2022 WL 333234
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United States Court of Appeals, Eleventh Circuit.

William O. FULLER,
Martin A. Pinilla, II, Plaintiffs-Appellees,
v.
Joe CAROLLO, Defendant-Appellant,
John Does 1-10, et al., Defendants.

No. 21-11746
|
Non-Argument Calendar
|
Filed: 02/04/2022

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 1:18-cv-24190-RS.

Attorneys and Law Firms

Rossana Arteaga-Gomez, Jeffrey W. Gutchess, Brandon Perry Rose, AXS Law Group, PLLC, Joshua Jay Shore, Krinzman Huss Lubetsky Feldman & Hotte, Miami, FL, for Plaintiffs-Appellees.

Benedict P. Kuehne, Kuehne Davis Law, PA, Thomas Emerson Scott, Jr., Cole Scott & Kissane, PA, Miami, FL, for Defendant-Appellant.

Before WILLIAM PRYOR, Chief Judge, WILSON, and ANDERSON, Circuit Judges.

Opinion

PER CURIAM:

Joe Carollo, a City Commissioner, appeals a second time a denial of immunity from a complaint filed by William O. Fuller and Martin A. Pinilla, businessmen from the Little Havana neighborhood of Miami, who allege that Carollo repeatedly harassed them in retaliation for their political support of his election opponent in violation of the First Amendment. *See* 42 U.S.C. § 1983. After briefing and oral argument, we dismissed Carollo's first appeal for lack of jurisdiction because it challenged a nonfinal order that granted the businessmen leave to amend their complaint. *Fuller v. Carollo*, 977 F.3d 1012 (11th Cir. 2020). Fuller and Pinilla amended their complaint, and the district court granted a partial dismissal based on legislative immunity and denied a dismissal based on qualified immunity. We affirm.

I. BACKGROUND

At this stage, we accept the allegations in the amended complaint as true and construe them in the light most favorable to the plaintiffs. *See Keating v. City of Miami*, 598 F.3d 753, 762 (11th Cir. 2010). We need not rehash all the details of the proceedings that led to their first appeal. We limit our review to the allegations in the amended complaint that relate to Carollo's arguments for legislative and qualified immunity.

In 2017, Carollo was a candidate for city commissioner for the district 3 that includes Little Havana. Before the general election, he sought Fuller's political support and the two men appeared to have a good relationship. Carollo advanced to a runoff election against Alfie Leon.

After early voting for the runoff began, Leon held political rallies at a property Fuller owned that was adjacent to an early voting center. Carollo's campaign chief of staff, Steve Miro, noticed Pinilla at the rallies and notified Carollo. On the last day of early voting, Miro saw Pinilla at a rally, called Fuller, and demanded that he shut down the event. Carollo and Miro then used contacts in city government to shut down the rally. Carollo defeated Leon in the runoff election in November.

Less than a week later, at Carollo's direction, dozens of police, fire, building, and other officers raided Sanguich de Miami, a restaurant where Fuller and Pinilla were investors and landlords. Weeks later, Carollo introduced and voted for Ordinance 13733, which ended the temporary-use permits used to operate Sanguich. When Sanguich attempted to reopen, city officials twice shut it down acting on direct orders from Carollo and his associates. Carollo also targeted Sanguich at the Gay 8 Festival where it operated as a tent vendor. Carollo and Miro voiced concerns about Sanguich selling contaminated food to a city fire inspector, who then performed an intrusive surprise inspection. Carollo did not target any other vendor at the festival. Sanguich eventually relocated to a property

not owned by Fuller and Pinilla and resumed operations without interference.

A month after the runoff election, Carollo also attempted to shut down Fuller and Pinilla's office Christmas party. Carollo had Maria Lugo, a campaign advisor and former city employee, demand that the director of code enforcement shut down the event for lacking a special events permit. When an enforcement officer reported that the event did not violate the code, her supervisor (a friend of Lugo) instructed her to remain outside the event until it ended. Carollo also complained to the assistant city manager, who instructed the director to attend the party in person. The director later confirmed to Fuller that Carollo's actions were politically motivated.

Three months after the runoff, Carollo shut down the one-year anniversary party of Union Beer Store after visiting the property with several police officers and code enforcement officer. Fuller and Pinilla were landlords for and partners in Union Beer.

That same month, Carollo also started harassing the Ball & Chain nightclub, which Fuller and two friends owned. Carollo and several associates visited the club's valet parking lot and photographed cars on the pretense of performing an "official investigation" of the operation. Later, Carollo visited residents of a nearby building to solicit noise complaints against the club. Carollo also conducted a "park-and-walk" with city employees, including the acting director of code enforcement, to meet with a resident Carollo had prepped

to make a noise complaint against the club. Carollo arranged the park-and-walk without the knowledge of the city manager. Carollo later texted a parking complaint to the city manager, who in turn directed three code officers and a police officer to force club employees to move their cars from the club's parking lot. The general manager of the club later discovered Carollo and a member of the code enforcement board behind the club attempting to solicit more noise complaints from neighbors.

Carollo also used his official authority to harass Fuller in other ways. For example, Carollo issued orders shutting down Domino Plaza, the customary site of the monthly Viernes Culturales festival hosted by an organization led by Fuller. And, after Carollo raised concerns about Fuller-owned properties during a meeting of the city commission, the city attorney sent an email to local administrators requesting a review of records of and the inspection of properties discussed at the meeting, most of which were owned by Fuller or his associates or were related to Fuller's businesses.

Fuller and Pinilla filed a complaint in the district court alleging that Carollo retaliated against them in violation of the First Amendment. *See* 42 U.S.C. § 1983. Carollo moved to dismiss based on qualified immunity and legislative immunity. A magistrate judge issued a report and recommendation that the district court grant Carollo's motion in part and deny it in part. The district court adopted that report and recommendation. And it granted Fuller and Pinilla leave to amend their complaint consistent with the report and

recommendation. We dismissed Carollo's appeal of that order for lack of jurisdiction. *Fuller*, 977 F.3d 1012

After remand, Fuller and Pinilla filed a second amended complaint against Carollo. The amended complaint repeated many of the allegations made in the amended complaint.

Carollo moved to dismiss the amended complaint, which the district court granted in part and denied in part. Fed. R. Civ. P. 12(b)(6). The district court ruled that Carollo enjoyed legislative immunity as to "the passage of Ordinance 13733," but that he lacked legislative or qualified immunity for the "multiple actions directed solely at [Fuller and Pinilla] or directed at others who did business with [them]" and where his conduct "involve[d] code enforcement, something the Eleventh Circuit has stated is administrative, not legislative."

II. STANDARD OF REVIEW

We review *de novo* the denial of a motion to dismiss based on immunity from suit. *See Crymes v. DeKalb Cty., Ga.*, 923 F.2d 1482, 1485 (11th Cir. 1991) (legislative immunity); *Keating*, 598 F.3d at 762 (qualified immunity).

III. DISCUSSION

We divide our discussion in two parts. First, we discuss Carollo's argument for legislative immunity.

Second, we discuss Carollo's argument for qualified immunity.

A. The District Court Did Not Err by Partially Denying Carollo Legislative Immunity.

"Absolute legislative immunity extends only to actions taken within the sphere of legitimate legislative activity." *Brown v. Crawford Cty., Ga.*, 960 F.2d 1002, 1011 (11th Cir. 1992) (internal quotation marks omitted). So, "[i]t is the official function that determines the degree of immunity required, not the status of the acting officer." *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (alteration adopted) (quoting *Marrero v. City of Hialeah*, 625 F.2d 499, 508 (5th Cir. 1980)). To enjoy absolute immunity, the legislator must engage in "[a] legislative act [that] involves policymaking rather than [the] mere administrative application of existing policies." *Crymes*, 923 F.2d at 1485. The act of "rulemaking . . . [is] legislative." *Id.* But the enforcement of laws against "specific individuals, rather than the general population, . . . [are] more apt to be administrative" and excluded from protection under the doctrine of legislative immunity. *Id.*

The district court did not err in partially denying Carollo's argument for legislative immunity. Fuller and Pinilla's amended complaint alleges that Carollo exceeded the bounds of his legislative responsibilities by repeatedly harassing their businesses. Carollo's alleged enforcement actions were not legislative functions for which he was entitled to absolute immunity.

Carollo argues that legislative immunity applies to "matters arising out of his Commission votes," but the district court ruled that he was immune from suit for actions related to the passage of Ordinance 13733. Carollo also argues that he is immune from suit for "introducing legislation to abolish the use of special masters," but Fuller and Pinilla deleted that allegation from their amended complaint. Carollo identifies no legislative function he allegedly performed for which the district court denied him absolute immunity.

B. Carollo's Argument for Qualified Immunity Fails.

Carollo's argument for qualified immunity also fails. Carollo argues that the district court erred in determining that his actions fell outside "the allowable duties and functions of a City legislative policymaker." But the district court *agreed* that Carollo was acting in his discretionary capacity as a city commissioner. Carollo also argues that an investigative report attached to the complaint "rendered the[] First Amendment retaliation claims implausible," but the district court declined to consider the hearsay in that report. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1294 (11th Cir. 2012). Carollo does not challenge that reasoning. And Carollo identifies no legal error in the ruling that the complaint against him alleges that he violated settled law prohibiting officials from retaliating against constituents who engage in political activities protected by the First Amendment.

IV. CONCLUSION

We **AFFIRM** the partial denial of Carollo's motion to dismiss.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-11746

WILLIAM O. FULLER,
MARTIN A. PINILLA, II,

Plaintiffs-Appellees,

versus

JOE CAROLLO,

Defendant-Appellant,

JOHN DOES 1-10, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:18-cv-24190-RS

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: February 4, 2022

For the Court: DAVID J. SMITH, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-24190-CIV-SMITH

WILLIAM O. FULLER and
MARTIN PINILLA, II,

Plaintiffs,

v.

JOE CAROLLO,

Defendant. /

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

(Filed May 13, 2021)

This matter is before the Court on Defendant Commissioner Carollo's Motion to Dismiss Second Amended Complaint; Motion to Strike; Request for Hearing [DE 154], Plaintiff's Opposition [DE 162], and Defendant's Reply [DE 167]. This case arises from Defendant's alleged retaliatory conduct towards Plaintiffs after they supported Defendant's opponent in an election for City Commissioner. Defendant ultimately won the election and Plaintiffs allege that since the election Defendant has subjected Plaintiffs to a campaign of harassment in retaliation for Plaintiffs' exercise of their First Amendment right, thereby violating 42 U.S.C. § 1983. For the reasons set forth below, the Motion is granted in part and denied in part.

I. THE SECOND AMENDED COMPLAINT[1]

The Second Amended Complaint ("SAC") alleges a single count of First Amendment retaliation against Defendant, in violation of § 1983. Plaintiffs seek monetary damages, including punitive damages, attorneys' fees, and injunctive relief. Plaintiffs are local businessmen who own properties and businesses in the Little Havana neighborhood of Miami. One of Plaintiff Fuller's businesses is the Ball & Chain nightclub. Together Plaintiffs are working on redevelopment and restoration of the Tower Hotel.

In the summer of 2017, Defendant announced his campaign for Commissioner for the City of Miami's District 3, which includes Little Havana. The election required a run-off election between Defendant and another candidate, Alfie Leon. In November 2017, during the early voting period for the run-off election, a rally in support of Defendant's opponent was held on property that Plaintiffs owned and which was located near a voting center. Defendant allegedly used his contacts at the City to have Code Enforcement Officers and police shut down the rally. The following day, the same thing happened. Defendant won the election.

Under section 4(d) of the City of Miami Charter:

> Except for the purpose of inquiry and as may be necessary as provided in section 14, the mayor, the city commission, any committees

[1] The Second Amended Complaint is fifty-seven pages long and contains 321 numbered paragraphs. Set forth below is a summary of the allegations.

> and members thereof shall deal with the administrative service solely through the city manager, and neither the mayor nor the city commission, nor any committees nor members thereof shall give orders to any of the subordinates of the city manager, city attorney, city clerk and independent auditor general, either publicly or privately.

Thus, under the terms of the Charter, a commissioner cannot give orders to any subordinates of the City Manager; all orders should be directed to the City Manager who has the authority to give direction to the City departments.

According to the SAC, after Defendant won the election, he began a campaign of retaliation against Plaintiffs. Defendant immediately drew up a list of Plaintiffs' properties and associated businesses in District 3. Steve Miro, who had worked on Defendant's campaign, stated that "when [Defendant] took office . . . he went after Mr. Fuller, obviously." Orlando Diez, the Director of Code Compliance, Construction Manager, Officer of Capital Improvements for the City of Miami at the time, believed that Defendant, in an indirect way, told him to selectively target Fuller's properties.

On December 15, 2017, Plaintiffs held their annual office holiday party at the Tower Hotel. Defendant conspired with another City employee, Maria Lugo, to shut the party down. Lugo repeatedly called and texted Diez, as the Director of Code Enforcement, insisting that he shut down the event because the party lacked

a Special Events Permit. Diez sent a Code Officer to the Tower Hotel to investigate. The Code Officer did not identify any violations but was instructed to wait outside until the party ended. Diez also received a call from Assistant City Manager Alberto Parjus who directed Diez to go to the event himself because complaints were "coming from a Commissioner's office." Diez went to the property with additional Code Enforcement Officers. When Diez spoke to Fuller, he told Fuller that this was a political target and Defendant was behind it.

In fall 2017 a sandwich shop, Sanguish de Miami ("Sanguish"), opened on Plaintiffs' property in a refurbished shipping container. Under the City Code the use of shipping containers for retail business was permitted using Temporary Use Permits ("TUPs"). On November 26, 2017, less than a week after Defendant won the election, Sanguish was raided by 25-30 City enforcement personnel. After the raid, Fuller was contacted by City Manager Daniel Alfonso, who advised that Code Enforcement had been summoned to the property and, when asked if this was retaliation from Defendant, Alfonso replied "si." The owners of Sanguish also contacted Alfonso, who confirmed to them that the raid was performed at the direction of Defendant. In December 2017, Defendant met with Sanguish's owners and he told them they should relocate from Plaintiffs' property. Thereafter, at a December 14, 2017 City Commission meeting, Defendant inserted a provision into another commissioner's legislation that would prevent TUPs from being used in District 3,

Ordinance 13733. After additional run-ins with Code Enforcement Officers, Sanguish ultimately relocated to another location not owned by Plaintiffs. As a result, Plaintiffs have suffered a loss of rental income and other monetary damages.

Plaintiffs are the landlords of and partners in the Union Beer Store in District 3. On February 10, 2018, Union Beer held its one-year anniversary party in the parking lot behind the store. Defendant appeared at the property with police officers and approximately 15-20 Code Enforcement Officers. Defendant then ordered Code Enforcement to shut the party down.

On February 18, 2018, Defendant, and others, entered a parking lot used by the valet operator for Ball & Chain, the nightclub owned by Plaintiff Fuller and others. Defendant informed the valet attendant that he was performing an "official investigation" of the valet operation. When the operator of the valet business arrived, he told Defendant that the lot had been approved by the Miami Parking Authority and that the valet service had a valid lease with the lot owner. Defendant then told the valet operator that "I am the law" and that the operator was "working for a millionaire," meaning Fuller, which was not acceptable to Defendant.

On March 3, 2018, Defendant called a Code Enforcement supervisor and requested that an Officer be sent to District 3 because Defendant had concerns about building permits. When the Officer arrived, Defendant asked to ride along with the Officer to point

out five locations, three of which belonged to Plaintiffs, at which Defendant wanted the Officer to search for code violations. After the ride along, Defendant followed up with the Officer to see if any violations had been issued. On March 14, 2018, Defendant arranged for a "park-and-walk" with numerous City officials and employees, in search of code violations.

On March 12, 2018, Plaintiff Fuller, through his company The Barlington Group, filed an Ethics Complaint against Defendant with the Miami-Dade Commission on Ethics and Public Trust. While the Ethics Complaint was pending, the alleged harassment of Plaintiffs stopped. On August 13, 2018, Fuller withdrew the Ethics Complaint and the harassment began again.[2]

On August 20, 2018, just after withdrawal of the Ethics Complaint, Plaintiffs received a letter from the city which included notice of a Code violation at one of their properties where Plaintiffs intended to put a kiosk marketplace using retrofitted containers. Plaintiffs had a lawful Farmer's Market TUP for the marketplace. On September 4, 2018, the City informed Plaintiffs that it was revoking the TUP that allowed the kiosks on the property. On September 12, 2018, an emergency hearing was held at the Code Enforcement Board Meeting, where the Board granted the City permission to enter the property and remove the kiosks.

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[2] Attached to the SAC as Exhibit A is the Miami-Dade Commission on Ethics & Public Trust Investigative Report ("Investigative Report") that resulted from the Ethics Complaint.

Also, after the Ethics Complaint was withdrawn, Defendant reported false noise complaints and parking violations related to the Ball and Chain. Plaintiffs maintain that Defendant also attempted to stop a monthly neighborhood festival, with which they were associated, by closing the venue, Domino Plaza, and then reserving the plaza on the same days as future festivals. Defendant has gone on local radio shows and defamed Plaintiffs, claiming they are associated with corrupt governments and investors.

At a February 14, 2019 City Commission meeting, Defendant raised the issue of Code compliance but only focused his presentation on Plaintiff's properties in District 3. The presentation included false and misleading information about various Code violation on Plaintiffs' properties. The Commissioners passed a resolution calling for a task force to investigate Code compliance issues. After the meeting, the City Attorney asked City administrators to inspect eleven properties, seven of which were owned or affiliated with Fuller. Several City officials expressed concern that this was selective enforcement aimed against a business owner. Plaintiffs have also learned that Defendant has engaged in a campaign to direct City officials to use City resources and funds to purchase properties Plaintiffs were attempting to purchase.

II. PROCEDURAL HISTORY

On October 11, 2018, Plaintiffs filed their Complaint against multiple defendants, including

Defendant Carollo. Thereafter, Plaintiffs filed an Amended Complaint. The defendants filed motions to dismiss the Amended Complaint, which were referred to Magistrate Judge Louis for a Report and Recommendation. On April 30, 2019, Magistrate Judge Louis issued her Report and Recommendation [DE 99] ("R&R").

The R&R, among other things, recommended that Defendant's motion to dismiss the Amended Complaint be granted, with leave to amend. The R&R found that Plaintiffs have standing to bring their First Amendment retaliation claim but recommended that Plaintiffs be granted leave to amend to clarify the injuries for which Plaintiffs seek redress and to clarify the nature of the injunction sought. The R&R also found that Plaintiffs stated a claim upon which relief can be granted for First Amendment retaliation. However, the R&R found that Defendant's actions prior to winning the election were not actionable and neither were Defendant's action regarding the enactment of Ordinance 13733.

The R&R also declined to accept as true the hearsay statements contained in the Investigative Report that resulted from the Ethics Complaint. While those hearsay statements contradict some of the allegations in the Amended Complaint, the R&R declined to consider them to disprove the allegations in the Amended Complaint. The R&R also addressed Defendant's defense of qualified immunity. The R&R found that, while Defendant was acting within his discretionary authority, Plaintiffs had alleged that Defendant violated their

constitutional rights, which were clearly established at the time of his wrongful acts. Thus, Defendant was not entitled to qualified immunity. On June 12, 2019, the district court affirmed and adopted the R&R, granted Defendant's Motion to Dismiss, denied Defendant qualified immunity, and permitted Plaintiffs to file a second amended complaint.

On June 26, 2019, Defendant filed a Notice of Appeal as to the denial of qualified immunity. On June 28, 2019, Plaintiffs filed the SAC, dropping the other defendants and leaving only Defendant Carollo. As to Defendant Carollo, the SAC is nearly identical to the Amended Complaint except for additional allegations regarding Plaintiffs' injuries and damages and the injunctive relief sought. On October 26, 2020, the Eleventh Circuit issued its mandate, in which it dismissed the appeal for lack of jurisdiction because the district court had granted the motion to dismiss with leave to amend.

III. MOTION TO DISMISS STANDARD

The purpose of a motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) is to test the facial sufficiency of a complaint. *See* Fed. R. Civ. P. 12(b)(6). The rule permits dismissal of a complaint that fails to state a claim upon which relief can be granted. *Id.* It should be read alongside Federal Rule of Civil Procedure 8(a)(2), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Although a complaint challenged by a

Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is still obligated to provide the "grounds" for his entitlement to relief, and a "formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When a complaint is challenged under Rule 12(b)(6), a court will presume that all well-pleaded allegations are true and view the pleadings in the light most favorable to the plaintiff. *American United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1066 (11th Cir. 2007). However, once a court "identif[ies] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," it must determine whether the well-pled facts "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). A complaint can only survive a 12(b)(6) motion to dismiss if it contains factual allegations that are "enough to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true." *Twombly*, 550 U.S. at 555. However, a well-pled complaint survives a motion to dismiss "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.' " *Id.* at 556.

IV. DISCUSSION

Defendant seeks to dismiss the SAC because: (1) it does not state a claim upon which relief can be granted;

(2) Plaintiffs lack standing to assert allegations against Defendant on behalf of non-parties; (3) Defendant is protected by the doctrines of qualified immunity and legislative immunity; and (4) Defendant's actions prior to his election as a City Commissioner cannot give rise to a civil rights claim. Defendant previously raised several of these arguments when he sought to dismiss Plaintiffs' Amended Complaint. Specifically, Defendant previously argued that Plaintiffs lack standing, that Plaintiffs fail to state a claim, and that he is entitled to qualified immunity. The Court, by adopting the R&R, denied Defendant's prior motion to dismiss on these grounds. In addition to the Motion to Dismiss, Defendant also seeks to strike the allegations in six paragraphs of the SAC because they are "immaterial, impertinent, or scandalous matter." The Court will address each of these arguments.

A. Standing

Defendant argues that the SAC should be dismissed to the extent that it asserts claims on behalf of non-parties. Plaintiffs respond that this Court has already determined that they have standing and, as far as the claims of non-parties, Plaintiffs respond that the SAC alleges the nonparties have assigned their claims to Plaintiffs. Even if the non-parties have assigned their claims to Plaintiffs, there are no claims of First Amendment retaliation pled as to the non-parties. Plaintiffs have not pled that the non-parties exercised their First Amendment rights and were then retaliated against by Defendant. Thus, there is no alleged

"claim" for the non-parties to assign. However, as the Court has previously determined, Plaintiffs have adequately pled that they have standing and that the damages Plaintiffs seek are not for the harm suffered by non-parties but for the injuries suffered by Plaintiffs. As the R&R noted, "the conduct alleged to have impacted nonparty entities are examples of [Defendant's] retaliatory conduct towards Plaintiffs, as he allegedly targeted all business that Plaintiffs are associated with." (R&R at 7.) Consequently, Defendant's Motion is granted to the extent Plaintiffs seek to recover monetary damages allegedly suffered by non-parties; otherwise, the Motion is denied.

B. Failure to State a Claim

Defendant contends that the SAC fails to state a claim for violation of § 1983 when the Investigative Report is considered. The Court has already held, in the Order adopting the R&R, that it is not required to accept the statements and representations in the Investigative Report as true and that virtually the same allegations in the Amended Complaint stated a valid claim for First Amendment retaliation. The Court will not revisit this ruling based on Defendant's vague and conclusory statement that the Investigative Report shows that Defendant did not engage in retaliatory conduct. In the instant motion, Defendant points to nothing specific in the Investigative Report that would undermine Plaintiffs' claim. Given that the allegations of the Amended Complaint and the SAC make

virtually identical allegations in support of Plaintiffs' claim, Defendant's Motion is denied on this ground.

Defendant also argues that Defendant's alleged violations of the City Charter do not state a civil rights violation. Plaintiffs, however, do not allege that the violation of the City Charter alone constitutes a civil rights violation; instead, the SAC alleges that the violations along with Defendant's other actions amount to a civil rights violation.

C. Qualified Immunity

Defendant maintains that he is entitled to qualified immunity for actions taken in his role as an elected City Commissioner. The Court also previously held that Defendant was not entitled to qualified immunity. In adopting the R&R, the Court found that while Defendant was acting within his discretionary authority, Plaintiffs had met their burden of showing that Defendant had violated a constitutional right and that it was well-settled law that the government may not retaliate against its citizens for expressing their First Amendment rights; therefore, Defendant was not entitled to qualified immunity.

In his Motion, Defendant agrees with the R&R's finding that he was acting in his discretionary role as City Commissioner but again argues that he did not violate Plaintiffs' constitutional rights, nor did he violate clearly established law. Thus, he maintains that he is entitled to qualified immunity. Plaintiffs argue that not only did Defendant violate their clearly established

constitutional rights, but Defendant's actions also exceeded his discretionary authority. As noted earlier, the Amended Complaint and the SAC make nearly identical allegations. Because the allegations remain essentially the same and neither side has offered any reason for the Court to reconsider its earlier adoption of the R&R as to the issue of qualified immunity, Defendant's Motion to Dismiss based on qualified immunity is denied. Defendant is not entitled to qualified immunity for the reasons set forth in the R&R.

D. Legislative Immunity

Defendant argues that he is entitled to legislative immunity, which gives him absolute immunity from suit, because the SAC states that Defendant's actions were in furtherance of his duties. Defendant argues that his immunized conduct encompasses the introduction of legislation, all commentary made during a City Commission meeting, his alleged district inquiries, fact-findings, and investigations as an extension of his policy-making function. While it is not entirely clear from Defendant's Motion whether he seeks to dismiss the entire SAC based on legislative immunity or whether he seeks to dismiss only portions of it, what is clear is that Defendant has an overly broad view of legislative immunity.

While a defendant performing a legislative function has absolute immunity, merely being a legislator does not confer absolute immunity. *See Crymes v. DeKalb Cty., Ga.*, 923 F.2d 1482, 1485 (11th Cir. 1991). It

is the function performed, not the status of the acting officer that determines the degree of immunity. *Espanola Way Corp. v. Meyerson*, 690 F.2d 827, 829 (11th Cir. 1982) (citation omitted). The Eleventh Circuit has explained how to determine whether an act was legislative, and thus entitled to immunity, or whether it was administrative, and thus not entitled to immunity:

> A legislative act involves policy-making rather than mere administrative application of existing policies. *Minton v. St. Bernard Parish School Bd.*, 803 F.2d 129, 135 (5th Cir. 1986) (citing *Hornsby v. Allen*, 326 F.2d 605, 608-09 (5th Cir. 1964)). Acts of zoning enforcement rather than rulemaking are not legislative. *Front Royal & Warren County Industrial Park Corp. v. Front Royal*, 865 F.2d 77, 79 (4th Cir. 1989). If the facts utilized in making a decision are specific, rather than general, in nature, then the decision is more likely administrative. Moreover, if the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature. *See Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984). *See generally Developments in the Law–Zoning*, 91 Harv. L. Rev. 1427, 1510-11 (1978).

Crymes, 923 F.2d at 1485. Thus, immunity has been found in cases involving the vetoing of an ordinance passed by the city's legislative body, the examining of a person before a legislative committee, and voting on legislation. *Espanola Way*, 690 F.2d at 830.

Based on this, Defendant is not entitled to legislative immunity. Plaintiffs allege that Defendant took multiple actions directed solely at them or directed at others who did business with Plaintiffs, solely for the purposed of harming them. Thus, Defendant's actions were directed at specific individuals, not the general population. Further, many of the allegations in the SAC involve code enforcement, something the Eleventh Circuit has stated is administrative, not legislative. The only allegations that would fall within the legislative ambit are those concerning the passage of Ordinance 13733, which disallowed TUPs in District 3 only. Thus, as to the allegations directly relating to the passage of Ordinance 13733, Defendant is entitled to legislative immunity.

E. Motion to Strike

Defendant moves to strike six paragraphs from the SAC, paragraphs 269-274, that allege Defendant himself has violated City Code. Defendant argues that these allegations are irrelevant to Plaintiffs' claim of retaliation and are included in the SAC to embarrass and damage Defendant individually. Thus, Defendant seeks to strike these allegations pursuant to Federal Rule of Civil Procedure 12(f). Plaintiffs contend that these allegations are not to embarrass or damage Defendant but, instead, help demonstrate Defendant's retaliatory motive. Plaintiffs argue that Defendant's own failure to comply with City Code shows that his actions towards Plaintiffs may not have been solely based on

his desire to avoid code violations within his community.

The Court agrees with Plaintiffs. Defendant has maintained that he was just doing his job to ensure code compliance. However, Defendant's own alleged multiple failures to comply with the City Code undermine this contention. Consequently, the allegations are not irrelevant to Plaintiffs' claim and the Motion to Strike is denied.

Accordingly, it is

ORDERED that:

1. Defendant Commissioner Carollo's Motion to Dismiss Second Amended Complaint; Motion to Strike; Request for Hearing [DE 154] is **GRANTED in part and DENIED in part**:

a. The Motion to Dismiss Second Amended Complaint is **GRANTED in part and DENIED in part**. The Motion is granted as to the allegations concerning the passage of Ordinance 13733 and as to any non-party claims asserted by Plaintiffs. The Motion is denied in all other respects.

b. The Motion to Strike is **DENIED**.

c. The Request for Hearing is **DENIED as moot**.

2. Defendant shall file an answer to the Second Amended Complaint by **May 24, 2021**.

3. Defendant Commissioner Carollo's Motion to Continue Stay of Discovery Pending Resolution of Motion to Dismiss Second Amended Complaint [DE 172] is **DENIED as moot**.

DONE AND ORDERED in Fort Lauderdale, Florida, this 13th day of May, 2021.

/s/ Rodney Smith
RODNEY SMITH
UNITED STATES
DISTRICT JUDGE

Copies to: Counsel of Record

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12439

D.C. Docket No. 1:18-cv-24190-RS

WILLIAM O. FULLER,
MARTIN PINILLA,

Plaintiffs-Appellees,

versus

JOE CAROLLO,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(September 25, 2020)

Before WILLIAM PRYOR, Chief Judge, TJOFLAT and HULL, Circuit Judges. WILLIAM PRYOR, Chief Judge:

Joe Carollo, a Miami City Commissioner, appeals from an order that Carollo says denied him qualified immunity. But the district court granted Carollo's motion to dismiss and granted the plaintiffs, Miami businessmen William Fuller and Martin Pinilla, leave to

amend their complaint. That order is not appealable. We dismiss Carollo's appeal for lack of jurisdiction.

Fuller and Pinilla allege that Carollo violated their rights to freedom of speech and association under the First Amendment by retaliating against them for their support of one of Carollo's political opponents. They sued Carollo and others, *see* 42 U.S.C. § 1983, and the case was referred to a magistrate judge for pretrial proceedings. Carollo and other defendants not party to this appeal moved to dismiss the complaint for failing to state a claim. Carollo's motion sought dismissal of the complaint based, in part, on qualified immunity.

The magistrate judge recommended dismissing Fuller and Pinilla's complaint with leave to amend based on problems with the scope of the requested relief. Because the magistrate judge recommended dismissing with leave to amend, she also reviewed the other arguments presented in the motions to dismiss, including Carollo's argument for qualified immunity. The magistrate judge concluded that Carollo was not entitled to qualified immunity because his alleged conduct violated clearly established law.

The district court adopted the magistrate judge's report and granted the motions to dismiss, with leave for Fuller and Pinilla to amend. The district court also ordered that "Defendant Carollo's Motion to Dismiss [be] DENIED as to qualified immunity for the reasons detailed in the Report and Recommendation." But given the dismissal of the complaint, that language had no effect.

We have no choice but to *sua sponte* dismiss this appeal for lack of jurisdiction. "[T]he existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute." *Carroll v. United States*, 354 U.S. 394, 399 (1957). Carollo argues that we have jurisdiction because "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). But the district court did not enter an appealable order denying Carollo qualified immunity. The district court instead dismissed Fuller and Pinilla's complaint and granted them leave to amend it.

So a different finality rule applies: "[A]n order dismissing a complaint with leave to amend within a specified time becomes a final judgment if the time allowed for amendment expires. . . ." *Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co.*, 953 F.3d 707, 719-20 (11th Cir. 2020). The district court gave Fuller and Pinilla until June 28, 2019, to file an amended complaint. But Carollo filed his notice of appeal on June 26, two days before the order granting Fuller and Pinilla leave would have become final. And there is no later judgment that could have cured Carollo's premature notice of appeal. Fuller and Pinilla did in fact amend their complaint within the time allowed by the district court; on June 28 they filed a new pleading entitled "Second Amended Complaint." And on August 19, 2019, the district court stayed the proceedings

on the Second Amended Complaint pending this appeal. Because Carollo did not appeal from a final order of the district court, we lack jurisdiction under section 1291. And no other statute provides us with jurisdiction over the appeal.

We **DISMISS** the appeal.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 18-24190-CIV-MORENO

WILLIAM O. FULLER and
MARTIN PINILLA, II,

Plaintiffs,

vs.

JOE CAROLLO and
JOHN DOES 1-10,

Defendants. /

ORDER ADOPTING MAGISTRATE JUDGE LOUIS'S REPORT AND RECOMMENDATION

(Filed Jun. 13, 2019)

THE MATTER was referred to the Honorable Lauren F. Louis, United States Magistrate Judge, for a Report and Recommendation on Defendant Joe Carollo's Motion to Dismiss **(D.E. 53)**, Defendant the City of Miami's Motion to Dismiss **(D.E. 54)**, and Maria Lugo's Motion to Dismiss **(D.E. 64)**. The Magistrate Judge filed a Report and Recommendation **(D.E. 99)** on **April 30, 2019**. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Lauren F. Louis's Report and Recommendation is **AFFIRMED** and **ADOPTED**. Accordingly, it is

ADJUDGED that Defendant Joe Carollo's Motion to Dismiss is GRANTED and Plaintiff shall have leave to amend the complaint consistent with the Report and Recommendation. Defendant Carollo's Motion to Dismiss is DENIED as to qualified immunity for the reasons detailed in the Report and Recommendation. It is

ADJUDGED that Defendant the City of Miami's Motion to Dismiss is GRANTED and Plaintiff shall have leave to amend the complaint consistent with the Report and Recommendation. It is

ADJUDGED that Defendant Maria Lugo's Motion to Dismiss is GRANTED in part as set forth in the Report and Recommendation. It is also

ADJUDGED that the motions for extension of time to file objections and responses (D.E. 103, 109) are DENIED as moot. It is also

ADJUDGED that Plaintiff shall file an amended complaint by no later than **June 26, 2019**. It is also

ADJUDGED that the Joint Motion to Stay Discovery **(D.E. 71)** is DENIED as moot in view of this order.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th of June 2019.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Lauren F. Louis

Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-24190-CIV-MORENO/LOUIS

WILLIAM O. FULLER, and
MARTIN PINILLA, II,

Plaintiffs,

vs.

JOE CAROLLO, THE CITY
OF MIAMI, MARIA LUGO,
AND JOHN DOES 1-10,

Defendants. /

REPORT AND RECOMMENDATION

(Filed Apr. 30, 2019)

This cause came before the Court upon the Motions to Dismiss Plaintiffs' Amended Complaint brought by Defendants Joe Carollo (ECF No. 53), The City of Miami (ECF No. 54), and Maria Lugo (ECF No. 64). This matter was referred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(A) and the Magistrate Judge Rules of the Local Rules of the Southern District of Florida, by the Honorable Federico A. Moreno, United States District Judge, to take all necessary and proper action with respect to any and all pretrial matters. (ECF No. 49). Having carefully considered the briefs, the record as a whole, and being otherwise fully advised in the premises, the undersigned recommends that Carollo's Motion to Dismiss be GRANTED; that the City's Motion

be GRANTED; and that Lugo's Motion be GRANTED, in part; and that Plaintiffs be afforded leave to amend.

I. BACKGROUND

Plaintiffs William O. Fuller and Martin Pinilla, II bring this action under 42 U.S.C. § 1983, against Defendants Joe Carollo, the City of Miami (the "City"), Maria Lugo, and John Does 1 through 10.[1] Plaintiffs are local businessmen, who own several properties in Little Havana located in District 3 of the City.

In the summer of 2017, Defendant Carollo announced his intention to run for a vacant City of Miami District 3 Commissioner position. *See* Amended Complaint (ECF No. 43 at ¶ 30). On November 18, 2017, during the run-off election period, Plaintiffs allege that they allowed a group Carollo's opponent's supporters to host a rally at one of Plaintiffs' commercial properties. (*Id.* at ¶ 41). Plaintiffs allege that after becoming aware of the rally, Carollo used his political connections to shut down the rally. (*Id.* at ¶ 45). The next day, Plaintiffs once again permitted a second rally at the same location which was, likewise, shutdown by City Code Enforcement. Plaintiff Pinilla was spotted at the rally by Steve Miro, a staff campaign member of

[1] The facts recited herein are taken from the Second Amended Complaint. The factual allegations contained in the Second Amended Complaint are taken as true for purposes of Defendants' Motion pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Speaker v. US. Dep't of Health & Human Servs. Ctrs. For Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010).

Carollo; Miro reported Pinilla's presence at the rally to Carollo and phoned Fuller to instruct him to shut the rally down. (*Id.* at ¶¶ 33, 49, 51).

Carollo won the run-off election and was sworn in as a City of Miami Commissioner on December 2, 2017.

Plaintiffs allege that for a period often months following those rallies, Carollo has engaged in retaliatory efforts targeted at Plaintiffs, their tenants, and business affiliates, as a consequence of Plaintiffs' support of Carollo's political opponent. (*Id.* at p. 1-2). The first alleged event occurred immediately after Carollo took office. Carollo instructed Defendant Lugo, a City employee, to direct Code Enforcement officers to inspect Plaintiffs' holiday party on the basis that Plaintiffs did not obtain the necessary permit. (*Id.* at ¶¶ 73-76). Plaintiffs allege that their annual holiday party is a well-attended event, which the City Commissioners have attended in past years. Carollo allegedly learned of Plaintiffs' party and conspired with Lugo to shut it down. Lugo allegedly contacted the Director of Code Enforcement directly, instructing him to shut the party down for special permitting violations. (*Id.* at ¶¶ 72-74). Director Diez did as instructed and sent a Code Officer to the party. After Director Diez reported to Lugo that no violations were identified, Lugo allegedly contacted the Chief of Code Enforcement, who then sent the Code Officer to the party a second time. With no violations still identified, the Code Officer was instructed to stand outside the party until it was over, which she did, allegedly intimidating the guests in the process. (*Id.* at ¶¶ 82-84). Plaintiffs allege that the

Code Enforcement officers made their guests uneasy and concerned. (*Id.* at ¶ 78). Director Diez later contacted Plaintiff Fuller and confirmed Plaintiffs' suspicion that Carollo and Lugo had orchestrated the interference by Code Enforcement at the party. (*Id.* at ¶ 93).

Diez allegedly told Fuller that he was a "political target," (*Id.* at ¶ 90), a sentiment allegedly echoed by Carollo's campaign staff member Miro, who has made statements that when he took office, Carollo "went after" Fuller for supporting Carollo's opponent in the run off. (*Id.* at ¶¶ 64, 70). Miro further stated that Carollo created a spreadsheet itemizing properties owned by Plaintiffs to track their businesses. (*Id.* at ¶¶ 63-68).

Plaintiffs allege that in early 2018, Carollo targeted them by harassing their tenants Sanguish de Miami ("Sanguish") and Union Beer, a company of which Plaintiff Fuller was an investor. Carollo purportedly harassed Sanguish by revoking all temporary use permits ("TUPs"), which was necessary for Sanguish to operate, from District 3. (*Id.* at ¶ 108). Additionally, Code Enforcement officers continuously visited the sandwich shop. Sanguish ultimately relocated its business to another location not owned by Plaintiffs. (*Id.* at ¶ 108). Carollo also shut down Union Beer's anniversary party because it had failed to obtain the required event permit. (*Id.* at ¶ 120).

Later, in March 2018, Carollo contacted a Code Enforcement supervisor and requested that an officer be sent to District 3 because Carollo had concerns

regarding building permits at five businesses, three of which were owned by Plaintiffs. (*Id.* at ¶ 148). Carollo also toured District 3, including Plaintiffs' properties, with numerous City employees, including the Mayor and Deputy City Manager, and members of an organization, of which Lugo was a board member, in search of potential code violations. (*Id.* at ¶ 158).

On March 12, 2018, Plaintiff Fuller, through his company The Barlington Group, filed an ethics complaint against Carollo with the Miami-Dade Commission on Ethics and Public Trust for Carollo's retaliatory actions. (*Id.* at ¶ 165). Plaintiffs allege that while the ethics complaint was being investigated, Carollo stopped targeting Plaintiffs, their businesses, and their tenants. On August 13, 2018, Fuller withdrew the ethics complaint with the intention to amend and include additional charges against Carollo. (*Id.* at ¶¶ 171-173).

Plaintiffs allege that after Fuller withdrew the ethics complaint, Carollo's retaliation continued. In August 2018, the City, at Carollo's direction, informed Plaintiffs that kiosks related to one of Plaintiffs' business ventures – a farmer's market – were in violation of the City Code and issued a citation. (*Id.* at ¶ 176). The City also informed Plaintiffs that it was revoking their TUP in light of new legislation. TUP permits were no longer available in District 3, and because the building permit that allowed the kiosks was dependent on the TUP, the City would also be revoking the building permit. (*Id.* at ¶ 182).

Plaintiffs further allege that after the ethics complaint had been filed and withdrawn, Carollo reported false noise complaints and parking violations related to the night club Ball and Chain, of which Fuller was a part owner, and the valet company the night club hired. (*Id.* at ¶¶ 158-164, 124-134). Plaintiffs also allege that the retaliatory actions include the City Commission's passing of an ordinance abolishing special masters, and Carollo's statements to local radio shows that Plaintiffs were associated with corrupt governments and investors, and that Plaintiffs were attempting to make District 3 less diverse.

On January 8, 2019, Plaintiffs filed their three-count Amended Complaint, alleging First Amendment retaliation claims against Carollo and the City pursuant to 42 U.S.C. §1983 (Counts I and II, respectively); and a conspiracy to commit First Amendment retaliation claim against Carollo and Lugo (Count III). Plaintiffs seek injunctive relief and monetary damages for business disruption, emotional distress, and reputational harm.

II. DISCUSSION

In their Motions to Dismiss,[2] Defendants assert three grounds for dismissal: (1) Plaintiffs fail to allege

[2] Although all Defendants bring separate Motions to Dismiss, the Motions are substantively identical in their arguments for dismissal. Moreover, Carob moved to adopt all of Lugo's and the City's arguments (ECF No. 82); which this Court granted (ECF No. 88).

Article III standing; (2) the Amended Complaint fails to comply with Rule 8(a)(2) of the Federal Rules of Civil Procedure because it is a shotgun pleading; and (3) Plaintiffs fail to state a claim for which relief can be granted in violation of Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. Article III Standing

All Defendants argue that Plaintiffs fail to allege facts sufficient to show that they have standing to bring their First Amendment retaliation claims. Defendants aver that Plaintiffs have not suffered an injury in fact and instead improperly seek damages incurred (if at all) by non-parties such as Union Beer, Ball and Chain, and Viernes Culurales. Additionally, the City and Carollo aver that Plaintiffs' injuries cannot be redressed by this Court.

To sufficiently plead Article III standing, a plaintiff must plead a plausible injury in fact, causation, and redressability by the reviewing court. *L.S. by Hernandez v. Peterson*, No. 18-cv-61577, 2018 WL 6573124, at *5 (S.D. Fla. Dec. 13, 2018) (citing *Dermer v. Miami-Dade Cty.*, 599 F.3d 1217, 1220 (11th Cir. 2010)). If a plaintiff cannot satisfy these constitutional standing requirements, then the case lies outside of the district court's jurisdiction. *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1038 (11th Cir. 2008). Injuries that satisfy the Article III standing requirement are distinct, palpable, and concrete. *Harris v. Evans*, 20 F.3d 1118, 1122 (11th Cir. 1994). At the initial pleading

stage, a plaintiff may establish standing by pleading general factual allegations of injury. *Young Apartments*, 529 F.3d at 1038. However, while the plaintiff's allegations at this stage are presumed sufficient to establish the facts alleged in the complaint, the Court is not required to speculate concerning plaintiff's injuries if he has not pled one. *Eland v. Basham*, 471 F.3d 1199, 1206 (11th Cir. 2006).

In the Amended Complaint, Plaintiffs allege that they have suffered injuries as a result of conduct made in retaliation for Plaintiffs' exercise of their First Amendment rights, including monetary damages as a result of Defendants' retaliatory conduct, specifically damages for "business disruption" and "reputational harm." (ECF No. 43 at ¶ 232). Plaintiffs also allege that they have suffered emotional distress and mental anguish as a result of retaliatory conduct against the Plaintiffs individually. (*Id.* at ¶ 273).

In their Motions, Defendants aver that Plaintiffs lack standing to bring claims against the Defendants because Plaintiffs were not individually injured, and instead, seek damages as a result of injuries purportedly suffered by non-party organizations. In their opposition, Plaintiffs clarified that they do not seek economic injuries suffered by any business entity as a result of the retaliatory actions against those entities, but rather allege direct injuries suffered by Plaintiffs in their individual capacity. Though Plaintiffs seek no monetary damages arising from these acts, the conduct alleged to have impacted non-party entities are examples of Carollo's retaliatory conduct towards Plaintiffs,

as he allegedly targeted all businesses that Plaintiffs are associated with. *See* Plaintiffs' Response in Opposition to City of Miami's Motion to Dismiss (ECF No. 66 at p. 1920). Additionally, at the hearing, Plaintiffs explained that despite their reference to the retaliatory actions towards third parties and their allegations of economic losses due to business disruption, Plaintiffs are not seeking monetary damages for business losses. Plaintiffs' counsel made an *ore tenus* motion for leave to amend to better plead the Plaintiffs' injuries.

Plaintiffs have alleged a personal injury sufficient to demonstrate standing. Nonetheless, the Court recognizes the lack of clarity in the Amended Complaint with respect to the damages sought. As it stands, the Amended Complaint fails to allege a distinct injury to the individual Plaintiffs as they allege their injuries in two conclusory paragraphs of the Amended Complaint (ECF No. 43 at ¶¶ 232, 273) and in the "wherefore" clause; without more the Court is unable to determine what injuries Plaintiffs specifically suffered or what specific actions caused said injuries. Accordingly, the undersigned recommends that Plaintiff be afforded leave to amend to clarify the injury or injuries for which Plaintiffs seek redress. *See Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988) (noting the Eleventh Circuit's preference for granting leave to amend a complaint dismissed for failure to state a claim absent a "substantial reason" to deny leave to amend).

Carollo and the City also argue that Plaintiffs lack constitutional standing because the Court cannot

provide redress for the injuries alleged. The Amended Complaint seeks "a permanent injunction against further retaliation against them and further violations of the Miami City Charter." (ECF No. 43 at ¶ 276). Defendants argue that the request sought is overly broad. The Court agrees.

Plaintiffs respond in opposition that courts have repeatedly granted injunction relief in First Amendment cases. Plaintiffs rely primarily on *Hoyfe v. Nye Cty.*, 18-CV-01492-RFB-GWF, 2018 WL 4107897, at *1 (D. Nev. Aug. 28, 2018), in support of their request for a permanent injunction. In *Hoyfe*, the plaintiff brought a First Amendment retaliation claim against a municipality and sought a temporary injunction enjoining the municipality from making decisions regarding plaintiff's license applications during the pending litigation. In that case, the court granted plaintiff's request for a temporary injunction. However, Plaintiffs' reliance on *Hoyfe* is misplaced because the plaintiff in that case sought a temporary injunction preventing the defendant from partaking in specific conduct during an identified period of time frame. Here, Plaintiffs' request for a permanent injunction is overly broad. Plaintiffs seek an order enjoining Carollo from "participating in any decision of the Board of Commissioners in relation to any matters that directly affect the Plaintiffs . . . " (*Id.* at ¶ 227). Plaintiffs also request that the Court enjoin the City "from taking further retaliatory action against Plaintiffs . . . " (*Id.* at ¶ 303). As it stands, the Amended Complaint essentially asks the Court to prohibit Carollo and the City from performing

their official functions if they could affect Plaintiffs. It is impossible for the Court to determine what types of conduct Plaintiffs deem "retaliatory" for purposes of their request for an injunction. Accordingly, Carollo's and the City's Motions should be granted on this basis.

Because leave to amend is recommended, the Court further analyzes the deficiencies raised in Defendants' motions to dismiss based on Rule 12(b)(6), as repetition of such deficiencies would again warrant dismissal *See Fox*, 309 F. Supp. 3d at 1245 ("Nevertheless, the Court addresses the Amended Complaint's five claims and the parties' arguments in order to give Plaintiff direction on how to proceed with a final, amended pleading . . . ").

B. Shotgun Pleading – Rule 8(a)(2)

Defendants challenge the Amended Complaint as a shotgun pleading, arguing that Plaintiffs allege vague and immaterial facts that make it impossible for this Court or Defendants to understand what conduct by each Defendant gave rise to the claims alleged in the Amended Complaint.

Rule 8(a)(2) requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief" using allegations that are "simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d)(1). The Supreme Court has explained that Rule 8 does not require "detailed factual allegations," but rather demands "more than unadorned, the-defendant-unlawfully-harmed me accusation." *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009). Shotgun pleadings violate Rule 8 by failing to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests on. *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294 (11th Cir. 2018).

A complaint containing multiple counts, each count incorporating by reference the allegations of previous counts, is fairly characterized as a shotgun pleading if it results in a situation where it impossible for the court or the defendant to know which allegations are intended to support the respective claims for relief. *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1322 (11th Cir. 2015) ("the most common type [of shotgun pleading] . . . is a complaint containing multiple counts where each count adopts the allegations of all preceding counts causing each successive count to carry all that came before and the last count to be a combination of the entire complaint."); *Keith v. DeKalb Cnty.*, 749 F.3d 1034, 1045 n.39 (11th Cir. 2014) ("The complaint, through its incorporation into successive counts all preceding allegations and counts, is a quintessential 'shotgun' pleading . . . "). Courts in the Eleventh Circuit have little tolerance for shotgun pleadings as they waste judicial resources, inescapably broaden the scope of discovery, and ultimately wreak havoc on judicial dockets. *Vibe Micro, Inc.*, 878 F.3d at 1294-95.

While the Court notes that the Amended Compliant suffers from one of the characterizes of a shotgun pleading – incorporation of superfluous allegations into three counts – the undersigned does not recommend

dismissal on this ground, as the allegations are decipherable with respect to the individual defendants named. As the Eleventh Circuit noted in *Weiland*, which all the parties cite to, the incorporation of unnecessary facts and allegations into all counts is not *per se* dispositive of whether a complaint is a shotgun pleading. 792 F.3d at 1316. In *Weiland*, the appellate court concluded that while the complaint at issue was not ideal, it did "a good enough job" in giving the defendants notice of the claims against them, and therefore, did not constitute a shotgun pleading. *Id.*

Moreover, as noted above, the primary argument advanced by Defendants is the failure of the Amended Complaint to specify the injury suffered by the various business entities described in the complaint, and to allege Plaintiffs' interests in those entities with sufficient specificity to demonstrate Plaintiffs' standing to seek redress on behalf of those businesses – not Plaintiffs' inability to put Defendants on notice was to what conduct gave rise to the claims against them. The undersigned accordingly recommends denying the motions to dismiss on this basis.

C. Carollo's and the City's Motions to Dismiss for Failure to State a Claim

In Counts I and II, Plaintiffs claim that Carollo and the City violated their First Amendment rights. Plaintiffs contend that Carollo's action were pretextual and undertaken with improper retaliatory motives, adversely affecting the Plaintiffs' protected speech. In

their Motions, Defendants challenge the Amended Complaint on the grounds that Plaintiffs fail to state a claim because they do not allege an adverse action or that there is a causal connection between the retaliatory actions and the adverse effect on speech. Moreover, Carollo and the City argue that they are entitled to qualified and sovereign immunity, respectively.

"Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts to state a claim that is "plausble on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court's consideration is limited to the allegations in the complaint. *See GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). All factual allegations are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *See Speaker v. US. Dep't of Health & Human Servs. Ctrs. For Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). While a plaintiff need not provide "detailed factual allegations," a plaintiff's complaint must provide must provide "more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* Rule 12(b)(6) does not permit dismissal of a complaint because the court anticipates "actual proof of those facts is improbable;" however, "[f]actual allegations must be enough to raise a right of relief above the speculative level"

Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 545). A court evaluating a motion to dismiss for failure to state a claim must focus its analysis on the four corners of the complaint but may also consider any attachments to the complaint in making its determination. *Watson v. Bally Mfg. Corp.*, 844 F. Supp. 1533, 1535 n.1 (S.D. Fla. 1993), *aff'd mem.*, 84 F.3d 438 (11th Cir. 1996). Additionally, any documents that are referenced in the complaint and are central to the plaintiff's case may be considered. *In re Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1335 (S.D. Fla. 1999).

To state a claim under Section 1983, a plaintiff must allege that a person, acting under color of state law, deprived him of "rights, privileges, or immunities secured by the Constitution and laws." *Blanton v. Griel Mem'l Psychiatric Hosp.*, 758 F.2d 1540, 1542 (11th Cir. 1985). The Plaintiffs in this action bring claims of First Amendment retaliation against Defendants Carollo, and the City, and allege that Defendant Lugo conspired to commit those constitutional violations.

To survive a Rule 12(b)(6) motion to dismiss based on a claim of First Amendment retaliation under Section 1983, a plaintiff must allege facts establishing that: (1) his speech or act was constitutionally protected by the First Amendment; (2) a state actor's retaliatory conduct adversely affected the protected speech; and (3) that there is an actual causal connection between retaliatory actions and the adverse speech. *Abella v. Simon*, 522 F. App'x 872, 874 (11th Cir. 2013). *Jones v. Robinson*, 665 F. App'x 776, 778 (11th

Cir. 2016) (citing *Keeton v. Anderson-Wiley*, 664 F.3d 865, 878 (11th Cir. 2011)). With regard to the second element, a plaintiff suffers an adverse action if the defendant's purported retaliatory conduct would likely deter a person of ordinary firmness from the exercise of their First Amendment rights. *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). The third element requires the plaintiff to adequately allege that his protected speech was the motivating factor behind the defendants' conduct. *Smith v. Mosely*, 532 F.3d 1270, 1278 (11th Cir. 2008). A plaintiff must allege a sequence of events from which a retaliatory motive can be plausibly inferred, notwithstanding other non-retaliatory motives the defendant may harbor. *Eisenberg v. City of Miami Beach*, 1 F. Supp. 3d 1327, 1344 (S.D. Fla. 2014).

1. Constitutional Violations

In the Amended Complaint, Plaintiffs allege that Carollo has violated their First Amendment rights by retaliating against them by: (1) shutting down the rallies on Plaintiffs' properties; (2) sending Code Enforcement officers to Plaintiffs' holiday party for the purpose of harassing their guests and issuing a bogus citation; (3) intimidating their tenants and business affiliates; (4) revoking their temporary use permit to participate in a local farmer's market; and (5) enacting the passing of retaliatory legislation.

With respect to the first allegation of misconduct – the shutting down of the rallies – Carollo was not yet a government actor and, therefore, the conduct is not

actionable against Carollo or the City under Section 1983. 42 U.S.C. § 1983. Nor is the last allegation actionable, arising from the enactment of an ordinance banning temporary use permits in District 3; Plaintiffs have not stated a cognizable claim because they do not challenge the constitutionality of the ordinance on its face. *See In re Hubbard*, 803 F.3d 1298, 1313-14 (11th Cir. 2015) (holding that a plaintiff cannot bring a First Amendment challenge against an otherwise facially constitutional ordinance by claiming that the lawmakers who passed it acted with an unconstitutional purpose).

With respect to the remain alleged acts, the undersigned has considered the three-prong test set forth above and recognizes that Plaintiffs have satisfied the first prong: that their speech was protected by the First Amendment. *Abella v. Simon*, 522 F. App'x 872, 874 (11th Cir. 2013) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995)). Plaintiffs allege they were engaged in protected activity by permitting a political rally on their property and by filing an ethics complaint with Miami-Dade County. (ECF No. 43 at p. 2). Defendants do not challenge Plaintiffs' contention that their activities constitute protected speech.

As to the second prong, a plaintiff suffers an adverse action if the defendant's purportedly retaliatory behavior would likely deter a person of ordinary firmness from the exercise of their First Amendment rights. *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005) (finding retaliatory acts, including, a prolonged "campaign of harassment" by local police

officers, where defendants repeatedly followed, stopped, cited, and intimidated plaintiffs, and disseminated flyers depicting plaintiffs as criminals). In applying the ordinary firmness test, courts liberally interpret whether the alleged conduct had an adverse effect, thus while " 'the effect on freedom of speech may be small . . . there is no justification for harassing people for exercising their constitutional rights.' " *Eisengberg*, 1 F. Supp. at 1343 (quoting *Bennett*, 423 F.3d at 1254); *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003) (noting that the adverse effect on speech "need not be great in order to be actionable," where the retaliatory issuance of parking tickets for a nominal total amount would be sufficient to chill the speech of a person of ordinary firmness).

In *Eisenberg*, the plaintiffs, a development company and its individual president (Eisenberg), brought a First Amendment retaliation claim against a municipality for retaliatory conduct – the issuance of unfounded citations at one of the plaintiffs' commercial properties, unflattering statements to plaintiffs' mortgagee, the shutting down of one of the commercial properties, and Eisenberg's arrest – in response to statements that Eisenberg made regarding a kickback scheme which the City and its officials were purportedly involved in. *Eisenberg*, 1 F. Supp. at 1343. The court determined that conduct, "improperly motivated as alleged, would likely be sufficient to deter a person of ordinary firmness, especially as the adverse effect need not be substantial" *Id.*

The Amended Complaint amply states and describes activities constituting retaliatory conduct directed by Carollo that satisfy the second prong of the ordinary firmness test. The Amended Complaint alleges that in response to Plaintiffs' exercise of constitutionally protected political speech, Carollo effectuated a Code Enforcement raid of Plaintiffs' holiday party to intimidate Plaintiffs' guests (ECF No. 43 at ¶ 84); performed Code Enforcement "drive-bys" by looking for violations at Plaintiffs' businesses on multiple occasions; and representing to employees and independent contractors that there were parking and noise violations (*Id.* at ¶ 148); and revocation of Plaintiffs' TUP permit to prevent Plaintiffs' participation in a local farmer's market (*Id.* at ¶¶ 183-185). The Amended Complaint also alleges that Carollo made defamatory statements on local radio stations suggesting that Plaintiffs were attempting to make District 3 less culturally diverse and support radical governments (*Id.* at ¶224); and that Carollo made intimidating statements to Plaintiffs' tenants to encourage the tenants to relocate (*Id.* at¶¶ 97, 107). The facts as alleged and viewed in the light most favorable to the Plaintiffs sufficiently represent the type of conduct that would likely have an adverse effect upon a person of ordinary firmness. *Eisenberg*, 1 F. Supp. at 1343.

Moreover, Defendants urge this Court to find that Plaintiffs fail to meet their burden to show an adverse effect because some of the code violations and drive-bys were aimed at Plaintiffs' tenant and corporate affiliates, instead of Plaintiffs individually. However, the

fact that some of the alleged retaliatory acts did not directly impact Plaintiffs individually does not defeat the sufficiency of the factual allegations supporting the second prong of the ordinary firmness test. *See Cuevas v. City of Sweetwater*, No. 15-22785-CIV, ECF No. 38 (S.D. Fla. Oct. 28, 2015). In *Cuevas*, the plaintiff, owner of a gas station, alleged that the municipality and a city commissioner violated his First Amendment rights by harassing him personally as well as intimidating the gas station employees who were employed by an unrelated company after the plaintiff displayed support for the commissioner's political opponent. *Id.* In determining the issues of whether plaintiff had standing to allege an injury rising from the retaliatory conduct aimed at the gas station employees and the independent contractor that operated the gas station, the court concluded that it was "fairly obvious" how Cuevas as the owner of the gas station might be dissuaded from his continued support for a political candidate despite some of the retaliatory conduct being aimed at other related parties. *Id.* (citing *Ranize v. Town of Lady Lake, Florida*, No. 5:11-CV-646, 2012 WL 4856749 (M.D. Fla. Oct. 12, 2002)). Likewise, under the facts alleged in the Amended Complaint, it is plausible that the retaliatory conduct aimed at Plaintiffs, their tenants, and business affiliates may discourage a person of ordinary firmness from exercising their First Amendment rights.

With regard to the third prong of a First Amendment retaliation claim, Plaintiffs plausibly allege a causal connection between the described retaliatory

actions and the adverse effects on speech. To establish a causal connection at the motion to dismiss stage, a plaintiff must allege that his protected speech was a motivating factor behind the alleged retaliatory conduct. *Bennett*, 423 F.3d at 1250; *Eisenberg*, 1 F. Supp. 3d at 1344. A plaintiff must plead a series of events from which a retaliatory motive can be plausibly inferred. *Id.* Causation may be shown by pleading "(1) an unusually suggestive temporal proximity between the protected activity and the alleged retaliatory act, or (2) a pattern of antagonism coupled with timing to establish a causal link." *Lozman v. City of Riviera Beach*, 39 F. Supp. 1392, 1405-06 (S.D. Fla. 2014).

Plaintiffs allege that their protected speech occurred on two occasions at the rallies in November 2017, and when Plaintiff Fuller filed the ethics complaint in March 2018. Taken in the light most favorable to Plaintiffs, the alleged retaliatory conduct occurred within close temporal proximity of Plaintiffs' expression of their protected speech. Plaintiffs allege that in December 2017, within a month of the rallies, Carollo orchestrated Code Enforcement officers to investigate Plaintiffs' holiday party. Later, in January and February 2018, Carollo intimidated Plaintiffs' tenant by directing Code Enforcement to "raid" the tenant's business and by purportedly explaining that "my problem is not as much with you as it is with your landlord." (ECF No. 43, ¶¶ 112, 113). The Amended Complaint also alleges that in February 2018, three months after the rallies, Carollo and two City employees investigated Ball and Chain, a business of which Fuller is in

an investor, and took pictures of the cars parked in the parking lot adjacent to the business (*Id.* at ¶¶ 112, 113). Likewise, Carollo alleged appeared at an anniversary party hosted by Union Beer, another business in which Fuller is an investor, and stated that "you need a temporary event permit . . . but even if you had applied for one, I would have denied it." (*Id.* at ¶ 120).

Subsequently, the Amended Complaint alleges that Fuller filed an ethics complaint against Carollo in March 2018. (*Id.* at ¶ 165). Plaintiffs allege that while the complaint was being investigated, the retaliatory conduct ceased, but that once the complaint was withdrawn in August 2018, the conduct commenced again. Plaintiffs allege that seven days after the complaint was withdrawn, Plaintiffs received a letter from the City advising them of a code violation regarding kiosks Plaintiffs intended to use at a local farmer's market, for which they had previously obtained temporary use permits. (*Id.* at ¶¶ 178-181). Plaintiffs further allege that within weeks of the withdrawal of the complaint, the investigations and drive-bys at Ball and Chain recommenced. (*Id.* at ¶ 175). Plaintiffs allege that their political speech against Carollo was the motivation for all retaliatory conduct and substantiate their allegations of motive with statements Carollo allegedly made, admitting that he was targeting Fuller. "'Numerous courts have found that harassment in the form of constant monitoring, investigating or issuance of violations can contravene First Amendment rights.'" *See Cuevas v. City of Sweetwater*, No. 15-22785-CIV, ECF No. 38 (S.D. Fla. Oct. 28, 2015) (quoting *Hollywood*

Cmty. Synagogue, Inc. v. City of Hollywood, Fla., 430 F. Supp. 2d 1296, 1316 (S.D. Fla. 2006)). The undersigned finds that the Amended Complaint sufficiently allege the necessary causal relationship between the Plaintiffs' speech and the alleged retaliatory conduct.

2. Plausibility of Constitutional Violation and Investigative Re port

In its Motion, the City's main argument for dismissal under Rule 12(b)(6) is that Plaintiffs fail to plausibly allege that Carollo's retaliatory conduct was plausible, let alone causally connected, to Plaintiffs' protected speech. In support of its argument, which Carollo adopted by motion, the City relies on the Investigative Report attached to the Amended Complaint, arguing that the Report contradicts the allegations of the Amended Complaint, and therefore must be accepted as true. The City directs the Court to Fuller's statements that he was unaware that the rally taking place was in support of the candidate opposing Carollo; Defendants' argue that if the Plaintiffs did not intend to exercise their speech in support of Carollo's opponent, they cannot now claim a violation of their First Amendment right. The City further argues that the Investigative Report represents that Plaintiffs own at least twenty properties in District 3 and that the likelihood of there being legitimate code violations is high, and as such, the Court should find that the investigations and citations were justified.

At the motion to dismiss stage, the Court may consider attachments to the Amended Complaint; however, it is not bound to accept the hearsay statements and representations in the Investigative Report as true to affirmatively disprove the allegations in the Amended Complaint. *See Bryant v. Miami-Dade Cty.*, No. 10-23768, 2011 WL 13223543, at *3 n.3 (S.D. Fla. Mar. 20, 2015) ("Moreover, taking judicial notice of a document does not mean that the Court accepts the contents of the documents as true."); *Barron v. Snyder's-Lance, Inc.*, No. 13-62496, 2015 WL 1182066, at *4 (S.D. Fla. Mar. 20, 2015) (citing *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take judicial notice of publications introduced to 'indicate what was in the public realm at the time, not whether the contents of those articles were true."). Accordingly, the undersigned recommends denial of the City's Motion on this basis.

3. Qualified Immunity

Carollo argues that even if Plaintiffs are able to plead a claim for First Amendment retaliation against him, the claim should be dismissed because he is shielded from suit by the doctrine of qualified immunity. Qualified immunity shields government officials sued in their individual capacities so long as their conduct does not violate a clearly established constitutional right. *Lozman v. City of North Bay Village;* No. 07-23357-CIV, 2009 WL 10699944, at *5 (S.D. Fla. 2009); *Oliverv. Fiorino*, 586 F.3d 898, 904 (11th Cir.

2009) (quoting *McCullough v. Antolini*, 559 F.3d 1201, 1205 (11th Cir. 2009)). The doctrine is intended to allow government officials to perform their discretionary duties without fear of personal liability or harassing litigation, "protecting from suit all but the plainly incompetent or one who is knowingly violating the federal law." *Grider v. City of Aubern Ala.*, 618 F.3d 1240, 1254 (11th Cir. 2010). The initial burden is on the defendant to establish that he was acting within the scope of his discretionary authority. *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1303 (11th Cir. 2006) (quoting *Lumley v. City of Dade City, Fla.*, 327 F.3d 1186, 1194 (11th Cir. 2003)). If the defendant is unable to show he was acting within his discretionary authority, he is ineligible for the benefit of qualified immunity. *Lozman*, 2009 WL 10699944, at *5 (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)). However, if the defendant meets his burden, the burden shifts to the plaintiff to show that qualified immunity is not appropriate under the circumstances. *Grey*, 458 F.3d at 1303.

In order to prevent the granting of a motion to dismiss on claims challenged under the doctrine of qualified immunity, the plaintiff must allege sufficient facts to allege that: (1) the defendant violated a constitutional right; and (2) the right was clearly established at the time of the alleged violation. *Wall-DeSousa v. Florida Dep't of Highway Safety and Motor Vehicles*, 691 F. App'x 584, 589 (11th Cir. 2017) (citing *Morris v. Town of Lexington*, 748 F.3d 1316, 1322 (11th Cir. 2014)). In suits brought pursuant to Section 1983, such

as this one, the question of qualified immunity and the Rule 12(b)(6) standard become intertwined. *GJR Invs., Inc. v. Cty. Of Escambia, Fla.*, 132 F.3d 1359, 1366 (11th Cir. 1998) *overruled on other grounds as recognized in Randall v. Scott*, 610 F.3d 701, 709 (11th Cir. 2010). In other words, where a defendant raises the qualified immunity defense in a Rule 12(b)(6) motion, the court should grant the motion if the complaint fails to allege a violation of a clearly established constitutional right. *Williams v. Bd. Of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1300 (11th Cir. 2007).

In his Motion, Carollo argues that he was acting within his discretionary duties in all instances alleged in the Amended Complaint. The initial burden is on Carollo to show that he was engaged in a discretionary function at the time of the alleged misconducts. Carollo argues that the Amended Complaint alleges that he made repeated inquiries regarding noise complaints and parking violations, which were well within his discretionary authority. *See* Carollo's Motion to Dismiss (ECF No. 53 at p. 19). The Motion further avers that the Amended Complaint alleges that Carollo held meetings with other government employees and constituents regarding Plaintiffs' businesses and that all of those discussions were also within his discretionary authority. *Id.* Plaintiffs contend that Carollo did not have the authority to direct Code Enforcement officers to investigate Plaintiffs' businesses because the City Charter requires that the City Manager, not the Commission, direct and manage Code Enforcement.

A public official can show that he was acting within his discretionary authority by showing that the facts as alleged would result in the conclusion that his actions were (1) undertaken pursuant to the performance of his duties; and (2) were within the scope of his authority. *Roberts v. Spielman*, 643 F.3d 899, 903 (11th Cir. 2011). The Court must examine the "general nature of the defendant's action" to determine if the conduct was within the government actor's discretionary authority. *Holloman ex. rel. Hollman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004).

Carollo argues that his conduct of reporting potential code violations to Code Enforcement constitutes proper encouragement of enforcement of municipal law. On the other hand, Plaintiffs argue that the City Manager, not Carollo, should have been the person directing the Code Enforcement Department. Plaintiffs allege that Carollo played a central role and was the driving force behind the harassing investigations and issuance of bogus citations. However, when determining whether a public official is acting within his discretionary authority, the Court must consider a "government's official's actions at the minimum level of generality necessary to remove the constitutional taint." *Holloman*, 370 F.3d at 1266. The inquiry is not whether Carollo had the authority to direct Code Enforcement officers to retaliate against Plaintiffs. *Id.* ("[T]he inquiry is not whether the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an untenable tautology."). Rather, the question is whether Carollo had the

authority to report his suspicion of code violations and encourage enforcement of the Code. *Id.* ("[W]e look to the general nature of the defendant's action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or other conditionally inappropriate circumstances.").

The relevant section of the City of Miami Charter that governs the City Commission, cited by both parties, provides that "[e]xcept for the purpose of inquiry and as may be necessary as provided in the section the mayor, the city commission, any committees and members thereof shall deal with the administrative service solely through the city manager [. . .]." *See* Miami, Fla. Charter, Subpart A, Section 4(d) (emphasis added). Therefore, in his ardent reporting and investigation of potential code violations as alleged, Carollo was acting within his discretionary authority.

Because Carollo met his burden to show that his actions were within his discretionary authority, the burden shills to Plaintiffs to show that qualified immunity is not appropriate under the circumstances. *Bryant v. Jones*, 575 F.3d 1281, 1295 (11th Cir. 2009). To meet their burden, Plaintiffs must allege that Carollo violated a constitutional right, and that this constitutional right was clearly established at the time of the wrongful act. Because the Court has already determined that Plaintiffs plausibly allege with supporting and detailed facts the three elements of a First Amendment retaliation claim, the only inquiry is whether

that right was established at the time of the misconduct. The undersigned fords that it was.

It is well-settled that the government may not retaliate against its citizens for the expression of their First Amendment rights. *Kollin v. Dorsett*, No. 15-62728-CIV, 2016 WL 4385356, at *4 (S.D. Fla. Apr. 14, 2016) ("The undersigned has little difficulty in concluding that the right to exercise free speech without fear of retaliation by governmental officials was clearly established law at the time of [the] alleged conduct in 2013."); *Bennett*, 423 F.3d at 1256; *Cuevas v. City of Sweetwater*, No. 15-22785-CIV, ECF No. 38 (S.D. Fla. Oct. 28, 2015). Accordingly, the undersigned recommends denying Carollo's Motion on the basis of qualified immunity.

4. Sovereign Immunity

In its Motion, the City argues that the First Amendment retaliation claim against it should be dismissed because Plaintiffs fail to allege a claim that would survive the doctrine of sovereign immunity. *See* City's Motion to Dismiss (ECF No. 54 at p. 4).

Municipalities and other local government entities are subject to liability for the actions of government officials under Section 1983 and may be sued directly for relief where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted by that body's officers." *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *Reyes v. City of*

Miami Beach, No. 07-22680-CIV, 2007 WL 4199606, at *4 (S.D. Fla. Nov. 26, 2007) ("As an initial matter, it is clearly established that a municipality . . . cannot be held liable under Section 1983 for the acts of its employees under a theory of *respondeat* superior."). A municipality may only be held liable under Section 1983 where there is a direct and causal link between the municipality policy or custom and the alleged connotational violation. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

To avoid dismissal of his claim against a municipality, a plaintiff must allege sufficient facts showing either: (1) an officially promulgated policy; (2) an unofficial custom or practice of the municipality shown through repeated acts of a final policy maker for the government entity; or (3) through a showing of the municipalities deliberate indifference to the constitutional rights of an individual, or by a repeated failure to make any meaningful investigation into multiple complaints of constitutional violations. *Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1329 (11th Cir. 2003); *German v. Broward Cty. Sheriff's Office*, 315 F. App'x 773, 776 (11th Cir. 2009) (noting that a policy or custom "is established by showing a persistent and widespread practice and an entity's actual or constructive knowledge of such customs, though the custom need not receive formal approval"). On the undersigned's finding that Plaintiffs sufficiently alleged a constitutional violation, the only inquiry that remains is whether Plaintiffs sufficiently allege a policy or custom of deliberate indifference.

Plaintiffs argue that the City is liable under the third alternative of *Monell* liability: a custom of deliberate indifference. Plaintiffs argue that many City officials, including the Mayor and the City Manager permitted a custom of "permitting and condoning" unconstitutional retaliation as they were aware of Carollo's conduct against the Plaintiffs. (ECF No. 43 at ¶ 286). In support of their argument, Plaintiffs represent that the Mayor, City Manager, Deputy City Manager, and Code Enforcement Director participated in a walkthrough of District 3 to search for code violations at Plaintiffs' properties, and therefore, were aware of the unconstitutional conduct (*Id.* at ¶ 286); and that code enforcement officers followed Carollo's orders, thereby carrying out his retaliatory conduct.

Plaintiffs rely primarily on *Lozman v. City of Riviera Beach*, 39 F. Supp. 3d 1392 (S.D. Fla. 2014), in support of their argument against sovereign immunity. In *Lozman*, the plaintiff brought a First Amendment retaliation claim against a municipality, alleging years of constitutional violations after plaintiff spoke out against the local government. 39 F. Supp. at 1400-01. After the court determined that a constitutional violation had been established, the court denied the municipality's sovereign immunity defense on the basis that plaintiff sufficiently showed a custom of indifference. *Id.* at 1408. In that case, the record showed that the municipality – through a majority of its city council members – was aware and in fact participated in repeated constitutional violations, including repeated arrests and expulsion of council meetings, against the

plaintiff. *Id.* at 1408. Here, no such body of government officials have been identified. That Plaintiffs alleged that a couple City officials, all belonging to different offices, were aware that Carollo raised code violations occurring at Plaintiffs' properties does not amount to the custom of indifference identified in *Lozman.* Additionally, *Lozman* alleged constitutional violations that spanned for a period of three years. Plaintiffs allege misconduct – primarily at the behest of one individual – over the span of ten months. Accordingly, the undersigned recommends that the City's Motion be granted, and Plaintiffs claims against the City dismissed.

D. Motion to Dismiss Conspiracy Claim Against Carollo and Lugo

Plaintiffs allege that Carollo and Lugo agreed to deprive Plaintiffs of their First Amendment rights. (ECF No. 43 at ¶ 305). Specifically, Plaintiffs allege that Lugo conspired with Carollo: (1) to shut down the November 2017 rallies; (2) by calling Code Enforcement to report unfounded violations at Plaintiffs' holiday party; and (3) by investigating and reporting false noise complaints against Ball and Chain. In support of her argument under Rule 12(b)(6), Lugo argues that Plaintiffs fail to allege an underlying constitutional violation and that Plaintiffs' claim against her are barred by the intracorporate conspiracy doctrine. Carollo adopted this argument by motion.

To survive a motion to dismiss of a Section 1983 conspiracy, a plaintiff must allege that the parties

reached an agreement to deprive plaintiff of his constitutional rights and committed an act in furtherance of that conspiracy. *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1261 (11th Cir. 2010) (citing *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990) ("The plaintiff attempting to prove such conspiracy must show that the parties 'reached an understanding' to deny the plaintiff his or her rights. The conspiratorial acts must impinge upon the federal right; the plaintiff must prove an actional wrong to support the conspiracy.").

The intracorporate conspiracy doctrine holds that corporate agents are an extension of the same corporation, thereby defeating the element of the claim that requires *two* persons enter into an agreement to deny a plaintiff of a constitutional right. *See McAndrew v. Lockheed Martin, Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000). Under the doctrine, a corporation cannot conspire with its own employees; and employees, acting within the scope of their employment, cannot conspire among themselves. *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1261 (11th Cir. 2010). The Eleventh Circuit has extended the doctrine to public entities, such as the City and its employees. *Id.* (citing *Denney v. City of Albany*, 247 F.3d 1172, 1190-91 (11th Cir. 2001)). An exception to the intracorporate conspiracy doctrine exists when a plaintiff shows that the conspiring employees were acting outside the scope of their employment. *Id.* at 1261.

The Amended Complaint alleges that, at Carollo's direction, Lugo agreed to use her political contacts to shut down the rallies. (ECF No. 43 at ¶ 55). With

respect to this alleged misconduct, Lugo and Carollo argue that the shutting down of the rallies cannot constitute a Section 1983 violation because Carollo was not acting under state color. *See* Lugo's Motion to Dismiss (ECF No. 64 at p. 9). The Court notes that while this is true for the claim against Carollo, it is not the case for the conspiracy claim against her since, as she alleges, Lugo was a government actor at all relevant times. Plaintiffs' conspiracy claim against Lugo and Carollo is independent from Plaintiffs' claims against Carollo. Accordingly, the Court must examine whether Plaintiffs have alleged sufficient facts to maintain their conspiracy claim against Lugo for this conduct. Plaintiffs specifically allege that Carollo, after becoming aware of the rallies, contacted Lugo who agreed to aid in the shutting down of the rallies. Lugo does not dispute that the rallies constitute protected speech or raise any other challenge to this misconduct. Therefore, Lugo's Motion should be denied as to this misconduct.

With regard to the remaining events alleged, including investigation of the holiday party, Lugo's participation in the walkthrough of Plaintiffs' businesses, and subsequent investigation of Ball and Chain, the undersigned finds that the conduct alleged occur ed solely between City employees and therefore, are barred by the intracorporate conspiracy doctrine. Additionally, the doctrine bars Plaintiffs' claim because Lugo and Carollo were both City employees acting within the scope of their employment as the subject of their alleged conspiracy – retaliating against Plaintiff

for expression of constitutionally protected speech – involves job-related functions within their scope of employment. As discussed above, Carollo had the authority to report and inquire about potential code violations, and likewise, Lugo, as an employee of the Code Enforcement Department, was well-within her scope of employment by investigating potential code violations. *See Girder*, 618 F.3d at 1261 ("We recognize that one might reasonably believe that violating someone's constitutional right is never a job-related function or within the scope of [employment] . . . The scope-of-employment inquiry is whether the employee . . . was performing a unction that, but for the alleged constitutional infirmity, was within the ambit of [their] authority (i.e., job-related duties) . . . "). Accordingly, the undersigned recommends that Lugo's Motion be granted, in part.

III. RECOMMENDATION

For the foregoing reasons, it is **RECOMMENDED** that Carollo's Motion to Dismiss be **GRANTED**, with leave to amend; that the City's Motion to Dismiss be **GRANTED**, with leave to amend; and that Lugo's Motion to Dismiss be **GRANTED**, in part.

Pursuant to Local Magistrate Rule 4(b), the parties have fourteen (14) days from the date of this Report and Recommendation to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge. Failure to file objections by that date may bar the parties from *de*

novo determination by the District Judge of any factual or legal issue covered in the Report and shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. *See* 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *Patton v. Rowell*, No. 16-10492, 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security*, No. 16-11238, 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

RESPECTFULLY SUBMITTED in Chambers this 30th day of April, 2019.

/s/ Lauren Louis
LAUREN LOUIS
United States Magistrate Judge

Copies to:
The Honorable Federico A. Moreno
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11746-CC

WILLIAM O. FULLER,
MARTIN A. PINILLA, II,

Plaintiffs - Appellees,

versus

JOE CAROLLO,

Defendant - Appellant,

JOHN DOES 1-10, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Apr. 1, 2022)

BEFORE: WILLIAM PRYOR, Chief Judge, WILSON, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc.

(FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)