**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,
MIKE HOWARD,
MATTHEW BROUGH.

Defendants.

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**OBJECTION TO THE MAGISTRATE JUDGE'S RECOMMENDATION**

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Plaintiff William Montgomery, through undersigned counsel, submits the following objections to the *Recommendation of United States Magistrate Judge* (Doc. 43)[1] (hereinafter "*Recommendation*" or "*Rec.*"):

## I. Introduction

This case involves claims related to the wrongful arrest and prosecution of Plaintiff. Plaintiff was arrested and prosecuted based on an accusation by Defendant officers that Plaintiff trespassed on a well-known public plaza. (AC[2], ¶¶ 14, 19-21, 39-40). These accusations followed interactions in which Plaintiff had questioned and criticized police tactics. (AC, ¶¶ 33-37). Prior to his arrest, however, Plaintiff had provided explanations and corroborating materials to show that his presence in the public plaza was authorized despite the existence of an illegal fence. (AC, ¶¶ 41-49). These explanations aligned with obvious

[1] In this *Objection*, citations to documents filed in the electronic docket are cited as "Doc. [docket number]".
[2] "AC" refers to the Plaintiff's *Amended Complaint*, Doc. 15.

indicia that the plaza was a longstanding public space. (AC, ¶¶ 15-16). Ignoring the explanations and evidence, and in spite of internal discussions and focus on that particular plaza by local police, Defendant officers proceeded to arrest Plaintiff in retaliation for his earlier questions and criticism, without considering clear indicia of a lack of probable cause and without completing a basic, constitutionally sufficient investigation. (AC, ¶¶ 19-21, 40, 42, 47-48, 50-53).

Defendants have moved under Fed. R. Civ. P. 12(b)(6) for dismissal of all claims brought in Plaintiff's *Amended Complaint*, for either failure to state a claim or based on qualified immunity. (*See generally* Doc. 17). Plaintiff now objects to the recommendation of dismissal with prejudice for each of his claims based on the *Recommendation*'s use of an erroneous legal framework for assessing questions of probable cause that is central to each of the *Recommendation*'s conclusions, and errors related to the qualified immunity assessment for Plaintiff's First Amendment retaliation and Fourth Amendment malicious prosecution claims.

**II. Standard of Review**

This Court reviews *de novo* a magistrate judge's findings and recommendations relating to dispositive issues. *Summers v. State of Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b)(3).

"[A] complaint must contain enough allegations of fact to state a claim to relief that is plausible on its face." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). To assess whether a claim should be dismissed under Fed. R. Civ. P. 12(b)(6), this court analyzes "not whether the claimant will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." *Collins v. Wal-Mart, Inc.*, 245 F.R.D. 503,

508 (D. Kan. 2007). Claims that are facially plausible, those that "give rise to a reasonable inference that the defendant is liable", are not subject to dismissal. *Big Cats of Serenity Springs, Inc. v. Rhodes*, 843 F.3d 853, 858 (10th Cir. 2016). The court accepts "all well-pleaded allegations of the complaint as true and consider[s] them in the light most favorable to the nonmoving party." *Id.* (internal quotations removed). "[E]xpressly rejected" is any "heightened fact pleading" requirement. *Robbins*, 519 F.3d at 1247 (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The non-moving party, here the Plaintiff, is entitled to "all reasonable inferences from the pleadings". *Wasatch Equality v. Alta Ski Lifts Co.*, 820 F.3d 381, 386 (10th Cir. 2016). Only "complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action" are insufficient. *Robbins*, 519 F.3d at 1247 (internal quotation omitted). A court may reject a party's "legal conclusions" but accepts all facts pleaded as true, without a heightened requirement that underlying details be alleged to support the claimed facts. *Wasatch*, 820 F.3d at 386; *see also Robbins*, 519 F.3d at 1247.

Additionally, "[i]n the context of qualified immunity, [a court] may not dismiss a complaint for failure to state a claim unless it appears beyond doubt that plaintiffs cannot prove a set of facts that would entitle them to relief." *Rhodes*, 843 F.3d at 858, *citing Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016). Qualified immunity should only protect an officer if the existing law could not be said to have put an official on fair notice that their conduct would be unconstitutional. *See Games v. Wood,* 451 F.3d 1122, 1134 (10th Cir. 2006). Generally, this means that there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Maresca v. Bernalillo County*, 804 F.3d 1301, 1308

(10th Cir. 2015). But "[a] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (internal quotations omitted).

**III. The legal framework for assessing questions of probable cause used in the *Recommendation* is erroneous, leading to a faulty determination that probable cause supported Plaintiff's arrest, a finding central to each of the *Recommendation*'s conclusions.**

The *Recommendation*'s main finding is that probable cause supported Plaintiff's warrantless arrest and subsequent prosecution. (*Rec.* 26). Based on this finding, the First Amendment retaliation, wrongful arrest and malicious prosecution claims are each recommended dismissed for either failure to state a claim or on qualified immunity grounds. (*Rec.* 13, 26, 28). However, a mistaken analysis of the legal standards governing probable cause questions in civil rights suits guided this finding.

First, the Tenth Circuit has "long recognized that it is a jury question in a civil rights suit whether an officer had probable cause to arrest"; the *Recommendation* erroneously analyzes this issue as a question of law for the court, without any analysis of whether Plaintiff alleged facts sufficient to raise reasonableness questions that must be left to a jury. *DeLoach v. Bevers*, 922 F.2d 618, 623 (10th Cir. 1990); (*compare Rec.* 21-26). "The underlying issue in deciding whether the police had probable cause to do what they did is reasonableness . . . —a classic jury issue." *DeLoach*, 922 F.2d at 623, *quoting Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir.1985). Where "there is room for a difference of opinion" the question of probable cause is not decided by a judge as a matter of law, but given to a jury. *Id.* Yet, the *Recommendation* first states that "*the Court* must consider the facts and circumstances" related to probable cause and then erroneously draws conclusions

without considering whether the pleaded facts provide plausible grounds for a jury to question the reasonableness of the Defendants' actions. (*Rec.* 20) (emphasis added); (*also Rec.* 21-26). As outlined *infra* in *Section IV*, the *Amended Complaint* sufficiently raises reasonable room for differences of opinion regarding probable cause.

Second, the *Recommendation*'s error is doubled by omitting analysis related to exculpatory evidence known and readily accessible to officers prior to Plaintiff's arrest. (*Rec.* 20, 24). Citing out-of-circuit authority, the *Recommendation* states that officers with probable cause are "not required to conduct further investigation for exculpatory evidence or to pursue the possibility that the suspect offender is innocent" before conducting a warrantless arrest. (*Rec.* 20). This analysis omits clearly established and longstanding Tenth Circuit precedent that "the probable cause standard of the Fourth Amendment requires officers to reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention." *Cortez v. McCauley*, 478 F.3d 1108, 1117 (10th Cir. 2007) *citing Romero v. Fay*, 45 F.3d 1472, 1476-77 (10th Cir. 1995).

A full analysis of probable cause in this circuit requires that "probable cause is measured at the moment the arrest occurs" and takes into account the "known progress of the[ ] investigation, including the steps that had not been taken" prior to arrest. *Cortez*, 478 F.3d at 1121. "Probable cause exists only if, in the totality of the circumstances, the facts available to the officers at the moment of the arrest would warrant a person of reasonable caution in the belief that an offense has been committed." *Maresca*, 804 F.3d at 1310 (internal quotations removed). "[I]n determining whether probable cause to arrest existed, we look not only to the facts supporting probable cause, but also to those that militate

against it" and do not permit "piling hunch upon hunch". *United States v. Valenzuela*, 365 F.3d 892, 897 (10th Cir. 2004). Any facts relied upon must be "reasonably trustworthy". *Cortez*, 478 F.3d at 1116. In determining if information is reasonably trustworthy, officers must conduct a sufficient investigation, such as by questioning the suspect at the scene and investigating basic evidence. *Maresca*, 804 F.3d at 1311. "[O]fficers are charged with knowledge of any 'readily available exculpatory evidence' that they unreasonably fail to ascertain." *Id.* at 1310 *quoting Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1259 (10th Cir. 1998). "A police officer may not close her or his eyes to facts that would help clarify the circumstances of an arrest. Reasonable avenues of investigation must be pursued especially when . . . it is unclear whether a crime had even taken place." *Cortez*, 478 F.3d at 1117 *quoting BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir.1986).

Using a faulty legal framework that overlooks the importance of conducting a basic investigation, the *Recommendation* offers minimal consideration of the evidence that would warrant a person of reasonable caution to question whether a crime had been committed. (*See Rec.* 24). As outlined *infra* in *Section IV*, the *Amended Complaint* alleges numerous facts that raise questions about the reasonable trustworthiness of information relied on by Defendants, which should be resolved by a jury.

## IV. Plaintiff has sufficiently alleged a lack of probable cause for his arrest and objects to the recommendation that his Fourth Amendment claim be dismissed.

A Fourth Amendment violation occurs where an officer arrests or detains a person without possessing probable cause that the person committed a crime. *Cortez*, 478 F.3d at 1116-17. Plaintiff has sufficiently alleged this claim, including by demonstrating the lack of probable cause to arrest for any of the offenses cited by Defendant officers.

**a. *Second Degree Trespass***

The *Recommendation* focuses mainly on probable cause for an arrest under Colorado's second degree criminal trespass statute, which includes three main elements: that a person (1) "unlawfully" enters or remains, (2) in or upon the premises "of another" (3) which premises are "enclosed" and/or "fenced." C.R.S. § 18-4-503; *see also Colo. Crim. Jury Instr.* 4-5:04; (*Rec.* 21-24). The facts alleged regarding the totality of the information known or readily available to officers at the moment of Plaintiff's arrest establish a plausible claim that officers acted objectively unreasonably and without conducting a basic investigation. (*See* AC, ¶¶ 40-53).

Defendant officers arrested Plaintiff for hopping a fence and remaining in an enclosed area; however, there is no dispute that the area was actually a public space on which the public could not trespass. (AC, ¶¶ 27-31, 41, 52, 68). The plaza had been a public space for over 20 years and had clear indicia of a public park/plaza, including public seating and walkways. (AC, ¶¶ 14-16). The plaza had come under particular police focus around 2016, as officers were regularly (3-4 times per day) dispatched to the plaza to address complaints that homeless individuals were gathering there. (AC, ¶¶ 18-20). The *Amended Complaint* alleges that Defendant officers were among those officers who were regularly dispatched to the area and were informed of the issues regarding the public plaza through internal meetings.[3] (AC, ¶¶ 21-22). An unauthorized fence had been erected by a private company, Loveland Commercial, at some point in 2016, however that company had been

[3] This is a factual allegation made on information and belief; no further pleading of underlying details is required to establish this factual claim. *Wasatch*, 820 F.3d at 386 (a court may reject "legal conclusions" but accepts all facts pleaded as true). These pleaded facts are accepted for present purposes as true. *Cf. id.*; (*compare Rec.* 21-23).

ordered to remove the fence as it illegally obstructed the public's access to the plaza. (AC, ¶¶ 23-28).

On the night of Plaintiff's arrest, Defendants observed Plaintiff hop the illegal fence and told him that he could not remain as he was trespassing. (AC, ¶¶ 39-41). Plaintiff was not arrested at this moment. (AC, ¶¶ 49-54). Instead, Plaintiff explained that he could not be trespassing because the space was a public plaza and the city had ordered that the illegal fence be removed. (AC, ¶¶ 42, 44-45). Given the clear indicia of a public park/plaza and the particular police focus on this plaza, it is a plausible inference that the context and circumstances known to Defendant officers were not limited to merely observing a fenced-in area. Instead, indicia and knowledge of the public nature of the plaza raised some question that Plaintiff may have been correctly indicating that he had permission to be in the plaza, rather than being there unlawfully. *Compare Maresca*, 804 F.3d at 1311 (officers must consider context and circumstances). Additionally, officers are required, at a minimum, to question the suspect at the scene to determine if a crime had been committed; here, Plaintiff's freely offered statements indicated that no crime was being committed. *Id.*; (AC, ¶¶ 42, 44-45). Defendants, however, did not ask any basic questions to determine if Plaintiff's statements were wild claims or based in verifiable facts. (AC, ¶¶ 42-45).

Plaintiff then asked his brother, who was seated nearby, to bring a printed copy of official emails sent by city officials notifying Loveland Commercial that the fence was an illegal obstruction; these emails included the names and telephone numbers of various city officials involved in the discussions. (AC, ¶¶ 47-49). It is a reasonable inference that neither Plaintiff nor his brother would have had the opportunity to fabricate detailed emails including names and emails of city officials within moments of Plaintiff's contact with

Defendant officers. Thus, with this corroborating information, Defendants were no longer required to rely on the Plaintiff's statement alone. (*Compare Rec.* 24 *citing Romero*, 45 F.3d at 1478); *but see Romero*, 45 F.3d at 1477-78 (while officers are not required to take a suspect's explanation on its face, they are required to conduct a basic investigation of information and witnesses available at the scene). They had several pieces of additional information on the scene to investigate, which may have been done by attempting to contact any of the city officials via the telephone numbers listed in the printed emails, to verify via the city's website that the names and email addresses were of actual city officials, to double check the information with the police department or police dispatch, to call Loveland Commercial to whom the emails were directed, or to question Plaintiff's brother for further details about the emails or his knowledge about the plaza. *See Maresca*, 804 F.3d at 1311 (it was unreasonable not to double check information by calling police dispatch when there was no exigency due to safety concerns); *Cortez*, 478 F.3d at 1117 (officers are required to interview witnesses on the scene). "An unreasonable mistake of fact cannot furnish probable cause." *Maresca*, 804 F.3d at 1310; *see also Baptiste*, 147 F.3d at 1259. "[O]fficers are charged with knowledge of any readily available exculpatory evidence that they unreasonably fail to ascertain" *Maresca*, 804 F.3d at 1310, and cannot close their eyes to information that can clarify the circumstances before an arrest. *Cortez*, 478 F.3d at 1117. By the moment of Plaintiff's arrest, Defendants could reasonably have taken any of the previously described investigative steps to determine that the plaza was open, public property, but failed to do so. (*See* AC, ¶¶ 49-52, 55) (officers had to wait to receive bolt cutters before Plaintiff was arrested). It is a plausible claim that the Defendant officers acted unreasonably in closing their eyes to evidence that would have clarified the circumstances.

The *Amended Complaint* alleges numerous facts that outline the progress of events and steps that had not been taken by the moment of Plaintiff's arrest. *Compare Cortez*, 478 F.3d at 1121. The totality of the circumstances, from the obvious public nature of the plaza to Plaintiff's explanation to the corroborating information that was left uninvestigated, present a plausible question for a jury of whether officers acted unreasonably in arresting Plaintiff. *See DeLoach*, 922 F.2d at 623 (reasonable differences of opinion regarding probable cause are left to a jury).

**b. *Additional crimes alleged***

The *Recommendation* states that probable cause to arrest Plaintiff alternatively existed "for obstructing a police officer, resisting arrest, and disorderly conduct" without any analysis of those potential crimes. (*Rec.* 25; *see also Rec.* 25-26). Yet, probable cause is determined in reference to the elements of concrete offenses with which a suspect may have been charged, and requires that officers have information supporting the elements of those offenses. *Fogarty v. Gallegos,* 523 F.3d 1147, 1156-57 (10th Cir. 2008) (analyzing the elements of and required proof for potential offenses); *Morris v. Noe*, 672 F.3d 1185, 1193 (10th Cir. 2012) (same); *Buck v. City of Albuquerque*, 549 F.3d 1269, 1282-86 (10th Cir. 2008) (same). Where the facts do not establish conduct that supports the elements of any chargeable offense, probable cause is not established. *Fogarty,* 523 F.3d at 1156-57. Further, "[a]lthough an officer's reasonable mistake of fact, as distinguished from a mistake of law, may support [a finding of] probable cause . . . an officer's failure to understand the plain and unambiguous law he is charged with enforcing is not objectively reasonable." *United States v. Cornejo*, No. 16-2937-MCA, 2017 WL 3225470 at *1 (D. N. Mex. May 9, 2017).

As outlined in *Plaintiff's Response to Defendant's Motion to Dismiss*, each of the Colorado offenses for obstructing a police officer, resisting arrest, and disorderly conduct

were inapplicable. (Doc. 24, 6-8, 14-15). In short, probable cause did not exist to charge Plaintiff with obstructing a police officer because he used no physical force, interference or obstacle to hinder police. (Doc. 24, 6-8); *see* C.R.S. § 18-8-102. Plaintiff did not use or threaten to use physical force or violence to resist arrest. (Doc. 24, 14); *see* C.R.S. § 18-8-103. Disorderly conduct is also inapplicable because Plaintiff did not create any "unreasonable noise" that was not intended as communication but merely a guise to disturb persons. (Doc. 24, 14-15); *see* C.R.S. § 18-9-106. Accordingly, Plaintiff has plausibly alleged that no probable cause supported his arrest, and his claim should not be dismissed.

**V. Qualified immunity does not protect Defendants from Plaintiff's First Amendment retaliation claim.**

The *Recommendation* finds that at the time of Plaintiff's arrest, officers may have reasonably interpreted the law to permit an arrest whenever probable cause existed for some offense, even if the such arrest was made in retaliation for use of protected speech, and per the finding that probable cause existed for Plaintiff's arrest, Defendants are entitled to qualified immunity. (*Rec.* 13, 17-18). Two distinct legal errors underlie this recommendation.

First, the *Recommendation*'s faulty legal framework resulted in an erroneous finding of probable cause. *Sect. III-IV supra*. These errors are more egregious in the context of qualified immunity, because at a motion to dismiss stage a claim is dismissed on qualified immunity grounds only when it is beyond doubt that the plaintiff has no plausible claim. *Rhodes*, 843 F.3d at 858. Plaintiff's allegations raise a variety of issues that plausibly call into question the adequacy of the pre-arrest investigation and the reasonableness of Defendants' actions. *Sect. IV supra.* It cannot be said that it is beyond doubt that Plaintiff cannot develop evidence to support his claim that no probable cause existed for his arrest. A purely retaliatory arrest,

unsupported by probable cause, is clearly unlawful and therefore cannot be protected under qualified immunity. *Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("when nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution").

Second, the *Recommendation* errs in holding that *Howards v. McLaughlin* did not clearly establish in the Tenth Circuit that a First Amendment retaliation claim may proceed even where probable cause for an arrest otherwise exists. 634 F.3d 1131, 1145-1146 (10th Cir. 2011) (*overruled on qualified immunity grounds by Reichle v. Howards*, 566 U.S. 658 (2012)); (*Rec.* 15-18). In *Howards*, the court made two rulings: 1) that a First Amendment retaliation claim is not nullified by the existence of a probable cause for an arrest and 2) that the law was clearly established on the issue. 634 F.3d at 1143-51. The *Howards* decision was reversed by the Supreme Court only for its second finding; the Court held that a 2006 ruling by the Court had resulted in some uncertainty on the issue, and so officers at the time of *Howard*s' 2011 ruling did not have clear notice of the unlawfulness of their actions. *Reichle*, 566 U.S. at 666. On remand, the *Howards* court did not revisit the first part of its ruling. 478 Fed. Appx. 528 (10th Cir. 2012). There is no suggestion that any ruling in the circuit has undermined *Howards*' First Amendment analysis since that time. Thus, *Howard*s' ruling that probable cause does not nullify First Amendment claims has continued to hold as the law in this circuit, and provides clear notice to all post-2011 activity. Furthermore, although there have been rulings from other circuits that do not accord with *Howards*, this does not undermine that the *Howards* analysis controls in this circuit. *See e.g., United States v. Spedalieri*, 910 F.2d 707, 709 n. 2 (10th Cir. 1990) (courts within a circuit are bound by

precedential circuit decisions, regardless of circuit splits). Accordingly, Defendants were under clear direction at the time of Plaintiff's 2016 arrest that the existence of probable cause did not authorize them to retaliate against Plaintiff for exercising his First Amendment rights, and are not entitled to qualified immunity on this claim even if probable cause existed.

**VI. Plaintiff's malicious prosecution claim is sufficiently alleged, including allegations of a lack of probable cause. Further, Defendants cannot be granted qualified immunity for prosecution of all charges even in the event that some charges are supported by probable cause.**

The *Recommendation* first concludes that Plaintiff's malicious prosecution claim should be dismissed based on the finding that probable cause supported his arrest and continued prosecution. (*Rec.* 28). Again, this finding was made in error and Plaintiff has alleged facts sufficient to raise plausible questions for a jury relating to probable cause in relation to each of the charged offenses. *Sect. III-IV supra*.

Next, the *Recommendation* concludes that Defendant officers are entitled to qualified immunity from all malicious prosecution claims if any of the charged offenses was supported by probable cause. (*Rec.* 29). This conclusion rests on the reasoning that "there is currently no clearly established law in the Tenth Circuit" establishing that malicious prosecution claims should be determined on a charge-by-charge basis. (*Rec.* 29) (internal quotations omitted). However, "the clearly established weight of authority from other courts" outside of the circuit will also determine that the law is settled for purposes of giving officers notice of the illegality of their actions. *Maresca*, 804 F.3d at 1308. The *Recommendation*'s failure to consider the depth of authority from courts outside the circuit was in error.

Opinions from within this circuit, from other federal circuit and district courts, and from state courts clearly establish that a malicious prosecution claim may sustain on a single charged offense, even in the event that other charged offenses are supported by probable cause. *See Miller v. Spiers*, 339 Fed. Appx. 862, 867-68 (10th Cir. 2009) (probable cause to pursue one charge does not prevent a claim for malicious prosecution based on simultaneous pursuit of a separate charge); *Holmes v. Vill. of Hoffman Estates*, 511 F.3d 673, 682 (7th Cir. 2007); *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991); *Johnson v. Knorr*, 477 F.3d 75, 85 (3d Cir. 2007); *Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1998); *Donahoe v. Arpaio*, 986 F. Supp. 2d 1091, 1104 (D. Ariz. 2013); *Elbrader v. Blevins*, 757 F. Supp. 1174, 1180 (D. Kans. 1991) (probable cause involving disorderly conduct charge does not prevent the pursuit of malicious prosecution claim for factually separate offenses charged without probable cause, including obstruction and resisting arrest); *Garvais v. United States*, No. CV–03–0290, 2010 WL 610282 at *14-15 (E. D. Wa. February 17, 2010); *Brown v. Willoughby*, 5 Colo. 1, 5 (Colo. 1879) ("If groundless charges are maliciously and without probable cause, coupled with others which are well founded, they are not on that account less injurious, and therefore constitute a valid cause of action."); *Bertero v. National General Corp.*, 13 Cal.3d 43, 55–57 (Cal. 1974).

Only one authority has been cited to question this proposition. (*See Rec.* 29). In *Van de Weigh v. Chambers,* a panel of the Tenth Circuit noted that the plaintiff had not carried the burden of showing that the law on this matter was clearly established. 569 Fed. Appx. 617, 620 (10th Cir. 2014) (unreported). The panel went on to note a possible question among the circuits regarding this issue, *citing Kossler v. Crisanti*, 564 F.3d 181, 193–94 & n. 8 (3d Cir. 2009). *Van de Weigh*, 569 Fed. Appx. at 620. Yet, the *Kossler* opinion explicitly does not

undermine the Third Circuit's earlier ruling in *Johnson v. Knorr, supra*, that "the finding of probable cause on one charge" would not prevent "the claim for malicious prosecution with respect to the other charges". *Kossler*, 564 F.3d at 192. The *Kossler* case dealt with an entirely separate issue regarding when a favorable termination is determined for malicious prosecution claims. *Id.* The *Kossler* court detailed the distinction and made clear that the *Johnson* decision's "charge-by-charge" approach to the probable cause element of malicious prosecution claims remains the law of the circuit. *Id.* at 193. The panel's decision, therefore, does not correctly point to any lack of uniformity of out-of-circuit authority.

Unlike the plaintiff in *Van de Weigh*, Plaintiff in this case has provided a strong weight of authority from within and outside this circuit to carry the burden of showing that the law has been settled on this issue. Accordingly, in the event that the Court finds no plausible issue for a jury regarding probable cause on a single charged offense, this does not provide qualified immunity from the malicious prosecution claim on other charged offenses.

**VII. Conclusion**

WHEREFORE, the Plaintiff respectfully objects to the conclusions in the *Recommendation* and requests that this Court deny the Defendants' requests under Fed. R. Civ. P. 12(b)(6) to dismiss Plaintiff's claims.

Dated: March 18, 2019

Respectfully submitted,

*/s Viniyanka Prasad*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 18th day of March, 2019 I electronically filed the foregoing **OBJECTION TO MAGISTRATE JUDGE'S RECOMMENDATION** with the Clerk of the Court using the CM/ECF systems which is expected to send notification of such filing to the following e-mail addresses:

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