UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

N.E.L.; M.M.A.; E.M.M., Plaintiffs - Appellants, v. MONICA GILDNER; ANGELA WEBB; TINA ABNEY, Defendants-Appellees.	No. 18-3059 (D.C. No. 2:17-CV-02155-CM-JPO) (D. Kan.)

ORDER AND JUDGMENT*

(Filed Jun. 25, 2019)

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

Kansas child-and-family-services employees obtained an ex parte order from a Kansas state court to

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

take ten minor children, including plaintiffs, into immediate physical custody. They then arranged with Colorado authorities to execute the Kansas custody order in Colorado, where the children were temporarily located. Plaintiffs N.E.L. and M.M.A. later sued both Kansas and Colorado officials under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado.

The District of Colorado determined it lacked personal jurisdiction over the Kansas defendants and transferred the case against them to the United States District Court for the District of Kansas. The District of Kansas denied a motion to re-transfer the case to the District of Colorado, granted the defendants qualified immunity, and dismissed the case. Plaintiffs appeal the dismissal and the denial of their motion to re-transfer to Colorado. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

In a related appeal, we affirmed the District of Colorado's order dismissing the plaintiffs' first amended complaint against the Colorado defendants. *N.E.L. v. Douglas Cty.*, 740 F. App'x 920, 922-27, 934 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1320 (2019) (*N.E.L. I*). After those defendants were dismissed and the action against the Kansas defendants was transferred to the District of Kansas, plaintiffs filed their operative second amended complaint (SAC). The SAC added an additional plaintiff (E.M.M.) and two additional claims.

We detailed plaintiffs' factual allegations at length in *N.E.L. I. See id.* at 922-26. We need not repeat that discussion here. Essentially, plaintiffs contend that the defendants obtained ex parte orders of protective custody from a Kansas court based on omissions and misrepresentations, then acted in concert with the Colorado defendants in wrongfully executing the orders, resulting in plaintiffs' removal from Jane Doe's custody and their temporary placement in state custody.

The SAC includes claims for unlawful seizure in violation of the Fourth Amendment, unlawful detention in violation of the Fourth Amendment, deprivation of familial association in violation of the Fourteenth Amendment, conspiracy to deprive plaintiffs of their constitutional rights, exemplary damages, deprivation of the right to travel, and malicious prosecution and/or abuse of process. The district court granted the defendants qualified immunity on all claims.

"A motion to dismiss based on qualified immunity imposes the burden on the plaintiff to show both that [1] a constitutional violation occurred and [2] that the constitutional right was clearly established at the time of the alleged violation." *Doe v. Woodard*, 912 F.3d 1278, 1289 (10th Cir.), *cert. denied*, 2019 WL 1116409 (U.S. May 20, 2019) (No. 18-1173) (internal quotation marks omitted). In deciding the qualified immunity question the district court considered not only the allegations of the SAC but also documents the defendants provided in support of their motion to dismiss. It determined the uncontested facts in these documents showed that

"[m]ost of the claimed 'misrepresentations and omissions' set forth in [the SAC] are refuted . . . or are not material." Jt. App., Vol. II at 206. The district court concluded based on the uncontested factual allegations in the Child in Need of Care (CINC) petitions "combined with the parents' post-petition conduct, it would be reasonable for an official to believe an ex parte order of protective custody was justified." *Id.* at 207. On appeal, the plaintiffs argue that (1) the district court construed their complaint too narrowly and failed to address the defendants' actions taken in conspiracy with the Colorado defendants to unlawfully execute the ex parte orders; (2) the district court erred in deferring to the defendants' judgment; and (3) clearly established law prohibited the Kansas defendants from seizing plaintiffs from a private home without a warrant, a valid court order, exigent circumstances, or consent. They also argue the district court clearly erred by failing to re-transfer their case to the District of Colorado.

DISCUSSION

1. Grant of Qualified Immunity

"We review de novo the grant of a motion to dismiss under Rule 12(b)(6) due to qualified immunity." *Doe*, 912 F.3d at 1288. "At the motion to dismiss stage, it is the defendant's conduct as alleged in the complaint that is scrutinized for objective legal reasonableness." *Id.* (brackets and internal quotation marks omitted).

A clearly established right "should not be defined at a high level of generality." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (internal quotation marks omitted). Instead, "the clearly established law must be particularized to the facts of the case." *Id.* (internal quotation marks omitted). Although plaintiffs need not cite "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted).

A. Execution of Ex Parte Orders

Plaintiffs argue the district court erred by discussing only the defendants' conduct in seeking the ex parte orders and ignoring plaintiffs' claims concerning the execution of those orders and their subsequent detention. We need not decide whether the district court failed to fully and individually discuss plaintiffs' execution- and detention-related claims, because we may affirm on any basis supported by the record, *see Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011), and we elect to do so here.

In *N.E.L. I*, we determined the Colorado defendants (a social worker and deputy sheriff) were entitled

to qualified immunity in connection with plaintiffs' claims that they "failed to first register the ex parte Kansas order with a Colorado court as required by the Colorado UCCJEA, entered Dr. and Mrs. G's home without a warrant, and illegally seized [the children]," 740 F. App'x at 929; "relied on the facially invalid Kansas ex parte order to enter the home," *id.;* "deprived [N.E.L. and M.M.A.] of their Fourteenth Amendment right to familial association by requiring Mrs. Doe to leave Dr. and Mrs. G's home[,] by prohibiting N.E.L. and M.M.A. from leaving with Mrs. Doe[,] by prohibiting N.E.L. and M.M.A. from traveling with Mrs. Doe, Mr. Doe, and their grandparents[,] and by detaining N.E.L. and M.M.A. for the purpose of terminating Mr. and Mrs. Doe's parental rights," *id.* at 931; and conspired to violate N.E.L. and M.M.A.'s Fourth Amendment and Fourteenth Amendment rights, *see id.* at 931 n.22. We reasoned plaintiffs failed to show the alleged actions violated clearly established law. *See id.* at 929-31.

Likewise, the Kansas defendants are entitled to qualified immunity on plaintiffs' seizure and detention-related claims in this case, because plaintiffs have failed to present clearly established law that supports their Fourth and Fourteenth Amendment claims. For substantially the reasons stated in *N.E.L. I*, we affirm the dismissal on qualified-immunity grounds of plaintiffs' claims relating to the execution of the ex parte orders and plaintiffs' resulting detention.

B. Lawfulness of CINC Petitions and Ex Parte Orders

Plaintiffs also attack the lawfulness of defendants' conduct in filing the CINC petitions and obtaining the ex parte orders. They contend defendants misrepresented or omitted facts to create the impression there was probable cause to believe that plaintiffs met the definition of "children in need of care" and were in immediate danger. *See* SAC ¶ 213, Jt. App., Vol. II at 49 (internal quotation marks omitted). "[G]overnment officials' procurement through distortion, misrepresentation and omission, of a court order to seize a child is a violation of the Fourth Amendment." *Malik v. Arapahoe Cty. Dep't of Soc. Servs.*, 191 F.3d 1306, 1316 (10th Cir. 1999) (citation and internal quotation marks omitted).[1]

But plaintiffs must show the alleged omissions and misstatements were "so probative they would vitiate probable cause." *Id.* (internal quotation marks

[1] Plaintiffs argue the district court's conclusion that "it would be reasonable for an official to believe an ex parte order of protective custody was justified," Jt. App., Vol. II at 207, contradicts its earlier findings that (1) "the allegations in the [SAC]—that defendants sought the ex parte order[s] knowing there was no emergency and knowing they were omitting and misrepresenting relevant facts—[establish that they] violate[d] clearly established Tenth Circuit law," *id.* at 200, and (2) no travel restrictions prohibited plaintiffs' travel to Colorado. Assuming these district court findings are contradictory, we are not bound by them in conducting our de novo review. *Cf. Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1104 (10th Cir. 2017) ("[W]e need not address . . . alleged errors regarding the district court's analytical tools because our review is de novo.").

omitted). "[W]e measure probable cause by (1) removing any false information from the [document supporting a probable cause determination], (2) including any omitted material information, and then (3) inquiring whether the modified [document] establishes probable cause." *Patel v. Hall*, 849 F.3d 970, 982 (10th Cir. 2017) (addressing claim that arrest warrant included false information and/or omissions that vitiated probable cause); *cf. Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990) (discussing evaluation of probable cause in context of "judicial deception" claim involving social workers' investigation).

(1) Reliance on Matters Outside Complaint

As an initial matter, plaintiffs complain the district court improperly relied on matters outside the SAC without converting the motion to dismiss to a motion for summary judgment and without giving them notice and an opportunity to present evidence in opposition to the "summary judgment" motion. "Generally, a district court can consider . . . materials [outside a complaint] only by converting the motion to dismiss to a motion for summary judgment." *Lincoln v. Maketa*, 880 F.3d 533, 537 n.1 (10th Cir. 2018). But a district court may consider indisputably authentic documents that are central to the plaintiff's claim and referred to in the complaint without converting the motion to one for summary judgment. *Pace v. Swerdlow*, 519 F.3d 1067, 1072-73 (10th Cir. 2008). "We review for abuse of discretion a district court's refusal to convert a Rule

12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment." *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017).

Here, the district court considered the outside documents after concluding there was no dispute as to their authenticity, plaintiffs had referred to them in the SAC, and the facts in these documents were central to plaintiffs' claims. Plaintiffs fail to show it abused its discretion in doing so.

Plaintiffs argue that even if they conceded the *authenticity* of the outside documents, they did not agree that the records' *contents* were true. They accuse the district court of using the CINC petitions to refute the facts they specifically pled in the SAC. The district court noted that plaintiffs had raised no challenge to the underlying facts in the CINC petitions. Jt. App., Vol. II at 202 ("[W]hile plaintiffs allege the CINC petitions were not based on probable cause, they have not contested the facts in the CINC petitions."). Although plaintiffs now purport to dispute the underlying facts in the petitions, their generalized assertions about the source of defendants' knowledge of certain facts or the conclusions to be drawn from these facts fail to present any significant challenge to the specific underlying facts themselves.

(2) Probable Cause

The factual challenges plaintiffs raise are insufficient to show that defendants sought the CINC

petitions without probable cause, relying on known falsehoods and omissions, in violation of clearly established law. The facts as summarized by the district court provided probable cause for filing the CINC petitions. Plaintiffs' claims of misrepresentations or omissions are insufficient to demonstrate otherwise.

That brings us to the heart of plaintiffs' claim: that defendants lacked probable cause to believe that plaintiffs were in immediate danger when they sought ex parte orders. According to plaintiffs, the motion for the orders, filed by an assistant district attorney at defendants' behest, falsely stated to the court that an emergency existed because the family had fled the state of Kansas. In their opening brief, plaintiffs make six arguments why the motion and/or orders were not supported by probable cause, and were based on alleged false statements and omissions made to the issuing court: (1) a non-emergency hearing had been set on the CINC petitions, (2) the CINC petitions did not prohibit them from traveling, (3) defendants were aware of their precise location in Colorado, (4) defendants had no reason to believe they were in immediate physical danger, (5) the Does had not refused to participate in family preservation services, and (6) plaintiffs ultimately prevailed in the CINC proceeding when the judge found no probable cause to remove them from their parents. None of these challenges establishes that defendants proceeded without probable cause in violation of clearly established law.

First, the CINC court presumably was aware of its own docket and the fact that a non-emergency hearing

had been set. The omission of that fact did not conceal a lack of probable cause.

Second, the failure to mention that the CINC petitions lacked travel restrictions was not a significant omission. The gist of the motions was that the Does had left the state soon after the initiation of CINC proceedings and shortly before a scheduled hearing. This timing-related concern remained valid regardless of whether the plaintiffs were subject to express travel restrictions.

Third, the CINC filings did not state that the children's whereabouts were unknown. In fact, the motion for ex parte orders acknowledged that the Does' food stamp card was used in Littleton, Colorado on May 2, 2009. This is consistent with the representation in the SAC that the defendants "had information that the Doe family was in Littleton, Colorado as of May 2, 2009." Jt. App., Vol. II at 28 ¶ 99.

We note the SAC further alleges that when they sought the ex parte orders, defendants knew the "precise" address where the children were located. *Id.* at 29-30 ¶ 108. Given this alleged fact, defendants' representation in the motion that they merely knew locations where the Doe family's food stamp card had been used in Colorado may seem disingenuous. But disingenuousness is not enough. We must ask whether inclusion of the precise address where the plaintiffs were staying would have vitiated probable cause. Again, the core concern was that the children had been removed from the state after the initiation of CINC proceedings

and shortly before a scheduled hearing, not whether their precise location was known.[2]

Fourth, although defendants may not have had a basis to be concerned about plaintiffs' physical safety, for the reasons we have stated they did have a concern about their mental well-being. This concern formed the basis for the underlying petitions and the asserted emergency.

Fifth, the motion requesting ex parte orders asserted that family preservation services had been offered and that John Doe indicated he was willing to participate in the services. The motion did not state that the Does had rejected such services. To the extent the ex parte orders could have created a misleading impression by stating only that such services had been offered, without disclosing Mr. Doe's willingness to accept them, this did not vitiate probable cause. The court found *both* that reasonable efforts had been made to avoid removal of the children from their home, *and* that such reasonable efforts were not required because an emergency existed. Mr. Doe's willingness to

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[2] The ex parte orders themselves go further, affirmatively stating that the children's whereabouts are unknown. But it is unclear that statement can be attributed to the defendants. The SAC merely asserts, on information and belief, that the defendants "participated in intentionally crafting the language of the *Ex Parte* Orders." Jt. App., Vol. II at 30 ¶ 112. An allegation on information and belief that defendants participated in some unspecified way in drafting a court order that purportedly contained an inaccuracy falls short of plausibly asserting a basis for liability. *Cf. Madonna v. United States*, 878 F.2d 62, 66 (2d Cir. 1989) (fraud on the court must be pled with particularity).

participate in family preservation services arguably affected only the non-emergency-based rationale.

Sixth, the fact that plaintiffs ultimately prevailed in state-court proceedings does not mean that defendants' alleged misrepresentations and omissions violated clearly established law. For the reasons we have stated, plaintiffs fail to show such a violation.

Whether we would have concluded that an emergency existed under the facts alleged if the question were presented to us in the first instance is not the issue. Rather, it is whether the defendants, in making the alleged misrepresentations and omissions, violated clearly established law by knowingly presenting the need for emergency seizure and detention without probable cause. They did not. The district court therefore properly granted qualified immunity concerning this claim.

2. Denial of Motion to Re-Transfer

In the prior appeal we noted plaintiffs had failed to appeal the transfer of their claims against the Kansas defendants to the District of Kansas. *N.E.L. I*, 740 F. App'x at 927. In its order denying their motion to re-transfer, the district court concluded, based on the prior decision, that it was constrained by the "law of the case" doctrine. Jt. App., Vol. II at 183 (internal quotation marks omitted). It determined plaintiffs failed to assert any good reason for departing from that doctrine. *See id.* at 184.

The law of the case doctrine does not deprive a transferee court of its power to correct an erroneous transfer decision. *F.D.I.C. v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). A litigant dissatisfied with the transfer decision may still "bring[] a motion to retransfer in the transferee court." *Id.* at 222. But the prior transfer decision of a coordinate court should only be revisited in extraordinary circumstances, "such as where the initial decision was clearly erroneous and would work a manifest injustice." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (internal quotation marks omitted).

The district court determined that plaintiffs failed to demonstrate clear error. It noted the District of Colorado's rationale that all the defendants' conduct took place in Kansas with the goal of returning the children to Kansas, and that any contacts with defendants in Colorado were too slight to overcome the fact that most of the conduct plaintiffs complain of occurred in Kansas. Plaintiffs advance several arguments in opposition to this conclusion, *see* Jt. Opening Br. at 23-29, centered on the allegedly unlawful seizure and/or deprivations they contend took place in Colorado. But the District of Colorado granted qualified immunity to the Colorado defendants concerning those claims. For substantially the same reasons cited by the District of Colorado, we have determined the District of Kansas properly granted qualified immunity to the Kansas defendants. Thus, plaintiffs cannot show they had any likelihood of a different result had they been permitted to pursue their claims in the District of Colorado

rather than the District of Kansas, and any error in the transfer decision was therefore harmless.

CONCLUSION

We affirm the district court's orders dismissing the case and denying plaintiffs' motion for re-transfer to Colorado. We grant plaintiffs' unopposed motion to seal the CINC records contained in Volume III of the Appendix.

Entered for the Court

Gregory A. Phillips
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

N.E.L., M.M.A., and E.M.M., **Plaintiffs,** **v.** **MONICA GILDNER, et al.,** **Defendants.**	**Case No. 17-2155-CM**

MEMORANDUM AND ORDER

(Filed Mar. 1, 2018)

This matter is before the court on plaintiffs N.E.L., M.M.A., and E.M.M.'s Motion to Transfer Case (Doc. 130). Plaintiffs ask this court to reverse the United States District Court for the District of Colorado's decision to transfer the case to this court because it lacked specific jurisdiction over defendants.

This case was transferred to this court from the District of Colorado on March 14, 2017. Plaintiffs filed the present motion on September 25, 2017, more than six months after the case was transferred. Plaintiffs allege the District of Colorado erred in finding it lacked specific jurisdiction because the suit arises out of, or relates to, the contacts defendants had with two Colorado officials and their conspiracy to commit an unlawful seizure in Colorado, and because the deprivation of plaintiffs' constitutional rights occurred in Colorado.

Plaintiffs claim their legal basis for their motion to retransfer is found in *F.D.I.C. v. McGlamery*, 74 F.3d 218, 222 (10th Cir. 1996). In *McGlamery*, the Tenth Circuit found that a transferee court and transferee circuit have the power to "indirectly review the transfer order if the [plaintiff] moves in those courts for retransfer [sic] the case." *Id.* at 221. Courts considering a motion to retransfer, however, are constrained by the "law of the case" doctrine. *See Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991) ("Accordingly, traditional principles of law of the case counsel against the transferee court reevaluating the rulings of the transferor court, including its transfer order."). A prior ruling of a transferor court, therefore, may only be reconsidered when 1) the governing law has been changed by the subsequent decision of a higher court, 2) when new evidence becomes available, or 3) when clear error has been committed or to prevent manifest injustice. *Id.* Additionally, a party may choose to challenge the transferor court's decision to transfer a case for lack of personal jurisdiction on appellate review after final judgment. *McGlamery*, 74 F.3d at 222 ("In terms of the effectiveness of review after final judgment, a transfer for lack of personal jurisdiction provides no less opportunity for review than a transfer for improper venue under § 1406(a).").

In reviewing plaintiffs' motion, however, the court finds no good reason to overturn the decision of the magistrate judge in the District of Colorado, which was later adopted by the district court judge. Plaintiffs have not shown any intervening law changes or the

discovery of new evidence, nor have they made a sufficient case to show the District of Colorado committed clear error. Personal jurisdiction exists only when the suit arises out of or is related to the defendant's contact with the forum. *Bristol-Myers Squibb Co. v. Superior Court of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1780 (2017). The District of Colorado found defendants did not have the requisite contacts with Colorado, as all of defendants' conduct took place in Kansas with the goal of returning the children to Kansas. The fact they may have contacted officials in Colorado during the execution of a Kansas order or that the children were in Colorado at the time of their alleged illegal seizure are too slight of contacts to overcome the fact that most of the complained of conduct occurred in Kansas.

The court finds plaintiffs have failed to meet their burden to show this court should alter the District of Colorado's decision to transfer the case for lack of personal jurisdiction under the law of the case doctrine. The motion is therefore denied.

IT IS THEREFORE ORDERED that plaintiffs' Motion to Transfer Case (Doc. 130) is denied.

Dated March 1, 2018, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

N.E.L., M.M.A., and E.M.M., **Plaintiffs,** **v.** **MONICA GILDNER, et al.,** **Defendants.**	**Case No. 17-2155-CM**

MEMORANDUM AND ORDER

(Filed Mar. 7, 2018)

Plaintiffs N.E.L., M.M.A., and E.M.M. bring this action against defendants Monica Gildner, Angela Webb, and Tina Abney, for violations of their constitutional rights under 42 U.S.C. § 1983. Plaintiffs allege defendants—who at the relevant time were social workers with the Kansas Department of Children and Families ("DCF")—engaged in a series of acts which led to plaintiffs' unconstitutional seizure and detainment. The matter is now before the court on defendants' Motion to Dismiss Second Amended Complaint (Doc. 120). For the reasons set forth below, the court grants the motion.

I. Background

This case has a long, storied past. It comes before this court after it was transferred from the District of Colorado on March 14, 2017. Plaintiffs originally filed

their complaint in the District of Colorado on December 31, 2015, alleging constitutional violations against defendants as well as two Colorado state officials and Douglas County, Colorado. A magistrate judge recommended the district court grant defendants' motions to dismiss, finding the Colorado defendants were entitled to qualified immunity and that the court lacked personal jurisdiction over the Kansas defendants. (Doc. 91.) The district court judge adopted the recommendations and transferred the claims against the Kansas defendants to this court. (Doc. 98.) Upon transfer, plaintiffs filed a second amended complaint against defendants. This amended complaint is the subject of the current motion to dismiss.

Accepting the facts in the second amended complaint as true and viewing them in the light most favorable to the plaintiffs, the court will summarize the incident that gave rise to the current litigation.

Plaintiffs are three of John Doe and Jane Doe's ten children. In 2008, John Doe, Jane Doe, and their ten children lived in Johnson County, Kansas. In the spring of 2008, one of the younger children, who is not a party to this case, began exhibiting troubling behavior and making comments regarding improper behavior involving a relative of Jane Doe. The parents made a report to authorities at the Kansas Department of Social and Rehabilitation Services (now known as DCF) and advised them that none of their children had seen the relative, or any other members of Jane Doe's family, since 2006.

Defendant Monica Gildner was assigned by her superiors, defendant Angela Webb and defendant Tina Abney, to oversee the Doe family's case. Defendants referred the children to Sunflower House for interviews regarding the alleged abuse. After a criminal investigation into the allegations against the relative, law enforcement notified defendant Gildner that no charges would be pursued. Gildner then closed the Doe family's file. After the file was closed, however, the reporting child shared additional information, which the parents reported to DCF. Defendant Gildner referred the child again to the Sunflower House and reopened the DCF file. Another Doe child then reported abuse by the same relative and was referred to the Sunflower House. The children were also seeing a counselor.

At some point, defendant Gildner took the position that the abuse allegations against the relative were fabricated and that Jane Doe was suffering from postpartum depression and mental instability. She recommended the children continue counseling and that Jane Doe begin counseling. John Doe then attempted to cease contact with defendant Gildner because of her adversarial position to his wife and him and her "antagonistic, biased, and baseless positions." Defendants Webb and Abney refused to replace defendant Gildner with a different social worker. At some point after John Doe asked for defendant Gildner to be taken off the case, Gildner threatened to initiate court action and required that the entire family participate in Family Preservation Services, which plaintiffs allege was in retaliation for John Doe's complaint against her.

In February 2009, defendant Gildner received two more reports regarding the allegations by the second-reporting Doe child. Shortly thereafter, John Doe filed a formal complaint with DCF regarding defendant Gildner's inaction as he was concerned that no medical exams were ordered and no follow up interviews were being conducted for the child. Defendant Gildner sought a meeting with John Doe to discuss her concerns about the children being subjected to continued interviews about the allegations and how the family was going to move forward. Plaintiffs allege defendant Gildner believed the relative and maternal grandmother's denials of the alleged abuse over the children's claims. Defendant Gildner told John Doe that if he refused to meet with her or participate in recommended services that she may have to involve the District Attorney's Office and the court. Plaintiffs allege this meeting and the imposition of services was in retaliation for their complaint against her.

In March 2009, a third Doe child reported abuse allegations by the same relative to DCF. On April 20, 2009, the District Attorney's Office filed Child In Need Of Care ("CINC") petitions for all ten of the Doe children in the Johnson County, Kansas District Court. After the petitions were filed, the court set a non-emergency hearing for May 11, 2009. The children remained in John and Jane Doe's custody.

On April 29, 2009, John Doe notified defendant Gildner that he was willing to participate in Family Preservation Services. On April 30, 2009, defendant Gildner was notified by a relative of the Doe family

that Jane Doe and the children may have left town. Evidence suggested Jane Doe and the children had gone to Colorado. On May 4, 2009, defendant Gildner went to the Doe home and met John Doe, who told her any contact with him needed to be through his attorney. John Doe provided the address of where the family was in Colorado to the Overland Park, Kansas police.

On May 5, 2009, defendants sought an ex parte order of protective custody. An application for the order was filed by the District Attorney's Office and was granted by the Johnson County District Court. According to the order, the court found:

1. that remaining in the home would be contrary to the welfare of the children,

2. immediate placement was in the best interest of the children based on allegations of physical, sexual, mental, or emotional abuse in the CINC petitions and,

3. it was reported that the children had left the area, that John Doe had refused to provide any information about the whereabouts of the children, and that the whereabouts of the children were presently unknown.

Plaintiffs allege defendants "fraudulently misrepresented to the court the factual basis for obtaining the Ex Parte Orders and participated in intentionally crafting the language of the Ex Parte Order to make it appear that an immediate danger to the children existed when Defendants knew in fact that no such immediate danger existed or . . . they had no facts upon

which to form a reasonable suspicion that Plaintiffs were in immediate danger . . . " (Doc. 114, at 15–16.)

Plaintiffs allege the following facts in the ex parte order that falsely state or insinuate in a manner intended to alarm and mislead:

- That the parents had committed physical, sexual, mental, or emotional abuse when such statement had no basis in the facts alleged in the CINC petitions or in the facts known to defendants.
- That John and Jane Doe had refused Family Preservation Services when in fact John Doe had specifically accepted the offer of Family Preservation Services.
- That an emergency existed which threatened the safety of the children when defendants knew the Doe children were not in danger based on their actions:
    - in initially closing the DCF file
    - in disbelieving that the children's abuse had actually occurred
    - in filing CINC petitions only after John Doe had lodged a complaint against defendant Gildner
    - in not seeking immediate custody of the children upon filing the CINC petitions

- in failing and refusing to contact John and Jane Doe's attorney or the children's court-appointed guardian *ad litem* prior to seeing the ex parte order.

- That John Doe would not provide any information on the whereabouts of the children when he actually instructed defendant Gildner to contact his attorney, which she did not.

- That the whereabouts and safety of the children were unknown, when defendants knew that Jane Doe and the children had gone to Colorado and defendants made no attempt to obtain information from the children's guardian *ad litem*.

Plaintiffs also allege defendants intentionally or recklessly failed to disclose the following facts that, but for their omission, would have resulted in a denial of the ex parte order:

- The CINC petitions contained no prohibition against travel by John or Jane Doe or the children before the CINC hearing.

- The request for the ex parte order was in retaliation for John and Jane Doe's complaint against defendant Gildner and/or for their retaining counsel to represent them.

- Defendants had failed to contact either the children's guardian *ad litem* or John and Jane Doe's attorney before seeking the ex parte order.

- Defendants disbelieved the children's allegations of abuse by their relative.

- Defendants had no reasonable suspicion to believe any of the Doe children were in imminent danger of physical harm or neglect.
- The Doe children did not meet the definition of children in need of care under K.S.A. § 38-2202(d).

Plaintiffs allege that the ex parte orders lacked any objectively reasonable basis for believing the facts alleged in support were sufficient to establish probable cause to temporarily remove the children from the custody of their parents, and defendants applied for the orders without an objectively reasonable basis for believing there was probable cause.

On May 6, 2009, Jane Doe was with her ten children visiting family friends in Douglas County, Colorado. Lesa Adame, a social worker with the state of Colorado, and Carl Garza, an employee of the Douglas County, Colorado Sheriff's Office, went together to the home where Jane Doe and the Doe children were staying. Adame and Garza told the family friend, Dr. G, that they had a court order from the State of Kansas to seize custody of all ten of the Doe children. Adame and Garza entered the home with an order from the Colorado Department of Social Services and the Douglas County Department of Human Services that required Dr. G and his wife Mrs. G to take custody of the Doe children and follow through with a safety plan. The order also required Jane Doe to not have any contact with the children. Dr. and Mrs. G were allowed to personally transport the Doe children to Kansas, and upon arrival in Kansas, the children were transferred

to DCF custody. Dr. G requested temporary custody of the children or, alternatively, for the children to be placed in the custody of their paternal grandparents. DCF declined this request and instead separated the children and placed them with foster families.

II. Legal Standards

Under Rule 12(b)(6), a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Rule 8(a)(2) states that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." To withstand a motion to dismiss under 12(b)(6), 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 Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A claim is plausible when "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). When the complaint contains well-pleaded factual allegations, a court should "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

Generally, when reviewing a Rule 12(b)(6) motion, a court only considers the contents of the complaint. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Exceptions to this rule include: 1) documents that the complaint incorporates by reference, 2)

documents referred to in the complaint if the documents are central to the plaintiffs' claim and the parties do not dispute the documents' authenticity, and 3) matters of which a court may take judicial notice. *Id.*; *see also Indus. Constructors Corp. v. U.S. Bureau of Reclamation*, 15 F.3d 963, 964 (10th Cir. 1994) (courts may consider documents attached to the complaint when reviewing a 12(b)(6) motion); *Van Woudenberg v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000) ("[T]he court is permitted to take judicial notice of its own files and records, as well as facts which are a matter of public record."), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir.2001); *GFF Corp. v. Assoc'd Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) ("[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.").

In this case, plaintiffs have attached various documents to their second amended complaint, including a copy of the Ex Parte Order of Protective Custody filed in Johnson County District Court on May 5, 2009 (Doc. 114-1), and a "Safety Plan" from the Colorado Department of Social Services and Douglas County Department of Human Services (Doc. 114-2). In their motion to dismiss, defendants attached:

> 1) Motion for Request for Ex Parte Orders of Protective Custody filed by the Johnson County District Attorney on May 4, 2009,

> 2) copies of the CINC petitions for all three plaintiffs filed April 20, 2009 in Johnson County District Court,
>
> 3) copies of the Ex Parte Order of Protective Custody for all three plaintiffs filed May 5, 2009 in Johnson County District Court,
>
> 4) copies of the Motion for Pick-Up Order for all three plaintiffs filed May 5, 2009 in Johnson County District Court,
>
> 5) copies of the Order for Pick Up filed May 5, 2009 in Johnson County District court for all three plaintiffs, accompanied by an affidavit submitted by the District Attorney in support of the Pick-Up Order,
>
> 6) Journal Entry Nunc Pro Tunc filed on May 8, 2009 in Johnson County District Court ordering the Doe children be placed in custody of the Secretary of Social and Rehabilitation Services.

(Docs. 123-1-14 *SEALED*.)

Because there is no dispute to the authenticity of these documents, and because the plaintiffs refer to these documents in their complaint and the facts in the documents are central to plaintiffs' claims, the court will consider the exhibits without converting the motion into a motion for summary judgment.

III. Analysis

Plaintiffs' Second Amended Complaint includes the following claims:

1) Unlawful seizure in violation of the Fourth Amendment,

2) Unlawful detention in violation of the Fourth Amendment,

3) Deprivation of familial association in violation of the Fourteenth Amendment,

4) Conspiracy (with the Colorado officials) to deprive plaintiffs of their constitutional rights,

5) Exemplary damages,

6) Deprivation of the right to travel, and

7) Malicious prosecution and/or abuse of process.

All of the claims are related to defendants' conduct in seeking the ex parte order for protective custody, which, when it was granted by a judge in Johnson County District Court, resulted in plaintiffs' removal from Jane Doe's custody in Colorado and subsequent temporary placement in state custody.

Defendants move to dismiss the complaint arguing 1) the *Rooker-Feldman* doctrine bars plaintiffs' claims, 2) they are entitled to absolute immunity, 3) plaintiffs failed to state a claim as the seizure was inherently reasonable, 4) plaintiffs failed to state a claim for deprivation of their right to familial association, 5) plaintiffs failed to state a claim for malicious prosecution or abuse or process, 6) plaintiffs failed to state a claim for deprivation of the right to travel, 7) they are entitled to qualified immunity, 8) plaintiffs failed to establish defendant Webb and defendant Abney's

personal involvement, and 9) the claims are barred by the statute of limitations.

a. Rooker-Feldman

Defendants insist that the *Rooker-Feldman* doctrine applies to plaintiffs' claims and, therefore, this court does not have jurisdiction over the case. Because this implicates whether the court has subject matter jurisdiction over the case, the court will take up this argument first.

The *Rooker-Feldman* doctrine "precludes lower federal courts 'from effectively exercising appellate jurisdiction over claims actually decided by a state court and claims inextricably intertwined with a prior state-court judgment.'" *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1193 (10th Cir. 2010) (citing *Mo's Express, LLC v. Sopkin*, 441 F.3d 1229, 1233 (10th Cir. 2006)). The doctrine extends to "all state-court decisions—final or otherwise . . . and covers not only claims actually decided by the state court but issues inextricably intertwined with such claims." *Atkinson-Bird v. Utah, Div. of Child & Family Servs.*, 92 F. App'x 645, 647 (10th Cir. 2004). The Supreme Court has recently clarified the "narrow scope" of the doctrine, noting it applies only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Wagner*, 603 F.3d at 1193 (citing *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). In

deciding whether the doctrine applies, courts should determine whether "the state-court judgment *caused*, actually and proximately, the *injury* for which the federal-court plaintiff seeks redress," and whether success on the claims "would require the district court to review and reject [the state court's] judgments." *Id.* For example, the doctrine would bar a claim for constitutional violations if the alleged violation was the result of the state court's order. *See Atkinson-Bird*, 92 F. App'x at 647 ("[A]n unsuccessful state litigant cannot challenge an adverse state judgment and circumvent the rule of *Rooker-Feldman* simply 'by bringing a constitutional claim under the civil rights statutes.' ")

Defendants claim the *Rooker-Feldman* doctrine applies, arguing plaintiffs are effectively seeking appellate review of the ex parte order of protective custody. Defendants note that orders of temporary custody are appealable under K.S.A. § 38-2273, therefore the ex parte order was a final, appealable order and plaintiffs chose not to seek appellate review and are prohibited from seeking such review in this court. The doctrine further precludes subject matter jurisdiction because the relief plaintiffs seek is "inextricably intertwined" with the ex parte order.

First, there is no indication the ex parte order was a final, appealable order. The Kansas Court of Appeals has held that an ex parte order is not appealable because it does not fall under the definition of "temporary custody order" in K.S.A. § 38-2243 and because "[e]x parte orders issued . . . upon a verified application are designed to be short-lived orders that remain in effect

until the temporary custody hearing. . . ." *In re K.W.C.*, Nos. 112,904–907, 2015 WL 6112013, at *5 (Kan. Ct. App. Oct. 16, 2015). Regardless, the doctrine applies to all state-court decisions "final or otherwise," including issues "inextricably intertwined with such claims." *Atkinson-Bird*, 92 F. App'x at 647.

Although defendants argue that plaintiffs' claims in substance attack the state-court order and/or are "inextricably intertwined" with the issues in the order, the court finds they do not. Plaintiffs allege that defendants' pre-order conduct—including misleading the court with factual misrepresentations and omissions and seeking an ex parte order fully knowing there was no probable cause to do so—ultimately led to their illegal seizure. Plaintiffs are not asking for the invalidation of the ex parte order, rather, they seek relief for defendants' alleged illegal actions which led to the issuance of that ex parte order. *See Kovacic v. Cuyahoga Cnty. Dep't of Children & Families*, 606 F.3d 301, 310 (6th Cir. 2010) (finding the *Rooker-Feldman* doctrine did not apply to plaintiffs' Fourth Amendment claims and claims for due process violations because they did not "seek review or reversal of the decision of the juvenile court to award temporary custody to the state, but instead focus[ed] on the conduct of Family Services and of the social workers *that led up to* the juvenile court's decision to award temporary custody to the County."). Because the Supreme Court has advised that the *Rooker-Feldman* doctrine has a "narrow application," the court finds it does not apply in this case and subject matter jurisdiction exists over plaintiffs' claims.

b. Absolute Immunity

Defendants next argue they have absolute immunity from suit based on the nature of their functions. Absolute immunity is "necessary to assure that judges, advocates, and witnesses can perform their respective functions, often controversial, without concern about possible repercussions." *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990). The Supreme Court has applied a "functional approach" when determining whether particular acts of government officials are eligible for absolute immunity, looking to "the nature of the function performed, not the identity of the actor who performed it." *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). The Tenth Circuit has held that "the more distant a function is from the judicial process, the less likely absolute immunity will attach." *Snell*, 920 F.2d at 687. So, for example, an officer applying for a warrant is not absolutely immune from suit, but a prosecutor seeking an indictment may enjoy absolute immunity. *Id.* The Tenth Circuit has found specifically that social workers are not absolutely immune from suits involving their investigative functions. *See Malik v. Arapahoe Cnty. Dep't of Soc. Servs.*, 191 F. 3d 1306, 1314 (10th Cir. 1999) (denying absolute immunity for social workers in a suit related to their "participation in the investigative act of seeking a placement order). In contrast, the Tenth Circuit has granted absolute immunity for social workers in suits related to their functions as a testifying witness. *See English v. LeBaron*, 3 F. App'x 872, 873 (10th Cir. 2001).

Because the facts in the second amended complaint allege defendants committed constitutional violations when they relied on factual misrepresentations and omissions when they recommended the District Attorney seek an ex parte order of protective custody, the court finds absolute immunity does not apply, as defendants' conduct involved their investigative function.

c. Qualified Immunity

Defendants next argue that if they are not absolutely immune, they are at least entitled to qualified immunity. Qualified immunity recognizes "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). It protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). A defendant is entitled to qualified immunity unless the plaintiff can show "(1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct." *Estate of Booker v. Gomez*, 745 F.3d 405, 411 (10th Cir. 2014). The Supreme Court has held a court has the discretion to consider "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

Following this instruction from the Supreme Court, the court will first address whether defendants violated clearly established law. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). For a right to be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Determining when a law is clearly established ordinarily requires "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 plaintiff maintains." *Booker*, 745 F.3d at 427. The Tenth Circuit has adopted a sliding scale approach to determine when law is clearly established. *Id.* Under the sliding scale approach, "the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to establish the violation." *Id.* The question we must answer, therefore, is whether officials—in this case social workers—"of reasonable competence could disagree about the lawfulness of the challenged conduct." *Gomes v. Wood*, 451 F.3d 1122, 1136 (10th Cir. 2006). If so, the court must grant defendants qualified immunity.

The Fourth Amendment prohibits the government from unreasonably removing children from their home. *See Burgess v. Houseman*, 268 F. App'x 780, 783 (10th Cir. 2008) (finding an unreasonable seizure when a

social worker helped seize and detain a child without a warrant or probable cause to believe the child would be abused if she remained in her mother's custody); *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1244 (finding a child was unreasonably seized within meaning of the Fourth Amendment when state actors removed him from his home under belief that his health was at risk.). Plaintiffs maintain that in the Tenth Circuit, the law is clearly established that obtaining a court order to seize a child through distortion, misrepresentation, and omission is a violation of the Fourth Amendment. *See Malik*, 191 F.3d at 1316 ("Officials cannot reasonably assume that the law permits them to obtain a custody order in retaliation for a parent's retaining counsel and through reckless omission of probative facts to a magistrate.").

In *Malik*, a police officer and state social worker sought an order from a magistrate judge to remove a four-year-old girl from her mother's custody so that they could interview her regarding nude photographs taken of her. *Id.* at 1310–13. In seeking the order, the social worker failed to inform the judge that authorities did not consider the girl to be in imminent danger, that the photographs were five months old and taken by an uncle who did not live in the area, that the mother had already been interviewed, that the officer had already cancelled one of the previously scheduled interviews with the child, and that a medical professional had expressed doubt that the child had bruises on her in the photographs. *Id.* at 1311–12. The social worker also failed to mention that the mother had

retained an attorney who had insisted on certain conditions for the child to be interviewed, and proposed alternative interview dates should officials agree to the conditions. *Id.* at 1310. The magistrate judge granted the order and once the child had been removed from her mother's custody, another officer allegedly told the mother, "this wouldn't have happened if you hadn't gotten an attorney." *Id.* at 1312. The Tenth Circuit found the officer and social worker were not entitled to qualified immunity because "[o]fficials' desire to circumvent an attorney's attempt to negotiate protective conditions for an interview does not rise to the level of an extraordinary circumstance dangerous to the child . . . ," because the magistrate judge's order was procured because of relevant factual omissions, and because it was clearly established that an individual's rights are violated when a police officer retaliates against him for hiring an attorney. *Id.* at 1315–16.

Defendants, however, note that the Tenth Circuit has found qualified immunity for social workers in suits against them for violations resulting from the removal of children. In *Gomes v. Wood*, for example, the Tenth Circuit found that because officers of reasonable competence could disagree as to whether an immediate threat to the safety of the child did not exist, the social worker—who had recommended removal of a child who had suffered a skull fracture—was entitled to qualified immunity. 451 F.3d at 1137. In granting qualified immunity, the Tenth Circuit emphasized that "considerable deference should be given to the judgment of responsible government officials in acting to

protect children from perceived imminent danger or abuse." *Id.* Further, qualified immunity should only be denied if, when presented with all relevant information in the case, a reasonable official would have "understood that there were no 'emergency circumstances which pose an immediate threat to [the child's] safety.' " *Id.* In deciding whether officials have a reasonable suspicion of threat to a child, courts must consider "*all relevant circumstances*, including the state's reasonableness in responding to a perceived danger, as well as the objective nature, likelihood, and immediacy of danger to the child." *Id.* at 1131.

The court agrees with plaintiffs that the allegations in the second amended complaint—that defendants sought the ex parte order knowing there was no emergency and knowing they were omitting and misrepresenting relevant facts—does violate clearly established Tenth Circuit law. Yet the Tenth Circuit has recognized the difficulty social workers face in making "on-the-spot judgments on the basis of limited and often conflicting information . . . with limited resources to assist them," and has emphasized that courts must consider all relevant circumstances when deciding whether an official acted within the bounds of the law. *Id.* at 1138, 1131. Therefore, the court must consider not only plaintiffs' allegations but also the uncontested documents provided by defendants in support of their motion to dismiss to determine whether any official could disagree with the reasonableness of defendants' conduct.

As mentioned above, plaintiffs claim constitutional violations based on defendants' alleged omissions and misrepresentations in seeking the ex parte order of protective custody. Plaintiffs argue defendants knew no exigencies existed to justify removing them from their mother's custody and that the ex parte order was invalid, and therefore, their removal was a seizure under the Fourth Amendment. Again, the Tenth Circuit has instructed us to give deference to officials who are acting to protect children, and to consider all the relevant circumstances. In reviewing the documents attached to defendants' motion to dismiss, the court will briefly summarize defendants' and the Johnson County District Attorney's positions in regard to plaintiffs, their siblings, and John and Jane Doe.

In the Motion for Request For Ex Parte Orders of Protective Custody, the Johnson County District Attorney stated that CINC petitions had been filed for all ten children and that the facts alleged in the petitions "pursuant to the investigation of [DCF], remained the primary concern the State has for the welfare of the minor children." (Doc. 123-1 *SEALED*, at 2.) After the petitions were served on the parents, John Doe contacted defendant Abney to express his willingness to cooperate with the DCF investigation and services. This information was passed along to defendant Gildner. Defendant Webb contacted John Doe and he also expressed to her he wanted to work with Family Preservation as soon as possible, and that he intended to cooperate with DCF. On May 1, defendant Gildner received a message from the children's maternal

grandmother, who stated that one of her children had driven by the Doe home and had seen them loading luggage into their vehicle, and that later the home was dark and the family's vehicle was gone. The family's social worker for SRS benefits stated that the family's food stamp card had been used in Colorado on May 2 and May 3. The District Attorney then stated "[b]ased on this information, [DCF] has reason to believe that [Jane Doe] and the children have left the State of Kansas. Based upon these activities as well as the facts as outlined in the petitions filed of record, the State believes that the children may be at imminent risk for harm." (Doc. 123-1 *SEALED*, at 3.)

Because the motion for the ex parte order was based partially on the allegations in the CINC petitions, it is necessary to summarize those here. It is important to note that while plaintiffs allege the CINC petitions were not based on probable cause, they have not contested the facts in the CINC petitions. According to the petitions, filed by the Johnson County District Attorney, DCF began working with the Doe family in June 2008 after allegations of sexual abuse of one of the non-plaintiff children arose. This non-plaintiff child alleged that a maternal relative had touched her inappropriately. The Doe family was estranged from the maternal relatives because Jane Doe felt it was inappropriate that this same maternal relative had been tickling her children.

The non-plaintiff reporting child as well as two other non-plaintiff children were interviewed about the allegations. The maternal relative was also

interviewed by police regarding the allegations, which he denied. Because the allegations were unsubstantiated, DCF closed the case. DCF recommended Jane Doe seek counseling to address anger toward her family, as she had reported she had been sexually abused by a relative.

In November 2008, DCF received another report alleging the original reporting non-plaintiff child had disclosed additional information about the alleged sexual abuse by the maternal relative. The child was again interviewed, but the details were inconsistent with the original report. In December 2008, another non-plaintiff child reported that she and the original reporting non-plaintiff child were given pills, shown dead animals, and forced to watch pornography on the maternal relative's computer. Jane Doe reported that the maternal relative threatened to kill the children if they told anyone about the alleged abuse and that he gave the children injections, showed them pornography on his computer, and forced them to watch animals being shot and mutilated. She also alleged the relative pushed his mother down the stairs in front of the children.

DCF notified law enforcement about these allegations and concern was expressed regarding Jane Doe's mental stability as she recently had given birth and had a history of post-partum depression. DCF was concerned that because of the "fantastic nature" of the allegations, Jane Doe may be experiencing delusions related to the allegations. After further interviews of the children, law enforcement executed a search

warrant for the computers in the maternal relative's home. There was no pornography found on any of the computers. Based on the children's statements, an elder abuse investigation was also initiated, but was closed as the allegations were unconfirmed. Through this investigation, however, officials found out that the maternal relative and Jane Doe's mother and father had loaned the Doe family tens of thousands of dollars to help with necessities with the understanding the Doe family would pay them back. When the maternal relative confronted John and Jane Doe about how the money was being spent, John and Jane Doe became upset and cut off contact with the maternal side of the family. John and Jane Doe had also been involved with several lawsuits and had legal issues related to passing bad checks. Jane Doe had allegedly been soliciting money on the internet and the family had to file for bankruptcy. The maternal side of the family had expressed concern for the children's physical and emotional well-being and Jane Doe's mental health and safety. DCF had also received documentation that Jane Doe had been participating in online chat groups for victims of sexual abuse and had been asked to leave due to people being uncomfortable with her and feeling that she had been lying about allegations she had been reporting.

The family initially had accepted DCF's offer of Family Preservation Services, but later declined, stating the children were going to continue therapy and that Jane Doe was going to begin therapy elsewhere. In March 2009, John Doe called DCF to express his

disappointment with their services. Shortly after, DCF was informed by Leawood, Kansas and Kansas City, Missouri Police Departments that law enforcement and the FBI were involved in an investigation regarding allegations that the maternal relative had taken some of the Doe children to a bar in Kansas City, Missouri, had given them shots, stripped them naked, and made them lick a dead rat. Both agencies declined to further investigate the allegations based on lack of information.

DCF expressed concern about the "fantasticality" of the allegations and the high frequency of reports from the family. DCF believed that much of the information reported by the Doe family was untrue based on reports from others interviewed during the investigation. John Doe had reported he would continue to seek action against the maternal relative, including filing a lawsuit, and DCF was concerned about the emotional impact this would have on the children due to their continued exposure to interviews and investigations because of their parents' action. DCF reported they had attempted to discuss these concerns with John and Jane Doe, but the first meeting was rescheduled, and the second meeting was canceled by John Doe, who had expressed he no longer wanted to cooperate with DCF. DCF believed John and Jane Doe were unwilling to listen to DCF's concerns regarding their children and DCF remained concerned with the children's emotional well-being and safety, as Jane Doe was the primary caregiver, was home with the children all day, and was potentially suffering from mental

health issues. DCF believed that, based on reports, the source of much of the information regarding the allegations was from Jane Doe, not the children. And John and Jane Doe had become increasingly uncooperative in the investigation, and had recently denied DCF requests to interview the children.

The petition then stated that reasonable efforts have been provided to prevent removal of the children from the home, including ensuring the children were safe from the alleged perpetrator in the original investigation, and that the children and Jane Doe had been participating in therapy. DCF noted, however, that financial support from the maternal relatives had been cut off, and that the family declined Family Preservation Services and had been declining to cooperate with DCF. The petition then stated it was contrary to the children's welfare to remain in the home and that placement out of the home was in the best interest of the child due to: concerns about how the children's emotional and physical needs were being met, the continued on-going investigations and fantastic allegations being made against the maternal relative and the impact this had on the children's emotional health, and Jane Doe's mental stability.

As mentioned above, the court set a hearing on the petitions for May 11, 2009. On May 5, 2009, the Johnson County District Attorney filed an affidavit in support of a pick-up order of the children after the ex parte order of protective custody was issued. In the affidavit, the Johnson County District Attorney claimed that on May 5, defendant Gildner responded to the Doe family

home after it was reported John Doe was seen there. He informed defendant Gildner he would not divulge the whereabouts of his children and that any communication would need to go through his attorney. The District Attorney stated the pick-up order was necessary "to assure the juvenile's continuing placement, is necessary as there is no assurance that said juvenile will appear for hearing in this Court, and is made in the best interest of the child and the community." (Doc. 123-11 *SEALED*, at 3.)

The court finds it is important to outline the facts from the Johnson County documents as they refute many of the "misrepresentations and omissions" plaintiffs rely on to support their argument that defendants violated their constitutional rights. For example, plaintiffs allege that defendants had represented that "the parents had committed physical, sexual, mental, or emotional abuse when such statement had no basis in the facts alleged in the CINC petitions or in the facts known to defendants." As the details from the CINC petitions make clear, defendants had concern that the children were subject to at least emotional and mental abuse, and the facts alleged provided support for this concern. Plaintiffs also claim "that John and Jane Doe had refused Family Preservation Services when in fact John Doe had specifically accepted the offer of Family Preservation Services." In the motion for the ex parte order, the District Attorney specifically states that after the CINC petitions were filed, John Doe accepted the offer of Family Preservation Services and stated he was willing to cooperate with DCF. Further, plaintiffs

claim that defendants knew the Doe children were not in danger because they initially closed their file, disbelieved the children's abuse had actually occurred, and didn't seek immediate custody of the children upon filing the CINC petitions. The motion for the ex parte order, however, states that the allegations in the CINC petition, combined with the parents taking the children out of state, created an immediate need to take custody of the children. The CINC petition itself stated *it was contrary to the children's welfare to remain in the home and that placement out of the home is in the best interest of the child due to:* concerns about how the children's emotional and physical needs are being met, the continued on-going investigations and fantastic allegations being made against the maternal relative and the impact this has on the children's emotional health, and Jane Doe's mental stability. (Emphasis added.)

Based on a review of the Johnson County documents, the court can distinguish this case from the facts of *Malik*, which plaintiffs rely on to show the law was clearly established. In *Malik*, the evidence showed the officials had no reason to remove the child from the home beyond the fact that they were having difficulty scheduling the child for an interview. There were no facts that the child was in danger, and the social worker omitted material facts about the situation when seeking an order from the magistrate judge. Here, the District Attorney, likely based on a recommendation from defendants, sought an ex parte order of protective custody based on the allegations in the

CINC petition and the parents' post-petition conduct—removing the children from the state and not being forthcoming about the children's whereabouts. Most of the claimed "misrepresentations and omissions" set forth in plaintiffs' complaint are refuted by the Johnson County documents or are not material. Plaintiffs do claim that there were no travel restrictions placed on the family in the time period between the filing of the petition and the hearing, and therefore it was unreasonable to use the family's travel to justify the ex parte order. The court has not found any travel restrictions in any of the documents. The court, however, has to give reasonable deference to defendants' judgment in deciding when a child may be in danger.

The court therefore finds that reasonable officials could disagree as to whether there was a threat to plaintiffs' safety. And based on the factual allegations in the CINC petition—which have not been contested—combined with the parents' post-petition conduct, it would be reasonable for an official to believe an ex parte order of protective custody was justified.

For these reasons, the court finds defendants are entitled to qualified immunity because the law is not clearly established that their conduct violated plaintiffs' constitutional rights.

IT IS THEREFORE ORDERED that defendants' Motion to Dismiss Second Amended Complaint (Doc. 120) is granted.

This case is closed.

Dated March 7, 2018, at Kansas City, Kansas

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 15-cv-02847-REB-CBS

N.E.L., and
M.M.A.,

Plaintiffs,

v.

DOUGLAS COUNTY, COLORADO,
MONICA GILDNER, in her individual capacity,
ANGELA WEBB, in her individual capacity,
TINA ABNEY, in her individual capacity
LESA ADAMS, in her individual capacity, and
CARL GARZA, in his individual capacity,

Defendants.

ORDER OVERRULING OBJECTIONS TO AND ADOPTING RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(Filed Mar. 13, 2017)

Blackburn, J.

The matters before me are (1) the **Recommendation of United States Magistrate Judge re Motion to Dismiss** [#91], filed January 27, 2017; and (2) **Plaintiffs' Objections to the Recommendation on Pending Motions** [#93], filed February 10, 2017. I overrule the objections, approve and adopt the recommendation, grant the Douglas County defendants'

motion to dismiss, grant the Kansas defendants' motion to dismiss for lack of personal jurisdiction in this forum, and transfer the claims against the Kansas defendants to the United States District Court for the District of Kansas.

As required by 28 U.S.C. § 636(b), I have reviewed *de novo* all portions of the recommendation to which objections have been filed. I have considered carefully the recommendation, the objections, the underlying motions, and all applicable caselaw. The recommendation is thorough and well-reasoned, and I approve and adopt it in all relevant respects.

The magistrate judge found that defendants Lesa Adame and Carl Garza, the two Douglas County, Colorado, employees who executed the *ex parte* orders issued by the Johnson County, Kansas, court, were entitled to qualified immunity from plaintiffs' claims under the Fourth and Fourteenth Amendments.[1] Although I do not concur with some of the magistrate judge's analysis of the Fourth Amendment Claim,[2] I do agree that,

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[1] Ms. Adame was employed by Douglas County as a social worker, and OfficerGarza was employed by the Douglas County Sheriff's Office.

[2] Specifically, I believe the magistrate judge misread the complaint in finding plaintiffs were not seized because they were already in the custody of the state of Kansas by virtue of the *ex parte* orders. (**Recommendation** at 19-20.) Plaintiffs plainly allege that claim was false (***see*** **First Am. Compl.** ¶¶ 143-144 at 21, ¶ 150 at 22); indeed, the magistrate judge himself discussed how the *ex parte* orders did not contain *any* affirmative order, let alone a directive to take the children into custody (**Recommendation** at 10).

assuming *arguendo* plaintiffs have stated a constitutional right, they have failed to demonstrate that such right was clearly established on May 6, 2009. ***See Pearson v. Callahan***, 555 U.S. 223, 236, 129 S.Ct. 808, 818, 172 L.Ed.2d 565 (2009) (courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand").[3]

As the magistrate judge's cogent and competent discussion of these decisions amply demonstrates (***see*** **Recommendation** at 20-22), neither of the two Tenth Circuit decisions on which plaintiffs rely in attempting to satisfy their burden in this regard involve facts sufficiently similar to those alleged here such that a reasonable official in Ms. Adame's and Officer Garza's circumstances would have understood their actions violated the Fourth Amendment. ***See Dodds v. Richardson***, 614 F.3d 1185, 1206 (10th Cir. 2010), ***cert.***

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[3] I find it appropriate to exercise that discretion in this instance on several of the bases which have been identified as justifying addressing the clearly established prong first: (1) because the constitutional violation alleged " 'is so factbound that the decision provides little guidance for future cases' "; (2) because "discussing both elements risks 'bad decisionmaking' because the court is firmly convinced the law is not clearly established and is thus inclined to give little thought to the existence of the constitutional right"; and (3) because "the doctrine of 'constitutional avoidance' suggests the wisdom of passing on the first constitutional question because 'it is plain that a constitutional right is not clearly established but far"from obvious whether in fact there is such a right.' " ***See Kerns v. Bader***, 663 F.3d 1173, 1180-81 (10th Cir. 2011) (quoting ***Pearson***, 129 S.Ct. at 818-21).

denied, 131 S.Ct. 2150.[4] Additionally, I note that in these and the other cases to which plaintiffs point, state officers seized and removed a child from the parent. ***Gomes v. Wood*,** 451 F.3d 1122, 1126 (10th Cir. 2006); ***Jones v. Hunt*,** 410 F.3d 1221, 1224-25 (10th Cir. 2005), ***cert. denied*,** 127 S.Ct. 676. ***See also Wooley v. City of Baton Rouge*,** 211 F.3d 913, 917-18 (5th Cir. 2000). Here, the opposite occurred – Ms. Adame and Officer Garza allegedly required plaintiffs' mother, Mrs. Doe, to leave, but left the children where they first encountered them, in the home of Mrs. Doe's friends, Dr. and Mrs. G. Plaintiffs have presented no authority, and the court has found none, in which officers were found to have seized a child under closely analogous circumstances. Qualified immunity thus is proper as to this claim.

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[4] The two other federal appellate court decisions to which plaintiffs cite hardly constitute the clearly established weight of authority from other courts," even if those decisions were on point. ***Harman v. Pollock***, 586 F.3d 1254, 1261 (10th Cir. 2009). Moreover, plaintiffs' reliance on the Sixth Circuit's unpublished decision in ***Wendrow v. Michigan Department of Human Services***, 534 Fed. Appx. 516 (6th Cir. Aug. 28, 2013), which carries no precedential weight, ***see Braggs v. Perez***, 73 Fed. Appx. 147, 148 (6th Cir. 2003), ***cert. denied***, 124 S.Ct. 2113 (2004), is inapposite in any event, as it post-dates the allegedly unconstitutional actions in this case by more than four years, ***see Reichle v. Howards***, 566 U.S. 658, ___, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (right must be clearly established "by prior case law" "at the time of the challenged conduct"). ***See also Ashcroft v. al-Kidd***, 563 U.S. ___, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149 (2011) ("[E]xisting precedent must have placed the statutory or constitutional question beyond debate.").

Likewise, Ms. Adame and Officer Garza are entitled to qualified immunity from plaintiffs' substantive due process claim. Here, the magistrate judge relied on the first prong of the qualified immunity analysis, concluding plaintiffs failed to plead a viable claim of violation of their Fourteenth Amendment right to familial association because these defendants' alleged interference (as opposed to the arguably more substantial interference that occurred once the children returned to Kansas) was limited and incidental to the legitimate goal of keeping the children safe pending their return to Kansas. ***See Silvan v. Briggs***, 309 Fed. Appx. 216, 223 (10th Cir. Jan. 23, 2009) (citing ***Nicholson v. Scoppetta***, 344 F.3d 154, 172 (2nd Cir. 2003)).[5] I thus concur with the magistrate judge's conclusion that plaintiffs have failed to state a claim for violation of their constitutional right of familial association as against Ms. Adame and Officer Garza.[6]

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[5] Plaintiffs' objection – that Ms. Adame and Officer Garza may be liable because they allegedly conspired with the Kansas defendants in the subsequent, lengthier detention of the children – assumes what it would seek to prove. Plaintiffs first must prove these defendants violated their civil rights before they may be held liable for civil conspiracy to violate those rights. ***See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott***, 463 U.S. 825, 833, 103 S.Ct. 3352, 3358, 77L.Ed.2d 1049 (1983).

[6] Moreover, and although the magistrate judge did not reach the second prong of the qualified immunity test, his analysis further makes plain that plaintiffs have failed to satisfy their burden to show the right was clearly established as to these defendants. Although the issue was fairly joined in the apposite motion to dismiss (***see*** **Motion To Dismiss Amended Complaint** at 8-10 [#57], filed May 12, 2016), plaintiffs' response failed to address

In the absence of a viable claim that either Ms. Adame or Officer Garza violated their constitutional rights, it should go without saying that plaintiffs cannot sustain a claim for civil conspiracy to violate those rights against them. ***See United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott***, 463 U.S. 825, 833, 103 S.Ct. 3352, 3358, 77L.Ed.2d 1049 (1983). Moreover, in the absence of an underlying constitutional violation by one of its employees, Douglas County, Colorado, cannot be held liable for allegedly maintaining an unconstitutional policy or practice. ***Trigalet v. City of Tulsa, Oklahoma***, 239 F.3d 1150, 1155-56 (10th Cir.), ***cert. denied***, 122 S.Ct. 40 (2001). These claims therefore also must be dismissed.

As for the motion to dismiss for lack of personal jurisdiction filed by defendants Monica Gildner, Angela Webb, and Tina Abney (the "Kansas defendants"), there is no need for this court to engage in a festooned reiteration of the magistrate judge's incisive and well-reasoned analysis. It is pellucid that this court lacks personal jurisdiction over these defendants. All Mses. Gildner's, Webb's, and Abney's relevant actions took place in Kansas, under the auspices of a Kansas court, for the purpose of returning the children to Kansas. The mere fortuity that plaintiffs happened to be staying temporarily in Colorado at the time is far too ephemeral a contact to support a conclusion that the Kansas defendants purposefully directed their actions

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this claim at all, much less attempt to demonstrate the right was clearly established.

toward this forum. Even if it did, I agree with the magistrate judge that exercising personal jurisdiction over these defendants in this forum would offend due process.

Neither plaintiffs nor the Kansas defendants have objected to the magistrate judge's recommendation that these claims be transferred to the District of Kansas as contemplated by 28 U.S.C. § 1631. This recommendation also is prescient and well-taken. Given that the statute of limitations may have expired since the case was filed, the interests of justice plainly dictate that these claims should be transferred rather than dismissed outright.

While the substantive viability of plaintiffs' claims against the Kansas defendants thus remains for determination by a court of competent jurisdiction, the Douglas County defendants are entitled to a judgment in their favor. ***See Cain v. Graf***, 1998 WL 654987 at *2 (10th Cir. Sept. 21, 1998). It is pellucid in this instance that "the claims under review [are] separable from the others remaining to be adjudicated and . . . the nature of the claims already determined [is] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals.'" ***Stockman's Water Co., LLC v. Vaca Partners, L.P.***, 425 F.3d 1263, 1265 (10th Cir. 2005) (quoting ***Curtiss-Wright Corp. v. General Electric*** **Co.**, 446 U.S. 1, 8, 100 S.Ct. 1460, 1465, 64 L.Ed.2d 1 (1980) (alterations in ***Stockman's***). There is no just reason to delay entry of judgment in favor of the Douglas County defendants while the factually distinct claims against

the Kansas defendants are adjudicated in a different federal court. Pursuant to Fed. R. Civ. P. 54(b), I therefore will direct the entry of final judgment in favor of the Douglas County defendants.

THEREFORE, IT IS ORDERED as follows:

1. That the **Recommendation of United States Magistrate Judge re Motion to Dismiss** [#91], filed January 27, 2017, is approved and adopted as an order of this court;

2. That the objections stated in **Plaintiffs' Objections to the Recommendation on Pending Motions** [#93], filed February 10, 2017, are overruled;

3. That the **Motion to Dismiss Amended Complaint** [#57], filed May 12, 2016 by defendants Lesa Adame, Carl Garza, and Douglas County, Colorado, is granted;

4. That the **Motion to Dismiss First Amended Complaint with Memorandum in Support or, in the Alternative, Motion for Summary Judgment** [#65], filed May 26, 2016, by defendants Tina Abney, Monica Gildner, and Angela Webb is granted in part and denied in part as follows:

   a. That the motion is granted to the extent it seeks dismissal for lack of personal jurisdiction over these defendants in this forum; and

   b. That in all other respects, the motion is denied without prejudice;

5. That plaintiffs' claims against defendants Lesa Adame, Carl Garza, and Douglas County, Colorado, are dismissed with prejudice;

6. That plaintiffs' claims against defendants Tina Abney, Monica Gildner, and Angela Webb are dismissed without prejudice;

7. That, there being no just reason for delay, pursuant to Fed. R. Civ. P. 54(b), judgment with prejudice shall enter on behalf of defendants Lesa Adame, Carl Garza, and Douglas County, Colorado, and against plaintiffs, N.E.L. and M.M.A., on all claims for relief and causes of action asserted in this action; and

8. That this case is transferred to the United States District Court for the District of Kansas (500 State Ave, Kansas City, Kansas 66101).

Dated March 13, 2017, at Denver, Colorado.

BY THE COURT:

/s/ Bob Blackburn
Robert E. Blackburn
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02847-REB-CBS

N.E.L. and M.M.A.,

Plaintiffs,

v.

DOUGLAS COUNTY, COLORADO;
MONICA GILDNER, in her individual capacity;
ANGELA WEBB, in her individual capacity;
TINA ABNEY, in her individual capacity;
LESA ADAME, in her individual capacity; and
CARL GARZA, in his individual capacity.

Defendants.

RECOMMENDATION ON PENDING MOTIONS TO DISMISS

(Filed Jan. 27, 2017)

Magistrate Judge Craig B. Shaffer

This matter comes before the court on the Motion to Dismiss Amended Complaint (doc. # 57) filed by Defendants Lesa Adame, Carl Garza, and Douglas County (hereinafter referred to collectively as the "Douglas County Defendants"), and the Motion to Dismiss First Amended Complaint with Memorandum in Support or, in the alternative, Motion for Summary Judgment (doc. # 65) filed by Defendants Monica Gildner, Angela Webb, and Tina Abney (hereinafter referred to collectively as the "Kansas Defendants"). These motions have been fully briefed by the parties.

On March 1, 2016, this matter was referred to the Magistrate Judge to, *inter alia*, "hear and make recommendations on dispositive matters that have been referred." By separate memoranda, both of the pending motions have been referred to this court for recommendation. I have carefully reviewed the motions, all related briefing and attached exhibits, the entire court file, and the applicable case law.

PROCEDURAL HISTORY

This action was commenced with the filing of the original Complaint on December 1, 2015. The First Amended Complaint (doc. #55), filed on April 29, 2016, asserts six claims for relief. The First Claim asserts a Fourth Amendment violation and contends that all Defendants "approved and/or conducted an unlawful seizure . . . by which Plaintiffs were deprived of their liberty without due process when they were prohibited . . . from any movement or travel with their mother, father and grandparents." The Second Claim is brought against Defendants Gildner, Webb and Abney and asserts that Plaintiffs' Fourth Amendment rights were violated when they were "held against their will for five days prior to a hearing on the CINC petitions." The Third Claim is brought against Defendants Gildner, Webb, Abney, Adame, and Garza and asserts a violation of Plaintiffs' Fourteenth Amendment right to maintain a familial relationship with their parents, siblings, and grandparents. The Fourth Claim alleges that Defendants Gildner, Abney, Webb, Adame and Garza conspired to deprive Plaintiffs of their constitutional

rights. The Fifth Claim contends that Plaintiffs are entitled to exemplary damages because "[t]he actions of Gildner, Abney, Webb, Adame and Garza were attended by retaliation, malice, ill will, intent and/or recklessness, [and] callous disregard of Plaintiffs' rights, or indifference to Plaintiffs' rights." Finally, the Sixth Claim alleges that Defendant Douglas County violated Plaintiffs' Fourth Amendment rights by adopting an unlawful policy that authorized county sheriff's personnel "to seize Plaintiffs based on an out-of-state *ex parte* order in violation of the United States Constitution and Colorado law," or through deliberate indifference by failing to "adopt a policy requiring . . . or in failing to train personnel . . . to comply with the United States Constitution and Colorado law."

As the parties are well-familiar with the underlying circumstances of this case, I will only briefly summarize those facts and circumstances that are necessary to place the pending motions and this Recommendation in context.

It appears that Mr. and Mrs. Doe had their first contact with the Kansas Department of Social and Rehabilitation Services[1] in June 2008 after one of the Doe children[2] began exhibiting troubling behavior and making troubling comments that allegedly stemmed

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[1] This state agency is now called the Kansas Department of Children and Families, and is referenced in the First Amended Complaint as "SRS/DCF." *See* First Amended Complaint, at ¶5.

[2] The Plaintiffs in this action, N.E.L. and M.M.A., are two of the Does' ten children. Although Plaintiffs have reached the age of majority, during the relevant time period, both were minors.

from improper interaction with that child by one of Mrs. Doe's relatives. *See* First Amended Complaint at ¶¶ 17 and 21. Later, other Doe children reported having suffered abuse from the same suspected relative. *Id.* at ¶¶ 38, 65 and 77. During the time period relevant to this case, the Kansas Defendants were employed by SRS/DCF. The Kansas Defendants' contacts with the Doe family continued into 2009 and eventually became contentious. As some point, Mr. Doe apparently "communicated to [Ms.] Webb and [Ms.] Abney that he did not wish to have further contact with [Ms.] Gildner due to the animosity created by her antagonistic, biased and baseless positions." *Id.* at ¶ 55. In February 2009, Mr. Doe "filed a formal complaint with SRS/DCF" against Ms. Gildner. *Id.* at ¶ 66. The actual cause of this deteriorating situation is a matter of some dispute and wholly irrelevant to the disposition of the pending motions.

On or about April 20, 2009, ten Child-in-Need of Care (CINC) petitions were filed in the District Court for Johnson County, Kansas by the District Attorney's Office. Those petitions "requested termination of Mr. and Mrs. Doe's parental rights, appointment of a permanent custodian for Plaintiffs and their siblings, temporary removal of Plaintiffs and their siblings from their Parents' custody, and an order of child support." *Id.* at ¶ 86. The Johnson County District Court set a non-emergency hearing on these petitions for May 11, 2009. On May 5, 2009, SRS/DCF sought *Ex Parte* Orders of Protective Custody in the District Court of Johnson County. Although Mr. and Mrs. Doe dispute

the information proffered in support of the petitions for those orders, the District Court entered *Ex Parte* Orders on May 5, 2009.

On that same day, Mrs. Doe and her children were visiting long-standing family friends, Dr. and Mrs. G, who were living in unincorporated Douglas County, Colorado. At some point, Defendants Adame and Garza were made aware of the *Ex Parte* Orders issued by the Johnson County District Court and they went to the G's residence.[3] After some discussion on May 6, 2009, Mrs. Doe left the G residence. Later that same day, Dr. G and his wife drove the Doe children back to Kansas where they were placed in the temporary custody of SRS/DCF.

In moving to dismiss the First Amended Complaint, the Douglas County Defendants contend that Plaintiffs' claims are barred by the applicable statute of limitations, as well as the doctrines of absolute and qualified immunity. The Douglas County Defendants further insist that the First Amended Complaint fails to state a viable claim for relief against Douglas County. The Kansas Defendants have moved to dismiss the claims against them based upon a lack of personal jurisdiction. In the alternative, the Kansas Defendants insist that Plaintiffs' claims are barred by the statute of limitations and the doctrines of absolute

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[3] On May 6, 2009, Ms. Adame was a social worker either employed by the Colorado Department of Social Services or the Douglas County Department of Human Services, and Mr. Garza was employed by the Douglas County Sheriff's Office. *See* First Amended Complaint, at ¶¶ 10 and 11.

or qualified immunity, and that Plaintiffs' alleged Fourth Amendment violation fails to state a cognizable claim for relief. Plaintiffs naturally take strong exception to all of these arguments.

ANALYSIS

I. The Douglas County Defendants' Motion

Rule 12(b)(6) states that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6). In deciding a motion under Rule 12(b)(6), the court must "accept as true all well-pleaded factual allegations . . . and view these allegations in the light most favorable to the plaintiff." *Casanova v. Ulibarri*, 595 F.3d 1120, 1124-25 (10th Cir. 2010) (quoting *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009)). However, a plaintiff may not rely on mere labels or conclusions "and a formulaic recitation of the elements of a cause of action will not do." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Rather, the court's analysis is two-fold.

> First, the court identifies "the allegations in the complaint that are not entitled to the assumption of truth," that is those allegations that are legal conclusions, bare assertions, or merely conclusory. Second, the court considers the factual allegations "to determine if they plausibly suggest an entitlement to relief." If the allegations state a plausible claim for relief, such claim survives the motion to dismiss. Notwithstanding, the court need not accept

> conclusory allegations without supporting factual averments.

Wood v. Wells Fargo Bank, N.A., No. 13-cv-01731-CMA-KMT, 2013 WL 5763101, at *2 (D. Colo. Oct. 23, 2013) (internal citations omitted).

As the Tenth Circuit explained in *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007),

> the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.

"The burden is on the plaintiff to frame 'a complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atl. Corp.*, 555 U.S. at 556). The ultimate duty of the court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007).

Plaintiffs attached to the First Amended Complaint a redacted *Ex Parte* Order of Protective Custody, dated May 5, 2009 (Exhibit 1) (doc. #55-1) and a redacted document entitled Colorado Department of Social Services, Douglas County Department of Human

Services Safety Plan, dated May 6, 2009 (Exhibit 2) (doc. #55-2). The parties also have attached exhibits to their briefs in support of or in opposition to the Douglas County Defendants' motion to dismiss. Those exhibits consist of judicial records from Colorado's Eighteenth Judicial District (Defendants' Exhibit A, doc. # 57-1 and Plaintiffs' Exhibit 3, doc. #67-3) and the District Court for Johnson County, Kansas (Plaintiffs' Exhibit 2, doc. #67-2 and Plaintiffs' Exhibit 4, doc. #67-4). The parties also included as exhibits excerpts from the Colorado Code of Regulations, 12 CCR 2509-2 (Defendants' Exhibit B, doc. #57-2 and Exhibit C, doc. #76-1).[4]

Generally, a court considers only the contents of the complaint when ruling on a Rule 12(b)(6) motion. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Exceptions to this general rule include: documents incorporated by reference in the complaint; documents referred to in and central to the complaint, when no party disputes their authenticity; and "matters of which a court may take judicial notice." *Id.* (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). *Cf. Gilbert v. Bank of Am. Corp.*, No. 11-cv-00272-BLW, 2012 WL 4470897, at *2 (D. Idaho Sept. 26, 2012) (noting that a court may take judicial notice "of the records of state agencies and other undisputed matters of public record" without transforming a

[4] The Kansas Defendants and Plaintiffs also attached exhibits to their briefs in support of or in opposition to the Kansas Defendants' motion to dismiss. Most of those exhibits are judicial records subject to judicial notice by this court.

motion to dismiss into a motion for summary judgment). *Cf. Catchai v. Fort Morgan Times*, No. 15-cv-00678-MJW, 2015 WL 6689484, at *4 (D. Colo. Nov. 3, 2015) (in ruling on the pending motion to dismiss, the court acknowledged its ability to take judicial notice of court records from Morgan County District Court); *Reyes v. Hickenlooper*, 84 F. Supp. 3d 1204, 1207 (D. Colo. 2015) (noting that the court could take judicial notice of court filings from other cases without converting a Rule 12(b)(6) motion into a summary judgment motion). While the court has read and considered the parties' exhibits, I will analyze the issues and arguments under the standard governing motions to dismiss under Rule 12(b)(6).

A. Defendants' Claim to Absolute Immunity

Defendants Adame and Garza contend that all claims against them must be dismissed based on the doctrine of absolute or quasi-judicial immunity because on May 6, 2009 they were simply executing orders issued by a Kansas court. Plaintiffs argue in response that "absolute immunity does not apply because the Kansas *Ex Parte* Orders were not facially valid" and because "Adame and Garza exceeded the scope of the orders." *See* Response to Douglas Defendants' Motion to Dismiss, at 12.

The Tenth Circuit has held that "enforcing a court order or judgment is intrinsically associated with a judicial proceeding" and that "[a]bsolute immunity for officials assigned to carry out a judge's orders is

necessary to insure that such officials can perform their function without the need to secure permanent legal counsel." *Valdez v. City & Cty. of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989) ("it is simply unfair to spare the judges who give orders while punishing the officers who obey them"). *See also Moss v. Kopp*, 559 F.3d 1155, 1163-1168 (10th Cir. 2009) (holding that "[j]ust as judges acting in their judicial capacity are absolutely immune from liability under section 1983, 'official[s] charged with the duty of executing a facially valid court order enjoy [] absolute immunity from liability for damages in a suit challenging conduct prescribed by that order") (quoting *Turney v. O'Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990). "The 'fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised.'" *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 765 (9th Cir. 1987). *Cf. Smeal v. Alexander*, No. 5:06 CV 2109, 2006 WL 3469637, at *6 (N.D. Ohio Nov. 30, 2006) ("quasi-judicial immunity extends to those persons performing tasks so integral or intertwined with the judicial process that they are considered an arm of the judicial officer who is absolutely immune").

"[F]or the defendant state official to be entitled to quasi-judicial immunity, the judge issuing the disputed order must be immune from liability in his or her own right, the officials executing the order must act within the scope of their own jurisdiction, and the officials must only act as prescribed by the order in question." *Moss*, 559 F.3d at 1163. The doctrine of

quasi-judicial immunity further requires that the court order in question be "facially valid." *Id.* at 1164. The Tenth Circuit has recognized, however, that a court order may be "facially valid" even if that order is infirm or erroneous as a matter of state law.

> "State officials 'must not be required to act as pseudo-appellate courts scrutinizing the orders of judges,' but subjecting them to liability for executing an order because the order did not measure up to statutory standards would have just that effect." Further, "[t]o allow plaintiffs to bring suit any time a state agent executes a judicial order that does not fulfill every legal requirement would make the agent 'a lightning rod for harassing litigation aimed at judicial orders." "Simple fairness requires that state officers 'not be called upon to answer for the legality of decisions which they are powerless to control.' "

Id. at 1165 (internal citations omitted).

Plaintiffs contend that the First Amended Complaint "alleges specifically that the [*Ex Parte* Orders] were facially invalid by being issued from a Kansas court and being incomplete, such that Adame and Garza could see for themselves that no one from 'Kansas State Social Services' was granted custody by the [*Ex Parte* Orders]." *See* Plaintiffs' Response to Douglas Defendants' Motion to Dismiss, at 14 (emphasis in original). Plaintiffs also argue a Kansas judge "had no jurisdiction to issue *ex parte* orders for execution in Colorado." *Id.* at 15 (emphasis in original).

The *Ex Parte* Orders in question purportedly were issued "pursuant to K.S.A. 38-2242"[5] and specifically state that the District Court of Johnson County, Kansas found, in part, that "[r]easonable efforts are not required to maintain the child in the home because an emergency exists which threatens the safety of the child," that "remaining in the home or returning home would be contrary to the welfare of the child," and that "immediate placement is in the best interest of the child." *See* Exhibit 1 (doc. #55-1) attached to First Amended Complaint. The Orders further noted allegations of "physical, sexual, mental or emotional abuse." These documents bear the caption "*EX PARTE* ORDER OF PROTECTIVE CUSTODY and the signature of "Kathleen L. Sloan, Judge of the District Court," and apparently ere [sic] time-stamped by the Clerk of the District Court on "2009 May -5 PM 3:40." Although these court filings set forth "findings" of fact, Judge Sloan did not direct any action to be taken based upon those findings. So, for example, the *Ex Parte* Order did not explicitly require that the identified child be taken into

[5] This statute provides that a court "upon verified application, may issue ex parte an order directing that a child be held in protective custody and, if the child has not been taken into custody, an order directing that child be taken into custody." A court may issue such an ex parte order "only after the court has determined there is probable cause to believe the allegations in the application are true." "If the court issues an order of protective custody, the court may also enter an order restraining any alleged perpetrator of physical, sexual, mental or emotional abuse of the child from residing in the child's home; visiting, contacting, harassing or intimidating the child, other family member or witness; or attempting to visit, contact, harass or intimidate the child, other family member or witness."

custody. The district judge also did not check the box that "FURTHER ORDERED that any duly authorized law enforcement officer of the jurisdiction where the child(ren) can be found shall take the child(ren) named above into custody and deliver the child(ren) to" a specified location or government official. Judge Sloan also did not indicate that a "restraining order shall be filed against" anyone." In short, from the face of the *Ex Parte* Order, it is difficult to discern exactly what actions Judge Sloan required or even contemplated.

As this matter comes before the court on a motion to dismiss, I must confine my analysis to the well-pled facts (but not conclusory allegations) contained in the First Amended Complaint and the exhibits properly before the court. The court is required to construe those facts and documents in a light most favorable to Plaintiffs.

The First Amended Complaint contends that the *Ex Parte* Orders issued by Judge Sloan were not based upon probable cause and falsely presented or omitted material facts concerning Mr. and Mrs. Doe and their children. There are no well-pled facts in the First Amended Complaint that would suggest Defendants Adame or Garza were aware of these alleged deficiencies in the *Ex Parte* Orders. *But see Moss*, 559 F.3d at 1165 ("Simple fairness requires that state officers 'not be called upon to answer for the legality of decisions which they are powerless to control.' ").

However, there is a fundamental problem with the Douglas County Defendants' invocation of quasi-judicial

immunity. As the Tenth Circuit has explained, "an official charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for damages in a suit *challenging conduct prescribed by that order.*" *Valdez*, 878 F.2d at 1286 (emphasis added). Stated differently the government official is entitled to quasi-judicial immunity because he or she is taking actions commanded by the court orders in question. *Cf. Martin v. Bd. of Cty. Comm'rs*, 909 F.2d 402, 405 (10th Cir. 1990) (holding that quasi-judicial immunity protects defendants from damage claims directed to the conduct prescribed in the court order itself, but not to the manner of its execution). Here, Judge Sloan's *Ex Parte* Orders simply make findings of fact; nothing is specifically or inferentially "ordered."[6] Therefore, the

[6] At some point, Judge Sloan apparently realized that her *Ex Parte* Orders did not mandate any specific action. Exhibits attached to the Kansas Defendants' motion to dismiss include two documents captioned "Pick Up Order," dated May 5, 2009 and time stamped 3:40 PM. These Orders state that "on the 5TH DAY OF MAY, 2009, [each Plaintiff] was placed in the care, custody and control of [the State of Kansas] with authority for suitable placement" and direct "ANY LAW ENFORCEMENT AGENCY" to take said child into your custody and transport said child to court approve {sic] Juvenile Intake and Assessment Center." *See* Exhibits I and J (doc. ## 64-9 and 64-10) attached to Motion to Dismiss. Another exhibit proffered by the Kansas Defendants consists of a "Journal Entry Nunc Pro Tunc" filed in the District Court of Johnson County on May 8, 2009 purporting to "correct[ ] the Ex Parte Orders of Custody filed on May 5, 2009 . . . to read as follows: THE COURT HEREBY ORDERS THAT the above named children shall be placed in the custody of: The Secretary of Social and Rehabilitation Services." *See* Exhibit K (doc. # 64-11), attached to Motion to Dismiss. The foregoing orders are not referenced in the First Amended Complaint, and it is not clear whether Defendants Adame and Garza ever received the

rationale for quasi-judicial immunity seems to be lacking in this case. I recommend that the motion to dismiss be denied to the extent Defendants Adame and Garza are relying in whole or in part on the doctrine of absolute or quasi-judicial immunity.

B. Defendants' Claim to Qualified Immunity

Even if Defendants Adame and Garza are not protected by quasi-judicial immunity, they are entitled to qualified immunity for conduct performed within the scope of their official duties. "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Messerschmidt v. Millender*, 565 U.S. 535, 132 S. Ct. 1235, 1244 (2012) (internal quotation marks and citations omitted). *See also Duncan v. Gunter*, 15 F.3d 989, 992 (10th Cir. 1994) (same). Stated differently, the affirmative defense of qualified immunity "protects all but the plainly incompetent [government official] or those who knowingly violate the law." *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1185 (10th Cir. 2001). Whether Defendants Adame and Garza are entitled to qualified immunity is a legal question. *Wilder v. Turner*, 490 F.3d 810, 813 (10th Cir. 2007).

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foregoing court filings prior to arriving at the G's residence on May 6, 2009. But again, on a motion to dismiss the court must construe the allegations in a light most favorable to Plaintiffs.

In resolving a motion to dismiss based on qualified immunity, the first prong of the court's analysis asks "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). This determination turns on the substantive law regarding the constitutional right at issue. *See McGettigan v. Di Mare*, 173 F. Supp. 3d 1114, 1121 (D. Colo. 2016) (citing *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1282-83 (10th Cir. 2007)).

Under the second prong of the qualified immunity doctrine, the plaintiff must show that the right at issue was "clearly established" at the time of the defendant's alleged violation.[7] *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). "The clearly established inquiry examines whether the contours of the constitutional right were so well-settled, in the particular circumstances presented, that every reasonable . . . official would have understood that what he is doing violates that right." *Lane v. Yohn*, No. 12-cv-02183-MSK-MEH, 2013 WL 4781617, at *3 (D. Colo. Sept. 6, 2013) (internal quotation marks and citation omitted), *appeal dismissed*, No. 13-1392 (10th Cir. Oct. 31, 2013). "[T]he salient question . . . is whether the state of the law at the time of [the] incident provided 'fair

[7] The court has the discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009). However, "[q]ualified immunity is applicable unless" the plaintiff can satisfy both prongs of the inquiry. *Id.*

warning'" to Defendants Adame and Garca [sic] that their alleged conduct was unconstitutional. *Tolan v. Cotton*, ___ U.S. ___, 134 S. Ct. 1861, 1866 (2014) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "To satisfy this prong, the burden is on the plaintiff to point to Supreme Court or Tenth Circuit precedent (or the clear weight of other circuit courts) that recognizes an actionable constitutional violation in the circumstances presented." *Havens v. Johnson*, No. 09-cv-01380-MSK-MEH, 2014 WL 803304, at *7 (D. Colo. Feb. 28, 2014) (citing *Schwartz v. Booker*, 702 F.3d 573, 587-88 (10th Cir. 2012)), *aff'd*, 783 F.3d 776 (10th Cir. 2015). "It is not necessary for the plaintiff to adduce a case with identical facts, but the plaintiff must identify some authority that considers the issue not as a broad general proposition, but in a particularized sense. . . ." *Havens*, 2014 WL 803304, at *7. There must be "a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." *Duncan v. Gunter*, 15 F.3d 989, 992 (10th Cir. 1994) (internal quotation marks and citations omitted).

In the past, the Tenth Circuit has employed a "sliding scale" in applying the second prong of the qualified immunity doctrine: "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Casey*, 509 F.3d at 1284 (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)). "As long as the unlawfulness of the [defendant's] actions was 'apparent' 'in light of pre-existing

law,' then qualified immunity is inappropriate." *Estate of Booker v. Gomez*, 745 F.3d 405, 433-34 (10th Cir. 2014) (quoting *Hope*, 536 U.S. at 739).

The Supreme Court recently shed additional light on how the second prong of the qualified immunity doctrine should be applied in the context of a Fourth Amendment claim. In vacating the decision of a divided panel of the Tenth Circuit, the Supreme Court in *White v. Pauly*, 580 U.S. ___, 2017 WL 69170, at *4 (Jan. 9, 2017), reiterated that clearly established law "should not be defined 'at a high level of generality'" and "must be 'particularized' to the facts of the case." Otherwise, "'[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *Id.* The lower court in *White* "failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." *Id.* at *5. The Supreme Court's *per curiam* opinion emphasized that *White* "present[ed] a unique set of facts and circumstances" and that "alone should have been an important indication to [lower courts] that [the defendant] did not violate a 'clearly established' right." *Id.*

1. Plaintiffs' First Claim Alleging A Fourth Amendment Violation

Plaintiffs' First Claim asserts that Defendants Adame and Garza violated their Fourth Amendment right to be free from unlawful seizure.

A violation of the Fourth Amendment requires an intentional acquisition of physical control. *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). A seizure for purposes of the Fourth Amendment occurs when "government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *JL v. N.M. Dep't of Health*, 165 F. Supp. 3d 996, 1042 (D. N.M. 2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989)).

> [A] person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatsoever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the policy [sic] and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." * * * We conclude that a person has been "seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to

> leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (internal citations omitted). *Cf. United States v. Beamon*, 576 F. App'x 753, 757 (10th Cir. 2014) ("until a citizen's liberty is actually restrained, there is no seizure" for purposes of the Fourth Amendment).

Every "seizure," however, does not necessarily equate to a constitutional violation, because the Fourth Amendment only prohibits "unreasonable" seizures. *See JL*, 165 F. Supp. 3d at 1043. *Cf. Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994) (to state a violation of the Fourth Amendment, a plaintiff must allege both that a defendant's conduct constituted a seizure and that the seizure was unreasonable). The Fourth Amendment's "central requirement" is one of reasonableness. *See Brower*, 489 U.S. at 599 (emphasizing that a seizure "alone is not enough for § 1983 liability; the seizure must be unreasonable") (internal quotation marks omitted). "[C]ourts have long recognized that the reasonableness of a seizure depends not just on why or when it is made, but also on how it is accomplished." *Fisher v. City of Las Cruces*, 584 F.3d 888, 894 (10th Cir. 2009) (citation omitted). "[T]o determine whether a seizure is reasonable, which is the Fourth Amendment's 'ultimate standard,' a court must balance the government's interest in conducting the

seizure against the individual's interest in being free from arbitrary governmental interference." *JL*, 165 F. Supp. 3d at 1043 (internal citations omitted).

The First Amended Complaint alleges the following pertinent facts which, for purposes of the pending motion, the court will presume are true and construe in a light most favorable to Plaintiffs. On May 6, 2009, Mrs. Doe and all of her children were visiting Dr. and Mrs. G at their home in Douglas County, Colorado. *See* First Amended Complaint at ¶ 123. On that same day, Defendants Adame and Garza, "at the instigation of the Kansas SRS/DCF, Gildner, Abney and Webb," went to the home of Dr. and Mrs. G "to carry out official business on behalf of the Douglas County Sheriff's Office, the Department of Human Services for Douglas County, and the Colorado Department of Social Services." *Id.* at ¶ 125. Either Defendant Adame or Defendant Garza told Dr. G that "they were in possession of a court order from the State of Kansas to seize custody of all ten of the Doe's children and demanded entry and custody of the children."[8] *Id.* at ¶ 132. Defendant Adame also "represented to Dr. G that she had been contacted by the Kansas SRS/DCF." *Id.* at ¶ 133. On the advice of an "attorney-friend [on the] telephone, Dr. G asked Defendants if they had a warrant or an order issued by a Colorado court. *Id.* at ¶ 135. Defendants allegedly responded that they were not required

[8] Based upon other allegations in the First Amended Complaint, it would appear that Plaintiffs are alluding to the *Ex Parte* Orders issued by the District Court for Johnson County, Kansas on May 5, 2009. *See* First Amended Complaint at ¶¶ 150 and 172.

to have a warrant to enter the residence and "that they 'do this all the time.'" *Id.* at ¶¶ 136-137. Plaintiffs allege that at some point during this exchange, Defendant Garza "became belligerent, raised his voice and threatened Dr. G with arrest or contempt for interfering with law enforcement." *Id.* at ¶ 138. Deputy Garza allegedly also stated that he and Defendant Adame were "coming in and we're taking these kids." *Id.* at ¶ 139. Throughout the incident, Defendant Garza was wearing a sidearm. *Id.* at ¶ 130. Plaintiffs allege that "[d]ue to the Colorado Agents' visible weapon, their false claims of legal authority, their use of force, intimidation, and loud and belligerent demeanor, Dr. G was powerless to prevent them from entering his house over his objection." *Id.* at ¶ 140.

Once inside the G's residence, Defendants Adame and Garza "falsely claimed that Plaintiffs and the other Doe children were in the custody of the State of Kansas." *Id.* at ¶ 143. Although they allegedly found no evidence of "emergency conditions" that threatened the safety of the Plaintiffs or the other Doe children, Defendants Adame and Garza "commanded Mrs. Doe to vacate the G's home immediately." *Id.* at ¶ 142. Plaintiffs allege that Defendants Adame and Garza Defendants "issued summary orders inside the G's house, both verbal and written, without a supporting court order, without prior notice, hearing or probable cause, which the G's, Mrs. Doe and the Doe children were forced to obey by virtue of the Colorado Agents' threats of force,

intimidation and false claims of legal authority."[9] *Id.* at ¶ 146.

The First Amended Complaint also alleges that Defendant Adame signed a document that Plaintiffs refer to as the "Colorado Order." That document purportedly required Dr. and Mrs. G "to take custody of the Doe's children" and prohibited Mrs. Doe from having any "contact, physical or verbal with any of the children, including any communication through Dr. G and his wife Mrs. G or any third party." *Id.* at ¶¶ 147 and 151-52. Plaintiffs further assert that in a later telephone conversation with Dr. G, Defendant Adame "prohibit[ed] Dr. G from allowing Mr. Doe, or even his parents, to talk to the children on the phone or have any contact with them." *Id.* at ¶ 153. Defendants Adame and Garza purportedly "informed the G's that government agents from Kansas would arrive at an unspecified time/day to take physical custody of the Doe children from Dr. and Mrs. G." *Id.* at ¶ 161. That

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[9] *Compare Siliven v. Ind. Dep't of Child Servs.*, 635 F.3d 921, 926-27 (7th Cir. 2011) (recognizing, in a case where a parent agreed to remove their minor child from the family home and place him with his grandmother [sic] home when told that the child otherwise would be placed in foster care, that a Fourth Amendment seizure may occur where "coercive conduct on the part of the police . . . indicates cooperation is required;" the court concluded, however, that the defendants' conduct did not rise to the level of a Fourth Amendment violation because the information available to defendants "[was] sufficient to warrant a prudent caseworker in believing that [the minor child] was in danger"). *See also Schattilly v. Daugharty*, 656 F. App'x 123, 129-30 (6th Cir. 2016) (holding that officials did not violate the plaintiff's constitutional rights by threatening removal proceedings in order to obtain consent to temporary placement).

same day, after the exchange with Defendants Adame and Garza, Dr. G and his wife "personally transported the ten Doe children to Kansas from Colorado" and "delivered the Doe children the next day to the custody of SRS/DCF in Johnson County. *Id.* at ¶¶ 164 and 166.

The so-called "Colorado Order" is attached to the First Amended Complaint as Exhibit 2. Notably, the word "order" does not appear any where in that document. To the contrary, Exhibit 2 is captioned "Colorado Department of Social Services, Douglas County Department of Human Services" and entitled "Safety Plan." In addition to the provisions cited in the First Amended Complaint, the Safety Plan apparently required Mrs. Doe "to contact Kansas casework[sic]; Monica Gildner on 5/7/09." At the bottom of the single-page document is space for the signatures of "Safety Plan Participants and Parents" which is prefaced by the following:

> Family Agreement with Safety Plan
>
> We have participated in the development of and reviewed this safety plan and agree to work with the provisions and services as described above.[10]

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[10] Colorado law provides that a county department of social services and "any person who is believed to be responsible for the abuse or neglect of a child" may enter into a safety plan agreement. *See* Colo. Rev. Stat. § 19-3-309.5. That statute further provides that "[p]articipation in a safety plan agreement by an [sic] county department and by any person who is believed to be responsible for child abuse or neglect shall be at the discretion of the person who is believed to be responsible for the child abuse or neglect."

Exhibit 2 bears two illegible signatures and is dated May 6, 2009.

This court finds the allegations in the First Amended Complaint are insufficient to allege a violation of Plaintiffs' Fourth Amendment rights by either Defendant Adame or Garza.[11] As noted earlier, Fourth Amendment seizure requires an intentional acquisition of physical control. If I credit Plaintiffs' own allegations, Defendants Adame and Garza announced that Plaintiffs and the other Doe children already "were in the custody of the State of Kansas." *See* First Amended Complaint at ¶ 143. If that allegation is accepted as true, the Safety Plan Agreement executed on May 6, 2009 did not further restrict Plaintiffs' freedom of movement. That seems consistent with Dr. and Mrs. G's understanding and subsequent actions, since it is undisputed that they returned Plaintiffs and their siblings to Kansas that same night. While the First Amended Complaint portrays the Defendants (and particularly Deputy Garza) as intimidating, loud and belligerent, those behaviors did not change Plaintiffs' status or restrict their movements. I also do not find that the Safety Plan executed on May 6, 2009 was unreasonable for purposes of the Fourth Amendment in light of the findings contained in Judge Sloan's *Ex Parte* Orders which apparently were available to Defendants Adame and Garza.

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[11] It bears noting that the First Amended Complaint does not assert any Fourth Amendment claims on behalf of Dr. and Mrs. G, or Mrs. Doe.

Finally, and most importantly, I do not find that Plaintiffs have sustained their burden under the second prong of the qualified immunity analysis. As the Supreme Court re-affirmed in *White*, the clearly established law element "must be 'particularized' to the facts of the case" and "should not be defined 'at a high level of generality." In challenging Defendants' claim of qualified immunity under the Fourth Amendment, Plaintiffs' response brief relies on four reported decisions. In *Jones v. Hunt*, 410 F.3d 1221 (10th Cir. 2005), the court held that a sixteen year old student was "seized" within the meaning of the Fourth Amendment when she was confronted at school and coerced into returning to live with her father. The Tenth Circuit noted that the deputy sheriff and social worker repeatedly threatened the student with arrest if she did not comply with their directives. The Tenth Circuit also found that the Fourth Amendment seizure "was not 'justified at its inception' " since there was no indication that the child's mother was suspected of abusive or neglectful behavior. In *Gomes v. Wood*, 451 F.3d 1122 (10th Cir. 2006), parents brought a due process claim under the Fourteenth Amendment after their minor daughter was removed from their home and placed in protective custody. In holding that the defendants were entitled to qualified immunity from the plaintiffs' claim for damages under the Fourteenth Amendment, the appellate court acknowledged that "[s]ocial workers face extreme difficulties in trying simultaneously to help preserve families and to serve the child's best interests" and are required to "balance the parents' interest in the care, custody and control of their children with

the state's interest in protecting the children's welfare." *Id.* at 1138.

Plaintiffs also rely on two appellate decisions from other Circuits.[12] The facts in *Wendrow v. Michigan Department of Human Services*, 534 F. App'x 516 (6th Cir. 2013) are demonstrably different from those in this case. In *Wendrow*, the Sixth Circuit held that a thirteen year old child was seized when she was removed from class and then interviewed by prosecutors and police officers in a separate area on school grounds. The child in question had been diagnosed with Asperger's syndrome. The court concluded that "it was objectively unreasonable for [defendants] to subject [this child] to an interview of this type without consent." In *Wooley v. City of Baton Rouge*, 211 F.3d 913 (5th Cir. 2000), a panel of the Fifth Circuit held that a minor child was "seized" in violation of the Fourth Amendment when he was physically removed from his home without a warrant or probable case. The court specifically found that it was not "objectively reasonable for the officers to believe that [the minor child] was in danger of imminent harm" and further noted that the judicial order in the officers' possession "in no way indicated that [the

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[12] I am not convinced these two cases demonstrate "the clearly established weight of authority from other courts" as contemplated by the qualified immunity doctrine. *See PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1196-97 (10th Cir. 2010) ("A right is clearly established 'when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as [the] plaintiff maintains.") (quoting *Harman v. Pollock*, 586 F.3d 1254, 1260 (10th Cir. 2009).

minor child's] safety might be jeopardized." Indeed, the appellate court noted that "the police were not informed of any abuse prior to arriving" at the child's home.

Here, Plaintiffs were not taken into custody by Defendants Adame and Garz. Defendants were in possession of court orders that specifically found that "an emergency exists which threatens the safety of" the Plaintiffs, that "remaining in the home or returning home would be contrary to the welfare of the child, and that "immediate placement is in the best interest of the child." Judge Sloan's *Ex Parte* Orders also referred to allegations of physical, sexual, mental, or emotional abuse involving these children. Echoing the Supreme Court's observation in *White*, I find that Plaintiffs have "failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the Fourth Amendment." Accordingly, I recommend that Defendants Adame and Garza be dismissed from the first claim for relief on the basis of qualified immunity.

2. Plaintiffs' Third Claim Alleging A Fourteenth Amendment Violation

In their Third Claim, Plaintiffs allege that Defendants Adame and Garza "caus[ed] Plaintiffs to be deprived of their familial associations in violation of the 14th Amendment." *See* First Amended Complaint at ¶ 208. More specifically, Defendants Adame and Garza allegedly prohibited "Plaintiffs from leaving [the G's

residence] with their mother and . . . prohibit[ed] Plaintiffs, through written and verbal orders, from movement and travel with their mother, father, and grandparents." Plaintiffs further allege that Defendants Adame and Garza knew their "actions could and did result in Plaintiffs' detention." *Id.* at ¶ 205.

In moving to dismiss this claim, Defendants Adame and Garza argue, in rather cursory fashion, that they placed only "limited restrictions" on Plaintiffs' interaction with their parents that lasted "for a single day when [Plaintiffs] left [Colorado] without the permission or even knowledge of Garza or Adame." *See* Motion to Dismiss, at 9. Defendants insist that they "are not aware of any Constitutional right to uninterrupted familial relations in the face of credible evidence of imminent danger of abuse" and that they

> acted reasonably when they determined that to protect the Plaintiffs and their siblings, it was best to separate them from their parents and leave them in the care of a family friend of the parents for a short time pending further investigation.

Id. Plaintiffs' analysis of their Fourteenth Amendment claim is equally perfunctory.

In addition to the factual allegations enumerated in support of Plaintiffs' Fourth Amendment claim, the First Amended Complaint avers that after Plaintiffs and their siblings returned to Johnson County on May 7, 2009, "SRS/DCF disregarded the children's best interest and proceeded arbitrarily to separate them from

each other, from their parents, from their grandparents, from the G.'s and from anyone known to them, causing the children obvious mental and physical anxiety, needless worry and grief." *See* First Amended Complaint at ¶ 168.

The Due Process Clause of the "Fourteenth Amendment provides that no state shall 'deprive any person of life, liberty, or property, without due process of law.' " *Estate of DiMarco v. Wyo. Dept. of Corrections*, 473 F.3d 1334, 1339 (10th Cir. 2007) (quoting the Due Process Clause of the U.S. Const. amend. XIV, § 1). "The Supreme Court's interpretation of this clause recognizes two different kinds of constitutional protection: procedural due process and substantive due process." *McKinney v. Pate*, 20 F.3d 1550, 1555 (11th Cir. 1994). "In its substantive mode, the Fourteenth Amendment provides protection against arbitrary and oppressive government action, even when taken to further a legitimate governmental objective." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 767 (10th Cir. 2008). One strand of the substantive due process doctrine "protects an individual's fundamental liberty interest, while the other protects against the exercise of governmental power that shocks the conscience." *Id.* Plaintiffs' Third Claim fails under either application of the substantive due process doctrine.

The "protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." *Becker v. Kroll*, 494 F.3d 904, 923 (10th Cir. 2007) (quoting *Albright v. Oliver*, 510 U.S. 266, 272

(1994)). *See also Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 851 (1992) (acknowledging that constitutional protections extend to personal decisions relating to, *inter alia*, family relationships and child rearing, and that Supreme Court precedents "have respected the private realm of family life which the state cannot enter"). As the Tenth Circuit noted in *Starkey ex rel. A.B. v. Boulder County Social Services*, 569 F.3d 1244, 1253 (10th Cir. 2009) (internal citations omitted),

> "[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." But this right to family integrity "has never been deemed absolute or unqualified." "Courts have recognized that the constitutional right to familial integrity is amorphous and always must be balanced against the governmental interest involved."

Cf. Tenenbaum v. Williams, 193 F.3d 581, 601 (2d Cir. 1999) ("It does not follow from the principle that brief seizures of people may be unreasonable and therefore violate the Fourth Amendment that brief removals [of minor children] from their parents to protect them from abuse are 'without any reasonable justification in the service of a legitimate government objective' under the Due Process Clause.") (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

The Tenth Circuit also addressed the constitutionally protected right of familial association in *Silvan W.*

v. Briggs, 309 F. App'x 216, 223 (10th Cir. 2009). There, the court acknowledged that:

> The substantive component of the Fourteenth Amendment "protects an individual's fundamental liberty interests" and guards "against the exercise of governmental power that shocks the conscience." * * * The right of familial association arises from the concept of ordered liberty. It is violated when government officers intend to interfere with a protected relationship and the reason for interfering "constitute[s] an undue burden on [the plaintiffs'] associational rights."

Id. (internal citations omitted). In *Silvan*, the Tenth Circuit found no evidence that plaintiffs' familial association rights were unduly burdened where defendants acted "on the basis of a reasonable suspicion of past and impending harm." The court concluded that plaintiffs' associational rights "[did] not outweigh the government's 'interest in protecting [the minor child] from abuse and from situations where abuse might occur.'" *Id.* (citing *Griffin v. Strong*, 983 F.2d 1544, 1547 (10th Cir. 1993)). *Cf. Vigil v. S. Valley Acad.*, No. 06-2309, 247 F. App'x 982, 988 (10th Cir. 2007) ("a plaintiff claiming a violation of the right to familial association must show that the defendant had the specific intent to interfere with the family relationship"). *Cf. Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222 (10th Cir. 2006) (noting that to properly allege a substantive due process violation, "a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing

government power") (quoting *Moore v. Guthrie*, 438 F.3d 1036, 1040 (10th Cir. 2006)).

Although I accept as true the well-pled allegations of the First Amended Complaint, I do not find that Plaintiffs have alleged facts that rise to the level of a plausible substantive due process violation by Defendants Adame and Garza.[13] Stated differently, the allegations in the First Amended Complaint do not plausibly demonstrate that Defendants Adame and Garza on May 6, 2009 intended to interfere with a protected relationship or that the Safety Plan they put in place on that day constituted "an undue burden" on Plaintiffs' right of familial association.

Plaintiffs' allegations make clear that even if Defendants' underlying assumptions may have been incorrect or misguided, they were acting in response to the *Ex Parte* Orders issued by the District Court of Johnson County. *See* First Amended Complaint at ¶ 132 (Defendants represented that "they were in possession of a court order from the State of Kansas"). *Cf. Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 275 (2d Cir. 2011) (to prove a due process violation of the right to familial association, it is not enough to

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[13] In reaching this conclusion, the court expresses no views as to the actions of other Defendants taken either before or after May 6, 2009. Under § 1983, the court must consider to what extent, if at all, Defendants Adame and Garza personally participated in the alleged constitutional violations because to assert a viable claim under § 1983, the plaintiff must plausibly allege that the defendant's own individual actions violated the Constitution. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

show that the government action was "incorrect or ill-advised"). The allegations in the First Amended Complaint also demonstrate Defendants' appreciation of their limited role on May 6, 2009. *See* First Amended Complaint at ¶¶ 143 and 161 (Defendants Adame and Garza stated that "Plaintiffs and the other Doe children were in the custody of the State of Kansas" and that "government agents from Kansas would arrive at a unspecified time/day to take physical custody of the Doe children from Dr. and Mrs. G"). The Safety Plan put in place by Defendants Adame and Garza specifically directed Mrs. Doe to contact Ms. Gildner, the social worker in Kansas, the very next day (May 7, 2009), presumably to discuss the children's current and future situation. *Cf. Cox*, 654 F.3d at 275 ("Absent truly extraordinary circumstances, a brief deprivation of custody is insufficient to state a substantive due process custody claim."); *Silvan*, 309 F. App'x at 223 (in finding that the defendants had not violated plaintiffs' familial association rights, the court noted "the relatively short duration" of the child's placement with her aunt and uncle and cited with favor *Nicholson v. Scoppetta*, 344 F.3d 154, 172 (2d Cir. 2003) which held that "brief removals generally do not rise to the level of a substantive due process violation, at least where the purpose of the removal is to keep the child safe during investigation and court confirmation of the basis for removal"); *Wofford v. Evans*, No. 7:02CV00762, 2002 WL 32985799, at *7 (W.D. Va. Dec. 17, 2002) (holding that state action that affects a familial relationship only incidentally is not cognizable in a § 1983 due process claim). There is absolutely no allegation that

Defendant Adame or Defendant Garza had any role or input in the subsequent decision by Kansas authorities to separate the Doe children "from each other, from their parents, from their grandparents, from the G's and from anyone known to them."

Finally, in finding that Defendants Adame and Garza must be dismissed from Plaintiffs' Third Claim on the basis of qualified immunity, I remain mindful of the Tenth Circuit's observations regarding the "difficult and essential" judgments that social workers must make when they are confronted with allegations of child abuse and are forced to make "on-the-spot judgments on the basis of limited and often conflicting information." *Gomes*, 451 F.3d at 1138. *Cf. Hedger v. Kramer*, No. CIV-13-0654-HE, ___ F. Supp. 3d ___, 2016 WL 3945816, at *9 (W.D. Okl. Jul. 19, 2016) (heeding "the Tenth Circuit's admonition that 'considerable deference should be given to the judgment of responsible government officials in acting to protect children from perceived imminent danger or abuse"), *appeal pending.* " '[I]f officers of reasonable competence could disagree' about the lawfulness of the challenged conduct, then '[qualified] immunity should be recognized." *Gomes*, 451 F.3d at 1136 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

> "Officials do not lose their qualified immunity because of a mistaken, yet reasonable belief, nor do officials lose their immunity because of a reasonable mistake as to the legality of their actions." "[T]he purpose of the qualified immunity doctrine is to provide ample room for

> mistaken judgments and to protect 'all but the plainly incompetent or those who knowingly violate the law.'"

Dupree v. City of Jacksonville, No.4:08CV00327 JMM, 2009 WL 1392578, at *6 (E.D. Ark. May 13, 2009) (internal citation omitted).

Accordingly, I recommend that Defendants Adame and Garza be dismissed from Plaintiffs' Third Claim for Relief based upon the doctrine of qualified immunity.[14]

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[14] If the substantive claims against Defendants Adame and Garza are dismissed pursuant to this Recommendation, those Defendants also must be dismissed under Plaintiffs' Fourth Claim which alleges they participated in a conspiracy to deprive Plaintiffs of their constitutional rights. *See Fernandez v. N. Kern State Prison*, No. 1:16-cv-1612 AWI JLT, 2016 WL 7324708, at *6 (E.D. Cal. Dec. 16, 2016) (holding that "[b]ecause Plaintiff's complaint fails to allege any substantive claims . . . it follows that Plaintiff's claim for civil conspiracy must be dismissed"). *Cf. Aleynikov v. McSwain*, No. 15-1170 (KM), 2016 WL 3398581, at *19 (D. N.J. Jun. 15, 2016) (citing the "established rule . . . that a cause of action for civil conspiracy requires a separate underlying tort as a predicate for liability;" because the court found no violation of the plaintiff's constitutional rights, the companion conspiracy claim was dismissed), *clarified on other issues*, 2016 WL 5340513 (D. N.J. Sep. 22, 2016); *Everling v. Ragains*, No. 1:14-cv-00024-TWP-DML, 2015 WL 1319707, at *5 (S.D. Ind. Mar. 23, 2015) (holding that in the absence of an underlying substantive claim, plaintiff's conspiracy cause of action must be dismissed; "[b]ecause all the federal claims under 42 U.S.C. § 1983 are barred by prosecutorial immunity, there is no underlying cause of action on which to base a conspiracy claim"). Also, because this court is recommending Defendants Adame's and Garza's dismissal based upon qualified immunity, there is no need to address their statute of limitations affirmative defense.

C. The Claim Against Defendant Douglas County

The Sixth Claim in the First Amended Complaint asserts that "[u]nder 42 U.S.C. § 1983, Douglas County is liable for causing Plaintiffs to be seized and deprived of their liberty in violation of the 4th Amendment of the United States Constitution." Plaintiffs allege in conclusory fashion that "Douglas County had adopted an unwritten policy, custom, or practice by which it authorized county sheriff's personnel to seize Plaintiffs based on out-of-state *ex parte* court orders in violation of the United States Constitution and Colorado law." *See* First Amended Complaint, at ¶ 216.

This claim cannot survive if Defendants Adame and Garza are dismissed from this action. It is axiomatic that a local government body cannot be liable for damages if the plaintiff suffered no constitutional injury at the hands of a government employee. *See, e.g.*, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (*per curiam*); *Estate of Larsen ex rel. Sturdivan v. Murr*, 511 F.3d 1255, 1264 (10th Cir. 2008). *Cf. Maco v. Baldwin Union Free Sch. Dist.*, No. CV 15-3958, 2016 WL 4028274, at *6 (E.D.N.Y. Jul. 26, 2016) ("[W]here there is no underlying violation of a plaintiff's constitutional rights, any claim for municipal liability necessarily fails as well."); *Bonilla, v. City of York*, No. 1:14-CV-2238, 2016 WL 3165619, at *12 (M.D. Pa. Jun. 7, 2016) ("[T]here is no municipal liability under *Monell* where there is no underlying violation of a constitutional right by the individual officers."), *appeal pending; Caputo v. Rio Ranche Police Dep't*, No. CIV 05-321-JB/DJS, 2006 WL 4063020, at *9 (D.N.M. Jun. 30, 2006) (while the

acts of a single employee may sometimes give rise to a *Monell* claim, "such a *Monell* claim still requires that a constitutional violation occurred").

II. The Kansas Defendants' Challenge to Personal Jurisdiction

Where a defendant is moving to dismiss under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction and under Fed. R. Civ. P. 12(b)(6) for failure to state a cognizable claim for relief, the court should first address the challenge to personal jurisdiction. "The question of personal jurisdiction must be addressed before a court can reach the merits of a case, because 'a court without jurisdiction over the parties cannot render a valid judgment.'" *Doe v. May*, No. 14-cv-01740-WJM-NYW, 2015 WL 8519519, at *3 (D. Colo. Nov. 16, 2015) (quoting *Omi Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1091 (10th Cir. 1998)), *rec. adopted*, 2015 WL 8479808 (D. Colo. Dec. 10, 2015).

In every action, the plaintiff bears the burden of establishing personal jurisdiction over a non-resident defendant. *See Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995). "In the preliminary stages of litigation, Plaintiff's burden is light." *Walker v. Wegener*, No. 11-CV-3238-PAB-KMT, 2012 WL 1020673, at *3 (D. Colo. Mar. 2, 2012) (citing *Wenz*, 55 F.3d at 1505), *rec. adopted*, 2012 WL 1020954 (D. Colo. Mar. 26, 2012). "Where, as here, there has been no evidentiary hearing, and the motion to dismiss for lack of personal jurisdiction is decided on the basis of affidavits and other

materials, Plaintiff[] need only make a *prima facie* showing that jurisdiction exists." *Id.* at *3 (internal citation omitted). *See also Pytlik v. Prof'l Res., Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989) (Plaintiff "has the duty to support jurisdictional allegations in a complaint by competent proof of the supporting facts if the jurisdictional allegations are challenged by an appropriate pleading"). This court must resolve any factual disputes in Plaintiffs' favor. *See Beyer v. Camex Equip. Sales & Rentals, Inc.*, No. 10-CV-01580-WJM-MJW, 2011 WL 2670588, at *2 (D. Colo. July 8, 2011) ("Any factual conflicts must be resolved in the plaintiff's favor."), *aff'd*, 465 F. App'x 817 (10th Cir. 2012). "However, 'only the well pled facts of plaintiff's complaint, as distinguished from mere conclusory allegations, must be accepted as true." *Wise v. Lindamood*, 89 F. Supp. 2d 1187, 1189 (D. Colo. 1999). The court also should accept as true those facts presented in defendant's affidavits or exhibits that remain unrefuted by plaintiff. *See Glass v. Kemper Corp.*, 930 F. Supp. 332, 337 (N.D. Ill. 1996).

Here, both the Kansas Defendants and Plaintiffs have attached exhibits to their motion and response brief, respectively. "A court may consider material outside of the pleadings in ruling on a motion to dismiss for lack of . . . personal jurisdiction," without converting "the motion into one for summary judgment; 'the plain language of Rule 12(b) permits only a 12(b)(6) motion to be converted into a motion for summary judgment.'" *1-800-Contacts, Inv. v. Mem'l Eye, PA*, No. 1:08-CV-983 TS, 2009 WL 1586654, at *1 n.1 (D. Utah,

Jun. 4, 2009). *Cf. Rich Food Servs., Inc. v. Rich Plan Corp.*, No.5:99-CV-677-BR, 2001 WL 36210598, at *9 n.2 (E.D.N.C. May 12, 2001) ("Rule 12(b) does not impose a restriction on [a] trial court in considering matters outside the pleadings in ruling on a motion to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction"); *Sunwest Silver, Inc. v. Int'l Connection, Inc.* 4 F. Supp. 2d 1284, 1285 (D. N.M. 1998) ("The submission of affidavits in connection with a motion to dismiss for lack of personal jurisdiction does not convert the motion into one for summary judgment, thus, the court examines this jurisdictional issue pursuant to the standards applicable to a Rule 12(b)(2) motion.").

"To obtain personal jurisdiction over a nonresident defendant in a diversity action, a plaintiff must show both that jurisdiction is proper under the laws of the forum state and that the exercise of jurisdiction would not offend due process." *Intercon, Inc. v. Bell Atl. Internet Sols.*, 205 F.3d 1244, 1247 (10th Cir. 2000) (citation omitted). Because Colorado's long-arm statute permits the exercise of any jurisdiction that is consistent with the United States Constitution, the personal jurisdiction inquiry under Colorado law "collapses into the single due process inquiry." *Id.* at 1247 (citation omitted). *See also Beyer*, 2011 WL 2670588, at *3 (The court "need only address the constitutional question of whether the exercise of personal jurisdiction over [Defendants] comports with due process.").

"The Due Process Clause permits the exercise of personal jurisdiction over a nonresident defendant so long as there exist minimum contacts between the

defendant and the forum State." *Intercon*, 205 F.3d at 1247 (internal quotation marks and citation omitted). The minimum contacts requirement protects a defendant from "being subject to the binding judgment of a forum with which [it] has established no meaningful contacts, ties, or relations." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (internal quotation marks and citation omitted). The defendant must have "fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign." *Id.* at 472. "[T]he question of whether a non-resident defendant has the requisite minimum contacts with the forum state to establish in personam jurisdiction must be decided on the particular facts of each case." *Benton v. Cameco Corp.*, 375 F.3d 1070, 1076 (10th Cir. 2004) (internal quotation marks omitted).

In this case, Plaintiffs are asserting the court has specific personal jurisdiction over the Kansas Defendants. "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. ___, 134 S. Ct. 1115, 1121 (2014). As the Supreme Court explained in *Walden*, 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. . . . But the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the defendant's conduct that must form the necessary connection with

> the forum State that is the basis for its jurisdiction over him.

Id. at 1122. *Cf. Giduck v. Niblett*, No. 13CA0775, 2014 WL 2986670, at *5 (Colo. App. Jul. 3, 2014) ("[i]n properly viewing the focus of the minimum contacts analysis, . . . it is the defendants, not plaintiffs or third parties, who must create contacts with the forum state. . . ."), *cert. dismissed*, Aug. 28, 2015.

"[A] court may, consistent with due process, assert specific jurisdiction over a nonresident defendant if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Intercon*, 205 F.3d at 1247 (citation omitted). "[P]urposeful direction exists when there is 'an intentional action . . . expressly aimed at the forum state . . . with [the] knowledge that the brunt of the injury would be felt in the forum state," and the "plaintiff's injuries must 'arise out of [the] defendant's forum-related activities." *Anzures v. Flagship Restaurant Group*, 819 F.3d 1277, 1280 (10th Cir. 2016) (quoting *Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1071-72 (10th Cir. 2008)). "This purposeful availment requirement 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." *Rambo v. Am. S. Ins. Co.*, 839 F.2d 1415, 1419 (10th Cir. 1988) (quoting *Burger King*, 471 U.S. at 474-75). *Cf. New Frontier Media, Inc. v. Freeman*, 85 P.3d 611, 614 (Colo. App. 2003) (contacts that exist with a state due

to a plaintiff's unilateral acts have been held insufficient to establish personal jurisdiction).

For this court to assert personal jurisdiction over the Kansas Defendants, there must be more than "mere injury to a forum resident." *Walden*, 134 S. Ct. at 1125. Indeed, the Tenth Circuit has acknowledged that "personal jurisdiction cannot be based on a [defendant's] interaction with a plaintiff known to bear a strong connection to the forum state." *Rockwood Select Asset Fund XI(6)-1, LLC v. Devine, Millimet & Branch*, 750 F.3d 1178, 1180 (10th Cir. 2014) (citing *Walden*, 134 S. Ct. at 1122-26)). In this case, it seems clear that on May 6, 2009, Plaintiffs did not qualify as residents of Colorado or have a strong connection with Colorado.[15] In reaching that conclusion, I find instructive the Colorado Supreme Court's analysis in *Brandt v. Brandt*, 268 P.3d 406 (Colo. 2012). Although that case arose under the Uniform Child Custody Jurisdiction and Enforcement Act and considered when a non-issuing jurisdiction could modify an out-of-state custody order, the Colorado Supreme Court held that a determination of where a parent and child "presently reside" for purposes of a residency determination must be based on a "totality of the circumstances determination." *Id.* at 415. Factors that should be weighed include:

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[15] The First Amended Complaint alleges that at all relevant times in 2009, Plaintiffs, as well as their parents, and their siblings, were residents of the State of Kansas and resided in Johnson County, Kansas. *See* First Amended Complaint at ¶ 16.

> the length and reasons for the parents' and the child's absence from the issuing state; their intent in departing from the state and returning to it; . . . where they maintain a home, car, driver's license, job, professional licensure, and voting registration; where they pay state taxes; the issuing state's determination of residency based on the facts and the issuing state's law; and other circumstances demonstrated by evidence in the case.

Id. This court has not been provided with any evidence that would suggest Plaintiffs qualified as "residents" of Colorado on May 6, 2009. With the recommendation to dismiss the claims against Defendants Douglas County, Adame, and Garza, the remaining parties to this action were all Kansas residents at the time of the relevant conduct in 2009.

Moreover, I do not find that the Kansas Defendants' very brief contact with Colorado officials is sufficient to demonstrate that these Defendants "purposefully directed" their activities at this forum with "[the] knowledge that the brunt of the injury would be felt in the forum state." I also do not find that any violation of Plaintiffs' constitutional rights arose "out of [the] defendant's forum-related activities."

The First Amended Complaint alleges that on April 20, 2009, Defendant Gildner allegedly enlisted the assistance of Assistant District Attorney Jaclynn J.B. Moore, "who filed ten Child-in Need-of-Care ("CINC") petitions in the District Court for Johnson County, Kansas." *See* First Amended Complaint at

¶ 85. A "non-emergency hearing" on those petitions was set for May 11, 2009 in the District Court for Johnson County. *Id.* at ¶ 92. Thereafter, on May 4, 2009, Assistant District Attorney Donald W. Hymer, Jr. moved for issuance of *Ex Parte* Orders of Protective Custody Pursuant to K.S.A 38-2242 in the District Court of Johnson County, Kansas. *Id.* at ¶ 111. *See also* Exhibit A (doc. #64-1) attached to Motion to Dismiss. *Cf. Fitzgerald v. Zakheim & Lavrar, P.A*, 90 F. Supp. 3d 867, 873 (D. Minn. Feb. 11, 2015) (holding that the defendant law firm did not "purposely direct" its actions at a Minnesota resident when it obtained from a Florida state court a writ of garnishment aimed at an individual the defendant believed resided in Florida). Plaintiffs contend that after Dr. and Mrs. G returned the Doe children to Kansas on May 7, 2009, "SRS/DCF [the Kansas Defendants' employer] . . . proceeded arbitrarily to separate them from each other, from their parents, from their grandparents, from the G's and from anyone known to them." The "purposeful activities" which form the basis for the instant action all took place in Kansas and the consequences of the Kansas Defendants' conduct also were felt in that state. Accordingly, I do not find that the Kansas Defendants had sufficient contacts with Colorado to permit this court to exercise specific personal jurisdiction over those individuals.

"Even if defendant's actions created sufficient minimum contacts," the court "must still consider whether the exercise of personal jurisdiction over defendant would offend traditional notions of fair play

and substantial justice." *Intercon*, 205 F.3d at 1247 (internal quotation marks and citation omitted). "This inquiry requires a determination of whether the district court's exercise of jurisdiction over defendant is reasonable in light of the circumstances surrounding the case." *Id.* The court considers the following factors in deciding whether the exercise of jurisdiction is reasonable: "(1) the burden on the defendant, (2) the forum state's interest in resolving the dispute, (3) the plaintiff's interest in receiving convenient and effective 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 substantive social policies." *Id.* at 1249.

> In assessing the reasonableness of jurisdiction, we also take into account the strength of a defendant's minimum contacts. [T]he reasonableness prong of the due process inquiry evokes a sliding scale: the weaker the plaintiff's showing on minimum contacts, the less a defendant need show in terms of unreasonableness to defeat jurisdiction.

Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc., 618 F.3d 1153, 1161-62 (10th Cir. 2010) (internal citations omitted). The Supreme Court has cautioned that "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent." *Burger King*, 471 U.S. at 478.

On balance, I am not convinced that exercising personal jurisdiction over the Kansas Defendants in Colorado would comport with traditional notions of fair play and substantial justice. Colorado does not appear to be the most efficient place to litigate the dispute, and certainly does not have a greater interest in protecting the interests of the children in this case than Kansas. To the contrary, this action arises out of orders issued by the District Court for Johnson County, Kansas. I have no reason to believe that proceeding against the Kansas Defendants in that forum would impose undue burdens on Plaintiffs or impair their ability to resolve their claims on the merits. Basic notions of due process mandate that this case proceed, if at all, in the District of Kansas.

In lieu of dismissing the claims against the Kansas Defendants, the court may exercise its discretion and transfer the remaining claims and parties to the District of Kansas pursuant to 28 U.S.C. § 1631. That statute provides that if a court finds that it lacks personal jurisdiction, it "shall, if it is in the interests of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed." *Cf. Doe v. May*, 2015 WL 8519519, at *5; *Reynolds v. Henderson & Lyman*, No. 13-cv-03283-LTB, 2014 WL 5262174, at *4-5 (D. Colo. Oct. 14, 2014). It would appear that Plaintiffs could have brought their claims against the Kansas Defendants originally in that forum. I further find that transferring this action to the District of Kansas would further the interests of justice, particularly if Plaintiffs' claims might

be time-barred if filed anew in that jurisdiction. At this point, I cannot say with certainty that Plaintiffs' claims against the Kansas Defendants are "unlikely" to have merit, just as I will not presume that Plaintiffs are pursuing their claims in bad faith. On balance, I recommend that the action and the remaining claims against Defendants Gildner, Webb and Abney be transferred to the District of Kansas.[16]

CONCLUSION

Accordingly, for the reasons set forth above, this court RECOMMENDS that the Motion to Dismiss Amended Complaint (doc. #57) filed by Defendants Lesa Adame, Carl Garza, and Douglas County be GRANTED and that the claims against those defendants be dismissed with prejudice. I further RECOMMEND that Defendants Monica Gildner, Angela Webb, and Tina Abney's Motion to Dismiss First Amended Complaint with Memorandum in Support or, in the alternative, Motion for Summary Judgment (doc. #65) be DENIED WITHOUT PREJUDICE, and that this case and the claims against Defendants Gildner, Webb, and Abney be transferred to the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1631.

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[16] In view of this Recommendation, the court need not address the substantive arguments advanced in the Kansas Defendants' motion to dismiss. Those arguments should be resolved by the assigned judicial officer in the District of Kansas.

DATED this 27th day of January, 2017.

BY THE COURT:

s/ Craig B. Shaffer
United States
Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

N.E.L., et al., Plaintiffs - Appellants, v. MONICA GILDNER, et al., Defendants - Appellees.	No. 18-3059

ORDER

(Filed Aug. 20, 2019)

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk