United States Court of Appeals
FOR THE NINTH CIRCUIT

Filed March 23, 2018

No. 16-15059

BRIAN EDWARD MALNES,

Plaintiff-Appellant

v.

CITY OF FLAGSTAFF; et al.,

Defendants-Appellees

Appeal from the United States District Court
For the District of Arizona
G. Murray Snow, District Judge, Presiding
(No. 3:15-cv-08113-GMS).

Before: D.W. NELSON, TASHIMA, and CHRISTEN, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judge Christen voted to deny the petition for rehearing en banc. Judge Nelson and Judge Tashima recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

United States Court of Appeals
FOR THE NINTH CIRCUIT

Submitted February 5, 2018[25] Filed February 7, 2018

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Plaintiff-Appellant

v.

CITY OF FLAGSTAFF; et al.,

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Appeal from the United States District Court
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G. Murray Snow, District Judge, Presiding
(No. 3:15-cv-08113-GMS).

Before: D.W. NELSON, TASHIMA, and CHRISTEN, Circuit Judges.

Brian Malnes ("Malnes") appeals pro se the district court's dismissal of his civil rights and state law claims against various school, city, and law enforcement officials.[26] We have jurisdiction under 28 U.S.C. § 1291, and **we affirm in part and dismiss in part.**

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[25] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

[26] This memorandum refers to the following parties as the "Arizona Defendants": City of Flagstaff, Michelle D'Andrea, Robert Brown, Kevin Treadway, Bradley Battaglia, Todd Bishop, and Bill Burke.

1. The district court ruled on the Arizona Defendants' Motion for Judgment on the Pleadings after all the defendants in this action had filed an answer, and hence, "[a]fter the pleadings [had] closed," in compliance with Federal Rule of Civil Procedure 12(c). *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005) (emphasis removed) (citation omitted); *see also Shame on You Prods., Inc. v. Elizabeth Banks*, 120 F. Supp. 3d 1123, 1142 (C.D. Cal. 2015) (citing id.) (holding the court "[could not] grant defendants' motion for judgment on the pleadings" until all defendants had filed answers).

2. Malnes's claims for false arrest and malicious prosecution pursuant to 42 U.S.C. § 1983 fail because there was probable cause to arrest him for harassment under Ariz. Rev. Stat. Section 13-2921. *Fortson v. L.A. City Attorney's Office*, 852 F.3d 1190, 1194 (9th Cir. 2017) (citations omitted); see also *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015) (citations omitted). "The insufficiency of [his] allegations to support a [§] 1983 violation [further] precludes a conspiracy claim [under § 1985] predicated [on] [those] same allegations." *Cassettari v. Nev. Cty., Cal.*, 824 F.2d 735, 739 (9th Cir. 1987) (citation omitted).

It refers to the following parties as the "Louisiana Defendants": Christine Devine, Larry Zerangue, Joey Sturm, Patricia Cottonham, Jennifer Vaught, Jordan Kellman, Jo Davis-McElligatt, Aaron Martin, John Laudun, Shelley Ingram, Claiborne Rice, James McDonald, Joseph Adriano, John Greene, Christine Brasher, and Joseph Savoie.

3. Malnes fails to state a claim for intentional infliction of emotional distress because his arrest for harassment "[was] lawful," and hence, could not constitute the "extreme or outrageous" behavior required to establish the tort. *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 909 P.2d 486, 496 (Ariz. Ct. App. 1995); see also *Joseph v. Markovitz*, 551 P.2d 571, 575-76 (Ariz. Ct. App. 1976) (finding the "filing of [a] third-party complaint" that was based on probable cause and subsequently dismissed "[did] not [come] within the purview of extreme and outrageous conduct").

4. Malnes cannot claim defamation as to the police reports because they are "[s]ubstantial[ly] tru[e]." *Desert Palm Surgical Grp., P.L.C. v. Petta*, 343 P.3d 438, 449 (Ariz. Ct. App. 2015) (citing *Fendler v. Phx. Newspapers, Inc.*, 636 P.2d 1257, 1261-62 (Ariz. Ct. App. 1981)); *see also Godbehere v. Phx. Newspaper, Inc.*, 783 P.2d 781, 787 (Ariz. 1989) (citation omitted). He cannot claim invasion of privacy because he does not allege the reports were "communicat[ed] . . . to the public at large" and therefore published for purposes of this cause of action. *Hart v. Seven Resorts, Inc.*, 947 P.2d 846, 854 (Ariz. Ct. App. 1997) (emphasis removed) (citation and internal quotation marks omitted).

5. The district court did not abuse its discretion in denying Malnes leave to amend his claims. Permitting amendment here would have been "futil[e]," caused "undue delay," and "undu[ly] prejudice[d] . . . the opposing part[ies]." *Moore v. Kayport Package Express,*

Inc., 885 F.2d 531, 538 (9th Cir. 1989) (citations omitted).

6. Given we have "affirm[ed] the district court's grant of [judgment on the pleadings,] . . . a reversal of its denial of [Malnes's request for a temporary restraining order] would have no practical consequences." *Mount Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992). "Accordingly, we dismiss [Malnes's request] as moot." Id.

AFFIRMED IN PART AND DISMISSED IN PART.

United States District Court
FOR THE DISTRICT OF ARIZONA

BRIAN EDWARD MALNES, **Plaintiff,**	)
v.	) No.) CV-15-08113-PCT-GMS
STATE OF ARIZONA, et al., **Defendants.**	) **ORDER**)

Pending before the Court is the Motion for Temporary Restraining Order by Brian Edward Malnes. (Doc. 47.) The Court denies the motion.

Also pending before the Court is the Motion for Judgment on the Pleadings by Defendants. (Doc. 38.) For the following reasons, the Court grants the motion. Judgment is granted to Defendants on all claims, and all other pending motions are therefore moot.

BACKGROUND

Plaintiff Malnes attached to his Complaint a copy of a narrative report drafted by Major Larry Zerangue, Jr., of the University of Louisiana Police Department, detailing Zerangue's account of the background facts. (Doc. 1 at 13.)

Malnes expressly concedes the truth of Zerangue's account. (Doc. 1 at 3.) Therefore, the following facts are not in dispute.

On March 19, 2014, Malnes contacted Professor Christine DeVine, Director of Graduate Studies/ Department of English, and Aaron Martin, Director of Communications and Marketing, requesting copies of comprehensive exams he had failed. Malnes also emailed Assistant Professor of English Joanna Davis-McElligatt indicating that she had manipulated him into breaking the law by providing her with medicinal marijuana, for which he has a prescription. Malnes again emailed DeVine, indicating that she has not responded to accusations he made in November 2013 regarding a professor soliciting marijuana from him. Malnes then sent DeVine an email requesting the names of the graders of each failed test.

On March 20, DeVine notified Malnes that she was in the process of having his exams scanned and would email him the exams the following day.

On Friday, March 21 at 7 a.m., DeVine emailed Malnes notifying him that all of the examiners who graded his tests were copied (cc'ed) in that email. At 2:44 p.m., Malnes emailed DeVine, Martin, and Patricia Cottonham stating that he had not received his requested material and was contacting every state senator and representative in Louisiana regarding his request. At 6 p.m., Malnes again emailed DeVine, demanding his exam reports and alleging the department was keeping the information from him. At 6:13 p.m., Malnes emailed Professor Joseph Andriano, requesting his exam reports.

At 6:22 p.m., Malnes emailed DeVine a threat to call her home all weekend until she spoke to him. At 9:09 p.m., Malnes called the home of Professor Jennifer Vaught regarding the issue. Vaught told Malnes to address the matter during business hours, at which time Malnes became very angry. Professor John Laudun reported that Malnes had called him at his home at around 9 p.m., and further reported that Assistant Professor Shelley Ingram felt physically in danger due to Malnes's emails to her.

At 10:42 p.m., DeVine provided Chief Joey Sturm of the University of Louisiana Police Department with a list of nineteen occasions when Malnes had called her between 3 p.m. and 10:34 p.m. on that day. DeVine stated that she had to unplug her telephone at her residence to stop the calls. Malnes then attempted to contact her via Facebook.

At around 11 p.m., Chief Sturm notified Zerangue that Malnes was repeatedly calling and emailing various university faculty and administrative personnel at home in the late evening and refused to comply with requests to cease the communications. Sturm forwarded the emails to Zerangue for his review. After reviewing the emails, Zerangue contacted Malnes via telephone at his Arizona residence. Zerangue told Malnes that by continually calling these individuals at home and refusing to comply with their requests to deal with the issue during business hours, he was committing a crime. Zerangue told Malnes to cease all communications with university faculty and staff until the

open of business the following Monday. Malnes stated that he understood and would comply.

Nonetheless, at 11:40 p.m. on the same night, Sturm called Zerangue to report that Malnes was again contacting Aaron Martin regarding the issue. Zerangue called Malnes and advised him that any further calls could result in a warrant for his arrest. Malnes became irate and stated, "You can't tell me what to do nor do anything to me." Zerangue again advised him to cease communications with the university. Malnes hung up the phone.

At 11:50 p.m., Malnes emailed DeVine, Martin, and Cottonham accusing them of calling the police instead of rationally speaking with him and indicated he would file a complaint with the Office of Civil Rights.

The following morning, on Saturday, March 22, Zerangue contacted the Flagstaff, Arizona Police Department and reported that Malnes was placing harassing phone calls from his residence in Flagstaff. Zerangue explained the situation to Officer Bradley Battaglia, forwarded the emails, and requested that Battaglia go to speak to Malnes in an attempt to cease the harassing communications. Officer Battaglia later reported that he had done so and asked to be notified if Malnes initiated further communications.

After Officer Battaglia spoke to Malnes, Malnes emailed DeVine, Martin, and Cottonham with a copy to Senator Mary Landrieu and the University of Louisiana Lafayette Police Department, reminding them that they were state employees and that he could send

them emails if he so wished. Malnes also reported Zerangue to Chief Sturn for harassment.

At 5:22 p.m., Malnes emailed Major Zerangue asking permission to cc him on the hundred or so letters he planned to send. Zerangue did not respond. Malnes then contacted the University of Louisiana Lafayette police department (copying Zerangue) notifying them that he was contacting the U.S. Attorney's Office to report "jurisdictional violations." Malnes then emailed the U.S. Department of Justice, Civil Rights Division and copied all parties involved.

At 6:59 p.m., Malnes emailed Zerangue to tell him to "go ahead and process the warrant that [Malnes] was threatened with." Zerangue forwarded all of the emails to Officer Battaglia with the Flagstaff Police Department. At 8:04 p.m., Malnes emailed Chief Sturm, alleging that Major Zerangue, Professor DeVine, and Aaron Martin were conspiring to illegally harass him.

On Sunday, March 24, at 12:53 p.m., Malnes emailed DeVine to tell her that he was appealing to Northern Arizona University to get his exams from the testing center. At 1:08 p.m. (central time), Flagstaff Police issued Malnes a misdemeanor citation for harassment. Shortly after receiving the citation, Malnes emailed numerous individuals, including the president of the university, stating that he was arrested for emailing state employees and that he was being harassed by the university. Malnes then sent an email to all the faculty and staff he had previously contacted, stating that Zerangue had him arrested. Malnes also

emailed Chief Sturn that he had reported Zerangue to the FBI for violating his rights.

On June 24, 2015, Malnes filed the Complaint in this case, alleging violations of his civil rights, conspiracy to violate his civil rights, and the torts of intentional infliction of emotional distress, defamation, and invasion of privacy.

DISCUSSION

As a preliminary matter, Malnes filed a Motion for Temporary Restraining Order (Doc. 47) claiming that Marianne E. Sullivan, Senior Assistant City Attorney for the City of Flagstaff sent Malnes a letter on letterhead which provides the address of the City Attorney's Office but enclosed the letter in an envelope bearing the return address of the Flagstaff Police Department, which Malnes interprets as an attempt to intimidate him. Malnes asserts that "[t]he envelope with its logo/symbol of the Flagstaff Police Department is a physical symbol of intimidation not unlike a cross that was burned into ones [sic] lawn, or a spray-painted gang sign." (Doc. 52 at 2.) The logo is the seal for the City of Flagstaff and exists on the letterhead and envelopes for every department of the City of Flagstaff. The seal—a drawing of mountains, a deer, and a flagpole flying the American flag, encircled with the words "City of Flagstaff Arizona Established 1882"—is not inherently a symbol of enforcement or intimidation. (Doc. 54 at 2.) Moreover, Sullivan is assigned to the Flagstaff Police Department, her office is physically

located at the Police Department, and Defendants have stated that the only envelope available to her at that time was one that displayed the Flagstaff Police Department's return address. (*Id.*)

To be granted a temporary restraining order, Malnes "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." *Id.* at 24. "[C]ourts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief . . . pay[ing] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* (internal quotations omitted). Malnes cites to no legal authority or cause of action by which he would be entitled to a temporary restraining order from this Court prohibiting the City Attorney from using the logo of the City for which she is an employee with an envelope displaying the return address of the location at which her office is physically located.

Malnes's request for a temporary restraining order precluding Sullivan from sending correspondence in envelopes bearing the seal of the City of Flagstaff and the return address of the Flagstaff Police Department is denied.

The remainder of the discussion addresses the claims Malnes alleges in his Complaint, none of which survive Defendants' motion for judgment on the pleadings.

I. Legal Standard

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) "is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Fajardo v. County of L.A.*, 179 F.3d 698, 699 (9th Cir. 1999). To survive a Rule 12(c) motion, a plaintiff must allege sufficient facts to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (finding applies to Rule 12(c) motions because Rule 12(b)(6) and Rule 12(c) motions are "functionally identical"). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* "When there are well-pleaded factual allegations, a court should assume

their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

II. Analysis

A. Malnes fails to state a facially plausible claim under § 1983 or § 1985.

Malnes stated in his Complaint that he admits to the repeated communications that formed the basis for his misdemeanor criminal citation, but he states that Major Zerangue "did not have the authority to contact the Flagstaff Police at all regarding phone calls made outside of his jurisdiction." (Doc. 1 at 3.) According to Malnes, "Zerangue improperly reported a crime," and therefore "when the Flagstaff Police responded to this illegal and improper request they in turn acted improperly and illegally by arresting the Plaintiff," thereby "violating his Civil Rights." (*Id.* at 4.)

Accepting the facts as they are pleaded in the Complaint, Malnes's conclusion that his civil rights were violated has no basis in the law. Common sense dictates that any person may report a crime—whether that person is a police officer or lay citizen, and whether that person resides in the jurisdiction where the crime was committed or in another city, state, or country. It was therefore not improper for Zerangue to

report Malnes's harassing conduct to the Flagstaff Police Department.

Assuming as true Malnes's factual allegation that he was arrested,[27] the facts in his Complaint clearly establish as a matter of law that the Flagstaff Police Department had probable cause to arrest him. "[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal quotations omitted). "To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *Id.* (internal quotations omitted). Officer Battaglia had reviewed forwarded emails evincing the harassment. He clearly had a reasonable ground to believe that Malnes

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[27] Major Zerangue's narrative report, which Malnes attached to his Complaint and conceded as true, establishes that Officer Battaglia issued Malnes a misdemeanor citation—not that he arrested Malnes. Under Arizona law, "[a]n arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest." A.R.S. § 13-3881. "Whether an arrest has occurred must be determined by examining the facts and circumstances of each case." *State v. Stroud*, 209 Ariz. 410, 412-13, 103 P.3d 912, 914-15 (2005). An "arrest" and the issuance of a misdemeanor citation are legally distinct. *See Agriesti v. MGM Grand Hotels, Inc.*, 53 F.3d 1000, 1002 (9th Cir. 1995). To the extent that Malnes's "arrest" is a disputed fact, the Court assumes its veracity for the purposes of judgment on the pleadings. *See Iqbal*, 556 U.S. at 679.

was committing the crime of harassment. Therefore, even assuming Battaglia arrested Malnes, his civil rights were not violated. *Beauregard v. Wingard*, 362 F.2d 901, 903 (9th Cir. 1966) ("[I]t should . . . be clear that where probable cause does exist civil rights are not violated by an arrest.").

Malnes further argues that his Sixth Amendment rights were violated because the prosecutor dismissed the charge against him: "This dismissal without the chance to confront witnesses is an affront to the U.S. Constitution." (Doc. 1 at 5.) Malnes's claim for conspiracy under section 1985 is based on his legal conclusion that dismissing charges is a violation of constitutional rights: "D'Andrea, Burke, and Brown collectively conspired to drop the charges." (*Id.*)

Prosecutors routinely exercise discretion in determining whether or not to drop charges. "In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). There exists a "presumption that a prosecutor has legitimate grounds for the action he takes," a presumption which courts must not "lightly discard," as the U.S. Supreme Court has held that "judicial intrusion into executive discretion of such high order should be minimal." *Hartman v. Moore*, 547 U.S. 250, 263 (2006). Here, Malnes failed to give *any* reason to challenge the legitimacy of the prosecutor's decision to dismiss his charges, but

rather seems to assert that dropping charges is *always* a constitutional violation. That position clearly does not accord with established law.

Because Malnes did not plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678, the Court grants judgment on the pleadings to Defendants on Malnes' § 1983 and § 1985 claims.

C. Malnes's fails to state facially plausible state claims.[28]

1. Defamation and Invasion of Privacy

Publication is a core element of the Arizona state torts of defamation and invasion of privacy. *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341, 783 P.2d 781, 787 (1989). "To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff's honesty, integrity, virtue, or reputation." *Id.* "[T]o qualify as a false light invasion of privacy, the publication must involve a major misrepresentation of the plaintiff's character, history, activities or beliefs, not

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[28] Defendants argue that Malnes's state claims are procedurally barred by Arizona's notice of claims statute and by the statute of limitations. (Doc. 38 at 11-13.) Because these state claims are patently frivolous and obviously fail on their merits—and because Malnes declined to respond to any of Defendants' arguments on the merits—the Court grants judgment on the pleadings to Defendants on the merits, rather than addressing the disputed procedural grounds.

merely minor or unimportant inaccuracies." *Id.* (internal quotations omitted).

Here, Malnes has failed to provide facts suggesting that any party to the suit "published" anything. To the extent that Malnes suggests that the police report was itself a "publication," no liability can derive from the police report in the absence of malice or intentional defamation, as the police have a duty to make such reports and they are privileged as a matter of law. *Carlson v. Pima Cty.*, 141 Ariz. 517, 519, 687 P.2d 1272, 1274 (App. 1983) *approved as supplemented*, 141 Ariz. 487, 687 P.2d 1242 (1984).

Moreover, Malnes has conceded the truth of the facts in the police report. "Substantial truth of an allegedly defamatory statement may provide an absolute defense to an action for defamation." *Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, 579, 343 P.3d 438, 449 (App. 2015), *review denied* (July 30, 2015). "If the underlying facts are undisputed, the court may determine the question of substantial truth as a matter of law." *Id.*

Assuming the veracity of the facts as pleaded by Malnes, the Court cannot draw the reasonable inference that Defendants could be liable for defamation or invasion of privacy, and therefore the claims fail as a matter of law. *See Iqbal*, 556 U.S. at 678.

2. Intention Infliction of Emotional Distress

Under Arizona law, "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. . . ." *Godbehere*, 162 Ariz. at 339, 783 P.2d at 785. "The element of 'extreme and outrageous conduct' requires that plaintiff prove defendant's conduct exceeded all bounds usually tolerated by decent society and caused mental distress of a very serious kind." *Id.* (internal quotations omitted). A claim of intentional infliction of emotional distress necessarily includes three elements: "(1) the defendant's conduct must be capable of being characterized as 'extreme and outrageous'; (2) the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that distress will result from his conduct; and (3) the defendant's conduct must have caused severe emotional distress." *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 149 Ariz. 76, 78-79, 716 P.2d 1013, 1015-16 (1986).

Given the facts of this case, reasonable minds cannot differ as to whether the prosecutor's decision to drop the charges against Malnes was "extreme and outrageous conduct." *Cf. id.* Nor could reasonable minds conclude that the Louisiana Defendants behaved outrageously by reporting the harassment, or that the Flagstaff Police Department behaved outrageously by issuing the misdemeanor citation. Thus, Malnes's intentional infliction of emotional distress claim fails as a matter of law.

CONCLUSION

Taking all of the allegations in Malnes's pleadings as true, Defendants are entitled to judgment as a matter of law on all claims.

IT IS THEREFORE ORDERED that the Motion for Judgment on the Pleadings by Defendants (Doc. 38) is **GRANTED**.

IT IS FURTHER ORDERED that the Motion for Temporary Restraining Order by Brian Edward Malnes (Doc. 47) is **DENIED**.

IT IS FURTHER ORDERED that the Complaint is dismissed with prejudice and all other pending motions in this case are moot (Docs. 22, 25, 31, 50, 56, 58, 63, 64, 67, 75, 79, 85, 86). The Clerk of Court is directed to enter judgment accordingly.

Dated this 8th day of January, 2016.

_____/s/_____

Honorable G. Murray Snow
United States District Judge