IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-00217-REB-KLM

WILLIAM MONTGOMERY,

Plaintiff,

v.

MATTHEW CHERNAK, *et al.*,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants Matthew Chernak, Mike Howard and Matthew Brough, through their counsel, respectfully submit this Motion to Dismiss the Amended Complaint, as follows:

STANDARD OF REVIEW

Defendants adopt and incorporate the legal authority contained in the "Standard of Review" section of their Motion to Dismiss. [ECF 10.]

SUMMARY OF AMENDED COMPLAINT'S ALLEGATIONS[1]

Apart from the specific facts referenced below, the facts in the Amended Complaint are not materially different than those in the Summary of Complaint's Allegations in the Motion to Dismiss, which Defendants adopt and incorporate herein. [ECF 10.]

I. **Plaintiff's First Amendment retaliatory arrest claim fails**.

The Tenth Circuit has traditionally required the following elements for a First Amendment retaliation claim: (1) plaintiff engaged in protected activity; (2) defendant's

[1] For this motion only, Plaintiff's allegations are accepted as true. Defendants reserve the right to dispute each factual allegation contained in the Complaint in any future proceedings.

actions caused plaintiff to suffer injury that would reasonably have a chilling effect on exercise of protected activity; and (3) defendant's action substantially motivated as a response to plaintiff's exercise of constitutionally protected conduct. ***Keough v. Packard***, No. 13-cv-2485-REB-KLM, 2014 U.S. Dist. LEXIS 128671, *14 (D. Colo. Aug. 25, 2014) "In addition, in 2006, the Supreme Court settled a circuit split and held that where the retaliatory action being taken was a criminal prosecution, a plaintiff bringing suit under 1983 must plead and prove a fourth element: lack of probable cause for the allegedly retaliatory prosecution." ***Id.*** at *14-15, *citing* ***Hartman v. Moore***, 547 U.S. 250, 261-66 (2006). "*Hartman* thus placed upon the plaintiff the burden of pleading, and then proving, that there was no non-retaliatory reason for the prosecution." ***Id.***

The Tenth Circuit in 2011 concluded *Hartman* did not apply to a claim for retaliatory *arrest*; however, the Supreme Court granted certiorari and reversed. *See* ***Reichle v. Howards***, 566 U.S. 658, 665-670 (2012); ***Howards v. McLaughlin***, 634 F.2d 1311, 1148 (10th Cir. 2011). The Tenth Circuit summarized ***Reichle***, as follows:

> The Court declined to decide "whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest." *Id.* at 2093. Instead, it held this court erred in concluding the law was clearly established in June 2006. *See id.* at 2094-95, 2097. Specifying that "the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause," the Court noted that it "has never held that there is such a right." *Id.*at 2094. It further stated that in June 2006, "*Hartman*'s impact on the Tenth Circuit's precedent governing retaliatory arrests was far from clear. Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests." *Id.* at 2095. "[F]or qualified immunity purposes, at the time . . . it was at least arguable that *Hartman*'s rule extended to retaliatory arrests." *Id.* at 2096. Accordingly, the Court held that the defendant officers were entitled to qualified immunity. *Id.* at 2097.

Wilson v. Vill. Of Los Lunas, 572 Fed. Appx. 635, 643 (10th Cir. July 22, 2014). Based on ***Riechle***, courts within the Tenth Circuit have repeatedly granted qualified immunity for retaliatory arrest claims where probable cause was present, based upon the uncertainly for officers rooted in the Supreme Court's acknowledgement the law is not clearly established. ***Id***.; ***Moral v. Hagen***, 553 Fed. Appx. 839, 849 (10th Cir. 2014). Most recently, the Supreme Court granted certiorari and heard oral arguments on February 27, 2018 in ***Lozman v. City of Riviera Beach Florida***, 679 Fed. Appx. 979 (11th Cir. 2017), to consider the whether the jury's determination plaintiff's arrest was supported by probable cause defeated his First Amendment retaliatory arrest claim as a matter of law.

A. The Amended Complaint demonstrates probable cause existed.

The Amended Complaint fails to allege whether Plaintiff's claim is for retaliatory arrest or prosecution, further demonstrating its failure to comply with requisite pleading standards. Nonetheless, references to multiple contacts with "the prosecutor" to protest his innocence, provision of "the exculpatory emails" to him or her, and the prosecutor's dismissal of the charges render a retaliatory prosecution claim against the Defendant officers too attenuated from his arrest. [ECF 15, ¶62-63, 68.] *See* ***Barham v. Town of Greybull***, 483 Fed. Appx. 506, 509 (10th Cir. 2012) (judge's independent probable cause determination breaks causal chain between unlawful arrest and subsequent prosecution).

The only claim which could be construed from the Complaint, then, is for retaliatory arrest. As discussed above, the most likely interpretation from present caselaw is that lack of probable cause is required for a retaliatory arrest claim.[2] *See* ***Wilson****, supra;*

[2] Even if this Court does not determine probable cause as a necessary element for a retaliatory arrest claim, the uncertainty demonstrates qualified immunity is appropriate. *See* Section I, B, below.

Moral**, supra; **Lozman**, supra; **Galarnyk v. Fraser, 687 F.3d 1070, 1076 (8th Cir. 2012).

A warrantless arrest is permissible when an officer has probable cause to believe a person committed a crime. ***Cortez v. McCauley,*** 478 F.3d 1108, 1115 (10th Cir. 2007). This is true even if the crime is a minor offense. ***Atwater v. City of Lago Vista***, 532 U.S. 318, 354 (2001). An arrest is lawful if the officer had probable cause to believe a crime - any crime- occurred. ***Devenpeck v. Alford***, 543 U.S. 146, 152-53 (2004). Although an officer must investigate easily accessible facts related to the probable cause determination, he need not conduct a mini-trial before effectuating an arrest. ***Cortez*****,** 478 F.3d at 1117.

Plaintiff portrays himself as an innocent bystander targeted by Defendants for alleged activism, but Defendants' Motion to Dismiss conclusively demonstrated Plaintiff's own allegations in his original Complaint demonstrated probable cause for numerous criminal offenses. [ECF 10, pp. 6-10.] In response, Plaintiff's amendments made no changes to claims or legal theories underlying the complaint, but merely omitted those facts which demonstrate probable cause. (*See, e.g.*, ECF 15-1: deleting reference in ¶42 to Plaintiff's failure to provide birthdate; deleting ¶42, which stated "Plaintiff increased his voice to match the officers so that they would hear his protests";[3] deleting ¶43, which acknowledges Plaintiff's refusal to return over the fence upon being ordered to do so.) Although an amended complaint generally supersedes a previous pleading, "where the amended allegations flatly contradict the originals and there is no suggestion that the originals were made in error, courts have considered the different complaints together in the interests of justice." ***Nance v. NBCUniversal Media***, 2018 U.S. Dist. LEIXS 61787,

[3] Contrary to the Court's requirement for a red-lined version clearly delineating each change reflected in an Amended Complaint, the deletion of Paragraph 42 is not identified in the red-lined version of the Amended Complaint. [ECF 1, 15-1.]

*14-15 (N.D. Ill. April 12, 2018) ("Allowing Plaintiff to remold his allegations around Defendants' Motions will only waste the Court's and parties' time: Such earnest gamesmanship is not in the interests of justice and will not be allowed.") Presented with a directly comparable example where a plaintiff filed an amended complaint which omitted factual allegations demonstrating probable cause existed for arrest in response to a motion to dismiss his Section 1983 claim, the court nonetheless considered the allegations contained in the original complaint where no evidence of mistake existed for the deletions from the amended complaint in ***Aasen v. Drm***, 2010 U.S. Dist. LEXIS 68054 *7(N.D. Ill. July 8, 2010) There is no suggestion of mistake Plaintiff's revisions to the factual allegations which Defendants' relied upon regarding the existence of probable cause. Such facts were not merely clarified, but were outright omitted to circumvent dismissal with the replacement of facts by vague, conclusory statements.[4]

Despite these efforts to circumvent Defendants' arguments, the Amended Complaint still contains sufficient facts to demonstrate probable cause. Plaintiff inserted himself into officers' response to the 7-11 trespass complaint to such a degree he became an obstacle to the investigation and was told to leave the area.[5] [ECF 15, ¶33, 35.]

[4] These omissions are even more apparent because the Amended Complaint now refers specifically to Officers Chernak's affidavit in support of arrest, allowing this Court to consider the unequivocal evidence of probable cause contained therein. [Ex. A, affidavit of arrest.] *See* ***Driskell v. Thompson***, 971 F. Supp. 2d 1050, 1056 n.5 (D. Colo. 2013) (documents referred to in Complaint may be considered in Rule 12(b)(6) motion). For example, the original complaint alleged Plaintiff "increased his voice to match the officers so that they would hear his protests" when he characterized the officers as "loud and aggressive." [ECF 1 at 43-44.] Plaintiff omitted any reference to his raising his voice at officers in the Amended Complaint, but (consistent with the original complaint) the affidavit of arrest states "Montgomery began to yell and scream at officers as we attempted to get him to exit the property. There are several residential homes directly across the street from the property…" [Ex. A.]

[5] C.R.S. § 18-8-102 provides "[A] person commits obstructing government operations if he intentionally obstructs, impairs, or hinders the performance of a governmental function by a public servant, by using or threatening to use violence, force, or physical interference or obstacle."

Instead, he climbed the nearby fence, so he could continue to observe the police interaction. [¶37.] Officers saw him climb the fence and concluded he was trespassing.[6] [¶39.]

Plaintiff asserts, in a purely conclusory fashion that "[o]n information and belief," each of the Defendant officers knew the fenced area was "public property." [¶22.] No factual basis is provided for these conclusory statements; to the contrary, Plaintiff's own allegations demonstrate their implausibility. Plaintiff alleges the fence was erected by the private company without "city authorization" on January 11, 2016. [¶23.] Plaintiff had to research the public vs. private nature of the land, as information about the fence was not readily identifiable. [¶29.] It took multiple emails between the City's Chief Planner, Chief Construction Inspector and the private company to ascertain the legality of the fence and, it was not until January 26, 2016 that the company was informed to remove the fence. [¶27-28.] Plaintiff received some emails on January 27, 2016, and armed with this information, climbed the fence *the very next day* when he encountered officers on January 28, 2016. [¶31, 33.] Accepting these facts as true, it strains credulity to expect Defendant officers to have known the alleged illegality of the fence just two days after the City's Chief Inspector made such determination and notified the private company.[7] *See* ***Williams v.***

Fort Collins Municipal Code Section 17-63 states "No person shall knowingly obstruct, impair or hinder any peace officer . . . acting under the color of his or her official authority to enforce the law or perform an official duty by the use or threat of violence, force, physical interference or obstacle, or by knowingly providing false or misleading information to any such officer, employee or official." And "When a peace officer …, acting under the color of his or her official authority, is enforcing the law or performing an official duty, no person shall, after having been ordered by said officer to move on and away from the scene of the officer's activity, knowingly remain in the officer's presence or engage in conduct that disrupts, obstructs, impairs or hinders the officer's enforcement of the law or the performance of his or her official duty."

[6] C.R.S. 18-4-503 provides "A person commits the crime of second degree criminal trespass if such person [u]nlawfully enters or remains in or upon the premises of another which are enclosed in a manner designed to exclude intruders **or are fenced**[.]" (Emphasis added.)

[7] Plaintiff appears to have sought to plead around this argument by alleging in his Amended Complaint that officers failed to investigate whether the area was public or private property. [ECF 15 ¶39,

Town of Greenburgh, 535 F.3d 71 (2d Cir. 2008) ("a mistake about relevant facts – in this case, the adequacy of the [trespass] warning [sign] – does not undermine the existence of probable cause").

Upon witnessing Plaintiff climb the fence, which would constitute a crime to anyone who had not learned of the fence's "illegality" in the preceding two days, Defendant officers asked Plaintiff to provide his name and date of birth. [ECF 15, ¶42; *see* ECF 1, ¶39.] Plaintiff acknowledges he refused to provide his date of birth, instead overhearing the officers figuring it out by radio when they reported his name to dispatch. [ECF 15, ¶42; *see* ECF 1, ¶39-40.] Plaintiff ignored the command to climb back over the fence, *even after being told he was being arrested*. [ECF 15, ¶43-44.] Plaintiff also "yelled out to his brother" (who just happened to be sitting in a van across the street), summoning another individual to the scene, further obstructing the arrest process and reasonably placing the officers in a heightened defensive posture. [ECF 15, ¶47.] Plaintiff's refusal to comply with the order to return over the fence to be arrested continued until another officer had to be summoned to the scene with bolt cutters to damage the property and cut the fence open so officers could detain him. [Id., ¶52.] Throughout this disturbance, Plaintiff continued "voicing his concerns" to "surrounding persons" and the officers in protest of his arrest.[8]

55.] This allegation is completely inconsistent with his allegation the officers knew it was public and agreed to use the fence as a pretext to arrest him. Either way, Plaintiff's allegations fail as a matter of law. On the one hand, the officers did not know the area was "public property" and thus there was probable cause for a trespass arrest. Officers are not required to conduct a full investigation at the scene of an arrest, and any suggestion they would call the uncorroborated cell phone number purporting to be the City Building Inspector provided to them on the street in an unauthenticated email after midnight is a farce. On the other hand, if the officers knew it was public, as Plaintiff also alleges, there cannot be a constitutional violation based upon failure to investigate.

[8] C.R.S. 18-9-106 states "A person commits disorderly conduct if he or she intentionally, knowingly, or recklessly [m]akes a coarse and obviously offensive utterance, gesture, or display in a public place and the utterance, gesture, or display tends to incite an immediate breach of the peace; or [m]akes unreasonable noise in a public place or near a private residence that he has no right to occupy.

[Id., ¶3, 53; *See* Footnote 4.] These facts plainly demonstrate probable cause for trespass, obstructing a peace officer and disorderly conduct, for which Plaintiff was charged, in addition to property damage and other offenses, for which he was not.

While ignoring Plaintiff's own criminal behavior, the Amended Complaint seeks to impose expectations upon officers that are not only unsupported in the law, but are absurd - that they know information released by the City Inspector to private parties two days prior; credit the unauthenticated, potentially fraudulent emails produced on scene by Plaintiff's brother; and ignore criminal acts brazenly performed in their presence. To the contrary, rather than immediately publicly "protesting," Plaintiff could have returned over the fence at the first request and chose to either litigate the legality of the fence in civil court or through the criminal process if he received a trespass citation. An arrestee's response to even "an invalid arrest or *Terry* stop may constitute independent grounds for arrest." ***U.S. v. Dawdy***, 46 F.3d 1427, 1431 (8th Cir. 1995), *citing* ***U.S. v. Waupekenay***, 973 F.2d 1533, 1538 (10th Cir. 1992). Plaintiff's bald assertion probable cause was lacking is an unsubstantiated legal conclusion which fails to state a claim. ***Keough***, 2014 U.S. Dist. LEXIS 128671, *20-21 (granting qualified immunity where retaliatory prosecution claim failed to demonstrate absence of probable cause). His allegations demonstrate the probable cause for criminal charges, thus negating his retaliatory arrest claim. ***Id***. at *21-27.

In addition to his failure to demonstrate probable cause, the allegations demonstrate Defendants' did not cause Plaintiff to suffer an injury that had any chilling effect on his exercise of the alleged protected activity, as he continued to protest the fence even after his arrest. [ECF 15 ¶ 53, 62, 63.] Moreover, Plaintiff fails to allege sufficient facts that his arrest and subsequent charges were substantially motivated by his criticism

of Defendants' activities, as the Amended Complaint offers nothing more than conclusory allegations about the reason for Plaintiff's arrest or the alleged reliance upon officers' statements by "the court and the prosecutor."

B. Defendants are entitled to qualified immunity.

Qualified immunity protects governmental officials from civil liability so long as their conduct does not violate clearly established Constitutional rights of which a reasonable person would have known. ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). When a defendant pleads the defense of qualified immunity, a plaintiff bears a heavy two-part burden of proving (1) the defendants' actions violated a constitutional right, and (2) the right was clearly established at the time of the conduct at issue. ***Mick v. Brewer***, 76 F.3d 1127, 1134 (10th Cir.1996). To survive dismissal, plaintiff must show the right was "clearly established" in a "particularized" sense. ***Wilson v. Meeks***, 52 F.3d 1547,1552 (10th Cir. 1995). "[F]or a right to be 'particularized,' there must ordinarily be a Supreme Court or Tenth Circuit decision on point, or 'clearly established weight of authority' from other courts." ***Id.***

As described *supra*, the Tenth Circuit has repeatedly granted qualified immunity for retaliatory arrest claims where probable cause was present, recently noting the uncertainty in the law governing retaliatory arrests. ***Wilson****, supra;* ***Moral****, supra*. The Supreme Court's acceptance of this specific legal question in ***Lozman*** demonstrates it remains unsettled. It does not stand to reason that this Court could find it was "clearly established" at the time of the 2016 arrest that Plaintiff had a First Amendment right to be free from a retaliatory arrest otherwise supported by probable cause, when the Supreme Court "expressly declined to decide" the existence of the right in 2012 and the Tenth Circuit granted qualified immunity on that basis at least twice in 2014.

Moving on from the probable cause issue, Defendants have demonstrated Plaintiff's failure to plead a constitutional violation, and no clearly established right can be identified, nor are Defendants aware of any United States Supreme Court or Tenth Circuit precedent that would indicate Defendants were on notice that any facts alleged in the Complaint were ever before recognized as a Constitutional violation. The existence of probable cause for a variety of criminal violations suggests reasonable officers in Defendants' position would similarly have arrested Plaintiff regardless of his "protests." ***Whitington v. Lawson***, No. 06-cv-00759-LTB-CBS, 2009 WL 3497791, at *3 (D. Colo. Oct. 29. 2009). Even if the Court concludes otherwise, there need only have been "arguable probable cause" at the time to entitle Defendants to immunity. ***Cortez***, 478 F.3d at 1120-21. ("Law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.").

II. Plaintiff cannot sustain his wrongful arrest claim.

A. Plaintiff's allegations fail to state a claim.

Under Colorado law, a claim for false arrest will not lie if an officer has a valid warrant or probable cause to believe that an offense has been committed and that the person who was arrested committed it. ***Enright v. Groves***, 39 Colo. App. 39, 560 P.2d 851, 852 (Colo. App. 1977). "In evaluating the existence of probable cause, we consider whether the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." ***Id***. Section I, B contains a comprehensive discussion of the applicable law regarding probable cause and Plaintiff's allegations which demonstrate its existence for his arrest.

The allegation the charges were later dismissed by the prosecutor makes no difference in a Fourth Amendment unlawful arrest analysis. *See* ***Fogarty***, 523 F.3d at 1156. Additionally, the Amended Complaint fails to allege sufficient personal participation by Defendants Howard and Brough. Plaintiff alleges they were at the scene, and Defendant Brough read a document and Defendant Howard spoke with Defendant Chernak. Plaintiff does not allege in anything more than a conclusory fashion they made the decision to arrest him or affected his arrest; their mere presence on scene does not establish a constitutional violation. ***Trujillo v. Williams***, 465 F.3d 1210, 1228 (10th Cir. 2006).

B. Defendants are entitled to qualified immunity.

As argued above, Defendants are entitled to qualified immunity because they did not violate any of Plaintiff's constitutional rights. Plaintiff's unlawful arrest allegations do not suffice to overcome the qualified immunity afforded the Defendants, and nowhere does Plaintiff offer any indication that any Defendant engaged in any activity that could be construed as constituting behavior earlier determined to be an established violation of any recognized constitutional right. Moreover, the existence of probable cause for the arrest entitles a defendant to qualified immunity from a false arrest claim. ***Wilder v. Turner***, 490 F.3d 810, 813 (10th Cir. 2007). Plaintiff's arrest is constitutional so long as Defendant had arguable probable cause. ***Stonecipher v. Valles***, 759 F.3d 1134, 1141 (10th Cir. 2014). Defendants incorporate the probable cause arguments in Section I, B.

III. Plaintiff's malicious prosecution fails as a matter of law.

A. The allegations in the Complaint fail to meet the elements of the claim.

The elements of a §1983 malicious prosecution claim are: (1) defendant caused plaintiff's continued confinement or prosecution; (2) original action terminated in plaintiff's

favor; (3) no probable cause supported original arrest, confinement, or prosecution; and (4) plaintiff sustained damages. ***Wilkins v. DeReyes***, 528 F.3d 790 (10th Cir. 2008). Regarding the first element, Defendants did not cause Plaintiff's continued confinement. The probable cause determination was approved a judge,[9] and the Amended Complaint alleges it was the prosecutor who made the determination to go forward, and then to dismiss, the charges. These independent intermediaries attenuate the officers from the prosecution. *See, e.g.,* ***Buehler v. City of Austin/Austin Police Dep't***, 824 F.3d 548, 553 (5th Cir. 2016). Defendants could only be subject to a malicious prosecution claim where they "conceal and misrepresent material facts to the district attorney." *See* ***Schoenfeld v. Thompson***, No. 16-cv-2630-MSK-NYW, 2017 U.S. Dist. LEXIS 113172 (D. Colo. June 7, 2017). The only such allegations in the Amended Complaint are purely conclusory and unsupported by any factual description.

Regarding the second element, Plaintiff alleges the prosecutor dismissed his charges "in circumstances suggestive of [his] innocence." [ECF 15, ¶69-70, 93.] Plaintiff fails to describe any detail surrounding the dismissal and, thus, has failed to plead sufficient facts the original charge was terminated in his favor. ***Schoenfeld***, 2017 U.S. Dist. LEXIS 113172 at *18-19 (holding plaintiff's characterization of charges as "false, groundless, and frivolous" is conclusory and fails to state claim).

Plaintiff also fails on the third element. As argued *supra*, the Amended Complaint's allegations demonstrate probable cause existed to arrest Plaintiff for numerous criminal offenses. Even if this Court cannot determine from the allegations of the Amended

[9] The Order stating, "probable cause found" signed by Magistrate Matthew Richard Zehe on January 28, 2016 is attached as Exhibit A. ***Pace v. Swerdlow***, 519 F.3d 1067, 1072 (10th Cir. 2008) (stating a court may properly consider facts subject to judicial notice, state court pleadings, and matters of public record without converting a motion to dismiss into a motion for summary judgment).

Complaint that probable cause existed for each of the charges against Plaintiff, the existence of probable cause for any of the charges precludes his malicious prosecution claim with respect to other charges arising out of the same set of facts***. Kossler v. Crisanti***, 564 F.3d 181, 193-94, n. 8 (3d Cir. 2009) (probable cause for one charge precludes plaintiff from proceeding with malicious prosecution claim with respect to any other charge brought simultaneously against her and arising out of same facts.)

B. Defendants are entitled to qualified immunity.

The Tenth Circuit recently acknowledged the lack of clearly established law regarding whether a malicious prosecution claim exists when one charge is supported by probable cause but other simultaneous charges arising from the same set of facts are not. ***Van De Weghe v. Chambers***, 569 Fed. Appx. 617, 619-620 (10th Cir. 2014). Citing the lack of a binding opinion from the Supreme Court, uncertain signals from the Tenth Circuit and other courts unmistakably divided, the Court posited, "it becomes difficult to conjure how Mr. Van De Weghe might have cleared the 'clearly established law' hurdle even if he had tried." Plaintiff in this case is in no different position. *See* arguments regarding probable cause, *supra* at Section I, A. A determination Plaintiff's allegations demonstrate a basis for any charge establishes Defendants' entitlement to qualified immunity from the malicious prosecution claim. ***Id.*** Plaintiff's malicious prosecution allegations cannot overcome Defendants' qualified immunity, Plaintiff offers no indication any Defendant engaged in any activity that could be construed as constituting behavior earlier determined to be an established violation of a recognized constitutional right.

IV. Plaintiff fails to allege personal participation by each Defendant.

At the pleading stage, it is not the defendants' or the Court's responsibility to guess at plaintiff's claims. ***Twombly***, 550 U.S. at 555***; Robbins v. State of Oklahoma***, 519 F.3d 1242, 1248–49 (10th Cir. 2008). To establish §1983 liability in an individual capacity, "'the plaintiff must establish a deliberate, intentional act' on the part of the defendant 'to violate [the plaintiff's legal] rights.'" ***Porro v. Barnes***, 624 F.3d 1322, 1327-28 (10th Cir. 2010). It is not sufficient to refer collectively to a group of defendants, without specifying the individual activities of each. ***Robbins***, 519 F.3d at 1250. Federal pleading standards require Plaintiff to also establish personal participation in conduct violative of his Constitutional rights. ***Fogarty v. Gallegos***, 523 F.3d 1147, 1162 (10th Cir.2008).

The Amended Complaint is devoid of any allegations explaining, in more than conclusory terms, how the individual Defendants are each alleged to have personally caused any deprivation of a federal right. Defendants' Motion to Dismiss argued Plaintiff's repeated collective references to "the officers" or "Defendant officers" failed to adequately connect any Defendant to specific conduct at the arrest scene. In response, Plaintiff did not articulate conduct attributable to each defendant, but merely changed many allegations to "all three Defendant Officers." These vague allegations (some of which are physically implausible) still fail to meet pleading requirements and are merely an end-run around Defendants' arguments.[10] ***Nance; Aasen****, supra*. Such group pleading is not sanctioned by FED. R. CIV. P. 8(a*). **Robbins**,* 519 F.3d at 1242.

[10] *See, e.g.,* ECF 15, ¶52 ("The three officers then cooperatively placed hands on Plaintiff…); ¶53 ("The officers, each, grabbed him, placed handcuffs on him, walked him to the police vehicle, placed him in the police vehicle…) ¶55 ("The three officers unreasonably failed to investigate …The three officers failed to discuss …); ¶64 (On information and belief, the prosecutor communicated with all three of the Defendant Officers….)

Plaintiff suggests Defendants' mere presence at the arrest scene renders them all "arresting officers" subject to any constitutional violation he attributes to his arrest. The law does not support this interpretation. To state a claim against any Defendant, Plaintiff must articulate the constitutional right and conduct of each respective officer that violated that right *with specificity*, and conclusory allegations are not sufficient. ***Wise v. Bravo***, 666 F.2d 1328, 1333 (10th Cir. 1981). The only allegation directed at Defendant Brough is that he received a printed email from Plaintiff's brother, read part of it, and handed it to Defendant Chernak. [ECF 15, ¶48-49.] Regarding Defendant Howard, the only non-conclusory allegation from Plaintiff is that he had a conversation with Defendant Chernak outside of Plaintiff's audible range [¶50.] Plaintiff also alleges Howard and Brough both assisted Chernak in handcuffing and escorting Plaintiff to Chernak's vehicle. [¶52-53.] None of these acts could reasonably be construed to demonstrate a constitutional violation. Without designation of personal participation by each Defendant linked to each alleged constitutional violation, Plaintiff cannot sustain his claims.

For all of the foregoing reasons, Defendants respectfully request this Court dismiss Plaintiff's claims against them in their entirety with prejudice, and for all other and further relief as this Court deems proper.

Dated: May 9, 2018.

Respectfully submitted,

s/ *Christina S. Gunn*

Thomas J. Lyons, Esq.
Christina S. Gunn, Esq.
Hall & Evans, L.L.C.
1001 17th Street, Suite 300, Denver, CO 80202
303-628-3300 /Fax: 303-628-3368
lyonst@hallevans.com /gunnc@hallevans.com

CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on the 9th day of May, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Raymond K. Bryant
raymond@rightslitigation.com

s/ Nicole Marion, Legal Assistant to
Christina S. Gunn, Esq. of
Hall & Evans, L.L.C.