*, 521 U.S. at 404-05. Here also, the denial of qualified immunity to private actors is unlikely to deter the government from being able to collect court debts. Because of the financial incentives involved, it is not even likely to deter private firms from contracting with the state to collect such debts. *Id.* at 409, 411.

Aberdeen is a private firm, "systematically organized to assume a major lengthy administrative task" (collecting court debts) "with limited direct supervision by the government," and is "undertak[ing] that task for profit and potentially in competition with other firms." *Filarsky*, 566 U.S. at 393. The Shofners, through their control of Aberdeen, are "using the mechanisms of government to achieve their own ends." *Id.* at 392. No reasonable reading of *McKnight* and *Filarsky* could support granting qualified immunity to the Shofners. *See also Tanner v. McMurray*,

[5] The Shofners' claim that they are not subject to supervisory liability is addressed *supra* in Section I.B.

989 F.3d 860, 870 (10th Cir. 2021) (denying qualified immunity to private medical provider who contracted to provide prison healthcare because "neither 19th century common law nor modern policy considerations" supported extending immunity); *Briggs v. Montgomery*, No. 18-cv-02684, 2019 WL 2515950, at *8-9 (D. Ariz. June 18, 2019) (denying qualified immunity to private company that contracted with county to manage diversion program).

Finally, even if qualified immunity were available to the Shofners, they would not be shielded by it because, as discussed *supra* in Section I.C, 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.

II. Plaintiffs Have Stated a RICO Claim Against the Shofners.

The Shofners' arguments against Plaintiffs' RICO claims are virtually identical to the ones raised by Aberdeen in its motion to dismiss. *See* Doc. 403 at 8-13; Doc. 404 at 4-10. Because, as discussed above in Section I.B, the Shofners are the policymakers behind Aberdeen's participation in the RICO scheme, the Shofners' arguments fail for the same reasons as Aberdeen's. Thus, Plaintiffs incorporate their opposition to Aberdeen's motion to dismiss here to avoid duplicative briefing. *See* Br. E, Section II.

In short, there, as here, Plaintiffs have established every element of civil RICO. To begin, Plaintiffs have pled the existence of RICO enterprise—that is, "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Here, the enterprise is straightforward: two separate corporate entity defendants (Aberdeen and OSA), along with their officers and members (the Shofners and Sheriff Defendants), have united by contract with the common purpose of engaging in a course of conduct

to maximize the collection of money from indigent court debtors in Oklahoma counties.[6] SAC ¶¶ 55. Aberdeen and its officers the Shofners, as well as OSA, are connected through, and have periodically renewed, the contract, *id.* ¶ 350; and each of the Sheriff Defendants has authorized OSA to enter into the contract and use Aberdeen to collect money in his or her county, *id.* ¶ 65. They do so with the common purpose of maximizing the amount of money collected from indigent debtors.

This enterprise also has at least a "minimal" effect on interstate commerce both because it (1) uses the instrumentalities of interstate commerce, including telephone calls, to threaten indigent debtors and their family members, some of whom are out of state, and (2) has, in aggregate, deprived indigent debtors and their families of tens of millions of dollars which otherwise could have been used to purchase goods in interstate commerce. And indigent plaintiffs were injured by the loss of this money which, under both state and federal law, they were not required to pay to Aberdeen. They only paid because Aberdeen, at the Shofners' instruction, concealed from them that they were not required to pay and instead made extortionate threats of unlawful arrests and imprisonment if they did not. Plaintiffs' complaint alleges dozens of these extortionate threats from Aberdeen made for same or similar purposes, results, participants, victims, and methods of commission. The complaint thus clearly establishes a pattern of extortion, which requires only "'two acts of racketeering activity within ten years' of each other." *Tal v. Hogan*, 453 F.3d 1244, 1267 (10th Cir. 2006) (quoting 18 U.S.C. § 1961(5)).

Finally, these threats constitute predicate offenses for racketeering activity. Specifically, the Shofners and Aberdeen have engaged in both extortion under the Hobbs Act, Travel Act, and

[6] The Shofners' claim that it "does not appear that Plaintiffs' 'enterprise' extends beyond Aberdeen itself" is thus not based in reality. *See* Doc. 403 at 10 n.5.

state law, as well as the extortionate extension of credit, that is the "use of any extortionate means (1) to collect or attempt to collect [any debt], or (2) to punish any person for the nonrepayment thereof." 18 U.S.C. § 894(a).

The lone argument the Shofners raise in their motion to dismiss that is not raised by Aberdeen is that their threats of arrest cannot constitute extortionate means, for which they rely upon *United States v. Pacione*, 738 F.2d 567, 572-73 (2d Cir. 1984). Doc. 403 at 10. Their reliance on *Pacione* is misplaced. In that case, the Second Circuit held that "extortionate means" must include some element of violence, which was absent where the defendant threatened merely to record a false mortgage deed. 738 F.2d 572-73. But the Tenth Circuit has not adopted such a proscribed reading of the statute, which defines extortionate means as threats "of violence *or other criminal means*." 18 U.S.C. § 891(7) (emphasis added). Even so, Aberdeen's actual threats of unlawful arrest and incarceration are necessarily threats of force. SAC ¶¶ 2, 20, 76. During arrest and incarceration, a debtor's body would be seized, physically forced into compliance, handcuffed, stripped naked, and locked in a jail cell where guards carrying weapons prevent them from leaving. This is a far cry from recording a mortgage deed.

III. Plaintiffs Have Properly Pled Their State Law Claims.

A. 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. 403 at 26-27. Their arguments fail.[8]

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-cv-20444, 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."), *rev'd and remanded on other grounds*, 915 F.3d 1276 (11th Cir. 2019). 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. 403 at 27, the Second Amended Complaint explains that rather than use a warrant to accomplish a lawful arrest, the Shofners, through Aberdeen, (1) repeatedly 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

[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.

[8] Defendants baselessly allege in a footnote that Plaintiffs' state law claims do not reference any specific participation by the Shofners. Doc. 203 at 27 n.12. 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 discussed *supra* in Section I.B, Plaintiffs allege that the Shofners personally implemented and oversee Aberdeen's policies that harmed the Plaintiffs. That they are not named separately from Aberdeen in the section of the complaint that provides greater detail on the claims for relief is immaterial, especially because those sections incorporate the preceding allegations. *See* SAC ¶¶ 363, 368, 371.

installment payments). *See, e.g.*, SAC ¶¶ 7, 19, 20, 22, 24, 80.[9] 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*, 28 N.W.2d 780, 790 (Minn. 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 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

[9] 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. Okla. Stat. tit. 19, § 514.4(A)(2).

case where use of the court's process has the mere "collateral effect of exerting pressure for collection of a debt." *Bank of Okla., 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. 404 at 7 (emphasis omitted). That concession proves that Aberdeen's frequent use of warrants does not advance the warrants' intended purpose.

B. Duress

Plaintiffs have also stated a valid claim for duress. *Cimarron Pipeline Constr., Inc. v. U.S. Fid. & Guar. Ins. Co.*, 848 P.2d 1161, 1164 (Okla. 1993) (the relief of "restoring money paid under duress is codified in [Oklahoma's] contract statutes."); *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." *Cimarron Pipeline Constr., Inc.*, 848 P.2d at 1164. 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 therefore

could not lawfully have been compelled to pay. Nonetheless, each of them 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.*, 145 P. at 1127.

The Shofners oppose this claim on the ground that duress "is not an independent tort under Oklahoma law." Doc. 403 at 27. 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 nonpayment. Doc. 403 at 27-28. As an initial matter, state law has only permitted 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 were to permit the arrest of indigent debtors, it does not authorize 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. 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." *Okla. 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-percent penalty added to a debtor's outstanding debt when a warrant issues and a case is referred to the company.[10] *See* Okla. Stat. tit. 19, § 514.5(A). Because these penalty-triggering "warrants" issue without probable cause and not on the basis of oath or affirmation, a violation of the law underpins the money the Shofners, through Aberdeen, receive.[11] Retention of that money therefore constitutes unjust enrichment. *See City of Scottsbluff v. Waste Connections of Neb., Inc.*, 809 N.W.2d 725, 743 (Neb. 2011) ("[I]t is a bedrock principle of restitution that unjust enrichment means a 'transfer of a benefit *without adequate legal ground*.'" (emphasis added) (quoting Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b)). 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.

CONCLUSION

For the foregoing reasons, the Court should deny the Shofners' motion to dismiss.

Dated: August 10, 2023

Respectfully submitted,

/s/ *Daniel E. Smolen*
Daniel Smolen, OBA #19943
Robert M. Blakemore, OBA #18656
Smolen & Roytman

[10] The Shofners' suggestion that it is not enriched *at all,* justly or unjustly, because Plaintiffs are not paying a "fee" but merely making payments related to their "criminal sentences *through Aberdeen*," Doc. 403 at 28 (emphasis in original), is thus simply false. S*ee* SAC ¶ 26.

[11] The Shofners' argument that their enrichment is equitable because it is authorized by statute thus falls flat. Although Oklahoma law authorizes the assessment of the 30-percent penalty when "warrants [are] referred," Okla. Stat. tit. 19, § 514.5(A), "warrants" obviously means lawful warrants.

701 South Cincinnati Avenue
Tulsa, OK 74119
Tel: 918-585-2667
Fax: 918-585-2669

/s/ *Ryan Downer*
Ryan Downer (admitted *pro hac vice*)
D.C. Bar No. 1013470
Katherine Hubbard (admitted *pro hac vice*)
D.C. Bar No. 1500503
Marco Lopez (admitted *pro hac vice*)
D.C. Bar No. 888324793
Leonard J. Laurenceau (admitted *pro hac vice*)
D.C. Bar No. 90007729
Ellora Thadaney Israni (admitted *pro hac vice*)
D.C. Bar No. 1740904
Civil Rights Corps
1601 Connecticut Ave. NW, Suite 800
Washington, D.C. 20009
Tel.: 202-844-4975
ryan@civilrightscorps.org
katherine@civilrightscorps.org
marco@civilrightscorps.org
leo@civilrightscorps.org
ellora@civilrightscorps.org

/s/ *Seth Wayne*
Seth Wayne (admitted *pro hac vice*)
D.C. Bar No. 888273445
Shelby Calambokidis (admitted *pro hac vice*)
D.C. Bar No. 1684804
Mary B. McCord (admitted *pro hac vice*)
D.C. Bar No. 427563
Institute for Constitutional Advocacy and Protection
Georgetown University Law Center
600 New Jersey Ave. NW
Washington, D.C. 20001
Tel: 202-662-9042
sw1098@georgetown.edu
sc2053@georgetown.edu
mbm7@georgetown.edu

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August, 2023, 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*