FILED
United States Court of Appeal
Tenth Circuit

January 22, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CYNTHIA ORTIZ,

Plaintiff - Appellant,

v.

CHARLES PERRY, individually;
MATTHEW POWELL, individually;
JOSH BURSON, individually,

Defendants - Appellees.

No. 19-5003
(D.C. No. 4:17-CV-00489-JHP-JFJ)
(N.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **CARSON**, Circuit Judges.

Pro se appellant Cynthia Ortiz seeks to appeal an order the United States District Court for the Northern District of Oklahoma entered pursuant to 28 U.S.C. §§ 1406(a) and 1631, transferring her civil suit to the United States District Court for the Northern District of Texas, where the case proceeded and judgment has now entered. For the reasons set forth below, the court dismisses the appeal for lack of jurisdiction. *See Kennedy v. Lubar*, 273 F.3d 1293, 1301 (10th Cir. 2001) (noting that appellate courts have a duty to confirm that jurisdiction is proper).

Absent a certification order under 28 U.S.C. § 1292(b), an order transferring a case between district courts is not typically appealable until the entry of final judgment. *See Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1517 n.7 (10th Cir. 1991). Here, however, the Northern District of Oklahoma denied Ms. Ortiz's request for a § 1292(b) certification. *See In re Ortiz*, No. 18-5057 (10th Cir. July 12, 2018) (dismissing Ms. Ortiz's attempt at interlocutory appeal for lack of jurisdiction because the district court denied § 1292(b) certification). And, although the Northern District of Texas has now entered final judgment in Ms. Ortiz's case, that court is not within the territory of this circuit. *See* 28 U.S.C. § 1294 (providing that appeals from reviewable decisions of the district courts shall be taken "to the court of appeals for the circuit embracing the district").

Once the Northern District of Texas opened the transferred case on May 30, 2018, jurisdiction transferred to that district and this court lost jurisdiction over any appeal. *See Chrysler Credit Corp.*, 928 F.2d at 1516-17. "The date the papers in the transferred case are docketed in the transferee court also forms the effective date that appellate jurisdiction in the transferor court is terminated; the transfer order becomes unreviewable as of that date." *Id.* Accordingly, this court is without jurisdiction to consider Ms. Ortiz's appeal. *See also In re Ortiz*, No. 18-5114 (10th Cir. Jan. 10, 2019) (dismissing Ms. Ortiz's post-transfer request for a writ of mandamus for lack of jurisdiction "because this case has been transferred to a district court outside of the Tenth Circuit").

The court notes that Ms. Ortiz has appealed the Northern District of Texas's order to the Fifth Circuit, where it remains pending. *See Ortiz v. Perry, et al.*, No. 18-11623 (5th Cir.).

APPEAL DISMISSED.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Lisa A. Lee
Counsel to the Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CYNTHIA ORTIZ,	)	
	)	
Plaintiff,	)	
	)	**Case No. 17-CV-489-JHP-JFJ**
v.	)	
	)	
CHARLES PERRY, individually;	)	
MATTHEW POWELL, individually;	)	
JOSH BURSON, individually; and	)	
DAVE ROBERSON, individually,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

Before the undersigned are Defendant District Attorney Powell's Opening Motion to Dismiss (ECF No. 31); Defendant Perry's Motion to Dismiss (ECF No. 42); Defendant Dave Roberson's Motion to Dismiss (ECF No. 44); and Defendant Burson's Motion to Dismiss (ECF No. 75). These motions were referred for Report and Recommendation.

I. Plaintiff's Factual Allegations

Plaintiff appears *pro se*. Plaintiff alleges the following facts in a sixty-one page, verified pleading entitled "Second Amended Petition Plaintiff's Second Amended Motion to Seek Injunctive Relief For False Imprisonment, Obstruction of Justice, Stalking and Harassment, Slander, Defamation and Libel, Malicious Prosecution, Providing False and Misleading Information to Law Enforcement, and to Seek a Restraining Order Against Defendants (ECF No. 19). Plaintiff met Defendant Charles Perry ("Perry"), a Texas State Senator and Texas resident, in 2010 when she served as a campaign consultant for one of Perry's friends. Perry allegedly harassed and stalked Plaintiff while she lived in Texas. Plaintiff moved from Texas to Oklahoma in September of 2014 "in order to get further away from" Perry. ECF No. 19 at ¶ 44(E). Plaintiff continues to reside in Oklahoma.

On May 19, 2015, Plaintiff sought to obtain an Order of Protection against Perry in Creek County, Oklahoma. The court denied her request due to lack of personal jurisdiction over Perry and failure to file a police report. On October 13, 2015, Plaintiff was approached at her place of employment, a gentlemen's club known as Lady Godiva's, by Defendant Dave Roberson ("Roberson"), an Oklahoma resident. According to Plaintiff, Roberson "identified himself [to Plaintiff] as Defendant Charles Perry's proxy or representative" and as Perry's "hit man." *Id.* at ¶ 2. Although Plaintiff had never met Roberson, he knew details about her personal and private life. Roberson told Plaintiff these details "in an apparent attempt to substantiate his claims that he had knowledge of [her] from Defendant Charles Perry." *Id.* Roberson threatened to physically harm Plaintiff unless she "recanted" the allegations previously made by Plaintiff in Creek County. Specifically, Roberson threatened to "arrange a false arrest or kill her if she continued to refuse to recant her claims" regarding Perry stalking and harassing her. *Id.* at ¶ 3. Between October 2015 and January 2016, Plaintiff became ill, and she believed Roberson was having her drinks at work poisoned. Roberson also "engaged in sexual assault, in grabbing her crotch, which is not normal behavior for most customers in a Gentlemen's Club." *Id.* at ¶ 6. Following an incident at the club on January 9, 2016, Roberson was asked to leave, due in part to threatening behavior directed at Plaintiff.

On January 12, 2016, Plaintiff filed a police report with the desk clerk of the Tulsa Police Department ("TPD Report"), accusing Roberson of stalking her on behalf of Perry. Plaintiff filed the TPD Report to obtain a protective order in Tulsa County against Perry and Roberson. The desk clerk told Plaintiff that a detective would contact her for a statement.

On January 29, 2016, before she was contacted by any detective, Sapulpa police officers arrested Plaintiff at her home in Sapulpa, Oklahoma. Plaintiff was charged with "Obstruction or Retaliation," in violation of Texas Penal Code Annotated § 36.06, which prohibits "threaten[ing]

to harm another by an unlawful act in retaliation for or on account of the service or status of another as a . . . public servant." Plaintiff alleges that Perry, Defendant Lubbock County District Attorney Matthew Powell ("Powell"), and Defendant Texas Ranger Josh Burson ("Burson"), "acting in collusion," caused these false criminal charges to be filed against her in Texas. Plaintiff alleges Perry made false accusations, including that her actions were "on account of [Perry's] job or due to his status," rather than due to her personal frustration about his harassment and threats. *Id.* at ¶ 44(D).

Plaintiff contends Burson, acting under color of law, "made false statements and intentionally, concealed material facts intending to mislead the Grand Jury and the Court, to obtain the intended outcome of gaining an illegal indictment." *Id.* at ¶ 21. Plaintiff alleges Powell, acting under color of law, "committed fraud in allowing Mr. Burson's perjured sworn statement to be presented in court," *id.* at ¶ 28, and "pursu[ed] illegal charges against [Plaintiff,] the victim of a crime in Tulsa, committed by his close friend," *id.* at ¶ 32. According to Plaintiff, Perry and Powell had the "intent to delay and prevent her from reporting the crime committed against her by Perry and Roberson." *Id.* at ¶ 36. Plaintiff further alleges Perry and Powell defamed her in various ways, including releasing her mugshot to the media and ordering her to undergo a mental competency examination. *Id.* at ¶¶ 33, 34, 72.

After being detained in Oklahoma and waiving extradition,[1] Plaintiff was extradited to Lubbock, Texas, on February 11, 2016. Plaintiff was held at the Lubbock County Detention Center from February 11, 2016 until April 5, 2016. On February 22, 2016, Powell and Perry caused Plaintiff to undergo a mental competency exam. At some point, Plaintiff's appointed criminal attorney in Texas, Ted Hogan ("Hogan"), advised Plaintiff that Powell "realized he had made a terrible mistake and wished he had not charged her with a crime or had her arrested." *Id.* at ¶ 37.

[1] At oral argument on the motions to dismiss, Plaintiff did not dispute she waived extradition.

Plaintiff was released on bond conditions on April 5, 2016. Plaintiff alleges she agreed not to tell the media about her wrongful arrest in exchange for Perry agreeing not to contact her. One of Plaintiff's bond conditions included mental health treatment in Tulsa from Dr. Jeanne Russell. According to Plaintiff, Dr. Russell concluded, on October 6, 2016, that Plaintiff's arrest "was a stalking escalation and done with intent to harm her and get her attention." *Id.* at ¶ 44. Plaintiff purportedly quotes a letter from Dr. Russell dated July 13, 2017, stating she found Plaintiff:

> to be an intelligent, articulate, and honest individual, focused on her legal case and what she sees as Mr. Perry's interference in her life. She has never expressed, nor have I sensed any hostility on her part to do Mr. Perry harm. Instead, she concentrates on how to avoid Mr. Perry so she can focus on her career and the care of her son.

ECF No. 19 at ¶ 43(B). While detained, Plaintiff lost her home, lost her job, and her teenage son was forced to move in with a cousin.[2]

Upon her return to Oklahoma in April of 2016, Plaintiff retrieved a phone message from a TPD detective following up on the TPD Report. Plaintiff alleges that, due to the passage of time, she lost evidence relevant to her TPD Report against Perry and Roberson. Plaintiff contends that Roberson and Perry "continued making threats after her return home from jail" and that she informed an attorney of these threats. *Id.* at ¶ 52(G).

On April 6, 2017, an attorney sent a letter to Lady Godiva's on Plaintiff's behalf requesting irregular work schedules due to Plaintiff being harassed. On April 12, 2017, Plaintiff was terminated from Lady Godiva's because of absences. Plaintiff alleges she missed work due to her wrongful detention and the continued harassment. The Texas criminal charges were ultimately dismissed, over a year after her release on bond, on June 28, 2017.

[2] Plaintiff's son submitted an affidavit describing the consequences he suffered from her detention. ECF No. 13.

II. Plaintiff's Causes of Action and Requested Relief

Plaintiff sets forth seven "causes of action." First, Plaintiff asserts "§ 1983 – False Imprisonment/False Arrest/Unreasonable Seizure" against Defendants Perry, Powell, and Burson, alleging they lacked cause to believe Plaintiff had committed any crime and violated her Fourth and Fourteenth Amendment rights, while acting under color of law. ECF No. 19 at ¶¶ 55-60. Second, Plaintiff asserts "[18 U.S.C.] § 1503, 1512, 1513 – Obstruction of Justice" against Perry, Powell, and Burson, alleging they caused her to lose evidence in support of her TPD Report. *Id.* at ¶¶ 61-66. Third, she asserts "[18 U.S.C.] § 1001, 1621, 1623 – Perjury/Making False Statements to Police" against Perry and Burson, alleging that Perry falsely accused Plaintiff of a crime and that Burson made false statements in an affidavit for her arrest. *Id.* at ¶¶ 67-70. Fourth, Plaintiff asserts "28 U.S.C. § 4101 – Slander, Defamation and Libel" against Perry, Powell, and Burson, alleging they damaged her reputation by falsely arresting her, ordering her to undergo a mental competency examination, and reporting her arrest to the media. *Id.* at ¶¶ 71-72. Fifth, Plaintiff asserts "28 U.S.C. § 2680 – Malicious Prosecution/Prosecutorial Misconduct/Fraud" against Burson and Powell, alleging they intentionally, and without probable cause, initiated and pursued the Texas charges. *Id.* at ¶¶ 74-78. Sixth, Plaintiff asserts "29 U.S.C. § 185 – Tortious Interference" against Burson, Powell, Perry, and Roberson, alleging they interfered with her employment contract at Lady Godiva's. *Id.* at ¶¶ 80-82. Seventh, Plaintiff asserts "Breeden Restatement (Second) Torts § 46 – Intentional Infliction of Emotional Distress" against Perry, Powell, Burson, and Roberson. *Id.* at ¶ 85. In the background section of her Second Amended Petition, Plaintiff has sections entitled "Stalking and Harassment" and "Aggravated Assault and Battery/Attempted Murder/Sexual Assault," describing Roberson's conduct. *Id.* at ¶¶ 1-13.

In construing *pro se* pleadings, courts must construe all arguments liberally but not cross the line into serving as an advocate. *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

The liberal construction of the plaintiff's complaint "does not relieve the plaintiff of the burden of alleging sufficient facts on which a recognized legal claim could be based." *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996). Although certain "causes of action" reference irrelevant federal criminal or civil statutes, Plaintiff's factual averments are sufficient to invoke 42 U.S.C. § 1983 and common-law tort theories of relief.[3] The undersigned construes Plaintiff's pleading as asserting § 1983 claims and common-law tort claims against Perry, Burson, and Powell. The undersigned construes her pleading as asserting common-law tort claims against Roberson.

As remedies, Plaintiff requests compensatory and punitive damages. She also requests preliminary and permanent injunctive relief in the form of a restraining order against all four Defendants. Plaintiff claims Defendants have engaged "in a repeated pattern of harassment and unwanted contact" and requests that the Court "prevent further injury to the Plaintiff." ECF No. 19 at ¶ 94.

III. Procedural History

Upon referral of Plaintiff's original motion for temporary restraining order and/or preliminary injunction (ECF No. 1), the undersigned issued a Report and Recommendation recommending: (1) denying the motion for temporary restraining order on grounds that Plaintiff failed to comply with procedural requirements of Federal Rule of Civil Procedure 65(b)(1); and (2) denying the motion for preliminary injunction on grounds that Defendants lacked notice. The undersigned recommended denying both motions without prejudice. Plaintiff objected, and Judge Payne adopted the Report and Recommendation. Plaintiff filed a First Amended Petition and motion for preliminary injunction (ECF No. 14) and then a Second Amended Petition and motion

[3] All other "federal" claims alleged by Plaintiff are either criminal statutes with no civil remedy, *see* 18 U.S.C. §§ 1503, 1512, 1513, 1001, 1621, 1623; a federal definition that does not create a cause of action, *see* § 28 U.S.C. § 4101 (federal definition of "defamation"); or a federal statute with no application to the facts alleged, *see* 28 U.S.C. § 2680 (exception to federal tort claims act); 29 U.S.C. § 185 (part of Labor Management Relations Act).

for preliminary injunction (ECF No. 19), and both motions for preliminary injunctive relief were referred to the undersigned for Report and Recommendation.

Defendants Powell, Perry, and Roberson received notice and filed motions to dismiss (ECF Nos. 31, 42, 44). Powell moved to dismiss based on lack of personal jurisdiction, prosecutorial immunity, and failure to state any claim for relief. Perry moved to dismiss on the same grounds, except prosecutorial immunity. Construing Plaintiff's allegations as asserting only federal claims, Roberson moved to dismiss all claims for failure to state a claim for relief. On January 2, 2018, Judge Payne referred the motions to dismiss for Report and Recommendation. Plaintiff filed responses to the motions to dismiss and various motions to compel jurisdictional discovery.

On January 30, 2018, the undersigned heard oral argument on the pending motions to dismiss and Plaintiff's motion to compel jurisdictional discovery. After inquiring as to topics Plaintiff desired to explore, the undersigned denied Plaintiff's motion to compel jurisdictional discovery and stayed all discovery pending determinations of jurisdiction. On February 9, 2018, Defendant Burson filed a motion to dismiss (ECF No. 75), which was referred on March 14, 2018. Burson moved to dismiss for lack of personal jurisdiction and failure to state a claim for relief.[4]

IV. Federal Subject Matter Jurisdiction

Plaintiff alleges the existence of diversity jurisdiction under 28 U.S.C. § 1332. ECF No. 19 at ¶ 7. However, Roberson and Plaintiff are both Oklahoma residents, and the Court lacks "complete diversity" of the parties. The Court therefore lacks diversity jurisdiction under 28

[4] Since the hearing, Plaintiff has filed other Emergency Requests for Injunctive Order Due to New Incident of Unwanted Conduct and related requests to compel discovery (ECF Nos. 88, 94, 98), wherein she alleges Defendant Perry caused two additional "proxy stalkers" to harass her at work on March 24, 2018, and March 31, 2018. Plaintiff again requests an "Injunctive Order of Protection prohibiting all contact with her direct or indirect, in particular, Defendant Perry." ECF No. 98 at 10. Plaintiff also informed the Court that she had consulted with a U.S. Attorney in the Northern District of Oklahoma in further attempt to restrain Defendants' conduct. ECF No. 87. The undersigned will make recommendations on pending motions for preliminary injunctive relief upon resolution of jurisdictional issues.

U.S.C. § 1332. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553 (2005) (explaining that, to have complete diversity, no defendant can be from the same state as any plaintiff). Plaintiff also alleges federal question jurisdiction, citing 42 U.S.C. § 1983 and other federal laws. ECF No. 19 at ¶ 7. Based on Plaintiff's allegations that Powell, Burson, and Perry violated her constitutional rights and § 1983, Plaintiff has adequately alleged federal question jurisdiction under 28 U.S.C. § 1331.

V. Powell, Burson, and Perry's Motions to Dismiss for Lack of Personal Jurisdiction – Rule 12(b)(2)

Defendants Powell, Burson, and Perry, all Texas residents, move to dismiss all claims against them pursuant to Federal Rule of Civil Procedure 12(b)(2) based on the Court's lack of personal jurisdiction.

A. Standard of Review/Written Materials Before the Court

A court has discretion to resolve a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction "in a variety of ways – including by reference to the complaint and affidavits, a pre-trial evidentiary hearing, or sometimes at trial itself." *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008). Because the undersigned elects to rule on the motions to dismiss without conducting an evidentiary hearing, Plaintiff "need only make a *prima facie* showing of personal jurisdiction to defeat the motion[s]." *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091-92 (10th Cir. 1998); *see also Anzures v. Flagship Rest. Grp.*, 819 F.3d 1277, 1279 (10th Cir. 2016) ("Because the district court decided the jurisdictional issue based only on the documentary evidence, [a plaintiff] must only make a *prima facie* showing of personal jurisdiction."). "The plaintiff may make this *prima facie* showing by demonstrating, via affidavit or other written materials, facts that if true would support jurisdiction over the defendant." *OMI Holdings, Inc.*, 149 F.3d at 1091. The court must "accept as true any allegations in the complaint

not contradicted by the defendant's affidavits, and resolve any factual disputes in the plaintiff's favor." *Melea Ltd. v. Jawer SA*, 511 F.3d 1060, 1065 (10th Cir. 2007).

Powell is the only Defendant who submitted written materials in support of his motion to dismiss. Plaintiff submitted written materials in the form of various "admittance of exhibits." *See, e.g.*, ECF Nos. 33, 39. The undersigned has fully considered all written materials and construed them in Plaintiff's favor. Submissions by the parties establish the following facts. On January 29, 2016, Burson presented an "Affidavit for Arrest Warrant" to a Lubbock County magistrate judge ("Affidavit for Warrant"). Burson testified he had reason to believe Plaintiff committed the Texas crime of "retaliation," in violation of Texas Penal Code Annotated § 36.06, by

> intentionally and knowingly harm[ing] or threaten[ing] to harm Charles Perry by an unlawful act, to wit: assault and/or false report to a police officer, in retaliation for or on account of the service or status of Charles Perry as a public servant, to wit: a State Senator.

ECF No. 32-1. In the Affidavit for Warrant, Burson relied upon the following: (1) emails Plaintiff sent to Perry in 2011; (2) quotations and other information gathered from Plaintiff's social networking websites, including a Twitter account under the subscriber name cynthiaortiz@PerryStalkerVic; and (3) Burson's communications with Sapulpa law enforcement officials, including information that Plaintiff had accused Perry of stalking and harassment on May 18, 2015. *Id.* A Texas magistrate judge executed an arrest warrant on January 29, 2016, and Plaintiff was arrested in Sapulpa, Oklahoma, on the same date. *Id.* On February 10, 2016, a Texas grand jury returned a felony indictment charging Plaintiff with "retaliation" against Perry, based on actions taken by her "on or about" January 12, 2016. ECF No. 32-3.

On April 5, 2016, Plaintiff was released on the following conditions: (1) Plaintiff and Perry shall have no contact of any kind; (2) Plaintiff shall submit to evaluation and treatment under the direction of Dr. Jeanne Russell, in Tulsa Oklahoma; and (3) Plaintiff shall consult with caseworkers from Lubbock County Private Defenders' Office as needed. ECF No. 33 at Ex. B.

Powell personally signed and filed the motion to dismiss on June 28, 2017, which states that "Defendant [Ortiz] continues counseling and has made no contact with the victim [Perry]." ECF No. 33 at Ex. A. Plaintiff also submitted an email from Hogan to Plaintiff discussing his conversations with "Matt Powell" regarding dismissal of her case. ECF No. 39 at Ex. N.

B. Legal Framework

In order to assert personal jurisdiction in a federal question case, the court must determine: "(1) whether the applicable statute potentially confers jurisdiction by authorizing service of process; and (2) whether the exercise of jurisdiction comports with due process." *Peay v. Bellsouth Med. Assistance Plan*, 205 F.3d 1206, 1209 (10th Cir. 2000) (quotations and citations omitted). Section 1983 does not authorize nationwide service of process, *see McChan v. Perry*, 229 F.3d 1164, 2000 WL 1234844, at *1 (10th Cir. Aug. 31, 2000), and Federal Rule of Civil Procedure 4(k)(1)(A) governs. It requires the court to apply the law of the state where the district court sits. Because Oklahoma's long-arm statute confers the maximum jurisdiction permissible under the Due Process Clause, the inquiry collapses into a single due process inquiry. *See Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1131 (10th Cir. 1991).

"Due process requires both that the defendant purposefully established minimum contacts within the forum State and that the assertion of personal jurisdiction would comport with fair play and substantial justice." *Old Republic Ins. Co. v Continental Motors*, 877 F.3d 895, 903 (10th Cir. 2017). "[A]n out-of-state defendant's contacts with the forum state may give rise to either general (all-purpose) jurisdiction or specific (case-linked) jurisdiction." *Id.* "General personal jurisdiction means that a court may exercise jurisdiction over an out-of-state party for all purposes" because the defendant's "affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." *Id.* (internal quotations omitted). "Specific jurisdiction

means that a court may exercise jurisdiction over an out-of-state party only if the cause of action relates to the party's contacts with the forum state." *Id.*

Plaintiff's allegations do not make a *prima facie* showing of any "continuous or systematic contacts" with Oklahoma by Powell, Burson, or Perry, such that they are essentially "at home" in an Oklahoma court. Instead, the issue is whether the Court may exercise specific jurisdiction. *See id.* ("Even though a defendant's forum state contacts may not support general jurisdiction, they may still meet the less stringent standard for specific jurisdiction if sufficiently related to the cause of action.").

The "minimum contacts" analysis for purposes of specific personal jurisdiction requires that: "[1] the defendant purposefully directed its activities at the forum state, and [2] the plaintiff's cause of action arose out of those activities." *Id.* at 909. If a plaintiff meets its burden of establishing minimum contacts, a court "must still inquire whether the exercise of personal jurisdiction would offend traditional notions of fair play and substantial justice." *Id.* at 908-09.

The "purposeful direction" requirement generally "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, . . . or of the unilateral activity of another party or a third person." *Id.* at 904-05 (internal quotations omitted). Most relevant to Plaintiff's allegations here, "[p]urposeful direction may [] be established . . . when an out-of-state defendant's *intentional* conduct targets and has substantial harmful effects in the forum state." *Id.* at 905. Generally, this method requires a showing of (1) an intentional action, (2) that was "expressly aimed at the forum state," (3) with "knowledge that the brunt of the injury would be felt in the forum state." *Id.* (internal quotations omitted).

The United States Supreme Court clarified that this "effects" method of proving "purposeful direction" has limits. *See Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014). First, a defendant's relationship with a forum state "must arise out of contacts that the defendant *himself*

creates with the forum State" because "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties." *Id.* at 1122 (internal quotations omitted). Second, the minimum contacts analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* The plaintiff "cannot be the only link between the defendant and the forum." *Id.* at 1122. Instead, specific jurisdiction against "an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* at 1123.

Walden is instructive in the instant case. In *Walden*, two residents of Nevada sued Walden, a Georgia police officer/deputized Drug Enforcement Agency agent, who had detained them in a Georgia airport and seized approximately $97,000 in cash. *See id.* at 1119. After seizing the funds, Walden "helped draft an affidavit to show probable cause for forfeiture of the funds and forwarded that affidavit to a United States Attorney's Office in Georgia." *Id.* The government never filed the forfeiture suit, and the DEA returned the money approximately eight months after the seizure. *See id.* at 1120. The plaintiffs filed suit in Nevada against Walden and other agents, alleging Walden violated their constitutional rights by knowingly submitting a false affidavit in support of seizure. *See id.* The Ninth Circuit Court of Appeals held the Nevada court had personal jurisdiction over Walden with respect to the "false affidavit" claim because Walden "'expressly aimed'" his affidavit at Nevada, knowing "that it would affect persons with a 'significant connection'" to Nevada. *Id.* at 1121. The Supreme Court reversed, finding that the Nevada court lacked specific jurisdiction over Walden. *See id.* The Court held that none of Walden's conduct took place in Nevada and that he "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." *Id.* at 1124. The fact that the plaintiffs suffered "foreseeable harm" in Nevada was not sufficient; the Ninth Circuit's reasoning "obscure[d] the

reality that none of Walden's challenged conduct had anything to do with Nevada itself." *Id.* at 1125.

The Supreme Court distinguished its "effects" decision in *Calder v. Jones*, 465 U.S. 783 (1984), upon which the Ninth Circuit had relied. The Court reasoned that the "reputation-based effects of the alleged libel connected the defendants to California, not just to the plaintiffs." *Id.* Because "the reputational injury" caused by the intentional tort "would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens," the tort "actually occurred in California." *Id.* Based on the Supreme Court's contrast of these two cases, some courts have couched their analysis as whether the facts have "more in common" with *Walden* or *Calder*. *See Morrill v. Scott Fin. Corp.*, 873 F.3d 1136, 1145 (9th Cir. 2017) (finding lack of personal jurisdiction because facts had "more in common" with *Walden* than *Calder*); *id.* at 1153 (Kleinfeld, J., dissenting) (describing *Walden* and *Calder* as "book ends" for determining whether jurisdiction exists).

C. Powell

Accepting Plaintiff's extensive allegations as true and resolving all factual disputes in her favor, Plaintiff has not made a *prima facie* showing that Powell expressly aimed any actions at Oklahoma with knowledge that the brunt of the injury would be felt in Oklahoma. Assuming Powell maliciously prosecuted Plaintiff, wrongfully detained her, and maliciously prolonged the criminal proceedings, all of Powell's relevant conduct took place within Texas. There is no indication Powell entered Oklahoma, filed documents in Oklahoma, or sent communications to Oklahoma during the alleged malicious prosecution of Plaintiff. Instead, Powell's alleged actions were taken in his role as the Lubbock County District Attorney and occurred exclusively in Texas. *Walden* teaches that Powell's awareness that Plaintiff would suffer foreseeable harm in Oklahoma is not sufficient to hale Powell into an Oklahoma court. *See Walden*, 134 S. Ct. at 1124-25;

Enutroff, LLC v. Epic Emergent Energy, Inc., No. 14-CV-2389-EFM-GLR, 2015 WL 419797, at *7 (D. Kan. Feb. 2, 2015) ("Applying *Walden* here, Enutroff's theory that the Court should assert personal jurisdiction simply because Defendants knew that their conduct would harm Enutroff in Kansas fails.").

With respect to any alleged defamatory actions taken by Powell, *see* ECF No. 19 at ¶¶ 40, 41, 72, Oklahoma was not the focal point of the alleged defamation. Plaintiff alleges Powell defamed her by making false statements to the media, by "allow[ing] the public dissemination" of her mugshot, and by ordering her to undergo a competency examination while detained in Texas. Plaintiff alleges Powell took these actions "seeking to cast her in a bad light knowing it would . . . prejudice a criminal proceeding." *See* ECF No. 19 at ¶ 33. Unlike the Florida publishers haled into California court in *Calder* because they specifically *targeted California* for their publication, Plaintiff's allegations indicate Powell's defamatory actions were directed at Texas.[5]

D. Burson

Accepting Plaintiff's extensive allegations as true and resolving all factual disputes in her favor, Plaintiff also has not made a *prima facie* showing that Burson expressly aimed any actions at Oklahoma with knowledge that the brunt of the injury would be felt in Oklahoma. Assuming Burson drafted a false and malicious affidavit, submitted that affidavit to a Texas judge, and played a role in causing the Texas grand jury to indict Plaintiff, all this conduct took place exclusively in Texas. Plaintiff does not allege Burson physically entered Oklahoma[6] or directed his false affidavit to a judge in Oklahoma. *Cf. Khorrami v. Rolince*, 493 F. Supp. 2d 1061, 1072 (N.D. Ill. 2007)

[5] Although Plaintiff alleges her mugshot ended up "all over Texas and Oklahoma," ECF No. 19 at ¶ 38, Plaintiff's allegations do not show any purposeful direction to Oklahoma by Powell.

[6] In the first Report and Recommendation (ECF No. 10), the undersigned mistakenly construed Plaintiff's Complaint as alleging that Burson personally arrested Plaintiff and transported her to Texas. Plaintiff now clearly alleges she was arrested in Oklahoma by Todd Lawrence of the Sapulpa Police Department. ECF No. 19 at ¶ 35.

(holding court had specific jurisdiction over federal law enforcement officer where officer in one state sent the affidavit to a judge *in the forum state*) (emphasis added). Like the agent in *Walden*, Burson "directed" his allegedly false affidavit and malicious conduct at Texas, knowing it would impact an Oklahoma resident in various ways. This is not sufficient to constitute "purposeful direction" to Oklahoma. *See Walden*, 134 S. Ct. at 1124-25.

Although Plaintiff did not allege Burson made contacts with Oklahoma, the undersigned has reviewed the record to determine if discovery is warranted. The Affidavit for Warrant reflects that Burson communicated with Sapulpa law enforcement during his investigation. In addition, it is possible that Burson or some other Texas law enforcement officer reached out to Oklahoma in relation to Plaintiff's arrest and detention in Oklahoma. Assuming Plaintiff had alleged and/or could demonstrate these facts, this would not be sufficient to establish purposeful direction. According to Plaintiff, Burson maliciously falsified or omitted facts from the Affidavit for Warrant for the purpose of having her arrested and extradited to Texas. Any minimal contacts Burson may have established with Oklahoma to effectuate the arrest cannot convert Oklahoma into the focal point of Burson's wrongful conduct. Under similar circumstances, courts have failed to find specific personal jurisdiction over non-resident officers. *See Bush v. Adams*, No. CIV.A. 07-4936, 2008 WL 4791647, at *13 (E.D. Pa. Nov. 3, 2008) (making phone calls to forum state to effectuate arrest warrant issued in another state was not enough to constitute minimum contacts because the "focal point" of harm was state of prosecution); *Boyd v. Arizona*, No. CIV. A. 08-4521, 2010 WL 376665, at *3 (D.N.J. Jan. 26, 2010) (although an officer's investigation resulted in the extradition of an individual from New Jersey, the actions "arose out of an Arizona investigation and would have been conducted regardless of Plaintiff's location"); *Rodgers v. Fallin*, No. CIV-12-171-D, 2013 WL 149723, at *5 (W.D. Okla. Jan. 14, 2013) (no personal jurisdiction over Missouri

officials, even though plaintiff was arrested in Oklahoma and extradited to Missouri on allegedly wrongful criminal charges).

Plaintiff has alleged foreseeable harm in Oklahoma flowing from these Defendants' actions. But Powell and Burson "expressly aimed" their challenged conduct at Texas, with knowledge that the brunt of injury – namely, a Texas criminal prosecution – would be felt in Texas. Due process limits "principally protect the liberty of the nonresident defendant – not the convenience of plaintiffs or third parties." *Walden*, 134 S. Ct. at 1122 (internal quotations omitted). A defendant does not "create sufficient contacts with [Oklahoma] simply because he allegedly directed his conduct at [Plaintiff] whom he knew had [Oklahoma] connections." *Id.* at 1125. On the *Walden/Calder* continuum, Powell and Burson's alleged connections with Oklahoma are more like the agent's connections in *Walden* than the defendant's connections in *Calder*. Powell and Burson's motions to dismiss should be granted for lack of personal jurisdiction.[7]

E. Perry

Perry's alleged contacts with Oklahoma are more extensive and must be analyzed separately. Plaintiff must make a *prima facie* showing that Perry purposefully directed his activities at Oklahoma and that her cause of action arose out of those activities. *Old Republic Ins. Co.*, 877 F.3d at 909.

[7] In this case, Plaintiff filed a detailed, sixty-one page pleading and written materials. The undersigned continues to find that jurisdictional discovery is unlikely to shed light on jurisdictional questions related to Powell. *See* ECF No. 70. Burson filed his motion after this denial of discovery. For reasons explained above, the undersigned finds discovery unlikely to assist Plaintiff in establishing purposeful direction by Burson. *See* 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2008.3 (3d ed.) ("A district court may properly refuse or limit jurisdictional discovery if the plaintiff has not made a sufficient showing that there may be a basis for exercise of jurisdiction, or if the proposed discovery seems unlikely to shed light on the jurisdictional question.").

1. Purposeful Direction

With respect to Perry's role in making the false accusation and setting the Texas criminal proceedings in motion, Perry's conduct was limited to Texas. Accepting Plaintiff's allegations as true, Perry: (1) fabricated a criminal charge against Plaintiff for his own benefit; (2) communicated that fabricated charge to Burson and Powell in Texas, who carried out Perry's scheme; and (3) caused Powell to defame her in various ways and prolong the Texas proceedings. Essentially, Plaintiff contends Perry used his influence to manipulate the Texas criminal justice system for his benefit. As with Powell and Burson, all of Perry's conduct took place in Texas and was not "expressly aimed" at Oklahoma, even though Perry targeted an Oklahoma resident. If the allegations against Perry ended there, the undersigned would likely conclude Perry lacked minimum contacts with Oklahoma. *See Nelson v. Bulso*, 149 F.3d 701, 704 (7th Cir. 1998) (individual's malicious and false statement in Tennessee about Wisconsin resident, which resulted in plaintiff's arrest in Wisconsin, found not sufficient to hale individual into Wisconsin court because "no relevant conduct occurred in Wisconsin").

However, unlike Powell and Burson, Perry's alleged contacts with Oklahoma go beyond his role in the Texas criminal proceedings. Plaintiff alleges Perry threatened and harassed her in Oklahoma through Roberson as his "proxy or representative" and as his "hit man." Plaintiff's allegations adequately invoke some type of "agency" or "conspiracy"-based contacts with Oklahoma. In his motion to dismiss, Perry makes two relevant arguments: (1) an Oklahoma judge previously ruled Oklahoma lacked personal jurisdiction over Perry, (ECF No. 43 at 5); and (2) Plaintiff's allegations regarding Perry's relationship with Roberson should be disregarded because they are "vague and unsupported" and based on "she said that he said that Perry said," (ECF No. 43 at 3).

a. Oklahoma Ruling

Perry urges this Court to follow Creek County Judge Mark Ihrig's finding, in August of 2015, that Oklahoma courts lacked jurisdiction over Perry. This ruling was made well before the events alleged by Plaintiff in this lawsuit. Plaintiff alleges Perry caused Roberson to harass and threaten her after this ruling. Plaintiff also alleges it was her act of seeking this protective order that led to increased harassment. Judge Ihrig's findings were based on a different record and are not conclusive here.

b. Agency-Based Contacts

Generally, "[f]or purposes of personal jurisdiction, the actions of an agent may be attributed to the principal." *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 55 (1st Cir. 2002) (citing cases); *Melea, Ltd.*, 511 F.3d at 1069-70 (discussing "agency theory" of personal jurisdiction). Under Oklahoma law, an actual agency relationship is created by "a principal's manifestation of consent to the agent that he is authorized to act on the principal's behalf and subject to his control." *Thornton v. Ford Motor Co.*, 297 P.3d 413, 419 (Okla. Civ. App. 2012). In addition, "[t]he existence of a conspiracy and acts of a co-conspirator within the forum may, in some cases, subject another co-conspirator to the forum's jurisdiction." *Melea, Ltd.*, 511 F.3d at 1069. "In order for personal jurisdiction based on a conspiracy theory to exist, the plaintiff must offer more than 'bare allegations' that a conspiracy existed, and must allege facts that would support a *prima facie* showing of a conspiracy." *Id.*

Plaintiff's agency and/or conspiracy allegations between Perry and Roberson are not overly "vague," as Perry argues. Plaintiff provided details regarding Roberson's interactions with her and the reasons she concluded Perry controlled Roberson's conduct, including: (1) Roberson introduced himself as Perry's proxy, representative, and hit man; (2) Roberson knew details about her personal life despite having never met her; and (3) Roberson had not been a prior visitor to the

club and, but for his connection with Perry, would have no reason to threaten her life. Roberson allegedly threatened her with criminal prosecution in Texas if she filed additional reports against Perry. Plaintiff filed the TPD Report against Roberson and Perry on January 12, 2016, and she was arrested on a claim related to Perry on January 29, 2016. Her allegations that Roberson threatened her, as an agent of or co-conspirator with Perry, are not overly "vague" and are consistent with Plaintiff's version of events. *See Dodson Int'l Parts, Inc. v. Altendorf*, 181 F. Supp. 2d 1248, 1254 (D. Kan. 2001) (allegations sufficient where complaint laid out what actions were taken in Kansas in furtherance of the conspiracy).[8]

Perry also argues her allegations are not "supported." But Perry did not submit an affidavit denying a relationship with Roberson or otherwise challenging her factual assertions. Without any affidavit from Perry, Plaintiff has no burden to further "support" her well-pled agency allegations at this stage of the proceeding.

These contacts through Roberson, if proven, constitute "intentional action [by Perry] expressly aimed at [Oklahoma] with the knowledge that the brunt of the injury would be felt in [Oklahoma]." *Anzures*, 819 F.3d at 1281; *see also Doyle v. Illinois Cent. R. Co.*, No. CVF 08-0971, 2009 WL 232267, at *6 (E.D. Cal. January 30, 2009) (finding *prima facie* case of personal jurisdiction over railroad company that allegedly caused investigators to harass plaintiffs in forum state, where railroad company denied hiring investigators, because any factual disputes must be resolved in favor of plaintiff on Rule 12(b)(2) motion). Plaintiff's factual allegations establish a *prima facie* case of Perry's purposeful direction of activity to Oklahoma.

[8] Plaintiff has not alleged facts connecting Burson or Powell to Roberson in any manner. Their alleged "conspiracy" with Perry occurred entirely in Texas.

2. Arise Out Of

The next question is what, if any, claims arose out of Perry's agency-based contacts with Oklahoma. *See Melea, Ltd.*, 511 F.3d at 1066 (specific personal jurisdiction exists over a defendant that purposefully directed its activities at the state's residents "if the cause of action arises out of those activities"). As to the level of causation required, the Tenth Circuit has not settled whether the contacts must be a "but for" or "proximate cause" of a claim. *See Dudnikov*, 514 F.3d at 1079 (refusing to "pick sides" between those two tests but rejecting a stricter "substantial connection" test). Under a but-for approach, "any event in the causal chain leading to the plaintiff's injury is sufficiently related to the claim to support the exercise of specific jurisdiction." *Id.* Under a "proximate cause" approach, courts must examine "whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *Id.*

Any tort claims against Perry premised on Roberson's conduct in Oklahoma "arose out" of Perry's alleged purposeful direction of activity to Oklahoma. But Plaintiff's § 1983 claim (and related torts) against Perry present a closer question.[9] Accepting Plaintiff's allegations as true, Perry caused Roberson to harass and threaten her with malicious prosecution unless she "recanted" accusations against Perry. Undeterred, Plaintiff filed the TPD Report accusing Perry and Roberson of stalking. Allegedly, Perry discovered the TPD Report and made false accusations against her in Texas. Under a "but for" test, the harassment could be viewed as a link in the causal chain and/or relevant to whether Perry later violated her Fourth Amendment rights. Plaintiff essentially alleges Perry threatened her in Oklahoma (via agent) and then carried out that threat in Texas. Given the entire alleged course of conduct, Perry could reasonably anticipate being haled into an

[9] To the extent Plaintiff attempts to assert a § 1983 claim on violations of criminal interstate stalking law, 18 U.S.C. § 2261A, this law does not provide a private right of enforcement and cannot support a § 1983 claim. *See Walsh v. George*, No. 1:14-CV-1503, 2015 WL 404125, at *7 (M.D. Pa. Jan. 29, 2015) (dismissing *pro se* § 1983 claim premised on interstate stalking criminal statute because it "does not provide a private right of enforcement").

Oklahoma court for the § 1983 claim. Plaintiff has created a *prima facie* case of minimum contacts over Perry for all claims asserted against him. These issues may be revisited at later stages of the proceedings. *See Arocho v. Nafziger*, 367 F. App'x 942, 950 (10th Cir. 2010) ("[T]he question of personal jurisdiction can always be revisited at a post-pleading stage of the proceedings, where the evidence may show that the relevant facts are other than they have been pled.").[10]

3. Fair Play and Substantial Justice

Once a plaintiff establishes minimum contacts, the burden shifts to a defendant to make a "compelling case" that other factors render jurisdiction unreasonable. *Dudnikov*, 514 F.3d at 1080. Relevant factors include:

> (1) the burden on the defendant, (2) the forum state's interests in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effectual relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states . . . in furthering fundamental social policies.

Id. Under Tenth Circuit law, there is a "sliding scale" between minimum contacts and reasonableness. *OMI Holdings, Inc.*, 149 F.3d at 1092. The weaker the showing on minimum contacts, the less a defendant needs to show in terms of unreasonableness to defeat jurisdiction. *Id.*

Perry's contacts with Oklahoma are fairly "weak." But Perry failed to make any arguments regarding unreasonableness or address the relevant five factors in any manner. *See* ECF No. 42.

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[10] If the Court loses personal jurisdiction over the § 1983 claim, it would lose jurisdiction over the entire case since Roberson and Plaintiff are both from Oklahoma. The doctrine of "pendent personal jurisdiction" would not apply because the only potential basis for personal jurisdiction is a pendent state-law claim. *See Leachman Cattle of Colo., LLC v. Am. Simmental Ass'n*, 66 F. Supp. 3d 1327, 1339 (D. Colo. 2014) ("[W]here neither set of claims could survive on its own, it feels fundamentally unfair to rely on each set of independently deficient claims to subject the defendant to jurisdiction in Colorado."); *see also Poor Boy Prods. v. Fogerty*, No. 3:14-CV-00633-RCJ, 2015 WL 5057221, at *8 (D. Nev. Aug. 26, 2015) ("[W]here the court's subject matter jurisdiction over the only claims giving rise to personal jurisdiction is not original but supplemental, the Court finds that fairness to the nonresident Defendant counsels dismissal or transfer of the case.").

Perry failed to make any case, let alone a "compelling case," that exercising jurisdiction against him in Oklahoma offends the traditional notions of fair play and substantial justice.[11]

VI. Roberson's Motion to Dismiss – Rule 12(b)(6)

In his motion to dismiss for failure to state a claim, Roberson limited his arguments to Plaintiffs' failure to state any claim for relief under federal statutes. ECF No. 44. After considering each cause of action naming Roberson as a defendant (ECF No. 19 at sixth and seventh causes of action), and the additional claim for assault and battery, (*id.* at ¶¶ 1-13), the undersigned agrees Plaintiff has failed to state any claim for relief against Roberson arising under federal law.

A. Legal Standard

In order to "withstand a Rule 12(b)(6) motion to dismiss, a complaint must contain enough allegations of fact, taken as true, 'to state a claim to relief that is plausible on its face.'" *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plaintiff must "nudge" his or her claims "across the line from conceivable to plausible" in order to survive a motion to dismiss. *Id.* In examining a complaint, a court must disregard "conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable." *Id.* at 1191. Under Tenth Circuit law, "plausibility" refers to the scope of the allegations in a complaint. *Id.* If allegations are so general that they encompass a wide array of conduct, much of it innocent, then a plaintiff has not nudged a claim across the line from conceivable to plausible. *Id.* "Plausibility" does not mean "likely to be true." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (citing *Twombly* for proposition that a well-pleaded complaint may proceed even if actual proof of the facts is

[11] Because Plaintiff failed to make a showing of minimum contacts with Powell and Burson, the undersigned need not reach the "fair play and substantial justice" analysis as to these Defendants. *AgJunction LLC v. Agrian Inc.*, No. 14-CV-2069-DDC-KGS, 2014 WL 3361728, at *11 (D. Kan. July 9, 2014).

improbable and recovery is very remote and unlikely). The standard is a "middle ground between heightened fact pleading . . . and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action." *Id.* (internal quotations omitted).

B. Sixth Cause of Action – Tortious Interference

In this cause of action, Plaintiff alleges "29 U.S.C. § 185 – Tortious Interference." The facts relate to Roberson's interference with her employment contract at Lady Godiva's. To the extent Plaintiff attempts to assert an independent violation of 29 U.S.C. § 185 or use this statute as an underlying basis for a § 1983 claim, this cause of action fails to state a claim for relief. This statute relates to "[s]uits by and against labor organizations," which is defined as an organization that exists for the purpose of "dealing with employers concerning grievances, labor disputes, wages . . . or other terms and conditions of employment." 29 C.F.R. § 451.3. The statute has no application to the facts. But, construed liberally, Plaintiff's allegations assert a common state-law tort for tortious interference with contract. Roberson did not move to dismiss such a claim, and it remains pending.

C. Seventh Cause of Action - IIED

The seventh cause of action is clearly a common-law tort claim for IIED. Roberson did not move to dismiss such claim, and it remains pending.

D. Assault and Battery

The undersigned construes Plaintiff's allegations as asserting an assault and battery claim against Roberson and Perry. *See* ¶¶ 1-13. Roberson did not move to dismiss such claim, and it remains pending.[12] The undersigned recommends granting Roberson's motion to dismiss any federal claims and otherwise denying the motion.

[12] Any allegations of poisoning or other assault by Roberson occurring prior to August 25, 2016 appear to be barred by the one-year statute of limitations. *See* Okla. Stat. tit. 95(A)(4).

VII. § 1631 Transfer

Under Tenth Circuit law, "[a] court may *sua sponte* cure jurisdictional and venue defects by transferring a suit under the federal transfer statutes, 28 U.S.C. §§ 1406(a) and 1631, when it is in the interests of justice." *Trujillo v. Williams*, 465 F.3d 1210, 1222-23 (10th Cir. 2006). Prior to dismissing claims lacking in jurisdiction, a court must "evaluate[] the possibility of transfer" under § 1631. *See id.* (district court abused discretion by failing to consider transfer of certain defendants over whom court lacked personal jurisdiction); *Shrader v. Biddinger*, 633 F.3d 1235, 1249-50 (10th Cir. 2011) ("We have recognized such transfers as a discretionary option under 28 U.S.C. § 1631 that should be considered to cure deficiencies relating to personal jurisdiction."). Courts consider whether the claims would be time-barred if dismissed, whether the claims are likely to have merit, and whether Plaintiff filed the action in good faith. *Trujillo v. Williams*, 465 F.3d at 1223 n.15. Courts also consider the "court system's efficient administration." *Whiting v. Hogan*, 855 F. Supp. 2d 1266, 1285 (D.N.M. 2012). Courts appear to have discretion to transfer an entire case, even including claims for which personal jurisdiction exists, if transfer is in the interests of justice. *See generally* 14D Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Juris. § 3827 (4th ed.). Transfer can only be made to a forum "where the case could have been brought at the time it was filed." 28 U.S.C. § 1631.

The undersigned recommends ordering briefs from all parties, not to exceed five pages, addressing whether a § 1631 transfer to the Northern District of Texas is appropriate in this case.[13] It appears Texas might be the most efficient forum to collectively resolve claims against Perry, Burson, and Powell, but a Texas court may lack personal jurisdiction over Roberson.

[13] Defendants need not reiterate "merits" arguments already made, such as prosecutorial immunity.

RECOMMENDATIONS

The undersigned recommends:

- Parties to file briefs not to exceed five pages on the issue of whether a § 1631 transfer is appropriate in this case, following the district judge's ruling on this Report and Recommendation.
- Powell's Motion to Dismiss (ECF No. 31); and Burson's Motion to Dismiss (ECF No. 75) be **GRANTED** in part for lack of personal jurisdiction pursuant to Rule 12(b)(2), but held in abeyance pending a ruling on whether the claims will be dismissed or transferred.
- Perry's Motion to Dismiss (ECF No. 42) be **DENIED** in part as to the issue of personal jurisdiction, but held in abeyance pending a ruling on whether the claims will be maintained or transferred.
- Roberson's Motion to Dismiss (ECF No. 44) be **GRANTED** as to any federal claims pursuant to Rule 12(b)(6) and **DENIED** as to remaining state-law claims.

OBJECTIONS

In accordance with 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b)(2), a party may file specific written objections to this report and recommendation. Such specific written objections must be filed with the Clerk of the District Court for the Northern District of Oklahoma by May 25, 2018.

If specific written objections are timely filed, Federal Rule of Civil Procedure 72(b)(3) directs the district judge to

> determine *de novo* any part of the magistrate judge's disposition to which a party has properly objected. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Id.; *see also* 28 U.S.C. § 636(b)(1). The Tenth Circuit has adopted a "firm waiver rule" which "provides that the failure to make timely objections to the magistrate's findings or recommendations waives appellate review of both factual and legal questions." *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir. 1996)). Only a timely specific objection will preserve an issue for *de novo* review by the district court or for appellate review.

SUBMITTED this 11th day of May, 2018.

Jodi F. Jayne

JODI F. JAYNE, MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

FILED
United States Court of Appeals
Tenth Circuit

February 15, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CYNTHIA ORTIZ,

Plaintiff - Appellant,

v.

CHARLES PERRY, individually;
MATTHEW POWELL, individually;
JOSH BURSON, individually,

Defendants - Appellees.

No. 19-5003
(D.C. No. 4:17-CV-00489-JHP-JFJ)
(N.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO**, and **CARSON**, Circuit Judges.

This matter is before the court on receipt from pro se appellant Cynthia Ortiz of two motions: (1) a *Notice of Error/Motion to Correct*; and (2) a *Motion for Full Panel Rehearing*.

The petition for rehearing is untimely. However, Ms. Ortiz embeds in the petition a request that the court extend the time within which she may file a petition because she is participating in the Oklahoma Attorney General's Protected Address Program, which delays her receipt of this court's orders. *See* Petition at 7.

Upon consideration, the court:

(1) Grants Ms. Ortiz's request for an extension of time to file a petition for rehearing and accepts the petition as filed;

(2) Construes the *Motion for Full Panel Rehearing* as a petition for panel and denies it as construed; and

(3) Denies the *Notice of Error/Motion to Correct.*

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Lisa A. Lee
Counsel to the Clerk