

Appendix A: Decision, U.S. Ct of Appeals, Fed. Cir.

NOTE: This disposition is nonprecedential.
United States Court of Appeals for the Federal Circuit

JOHN S. BARTH, *Plaintiff-Appellant*

v.

UNITED STATES, *Defendant-Appellee*

2017-2238

Appeal from the United States Court of Federal Claims
in No. 1:17-cv-00635-NBF, Sr Judge Nancy B. Firestone
Decided: December 11, 2017

John S. Barth, Springvale, ME, pro se.

Lauren Moore, Comm'l Lit'n Branch, Civil Div, U.S.
Dept of Justice, Washington, DC for defendant-appellee.

Also rep'd by Chad Readler, Robert Kirschman, Jr.,
Patricia McCarthy.

Before DYK, REYNA, and TARANTO, *Circuit Judges*.

PER CURIAM.

John Barth appeals from a judgment from the Court of Federal Claims (“Claims Court”) dismissing his complaint for lack of subject matter jurisdiction. We *affirm*.

BACKGROUND

Barth’s complaint arises from disputes with his neighbor, Starlet McNeely. For over four years, Barth alleges that he has suffered from prolonged sleep deprivation due to loud barking by McNeely’s dogs throughout the night. Barth also alleges that McNeely’s actions amounted to extreme nuisance and assault. In addition to the United States, Barth also names as defendants various state and federal court judges, a federal court employee, Florida state officials, the state of Florida, and various private individuals. Barth claims that the defendants have violated his due process and equal protection rights and that the effect of their actions has been an unconstitutional taking. Barth seeks money damages as well as imprisonment of the individual defendants.

The Claims Court sua sponte dismissed the complaint under Rule 12(h)(3) of the Rules of the United States Court of Federal Claims, which provides that the court must dismiss an action if at any time the court determines it lacks subject matter jurisdiction. The Claims Court explained that it lacked jurisdiction over claims against defendants other than the United States and over the claims brought against the United States because they do not come under the Tucker Act. Barth timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review de novo whether the Claims Court possessed jurisdiction. *Estes Express Lines v. United*

States, 739 F.3d 689, 692 (Fed. Cir. 2014). The plaintiff bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Id.* In reviewing a dismissal for lack of subject matter jurisdiction, we take all uncontested factual allegations as true and construe them in the light most favorable to the plaintiff. *Id.*

The Tucker Act, 28 U.S.C. § 1491, defines the scope of the Claims Court's jurisdiction. The Tucker Act confers jurisdiction on the Claims Court and waives sovereign immunity for certain claims for monetary relief against the United States. It provides the Claims Court with jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." § 1491(a)(1).

The Claims Court only has jurisdiction to hear claims against the United States. *United States v. Sherwood*, 312 U.S. 584, 588 (1941). To the extent that Barth's complaint seeks relief against defendants other than the United States, including state entities, judicial officers, and private parties, the Claims Court correctly dismissed those claims.

The essence of Barth's remaining claims against the United States is that the District Court for the Middle District of Florida and the Eleventh Circuit failed to provide relief in his dispute with McNeely, and that these failures violated the Due Process, Equal Protection, and Takings Clauses. However, the Claims Court does not have jurisdiction to afford relief based on the actions or inactions of other federal district and circuit courts. *Vereda, Ltda. v. United States*, 271 F.3d 1367, 1375 (Fed. Cir. 2001); *see also Plaut v.*

Spendthrift Farm, Inc., 514 U.S. 211, 218–19 (1995) (holding that Article III forbids an Article I tribunal from reviewing the actions of an Article III court).

Barth argues that his claim is reviewable under *Boise Cascade Corp. v. United States*, 296 F.3d 1339 (Fed. Cir. 2002). However, Boise presented a different scenario. In *Boise*, the U.S. Fish and Wildlife Service obtained an injunction prohibiting logging on a landowner's land without a permit pursuant to the Endangered Species Act. *Id.* at 1342. The Federal Circuit held that the Claims Court had jurisdiction to review whether the Fish and Wildlife Service's actions resulted in a taking. *Id.* at 1345. In *Boise*, the government was not merely involved as an impartial judicial arbiter—the Fish and Wildlife Service sought an injunction against the landowner. *Id.* Here, the sole government involvement arises from judicial decisions of the courts denying relief to Barth. Therefore, the Claims Court properly determined that it lacked jurisdiction to review of the merits of the underlying federal courts' decisions.

CONCLUSION

The Claims Court lacked jurisdiction over Barth's claims, and properly dismissed the complaint.

AFFIRMED

COSTS

No costs.

Appendix B: Decision of U.S. Ct of Federal Claims

In the U.S. Court of Federal Claims

No. 17-635 C

(Filed: June 14, 2017)

NOT FOR PUBLICATION

	)
JOHN S. BARTH,	)
Pro Se Plaintiff,	)
v.	)
The United States,	)
Defendant.	)

Pro Se; Sua Sponte Dismissal; Lack of Subject Matter of Jurisdiction; Claims Against State Officials and Agencies; Civil Rights Claims; Tort Claims; RICO Claims; Constitutional Claims; Collateral Attack of Other Court Decisions

ORDER OF DISMISSAL

The complaint in this case was filed by John Barth proceeding pro se on May 10, 2017. The claims alleged in the complaint appear to be rooted in a long-running dispute between the plaintiff and his neighbor, Starlet McNeely. As set forth in the complaint, the plaintiff alleges that Ms. McNeely has "sought for over four more years to force the Plaintiff from his home by extreme nuisance, keeping large dogs outside to bark through the night, and other crimes including vandalism and assault." Compl. 18. Plaintiff's claims

relate to the alleged failure of various federal and state court judges and individuals working for state and federal courts to provide him with the relief he has sought in the various lawsuits he has filed against Ms. McNeely. Mr. Barth has also named several individuals whom he claims are involved in his dispute with Ms. McNeely. Specifically, Mr. Barth has named as defendants: (1) the United States; (2) Judge Elizabeth Kovachevich, of the U.S. District Court of the Middle District of Florida; (3) Jacob Travers, an employee of the United States Supreme Court; (4) the State of Florida; (5) Judge Kimberly (Carlton) Bonner of the Twelfth Judicial Circuit Court of Florida; (6) Sarasota County of Florida; (7) Scott Ortner, a Florida state official; (8) Robert Lincoln, the lawyer representing Ms. McNeely and several other private individuals involved in the neighborhood dispute; (9) Starlet McNeely, owner of adjacent property; (10) Chantel Hollman, McNeely's daughter; (11) Herbert Buck, a nearby resident involved in the neighborhood dispute; and (12) any persons yet unknown that may become defendants or seek to obstruct this action or injure the plaintiff. Compl. 4.

Mr. Barth claims that the parties named have violated his due process and equal protection rights and have taken his property without just compensation. He also makes a variety of judicial misconduct, racketeering, nuisance and assault claims. By way of relief, Mr. Barth states that he is seeking compensatory damages of \$1,500,000.00 for loss of quality of life and \$300,000.00 for the purchase of another home where animal nuisances are not permitted. He is also seeking \$1,000,000.00 from each government entity that has denied his constitutional rights. Finally, the plaintiff "demands the imprisonment of each of [the defendants] for four years under continuous monitoring and

noisemaking sufficient to ensure that they do not sleep more than four hours in any twenty-four hour period." Compl. 30.

For the reasons explained below, the court has determined that jurisdiction is lacking over all of plaintiff's claims. Accordingly, under Rule 12(h)(3) of the Rules of the United States Court of Federal Claims ("RCFC"), the action is DISMISSED.

I. STANDARD OF REVIEW

"Courts have an independent obligation to determine whether subject-matter jurisdiction exists...." *Hertz Corp. v. Friend*, 559 U.S. 77,94 (2010). If the court lacks jurisdiction, it cannot proceed with the action. *Arbaugh v. Y&H Corp.*, 546 U.S. 500' 514 (2006). Even if subject matter jurisdiction has not been challenged by either party, the court must evaluate the existence of subject matter jurisdiction. *Id.* at 506. Rule of the Court of Federal Claims 12(h)(3) provides: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

In determining whether subject matter jurisdiction exists, the court will take uncontested allegations as true and will construe them in the light most favorable to the plaintiff. *Estes Express Lines v. United States*, 739 F.3d 689,692 (Fed. Cir. 2014). In addition, the pleadings of pro se plaintiffs will be held "to less stringent standards than formal pleadings drafted by lawyers." *Johnson v. United States*, 411 F. App'x 303, 305 (Fed. Cir. 2010) (quoting *Haines v. Kerner*, 404 U.S. 519,520 (1972)). However, the court's leniency will not relieve the burden on a pro se plaintiff to meet jurisdictional requirements. *Minehan v. United States*, 75 Fed. Cl.249,253 (2007),

In order to avoid dismissal, the plaintiff must demonstrate that his claims fall within the court's jurisdiction and that substantive law creates a right to money damages. *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). As discussed below, although the plaintiff cites this court's jurisdictional statute, the Tucker Act, 28 U.S.C. § 1491, as a basis for jurisdiction, Compl. 10, this court finds that none of his claims fall within that jurisdictional grant.

II. DISCUSSION

To begin, the Court of Federal Claims only has jurisdiction to hear claims against the United States. *United States v. Sherwood*, 312 U.S. 584, 588 (1941) (explaining that the court's 'Jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States . . . and if the relief is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court.'). As this court explained in *Anderson v. United States*, the Court of Federal Claims lacks 'Jurisdiction over any claims alleged against states, localities, state and local government entities, or state and local government officials and employees; jurisdiction only extends to suits against the United States itself.' 17 Fed. Cl. 330, 331 (2014). Therefore, this court lacks jurisdiction over all claims against parties other than the United States and all claims against those parties must be dismissed, including his claims for: nuisance, judicial misconduct and abuse of office, racketeering, and various tort claims such as nuisance and assault.

This court also lacks jurisdiction over plaintiff's claims against the United States. First, this court does not have jurisdiction over claims brought by plaintiff for

violations of the civil Rights Acts or for deprivation of rights under the color of law. only federal district courts, and not the Court of Federal Claims, have jurisdiction to hear claims alleging civil rights violations. See *Jones v. United States*, 104 Fed. Ct.92'99 (2012); *Marlin v. United States*, 63 Fed. Cl. 4'15,4'76 (2005) (citing *Wildman v. United States*, 28 Fed. Cl. 494,495 (1993) ("[T]he Court does not have jurisdiction to consider civil rights claims brought pursuant to 42 U.S.C. §§ 1981, 1983, or 1985 because jurisdiction over claims arising under the Civil Rights Act resides exclusively in the district courts."). This court similarly lacks jurisdiction to hear claims alleging deprivation of civil rights under color of law. See *Jones*, 104 Fed. Cl. at 99 (dismissing pro se plaintiff's claim for deprivation of rights under color of law for lack of jurisdiction).

Second, this court lacks jurisdiction to hear plaintiff's claims against the United States sounding in tort. The Tucker Act states that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (emphasis added). Thus the many claims plaintiff has alleged in connection with his neighborhood dispute, such as nuisance, assault, slander, harassment, and trespass, to the extent they include the United States, sound in tort and must be dismissed. See *McKenzie v. United States*, 524F. App'x 636, 637-38 (Fed. Cir. 2013) (held that public nuisance claim brought by federal prisoner proceeding as a pro se plaintiff sounded in tort and therefore was not within

subject matter jurisdiction of Court of Federal Claims under the Tucker Act); *Moore v. United States*, 419 F. App'x 1001, 1002 (Fed. Cir. 2011) (assault claim sounded in tort); *Kortlander v. United States*, 107 Fed. Cl. 357, 368 (2012) (slander and harassment sounded in tort); *Cycenas v. United States*, 120 Fed. Cl. 485, 498 (2015) (trespass claim sounded in tort). This court also does not have jurisdiction over plaintiff's claims that are criminal in nature such as vandalism, as alleged in his complaint. *Jones v. United States*, 440 F. App'x 916, 918 (Fed. Cir. 2011).

Third, this court lacks jurisdiction over plaintiff's claims related to violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964. RICO vests jurisdiction over civil actions involving racketeering claims exclusively in the federal district courts. See *Julian v. United States*, 658 F. App'x 1014, 1016-17 (Fed. Cir. 2016) (RICO Act is not a money-mandating statute conferring jurisdiction on the U.S. Court of Federal Claims); *Stanwyck v. United States*, 127 Fed. Cl. 308, 315 (2016) (The RICO Act "provides for a civil action within the exclusive federal jurisdiction of U.S. district courts, and not this court.").

Fourth, this court lacks jurisdiction over plaintiff's claims based on alleged violations of the Due Process and Equal Protections clauses of the Fifth and Fourteenth Amendments. It is well-settled that neither of these clauses are money-mandating and thus cannot serve as a basis for jurisdiction in this court. See *Smith v. United States*, 709 F.3d 1114, 1116 (Fed. Cir. 2013) ("[T]he Fourteenth Amendment's Equal Protection Clause" and "the Due Process clauses of both the Fifth and Fourteenth Amendments do not mandate the payment of money and thus do not provide a cause of action under the Tucker Act."); see also *Leblanc v.*

United States, 50 F.3d 1025, 1028 (Fed. Cir. 1995) (alleged due process and equal protection violations are an insufficient basis for jurisdiction because they do not mandate payment of money damages).

Finally, because this court does not have jurisdiction to review the actions of federal district courts, plaintiff's Fifth Amendment Taking claim must also be dismissed. The plaintiff appears to allege that the decisions of the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh has held, however, that the Court of Federal Claims does not have jurisdiction over a taking claim requiring this court to determine whether another court case was correctly decided. As the Federal Circuit stated in *Vereda, Ltda. v. United States*, "the Court of Federal Claims cannot entertain a taking claim that requires the court to 'scrutinize the actions of another tribunal.'" 271 F.3d 1367, 1315 (Fed. Cir. 2001) (quoting *Allustiarte v. United States*, 256 F.3d 1349, 1352 (Fed. Cir. 2001)). Here, plaintiff's taking claim would require this court to review the decisions of the District court for the Middle District of Florida and the Court of Appeals for the Eleventh Circuit. Because the court may not review those decisions, plaintiff's taking claim must be dismissed.

III. CONCLUSION

For all of the above-stated reasons, plaintiff's complaint is DISMISSED in accordance with RCFC 12(h)(3) for lack of jurisdiction. The clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

Nancy B. Firestone
Senior Judge

**Appendix C: Decision of U.S. Ct of Appeals, 11th
Cir.**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 14-13182
Non-Argument Calendar

D.C. Docket No. 8:14-cv-00118-EAK-EAJ
JOHN S. BARTH, Plaintiff - Appellant,
versus
STARLET MCNEELY, CHANTEL HOLLMAN,
HERBERT BUCK, JOHN DOE, JANE DOE,
Defendants - Appellees, SARASOTA COUNTY,
Defendant.

Appeals from the United States District Court
for the Middle District of Florida

(March 10, 2015)

Before TJOFLET, MARTIN and ANDERSON, Circuit
Judges. PER CURIAM:

This case involves a long-running neighborhood dispute that is being litigated simultaneously in the Circuit Court of Sarasota County and the Middle District of Florida. The disputants are John S. Barth, his next-door neighbor Starlet McNeely, and Herbert Buck, who lives behind them.¹

According to the *pro se* complaint Barth filed in the instant case, McNeely has been trying to force [him] from his home by nuisance, harassment, vandalism, trespass, perjury,

slander, and solicitation of crime. The nuisance and harassment consist of keeping large dogs outside to bark through the night, other noisemaking . . . with the intent and effect of severe injury to [him] in quality of life and the use and value of his home, for a period exceeding one year. [And] Buck has committed assault against [him].

Doc. 1, at 2. And Sarasota County has, in violation of his rights under the Fourteenth Amendment and federal civil rights statutes, effectively sided with McNeely and Buck by refusing to curtail their tortious activity through the enforcement of its nuisance ordinance.

Barth's complaint alleges that on at least five separate occasions between November 2012 and July 2013, he complained to the Sarasota County Sheriff's Office about McNeely and Buck's tortious conduct and that the Sheriff's Office did nothing to prevent it. As a result, McNeely and Buck's behavior continued unabated, and Barth sued McNeely and Buck in Sarasota County Circuit Court. He brought four lawsuits in all.² The first three have concluded; the fourth is still pending.³

The complaint Barth presented to the District Court in this case replicates the allegations of the complaints he filed in the four Circuit Court cases. The complaint contains five counts. All counts comingle in a convoluted manner alleged violations of the United States Constitution, federal civil rights statutes, and state law. And, with minor immaterial exceptions, all counts assert essentially the same wrongful conduct.

Count I seeks relief⁴ against the County under 42 U.S.C. § 19835 on the grounds that the County, acting through the Sheriff's Office, denied Barth his

Fourteenth Amendment rights to due process of law and equal protection of the law through selective enforcement of its nuisance ordinance, the improper training of County and Sheriff's Office employees, and falsifying official records. Count II seeks relief from McNeely and Counts III and IV seek relief from McNeely and Buck under 42 U.S.C. § 1983 (for violations of the Fourteenth Amendment), 1985(3), and 1986. Count V seeks relief against McNeely under Florida tort law.

The defendants moved to dismiss all counts of the complaint under Federal Rule of Civil Procedure 12(b) (6) for failure to state a claim and Count V for lack of subject matter jurisdiction under 28 U.S.C. 1332 (diversity of citizenship). The District Court granted their motions with prejudice with leave to amend. Barth has not filed an amended complaint. He instead appeals the District Court's dismissal of his original complaint.

I.

We affirm the District Court's dismissal of Count I. The Fourteenth Amendment to the United States Constitution provides that a State shall not "deprive any citizen of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Barth claims that as a resident of Sarasota County, he is entitled to the County's enforcement of its nuisance ordinance, a benefit that is the equivalent of a property or liberty interest protected by the procedural component of the Fourteenth Amendment's Due Process Clause.⁶ Barth thus argues that 42 U.S.C § 1983 gives him the right to bring an action against the County to enforce the ordinance or for damages. We are not persuaded.

Whether Barth can obtain relief under § 1983 because Sarasota County refused to enforce its nuisance

ordinance depends on whether the County created a property or liberty interest in such enforcement. The Florida Supreme Court has answered this question. In *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985), it held that “there is not now, nor has there ever been, any common law duty for . . . a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals.” Sarasota County has the discretion, as a matter of governance, to enforce compliance with its ordinances, including the nuisance ordinance at issue here. *Id.* at 919. Given this fact, the benefit Barth claims is not a property or liberty interest protected by the Due Process Clause. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 2803, 162 L. Ed. 2d 658 (2005).⁷

Barth also claims that the County’s failure to enforce the nuisance ordinance denies him equal protection of the laws, in violation of the Fourteenth Amendment. We assume for sake of argument that he might have an equal protection claim if he could show that the County routinely enforces the ordinance in situations materially similar to his. His problem is that his complaint fails to make such a showing.

II.

Counts II, III, and IV seek relief under 42 U.S.C. §§ 1983, 1985(3), and 1986. To make out a case against McNeely and/or Buck under § 1983, Barth has to allege that they subjected him to the tortious conduct his complaint describes while acting “under color of any statute, ordinance, regulation, custom, or usage, of” Sarasota County. 42 U.S.C § 1983; *see supra* text accompanying note 5. The District Court properly dismissed Barth’s § 1983 claims because Counts II, III,

and IV fail to allege that McNeely or Buck acted under color of any such law.

Counts II, III, and IV allege that McNeely and/or Buck are liable to him for damages under § 1985(3).

Section 1985(3) states, in pertinent part:

If two or more persons in any State . . . *conspire* or go in disguise on the . . . premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the *conspirators*.

42 U.S.C. 1985(3) (emphasis added). To state a claim under this section, a plaintiff must allege that some racial or other “class-based invidiously discriminatory animus lay behind the conspirators’ action.” *Childree v. UAP/GA CHEM, Inc.*, 92 F.3d 1140, 1146–47 (11th Cir. 1995). The District Court properly dismissed Counts II, III, and IV because they contain no such allegation.

In Counts II, III, and IV, Barth seeks relief against McNeely and Buck under 42 U.S.C § 1986. That section provides a cause of action against anyone who has “knowledge that any of the wrongs conspired to be done, and mentioned in [42 U.S.C. § 1985(3)], are about to be committed , and having the power to prevent or aid in preventing the commission of the same, neglects

or refuses to do so.” 42 U.S.C. § 1986. A section 1986 claim is derivative of a § 1985(3) violation and thus requires the existence of a § 1985(3) conspiracy. Since Barth alleged no such conspiracy, Counts II, III, and IV fail to state a § 1986 claim. 7

In Counts II, III, and IV, Barth seeks relief against McNeely and Buck under 42 U.S.C § 1986. That section provides a cause of action against anyone who has “knowledge that any of the wrongs conspired to be done, and mentioned in [42 U.S.C. § 1985(3)], are about to be committed , and having the power to prevent or aid in preventing the commission of the same, neglects or refuses to do so.” 42 U.S.C. § 1986. A section 1986 claim is derivative of a § 1985(3) violation and thus requires the existence of a § 1985(3) conspiracy. Since Barth alleged no such conspiracy, Counts II, III, and IV fail to state a § 1986 claim.

III.

Count V seeks relief against McNeely under Florida tort law. Barth alleges that subject matter jurisdiction exists under 28 U.S.C. § 1332 because he is a citizen of Maine and McNeely is a citizen of Florida. In response to McNeely’s motion to dismiss, however, Barth asserted that he is a citizen of Florida. Doc. 16, at 10. The District Court, recognizing that Barth was proceeding *pro se*, dismissed it *sua sponte*, with leave to amend in order to remove the inconsistency. Doc. 36, at 14–15. Barth, however, chose not to eliminate the inconsistency. After considering all of Barth’s factual allegations—including those he made in his four state court lawsuits we are satisfied that Barth is a citizen of Florida and that § 1332 jurisdiction is therefore lacking.

IV.

For the foregoing reasons, we affirm the District Court’s dismissal of Counts I through V of Barth’s complaint.⁹

1 The controversy also involves McNeely's daughter, Chantel Hollman, who lives with her. We refer to them as McNeely for ease of discussion.

2 The record does not contain the complaints in these Circuit Court cases, so we cannot know whether Barth only sued McNeely and Buck.

3 In the first case, Barth sued McNeely because her fence allegedly encroached on his property. McNeely moved the fence and the case was dismissed. In the second case, which the Circuit Court dismissed on a procedural ground, Barth sued McNeely for maintaining a nuisance (barking dogs) and Buck for trespass and assault. The third case, brought against McNeely and Buck for trespass, nuisance, perjury, slander, and assault, was also dismissed on a procedural ground. The complaint in the fourth case, which contained the same allegations as the complaint in the third case, was dismissed with leave to amend. The fourth case is still pending.

4 We refer to both legal and equitable relief because the complaint is capable of being interpreted as seeking both.

5 Section 1983 states, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, an citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, . . . for redress.

6 We do not read Barth's complaint as asserting a substantive due process claim—that is, a substantive constitutional right to require the County to enforce the law, such as its nuisance ordinance.

7 Barth's allegation that the County denied him due process through improper training of County and Sheriff's Office employees, and falsifying official records is patently meritless.

8 We consider the allegations of the state court complaints only to the extent that Barth's complaint reveals them.

9 In this appeal, Barth challenges the District Court's denial of his motion for summary judgment and denial of his motion to add as a party defendant Robert Lincoln, counsel for McNeely and Buck. These challenges are meritless.

Appendix D: Decision of District Court of Florida

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

JOHN S. BARTH,
Plaintiff,

vs. **CASE NO.: 8:14-cv-00118-EAK-EAJ**

**STARLET McNEELY,
CHANTEL HOLLMAN,
HERBERT BUCK,
SARASOTA COUNTY,
JOHN DOE and JANE DOE,**
Defendants.

_____ /

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This cause is before the Court on Defendant, Sarasota County's, Motion to Dismiss Count I of Plaintiff's Complaint (Doc. 8), Defendants, Starlet McNeely, Chantel Hollman, and Herbert Buck's (collectively "Private Defendants"), Motion to Dismiss (Doc. 13), and Plaintiffs Responses in Opposition to Defendants' motions (Doc. 16; Doc. 19). For the reasons set forth below, Defendant Sarasota County's Motion to Dismiss Count I for failure to state a claim is GRANTED, Private Defendants' Motion to Dismiss Counts II, III, and IV for failure to state a claim is GRANTED with respect to violations of the Civil Rights Act, and Private Defendants' Motion to Dismiss state law claims in Counts II, III, IV, and V for lack of subject

matter jurisdiction is GRANTED WITH LEAVE TO AMEND.

STATEMENT OF THE FACTS

Plaintiff submitted the following facts in the Complaint. The Court recognizes these as “facts” only in regard to resolution of these pending motions to dismiss.

Plaintiff lives next door to Defendants McNeely and Hollman on Brazilnut Avenue in Sarasota County, Fla. (Doc. 1, Pg. 3). Defendant Buck resides on Almond Avenue, one street behind Brazilnut Avenue. (Doc. 1, Pg- 3).

On many occasions, Private Defendants left McNeely’s large dogs outdoors to bark throughout the night. (Doc. 1, Pg. 9).

On November 27, 2012, after Sheriffs served the Summons and Complaint for a state civil action for nuisance abatement, Buck pounded on Plaintiffs door and shouted threats of violence before leaving at Plaintiffs request. (Doc. 1, Pg. 8). With the direction of McNeely, Buck returned to Plaintiffs home and continued the same threats causing Plaintiff to fear injury by Buck. (Doc. 1, Pg. 8). Sheriff deputies responded to Plaintiff’s call and spoke with him and Buck. (Doc. 1, Pg. 9). The Sheriffs incident report did not mention any offenses or identities and noted “a verbal argument over dog barking” which did not occur that day. (Doc. 1, Pg. 9). Harassment by Private Defendants occurred most days and nights (Doc. 1, Pg. 10), but most deputy observations did not result in a report due to deputy confusion on which ordinance to enforce, misunderstanding of ordinances, and bias that they must protect dog owners. (Doc. 1, Pg. 13).

On one occasion, McNeely pounded on sheet metal during the night after Plaintiff reported the dog barking. (Doc. 1, Pg. 10). After this incident, Lieutenant Stroud assured Plaintiff that the report records observations of nuisance whether or not action was taken. (Doc. 1, Pg. 11). Deputies' mistakes reduced the number of reports showing dog barking in Plaintiffs second civil complaint in Circuit Court. (Doc. 1, Pg. 13).

In addition to Plaintiffs federal litigation, Plaintiff has filed five related state civil actions. (Doc. 1). The first state civil action was voluntarily dismissed by the Plaintiff, three subsequent complaints were dismissed by the court, and Plaintiffs most recent related state claim is pending before the Circuit Court. (Doc. 1).

In Plaintiffs Complaint before this Court, Plaintiff alleges that Defendants denied, and conspired to deny, Plaintiffs due process and equal protection under the law. (Doc. 1, Pg. 4-6). Plaintiff also alleges several related state law claims against the Private Defendants. (Doc. 1, Pg. 5-6).

STANDARD OF REVIEW

The allegations of a *pro se* complaint are held to less stringent standards than pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Nevertheless, *pro se* litigants must still comply with procedural rules. *Albra v. Advan, Inc.*, 490 F.3d 826, 829 (11th Cir. 2007). Federal Rule of Civil Procedure 8(a)(2) requires that a plaintiffs complaint set out a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "While a complaint attacked by a Rule 12(b)(6) motion

to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citations and internal quotation marks omitted).

Therefore, to survive a defendant's motion to dismiss, the plaintiff's complaint "must now contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 570). In considering a motion to dismiss under this plausibility standard, courts follow a two-pronged approach. First, a court must "eliminate any allegations in [a] complaint that are merely legal conclusions." *Id.* at 1290 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)). Then, a court must take any remaining well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950) (internal quotation marks omitted). In sum, Rule 8's pleading standard "does not require 'detailed factual allegations,' but demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

DISCUSSION

Plaintiff asserts that Defendant Sarasota County is liable under 42 U.S.C. § 1983 for violations of Plaintiff's rights to due process and equal protection afforded to him by the Fourteenth Amendment of the United States Constitution. Sarasota County makes several arguments for why Plaintiff's claim against it

must be dismissed. Private Defendants join in this motion. (Doc. 13, Pg. 1). Sarasota County argues that Count I of Plaintiff's Complaint should be dismissed because "the County is not an entity subject to suit for the alleged actions of the Sheriff of Sarasota County and/or his employees[.]" "[p]laintiff has failed to allege either a due process or equal protection claim[.]" and the Plaintiff made "no allegation demonstrating an affirmative causal connection between any act attributable to the County and any alleged Section 1983 claim." (Doc. 8, Pg. 1).

I. Plaintiff Fails To Show His Constitutional Rights Were Violated By Sarasota County

To state a claim for municipal liability under 42 U.S.C. § 1983, a plaintiff must show (1) that his constitutional rights were violated, (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right, and (3) that the policy or custom caused the violation. *McDowell v. Brown*, 392 F.2d 1283, 1289 (11th Cir. 2004). An underlying constitutional injury must be found before examining an entity's policy or custom. *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Rooney v. Watson*, 101 F.3d 1378, 1381 (11th Cir. 1996).

A. Plaintiff Fails To Show A Violation Of His Due Process Rights

Plaintiffs' allegations do not show deputies' actions caused a deprivation of a constitutionally protected right or liberty.

Plaintiff asserts Sarasota County violated his right to due process "by means of customary selective

enforcement, customary mistreating and failure to train employees with reckless disregard and deliberate indifference to need resulting in wrongful employee actions, and by customary falsification and concealment of public records.” (Doc. 1, Pg. 4). Plaintiff further asserts custom dictated deputies’ failure to enforce various nuisance ordinances and inadequate investigation of Plaintiff’s multiple complaints of harassment by the Private Defendants. (Doc. 1, Pg. 10). The Due Process Clause of the Fourteenth Amendment provides that “[n]o State shall. . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV. A Section 1983 claim alleging a denial of procedural due process requires proof that an action by the state deprived an individual of a constitutionally-protected liberty or property interest without providing constitutionally-adequate process. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) (citing *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir. 1994)).

The Due Process Clause “is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.” *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989). “Its purpose [is] to protect the people from the State, not to ensure that the State protect[s] them from each other.” *Id.* at 196. Law enforcement is generally not liable under the Fourteenth Amendment and Section 1983 for harms that may have been prevented by better policing. *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768-769 (2005).

Plaintiff expressly contributes his injuries to the actions performed by the Private Defendants. (Doc. 16, Pg. 10). Plaintiff asserts the deputies’ failure to enforce

ordinances on numerous occasions facilitated and prolonged these injuries. (Doc. 16, Pg. 10). Because law enforcement is not required to protect individuals from third parties, the Sheriff deputies' failure to protect Plaintiff from harms solely created by the Private Defendants cannot state a claim for a violation of Due Process.

Plaintiff erroneously argues that the use of the word "shall" in Sarasota County's Public Nuisance ordinance creates a duty to enforce the ordinance. (Doc. 16, Pg. 12-13). It is well established that police officers are afforded discretion in their investigation of complaints, "even in the presence of seemingly mandatory legislative commands." *Castle Rock*, 545 U.S. at 761. The use of the word "shall" in the ordinance does not create an affirmative duty for the police to enforce the ordinance in every nuisance complaint.

Plaintiff also erroneously argues that acknowledgement and promises from the Sheriff created an affirmative duty to protect. (Doc. 16). A State's knowledge of the circumstances and expressions of intent to help, without action that makes the Plaintiff more vulnerable, does not create an affirmative duty to protect. *DeShaney*, 489 U.S. at 200. While the Sheriff may have been aware of the injuries inflicted by the Private Defendants in this case, the allegations do not show that the State played any role in creating the harm, nor do the allegations show that any actions by the deputies made the Plaintiff more vulnerable to harm.

Plaintiff does not allege sufficient facts in his Complaint to show "state action" as required to implicate the Due Process Clause of the Fourteenth Amendment.

B. Plaintiff Fails To Show A Violation Of Equal Protection

Identical to his Due Process claim, plaintiffs Equal Protection claim is based on the allegation that the deputies failed to thoroughly investigate his complaints and protect him from third parties. (Doc. 1, Pg. 10). Plaintiff further alleges that deputies have enforced the ordinances in past cases and would enforce the ordinances if the complaints were from other officers or judges. (Doc. 1).

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const, amend. XIV.

A plaintiff alleging a “class of one” equal protection claim must show that he was intentionally treated differently from others who were similarly situated. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). He must also show that there was no rational basis for the disparate treatment. *Id.*

A one-dimensional inquiry can be used to determine if individuals are similarly situated when the challenged decisions involve only one relevant factor. *Griffin Industries, Inc. v. Irvin*, 496 F. 3d 1189, 1203 (11th Cir. 2007). Other decisions require a multi-dimensional inquiry because they involve discretionary decisionmaking based on many relevant factors. *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1265 (11th Cir. 2010). To be similarly situated, the individuals must be “prima facie identical in all relevant respects.” *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006).

As discussed, *supra*, law enforcement is afforded discretion in its investigation and is generally not held

liable under the Fourteenth Amendment for failure to prevent harms inflicted by others. *Castle Rock*, 545 U.S. at 761, 768-769. Due to law enforcement's discretionary decisionmaking, Plaintiff must allege facts to support he is "prima facie identical [to comparators] in all relevant respects." *Campbell*, 434 F.3d at 1314.

Plaintiff fails to allege facts to support disparate treatment by law enforcement. To show disparate treatment, plaintiff alleges differing outcomes in other cases and his own conjecture to how deputies may respond to others' complaints. (Doc. 1).

The Court finds that the Plaintiff only offers conclusory allegations with no clear factual support of disparate treatment. Therefore Plaintiff fails to state a claim for a violation of Equal Protection.

Due to Plaintiffs failure to sufficiently allege an underlying constitutional injury, there is no need to examine policies and customs and whether Sarasota County is the correct entity to be sued for such violations.

As a result, Defendant Sarasota County's Motion to Dismiss Count I for failure to state a claim is GRANTED.

II. Plaintiff Fails To Show Private Defendants Violated The Civil Rights Act

Plaintiff asserts Private Defendants "denied and conspired to deny to plaintiff the exercise of rights guaranteed by the United States Constitution, to liberty and the free use and enjoyment of his property, in violation of the Civil Rights Act." (Doc. 1, Pg. 5-6). Private Defendants argue that no allegations in the complaint can establish "that McNeely, Saunders or Buck are 'state actors' or have taken any action under

color of state law, as is necessary to establish a valid claim under the Civil Rights Act.” (Doc. 13, Pg. 5.) In Plaintiffs response to Private Defendants’ motion, Plaintiff clarifies that his Civil Rights claims against the Private Defendants are being raised under 42 U.S.C. §§ 1985-1986 and therefore do not require the Private Defendants to be state actors. (Doc. 19, Pg. 10).

Section 1985 provides a cause of action when there is a conspiracy to deprive an individual of “the equal protection of the laws, or of equal privileges and immunities under the laws[.]” 42 U.S.C. § 1985. Section 1986 provides a cause of action against any person who had knowledge of a Section 1985 conspiracy and had the power to prevent the commission of the conspiracy but neglected or refused to do so. 42 U.S.C § 1986.

Section 1985 includes purely private conspiracies. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). Although the statute reaches private action, it was not intended “to apply to all tortious, conspiratorial interferences with the rights of others.” *Id.* To avoid interpreting Section 1985 as a general federal tort law, “[t]he language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.” *Id.* at 102.

Plaintiffs allegations may support a conspiracy among private individuals, but Plaintiff fails to allege any facts to support that the Private Defendants acted with a racial or class-based motive. Plaintiff merely alleges general tortious interferences prompted by a disagreement between neighbors. The Court finds these allegations are not actionable under Section 1985.

Because Plaintiff fails to allege facts supporting a conspiracy actionable under Section 1985, the Court

finds Private Defendants cannot be held liable for failing to prevent said inadequate conspiracy. Therefore, Private Defendants Motion to Dismiss Counts II, III, and IV for failure to state a claim for a violation of Plaintiff s civil rights is GRANTED.

III. Plaintiff Failed To Clearly Establish Diversity Jurisdiction

Federal courts are courts of limited jurisdiction. Because Plaintiff fails to state any claims under 28 U.S.C § 1331, Plaintiff must rely on diversity jurisdiction for the Court to have subject matter jurisdiction over his state law claims.

Pursuant to 28 U.S.C. § 1332, the district courts have original jurisdiction for all civil actions between citizens of different states where the matter in controversy exceeds \$75,000.00. Under 28 U.S.C. § 1332, citizenship is equivalent to an individual's domicile. *McCormick v. Aderholt*, 293 F.3d 1254, 1257 (11th Cir. 2002). An individual's domicile is the most recent state where he resided with the intent to remain indefinitely. *Id.* at 1258.

Private Defendants successfully point out the inconsistencies in Plaintiffs allegations as to his state citizenship. (Doc. 13, Pg. 7). Plaintiff asserts that he is a citizen of Maine (Doc. 1, Pg. 7), but alleges his neighbors in Sarasota County, the Private Defendants, harassed him for more than a year. (Doc. 1, App'x 1). Further, in Plaintiff s response to Defendant Sarasota County's Motion to Dismiss, Plaintiff asserts that he is a citizen of Florida. (Doc. 16, Pg. 10).

The Court finds that Plaintiffs inconsistent allegations do not establish diversity of citizenship. The Court recognizes that Plaintiff is proceeding *pro se*. *See*

Doc. 1). In accordance with construing a *pro se* complaint liberally, the Court, sua sponte, grants Plaintiff leave to amend his Complaint to rectify the inconsistent allegations of citizenship and to limit his complaint to the causes of action allowed by this order. Plaintiffs amendment must be in accordance with the good faith requirements of Federal Rule of Civil Procedure 11.

Private Defendants' Motion to Dismiss for lack of subject matter jurisdiction is GRANTED WITH LEAVE TO AMEND as to Plaintiffs citizenship. Due to lack of subject matter jurisdiction, the Court refrains from ruling on motions regarding the validity of the state law claims.

ORDERED that Defendant Sarasota County's Motion to Dismiss Count I for failure to state a claim is GRANTED, and Defendant Sarasota County is dismissed from this action. Private Defendants' Motion to Dismiss Counts II, III, and IV for failure to state a claim is GRANTED regarding violations of the Civil Rights Act, and Private Defendants' Motion to Dismiss Counts II, III, IV, and V for lack of subject matter jurisdiction is GRANTED WITH LEAVE TO AMEND. The amended complaint must be filed within fifteen days of this date or this case will be dismissed in its entirety.

DONE and ORDERED in Chambers, in Tampa, Florida this 7th day of July, 2014.

ELIZABETH A KOVACEVICH
UNITED STATES DISTRICT JUDGE
Copies to: All parties and counsel of record

Appendix E: 28 USC §§ 1491, 1495 Tucker Act

28 U.S. Code § 1491 - Claims against United States

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. ...

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders ... to any appropriate official of the United States... to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. ...

28 U.S. Code § 1495 - Damages for unjust conviction ...

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offense against the United States and imprisoned.

Appendix F: 28 USC §§ 1346(a2),(b), 2671-80 FTCA

28 U.S. Code § 1346 - United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of...

(b) (2) Any other civil action or claim against the United States, not exceeding \$10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or

upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. ...

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts... shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. ...

28 U.S. Code § 2671 – Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term “Federal agency” includes the executive departments, the judicial and legislative branches...

28 U.S. Code § 2674 - Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. ...