19-3949-cv
Anilao v. Spota

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
(Argued: December 4, 2020 Decided: March 9, 2022)
Docket No. 19-3949-cv

JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMAIO, ELMER JACINTO, JENNIFER LAMPA, RIZZA MAULION, THERESA RAMOS, RANIER SICHON, AND JAMES MILLENA,
Plaintiffs-Counter-Defendants-Appellants,
FELIX Q. VINLUAN,
Plaintiff-Appellant,
v.
THOMAS J. SPOTA, III, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF SUFFOLK COUNTY, OFFICE OF THE DISTRICT ATTORNEY OF SUFFOLK COUNTY, LEONARD LATO, INDIVIDUALLY AND AS AN ASSISTANT DISTRICT ATTORNEY OF SUFFOLK COUNTY, COUNTY OF SUFFOLK, KARLA LATO, AS ADMINISTRATOR OF THE ESTATE OF LEONARD LATO,
Defendants-Appellees,
SUSAN O'CONNOR, NANCY FITZGERALD, SENTOSA CARE, LLC, AVALON GARDENS REHABILITATION AND HEALTH CARE CENTER, PROMPT NURSING EMPLOYMENT AGENCY, LLC, FRANCRIS LUYUN, BENT PHILIPSON, BERISH RUBENSTEIN,
Defendants-Counter-Claimants.*

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* The Clerk of Court is directed to amend the caption as set forth above.

Before:

SACK, CHIN, and LOHIER, *Circuit Judges*.

Ten nurses and their former attorney filed claims under 42 U.S.C. § 1983 as well as common-law claims of false arrest and malicious prosecution under New York law against the defendants, including the District Attorney of Suffolk County and one of his bureau chiefs. The two principal questions presented on appeal are whether the individual defendants were entitled to absolute immunity for the actions they undertook as prosecutors, and whether there was any admissible evidence showing that they violated the plaintiffs' constitutional rights during the investigative phase of the case. Because we agree with the United States District Court for the Eastern District of New York (Bianco, J.) that the defendants were entitled to absolute immunity from claims arising from the prosecutorial phase of the case and to summary judgment on the remaining claims arising from the investigative phase of the prosecution, we **AFFIRM**.

Judge Chin dissents in a separate opinion.

STEPHEN L. O'BRIEN, O'Brien & O'Brien, LLP, Nesconset, NY, *for Defendant-Appellee* Thomas J. Spota, III.

BRIAN C. MITCHELL, Assistant County Attorney, Suffolk County Attorney's Office, Hauppauge, NY, *for Defendants-Appellees* County of Suffolk and Karla Lato, as Administrator of the Estate of Leonard Lato.

OSCAR MICHELEN, Cuomo LLC, Mineola, NY, *for Plaintiff-Appellant* Felix Vinluan.

PAULA SCHWARTZ FROME (James O. Druker, *on the brief*), Kase & Druker, Esqs., Garden City, NY, *for Plaintiffs-Counter-Defendants-Appellants* Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, Theresa Ramos, Ranier Sichon, and James Millena.

LOHIER, *Circuit Judge*:

Ten nurses and their former attorney, Felix Vinluan, filed claims under 42 U.S.C. § 1983 as well as common-law claims of false arrest and malicious prosecution under New York law against the defendants – the County of Suffolk, the Office of the District Attorney of Suffolk County (the "DA's Office"), Thomas J. Spota, III, the District Attorney of Suffolk County, and Leonard Lato, an Assistant District Attorney who was at all relevant times the Chief of the Insurance Crimes Bureau at the DA's Office. The plaintiffs allege that Spota and Lato improperly prosecuted them for child endangerment, endangerment of a physically disabled person, and related charges by fabricating evidence and engaging in other improper conduct before a grand jury, in violation of the plaintiffs' federal constitutional rights and New York state law. The state prosecution ended only when a New York state appellate court concluded that the plaintiffs were being "threatened with prosecution for crimes for which they cannot be constitutionally tried." Matter of Vinluan v. Doyle, 873 N.Y.S.2d 72, 83 (2d Dep't 2009). The United States District Court for the Eastern District of New York (Bianco, J.) found that Spota and Lato were entitled to absolute immunity for starting the criminal prosecution and presenting the case

to the grand jury, and it dismissed the plaintiffs' claims arising from any alleged misconduct during that prosecutorial stage. Anilao v. Spota, 774 F. Supp. 2d 457, 466-68 (E.D.N.Y. 2011) ("Anilao I"). The District Court later granted summary judgment in favor of the prosecutors and the DA's Office as to the remaining claims after concluding that there was insufficient evidence that Spota or Lato had violated the plaintiffs' constitutional rights during the investigative phase of the criminal proceedings. Anilao v. Spota, 340 F. Supp. 3d 224, 250 (E.D.N.Y. 2018) ("Anilao II"). And "given the absence of any underlying constitutional violation in the investigative stage," the court concluded, "no municipal liability can exist against Suffolk County as a matter of law." Id. at 251.

For the reasons that follow, we affirm the District Court's judgment. Although Spota and Lato may have unlawfully penalized the plaintiffs for exercising the right to quit their jobs on the advice of counsel, under our precedent both of them are entitled to absolute immunity for their actions during the judicial phase of the criminal process. As for the plaintiffs' claim that Spota and Lato fabricated evidence during the investigative phase of the criminal process, we agree with the District Court that there was insufficient admissible evidence of fabrication to defeat summary judgment. We therefore affirm.

BACKGROUND

Sentosa Care, LLC ("Sentosa")[1] operates health care facilities throughout New York and recruited the nurse plaintiffs from the Philippines to work in various Sentosa nursing home facilities on Long Island, New York. Each nurse signed an employment contract that required the nurses to work for at least three years or face a $25,000 penalty. When they arrived in New York, the nurses learned that they would be working for an employment agency, not Sentosa, and that the agency had assigned them to work at Avalon Gardens Rehabilitation and Health Center ("Avalon"), a nursing home for both adults and children.

Following a relatively brief stint at Avalon, the nurses began to complain about their working and living conditions – longer than expected work shifts, overcrowded and substandard housing, lower insurance benefits and pay, and less vacation time than their contracts provided. The nurses also voiced their concerns to the Philippine Consulate in New York, which referred them to Vinluan, an immigration and employment attorney, for advice. After speaking with the nurses and evaluating the facts, Vinluan concluded that Sentosa had breached its contracts with the nurses and advised them that they were free to resign from their positions without legal repercussion once their shifts ended. Based on Vinluan's advice, on April 7, 2006,

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[1] Sentosa, Avalon Gardens Rehabilitation and Health Care Center, Prompt Nursing Employment Agency LLC, Francris Luyun, Bent Philipson, Berish Rubenstein, Susan O'Connor, and Nancy Fitzgerald were originally defendants in this case, but they are not parties to this appeal.

all ten nurses resigned either after their shift was over or in advance of their next shift.

Soon after the nurses resigned, Sentosa filed a complaint with the New York State Department of Education, which licenses and regulates nurses. The company also filed a complaint in Nassau County Supreme Court to enjoin the nurses and Vinluan from speaking to other nurses about resigning. It even filed a complaint with the Suffolk County Police Department. None of Sentosa's complaints led to any action against the plaintiffs, however, and on September 28, 2006, the Department of Education closed the case after determining that the nurses had not engaged in any professional misconduct or deprived any patient of nursing care.

Unfazed, Sentosa continued its campaign against the plaintiffs. It finally found a receptive audience in Spota. Not long after representatives of Sentosa met with Spota to urge the DA's Office to file criminal charges against the nurses for imperiling the health and safety of Avalon's patients, Spota assigned the criminal investigation to Lato. Lato then quickly interviewed the plaintiffs, as well as other witnesses, like Francris Luyun, the head of Sentosa's recruitment agency.

In defense of the plaintiffs, who were now plainly the targets of a criminal investigation, Vinluan presented Lato with "significant exculpatory information." App'x 55. Among other things, Vinluan pointed to the fact that the Department of Education and the New York State Supreme Court had declined to act against the nurses. He also provided "information . . . that," contrary to Sentosa's

assertion, "none of the Nurse Plaintiffs had ceased work during a shift." App'x 55.

Lato was unpersuaded by Vinluan's arguments and presented several witnesses to a grand jury in Suffolk County. Among the witnesses were several Sentosa employees, an investigator in the DA's Office, a nurse who had also resigned but who is not a party to this appeal, and a nurse who filled in at Avalon immediately after the nurse plaintiffs resigned. The grand jury returned an indictment charging the nurses and Vinluan with (1) conspiracy in the sixth degree, in violation of New York Penal Law (N.Y.P.L.) §§ 105.00 and 105.20; (2) endangering the welfare of a child, in violation of N.Y.P.L. §§ 260.10(1) and 20.00; and (3) endangering the welfare of a physically disabled person, in violation of N.Y.P.L. §§ 260.25 and 20.00. Vinluan was also charged with criminal solicitation in the fifth degree, in violation of N.Y.P.L. § 100.00.

In response, the nurses and Vinluan moved in New York State Supreme Court in Suffolk County to, among other things, dismiss the charges against them. All of them insisted that their conduct was not criminal and that, in any event, the indictment was not supported by sufficient evidence. They also argued that the prosecution violated their constitutional rights. The nurses claimed that the prosecution violated their rights under the Thirteenth Amendment of the federal Constitution, which, with one exception not relevant here, prohibits any form of involuntary or forced labor without pay. Vinluan argued that the prosecution against him violated his First Amendment rights to free speech and to association in connection with providing counsel to his clients.

The state court rejected the plaintiffs' claims of insufficient evidence, holding that "the evidence [was] legally sufficient to support [all] the charges contained in the indictment" and "that each count of the indictment properly charges these defendants with a crime . . . ." App'x 814.[2] The court also rejected the plaintiffs' constitutional arguments. With respect to the nurses' constitutional challenge, the state court concluded that "[t]here is absolutely no evidence to suggest that this prosecution in any way violates the rights of any of these defendants under the Thirteenth Amendment to the United States Constitution." App'x 815. As for Vinluan's First Amendment challenge, the court determined, there was "no basis to disturb" the grand jury's finding that there was "sufficient evidence that [Vinluan] had entered into an agreement to perform an act which would endanger the welfare of children and disabled persons and that an overt act was committed in furtherance of that agreement." App'x 819.

Having failed to persuade the state court to dismiss the indictment against them, the plaintiffs petitioned the New York Appellate Division, Second Department for a writ of prohibition. See N.Y. C.P.L.R. § 7803(2). In January 2009 the Appellate Division granted the writ, which we describe further below, after finding that the prosecution of the nurses and of Vinluan "constitute[d] an impermissible

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[2] The state court also explained that "[i]n the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged," a standard significantly lower than the proof beyond a reasonable doubt required at a criminal trial. App'x 814-15. "Under these standards of review," the court said, "there was ample evidence before the Grand Jury to support all counts of the indictment against [the nurses and Vinluan]." App'x 815.

infringement upon [their] constitutional rights . . . and that the issuance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter." Vinluan, 873 N.Y.S.2d at 75. In its decision granting the writ, the Appellate Division explained that the nurses had not committed a crime by ending their employment at will, since they had "resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and staff members," id., and that Vinluan's good faith legal advice was likewise protected from prosecution under the First and Fourteenth Amendments, id. at 82-83. But the Appellate Division also explicitly acknowledged that "the [New York] Penal Law provisions relating to the endangerment of children and the physically disabled . . . do not on their face infringe upon Thirteenth Amendment rights by making the failure to perform labor or services an element of a crime," and that under "exceptional circumstance[s]," restrictions of an individual's Thirteenth Amendment rights may be warranted. Id. at 80-81. The problem with the prosecution, the court explained, was that the "District Attorney proffer[ed] no reason why this [was] an 'extreme case.'" Id. at 81.

The plaintiffs started this federal litigation in 2010. The complaint alleges, among other things, that Spota and Lato acted in concert with Sentosa to secure an indictment that they knew violated the plaintiffs' constitutional rights and that they lacked probable cause to bring in the first instance. In particular, the complaint asserts that "the Grand Jury was not properly charged as to the law," was "falsely informed that one or more of the nurses had

resigned and left the facility before completing his or her shift," and was "not informed that the Education Department had previously determined that the Nurse Plaintiffs had not violated the very regulations which they were indicted for violating." App'x 56. The complaint also alleges that at Sentosa's behest, Spota and Lato sought to punish the nurses for resigning from their employment at Avalon and discourage others from doing the same. Finally, the complaint claims that the County is liable under the principles of municipal liability announced in Monell v. Department of Social Services, 436 U.S. 658 (1978).

The defendants filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court granted the motion in part as to any claims arising from Spota and Lato's actions during the non-investigative, prosecutorial phase of their case against the plaintiffs, including the selection of charges, the initiation of the prosecution, and the presentation of testimony and evidence to the grand jury. As to those claims, the District Court concluded, Spota and Lato were entitled to absolute immunity from suit. See Anilao I, 774 F. Supp. 2d at 479-81.

But the District Court declined to dismiss on absolute immunity grounds the plaintiffs' claims arising from any alleged prosecutorial misconduct by Spota or Lato during the investigative phase of the case, finding instead that the defendants were at most entitled only to qualified immunity. Id. at 477, 482. For that reason, to the extent that the complaint plausibly alleged that Spota and Lato had violated the plaintiffs' constitutional rights during the investigative phase, the District Court decided that the case

would have to proceed past the pleading stage to discovery and summary judgment. See id. at 485, 493. After discovery, however, the District Court granted summary judgment in favor of the defendants because "there [wa]s simply no evidence in the record that [Spota and Lato] engaged in any constitutional wrongdoing in the investigative stage of the case," Anilao II, 340 F. Supp. 3d at 234. This was so even though the District Court had previously recognized (in Anilao I) that the case involved the "highly unusual set of circumstances in which the police not only lacked involvement in the investigation of [the plaintiffs] but also had expressly declined to investigate" them. Anilao I, 774 F. Supp. 2d at 481. The District Court then also dismissed the Monell claim against the County because there was no underlying constitutional violation. Anilao II, 340 F. Supp. 3d at 251.

This appeal followed.

DISCUSSION

The two questions presented on appeal are whether Spota and Lato were entitled to absolute immunity for the actions they undertook as prosecutors, and whether there was any evidence showing that they violated the plaintiffs' constitutional rights during the investigative phase of the prosecution, a phase with respect to which they are entitled at most only to qualified immunity. We address each question in turn.

I

The doctrine of absolute immunity applies broadly to shield a prosecutor from liability for money damages (but not injunctive relief) in a § 1983 lawsuit, even when the result may be that a wronged plaintiff is left without an immediate remedy.[3] See Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Our cases make clear that prosecutors enjoy "absolute immunity from § 1983 liability for those prosecutorial activities intimately associated with the judicial phase of the criminal process."[4] Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987) (quotation marks omitted). The immunity covers "virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." Hill v. City of New York, 45 F.3d 643, 661 (2d Cir. 1995) (quoting Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994)). For example, a prosecutor enjoys absolute immunity when determining which offenses to charge, initiating a prosecution, presenting a case to a grand jury, and preparing for trial. See id.; Imbler, 424 U.S. at 431 (concluding that a prosecutor is absolutely immune from a § 1983 suit for damages based on his "initiating a prosecution and . . . presenting the State's case"). For that reason, we have held that absolute immunity extends even to a prosecutor who

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[3] Recognizing that it would be unjust to allow prosecutorial misconduct to go unpunished and that absolute immunity does not render the public powerless, we have pointed to other methods, such as criminal and professional sanctions, to deter and redress wrongdoing. See Schloss v. Bouse, 876 F.2d 287, 292 (2d Cir. 1989); see also Imbler, 424 U.S. at 429 & n.29.

[4] To be clear, § 1983 itself does not mention absolute prosecutorial immunity (or, for that matter, any immunity). It is a judicially created doctrine that has developed over time.

"conspir[es] to present false evidence at a criminal trial. The fact that such a conspiracy is certainly not something that is properly within the role of a prosecutor is immaterial, because the immunity attaches to his function, not to the manner in which he performed it." Dory, 25 F.3d at 83 (cleaned up).

"Thus, unless a prosecutor proceeds in the clear absence of all jurisdiction, absolute immunity [from § 1983 liability] exists for those prosecutorial activities intimately associated with the judicial phase of the criminal process." Barr, 810 F.2d at 361 (emphasis added); see Shmueli v. City of New York, 424 F.3d 231, 237 (2d Cir. 2005). "Conversely, where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy" and is left with only qualified immunity as a potential shield. Barr, 810 F.2d at 361 (emphasis added); see Shmueli, 424 F.3d at 237. "[A] limitation upon the immunity," Chief Judge Hand explained, "[is] that the official's act must have been within the scope of his powers," but this does not mean that "to exercise a power dishonestly is necessarily to overstep its bounds." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.). Instead, "[w]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." Id.

A narrow limitation to the scope of absolute immunity in § 1983 actions thus exists where the defect is jurisdictional – that is, where the prosecutor acted well outside the scope of authority, rather than where the defect relates, as

here, to the prosecutor's motivation or the reasonableness of his official action. The jurisdictional defect must be clear and obvious. "In considering whether a given prosecution was clearly beyond the scope of that jurisdiction, or whether instead there was at least a colorable claim of authority, . . . we inquire whether" any relevant criminal statute exists that "may have authorized prosecution for the charged conduct." Shmueli, 424 F.3d at 237; see, e.g., Lerwill v. Joslin, 712 F.2d 435, 440 (10th Cir. 1983) (prosecutor who initiates prosecution under statutes he is not authorized to invoke is afforded absolute immunity if he "is arguably empowered to prosecute the alleged conduct under some statute" and "the statute he incorrectly invokes also arguably applies to the criminal defendant's alleged conduct").[5]

So "[e]ven if a prosecutor may lose his absolute immunity for prosecutorial acts for which he has no colorable claim of authority," it is not lost "immediately upon crossing the technical bounds of the power conferred on him by local law," or "simply because he acted in excess of his authority." Lerwill, 712 F.2d at 439; see Ashelman v. Pope, 793 F.2d 1072, 1076-77 (9th Cir. 1986) (en banc) (unanimously holding that prosecutor was entitled to absolute immunity

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[5] If the laws authorize prosecution for the charged crimes, a prosecutor may still be liable if he "has intertwined his exercise of authorized prosecutorial discretion with other, unauthorized conduct." Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004). Cited examples in which officials act clearly outside the scope of their powers include charging decisions that are accompanied by unauthorized demands for a bribe, sexual favors, the defendant's performance of a religious act, or the like. See id. Presumably no statute would authorize those acts under any circumstances.

after overruling prior Ninth Circuit holding that prosecutor who "files charges he or she knows to be baseless . . . is acting outside the scope of his or her authority and thus lacks immunity" (quotation marks omitted)). Instead, "absolute immunity must be denied" only where there is both the absence of all authority (because, for example, no statute authorizes the prosecutor's conduct) and the absence of any doubt that the challenged action falls well outside the scope of prosecutorial authority. Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004). In the vast majority of cases "the laws do authorize prosecution for the charged crimes," id. (emphasis added), and if the charging decision or other act is within the prosecutor's jurisdiction as a judicial officer, then absolute immunity attaches to their actions "regardless of any allegations" that their "actions were undertaken with an improper state of mind or improper motive," Shmueli, 424 F.3d at 237. Prosecutors thus have absolute immunity in a § 1983 action even if it turns out that "state law did not empower [them] to bring the charges," so long as "they have at least a semblance of jurisdiction" that does not run far afield of their job description. Barr, 810 F.3d at 361 (declining to adopt "a holding that a prosecutor is without absolute immunity the moment he strays beyond his jurisdictional limits," because doing so would "do violence to [the] spirit" of the doctrine).

These governing principles of law are well established and are not questioned by the parties on appeal – so much so that the plaintiffs recognize that the doctrine of absolute immunity creates a "formidable obstacle" to their cause of action. Appellants' Br. at 29 (quotation marks omitted).

Nevertheless, the plaintiffs contend that the very narrow exception to absolute immunity for prosecutorial acts that we have just described applies to the facts of this case. We disagree.

We start with our decision in Barr. There the plaintiff had been questioned by the State prosecutor's office as part of an investigation into alleged violations of state securities law. The plaintiff refused to answer any questions and invoked his Fifth Amendment right to remain silent. See 810 F.2d at 359-60. In response, the prosecutors charged the plaintiff with criminal contempt in violation of New York's penal law. See id. at 360. The contempt charge was eventually dismissed in state court on the ground that the plaintiff had merely exercised his Fifth Amendment right. Id. The plaintiff then filed a § 1983 civil damages action against the prosecutors, which the district court dismissed. On appeal, we held that the prosecutors were entitled to absolute immunity because they were broadly authorized by statute to pursue criminal contempt charges – even though they had trampled the plaintiff's Fifth Amendment rights. Id. at 362.

Likewise, in Bernard we considered whether county prosecutors were entitled to absolute immunity for their politically motivated investigation and prosecution of the plaintiffs without probable cause. See 356 F.3d at 497-98. The plaintiffs alleged that the prosecutors had sought indictments without probable cause and "knowingly present[ed] false evidence to, while at the same time withholding exculpatory evidence from, the various grand juries that returned the[ ] flawed indictments." Id. at 503. We held that even in the absence of probable cause, "as

long as a prosecutor acts with colorable authority, absolute immunity shields his performance of advocative functions regardless of motivation." Id. at 498, 505; see also id. at 503 (collecting cases in which prosecutors were absolutely immune for initiating prosecutions without probable cause and/or presenting false evidence to a grand jury).[6] In doing so, we reaffirmed the principle that "[w]here, as in this case, a prosecutor's charging decisions are not accompanied by any . . . unauthorized demands," such as for a bribe or sexual favors, "the fact that improper motives may influence his authorized discretion cannot deprive him of absolute immunity." Id. at 504; see Dorman v. Higgins, 821 F.2d 133, 139 (2d Cir. 1987) (holding that "absolute immunity spares the official any scrutiny of his motives" so that allegations of "bad faith or . . . malice [cannot] defeat[ ] a claim of absolute immunity").

In Shmueli, decided a year after Bernard, we held that absolute immunity applied to protect local prosecutors who engaged in conduct that, if it occurred, was nothing short of outrageous. The plaintiff alleged that two New York County Assistant District Attorneys maliciously prosecuted her for aggravated harassment of her former domestic partner "despite knowing that the charges against her were false and that [she] was innocent" of those charges. 424 F.3d at 233. The plaintiff also alleged that the prosecutors made several threatening phone calls

[6] We therefore reversed the decision of the district court in Bernard, which had denied the defendants' motion to dismiss as to the advocative misconduct claim on the ground that an improper political motive could take prosecutorial decisions and the prosecutor's conduct before the grand jury outside the scope of official functions shielded by absolute prosecutorial immunity. 356 F.3d at 505.

to her home during the prosecution. Id. at 233-34. The district court rejected the prosecutors' defense of absolute immunity because they acted "without clear jurisdiction and without any colorable claim of authority." Id. at 235. We reversed, holding that the district court had improperly "equat[ed] an allegedly improper prosecutorial state of mind with a lack of prosecutorial jurisdiction." Id. Absolute immunity, we explained, shielded the prosecutors' conduct because the indictment contained allegations that, even if completely false, could authorize the prosecutors to prosecute Shmueli under the New York Penal Law prohibiting aggravated harassment in the second degree. Id. at 238-39.[7] The prosecutors' "jurisdiction ... to prosecute Shmueli," we said, "depended on the authority conferred by the New York statutes" – no more, no less. Id. at 238.

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[7] Our sister circuits have similarly held that a prosecutor who initiates a prosecution with improper motives and without probable cause is absolutely immune from a claim for damages in a § 1983 action, even where the prosecutor's alleged misconduct during the judicial stage was reprehensible and violated the plaintiffs' constitutional rights. See, e.g., Jones v. Cummings, 998 F.3d 782, 784-85, 788 (7th Cir. 2021) (prosecutors alleged to have maliciously filed untimely amendment to plaintiff's criminal charges, which increased his term of imprisonment by several decades); Sample v. City of Woodbury, 836 F.3d 913, 915-16 (8th Cir. 2016) (city prosecutors filed criminal charges against plaintiff despite conflict of interest that arose because they represented the alleged victim in other domestic civil actions); Kulwicki v. Dawson, 969 F.2d 1454, 1464 (3d Cir. 1992) (prosecutor entitled to absolute immunity after bringing baseless conspiracy and attempted infant trafficking charges against political rival who merely tried to help family through adoption process); Ashleman, 793 F.2d at 1076-77 (prosecutor allegedly conspired with judge to predetermine outcome of a judicial proceeding); Lerwill, 712 F.2d at 43637 (city prosecutor initiated prosecution based on state felony statute, which he had no authority to enforce).

We have extended absolute immunity to prosecutorial misconduct that was arguably more reprehensible than the conduct in Shmueli. See, e.g., Pinaud v. County of Suffolk, 52 F.3d 1139, 1148 (2d Cir. 1995) (granting absolute immunity to prosecutors who improperly sought to increase plaintiff's bail; made false representations to prompt a plea agreement which they later breached; manufactured a bail jumping charge; lied to the Bureau of Prisons; and unnecessarily transferring plaintiff from county to state jail); Dory, 25 F.3d at 83 (granting absolute immunity to prosecutor who allegedly participated in a conspiracy to present false evidence at trial).

The lessons and holdings of Barr, Bernard, and Shmueli are hard to escape in this case. There is no dispute on appeal that the District Attorney was authorized by statute to prosecute the plaintiffs for endangering children and physically disabled persons, for conspiring to do the same, and for soliciting others to do so.[8] Neither the

[8] The dissent suggests that the indictment does not charge any criminal objectives of the conspiracy. Respectfully, the suggestion is wrong, as it rests on the indictment's most innocuous allegations and sidesteps the indictment's most serious allegations of criminal endangerment, which, under New York law and contrary to the dissent's view, requires only the threat of harm, not actual harm. See People v. Hitchcock, 98 N.Y.2d 586, 589 (2002) ("Under Penal Law § 60.10(1), a person endangers the welfare of a child when '[h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.' "); see, e.g., App'x 1405 ("The defendants pursued their objective without regard to the consequences that their pursuit would have on Avalon Gardens' pediatric patients. The defendants agreed that the defendant nurses, including all the available nurses who cared for children on ventilators, would resign without giving Avalon Gardens notice. The defendants did so knowing that their resignations and the prior resignations at other

dissent nor the plaintiffs propose that the state Supreme Court of Suffolk County lacked jurisdiction over the offense. Instead, the plaintiffs submit only that the prosecutors in this case had no power to act as they did – not because they lacked the statutory authority to do so, but because their conduct violated the nurses' rights under the Thirteenth Amendment and Vinluan's rights under the First Amendment. See Appellants' Br. at 33, 42.

In advancing their argument, the plaintiffs take their cue from the state appellate court's earlier conclusion in this case that "no facts suggesting an imminent threat to the well being of the children have been alleged." Vinluan,

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Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses for Avalon Gardens' pediatric patients, particularly the terminally ill JB, the child NL and the ventilated children NC, BC, TM and TT."). It is not enough to criticize, as the dissent does, the manner in which the prosecutors performed their "quintessential prosecutorial functions" of evaluating the evidence and initiating a criminal prosecution. Shmueli, 424 F.3d at 237. As we have already noted, absolute immunity "attaches to [the prosecutor's] function" or task, "not the manner in which he performed it." Dory, 25 F.3d at 83 (quoting Barrett v. United States, 798 F.2d 565, 573 (2d Cir. 1986)); see also Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (explaining that a prosecutor's "professional evaluation of the evidence" is protected by absolute immunity); Bernard, 356 F.3d at 505. And "whether a given prosecution was clearly beyond the scope of the prosecutor's jurisdiction" or function, "and so whether absolute immunity applies, depends on "whether the pertinent statutes may have authorized prosecution for the charged conduct." Shmueli, 424 F.3d at 237. In this case, even the Appellate Division acknowledged that, under New York law, "an employee's abandonment of his or her post in an 'extreme case' may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment." Vinluan, 873 N.Y.S.2d at 81. There can be no serious dispute under New York law that the claim of child endangerment was at least a colorable one that the prosecutors had authority to charge.

873 N.Y.S.2d at 82. They also argue that Spota and Lato knew or should have known at the outset of the case that their prosecution of the plaintiffs was constitutionally infirm. But fundamentally, in our view, these arguments relate to the existence or absence of probable cause – not, as Barr, Bernard, and Shmueli instruct us to consider, the defendants' statutory authority to pursue the prosecution in the first place. As already noted, under our precedent absolute immunity shields Spota and Lato for their prosecutorial and advocative conduct even in the absence of probable cause and even if their conduct was entirely politically motivated. See, e.g., Shmueli, 424 F.3d at 237-38 (improper motive does not factor into absolute immunity analysis);[9] accord Bernard, 356 F.3d at 505; see also Buckley v. Fitzsimmons, 509 U.S. 259, 274 n.5 (1993) (explaining that a prosecutor's entitlement "to absolute immunity for

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[9] As we stated in Shmueli:

> [A] defense of absolute immunity from a claim for damages must be upheld against a § 1983 claim that the prosecutor commenced and continued a prosecution that was within his jurisdiction but did so for purposes of retaliation, or for purely political reasons. A prosecutor is also entitled to absolute immunity despite allegations of his knowing use of perjured testimony and the deliberate withholding of exculpatory information. Although such conduct would be reprehensible, it does not make the prosecutor amenable to a civil suit for damages. In sum, the nature of absolute immunity is such that it accords protection from any judicial scrutiny of the motive for and reasonableness of official action. These principles are not affected by allegations that improperly motivated prosecutions were commenced or continued pursuant to a conspiracy.

424 F.3d at 237-38 (cleaned up).

the malicious prosecution of someone whom he lacked probable cause to indict" is rooted in the common-law).[10]

The Appellate Division's issuance of a writ of prohibition complicates but does not change our decision. The writ, rarely used, applies only to end a prosecution, not to undo what the prosecution has already done. United States v. Hoffman, 71 U.S. 158, 161-62 (1867) ("[T]he only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in the prohibited direction."). Under New York law, the prohibition lies "only when there is a clear legal right" to such relief, and, as relevant here, when the judicial officer "exceeds its authorized powers in a proceeding over which it has jurisdiction." Matter of State of New York v. King, 36 N.Y.2d 59, 62 (1975). By issuing the writ here, the Appellate Division ended the prosecution, stopping it from proceeding any further. But in this case, it did so because the prosecutors had violated the plaintiffs' rights based on the specific facts of the case and thus exceeded the jurisdiction conferred upon them by statute. See Vinluan, 873 N.Y.S.2d at 81-82. As we have seen, however, not even exceeding prosecutorial authority, let alone misusing it, is enough to lift the immunity under federal law, which requires the clear and obvious absence of any authority under any set of facts. Here, the Appellate Division did not suggest that the prosecutors were

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[10] The plaintiffs also allege that Lato made false statements and selectively allowed hearsay testimony to be presented when it benefitted him during the grand jury presentation, but in view of the precedent described above, the doctrine of absolute immunity clearly also protects his conduct against a claim of damages under § 1983. See Hill, 45 F.3d at 662.

incapable of properly charging the plaintiffs under any set of facts or that they acted clearly and obviously outside of all jurisdictional bounds.[11]

This case is practically indistinguishable from Barr, in which the state court issued a writ of prohibition and dismissed criminal contempt charges against the plaintiffs, but made clear that "contempt, if properly charged, in the context of the facts of this case is an underlying act of continuous concealment directly related to the securities fraud investigation, and therefore is within the jurisdiction of the Attorney General." Barr, 810 F.2d at 362 (emphasis added). Similarly, the Appellate Division here noted that the criminal laws relating to the endangerment of children "do not on their face infringe upon Thirteenth Amendment rights." Vinluan, 873 N.Y.S.2d at 82 (emphasis added). The Appellate Division also reaffirmed an attorney's right "to provide legal advice within the bounds of the law," id. (emphasis added), including Vinluan's right to do so "under the circumstances of th[e] case." Id. at 82. But it did not suggest that a lawyer in Vinluan's position could never be prosecuted for advising a client to commit a crime. The Appellate Division, in other words, recognized that the

[11] Although a writ may issue where an officer acts "without jurisdiction in a matter over which it has no power over the subject matter," Matter of State of New York, 36 N.Y.2d at 62, the plaintiffs do not contend on appeal that the Appellate Division, in issuing the writ, expressly found that the prosecutors acted "without jurisdiction." We therefore conclude that they have abandoned the argument on appeal. LoSacco v. City of Middletown, 71 F.3d 88, 92-93 (2d Cir. 1995). And in any event, we agree with the District Court that the Appellate Division found only that "the prosecution would be an excess in power." Vinluan, 873 N.Y.S.2d at 78; Anilao I, 774 F. Supp. 2d at 486.

prosecutors had the general authority to charge the plaintiffs under New York law, even though the federal Constitution prevented them from doing so under the particular facts of the case. See id. at 81-82.

The plaintiffs urge us to adopt a new rule under which absolute immunity would no longer apply to cases "where a prosecution is unconstitutional" from the start, where the unconstitutional nature of the prosecution "was evident or should have been evident to the prosecutor from the facts and the law, and where the prosecution is based upon evidence deliberately fabricated by the prosecutors." Appellants' Br. at 33. In inviting us to alter our approach to absolute immunity, the plaintiffs turn our attention to Fields v. Wharrie, 740 F.3d 1107 (7th Cir. 2014). There, the Seventh Circuit held that a prosecutor "acting pre-prosecution as an investigator" was not entitled to absolute immunity because he "fabricate[d] evidence" and eventually "introduce[d] the fabricated evidence at trial." Id. at 1113. "A prosecutor cannot retroactively immunize himself from conduct," the Seventh Circuit said, "by perfecting his wrongdoing through introducing the fabricated evidence at trial." Id. at 1114. Fields makes clear that a prosecutor's action in the investigative stage of a case is not spared from liability simply because the results of his investigative work are presented at trial. See id. (citing Zahrey v. Coffey, 221 F.3d 342, 354 (2d Cir. 2000)).

Our view, and the District Court's, is consistent with Fields. After all, the District Court determined that Spota and Lato were absolutely immune for their conduct as advocates during the judicial phase (initiating the prosecution, using allegedly perjured testimony during the

grand jury, and making allegedly false statements to the grand jury), but held, as in Fields, that they were not immune for their conduct during the investigative stage of the prosecution. And Barr and Shmueli prevent us from accepting the plaintiffs' invitation to further extend the exception to absolute immunity beyond Fields, to situations in which prosecutors during the advocacy phase bring charges they know violate an individual's constitutional rights. See Barr, 810 F.2d at 361; see also Shmueli, 424 F.3d at 238 (prosecutors are afforded absolute immunity for bringing charges that they knew were false because a contrary ruling would "confuse[ ] jurisdiction with state of mind"). Because the "postarraignment events" described above "consisted only of the prosecution" of the plaintiffs "in a court of competent jurisdiction on charges that were within the [prosecutors'] authority to bring," the prosecutors "are entitled to absolute immunity against" the plaintiffs' "claims for damages for those events." Shmueli, 424 F.3d at 239. The evidence that "the charges were brought for improper purposes do[es] not deprive" the prosecutors of that immunity. Id.

We therefore affirm the District Court's dismissal of the claims arising from the defendants' actions taken in their role as advocates during the judicial phase of the prosecution. In doing so, "[w]e recognize, as Chief Judge Hand pointed out, that sometimes such immunity deprives a plaintiff of compensation that [she] undoubtedly merits." Van de Kamp v. Goldstein, 555 U.S. 335, 348 (2009). "Especially in cases, such as the present one, in which a plaintiff plausibly alleges disgraceful behavior by district attorneys, the application of this doctrine is more

than disquieting." Pinaud v. County of Suffolk, 52 F.3d 1139, 1147 (2d Cir. 1995). "[B]ut the impediments to the fair, efficient functioning of a prosecutorial office that liability could create lead us to find that [immunity] must apply here." Van de Kamp, 555 U.S. at 348.

II

The District Court concluded from the pleadings that Spota and Lato were not entitled to absolute immunity for their conduct during the investigative stage of the prosecution, and that the plaintiffs had stated a claim for relief that was plausible on its face under § 1983. Anilao I, 774 F. Supp. 2d at 485, 513. The defendants do not challenge either conclusion on appeal, and the first conclusion in any event follows from our prior decisions. See Zahrey, 221 F.3d at 346-47; see also Buckley, 509 U.S. at 273. But the plaintiffs do challenge the District Court's grant of summary judgment in the defendants' favor. We therefore turn to whether there is a genuine factual issue about whether Spota and Lato violated the plaintiffs' constitutional rights during their investigation.

We review a grant of summary judgment de novo. See Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 19 (2d Cir. 2014). "Summary judgment is appropriate only where, construing all the evidence in the light most favorable to the non-movant and drawing all reasonable inferences in that party's favor, there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Id. (quotation marks omitted). The nonmoving party "must do more than simply

show that there is some metaphysical doubt as to the material facts" and "must come forward with specific facts showing that there is a genuine issue for trial." Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002) (quotation marks omitted). The non-movant cannot rely on conclusory allegations or denials and must provide "concrete particulars" to show that a trial is needed. R.G. Grp., Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984) (quotation marks omitted).

The District Court held that "Lato and Spota are entitled to summary judgment because . . . no rational jury could find that they knowingly fabricated evidence during the investigation, or otherwise violated plaintiffs' constitutional rights in the investigative phase of this case." Anilao II, 340 F. Supp. 3d at 250. Upon review of the record, we agree and affirm the District Court's grant of summary judgment.

On appeal, the plaintiffs, like our dissenting colleague, emphasize that there is at least a factual dispute as to whether Lato conspired with Sentosa to fabricate evidence to present to the grand jury, and in particular whether Lato conspired with Luyun to testify falsely against Vinluan before the grand jury. The plaintiffs highlight that Lato had been provided a Philippines-based advertisement showing that Vinluan was an immigration attorney, not a nurse recruiter, see App'x 1554-55, but that Lato nevertheless prodded Luyun to falsely testify that he had seen an advertisement that Vinluan was recruiting nurses to the United States, see App'x 654. Because Lato admitted that he met with all the witnesses who testified in the grand jury proceedings, the plaintiffs insist that Lato must have

met with Luyun and conspired with him to lie to the grand jury.

This is, in our view, little more than speculation. As such it poses no bar to summary judgment in the defendants' favor. Speculation aside, the plaintiffs fail to point to any admissible evidence that could lead a reasonable juror to conclude that Lato (or Spota) conspired with Luyun to fabricate evidence.[12] They had every opportunity to

[12] Relying on Morse v. Fusto, 804 F.3d 538 (2d Cir. 2015), our dissenting colleague points to Lato's failure to disclose to the grand jury the Department of Education's findings in favor of the plaintiffs, the state court's denial of a preliminary injunction, and the Nassau County Police Department's decision not to take any action against the plaintiffs. With respect, Lato's decision not to present evidence – also available to the plaintiffs at the time of the grand jury proceeding – of agency or judicial action or inaction does not come close to the defendant's egregious conduct in Morse. There the defendants actively "creat[ed] false or fraudulently altered documents," and we described the "constitutional violation" as the affirmative "manipulation of data to create false or misleading documents, knowing that such information was false or misleading at the time," and then deliberately presenting the false documents, with the fake facts, to the grand jury. Id. at 549-50 (quotation marks omitted) (emphasis in original). Neither the dissent nor the plaintiffs describe any similar fabrication of evidence on Lato's part, characterizing Lato's conduct instead as a wrongful refusal to disclose potentially exculpatory evidence to the grand jury. To be sure, Lato's decision not to present that evidence is far less than ideal in a world where we expect far more from prosecutors in our country; it would, for example, undoubtedly have violated the internal guidance that regulates the conduct of federal prosecutors. See U.S. Department of Justice, Justice Manual, Title 9, Chapter 11, § 9-11-233 (although not required to do so under federal law, "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person"). On the other hand, the plaintiffs had a right under New

develop the record and to uncover that evidence if it existed. But during Lato's deposition, for example, when given the chance to explore the alleged plot, they declined to question Lato about his meeting with Luyun. Answers to those questions might have yielded some firm evidence of the existence of a conspiracy between the two men, such as whether they ever discussed the contradictory newspaper advertisements about Vinluan.

The plaintiffs separately rely on the plotline that the police refused to investigate the nurses despite having been urged to do so by Spota and Lato. At best, however, this implies that Spota and Lato had a very weak and decidedly unappealing case against the nurses, not that they

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York law, upon waiving immunity, to testify before the grand jury and to present the same exculpatory evidence that was available to them. See People v. Mitchell, 82 N.Y.2d 509, 513-14 (1993) (citing N.Y. C.P.L.R. § 190.50)). None sought to enforce that right. Ultimately, the dissent's view ignores that the core function of the grand jury in New York is to determine if the charges are sufficiently supported by evidence to warrant a trial of the charge. See People v. Calbud, Inc., 49 N.Y.2d 389, 394 (1980). Trial, not the grand jury proceeding, is the crucible to air and test the full and final contentions of the parties for or against guilt in New York. Although, like our dissenting colleague, we might wish that the rule were otherwise and even share his palpable sense of unfairness, the reality is that a prosecutor in New York usually has no obligation to present to the grand jury evidence that is exculpatory. See People v. Hemphill, 35 N.Y.3d 1035, 1036 (2020) ("Contrary to defendant's claim that the indictment should be dismissed based on the prosecutor's failure to alert the grand jury to exculpatory evidence that implicated another, the People were not obligated to present evidence that someone else was initially identified as the "shooter."), cert. granted sub nom. on other grounds, Hemphill v. New York, 141 S. Ct. 2510 (2021). New York law clearly permitted Lato to withhold from the grand jury the information that the dissent, like the plaintiffs, claim he was obliged to disclose to that body.

conspired with Luyun to fabricate evidence to present to the grand jury, or that they otherwise clearly violated the plaintiffs' constitutional rights during the investigation.

We briefly respond to the dissent's suggestion that racial prejudice triggered and infects this entire litigation. Our dissenting colleague understandably focuses a great deal of attention on the reprehensible conduct of Sentosa, which may well have been motivated to kickstart the case and to prompt the criminal prosecution in part because the nurses were Filipino rather than "White and American citizens." Dissenting Op. at 24. As the dissent observes, Sentosa has been "found to have violated the rights of Filipino nurses" it employed, and it recently agreed to pay $3 million to a class of Filipino nurses in settlement. Id. at 25-26. But the immediate issue before us involves the conduct and immunity of the prosecutors, not Sentosa. As to that issue, not even the dissent proposes that the prosecutors were directly motivated by racial animus, and the plaintiffs' amended complaint likewise does not allege that the prosecution against them was prompted by race or national origin discrimination. Nevertheless, our colleague asserts that "[w]hatever their motivation" for proceeding with the investigation and ultimately prosecuting the plaintiffs, the prosecutors – Spota and Lato – were "complicit in Sentosa's effort to deter its Filipino nurses from pursuing their rights." Id. at 26. That may be true, but the dissent hedges on whether their complicity was itself racially motivated in the way that Sentosa's initiating campaign may have been. At best, asserts the dissent, "there is enough to put the issue" of whether "race played a part in the prosecutors' actions" "to a jury," even if it means

that the plaintiffs must resort to a "cat's paw" theory of manipulation and control usually reserved for Title VII cases. Id. at 27 n.12.

Whatever its other faults,[13] the most glaring problem with the dissent's view is that it is not shared by the plaintiffs, who have never embraced it at any point in this hard-fought and well-counseled litigation – not in the complaint, not on summary judgment, not even on appeal. "Few principles are better established in our Circuit than the rule that 'arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court.'" New York v. Dep't of Justice, 964 F.3d 150, 166 (2d Cir. 2020) (Katzmann, C.J., dissenting from denial of reh'g en banc) (quoting JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005)). However attractive it might be to us,

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[13] Although our dissenting colleague suggests that Spota and Lato acted with racial animus, the plaintiffs have repeatedly emphasized that, at worse, Spota and Lato were politically motivated to pursue the charges against them. See Appellants' Br. at 42; Oral Arg. Tr. at 5-6. They have not once mentioned that the defendants were motivated by racial or national origin animus. And we are bound by our prior holding in Bernard that "racially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity." Bernard, 356 F.3d at 504. To be sure, the dissent raises strong, even compelling policy concerns that, in our view, counsel in favor of significantly curtailing the doctrine of absolute prosecutorial immunity, perhaps across the board, and certainly as it relates to racially invidious prosecutions. But precedent – Barr, Bernard, Shmueli – limits the ability of this panel in the present case to modify or abrogate the doctrine. We are bound by these decisions absent overruling by the Court in banc, an intervening decision from the Supreme Court, or an act of Congress.

reaching the dissent's desired result based on legal arguments that the plaintiffs have never advanced would veer us far from "the normal rules of appellate litigation." Id. As Justice Ginsburg recently wrote for a unanimous Supreme Court in United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020), "in our adversarial system of adjudication, we follow the principle of party presentation. [I]n both civil and criminal cases, in the first instance and on appeal, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." Id. at 1579 (cleaned up). Even putting aside the principle of party presentation for a moment, Bernard binds us to the rule that "[t]he appropriate inquiry . . . is not whether authorized acts are performed with a good or bad motive, but whether the acts at issue are beyond the prosecutor's authority." 356 F.3d at 504 (emphasis in original). For the reasons already explained, the prosecutors acted within their authority to charge the plaintiffs under New York law.

III

Finally, we turn to the County's liability under Monell v. Department of Social Services, 436 U.S. 658 (1978).

"Monell does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006). In other words, a Monell claim cannot succeed

without an independent constitutional violation. See id. "[I]nherent in the principle that a municipality can be liable under § 1983 only where its policies are the moving force [behind] the constitutional violation, is the concept that the plaintiff must show a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." Outlaw v. City of Hartford, 884 F.3d 351, 373 (2d Cir. 2018) (cleaned up). "[I]f the challenged action is directed by an official with final policymaking authority, . . . the municipality may be liable even in the absence of a broader policy." Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003) (quotation marks omitted). As more directly relevant here, we have held that "the actions of county prosecutors in New York are generally controlled by municipal policymakers for purposes of Monell, with a narrow exception . . . being the decision of whether, and on what charges, to prosecute." Bellamy v. City of New York, 914 F.3d 727, 758-59 (2d Cir. 2019) (quotation marks omitted). Under the narrow exception that we noted in Bellamy, a district attorney in New York "is not an officer or employee of the municipality but is instead a quasi-judicial officer acting for the state in criminal matters." Ying Jing Gan v. City of New York, 996 F.2d 522, 535-36 (2d Cir. 1993) (quotation marks omitted).

With these principles in mind, we reject the plaintiffs' first claim that the County is liable for the individual defendants' conduct, including the fabrication of evidence, during the investigative stage. As discussed above, there was no evidence of a constitutional violation by the DA's Office at that stage, and we agree with the District Court that "the absence of any underlying constitutional

violation arising from the conduct of Spota or Lato in the investigative stage" means that "no municipal liability can exist against Suffolk County" based on that conduct. Anilao II, 340 F. Supp. 3d at 251; see Askins v. Doe No. 1, 727 F.3d 248, 253-54 (2d Cir. 2013).

The plaintiffs separately also claim that the County is liable under Monell for Spota's alleged administrative mismanagement of the DA's Office. But we agree with the District Court that the plaintiffs have not provided the "direct causal link" we require under these circumstances between Spota's alleged mismanagement and the alleged misconduct and constitutional deprivations involving the plaintiffs. Outlaw, 884 F.3d at 373; see Anilao II, 340 F. Supp. 3d at 251 n.36. To the extent the plaintiffs' claim centers on Spota's decision to prosecute the case rather than his management of the DA's Office, the claim fails because, in making that decision, Spota was clearly acting for New York State in a criminal matter, not for the County. See Ying Jing Gan, 996 F.2d at 536.[14]

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[14] To the extent the County suggests that it cannot be liable for Spota's and Lato's conduct during the judicial phase because of their absolute immunity, that argument is squarely foreclosed by our precedent. See Pinaud, 52 F.3d at 1153 ("Since municipalities do not enjoy immunity from suit – either absolute or qualified – under § 1983, [the plaintiff's] malicious prosecution claim against the County of Suffolk is not barred by prosecutorial immunity." (quotation marks omitted)); see also Askins, 727 F.3d at 254 ("[T]he entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to the liability of the municipality.").

We therefore affirm the District Court's grant of summary judgment in the County's favor.

CONCLUSION

We have considered the plaintiffs' remaining arguments and conclude that they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

CHIN, *Circuit Judge*, dissenting:

In this case, the Suffolk County District Attorney's Office (the "DA's Office") brought criminal charges against ten nurses and their lawyer for "patient abandonment" because the nurses resigned their positions at a nursing home to protest their work conditions and the lawyer advised them of their rights and filed a discrimination claim on their behalf with the Department of Justice. The Appellate Division, Second Department, took the extraordinary step of issuing a writ of prohibition to *bar* the DA's Office from pursuing the charges, recognizing that the nurses and their attorney were "threatened with prosecution for crimes for which they [could not] constitutionally be tried." *Vinluan v. Doyle*, 873 N.Y.S.2d 72, 83 (2d Dep't 2009) (Eng, *J.*). Indeed, as the Second Department held, "these criminal prosecutions constitute[d] an impermissible infringement upon the constitutional rights of these nurses and their attorney." *Id.* at 75.

Yet, the district court held that the nurses and their lawyer were precluded from pursuing civil rights claims against the prosecutors because they acted within their jurisdiction and were therefore protected by the doctrines of absolute and qualified immunity. This Court now affirms. In my view, however, the complaint plausibly alleged, as the Second Department found, that the nurses and their lawyer could not be prosecuted for the charged conduct and thus the immunities do not apply. In the extraordinary circumstances presented here, where the prosecutors were "proceeding . . . 'without or in excess of jurisdiction,'" *Vinluan*, 873 N.Y.S.2d at 77 (quoting N.Y. C.P.L.R. § 7803(2)), they were not protected by absolute or qualified immunity. Accordingly, I respectfully dissent.

I.

The ten nurses were recruited in the Philippines to work at nursing homes in New York operated by Sentosa Care, LLC ("Sentosa"). After arriving in the United States, they commenced employment at the Avalon Gardens Rehabilitation and Health Care Center ("Avalon Gardens"), a 353-bed private nursing facility on Long Island. The nurses soon concluded that Sentosa had breached certain promises it had made to them and that Sentosa was treating them in an unfair and discriminatory manner. They contacted the Philippine Consulate, which referred them to Vincent Q. Vinluan, an attorney based in New York. Vinluan advised them that, in his view, Sentosa had breached its contract with them and that they could resign to protest their poor work conditions, but that they should not do so until after completing their shifts. He filed a

claim of discrimination on their behalf with the immigrant and employee rights office of the Civil Rights Division in the Department of Justice in Washington, D.C. The next day, after completing their shifts and each giving notice of 8 to 72 hours, the nurses resigned. *See Vinluan*, 873 N.Y.S.2d at 76.

Sentosa complained to various authorities. In April 2006, it filed a complaint with the Suffolk County Police Department, which declined to take action after investigating the matter. Sentosa also brought suit against the nurses and Vinluan in the Supreme Court of the State of New York, Nassau County, seeking a preliminary injunction. The court denied the motion in July 2006, finding that Sentosa had failed to establish a likelihood of success on the merits. And the Office of Professional Discipline of the State Education Department ("DOE"), the entity with licensing jurisdiction over the nurses, investigated and concluded that the nurses' "conduct did not constitute patient abandonment"; it closed the investigation in October 2006 without taking any disciplinary action. App'x at 1280.

Sentosa then turned to the DA's Office and was able to obtain a personal meeting with then-Suffolk County District Attorney Thomas J. Spota III.[1] Although it was clear that the nurses had not engaged in "patient abandonment" -- the Suffolk County Police Department and DOE had declined to take action against them, and the state

[1] Spota was convicted in December 2019 in the Eastern District of New York on unrelated charges of conspiracy, obstruction of justice, and witness tampering. On August 10, 2021, he was sentenced to five years imprisonment. He was then denied bail pending appeal on October 15, 2021.

court had determined that Sentosa had not shown a likelihood of success on the merits of its claims of patient abandonment -- the DA's Office indicted the ten nurses *and* their lawyer, criminally charging them with endangering the welfare of patients and conspiracy to do the same, and also charging Vinluan with criminal solicitation.

The nurses and Vinluan brought an Article 78 proceeding in state court seeking a writ of prohibition to stop the prosecutions. On January 13, 2009, the Second Department granted the writ -- prohibiting the DA's Office from proceeding with the prosecutions. *See Vinluan*, 873 N.Y.S.2d at 83.

Thereafter, the nurses and Vinluan brought this action below against the County of Suffolk (the "County"), Spota, and former Assistant District Attorney Leonard Lato,[2] seeking damages pursuant to 42 U.S.C. § 1983 for violation of their constitutional rights. The district court dismissed the claims, first granting in part defendants' motion to dismiss and second granting their motion for summary judgment, holding that Spota and Lato both were protected by absolute immunity to the extent they were acting as prosecutors and by qualified immunity to the extent they were acting as investigators.

This appeal followed.

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[2] Lato died in 2018. *See* Robert Brodsky, *Officials: Leonard Lato, Defense Attorney, Ex-prosecutor, Found Dead*, Newsday (Sept. 19, 2018), https://www.newsday.com/long-island/defense-attorney-leonard-lato-dies-1.21104324.

II.

I address first the issue of absolute immunity.

I agree with the majority that prosecutors enjoy broad absolute immunity from liability for "prosecutorial activities intimately associated with the judicial phase of the criminal process." *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987). I acknowledge that this protection extends to "virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir. 1995) (internal quotation marks omitted). Still, the rule is not without exception. As this Court has explained:

> A [prosecutor] engaged in advocative functions will be denied absolute immunity only if he acts without any colorable claim of authority. The appropriate inquiry, thus, is not whether authorized acts are performed with a good or bad *motive*, but whether the *acts* at issue are beyond the prosecutor's authority. Accordingly, where a prosecutor is sued under § 1983 for constitutional abuse of his discretion to initiate prosecutions, a court will begin by considering whether relevant statutes authorize prosecution for the charged conduct. If they do not, absolute immunity must be denied. But if the laws do authorize prosecution for the charged crimes, a court will further consider whether the [prosecutor] has intertwined his exercise of authorized prosecutorial discretion with other, unauthorized conduct. For example, where a prosecutor has linked his authorized discretion to initiate or drop criminal charges to an unauthorized demand for a bribe,

> sexual favors, or the defendant's performance of a religious act, absolute immunity has been denied.

Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004) (internal quotation marks and citations omitted). Hence, "where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy." *Barr*, 810 F.2d at 361; *accord Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005).

Here, the question is whether plaintiffs plausibly alleged in their complaint that Spota and Lato proceeded without any colorable claim of authority. I believe they did.

As a threshold matter, what does it mean for a prosecutor to act "without any colorable claim of authority?" I do not think that all a prosecutor need do, to be absolutely immune, is to cite a criminal statute and assert that a defendant violated it. That is what the majority essentially suggests, as it observes that "[t]here is no dispute on appeal that the District Attorney was authorized by statute to prosecute the plaintiffs for endangering children and physically disabled persons, for conspiring to do the same, and for soliciting others to do so." Maj. Op. at 24. The mere invocation of a statute should not be enough. If that were the case, the exception would be illusory, and no plaintiff could ever invoke it. Under this reasoning, as long as a prosecutor charged the violation of a statute that fell within the prosecutor's jurisdiction, the prosecutor would always be absolutely immune -- even if there was absolutely no factual or legal basis for the charge.

The indictment here charged the nurses and Vinluan with conspiracy in the sixth degree,[3] five counts of endangering the welfare of a child,[4] and six counts of endangering the welfare of a physically disabled person,[5] and it also charged Vinluan with criminal solicitation in the fifth degree.[6] I agree that Spota and Lato had authority to prosecute these *types* of crimes. But in my view, the DA's Office did not have colorable authority to prosecute the nurses or Vinluan for the charged conduct. It was beyond the prosecutors' authority to criminally charge the nurses for resigning to protest what they believed to be discriminatory work conditions or their lawyer for giving them legal advice and filing a charge of discrimination on their behalf.

Additionally, the bringing of these charges was beyond the prosecutors' authority, *see Bernard*, 356 F.3d at 504, for as a factual matter the indictment charged only

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[3] A person commits the offense when "with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct." N.Y. Penal Law § 105.00.

[4] A person commits the offense when he "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old." *Id.* § 260.10(1).

[5] A person commits the offense when he "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself or herself because of physical disability, mental disease or defect." *Id.* § 260.25.

[6] A person commits the offense when "with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct." *Id.* § 100.00.

legally permissible conduct. For example, the indictment alleged that:

> 14. It was the conspiracy's objective to obtain for the Avalon Gardens' nurses alternative employment and a release from their three-year commitment to Sentosa Care without incurring a financial penalty of $25,000.
>
> 15. In pursuit of their objective, the defendant [Vinluan] and the defendant nurses sought to establish that Sentosa Care had breached the contracts and had discriminated against the nurses.

App'x at 1404-05. These were not criminal objectives.

The indictment charged three "overt acts" in furtherance of this purported criminal conspiracy:

- Vinluan asked the nurses to bring a claim against Avalon Gardens and Sentosa for discrimination and they agreed to bring the claim;

- Vinluan, on the nurses' behalf, filed a claim of discrimination with the Civil Rights Division of the Department of Justice against Avalon Gardens and Sentosa; and

- The ten nurses submitted their resignation letters to Avalon Gardens.

These were not, by any stretch of the imagination, criminal acts.[7] Moreover, while the charges were premised

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[7] The majority suggests that I have pointed only to "the indictment's most innocuous allegations and sidestep[ped]" altogether "the indictment's serious allegations of criminal endangerment." Maj. Op. at 24 n.8. Not so. Paragraphs 14 and 15 of the indictment quoted above are the heart of the conspiracy charged in Count One, identifying the

on the claim of patient abandonment, DOE -- the agency with licensing jurisdiction over the nurses -- had concluded otherwise, finding that there was no basis even to discipline the nurses, much less criminally charge them. The Suffolk County Police Department had also declined to take action, and the Suffolk County Supreme Court had concluded that Sentosa had not established a likelihood of success on the merits of its claim of patient abandonment. The DA's Office knew *all* this -- and still proceeded to charge the nurses and Vinluan.

The indictment's charge of patient abandonment was specious. The indictment did not allege that the nurses walked out during a shift or that any patients were actually harmed, or threatened with harm, by the nurses' resignations, nor could it have. As the Second Department explained:

> The nurses did not abandon their posts in the middle of their shifts. Rather, they resigned after

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"conspiracy's objective" and the actions taken by the defendants "[i]n pursuit of their objective." App'x at 1404-05. The three overt acts cited above are the *only* overt acts alleged in the conspiracy count. Moreover, the endangerment counts do not add any specific factual allegations, but instead rely on the facts alleged in the paragraphs of the indictment identified above. While it is true, as the majority notes, that the indictment contains language tracking the endangerment statute, the critical factual allegation is that the nurses resigned their positions -- conduct that is simply not criminal. And while the indictment also charges that the nurse defendants resigned "knowing that their resignations and the prior resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses," *id.* at 1405, it cannot be criminal for an employee to resign merely because she knows her employer will have difficulty finding a replacement.

> the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and staff members. Moreover, . . . coverage [for the patients] was indeed obtained, and no facts suggesting an imminent threat to the well being of the children have been alleged. Indeed, the fact that no children were deprived of nursing care played a large role in [DOE]'s decision to clear the nurses of professional misconduct.

Vinluan, 873 N.Y.S.2d at 81-82. Even assuming that a nurse *could* criminally endanger her patients simply by resigning from her job, the acts charged in the indictment did not come close to constituting criminal conduct.

The indictment of Vinluan is particularly outrageous. Surely a prosecutor has no colorable authority to bring charges against a lawyer for giving legal advice to clients and for filing a claim of discrimination on their behalf. As the Second Department held, "[a]s charged in the indictment, it is clear that Vinluan's criminal liability is predicated upon the exercise of ordinarily protected First Amendment rights." *Id.* at 82. The court observed unequivocally that the prosecution of Vinluan was "an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends." *Id.* at 83; *see also id.* at 82 ("It cannot be doubted that an attorney has a constitutional right to provide legal advice to his clients within the bounds of the law.") (collecting cases). I agree.

The majority observes that the Second Department's decision "complicates" the decision. Maj. Op. at 27. It does

more than that; it dispels any doubt as to whether the prosecutors had colorable authority to criminally charge the nurses and their lawyer. As the Second Department concluded, the prosecutors did not. While the court's opinion focused on the constitutionality of the prosecutions, the court squarely held that the conduct of the nurses and their lawyer was not proscribed by the relevant statutes. *See Vinluan*, 873 N.Y.S.2d at 82-83 ("[S]ince the nurses' conduct in resigning cannot, under the circumstances of this case, subject them to criminal prosecution, we cannot agree that Vinluan advised the nurses to commit a crime.").

New York law provides for a writ of prohibition "to prevent a body or officer acting in a judicial or quasi-judicial capacity from proceeding, or threatening to proceed, 'without or in excess of jurisdiction.'" *Id.* at 77 (quoting C.P.L.R. § 7803(2)); *see also id.* (providing that an Article 78 proceeding may be commenced to determine "whether [a] body or officer *proceeded* . . . without or in excess of jurisdiction" (emphasis added)). By granting the writ, the Second Department made clear that Spota and Lato had no colorable authority to bring these charges. And while the majority seeks to distinguish the Second Department's decision on the basis that a writ of prohibition is used only to end a prosecution and "not to undo what the prosecution has already done," Maj. Op. at 27, the Second Department's reasoning applies with equal force here. Spota and Lato did not have authority to commence the prosecution, and "the relevant statutes [did not] authorize prosecution for the charged conduct." *Bernard*, 356 F.3d at 504.

Finally, I note that the issue of absolute immunity arose on defendants' Rule 12(b)(6) motion. At a minimum, based on the circumstances described above and viewing all facts in the light most favorable to plaintiffs, plaintiffs plausibly alleged that the exception to absolute immunity applies here and they should have been allowed to proceed with their claims. As the majority acknowledges, the writ of prohibition is "rarely used." Maj. Op. at 27. The fact that the Second Department took the extraordinary step of issuing the writ here is most telling.

The majority cites a number of cases barring claims against prosecutors based on absolute immunity, and, indeed, there are many of them. What sets this case apart, however, is the Second Department's decision holding that the prosecutors were "proceeding . . . 'without or in excess of jurisdiction,'" *Vinluan*, 873 N.Y.S.2d at 77 (quoting N.Y. C.P.L.R. § 7803(2)) -- holding that Spota and Lato had no colorable authority to indict the ten nurses for resigning to protest work conditions and their lawyer for filing a claim of discrimination on their behalf. I would permit the claim to proceed.[8]

III.

I turn to the question of qualified immunity.

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[8] The cases cited by the majority, *see*, *e.g.*, *Shmueli*, 424 F.3d at 233, 235, 238-39, emphasize that motivation is irrelevant to the question of absolute immunity. I do not take issue with that point. My concern is, as the Second Department concluded, that the prosecutors here simply did not have authority to charge plaintiffs for the conduct in question.

Where a prosecutor acts in an investigative capacity, he enjoys only qualified -- as opposed to absolute -- immunity from suit. *See Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000). "Qualified immunity protects a public official from liability for conduct that 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 347 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see Horn v. Stephenson*, 11 F.4th 163, 168-69 (2d Cir. 2021). Qualified immunity turns on "the objective legal reasonableness of the action," *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (internal quotation marks omitted), and as the Supreme Court has repeatedly observed, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ziglar v. Abassi*, 137 S. Ct. 1843, 1867 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

This Court recognizes a constitutional "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." *Zahrey*, 221 F.3d at 344. We have explained that evidence may be fabricated not just through use of false statements, but also through "omissions that are both material and made knowingly." *Morse v. Fusto*, 804 F.3d 538, 547 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 126 (2016).

In *Morse*, we upheld a jury's award of more than $7 million in compensatory and punitive damages against a prosecutor and an investigator for denying a dentist his right to a fair trial in a Medicaid fraud prosecution. *Id.* at 541, 544. The jury found that the defendants had falsified billing summaries by omitting material information, they

did so knowingly and as part of their investigation, and the "evidence was material to the grand jury's decision to indict." *Id.* at 543, 548 (internal quotation marks omitted). While we recognized that prosecutors have no obligation to present exculpatory evidence to a grand jury, *id.* at 547, we nonetheless held that the defendants were not protected by qualified immunity:

> [F]alse information likely to influence a jury's decision violates the accused's constitutional right to a fair trial, because to hold otherwise, works an unacceptable corruption of the truth-seeking function of the trial process. Information may be false if material omissions render an otherwise true statement false. For example, . . . we [have] affirmed a verdict against a police officer who was found to have misrepresented the evidence to the prosecutors, or failed to provide the prosecutor with material evidence or information, or gave testimony to the Grand Jury that *was false or contained material omissions*, while knowing that he was making a material misrepresentation or omission by giving false testimony. . . . [T]he integrity of the judicial process can be unlawfully compromised by a government official's submission of information to a jury that implicates the accused based in part on material omissions.

Id. at 548 (cleaned up). We rejected the defendants' attempt to distinguish between the obligations of prosecutors and those of police officers, as well as their attempt to

distinguish between "affirmative misrepresentations and misleading omissions." *Id.*[9]

In my view, in this case plaintiffs presented sufficient evidence to raise genuine issues of fact as to whether Spota and Lato compromised the integrity of the judicial process by knowingly submitting false evidence or information to the grand jury that implicated the nurses and Vinluan, including through material omissions. The omitted information was highly relevant to the grand jury's decision to indict. *Morse*, 804 F.3d at 548; *see also Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (denying qualified immunity to police officers where a reasonable jury could find they "violated the plaintiffs' clearly established constitutional rights by conspiring to fabricate and forward to prosecutors a known false confession almost certain to influence a jury's verdict").[10]

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[9] The majority contends that the conduct here "does not come close to the defendant's egregious conduct in *Morse*." Maj. Op. at 36 n.12. *Morse*, however, squarely involved omissions in the evidence. There, "the jury found that by making material omissions in the billing summaries, the defendants in effect falsified them, and they did so knowingly and as part of their investigation." 804 F.3d at 548; *see also id.* at 547 ("We conclude that the omissions in this case were properly considered under the rubric of *Zahrey*, under which government officials may be held liable for fabricating evidence through false statements or omissions that are both material and made knowingly."); *accord Ashley v. City of New York*, 992 F.3d 128, 143 (2d Cir. 2021) ("The fabrication element requires only that the defendant knowingly make a false statement or omission.") (citing *Morse*, 804 F.3d at 547). While there are, of course, differences between the conduct here and the conduct in *Morse*, in my view there was enough for the matter to go to a jury.

[10] The majority emphasizes that "a prosecutor in New York usually has no obligation to present to the grand jury evidence that is

For example, Lato did not tell the grand jury of DOE's "decision to clear the nurses of professional misconduct." *Vinluan*, 873 N.Y.S.2d at 81-82. DOE concluded that "the nurses' conduct did not constitute patient abandonment." App'x at 1280. Yet, Lato repeatedly referred to the nurses "who walked out without notice." *Id.* at 380; *see also id.* at 378 (Lato: "On April 7 of [2006], all of the nurses who cared for the children in the pediatric area, without notice, they just came in and said we are out of here."). In fact, each nurse gave between 8 to 72 hours' notice. *See Vinluan*, 873 N.Y.S.2d at 76. Abandonment, of course, was the critical issue for the grand jury, and in his preliminary remarks to the grand jurors, Lato explained that "[t]he only focus to determine whether criminal charges have to be filed is nurses abandoning patients." *Id.* at 377, 379-80. He specifically referred to DOE and its definition of "abandonment" -- without disclosing that DOE had found that there was *no* abandonment. *Id.* at 381-82. Lato did not merely omit this critical information, but he presented evidence that he knew was squarely contradicted by the omissions.

Likewise, Lato also withheld from the grand jury the Nassau County Supreme Court's ruling that Sentosa had failed to show a likelihood of success on the merits of its claims of patient abandonment. In fact, Lato called Sentosa's lawyer to elicit that she had sued the nurses and Vinluan on Sentosa's behalf. And yet he did not ask her

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exculpatory." Maj. Op. at 36 n.12. Of course, I do not disagree. My concern here is with the nature and extent of the prosecutor's omissions -- as discussed below, they were so extensive and so material as to seriously compromise the truth-seeking function of the process.

about the state court's decision some seven months earlier denying Sentosa's motion for a preliminary injunction.

Similarly, although Lato spent pages of transcript eliciting testimony from multiple witnesses about the acute conditions of the children, including the death of one child, he withheld from the grand jury that, as the Second Department found, "coverage [for the children] was indeed obtained," and "no children were deprived of nursing care." *Vinluan*, 873 N.Y.S.2d at 81-82.

In his preliminary remarks, Lato explained that "the Education Law says that if a medical professional, doctor or nurse, walks out in the middle of a shift, that would be abandonment." App'x at 381. Whether the nurses walked out during a shift, while perhaps not dispositive, *see id.* at 381-82, was obviously an important factual question. At one point later in the grand jury proceedings, a grand juror asked Lato a question about a witness's testimony, specifically whether the nurses "walked out" during a shift:

> GRAND JUROR: [The witness] used the term "walked out" several times which seems to indicate they walked out in the middle of their shifts. I would like to know if they did in fact walk off the job during their shift.

Id. at 434. Lato refused to answer the question. *Id.* And although the witness, an investigator with the DA's Office, was recalled to answer certain questions, Lato chose not to ask him whether the investigator knew or had been told that the nurses had walked out during a shift. *See id.* at 426-32. In fact, as Lato knew (or should have known), none of the nurses walked out during a shift. *See Vinluan*, 873

N.Y.S.2d at 81-82 ("The nurses did not abandon their posts in the middle of their shifts. Rather, they resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and staff members.").

While supervisors and others with personal knowledge of what happened when the nurses resigned were called to testify in the grand jury, Lato withheld from the grand jurors evidence that the nurses did *not* walk out during a shift. To the contrary, he permitted one witness to testify that at a different facility (Brookhaven) the night before, "nine Filipino nurses" resigned at the same time, three of them during their shifts **[JA 649]**, and that at Avalon Gardens "nine nurses did the same thing, that they handed [in] their resignation similar to the resignation[s] . . . in Brookhaven." App'x at 649-50. In fact, one of the nurses, Theresa Ramos, completed her shift at 7 p.m. and then stayed an extra four hours until 11 p.m. to ensure there was coverage -- and *still* she was indicted.

At his deposition in this case, Lato explained that he withheld the information about DOE's determination because it was hearsay, "misleading," and "legally inadmissible." Sealed App'x at 432-33. Reports of a government agency, however, are admissible under New York's common law rule providing a hearsay exception for "official written statements, often called the official entries or public document rule." *Consol. Midland Corp. v. Columbia Pharm. Corp.*, 345 N.Y.S.2d 105, 106 (2d Dep't 1973) (internal quotation marks omitted); *accord Richards v. Robin*, 165 N.Y.S. 780, 784 (1st Dep't 1917). To the extent there

was any doubt, Lato could have called a witness from DOE to lay a foundation for admitting the report.

In contrast to his withholding of DOE's highly relevant determination, Lato permitted Francis Luyun, the CEO of Sentosa, to testify to rank hearsay: Luyun told the grand jurors that Vinluan was "trying to recruit his own nurses also to send here in the United States," App'x at 654, and that his knowledge was based on statements purportedly made to him by *unidentified* nurses. Moreover, plaintiffs presented evidence to show that Luyun's testimony was fabricated and that Lato knew it was false. Luyun testified in the grand jury that he knew Vinluan was trying to recruit nurses in the Philippines "[b]ecause it's in the newspaper ads he says he's promising them that he can give them a job with good benefits." App'x at 654. Yet, plaintiffs presented evidence to show that Lato knew, based on his investigation into Vinluan's business, that Vinluan was an immigration lawyer and not a nursing recruiter. Lato had in his files, for example, a copy of Vinluan's advertisement in a Philippines newspaper offering his services not as a recruiter but as an immigration attorney for individuals seeking to work in the United States. And when a grand juror asked Lato if Luyun knew "of any of the nurses that left and went to work for Vinluan's organization," Lato responded "[y]es." App'x at 658. No details of the new employment were provided, and although Lato knew that some or all of the nurses had obtained new employment, it does not appear that he asked his investigators to contact the new employers to determine whether they were connected to Vinluan. Moreover, Lato permitted Luyun to testify as he did even though the

Nassau County Supreme Court had ruled six months earlier that Sentosa had no likelihood of success on the merits of its claim that Vinluan had interfered with its contractual relationship with the nurses. A reasonable prosecutor would have known of this ruling.

Taken together, all of these omissions unlawfully compromised the integrity of the judicial process by implicating the nurses and the lawyer based in part on material omissions. *See Morse*, 804 F.3d at 548.

Finally, Lato's actions must be considered against the larger context: the DA's Office indicted ten Filipino nurses who believed they were being unfairly treated for resigning their jobs. The prosecutors indicted the nurses' lawyer for giving them legal advice, and for filing a claim of discrimination on their behalf. They did so even though the agency with licensing authority cleared the nurses of any professional misconduct. And the prosecutors indicted the nurses even though they gave notice of their resignation, arrangements were made for coverage, they did not "walk out" during their shifts, and no patients were jeopardized. As the Second Department concluded in taking the extraordinary step of granting a writ of prohibition, this prosecution never should have been brought.

The qualified immunity doctrine protects all but the "plainly incompetent." *Ziglar*, 137 S. Ct. at 1867. This is one of the rare cases where the government officials indeed were "plainly incompetent." In my view, a jury could very well find on this record that no reasonable prosecutor would have indicted the ten nurses and their lawyer in the

circumstances here or omitted the material information discussed above.

Beyond plain incompetence, the record also suggests bad faith. While Lato was the lead prosecutor on the case, the record contains ample evidence that Spota was intimately involved. Lato testified at his deposition that "I went through everything with Mr. Spota, how I saw the case, the complaints of the nurses and the complaints of everyone else." App'x at 1373. Lato "was to report to [Spota] on this," and while Lato was "running" the investigation, Spota was "ultimately in charge." *Id.* at 1364, 1368-69. Spota reviewed and edited a draft of the indictment, even though it was "unusual" for him to do so. *Id.* at 1379-80. Moreover, at the request of Howard Fensterman, Sentosa's attorney, Spota personally met with Sentosa's representatives to discuss the matter. *Id.* at 1340-42. And both Spota and Lato went to lunch with the representatives of Sentosa. *Id.* at 1369. Hence, triable issues of fact exist as to whether Spota is protected by qualified immunity. *See Arteaga v. State of New York*, 72 N.Y.2d 212, 216 (1988) (New York law grants government officials qualified immunity on state law claims, including false arrest claims, if their actions entail "making decisions of a judicial nature," unless "there is bad faith or the action taken is without a reasonable basis."); *see also Lore v. City of Syracuse*, 670 F.3d 127, 166 (2d Cir. 2012) ("In contrast to the federal standard, which is objectively reasonable reliance on existing law, the New York standard for entitlement to qualified immunity has both objective and subjective components." (internal quotation marks and citations omitted)).

Finally, the district court dismissed the claims against the County because it rejected the claims against Spota and Lato. As I would vacate the dismissal of the claims against Spota and Lato, I would also vacate the dismissal of the claims against the County.

* * *

The ten nurses and their lawyer were subjected to an outrageous criminal prosecution, and I cannot help but think that race and national origin were a factor. Sentosa employs many Filipino nurses, not just the ten plaintiffs, and, in pursuing these criminal charges, it clearly was sending a message to its Filipino nurses and others in the Philippines thinking of coming to the United States that they dare not challenge their work conditions.[11] It is hard to imagine that the ten nurses would have been prosecuted for resigning their jobs if they had been White and American citizens. *See Vinluan*, 873 N.Y.S.2d at 81 ("Accordingly, the prosecution has the practical effect of exposing the nurses to criminal penalty for exercising their right to leave their employment at will. The imposition of such a limitation upon the nurses' ability to freely exercise their right to resign from the service of an employer who allegedly failed to fulfill the promises and commitments made to them is the antithesis of the free and voluntary system

[11] At one point, Bent Philipson, one of the owners of Sentosa, told the grand jury that these nurses "were all brought over from the Philippines," and now that nurses were quitting, "we have to make sure this thing doesn't happen anywhere else." App'x at 458.

of labor envisioned by the framers of the Thirteenth Amendment.").[12]

Significantly, while we must assume for purposes of this appeal that the nurses were indeed treated in a discriminatory manner as they alleged below, *see* App'x at 1169-70 (in letter to Avalon Gardens, nurses complained of discrepancies in pay and hours and asked to be "treated with fairness and respect"), Sentosa has in fact been found to have violated the rights of Filipino nurses. A group of Filipino nurses successfully sued Sentosa in the Eastern District of New York for violations of the Trafficking Victims Protection Act, 18 U.S.C. § 1589 *et seq.* and for breach of contract. The district court denied Sentosa's motion to dismiss the complaint, *see Paguirigan v. Prompt Nursing Empl. Agency LLC*, 286 F. Supp. 3d 430 (E.D.N.Y. 2017), and thereafter granted summary judgment in *favor* of plaintiffs on liability, *see Paguirigan v. Prompt Nursing Empl. Agency LLC*, No. 17-CV-1302, 2019 WL 4647648, at *1, *21 (E.D.N.Y. Sept. 24, 2019), *aff'd in part and appeal*

[12] The issue of the exploitation of Filipino nurses has been the subject of attention. *See generally* Heather McAdams, *Liquidated Damages or Human Trafficking? How A Recent Eastern District Of New York Decision Could Impact The Nationwide Nursing Shortage*, 169 Univ. Pa. L. Rev. Online 1 (2020) (discussing how predatory staffing agencies exploit Filipino nurses and offer labor contracts that enable human trafficking-like conditions); Dan Papscun, *Filipino Nurses Win $1.56 Million in Trafficking Victims Case*, Bloomberg Law (June 1, 2021), https://www.bloomberglaw.com/bloomberglawnews/%20daily-labor-report/XBRBTCH8000000?bna_news_filter=daily-labor-report; *see also* Paulina Cachero, *From AIDS to COVID-19, America's Medical System has a Long History of Relying on Filipino Nurses to Fight on the Frontlines*, Time (May 30, 2021), https://time.com/6051754/history-filipino-nurses-us/.

dismissed in part, 827 F. App'x 116 (2d Cir. 2020) (summary order). The district awarded compensatory damages of $1,559,099.79. *See Paguirigan v. Prompt Nursing Empl. Agency LLC*, No. 17-CV-1302, 2021 WL 2206738, at *1, *8 (E.D.N.Y. June 1, 2021). And recently, the court preliminary approved a class action settlement pursuant to which Sentosa will pay $3 million to the nurses in the class. *See* Order Granting Preliminary Approval of Class Action Settlement, *Paguirigan v. Prompt Nursing Empl. Agency LLC* (E.D.N.Y. Nov. 22, 2021) (No. 17-1302).

For whatever their motivation, the prosecutors were complicit in Sentosa's effort to deter its Filipino nurses from pursuing their rights.[13] One of the grand jurors even

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[13] The majority contends that my dissent "hedges on whether [the prosecutors'] complicity was itself racially motivated in the way that Sentosa's initiating campaign may have been." Maj. Op. at 38. That race played a part in the prosecutors' actions is, in my view, certainly plausible. "[C]lever men may easily conceal their motivations," *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979) (internal quotation marks omitted), and here, where there is, as the majority seems to acknowledge, a "palpable sense of unfairness," Maj. Op. at 36 n.12, there is enough to put the issue to a jury. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1187 (2d Cir. 1992) (noting that even if there is no "smoking gun," "a thick cloud of smoke" is enough to require defendant to "convince the factfinder that, despite the smoke, there is no fire") (cleaned up). In addition, even assuming the prosecutors did not act out of a discriminatory motive, they may have been manipulated into taking action by parties with such a motive. *Cf. Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 271-73 (2d Cir. 2016) (adopting a "cat's paw" theory of liability that may be used to support a Title VII claim for retaliation). While the majority argues that plaintiffs "never embraced" race as a motivating factor, Maj. Op. at 39, plaintiffs' briefs on appeal and their amended complaint below contained repeated references to the nurses being Filipino, the nurses being from the Philippines, the unfair treatment of Filipino nurses,

asked Lato during the grand jury whether Sentosa was "using the District Attorney as a bargaining chip" to prevent nurses from leaving despite poor work conditions:

> GRAND JUROR: Does [Philipson] plan on going back to the Philippines and doing anymore recruiting?
>
> LATO: Why would that --
>
> GRAND JUROR: Because if he's using the District Attorney as a bargaining chip.
>
> LATO: If he's using --
>
> GRAND JUROR: I'm just saying now, during contracts, if he's going to say, listen, if you fail to show up there could be criminal charges against you.
>
> LATO: I can't ask him that question because it's not pertinent. I understand what you are saying. That's the type of thing that would presuppose there is some type of arrangement

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and the violation of the nurses' civil rights under the Thirteenth and Fourteenth Amendments. Indeed, plaintiffs' reply brief explicitly argues that "the Sentosa Defendants demonstrated that their purpose in contacting the District Attorney[ ] and their insistence on a prosecution was to intimidate the Filipino and other foreign nurses remaining in their employ." Appellants' Reply Br. at 9. Moreover, we have the discretion to consider an issue not raised below "when we think it is necessary to remedy an obvious injustice." *United States v. Stillwell*, 986 F.3d 196, 200 (2d Cir. 2021). Finally, while the majority emphasizes that motivation is not relevant to the question of absolute immunity, Maj. Op. at 39 n.13, it may be relevant to the question of qualified immunity. *See Ziglar*, 137 S. Ct. at 1867 ("qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law' ") (citation omitted).

> between the District Attorney's office and him. I'll have to have Tom Spota testify, which is not going to happen, you know. So.

App'x at 483-84. Of course the question was pertinent.

The nurses and their lawyer should be permitted to pursue their claims for damages on the merits. I dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

№ 10-CV-00032 (JFB) (AKT)

JULIET ANILAO, ET AL.,

Plaintiffs,

VERSUS

THOMAS J. SPOTA, III, ET AL.,

Defendants.

MEMORANDUM AND ORDER
November 28, 2018

JOSEPH F. BIANCO, District Judge:

Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos, Ranier Sichon (the "nurse plaintiffs"), and Felix Q. Vinluan ("Vinluan") (collectively "plaintiffs") brought this action against Thomas J. Spota, III, individually and as District Attorney of Suffolk County ("District Attorney Spota" or "Spota"); the Office of the District Attorney of Suffolk County ("the DA's Office"), Leonard Lato, individually and as an Assistant District Attorney of Suffolk County ("Lato"), and the County of Suffolk (collectively the "County defendants"); Sentosa Care, LLC ("Sentosa"), Avalon Gardens Rehabilitation and Health Care Center ("Avalon"), Prompt

Nursing Employment Agency, LLC ("Prompt"), Francris Luyun ("Luyun"), Bent Philipson ("Philipson"), Berish Rubenstein ("Rubenstein"), Susan O'Connor ("O'Connor"), and Nancy Fitzgerald ("Fitzgerald") (collectively the "Sentosa defendants"),[1] alleging that the County defendants and the Sentosa defendants violated plaintiffs' constitutional rights pursuant to 42 U.S.C. § 1983 ("Section 1983").[2]

As set forth in more detail below, the claims in this case stem from what was originally an employment dispute between the nurse plaintiffs and the Sentosa defendants. Based upon the undisputed facts, the record demonstrates that Sentosa recruited the nurse plaintiffs to work in the United States, and they were placed at the Avalon facility. Many of the nurse plaintiffs were specifically assigned to work in Avalon's pediatric ventilator unit, a unit whose patients required intensive medical care. The

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[1] Plaintiffs request that Rubenstein be dismissed from this action. (*See* Pls.' Aff. Opp'n Mot. Summ. J., ECF No. 121 ¶ 2.) Accordingly, the Court dismisses Rubenstein from the action. Moreover, as noted *infra*, the Court previously dismissed defendants O'Connor and Fitzgerald. Thus, for purposes of this Memorandum and Order, the "Sentosa defendants" does not include these three defendants who have been dismissed from the case.

[2] One of plaintiffs' claims is that Lato violated their due process rights by allegedly informing them that they were not targets of the Grand Jury (when they in fact were targets), and that this resulted in the plaintiffs' decision not to testify before the Grand Jury. Defendants make a number of arguments as to why this claim should fail. However, by its Memorandum and Order on the motion to dismiss, the Court already ruled that Lato and Spota were entitled to absolute immunity for the conduct underlying this claim, which is related to the Grand Jury. (*See* Memorandum and Order, ECF No. 31 at 22-23.) Thus, this Court has already dismissed this particular claim.

nurse plaintiffs had a number of complaints about their employment conditions. They voiced these complaints several times, beginning at the latest on February 16, 2006. By letter dated March 3, 2006 and addressed to Bent Philipson, an owner of Avalon and Sentosa who was also involved in the management of the facility during the relevant time period, and Susan O'Connor, the Administrator of Avalon, the nurse plaintiffs outlined their complaints. They further stated that, if they did not "have positive results" by March 6, 2006, they would not work until they were "treated with fairness and respect." The nurse plaintiffs also consulted Felix Vinluan, an immigration and employment attorney, about their complaints. Vinluan advised the nurse plaintiffs that, in his opinion, Sentosa breached its employment contract with them and that the nurse plaintiffs were legally free to resign.

On the afternoon of April 7, 2006, the nurse plaintiffs submitted resignation letters to Nancy Fitzgerald, Director of Nursing at Avalon. At the time of their resignation, only one of the plaintiff nurses, Theresa Ramos, was completing a shift at the facility. Ramos finished her shift. None of the nurse plaintiffs returned to work at Avalon after tendering their resignation.

There is a factual dispute as to how difficult (if at all) it was to secure coverage for the post-resignation shifts the nurse plaintiffs had been assigned to before they resigned, as well as whether any of the nurse plaintiffs' patients were ever in danger because of the need to secure coverage. However, it is undisputed that the Sentosa defendants did ultimately secure coverage for these shifts, and no patient was harmed as a result of the resignation.

In response to the resignation, O'Connor filed a complaint with the New York Department of Education and a police report with the Suffolk County Police Department ("SCPD"). The police report states that Avalon "wishe[d] to document that 11 workers . . . walked out of work and never returned without notice." The police did not take any action against plaintiffs in response to O'Connor's police report, and the Department of Education declined to revoke the nurses' licenses.

Sentosa's counsel, Howard Fensterman, secured a personal meeting with the District Attorney of Suffolk County, Thomas Spota. According to Leonard Lato, an assistant district attorney whom Spota later assigned to work on the case, Spota had given Fensterman "an audience" because they knew each other. At the meeting, the Sentosa defendants presented information concerning the resignation to Spota and some of his staff, including that the nurse plaintiffs had resigned without notice and that there had been concern on the part of the Sentosa defendants that something horrific could have happened to the patients because of the resignation. At some point, Spota became aware of O'Connor's contact with the SCPD. Spota agreed to investigate the case, and subsequently assigned it to Lato.

In the course of his investigation, Lato visited the Avalon facility twice, and he and investigators from the DA's Office interviewed several of the plaintiffs. Ultimately, Lato decided to present the case to the Grand Jury. According to plaintiffs, in the course of the Grand Jury presentation, several of the Sentosa defendants made false statements. Moreover, plaintiffs assert, among other

things, that the Grand Jury was misled to believe that the nurse plaintiffs may have resigned during their shifts (as opposed to at the end of their shifts). On March 6, 2007, the Grand Jury returned an indictment against plaintiffs, charging them with endangering the welfare of a child, endangering the welfare of a physically disabled person, conspiring to do the same, and solicitation.

The prosecution of plaintiffs was halted, however, when the New York State Appellate Division granted plaintiffs' Article 78 petition for a writ of prohibition based upon the fact that plaintiffs were being "threatened with prosecution for crimes for which they cannot constitutionally be tried." *Matter of Vinluan v. Doyle*, 873 N.Y.S.2d 72, 83 (2d Dep't 2009). Specifically, the Appellate Division found that the prosecution sought to punish the nurse plaintiffs for resigning from their employment at will, and to punish Vinluan for providing legal advice to the nurses in connection with their resignation. As such, the court found that the prosecution violated plaintiffs' First and Thirteenth Amendment rights.

After the prosecution of plaintiffs was accordingly prohibited, on January 6, 2010, plaintiffs commenced this action in federal court, alleging that defendants violated their constitutional rights in a variety of respects and seeking to vindicate those rights under Section 1983 and state law.

On March 23, 2010, the County defendants and the Sentosa defendants moved to dismiss the Amended Complaint. (ECF Nos. 14-15, respectively.) On March 31, 2011, the Court granted in part and denied in part the motions.

(ECF No. 31.)[3] As to the County defendants, the Court concluded that (1) the individual County defendants were entitled to absolute immunity for conduct in their role as advocates in connection with the presentation of the case to the Grand Jury; (2) the individual County defendants were not entitled to absolute immunity for alleged misconduct during the investigation of plaintiffs[4]; (3) plaintiffs sufficiently pled Section 1983 claims against the individual County defendants for alleged Due Process violations in the investigative stage; and (4) plaintiffs sufficiently pled a claim for municipal liability against the County of Suffolk. As to defendants Philipson, Luyun, Rubenstein, Sentosa, Prompt, and Avalon, the Court concluded that (1) plaintiffs sufficiently alleged that they were acting under color of state law; and (2) plaintiffs sufficiently pled claims for malicious prosecution and false arrest under both Section 1983 and state law, as well as a Section 1983 conspiracy claim.[5] The Court dismissed the claims against defendants O'Connor and Fitzgerald.

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[3] The Court also dismissed all claims brought against defendants Spota and Lato in their official capacities. (*See* ECF No. 31 at 2 n.4.)

[4] The Court reached this conclusion because a prosecutor is not entitled to absolute immunity for any alleged violations of due process (including any alleged fabrication of evidence) arising from conduct he performs in an investigative capacity, not undertaken in preparation for a Grand Jury presentation or in the prosecutor's role as an advocate. (ECF No. 31 at 4.) The Court also concluded that, at that time, it was unable to determine whether the individual County defendants are entitled to qualified immunity for any actions they took in an investigative capacity.

[5] The Court reached this conclusion, despite the Sentosa defendants' arguments to the contrary, because the Amended Complaint sufficiently alleged that, as private actors, they engaged in a conspiracy

The County defendants, the Sentosa defendants, and defendant Spota now move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (ECF Nos. 115-117.) For the reasons set forth below, the Court grants the County defendants' motion for summary judgment in its entirety. With respect to the Sentosa defendants' summary judgment motion, to the extent that plaintiffs have asserted a Section 1983 conspiracy claim against the Sentosa defendants for conspiring to fabricate evidence in the investigative stage with the County defendants, the motion for summary judgment is granted as to that claim. However, the Court denies the Sentosa defendants' motion for summary judgment on the malicious prosecution and false arrest claims under federal and state law.

The County defendants are granted summary judgment because, as noted above, Spota and Lato are absolutely immune for conduct relating to the Grand Jury proceeding (including the initiation of the charges), and the Court concludes that they are entitled to summary judgment for their other conduct. The Court reaches this conclusion because there is simply no evidence in the record that they engaged in any constitutional wrongdoing in the investigative phase of the case. In particular, plaintiffs' only allegation that pertains to conduct outside the scope of the Grand Jury (and the charging decision itself) is that Lato fabricated evidence. However, this allegation is not supported by any evidence in the record (including any reasonable inferences from the record), and thus it

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with the state actors to jointly deprive plaintiffs of their constitutional rights. (ECF No. 31 at 5.)

constitutes mere speculation. Because speculation cannot create an issue of fact, Spota and Lato are entitled to summary judgment for their conduct in the investigative phase and, thus, the Court grants the County defendants' motion for summary judgment as to them.

The Sentosa defendants who testified before the Grand Jury are also entitled to absolute immunity insofar as that testimony is concerned. However, as private actors, they do not have the benefit of absolute or qualified immunity with respect to their other conduct in connection with the alleged malicious prosecution and false arrest. They have moved for summary judgment on a number of other grounds. However, construing the facts (and all reasonable inferences from those facts) in the light most favorable to plaintiffs, the Court concludes that there are genuine disputes as to material facts such that summary judgment is not warranted as to the malicious prosecution and false arrest claims against the Sentosa defendants.

As a threshold matter, the Court concludes that plaintiffs have created a material issue of disputed fact as to whether the Sentosa defendants were willful participants in joint activity with the Suffolk County District Attorney's Office, such that they may be considered state actors for purposes of Section 1983. Construing the evidence in the light most favorable to plaintiffs, a rational jury could find that the Sentosa defendants exerted influence over the DA's Office through Spota, that the Sentosa defendants encouraged the bringing of charges against the plaintiffs, and that the judgment of the Sentosa defendants as to the evidence and as to whether charges should be brought was substituted for the judgment of the DA's Office.

With respect to the malicious prosecution claim, there are disputed issues of fact that preclude summary judgment on each of the elements. First, it is undisputed for purposes of this motion that the prosecution was terminated in plaintiffs' favor. Second, with respect to the "initiation" element, there is evidence that the Sentosa defendants did more than simply supply information and cooperate with the investigation of the DA's Office. Instead, construing the evidence in the light most favorable to plaintiffs (including drawing all reasonable inferences in their favor), the Court concludes that a reasonable jury could find that the Sentosa defendants, through their meetings with Spota and Lato, instigated and actively urged the alleged unlawful prosecution of the plaintiffs. The Court likewise concludes that the evidence could lead a reasonable jury to find that Lato's investigation and decision to bring the case before the Grand Jury was influenced by the Sentosa defendants' conduct, and that the resulting Grand Jury indictment did not sever any chain of causation between the conduct by the Sentosa defendants and plaintiffs' prosecution because it was a continuation of the effects of their conduct.

Third, the Court concludes that there are material issues of fact that preclude summary judgment as to whether there was probable cause to prosecute plaintiffs. The Court reaches this conclusion first by examining whether there is any material issue of disputed fact as to whether the Grand Jury indictment creates a presumption of probable cause. Having reviewed the Grand Jury transcript, the Court concludes that plaintiffs have raised a material issue of disputed fact as to whether there was

false testimony in the Grand Jury, whether critical evidence was suppressed in the Grand Jury proceeding, and whether there were other irregularities such that the indictment was the result of bad faith. Upon such a determination, there would be no presumption that there was probable cause to prosecute plaintiffs, and the jury would need to resolve whether probable cause existed independently of the indictment. The Court also concludes that there are material issues of disputed fact on this point because, in light of the evidence in the record that plaintiffs gave notice of their intention to resign, that the Sentosa defendants were able to secure coverage for their shifts, and that the nurse plaintiffs did not "walk off" during a shift, a reasonable jury could determine that there was no probable cause to believe plaintiffs were guilty of endangering the welfare of a child, endangering the welfare of a physically disabled person, conspiring to do the same, or solicitation. Moreover, there are issues of disputed fact that preclude summary judgment on the issue of whether the Sentosa defendants were motivated by malice.

In short, given these factual disputes, the Court denies the Sentosa defendants' motion for summary judgment as to the malicious prosecution claim against them under federal and state law.

Finally, the Court concludes that these same factual disputes also preclude summary judgment on the false arrest claim against the Sentosa defendants. Construing the evidence in the light most favorable to plaintiffs, a rational jury could conclude that the Sentosa defendants affirmatively instigated, encouraged, and caused plaintiffs' arrest. Accordingly, the Court also denies the Sentosa defendants'

motion for summary judgment as to the false arrest claim against them under federal and state law. Thus, the case will proceed to trial against the Sentosa defendants as to the malicious prosecution and false arrest claims under federal and state law.

I. BACKGROUND

A. Factual Background[6]

The following facts are taken from the parties' depositions, affidavits, and exhibits, and the parties' respective Rule 56.1 statements of fact.[7] Unless otherwise noted, the

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[6] The Sentosa defendants devote a significant portion of their 56.1 statement and briefs to the argument that plaintiffs do not have direct knowledge of a conspiracy or joint action between the DA's Office and the Sentosa defendants. (*See*, *e.g.*, Sentosa's 56.1 ¶¶ 62-76; Sentosa's Repl. Br. 1.) The Court does not repeat that portion of the 56.1 statement here because it is not necessary that plaintiffs possess direct knowledge of a conspiracy or joint action for a Section 1983 claim to proceed against private defendants, as discussed *infra*. Moreover, plaintiffs set forth evidence in their 56.1 statement regarding the details of the background of their employment issues with the Sentosa defendants, as well as the circumstances surrounding the 2006 suspension of Sentosa's license to recruit in the Philippines and its subsequent reinstatement. However, the Court has not summarized those facts because they are not material to the Court's disposition of the summary judgment motion that is the subject of this Memorandum and Order.

[7] Those documents are: Cnty. Defs.' Rule 56.1 Statement ("Cnty.'s 56.1"), ECF No. 115-3; Sentosa Defs.' Rule 56.1 Statement ("Sentosa's 56.1"), ECF No. 116-1; defendant Spota's Rule 56.1 Statement ("Spota's 56.1"), ECF No. 117-2; Pls.' Rule 56.1 Statement ("Pls.' 56.1"), ECF No. 126-1; Pls.' Resp. Cnty. Defs.' Rule 56.1 Statement ("Pls.' Resp. Cnty.'s 56.1"), ECF No. 126-2; Pls.' Resp. Spota's Rule 56.1 Statement ("Pls.' Resp. Spota's 56.1"), ECF No. 126-4; Pls.' Resp. Sentosa's 56.1 Statement ("Pls.' Resp. Sentosa's 56.1"), ECF

facts are uncontroverted. Upon consideration of the motion for summary judgment, the Court shall construe the facts in the light most favorable to plaintiffs as the non-moving party, and will resolve all factual ambiguities in their favor. *See Capobianco v. New York*, 422 F.3d 47, 50 n.1 (2d Cir. 2001).

1. The Parties and the Avalon Facility

Defendant Avalon operates a private nursing home located in Smithtown, New York, which has multiple nursing units, including a long-term pediatric care center. (Sentosa's 56.1 ¶ 1.) Avalon opened its pediatric unit in or around February 2004, and thereafter opened a pediatric ventilator unit to serve disabled children who required ventilator care. (Sentosa's 56.1 ¶ 2; Dep. Tr. Susan O'Connor ("O'Connor Dep."), ECF Nos. 115-9, 116-4, 123-6.)[8]

No. 126-3; and Sentosa's Resp. Pls.' 56.1 Statement ("Sentosa's Resp. Pls.' 56.1"), ECF No. 133-1.

[8] In addition to O'Connor's deposition transcript, the following deposition transcripts are referenced herein: Dep. Tr. Philipson ("Philipson Dep."), ECF Nos. 115-21, 116-5, 116-6, 123-15; Felix Vinluan ("Vinluan Dep."), ECF Nos. 115-14, 116-7, 123-2; Dep. Tr. Thomas J. Spota ("Spota Dep."), ECF Nos. 116-10, 124-6; Dep. Tr. Elmer Jacinto ("Jacinto Dep."), ECF Nos. 115-7, 116-17, 121-9; Dep. Tr. Harriet Avila ("Avila Dep."), ECF Nos. 115-16, 116-18, 121-6; Dep. Tr. Rizza Maulion ("Maulion Dep."), ECF Nos. 115-18, 116-19, 122-1; Dep. Tr. Theresa Ramos ("Ramos Dep."), ECF Nos. 115-6, 116-20, 122-3; Dep. Tr. James Millena ("Millena Dep."), ECF Nos. 115-19, 116-21, 122-2; Dep. Tr. Mark Dela Cruz ("Dela Cruz Dep."), ECF Nos. 115-8, 116-22, 121-7; Dep. Tr. Claudine Gamaio ("Gamaio Dep."), ECF Nos. 115-20, 116-23, 121-8; Dep. Tr. Juliet Anilao ("Anilao Dep."), ECF Nos. 115-17, 116-24, 121-5; Dep. Tr. Jennifer Lampa ("Lampa Dep."), ECF Nos. 115-15, 116-25, 121-10; Dep. Tr. Ranier Sichon ("Sichon Dep."), ECF Nos. 116-26, 122-4; Dep. Tr. Howard Fensterman

Defendant Sentosa is a company formed to provide shared services among various nursing homes located in the New York metropolitan area, including shared consultants and financial services. (Sentosa's 56.1 ¶ 3; Philipson Dep. 12.) Defendant Philipson has an ownership interest in both Avalon and Sentosa. (Sentosa's 56.1 ¶ 4; Philipson Dep. 9-12.) Philipson was also the chief operating officer of Sentosa and Avalon, and was involved in the management of Avalon during 2005 and 2006, the relevant time period for the instant case. (Sentosa's 56.1 ¶ 5; Philipson Dep. 16.) Defendant Prompt is an agency that provided payroll services to Avalon for nurses it employed, as well as other services to nurses recruited from other countries who worked for Avalon. (Sentosa's 56.1 ¶ 6; Philipson Dep. 63-65.) Defendant Luyun was involved in the recruitment of nurses in the Philippines for employment in nursing homes in the United States, including Avalon. (Sentosa's 56.1 ¶ 7; O'Connor Dep. 28-29.) Defendant O'Connor was the Administrator of Avalon, and oversaw the entire operation of the facility during the relevant time period. (Sentosa's 56.1 ¶ 8; O'Connor Dep. 17.)

Plaintiff Vinluan acted as an attorney and provided legal advice to the nurse plaintiffs in March and April 2006. (Sentosa's 56.1 ¶ 11; Dep. Tr. Vinluan Dep. 24, 27, 43-44, 49-52.) The nurse plaintiffs are nurses who were recruited from the Philippines to work in the United States

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("Fensterman Dep."), ECF Nos. 116-11, 124-1; Dep. Tr. Nancy Fitzgerald ("Fitzgerald Dep."), ECF No. 122-11; Dep. Tr. Leonard Lato ("Lato Dep."), ECF Nos. 116-12, 116-13, 116-14, 124-8.

Unless otherwise noted, an exhibit is attached to the 56.1 statement cited before it.

by Sentosa. (Sentosa's 56.1 ¶ 10; O'Connor Dep. 20-21; Pls.' 56.1 ¶¶ 1, 3-4.)

2. The Nurse Plaintiffs' Employment and Resignation

As noted, Sentosa recruited the nurse plaintiffs from the Philippines to work in the United States. In the course of recruiting them, Sentosa made various representations to the nurse plaintiffs as to the conditions of employment in the United States. (*See* Pls.' 56.1 ¶¶ 4-16.)[9] Plaintiffs allege that many of those conditions were not fulfilled during their subsequent employment, and they voiced their complaints about this failure on several occasions. (*Id.* ¶¶ 21-22; 28-33.) This included submitting a letter dated February 16, 2006 to Philipson outlining their complaints (Ex. X); a letter dated March 3, 2006 to Philipson and O'Connor that stated that, if they did not "have positive results by Monday, March 6, 2006," the nurse plaintiffs would "have to opt not to work until [they were] treated with fairness and respect" (Pls.' 56.1 ¶ 33; Ex. Y; Ex. Z.)

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[9] Plaintiffs characterize these representations as commitments, while the Sentosa defendants dispute that the brochure submitted as evidence contained any commitments. (Sentosa's Resp. Pls.' 56.1 ¶ 5.) The Sentosa defendants take issue with several of plaintiffs' contentions regarding the representations made by this brochure. (*See id.* ¶¶ 5-9.)

In addition, plaintiffs note that the brochure provided to the nurse plaintiffs stated that Sentosa was a "direct hire" agency. (Pls.' 56.1 ¶ 6.) Plaintiffs state that this meant that the nurses would be working directly for Sentosa and not for an agency (*id.*), but the Sentosa defendants dispute the legal impact of this statement (Sentosa's Resp. Pls.' 56.1 ¶ 6). These factual disputes are not material to the Court's analysis for purposes of the summary judgment motion.

The nurses also voiced their concerns to the Philippine Consulate in New York, which recommended that the nurse plaintiffs consult with Vinluan, an attorney with experience in corporate and immigration issues. (*Id.* ¶¶ 38-43.) The nurse plaintiffs subsequently consulted Vinluan, and he advised them that, in his opinion, their contract had been breached. (*Id.*) Vinluan did not advise them to resign, but he did advise that, if they elected to resign, they would not be liable for the penalties set forth in their contract. (*Id.* ¶¶ 43-44; Ex. BB 28-29, 39-40; O'Connor Dep. 74-75; Ex. H 48-49.) Vinluan further advised that, although the nurse plaintiffs were legally free to resign, they should not immediately do so because he intended to file legal proceedings on their behalf that he hoped might lead to a less drastic resolution of the issues. (Pls.' 56.1 ¶ 45; Ex. BB 46-47.) In addition, Vinluan specifically informed the nurse plaintiffs that, if they chose to resign, they must complete their shifts before leaving their employment. (Pls.' 56.1 ¶ 46; Pls.' Ex. BB 45, 183-84, 202, 235.)[10]

According to plaintiffs and the County defendants, during the relevant time, the nurse plaintiffs were employed by Prompt and assigned to the Avalon facility. (Cnty.'s 56.1 ¶¶ 1-2; Pls.' 56.1 ¶ 23; Pls.' Resp. Cnty.'s 56.1 ¶ 1; Cnty.'s 56.1 ¶¶ 1-2; Pls.' 56.1 ¶ 23; Pls.' Resp. Sentosa's 56.1 ¶ 6.) However, the Sentosa defendants have described the nurse plaintiffs as being employed by Avalon.

[10] The Sentosa defendants dispute this statement, arguing that there is testimony that Vinluan advised the nurses that they could resign immediately. (Sentosa's Resp. Pls.' 56.1 ¶ 45; Sentosa's 56.1 Ex. N 60-61.) However, a review of the deposition pages cited by the Sentosa defendants and the surrounding testimony reveal that the cited materials do not support the Sentosa defendants' assertion.

(Sentosa's 56.1 ¶ 6; Philipson Dep. 63-65.) There is also a factual dispute as to whether all of the nurse plaintiffs were assigned to the pediatric ventilator unit. According to the County defendants, all nurse plaintiffs worked in the pediatric ventilator unit. (Cnty.'s 56.1 ¶ 2.) According to plaintiffs, plaintiffs Maulion, Ramos, Anilao, Sichon, Gamaio, and Lampa (as well as two non-plaintiff nurses) worked with ventilator patients, while plaintiffs Avila, Jacinto, and Millena (as well as seven other non-plaintiff nurses) worked with non-ventilator pediatric patients, and plaintiff Dela Cruz was assigned to the geriatric units. (Pls.' 56.1 ¶ 24.)[11]

On April 6, 2006, Vinluan filed complaints with the Office of the Chief Administrative Hearing Officer concerning the conditions of the nurse plaintiffs' employment. (Pls.' 56.1 ¶¶ 47-48; Ex. BB 48-49.) The following day, the nurse plaintiffs resigned *en masse* at some point between 3:00 p.m. and 6:00 p.m. (the "resignation").[12] (Sentosa's

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[11] The Sentosa defendants dispute that Dela Cruz was assigned to the geriatric unit because the cited evidence is not admissible for its purpose. (Sentosa's Resp. Pls.' 56.1 ¶ 24.) "Materials submitted in support of or in opposition to a motion for summary judgment must be admissible themselves or must contain evidence that will be presented in admissible form at trial." *Delaney v. Bank of America Corp.*, 766 F.3d 163, 169-70 (2d Cir. 2014). Therefore, any evidence submitted that is inadmissible (and does not contain evidence that will presented in admissible form at trial) will be disregarded. In any event, these factual disputes are not dispositive to the Court's analysis for purposes of the summary judgment motion.

[12] Defendants assert that the nurse plaintiffs resigned between 5:00 p m. and 6:00 p.m. (Sentosa's 56.1 ¶¶ 12, 14.) Plaintiffs, however, assert that they resigned between 3:00 p.m. and 5:00 p.m. (Pls.' Resp. Cnty.'s 56.1 at 2) (asserting the resignation took place between 3:00

56.1 ¶¶ 12, 14; O'Connor Dep. 92; Ex. E, ECF No. 116-8; Cnty.'s 56.1 ¶ 7; Ex. A, ECF No. 115-5; Pls.' Resp. Cnty.'s 56.1 at 3.) They effectuated their resignation by submitting identical resignation letters directly to defendant Fitzgerald, the Director of Nursing Services at Avalon (Sentosa's 56.1 ¶ 9; Philipson Dep. 19), at the Avalon facility.[13] (Sentosa's 56.1 ¶¶ 12, 14; O'Connor Dep. 92; Ex. E, ECF No. 116-8; Cnty.'s 56.1 ¶ 7; Ex. A, ECF No. 115-5.) The resignation letters stated: "In view of the substantial breach of your company of our contract, I hereby tender my resignation effective immediately." (Sentosa's 56.1 ¶ 14.) April 7, 2006 was six days before Passover began, and one week before Easter weekend. (Sentosa's 56.1 ¶ 13; O'Connor Dep. 108-109; Pls.' Resp. Sentosa's 56.1 ¶ 13.)

Before their resignation, the nurse plaintiffs had discussed whether their simultaneous resignation would impair the ability of Avalon to provide adequate care for its patients. (Cnty.'s 56.1 ¶ 9; Dela Cruz Dep. 148; Pls.' Resp. Cnty.'s 56.1 at 4.)[14] They were aware that it was absolutely

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p.m. and 4:00 p.m.); Pls.' 56.1 ¶ 55 (asserting the resignation took place between 3:00 p m. and 5:00 p.m.).

[13] Other nurses, in addition to the nurse plaintiffs, working in other facilities affiliated with Sentosa and employed by Prompt, resigned their employment at or about the same time as the nurse plaintiffs. (Cnty.'s 56.1 ¶ 8; Pls.' Resp. Cnty.'s 56.1 at 3; Pls.' 56.1 ¶ 49.) The County defendants characterize the number of other nurses as "many" (Cnty.'s 56.1 ¶ 8); the nurse plaintiffs dispute this characterization and admit only that other nurses resigned (Pls.' Resp. Cnty.'s 56.1 at 3.)

[14] Defendants assert that, during these discussions, the nurse plaintiffs were concerned as to whether Avalon would be able to obtain adequate coverage for their shifts. (Cnty.'s 56.1 ¶ 10; Dela Cruz Dep. 148.) The nurse plaintiffs, however, deny this and assert that they had been repeatedly told by Luyun that many replacement nurses were

necessary to have someone cover shifts after their resignation. (Cnty.'s 56.1 ¶ 23; Jacinto Dep. 136-37.) The children in that unit required 24-hour care and supervision to ensure their health and safety. (Cnty.'s 56.1 ¶ 3; Pls.' Resp. Cnty.'s 56.1 at 2.) A shortage of nurses available to care for the children would be unsafe for the children. (Cnty.'s 56.1 ¶¶ 4-6; Jacinto Dep. 136; Ramos Dep. 118; Pls.' Resp. Cnty.'s 56.1 at 2.) In particular, skilled nurses were necessary because the duties and responsibilities associated with taking care of the children were so great. (Cnty.'s 56.1 ¶ 6; Jacinto Dep. 136; Pls.' Resp. Cnty.'s 56.1 at 3.) There was a minimum staffing requirement of four nurses total for the two pediatric units. (Pls.' 56.1 ¶ 26.) According to plaintiffs, they believed there were staffing options that would enable the Sentosa defendants to avoid any lapses in the patients' care.[15]

None of the nurse plaintiffs walked off during a shift. (Pls.' 56.1 ¶ 57.)[16] None of the nurse plaintiffs covered any

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available to the facility, all of whom were waiting for positions to open. (Pls.' 56.1 ¶ 59; Pls.' Resp. Cnty.'s 56.1 at 4; Ex. H.) Further, plaintiffs state that Avalon had access to nursing agencies that supplied nurses to facilities that needed shifts covered. (Pls.' 56.1 ¶ 58; Pls.' Resp. Cnty.'s 56.1 at 4; Ex. I.) Thus, plaintiffs state, they knew the shifts could be covered after their resignations. (Pls.' Resp. Cnty.'s 56.1 at 4.)

[15] The nurse plaintiffs also assert that the staffing calendar issued by Avalon had gaps in the schedule for both pediatric units. (Pls.' 56.1 ¶¶ 34-37.) The Sentosa defendants dispute this, arguing that the cited evidence is not admissible. (Sentosa's Resp. Pls.' 56.1 ¶ 35.) This dispute is immaterial for purposes of the Court's decision on the summary judgment motion.

[16] Plaintiff Ramos submitted her resignation letter while on duty and before her shift was scheduled to end, and stayed four hours after the scheduled end of her shift while Avalon secured coverage.

of their scheduled shifts after their resignation. (Sentosa's 56.1 ¶ 19; O'Connor Dep. 109.) The Sentosa defendants assert that there was some difficulty in covering their shifts following the resignation, which created a sense of urgency because there was a possibility that patients would be harmed if the shifts were not covered. (Sentosa's 56.1 ¶ 18; Cnty.'s 56.1 ¶ 13; O'Connor Dep. 186-89, 197.) Plaintiffs, however, deny that there was real potential that their resignation would impair the delivery of adequate care to the patients, citing Sentosa's ability to cover the shifts. (Pls.' Resp. Cnty.'s 56.1 ¶ 13; Pls.' Resp. Sentosa's 56.1 ¶ 18; Gamaio Dep. 70-73; Ramos Dep. 24; Sichon Dep. 191-93.) Ultimately, the shifts in the pediatric unit were all covered, and no patient was harmed by the resignation. (Pls.' 56.1 ¶¶ 60-61.) Avalon was able to staff the pediatric unit through various means, including by securing nurses from other units, calling staff back from vacation, and obtaining staff from other facilities who they trained on Avalon-specific policies and procedures, including those regarding the pediatric issues and ventilators. (Sentosa's 56.1 ¶ 19; O'Connor Dep. 109.)

(Sentosa's 56.1 ¶¶ 15-16; O'Connor Dep. 92-94; Cnty.'s 56.1 ¶ 36; Pls.' 56.1 ¶ 56.) Plaintiff Maulion was scheduled to work at 7:00 p.m. that evening until 7:00 a.m. the next morning, but did not work that shift. (Sentosa's 56.1 ¶ 17; O'Connor Dep. 99-100.) Maulion had not initially been scheduled to work that shift, but had been told at 7:00 a.m. on April 7, 2006 that she was assigned to cover the shift. (Pls.' 56.1 ¶¶ 50-51.)

3. Post-Resignation Events Preceding District Attorney's Involvement

By letter dated April 10, 2006, O'Connor complained to the New York Department of Education about the resignation and requested that the nurse plaintiffs' licenses and/or limited permits be revoked. (Pls.' 56.1 ¶ 69; Ex. W.)[17]

Shortly after the resignation, Philipson held meetings with Filipino nurses in various facilities. (Pls.' 56.1 ¶ 72; Ex. NN.)[18] At one of those meetings, Philipson stated that "we already know who misled [the nurse plaintiffs]. We are fully aware. And we are going to go after that person as well." (*Id.*) He went on to say that "we will be contacting the District Attorney tomorrow because what they did is actually a criminal offense, abandoning the patients the way they did. It's irresponsible of them to just walk off." (*Id.*) Philipson allegedly added, "But I feel we can extend an amnesty until tomorrow, as I've said, because after,

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[17] Months later, the Department of Education completed an investigation of the resignation and determined that the nurse plaintiffs had not committed any professional misconduct. (Pls.' Ex. MM.)

[18] The Sentosa defendants dispute the assertions concerning this meeting, arguing that the evidence supporting them is inadmissible because it is a typed transcript of a purported conversation. (Sentosa's Resp. 56.1 ¶ 72.) Although plaintiffs assert that the transcript is supported by a recording, they have not articulated how that recording will be authenticated or admitted into evidence. Therefore, the Court has not considered this piece of evidence for purposes of the summary judgment motion. However, as discussed *infra*, there is sufficient evidence apart from this transcript to preclude summary judgment for the Sentosa defendants.

after that time, I cannot do anything to pull it back. Once we pull the trigger, it's done." (*Id.*)[19]

On April 26, 2006, O'Connor filed a police report with the SCPD regarding the resignation. (Sentosa's 56.1 ¶ 20; Ex. F ("Field Report"), ECF No. 116-9; Cnty.'s 56.1 ¶ 14.; Pls.' Resp. Cnty.'s 56.1 ¶ 14; Pls.' 56.1 ¶ 78.) The report stated that Avalon "wishe[d] to document that 11 workers . . . walked out of work and never returned without notice." (Pls.' Resp. Sentosa's 56.1 ¶ 20.) At her deposition, O'Connor explained that she went to the police department because she "felt what transpired was not right," and she wanted to explore avenues by which the nurse plaintiffs could be held accountable for "creating what was really a very risky situation." (Sentosa's 56.1 ¶ 21; O'Connor Dep. 112-13.) She said that she understood that one of those avenues was to file a police report so that their conduct could be investigated. (Sentosa's 56.1 ¶ 21; O'Connor Dep. 112-13.) Other than the Avalon facility's counsel, O'Connor never discussed filing a police report with anyone. (Sentosa's 56.1 ¶ 22; O'Connor Dep. 113-14.)

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[19] Plaintiffs assert that, at about the same time, Philipson unsuccessfully attempted to persuade the American Consul General to deport the nurses. (*Id.* ¶ 77; Ex. T 2/1 at 38-39.) As the Sentosa defendants correctly point out, the Grand Jury testimony plaintiffs cite in making this assertion does not directly support this statement, so the Court does not accept this fact. (*See* Sentosa's Resp. 56.1 at 18.)

Citations to "Ex. T" reference the Grand Jury transcript, which was filed under seal by plaintiffs at ECF Nos. 128-1 through 128-7.

The police assigned the complaint to the Crime Control Unit, which took no action against the nurses. (Pls.' 56.1 ¶¶ 79-80; Ex. VV 55-57, 63; Ex. XX 74-75.)[20]

4. The District Attorney's Office's Involvement

Howard Fensterman, counsel for Avalon and Sentosa, subsequently scheduled a meeting with Spota. (Pls.' 56.1 ¶ 81; Ex. VV 48.) On May 31, 2006, Spota, investigators from the DA's Office, Philipson, O'Connor, and Fensterman met at the DA's Office for approximately forty-five minutes. (Sentosa's 56.1 ¶ 23; Philipson Dep. 169-70; Spota Dep. 47-53; O'Connor Dep. 120-24; Fensterman Dep. 76-82; Pls.' 56.1 ¶ 83; Ex. FF 120; Ex. WW; Ex. VV 49.) Plaintiffs also allege that Luyun was present. (Pls.' Resp. Sentosa's 56.1 ¶ 23; Ex. FF.)

At the meeting, the attendees discussed the nurse plaintiffs' simultaneous, unexpected resignation on April 7,

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[20] The County defendants assert that the SCPD did not expressly decline to investigate O'Connor's complaint, and it did not make a determination that no crimes had been committed by the nurse plaintiffs. (Cnty.'s 56.1 ¶¶ 15-16.) Plaintiffs dispute that argument, contending that the police department took no action in response to the complaint. (Pls.' Resp. Cnty.'s 56.1 ¶.) As a threshold matter, the facts asserted in the parties' respective 56.1 statements do not contradict each other. Plaintiffs assert that the police took no action against them; defendants assert they did not expressly decline to investigate the complaint. As such, the Court's analysis remains the same regardless of which description is used.

Also of note is that, at some point in 2006, the Sentosa defendants filed a lawsuit in the New York State Supreme Court, Nassau County, against plaintiffs and Juno Healthcare Staffing Systems, Inc., a former client of Vinluan's that is in the nurse recruitment business. (Pls.' 56.1 ¶ 65; Ex. GG.)

2006, and that the individuals charged with running the Avalon facility were concerned at that time about patient safety given that they needed to cover multiple shifts on the pediatric ventilator unit. (Sentosa's 56.1 ¶ 25; O'Connor Dep. 121-22; Philipson Dep. 171-72; Spota Dep. 50-52.)[21] In particular, according to the defendants, the fact that the nurses resigned without notice and walked out *en masse* was discussed (Philipson Dep. 172), as was the difficulty Sentosa had with staffing due to the holidays and the fact that nurses from multiple facilities resigned immediately (Spota Dep. 51-54). O'Connor was very emotional during the meeting and stated that she had been very concerned that something horrible or horrific could have happened to the patients because of the resignation. (*Id.* at 51-58.) According to the defendants, the attendees did not agree on a specific course of action at the conclusion of the meeting. (Sentosa's 56.1 ¶ 29; O'Connor Dep. 124.) More specifically, Spota, while having some idea as to how the case would progess, did not discuss or communicate how the it would at the meeting (Sentosa's 56.1 ¶ 30; Spota Decl. 60.) No further meetings were contemplated. (Sentosa's 56.1 ¶ 30; Spota Decl. 60.)[22]

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[21] According to the Sentosa defendants, they did not present false information, such as whether any of the nurses walked off during their shifts or whether any of the patients at the facility were ultimately harmed, at that meeting. (Sentosa's 56.1 ¶¶ 26-28; Philipson Dep. 174-75; O'Connor Dep. 198-99; Spota Dep. 58.) Plaintiffs dispute this, asserting that "at least some false statements were made at the meeting," including that one of the participants falsely informed Spota that Vinluan was in the parking lot of the Avalon facility on the day the nurses resigned. (Pls.' Resp. Sentosa's 56.1 ¶ 26.)

[22] Plaintiffs dispute that this "meeting was as simple or straightforward as the Sentosa defendants portray it." (Pls.' Resp. Sentosa's

O'Connor later described the meeting as "a follow-up to the police report . . . ." (O'Connor Dep. 123.) At his deposition, Spota stated that he had learned about the complaint to the police department, but he did not remember who had informed him of it. (Spota Dep. 55.) Spota directed investigators from the DA's Office to inquire about the police report, and he learned that the case had been assigned to the Crime Control Unit of the 4th Precinct. (*Id.* at 56.)

At Lato's deposition, he stated that his understanding was that Fensterman knew Spota and that Spota "gave Mr. Fensterman an audience" in light of their acquaintance, but that he was not aware of any other special consideration given to the case. (Sentosa's 56.1 ¶ 39; Lato Dep. 69.)[23]

Spota oversaw some initial investigative work performed by the DA's Office following the meeting, including requesting that an investigator from the DA's Office speak to the police and an investigator from Department of Education. (Spota Dep. 67.)

56.1 ¶ 25.) They also dispute, *inter alia*, the Sentosa defendants' assertions that no one ever represented that any patient was harmed and that no specific course of action was agreed to at the meeting. (Pls.' Resp. Sentosa's 56.1 ¶¶ 25-30.) Plaintiffs offer no factual evidence that directly contradicts these statements, instead relying (as is permitted) on circumstantial evidence in the record (including statements and conduct by various defendants before, and after, the meeting) to rebut this assertion.

[23] Plaintiffs argue that this testimony contradicts other statements made by Lato, including that Spota personally edited the indictment (Ex. XX 47, 53, 63-64, 103, 164-65, 184, 373-74), and that Lato had been told that Fensterman was "connected" politically (*id.* at 58; Pls.' Resp. Sentosa's 56.1 ¶ 39).

In his deposition, Spota testified that, approximately a couple of months after the May 31, 2006 meeting took place, he independently decided that defendant Lato would be appointed to investigate[24] the resignation and determine whether any crime had been committed. (Sentosa's 56.1 ¶ 31; Spota Dep. 60-66.) According to defendants, Spota never contacted any of the Sentosa defendants or their counsel in advance of making this decision to appoint Lato, nor did he seek any input in the decision. (Sentosa's 56.1 ¶ 32; Spota Decl. 67.)

Spota then called Fensterman to report on his office's progress and plans regarding the prosecution. (Pls.' 56.1 ¶ 84; Ex. QQ 67-68; Ex. XX 57, 64-65.) Spota also arranged a meeting to introduce Lato to Fensterman. (Sentosa's 56.1 ¶ 33; Spota Decl. 60.) The meeting was attended by Lato, Fensterman, and the investigators who were assisting Lato. (Sentosa's 56.1 ¶ 34; Spota Decl. 68-69; Decl. Leonard Lato ("Lato Decl."), Ex. I, ECF No. 116-12 at 56-57, 59.)[25] At the meeting, the nature of the case and the fact that Lato would conduct an investigation were discussed. (Sentosa's 56.1 ¶ 34; Spota Dep. 68-69; Lato Dep. 56-57, 59.) However, according to Lato, he "paid little attention" to what Fensterman had to say. (Sentosa's 56.1 ¶ 35; Lato

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[24] Plaintiffs take issue with the use of the word "investigate," instead alleging that he was appointed to "indict" the plaintiffs. (Pls.' Resp. Sentosa's 56.1 ¶ 31.)

[25] In his Rule 56.1 statement, Spota states that he did not meet or speak with any of the Sentosa defendants following the May 31, 2006 meeting. (Spota's 56.1 ¶ 4.) However, in his deposition, Spota stated that he met with Fensterman again two or three months after the initial May 31, 2006 meeting. (Spota Dep. 60.)

Dep. 58-59.)[26] Fensterman never represented to Lato that any of the patients at Avalon had been injured due to the resignation. (Sentosa's 56.1 ¶ 36.) According to defendants, no agreement was made between the parties as to how the investigation should proceed, and no representations were made as to what the ultimate outcome would be. (Sentosa's 56.1 ¶ 37; Spota Dep. 69.) At a later date, Lato paid a shiva call after Fensterman's father died, but that was the only other time that they met. (Sentosa's 56.1 ¶ 40; Lato Dep. 82-83.)

Lato subsequently conducted an investigation into plaintiffs' conduct. (Sentosa's 56.1 ¶ 41; Lato Dep. 62-63.) According to the Sentosa defendants, during that time, the investigation was entirely up to Lato. (Sentosa's 56.1 ¶ 46.) Plaintiffs dispute this, stating that, although Spota testified as such, Lato undermined this claim. (Pls.' Resp. Sentosa's 56.1 ¶ 46.)

The investigation lasted six months. (Sentosa's 56.1 ¶ 41; Lato Dep. 62-63; Pls.' Resp. Cnty.'s 56.1 ¶ 17.) During this time, Lato's only contacts with any individuals associated with Avalon were the two visits to the Avalon facility and a fax he received from counsel for Avalon and Sentosa. (Sentosa's 56.1 ¶¶ 42-43; O'Connor Dep. 124-26; Lato Dep. 384; Email, Ex. L (ECF No. 116-15.))

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[26] Plaintiffs dispute the truthfulness of Lato's testimony that he "paid little attention" to what Fensterman said, arguing it is undermined by Lato's statement that Fensterman "threw Felix Vinluan's name around." (Pls.' Resp. Sentosa's 56.1 ¶ 35; *see* Ex. QQ 67-68; Ex. XX 57, 64-65.)

During the first visit to Avalon, Lato met with O'Connor to discuss the facility and the circumstances surrounding the nurse plaintiffs' resignation on April 7, 2006. (Sentosa's 56.1 ¶ 42; O'Connor Dep. 124-26.) At that meeting, Lato told O'Connor that he did not know whether they were going to continue with the action. (Cnty.'s 56.1 ¶ 30; O'Connor Dep. 125-26; Cnty.'s 56.1 ¶ 31.)[27] The second visit was a follow-up visit to discuss documents that he requested from the facility and to take a tour of the pediatric unit. (Sentosa's 56.1 ¶ 42; O'Connor Dep. 124-26; *see* Pls.' Resp. Cnty.'s 56.1 ¶ 31.) On another occasion, counsel for Avalon and Sentosa faxed Lato an advertisement that purportedly showed an interest that Vinluan had in a competitor of Sentosa in the Philippines. (Sentosa's 56.1 ¶ 43; Ex. L, ECF No. 116-15.)

Lato's investigation also included multiple meetings, conducted by himself or detectives from the DA's Office, with a number of the nurse plaintiffs and with Vinluan to discuss the circumstances of the nurse plaintiffs' resignation. (Sentosa's 56.1 ¶ 45; Lato Dep. 369-71; Pls.' 56.1 ¶ 85; Lampa Dep. 84-87; Lato Dep. 81.) According to plaintiffs, Lato told the interviewees that the interviews were routine and were needed to close the investigations. (Pls.' 56.1 ¶ 85; Ex. K 79-80; Ex. XX 81.) During that time, Lato controlled the investigation. (Sentosa's 56.1 ¶ 46; Spota Dep. 129-30.) He also kept Spota informed, in both formal and informal meetings, of all of the facts of the case, including

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[27] Plaintiffs contest this characterization. (Pls.' Resp. Cnty.'s 56.1 ¶ 30.) It is not clear with which aspect of the County's characterization plaintiffs take issue. In any event, this factual issue is not dispositive for purposes of the Court's analysis of the summary judgment motion.

the later Grand Jury presentation and indictment. (Pls.' 56.1 ¶ 89; Ex. XX 47, 53, 63-64, 103, 164-65, 184-85, 373-74.)

5. Grand Jury Proceeding[28] and Subsequent Events

According to Lato, without any input from the Sentosa defendants, he ultimately decided to present the case to the Grand Jury at the end of January 2007.[29] (Sentosa's 56.1 ¶ 47; Lato Dep. 546-50.)

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[28] As discussed *infra*, the Court concludes that the County defendants and the Sentosa defendants are entitled to absolute immunity for their conduct in connection with the Grand Jury proceeding itself. In light of this absolute immunity determination, and because there is no evidence of wrongdoing by Lato or Spota in the investigative stage prior to the Grand Jury proceeding, the Court grants summary judgment in their favor on the claims against them. There is, however, evidence from which a rational jury could find that the Sentosa defendants solicited and encouraged the arrest and prosecution of plaintiffs and provided false and/or misleading testimony in the Grand Jury proceeding in order to achieve that result. The Court, therefore, includes here the relevant facts asserted by plaintiffs from the Grand Jury proceeding as pertains to Sentosa defendants, insofar as they are relevant to certain elements of malicious prosecution and false arrest claims (such as the presumption of probable cause from an indictment), even though the testimony itself is protected by absolute immunity.

[29] Plaintiffs note that Lato provided Spota with a copy of the indictment in draft form, which Spota personally edited, and that personally editing draft indictments was an uncommon practice for Spota. (Pls.' 56.1 ¶ 89; Ex. XX 47, 53, 63-64, 103, 164-65, 184-85, 373-74.) However, as discussed *infra*, Spota is entitled to absolute immunity for his conduct in relation to the Grand Jury proceeding, and, thus, personally editing the draft indictment does not render him liable for any of plaintiffs' claims. Similarly, Lato is absolutely immune for any alleged misconduct concerning whether the Grand Jury was properly instructed on the law regarding the charges that were presented.

Plaintiffs have submitted evidence from which they argue that, in the course of the Grand Jury proceeding, individuals affiliated with Sentosa made false statements.[30] In addition to alleging perjurious testimony, plaintiffs assert that there were a number of irregularities in the presentation of evidence. (Pls.' Opp. Br. 35-49.) For example, plaintiffs point out that Lato and Grand Jury witnesses repeatedly used terms such as "walked out" or similar phrases when referring to the nurses' conduct,

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[30] According to plaintiffs, these included: (1) Philipson's testimony that the nurses earned more money after February 2006 (Ex. T 2/1 at 11); (2) Philipson's and O'Connor's testimony that there were more shifts available to the nurses than were actually available (T. 2/1 at 48, 72); (3) O'Connor's testimony that Dela Cruz was trained for the vent unit and that there were no other nurses in the facility who ever worked on the vent unit, and that upcoming vacations prevented alternative staffing (*id.* 2/1 at 78); (4) O'Connor's testimony that some of the nurses functioned as supervisors (*id.* 2/1 at 102); (5) O'Connor's claim that the nurses had not requested a meeting with her to air out their complaints (*id.* 2/1 at 67); (6) Luyun's testimony that he dialed at least ten numbers to cover the nurses' shifts after their resignation (*id.* 2/13 at 22); and (7) Luyun's testimony about the significance of "direct hire" (*id.* 2/13 at 16).

The Sentosa defendants dispute those assertions, and counter that, in the course of the events giving rise to this litigation, (1) no one associated with the Sentosa defendants claimed that any patient was injured or that any nurse had walked off during their shift (Sentosa's 56.1 ¶ 44; Lato Dep. 77-78); (2) Fensterman never represented to Lato that any of the patients at Avalon were injured, and it "was clear that they were not" (Sentosa's 56.1 ¶ 36; Lato Dep. 60); (3) at no point between the time she learned she was going to testify before the Grand Jury and the date of her testimony did O'Connor speak to anyone regarding her potential testimony (Cnty.'s 56.1 ¶ 32; O'Connor Dep. 127); and (4) there is no evidence that Lato ever discussed potential Grand Jury testimony with any of the individuals who testified at the Grand Jury during the investigative phase of the case (Cnty.'s 56.1 ¶ 34).

thereby creating the false impression to the Grand Jury that the nurses walked out during a shift. (*See*, *e.g.*, Ex. T 1/30 at 7-9; 2/1 at 59-62; 2/8 at 3.) To demonstrate the confusion caused by the phrasing, plaintiffs further note that, at the beginning of the Grand Jury presentation, a grand juror asked a question about the use of that phrase: "He [Investigator Warkenthein] uses the term 'walked out' several times which seems to indicate they walked out in the middle of their shifts. I would like to know if they did in fact walk off the job during their shift." (Ex. T 1/30 at 61.) Lato responded that such evidence would have to come from other witnesses. (*Id.*) Plaintiffs also argue that Lato presented excessive and inflammatory evidence regarding the medical conditions of residents in the ventilator and non-ventilator units, including details of the children's conditions along with enlarged color photographs of the children. (Pls.' Opp. Br. 42.) Moreover, plaintiffs assert that Lato incorrectly instructed the jurors that, under New York law, co-conspirators are liable for acts in furtherance of a conspiracy. (*Id.* at 43.) Plaintiffs further argue that Lato gave the Grand Jury misleading instructions regarding the Department of Education laws that defined unprofessional conduct, and did not advise the Grand Jury that the Department of Education had issued a decision exonerating the nurses of any misconduct. (*Id.* at 43-46.)

On March 6, 2007, the Grand Jury returned an indictment against all of the plaintiffs.[31] (Sentosa's 56.1 ¶ 61;

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[31] Specifically, the Grand Jury returned a true bill of indictment against all of the plaintiffs for Endangering the Welfare of a Child, N.Y. Pen. L. § 260.10(1); Endangering the Welfare of a Disabled Person, N.Y. Pen. L. § 260.25, and Conspiracy in the Sixth Degree, N.Y.

Vinluan Dep. 114-17; Jacinto Dep. 94-95; Avila Dep. 97-98; Maulion Dep. 81-82; Ramos Dep. 90; Millena Dep. 96-97; Dela Cruz Dep. 66-67; Gamaio Dep. 91-92; Anilao Dep. 111-12; Lampa Dep. 103-104; Sichon Dep. 139-40; Cnty.'s 56.1 ¶ 37; Pls.' Resp. Cnty.'s 56.1 ¶¶ 37-38.)

On April 22, 2007, plaintiffs surrendered at the Suffolk County Courthouse, where they were arrested, sequestered, fingerprinted, and processed. (Pls.' 56.1 ¶ 91; Ex. BB 117.) They subsequently moved to dismiss on the grounds that the prosecution violated their constitutional rights and that the evidence before the Grand Jury was insufficient. (Pls.' 56.1 ¶ 92.) The motions were denied. (*Id.*; Ex. BBB.) Plaintiffs then requested that the New York State Governor appoint a special prosecutor. The request was ignored. (Pls.' 56.1 ¶ 92; Ex. CCC.)

Plaintiffs then applied to the Appellate Division, Second Department ("Appellate Division") for a writ of prohibition pursuant to New York C.P.L.R. Article 78. On January 13, 2009, the Appellate Division issued a writ of prohibition enjoining further prosecution of plaintiffs on the ground that the indictment violated their constitutional rights. (Pls.' 56.1 ¶ 93.)

B. Procedural Background

On May 9, 2016, the County defendants, the Sentosa defendants, and defendant Spota moved for summary judgment and filed their respective memoranda of law

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Pen. L. § 105.00. (Cnty.'s 56.1 ¶ 37.) The Grand Jury also returned a true bill of indictment against plaintiff Vinluan for Criminal Solicitation in the Fifth Degree, N.Y. Pen L. § 100.00. (*Id.* ¶ 38.)

("Cnty.'s Br.," "Sentosa's Br.," and "Spota's Br."). (ECF Nos. 115-4; 116-2; and 117, respectively.) Plaintiffs filed their response in opposition and accompanying memorandum of law ("Pls.' Br.") on September 29, 2016. (ECF No. 128.) The defendants filed their reply briefs on November 21, 2016 ("Cnty. Repl. Br.," "Sentosa Repl. Br.," and "Spota Repl. Br."). (ECF Nos. 132-134, respectively.) Oral argument was held on November 30, 2016. (ECF No. 136.) That day, plaintiffs filed supplemental exhibits with the Court. (ECF No. 135.) The County defendants then filed a supplemental letter with the Court on December 2, 2016, enclosing an opinion issued by the Honorable Sandra Feuerstein in *Kanciper v. Lato*, CV-13-0871. (ECF No. 137.) On May 16, 2017, plaintiffs filed a supplemental letter containing two Newsday articles (ECF No. 138), and the County defendants responded on May 17, 2017 (ECF No. 139). On October 30, 2017, plaintiffs filed a supplemental letter regarding the indictment of Thomas Spota (ECF No. 140), and the County defendants responded on October 31, 2017 (ECF No. 141). On December 6, 2017, the County defendants filed a supplemental letter, advising the Court that the Second Circuit had affirmed Judge Feuerstein's decision in *Kanciper* (ECF No. 142), and plaintiffs responded on December 7, 2017 (ECF NO. 143). On March 6, 2018, the County defendants filed a supplemental letter regarding the Supreme Court's decision in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018) (ECF No. 144), and plaintiffs responded on March 9, 2018 (ECF No. 145). The Court has fully considered the parties' submissions.

II. Standard of Review

The standard for summary judgment is well-settled. Pursuant to Federal Rule of Civil Procedure 56(a), a court may grant a motion for summary judgment only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013). The moving party bears the burden of showing that he is entitled to summary judgment. *See Huminski v. Corsones*, 396 F.3d 53, 69 (2d Cir. 2005).

Rule 56(c)(1) provides that:

> [A] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). The court " 'is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments.' " *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 122 (2d Cir. 2004) (quoting *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir. 1996));

see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (summary judgment is unwarranted if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Once the moving party has met its burden, the opposing party "'must do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]he nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial*.'" *Caldarola v. Calabrese*, 298 F.3d 156, 160 (2d Cir. 2002) (alteration and emphasis in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As the Supreme Court stated in *Anderson*, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." 477 U.S. at 249-50 (citations omitted). Indeed, "the mere existence of *some* alleged factual dispute between the parties alone will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 247-48 (emphasis in original). Thus, the nonmoving party may not rest upon mere conclusory allegations or denials, but must set forth "'concrete particulars'" showing that a trial is needed. *R.G. Grp., Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d Cir. 1984) (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978)). Accordingly, it is insufficient for a party opposing summary judgment "'merely to assert a conclusion without supplying supporting arguments or facts.'" *BellSouth Telecomms., Inc. v. W.R. Grace & Co.-Conn.*, 77 F.3d 603, 615 (2d Cir. 1996) (quoting *Research Automation Corp.*, 585 F.2d at 33).

III. Discussion

The County defendants, the Sentosa defendants, and defendant Spota each move for summary judgment. Specifically, the Sentosa defendants argue that: (1) the Section 1983 claims fail because the Sentosa defendants were not acting under the color of state law; (2) the Section 1983 and state law malicious prosecution claims fail because the Sentosa defendants did not initiate the criminal proceeding and, in any event, there was probable cause that a crime occurred; and (3) the Section 1983 and state law false arrest claims fail because the Sentosa defendants did not confine plaintiffs. The County defendants argue that: (1) there was no evidence of any wrongdoing by Lato; (2) Spota and Lato are entitled to qualified immunity regarding the investigative stage; and (3) the *Monell* claims against the County fail because there were no underlying constitutional violations, Lato is a state actor, not a county actor, and the conduct at issue was not caused by a municipal policy, custom, or usage. Finally, defendant Spota argues that plaintiffs have failed to show that Spota was personally involved in any constitutional violations.

A. The County Defendants

As noted above, in its Memorandum and Order on defendants' motions to dismiss, the Court reached two conclusions concerning whether Lato and Spota were entitled to immunity for their actions. First, the Court concluded that they were absolutely immune from liability on claims based upon their initiation of the prosecution against plaintiffs and their conduct in front of the Grand Jury.

(Memorandum and Order, ECF No. 31 at 18.)[32] Second, the Court held that, based upon the allegations in the amended complaint, it was unable to determine at that time whether Lato and Spota were entitled to absolute or qualified immunity for their conduct during the investigative phase. (*Id.* at 22.) In reaching this conclusion, the Court reasoned that plaintiffs sufficiently alleged that wrongdoing occurred during the investigation that caused a deprivation of their constitutional rights. (*Id.* at 21-22.)

The County defendants now move for summary judgment in part on the ground that there is no evidence of any wrongdoing by Lato, particularly with respect to the investigation of plaintiffs. Defendant Spota separately filed a motion for summary judgment on the ground that there is no evidence that Spota was personally involved in any constitutional deprivation, even assuming one had taken place. Moreover, both defendants argue that they are

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[32] The Court notes that, although it determined that Lato and Spota are entitled to absolute immunity for their conduct in connection with the Grand Jury proceeding, it has nonetheless reviewed the available evidence concerning that conduct to evaluate whether it supports any of plaintiffs' other claims against them for investigative conduct outside the Grand Jury context. For example, the Court has reviewed the transcript of the Grand Jury testimony to determine whether Lato's conduct creates an issue of material fact as to whether he entered a conspiracy with the Sentosa defendants in the investigative phase, prior to the Grand Jury proceeding, concerning matters outside the scope of the Grand Jury proceeding. However, the Court has concluded that, even when considering the Grand Jury proceedings, no rational jury could conclude that Spota or Lato violated the plaintiffs' constitutional rights in the investigative stage by conspiring to fabricate evidence, or in some other manner unrelated to the Grand Jury proceeding and initiation of charges (for which they are entitled to absolute immunity).

entitled to absolute and/or qualified immunity. For the following reasons, the Court concludes that Spota and Lato are entitled to summary judgment because there is no evidence that they violated the constitutional rights of plaintiffs in the investigative stage of the case (and, as previously discussed, they are entitled to absolute immunity with respect to their conduct in connection with the Grand Jury presentation and initiation of charges).

1. Legal Standard

"It is by now well established that 'a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution' 'is immune from a civil suit for damages under § 1983.'" *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 410, 431 (1976)). "In determining whether absolute immunity obtains, we apply a 'functional approach,' looking to the function being performed rather than to the office or identity of the defendant." *Hill v. City of New York*, 45 F.3d 653, 660 (2d Cir. 1995) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). In applying this functional approach, the Second Circuit has held that prosecutors are entitled to absolute immunity for conduct "'intimately associated with the judicial phase of the criminal process.'" *Fielding v. Tollaksen*, 257 F. App'x 400, 401 (2d Cir. 2007) (quoting *Imbler*, 424 U.S. at 430); *Hill*, 45 F.3d at 661 (same). In particular, "[s]uch immunity . . . extends to 'acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as advocate for the State.'" *Smith v. Garretto*, 147 F.3d 91, 94 (2d Cir. 1998)

(quoting *Buckley*, 509 U.S. at 273). On the other hand, "[w]hen a district attorney functions outside his or her role as an advocate for the People, the shield of immunity is absent. Immunity does not protect those acts a prosecutor performs in administration or investigation not undertaken in preparation for judicial proceedings." *Hill*, 45 F.3d at 661; *see also Carbajal v. Cty. of Nassau*, 271 F. Supp. 2d 415, 421 (E.D.N.Y. 2003) ("[W]hen a prosecutor supervises, conducts, or assists in the investigation of a crime, or gives advice as to the existence of probable cause to make a warrantless arrest—that is, when he performs functions normally associated with a police investigation—he loses his absolute protection from liability." (citation omitted)).

The Second Circuit has noted that "[t]he line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw." *Zahrey v. Coffey*, 221 F.3d 342, 347 (2d Cir. 2000). Courts, however, may rely on certain established distinctions between these roles. For example, the Supreme Court has explained that "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Buckley*, 509 U.S. at 273. In addition, the Second Circuit has identified the juncture in the criminal process before which absolute immunity may not apply. Specifically, "[t]he majority opinion in [*Buckley*] suggests that a prosecutor's conduct prior to the establishment of probable cause should be considered investigative: 'A

prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.' " *Zahrey*, 221 F.3d at 347 n.2 (quoting *Buckley*, 509 U.S. at 274); *see also Hill*, 45 F.3d at 661 ("Before any formal legal proceeding has begun and before there is probable cause to arrest, it follows that a prosecutor receives only qualified immunity for his acts."). Thus, in interpreting *Buckley*, the Second Circuit has distinguished between "preparing for the presentation of an existing case," on the one hand, and attempting to "furnish evidence on which a prosecution could be based," on the other hand. *Smith*, 147 F.3d at 94. Only the former entitles a prosecutor to absolute immunity. *Id.*

Notably, the mere fact that a prosecutor might later convene a grand jury and obtain an indictment does not automatically serve to cloak his prior investigatory actions with the protection of absolute immunity. As the Supreme Court stated in *Buckley*:

> That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial. A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial . . . .

Buckley, 509 U.S. at 275-76. Furthermore, "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . . a

prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5; *see Zahrey*, 221 F.3d at 347 n.2 ("All members of the Court [in *Buckley*] recognized . . . that a prosecutor's conduct even after probable cause exists might be investigative.").

If absolute immunity does not apply, government actors may be shielded from liability for civil damages by qualified immunity, *i.e.*, if their "conduct did not violate plaintiff's clearly established rights, or if it would have been objectively reasonable for the official to believe that his conduct did not violate plaintiff's rights." *Mandell v. Cty. of Suffolk*, 316 F.3d 368, 385 (2d Cir. 2003); *see also Fielding*, 257 F. App'x at 401 ("The police officers, in turn, are protected by qualified immunity if their actions do not violate clearly established law, or it was objectively reasonable for them to believe that their actions did not violate the law."). As the Second Circuit has also noted, "[t]his doctrine is said to be justified in part by the risk that the 'fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'" *McClellan v. Smith*, 439 F.3d 137, 147 (2d Cir. 2006) (quoting *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999)).

In considering a defense of qualified immunity to a Section 1983 claim, courts generally "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)); *Zahrey*, 221 F.3d at 346-48 (extending analysis to prosecutors). The right not to be deprived of liberty as a result of

the fabrication of evidence by a government officer acting in an investigative capacity has been established by the Second Circuit. *Zahrey*, 221 F.3d at 349.

2. Analysis

As a threshold matter, the Court concludes that Lato and Spota are not entitled to absolute immunity for the investigative stage. Applying the functional approach, it is clear that Spota's and Lato's conduct during this phase was not " 'intimately associated with the judicial phase of the criminal process.' " *See Fielding*, 257 F. App'x at 401 (quoting *Imbler*, 424 U.S. at 430); *Hill*, 45 F.3d at 661. Indeed, these acts, including listening to the complaints of the Sentosa defendants, visiting the facility, interviewing the Sentosa defendants, and interviewing the nurse plaintiffs, fall squarely into the category of acts "perform[e]d in . . . investigation not undertaken in preparation for judicial proceedings." *See Hill*, 45 F.3d at 661; *see also Carbajal*, 271 F. Supp. 2d at 421 (E.D.N.Y. 2003) ("[W]hen a prosecutor supervises, conducts, or assists in the investigation of a crime, or gives advice as to the existence of probable cause to make a warrantless arrest—that is, when he performs functions normally associated with a police investigation—he loses his absolute protection from liability." (citation omitted)). Lato's investigation is particularly the type of "searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested" that the Supreme Court and the Second Circuit have explained do not entitle a prosecutor to absolute immunity. *See Buckley*, 509 U.S. at 273; *see also Smith*, 147 F.3d at 94 (interpreting *Buckley* to distinguish

between "preparing for the presentation of an existing case" and attempting to "furnish evidence on which a prosecution could be based"). Thus, Lato and Spota are not entitled to absolute immunity for their conduct during the investigative phase.

The Court concludes, however, that Lato and Spota are entitled to summary judgment because, even construing the facts in the light most favorable to plaintiff, no rational jury could find that they knowingly fabricated evidence during the investigation, or otherwise violated plaintiffs' constitutional rights in the investigative phase of the case. Plaintiffs argue that Lato violated their constitutional rights because he fabricated evidence while acting in an investigative capacity, especially "in his zeal to assure that Mr. Vinluan, was indicted along with his clients." (Pls.' Br. 78.) In particular, plaintiffs state that "[i]t is clear that Lato assisted in suborning [ ] wholly false, and legally inadmissible, testimony." (*Id.* at 80.) Plaintiffs further argue that, at the very least, Lato's conduct raises an issue of fact as to whether the investigative phase included the creation of evidence in an effort to aid Sentosa's prosecutorial goals. (*Id.*)

The County defendants argue that these allegations are wholly unsupported and conclusory, and are exactly the type of evidence that is insufficient to overcome a motion for summary judgment. (Cnty.'s Repl. Br. 7.) They assert that testimony and documentary evidence establish that there was no wrongdoing by Spota or Lato during the investigative phase, and that there is no evidence that Lato presented any false evidence during the presentation to the Grand Jury, nor that he learned of any false evidence

(or conspired to create it) during the investigative stage of the case. (*Id.* at 5-13.) As such, they argue, it cannot be said that Lato and Spota violated plaintiffs' constitutional rights. *See Mandell*, 316 F.3d at 385.

Having carefully analyzed the record, the Court concludes that there is no evidence in the record from which a rational jury could find that Spota or Lato violated plaintiffs' constitutional rights during the investigative phase.[33] Although plaintiffs assert that the evidence shows that Lato participated in manufacturing evidence and fabricated a case (Pls.' Br. 78-79), plaintiffs point to no evidence in the record that would support such assertions. Indeed, the only evidence plaintiffs cite concerns Grand Jury testimony provided by the Sentosa defendants, and an inference cannot be drawn from that testimony alone that Lato or Spota had any involvement in the knowing fabrication of evidence prior to the Grand Jury proceedings, despite plaintiffs' conclusory assertions to the contrary. Plaintiffs

[33] Further, as discussed *infra*, plaintiffs' allegations that there was a conspiracy to fabricate testimony between Lato and the Sentosa defendants in the investigative phase are not supported by evidence in the record. The evidence they point to is that false testimony was given at the Grand Jury by the Sentosa defendants, and that special consideration was potentially given to the Sentosa defendants by the DA's Office, but this is insufficient to create a material issue of fact as to whether Spota and/or Lato agreed to fabricate evidence in the investigative stage because such a conclusion would be completely speculative in the absence of any other evidence in the record to support such a conclusion. The other wrongdoing alleged by plaintiffs is that Lato falsely told some of the nurse plaintiffs and Vinluan his interviews of them were routine and necessary to close the investigations. (Pls.' 56.1 ¶ 85; Lampa Dep. 84-87; Ex. XX 81.) However, plaintiffs have not established that such a statement (by itself) could rise to a violation of plaintiffs' constitutional rights.

appear to draw this conclusion based on the mere fact that the witnesses who allegedly gave this false testimony met with Lato before they testified.[34] (*Id.* at 80.) Plaintiffs argue that, "[a]t the very least, [Lato's] conduct raises an issue of fact as to whether the investigative phase included the creation of evidence in an effort to assure that Sentosa's especial target was included in the indictment." (Pls.' Br. 80.) However, plaintiffs are incorrect. An issue of fact cannot be created by mere speculation, and plaintiffs' allegations are just that. Plaintiffs have failed to set forth "concrete particulars" showing that a trial is needed, as they are required to do. *See Anderson*, 477 U.S. at 247-50. Although the Court recognizes that plaintiffs may rely on circumstantial evidence (and reasonable inferences drawn from such evidence), there is simply insufficient evidence in the record for a rational jury to reasonably infer that Lato and/or Spota conspired with the Sentosa defendants to fabricate evidence during the investigative phase. Thus, their argument fails, and Lato and Spota are entitled to summary judgment for their conduct during the investigative phase because no rational jury could find that their conduct during that phase violated plaintiffs' rights.[35]

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[34] In addition, Lato made two visits to the Avalon facility, during which he spoke with O'Connor. However, plaintiffs have not provided any evidence indicating that Lato (or O'Connor) agreed to fabricate evidence during those meetings. (Cnty.'s 56.1 ¶¶ 30-33; O'Connor Dep. 125-28.)

[35] The County defendants make the separate argument that Lato and Spota are entitled to qualified immunity for their conduct during the investigative phase on the grounds that officers of reasonable competence could disagree on whether the test for probable cause was met in the instant case and that their actions did not violate clearly established law. (Cnty.'s Br. 22-24.) Having concluded that there is no

Moreover, given the absence of any underlying constitutional violation in the investigative stage, no municipal liability can exist against Suffolk County as a matter of law.[36] *See Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006).

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evidence that Lato or Spota violated plaintiffs' rights, the Court need not address these arguments, or any other grounds raised by the County defendants.

[36] The Court also agrees with the County defendants that Spota and Lato acted as State actors, not County actors, in connection with the decision to present the case to the Grand Jury and initiate charges and, thus, cannot create liability for Suffolk County in connection with that conduct. *See Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988). To the extent plaintiffs seek to establish municipal liability based upon *Walker v. City of New York*, 974 F.2d 293, 296-97 (2d Cir. 1992), there is insufficient evidence in the record for a rational jury to find municipal liability in this case based upon a pattern of deficiencies in the management of the Suffolk County District Attorney's Office in terms of matters such as training and/or discipline. Allegations of such misconduct from newspapers and other judicial proceedings are not a substitute for evidence and, in any event, plaintiffs have failed to articulate how any such alleged misconduct in other cases pertained to the alleged constitutional violations in this case, which clearly hinge upon the decision to prosecute itself (rather than deficiencies in management of the DA's Office).

B. The Sentosa Defendants[37]

1. Malicious Prosecution

As set forth below, a malicious prosecution claim involves, *inter alia*, the following elements: (1) the initiation or continuation of a criminal proceeding against plaintiff, and (2) lack of probable cause for commencing the proceeding. Further, to find a private defendant liable for malicious prosecution, plaintiff must show that the defendant was acting under color of state law. The Sentosa defendants argue that plaintiffs' Section 1983 and state law malicious prosecution claims cannot survive summary judgment because there is insufficient evidence in the record to allow plaintiffs to meet these requirements at trial. (Sentosa's Br. 4-22.) For the following reasons, the Court disagrees.

a. Legal Standard

Claims for malicious prosecution brought under Section 1983 are substantially the same as claims for malicious prosecution under state law. *Lanning v. City of Glens Falls*, No. 17-970-cv, 2018 WL 5810258 (2d Cir. Nov. 17, 2018); *Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003). "A

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[37] To the extent that plaintiffs assert a Section 1983 conspiracy claim against the Sentosa defendants for fabricating evidence in the investigative stage with the County defendants, that claim fails to survive summary judgment for the same reasons as the claim against the County defendants fails, as discussed *supra*. However, the Court proceeds to analyze the malicious prosecution and false arrest claims against the Sentosa defendants arising from the initiation of charges against the plaintiffs and their subsequent arrest for which Spota and Lato have absolute immunity, but the Sentosa defendants do not.

malicious prosecution claim under New York law requires the plaintiff prove: '(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions.'" *Black v. Race*, 487 F. Supp. 2d 187, 211 (E.D.N.Y. 2007) (quoting *Jocks*, 316 F.3d at 136 (2d Cir. 2003)).

i. Under Color of State Law

The central question in examining the "under color of state law" requirement is whether the alleged infringement of federal rights is "fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003) ("A plaintiff pressing a claim of violation of his constitutional rights under § 1983 is thus required to show state action.").

It is axiomatic that private citizens and entities are not generally subject to Section 1983 liability. *See Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002); *Reaves v. Dep't of Veterans Affairs*, No. 08-CV-1624 (RJD), 2009 WL 35074, at *3 (E.D.N.Y. Jan. 6, 2009) ("Purely private conduct is not actionable under § 1983, 'no matter how discriminatory or wrongful.'" (quoting *Am. Mfrs. Mut.*

Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999))). However, as the Second Circuit has explained:

> [T]he actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state ('the compulsion test'); (2) when the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the [s]tate,' or the entity's functions are 'entwined' with state policies ('the joint action test' or 'close nexus test'); or (3) when the entity 'has been delegated a public function by the [s]tate,' ('the public function test').

Sybalski v. Indep. Grp. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001)). In addition, liability under Section 1983 may also apply to a private party who "conspire[s] with a state official to violate an individual's federal rights." *Fisk v. Letterman*, 401 F. Supp. 2d 362, 376 (S.D.N.Y. 2005) (report and recommendation), *adopted in relevant part by Fisk v. Letterman*, 401 F. Supp. 2d 362 (S.D.N.Y. 2005). A plaintiff "bears the burden of proof on the state action issue." *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1083 n.3 (2d Cir. 1990).

In this case, plaintiffs have only put forth allegations related to either joint action or a conspiracy between the Sentosa defendants and the County defendants. Under the "joint action" doctrine, a private actor can be found "to act 'under color of' state law for § 1983 purposes . . . [if the private party] is a willful participant in joint action with the

State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). "The touchstone of joint action is often a 'plan, pre-arrangement, conspiracy, custom, or policy' shared by the private actor and the police." *Forbes v. City of New York*, No. 05 Civ. 7331(NRB), 2008 WL 3539936, at *5 (S.D.N.Y. Aug. 12, 2008) (citing *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272 (2d Cir. 1999)). The provision of information to, or the summoning of, police officers is not sufficient to constitute joint action with state actors for purposes of Section 1983, even if the information provided is false or results in the officers taking affirmative action. *See Ginsberg*, 189 F.3d at 272 ("Healey's provision of background information to a police officer does not by itself make Healey a joint participant in state action under Section 1983 . . . [and] Officer Fitzgerald's active role in attempting to resolve the dispute after Healey requested police assistance in preventing further disturbance also does not, without more, establish that Healey acted under color of law." (internal citations omitted)). Similarly, if a police officer's actions are due to the officer's own initiative, rather than the directive of a private party, the private party will not be deemed a state actor. *See Shapiro v. City of Glen Cove*, 236 F. App'x 645, 647 (2d Cir. 2007) ("[N]o evidence supports Shapiro's contention that Weiss-Horvath acted jointly with the Glen Cove defendants to deprive her of her constitutional rights, and ample evidence shows that the Glen Cove officials who searched her house exercised independent judgment rather than acting at Weiss-Horvath's direction."); *Serbalik v. Gray*, 27 F. Supp. 2d 127, 131 (N.D.N.Y. 1998) ("[A] private party does not act under color of state law when she merely elicits but does not join in an exercise of official state authority." (quoting *Auster*

Oil & Gas, Inc. v. Stream, 764 F.2d 381, 388 (5th Cir. 1985))). Moreover, "a private party's motivation is irrelevant to the determination of whether that private party acted under color of state law." *Young v. Suffolk Cty.*, 922 F. Supp. 2d 368, 386 (E.D.N.Y. 2013) (citation omitted). Finally, if a plaintiff's only evidence in support of a Section 1983 claim is that the private defendants and a district attorney met and otherwise communicated on several occasions, it is insufficient because there is "'nothing suspicious or improper in such meetings, which are routine and necessary in the preparation of evidence,'" and the "'mere allegation of their occurrence is [not] sufficient to create a material issue of fact as to whether something improper took place during them.'" *Scotto v. Almenas*, 143 F.3d 105, 115 (2d Cir. 1998) (quoting *San Filippo v. U.S. Trust Co.*, 737 F.2d 246, 256 (2d Cir. 1984)).

When the private actor takes a more active role, however, and jointly engages in action with state actors, he will be found to be a state actor. *See*, *e.g.*, *Lugar*, 457 U.S. at 942 (finding that, when a supplier sought prejudgment attachment of a debtor's property, supplier was a state actor because it "invok[ed] the aid of state officials to take advantage of state-created attachment procedures"); *Dennis*, 449 U.S. at 27-28 (holding that defendants who conspired with and participated in bribery with federal judge acted under color of state law).

Indeed, "a defendant who causes an unlawful arrest or prosecution may be held responsible civilly if he does so by maliciously providing false information." *Friedman v. New York City Admin. for Children's Services, et al.*, No. 04-CV-3077(ERK), 2005 WL 2436219, at *8 (E.D.N.Y.

Sept. 30, 2005); *see also Coakley v. Jaffe*, 49 F. Supp. 2d 615 (S.D.N.Y. 1999) (finding plaintiffs sufficiently pled existence of joint action where private defendants manipulated evidence presented to a grand jury, thereby willfully causing an assistant district attorney to violate plaintiffs' rights). This could include providing authorities with evidence they know to be false or which unduly influenced authorities, particularly when the state actor does not subsequently exercise independent judgment. *See*, *e.g.*, *Palmer v. Monroe Cty. Deputy Sheriff*, No. 00-CV-6370, 2004 WL 941784 at *8 (W.D.N.Y. Apr. 29, 2004); *Ginsberg*, 189 F.3d at 272 ("Where, as here, a police officer exercises independent judgment in how to respond to a private party's legitimate request for assistance, the private party is not jointly engaged . . . ."); *Manbeck v. Micka*, 640 F. Supp. 2d 351 (S.D.N.Y. 2009) (recognizing an exception to the general rule concerning providing information to police where private actor provides false statements to state actors to intentionally violate constitutional rights); *Merkle v. Upper Dublin School Dist.*, 211 F.3d 782 (3d Cir. 2000) (holding school district may be liable under Section 1983 where police department would not have pressed charges and pursued criminal prosecution without the district's request to do so).

Thus, courts have determined the "under color of state law" requirement can be met as to private defendants where they had a clear objective of influencing the action of the state and fabricated evidence to achieve that objective, *Young v. Suffolk Cty.*, 705 F. Supp. 2d 183 (E.D.N.Y. 2010), where police have arrested individuals based solely on the private defendants' request, without

making an independent investigation of the matter, *Fletcher v. Walmart Stores, Inc.*, No. 05 Civ. 1859(WHP), 2006 WL 2521187, at *3 (S.D.N.Y. Aug. 28, 2006), and where they made false statements to the police to invoke the state's power to intentionally violate another's rights, *Weintraub v. Board of Educ.*, 423 F. Supp. 2d 38, 58 (E.D.N.Y. 2006).

Alternatively, to demonstrate that a private party defendant was a state actor engaged in a conspiracy with other state actors under Section 1983, a plaintiff must allege: (1) an agreement between the private party and state actors, (2) concerted acts to inflict an unconstitutional injury, and (3) an overt act in furtherance of the goal. *See Carmody v. City of New York*, No. 05 Civ. 8084(HB), 2006 WL 1283125, at *5 (S.D.N.Y. May 11, 2006) (citing *Ciambriello*, 292 F.3d at 324-25). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed. *See Ciambriello*, 292 F.3d at 325 (dismissing conspiracy allegations where they were found "strictly conclusory"); *see also Robbins v. Cloutier*, 121 F. App'x 423, 425 (2d Cir. 2005) (dismissing a Section 1983 conspiracy claim as insufficient where plaintiff merely alleged that defendants "acted in a concerted effort" to agree not to hire plaintiff and to inform others not to hire plaintiff). "A plaintiff is not required to list the place and date of defendants[']meetings and the summary of their conversations when he pleads conspiracy, but the pleadings must present facts tending to show agreement and concerted action." *Fisk*, 401 F. Supp. 2d at 376 (internal citations omitted). "Unsubstantiated allegations of purported collaboration between a state actor and a private party are insufficient to defeat a motion for summary judgment." *Young*, 922

F. Supp. 2d at 386 (*citing Scotto*, 143 F.3d at 115; *Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993) (affirming grant of summary judgment because plaintiff's allegations of conspiracy were "unsupported by any specifics, and many of them [were] flatly contradicted by the evidence proffered by defendants"). Indeed, because "conspiracies are by their very nature secretive operations," while conclusory allegations of a Section 1983 conspiracy are insufficient, they "may have to be proven by circumstantial, rather than direct, evidence." *Pangburn v. Culbertson*, 200 F.3d 65, 72 (2d Cir. 1999).

Private actors may be liable for malicious prosecution even if the state official with whom they have participated in joint action is himself immune from personal liability. *Dennis*, 449 U.S. at 28-29 ("[T]he private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability. Immunity does not change the character of the judge's actions or that of his co-conspirators."); *Coakley*, 49 F. Supp. 2d at 624.

ii. Initiating a Proceeding

The initiation or continuation of a criminal proceeding can be satisfied by, *inter alia*, showing that the defendant filed formal charges and caused the plaintiff to be arraigned. *Phillips v. DeAngelis*, 571 F. Supp. 2d 347, 353-54 (N.D.N.Y. 2008). It is well settled that "[i]n order for a civilian complainant to be considered to have initiated a criminal proceeding, 'it must be shown that [the complainant] played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities

to act.' " *Barrett v. Watkins*, 919 N.Y.S.2d 569, 572 (3d Dep't 2011) (quoting *Viza v. Town of Greece*, , 463 N.Y.S.2d 970, 971 (4th Dep't 1983)). Importantly, "[m]erely furnishing information to law enforcement authorities, who are then free to exercise their own judgment as to whether criminal charges should be filed, and giving testimony at a subsequent trial are insufficient to establish liability." *Barrett*, 919 N.Y.S.2d at 572.

iii. Probable Cause

A grand jury indictment gives rise to a presumption of probable cause for purposes of a malicious prosecution claim. *See Bernard v. United States*, 25 F.3d 98, 104 (2d Cir. 1994). However, a showing of "fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith" can overcome this presumption. *Id.* (citation omitted); *see also McClellan*, 439 F.3d at 145 (holding that the presumption of probable cause created from a grand jury indictment "may be rebutted by evidence of various wrongful acts on the part of the police," and that, "[i]f plaintiff is to succeed in his malicious prosecution action after he has been indicted, he must establish that the indictment was produced by fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith") (citing *Colon v. City of New York*, 60 N.Y.2d 78, (N.Y. 1983)); *Brogdon v. City of New Rochelle*, 200 F. Supp. 2d 411, 421 (S.D.N.Y. 2002) ("An indictment by a grand jury creates a presumption of probable cause that can only be overcome by establishing that the indictment itself was procured by 'fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.' " (quoting

Bernard, 25 F.3d at 104)); *Colon*, 60 N.Y.2d at 82-83 ("The presumption may be overcome only by evidence establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, that they have withheld evidence or otherwise acted in bad faith." (citations omitted)). If, after construing all inferences in the light most favorable to plaintiff, a jury could reasonably find that the indictment was secured through bad faith or perjury, the issue of probable cause cannot be resolved by summary judgment, and it will be left to the jury to determine whether the indictment was secured through bad faith or perjury. *See McClellan*, 439 F.3d at 146; *Boyd v. City of New York*, 336 F.3d 72, 77 (2d Cir. 2003).

In *McClellan*, for example, the following evidence offered by an arrestee against the prosecuting officer, Smith, was found sufficient to allow the case to proceed to a jury on the issue of probable cause, despite a grand jury indictment, because it could be concluded that the officer's "prosecution of the case was impelled solely by a personal animus":

> [Smith] was the instigator of the altercation; may have been intoxicated; lied to the arresting officer about McClellan's responsibility for the altercation; admittedly was displeased with the original grand jury result; supervised the investigation despite his obvious conflict of interest; reassigned the case because the officer originally assigned 'wasn't handling the investigation properly'; urged the District Attorney's office that had employed him (and was to employ him

> again) to apply for the second grand jury; pressured a prosecutor to make a deal with a putative witness to give testimony in the case against McClellan; eventually procured the sole witness whose testimony enabled the case to be presented to the second grand jury; and altered his testimony before the second grand jury with regard to the placement of the vehicles after speaking with an officer who had been at the scene.

439 F.3d at 146. In addition, the Court noted inconsistencies in the officer's and the arrestee's version of events. *Id.* In *Boyd*, the Second Circuit noted the difference between "a simple conflict of stories or mistaken memories" and "the possibility that the police . . . lied in order to secure an indictment." 336 F.3d at 77.

b. Analysis

For the following reasons, the Court concludes that the Sentosa defendants' arguments as to why plaintiffs' malicious prosecution claims against them cannot survive summary judgment are unpersuasive.

i. Under Color of State Law

First, the Sentosa defendants argue that plaintiffs' Section 1983 claims against them fail because they were not acting under color of state law. (Sentosa's Br. 4-18.) Specifically, they argue that discovery has proven that plaintiffs' allegations that the Sentosa defendants pressured the County defendants to act and then agreed to present false testimony to the Grand Jury were wholly

conclusory and unsubstantiated, and therefore their Section 1983 claims should be dismissed. (Sentosa's Br. 8.) Plaintiffs contend that, although they lack direct, personal knowledge of the joint activity or conspiracy they allege, there is abundant circumstantial evidence supporting their claim. (Pls.' Br. 54-55.) For the following reasons, the Court denies the Sentosa defendants' motion on this ground.

As noted above, the Sentosa defendants devote a significant portion of their legal argument on this issue and their 56.1 statement to developing the point that plaintiffs have no personal knowledge of any joint activity or conspiracy between the Sentosa and County defendants, and that no documents produced by any party in discovery support conspiracy or joint activity. (Sentosa's Br. 8-11.) For example, defendants assert that none of the nurse plaintiffs were able to identify facts that support claims of joint activity or conspiracy. (Sentosa's Br. 10.) The Sentosa defendants argue that, in the absence of direct, admissible evidence supporting their claims, they fail as a matter of law.

Plaintiffs argue that summary judgment is not warranted because the evidence on which the Sentosa defendants rely in their argument is comprised of "self-serving denials of wrongdoing." (Pls.' Br. 54.) Moreover, plaintiffs assert that there is strong circumstantial evidence supporting their claim, and that is all that is required to prevail. (*Id.* at 54-55.) In particular, plaintiffs argue that the Sentosa defendants are politically powerful and that they used this influence to ensure that the plaintiffs would be prosecuted, even though no patients were harmed, with the goal of deterring other nurses from pursuing their

legal rights against Sentosa. (*Id.* at 58, 61.) In support of this argument, plaintiffs point to, among other things, the following pieces of evidence: (1) the Sentosa defendants decided to press the DA's Office to prosecute the nurses at a meeting they were able to secure "with a simple telephone call," (*id.* at 63); (2) after the meeting, Spota separately telephoned Fensterman and invited him to come to the office for another meeting and a lunch (*id.* at 63); (3) the lack of involvement of the SCPD in the investigation; and (4) the manner of the investigation by the DA's Office prior to seeking an indictment from the Grand Jury, and the manner in which the investigation was conducted.[38] Moreover, plaintiffs point to the "egregious perjury" committed by the Sentosa witnesses. (*Id.* at 65.)[39] Plaintiffs

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[38] Plaintiffs also point to a transcript of an alleged recording of statements by Philipson in a meeting with Filipino nurses in various facilities as further evidence that he and the other Sentosa defendants were not merely supplying information to the DA's Office, but were insisting that the plaintiffs be charged and arrested. In particular, at that meeting with other nurses, Philipson purportedly stated, *inter alia*, the following: "[W]e will be contacting the District Attorney tomorrow because what they did is actually a criminal offense, abandoning the patients the way they did. It's irresponsible of them to just walk off. . . . But I feel we can extend an amnesty until tomorrow, as I've said, because after, after that time, I cannot do anything to pull it back. Once we pull the trigger, it's done." (Pls.' 56.1 ¶ 72; Ex. NN.) However, because plaintiffs have not articulated how this recording will be authenticated and admitted, the Court does not consider it for purposes of this decision. However, plaintiffs may still seek to authenticate and introduce that recording for purposes of trial.

[39] Plaintiffs also request that the Court take judicial notice of instances of corruption allegations involving Spota. As a threshold matter, any unproven allegations of misconduct in other cases by Spota do not constitute admissible evidence in this case, and are not facts of which the Court can take judicial notice. In any event, plaintiffs have

argue that, taking all these facts into account, and combining them with the subsequent actions of the County defendants described above after the meeting with the Sentosa defendants, they have created a material issue of fact as to whether the Sentosa defendants acted under color of state law under this theory.

As a threshold matter, the Sentosa defendants' reliance on the lack of personal knowledge by plaintiffs of evidence of a joint activity and/or conspiracy between the Sentosa defendants and the County defendants, and their insistence that direct evidence is required to sustain their malicious prosecution claim, are misguided as a matter of law. First, the Second Circuit has clearly held that circumstantial evidence alone is not only sufficient to sustain a Section 1983 claim, but may be the only evidence available due to the reality that "such conspiracies are by their very nature secretive operations. . . ." *Pangburn*, 200 F.3d at 72. Similarly, no case law requires that plaintiffs have direct knowledge of joint activity or a conspiracy to sustain a Section 1983 claim. Therefore, the Court rejects the Sentosa defendants' arguments on this ground.

Further, the Court must not and does not review whether the alleged false testimony by the Sentosa defendants in the Grand Jury forms the basis of a malicious prosecution claim. The Supreme Court has expressly held that a grand jury witness "has absolute immunity from any § 1983 claim based on the witness' testimony," even if that testimony is perjurious. *Rehberg v. Paulk*, 566 U.S. 356,

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provided no link between those allegations and the circumstances surrounding this case.

369 (2012). Such absolute immunity applies to witnesses in the grand jury, whether private parties or government officials. *San Filippo*, 737 F.2d at 256. As the Second Circuit has further explained, for a malicious prosecution claim to survive, it must be based on misconduct by defendants outside their perjurious grand jury testimony. *Coggins v. Buonora*, 776 F.3d 108, 113 (2d Cir. 2015).

Turning to the sufficiency of the circumstantial evidence plaintiffs have set forth of state action by the Sentosa defendants (excluding the alleged perjury by the Sentosa defendants in the Grand Jury proceeding), the Court does agree that plaintiffs have not set forth evidence of a conspiracy to fabricate evidence between the Sentosa defendants and the County defendants prior to the Grand Jury proceeding (and, for this reason, has determined that the claims against the County defendants cannot survive summary judgment). However, construing the facts and all inferences in the light most favorable to plaintiffs, a rational jury could find, based upon the entire record, that the Sentosa defendants exerted influence over the DA's Office through Spota, that the Sentosa defendants were actively encouraging the criminal prosecution of the plaintiffs, and that the judgment of the Sentosa defendants as to whether charges should be brought was substituted for the judgment of the DA's Office. Thus, the Court concludes that there is evidence that raises a question of material fact as to whether the Sentosa defendants were willful participants in the joint activity with the DA's Office in the decision to initiate charges against the plaintiffs and to arrest and prosecute them, such that they are state actors for purposes of Section 1983.

Based upon the record in this case, the Court finds inapposite the Sentosa defendants' reliance on case law that holds that, if a plaintiff's only evidence in support of a Section 1983 claim is that the private defendants met with a district attorney, the claim fails because the "mere allegation of [such meetings] is [not] sufficient to create a material issue of fact as to whether something improper took place during them." *Scotto*, 143 F.3d at 115. Although this is correct as a matter of law, plaintiffs have not "merely" made such allegations, as explained above. Thus, the case authority cited by the Sentosa defendants is not at odds with this Court's ruling. Instead, based upon the totality of the evidence in this case, a reasonable jury could determine that the Sentosa defendants had a clear objective of influencing the decision-making of the DA's Office and took a number of affirmative steps, through that influence, to set in motion an unlawful arrest and prosecution of plaintiffs.[40]

Other courts have similarly allowed such claims to proceed, either at the motion to dismiss stage or later stage of the proceeding, where such allegations or evidence are present. In fact, courts have emphasized that a conspiracy is not required for there to be joint action. *See, e.g.*, *Powell v. Miller*, 104 F. Supp. 3d 1298, 1310 (W.D. Okla. 2015) ("Although one way to prove willful joint action is to

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[40] In making such a determination, the jury would be able to consider the Sentosa defendants' decisions to pursue various avenues of action against plaintiffs, including by securing a personal meeting with Spota. *See, e.g.*, *Merkle*, 211 F.3d at 793 (finding relevant that the private defendant made a "telephone call to his friend, the Chief of Police," in which he did not disclose pertinent information and made clear that he desired an investigation and prosecution of plaintiff).

demonstrate that the public and private actors engaged in a conspiracy, a requirement of which is that both public and private actors share a common, unconstitutional goal, evidence that private persons exerted influence over a state entity, substituted their judgment for the state entity, or participated in the decision leading to the deprivation of rights, is also sufficient to establish joint action in satisfaction of the 'color of law' element of § 1983.") (citations omitted); *see also Harris v. Sec. Co. of 1370 Sixth Ave., B.D.*, No. 94 Civ. 2599 (JGK), 1996 WL 556927, at *3 (S.D.N.Y. Oct. 1, 1996) ("[S]ecurity guards, like all private persons, are considered to act under color of state law if they are willful participant[s] with the State or its agents. When a security guard detains suspects for subsequent arrest by the police, joint activity with the state occurs when the police arrest the suspect solely based on the security guard's request, without making any independent investigation of the matter. To constitute state action there must be more than a general understanding that the security guards can call the police for assistance. The police must allow the security guard's judgment about whether probable cause exists to be substituted for their own.") (quotations and citations omitted).

For example, in *M & D Sportswear, Inc. v. PRL U.S.A. Holdings, Inc.*, No. 02 Civ. 1562(GEL), 2002 WL 31548495, at *3-4 (S.D.N.Y. Nov. 14, 2002), the court allowed a Section 1983 claim to survive a motion to dismiss where there were allegations that manufacturers engaged in "joint action" with the district attorney's office and police department in seizing and destroying a retailer's merchandise. The court, citing the Second Circuit's decision in *Ciambriello*, noted

that a private actor could be a willful participant in state action, without necessarily satisfying the elements of a Section 1983 conspiracy claim. *Id.* at *3 (citing *Ciambriello*, 292 F.3d at 324). The court then explained:

> M&D has clearly alleged that the designer defendants were not mere complainants, but were active and indeed controlling participants in the investigation. The Complaint describes in detail the City defendants' reliance on the designer defendants, and the designers' consequent influence on the investigation . . . Indeed, if credited, the allegations in the Complaint could lead a reasonable factfinder to conclude that the designer defendants effectively controlled the investigation, the decision to prosecute, and the failure to retrieve the seized apparel before it was destroyed . . . These detailed allegations, if established, would be more than sufficient to establish joint participation on the parts of the designer defendants and the City defendants in the sequence of events that led to the destruction of the seized apparel.

Id. at 4 (citations omitted); *see also Wagenmann v. Adams*, 829 F.2d 196, 211 (1st Cir. 1987) (affirming a jury verdict against a private citizen where jury could rationally find that the citizen was not a mere complainant, but exercised influence over the police, such that, the police "felt *constrained* to jail the plaintiff notwithstanding the absence of any legal basis to do so") (emphasis in original); *Estiverne v. Esernio-Jenssen*, 833 F. Supp. 2d 356, 369 (E.D.N.Y. 2011) ("Here, plaintiffs have presented evidence that defendants went well beyond cooperation with ACS.

Although defendants have presented countervailing evidence that ACS made their decision independently, plaintiffs' evidence, viewed in the light most favorable to them, creates a genuine issue of material fact as to whether defendants conspired with ACS in determining to file a removal petition against Adult Plaintiffs.").

In short, the Court concludes that there is a material question of fact as to whether the Sentosa defendants acted under color of state law, and, therefore, the Sentosa defendants are not entitled to summary judgment on this issue.

ii. Initiation

Second, with respect to the Sentosa defendants' argument as to the initiation of the criminal proceeding, they assert that: (1) the Sentosa defendants did not prosecute plaintiffs; (2) the Grand Jury indictment severed any chain of causation between any actions by the Sentosa defendants and the resulting criminal proceeding; and (3) the exercise of independent judgment by Lato severed the chain of causation. (*See* Sentosa's Br. 19-21.) The Sentosa defendants acknowledge this Court's prior ruling that "the Sentosa defendants cannot hide behind the decision of the DA to prosecute and the subsequent indictment . . . when it was the Sentosa defendants who allegedly spurred the County defendants to act and fed them with false testimony in pursuit of that endeavor." (Memorandum & Order, ECF No. 31 at 43; *see* Sentosa's Br. 21.) However, they state that there is no evidence that they "spurred" the County defendants to act or that any false testimony was

presented either to Lato or to the Grand Jury, and that all evidence is to the contrary. (Sentosa's Br. 21.) The Sentosa defendants point to the depositions that indicate that, other than the initial meeting on May 31, 2006, the only substantive contact that the Sentosa defendants had with Lato's subsequent investigation related to O'Connor allowing Lato to tour the Avalon facility and providing him with documents. (*Id.*)[41]

Plaintiffs argue that the conduct of the Sentosa defendants in this case can be characterized as initiation of a prosecution because they did not merely report allegations of a crime to the police, but instead importuned the District Attorney to prosecute plaintiffs, even after the police refused to act.[42] (Pls.' Br. 71.) Plaintiffs allege that this was done "to make an example of the nurses and their counsel, to assure that none of the other Filipino nurses attempted to follow in the footsteps of the plaintiffs." (*Id.* at 72.) With respect to the Sentosa defendants' argument that any chain of causation between their actions and the resulting criminal proceeding was severed, plaintiffs argue that a chain of causation is not broken where the wrongdoer can reasonably foresee that the actions undertaken would lead to a decision resulting in

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[41] The Sentosa defendants do not include here that defense counsel Sarah C. Lichtenstein sent a fax to Lato, although it is not disputed that she did.

[42] Moreover, although not considered in connection with this summary judgment motion (for reasons discussed *supra*), plaintiffs point to an alleged recording in which they assert Philipson publicly threatened all the plaintiffs with arrest and prosecution, specifically stating that they were going to "pull the trigger" with the District Attorney. (Pls.' Br. at 71-72).

prosecution of the defendant. (*Id.*) Because Lato's investigation was influenced by pressure exerted by the Sentosa defendants and by the false information they provided, plaintiffs argue, the chain of causation was not broken by that investigation. (*Id.* at 72-73.)

The Court agrees with plaintiffs that there is sufficient evidence of initiation by the Sentosa defendants to survive summary judgment on this issue. First, the Sentosa defendants' argument that they should not be liable for malicious prosecution because they did not prosecute plaintiffs ignores the basic and well-established rule that private actors—although they do not themselves arrest or prosecute individuals—may be held liable for a false arrest or malicious prosecution. This is especially true where, as here, there is evidence that the prosecuting office was influenced to take certain actions due to conduct of the private defendants. *See*, *e.g.*, *Merkle*, 211 F.3d at 791 (holding that, "[a]lthough the charges against [plaintiff] were filed and the actual prosecution conducted by Detective Han," there was evidence that the police department would not have pursued the criminal prosecution in the absence of the private defendants' conduct). As discussed *supra*, construing the evidence of the meetings and contacts with the DA's Office most favorably to plaintiffs in light of the entire record, there is sufficient evidence that the Sentosa defendants went well beyond supplying information and, instead, were actively encouraging that the plaintiffs be charged and arrested.

Turning to the Sentosa defendants' other arguments, the Court disagrees that the Grand Jury indictment severs any chain of causation between the Sentosa defendants'

actions and the resulting indictment as a matter of law. Construing the facts and all inferences in the light most favorable to plaintiffs, a jury could find that the Grand Jury indictment was based on misrepresentations made by the Sentosa defendants themselves, and, therefore, that it was a continuation of the effects of the Sentosa defendants' alleged wrongdoing. *See Kerman v. City of New York*, 374 F.3d 93, 127 (2d Cir. 2004) ("The fact that [an] intervening third party may exercise independent judgment in determining whether to follow a course of action recommended by the defendant does not make acceptance of the recommendation unforeseeable or relieve the defendant of responsibility."). Further, the Court concludes that plaintiffs have set forth sufficient evidence to create an issue of material fact as to whether Spota and Lato exercised independent judgment that severs any chain of causation between the Sentosa defendants' actions and the resulting indictment. Despite the fact that Lato stated that his investigation of plaintiffs was conducted independently, he testified that he was aware that the Sentosa defendants' received an audience with Spota due to Spota's relationship with Fensterman, and, when taken into consideration alongside the alleged misrepresentations made by the Sentosa defendants in the Grand Jury, whether Lato's investigation was conducted independently for purposes of establishing a break in the chain of causation is a question for the jury.

iii. Probable Cause

The Court now addresses defendants' argument that there was probable cause for the prosecution of plaintiffs.

First, the Court acknowledges that defendants are correct that the Grand Jury indictment creates a rebuttable presumption of probable cause. (Sentosa's Br. 21-22; Cnty.'s Br. 10-11.) The defendants add that, because there is no evidence that any of the defendants agreed to provide false testimony, that the Sentosa defendants pressured the County defendants to prosecute plaintiffs, or that Lato committed any wrongdoing, there is no basis to rebut this presumption. (*See* Sentosa's Br. 22; Cnty.'s Br. 11-13.) Plaintiffs contend that the presumption should be rebutted, pointing to, among other things, the following: (1) the blatant perjury by the Sentosa witnesses;[43] (2) the admission of prejudicial evidence; (3) the withholding of exculpatory evidence; (4) the fact that highly pertinent questions by the grand jurors were ignored; (5) the fact that the jurors were led to believe that the nurse plaintiffs walked out during a shift; (6) improper charges on the law; (7) the use of hearsay to indict Vinluan; and (8) Lato's refusal to present the Education Department findings, as irregularities warranting rebuttal. (Pls.' Br. at 73-74.)

With respect to false and/or misleading statements to the Grand Jury, plaintiffs point to, among other things, O'Connor's testimony that gave the impression that the

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[43] As discussed in greater detail *infra*, the Court agrees that the Sentosa defendants are entitled to absolute immunity for their testimony before the Grand Jury. *See Rehberg*, 566 U.S. 356. However, grand jury testimony can be used at summary judgment or at trial for a purpose other than for its truth, *Marshall v. Randall*, 719 F.3d 113 (2d Cir. 2013), and, obviously, the Court must examine such testimony in the instant case to determine whether the presumption of probable cause could be rebutted. Thus, the Court examines the alleged false testimony here.

nurse plaintiffs did not communicate their grievances before resigning *en masse*, and Luyun's false statements. In addition, plaintiffs note that the multiple references to the nurses "walking out" may have confused the jurors as to whether the nurses left during their shifts. Moreover, plaintiffs assert that the Sentosa defendants' decision to contact the Department of Education, the SCPD, and the DA's Office about the resignation, and their desire that they be criminally prosecuted as expressed by Philipson at the meeting(s) he held with other nurses, demonstrates that the Sentosa defendants' misstatements or misleading testimony in the Grand Jury were made in bad faith.

Construing these facts and all inferences in the light most favorable to plaintiffs as the non-moving party, the Court concludes that a reasonable juror could infer from these facts, when taken together, that the indictment was procured through bad faith and/or perjury based upon the testimony in the Grand Jury, as well as other alleged prosecutorial errors and/or irregularities in the Grand Jury presentation.

Further, plaintiffs have created a material issue of fact as to whether probable cause existed independent of the Grand Jury indictment. There is evidence that the nurse plaintiffs did not walk out on their shifts; that the nurse plaintiffs had provided notice of their intent to resign if issues with their employment were not resolved; and that there were adequate staffing options such that their resignation would not create any safety issues for their patients. Construing these facts and all inferences in the light most favorable to plaintiffs as the non-moving party, a

reasonable jury could determine there was not probable cause to prosecute plaintiffs.

In sum, like the question of whether the presumption of probable cause generally applicable to grand jury indictments has been rebutted here, the question of whether there was independent probable cause, is a fact-intensive question which, under the particular circumstances of this case, needs to be resolved by a jury. *See Merkle*, 211 F.3d at 794 ("[W]hether [the private defendant] acted out of a concern that valuable supplies were being stolen or whether he criminally prosecuted [plaintiff] . . . is a disputed question of fact for a jury and not a question of law for the trial court."). Therefore, the Court rejects the Sentosa defendants' argument that summary judgment on plaintiffs' malicious prosecution claim is warranted because there was probable cause to indict plaintiffs, and defendants' motion for summary judgment on this ground is denied.

* * *

For these reasons, the Court rejects the Sentosa defendants' argument that they should be granted summary judgment on plaintiffs' malicious prosecution claims under federal or state law.[44]

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[44] The Court notes that, for purposes of the summary judgment motion, the Sentosa defendants do not argue that there is insufficient evidence with respect to the "favorable termination" or "malice" elements. In any event, the Court concludes that there is uncontroverted evidence of a favorable termination, such that this element is met for purposes of summary judgment. In addition, with respect to malice, it is well settled that a jury may infer actual malice from the absence of probable cause. *See*, *e.g.*, *Maxwell v. City of New York*, 554 N.Y.S.2d

2. False Arrest

The Sentosa defendants also argue that plaintiffs' false arrest claims fail as to them because they did not confine plaintiffs, and because they did not cause the arrest. (Sentosa's Br. 23-24.)

a. Legal Standard

Claims for false arrest brought under Section 1983 are "substantially the same as claims for false arrest . . . under state law." *Jocks*, 316 F.3d at 134 (quoting *Weyant*, 101 F.3d at 852). To prevail under New York law, a plaintiff must prove four elements: "(1) the defendant intended to confine him; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not contest the confinement; and (4) confinement was not otherwise privileged." *Conte v. Cty. of Nassau*, No. 06-CV-4746 (JFB)(ETB), 2008 WL 905879, at *8 (E.D.N.Y. Mar. 31, 2008) (citations omitted).

The Second Circuit has explained that "[t]o hold a defendant liable as one who affirmatively instigated or procured an arrest, a plaintiff must show that the defendant or its employees did more than merely provide information to the police." *King v. Crossland Sav. Bank*, 111 F.3d 251, 257 (2d Cir. 1997). Merely identifying a potential culprit or erroneously reporting a suspected crime, without any other action to instigate the arrest, is not enough to warrant liability for false arrest. *Id.* Instead, "a successful false arrest claim requires allegations that the private

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502, 505 (1st Dep't 1990). Thus, given the factual disputes about probable cause (as well as the other evidence in the record discussed *supra*), summary judgment on the malice requirement is unwarranted.

defendant 'affirmatively induced or importuned the officer to arrest . . . .'" *Delince v. City of New York*, No. 10 Civ. 4323(PKC), 2011 WL 666347, at *4 (S.D.N.Y. Feb. 7, 2011) (quoting *LoFaso v. City of New York*, 886 N.Y.S.2d 385, 387 (1st Dep't 2009)). Thus, where an individual instigates an arrest and does so based on knowingly false information, that individual may be held liable for false arrest. *Weintraub*, 423 F. Supp. 2d at 56 ("Contrary to defendants' argument, even where there is no claim that a defendant actually restrained or confined a plaintiff, a claim of false arrest or false imprisonment may lie where a plaintiff can 'show that . . . defendants instigated his arrest, thereby making the police . . . agents in accomplishing their intent to confine the plaintiff.'" (quoting *Carrington v. City of New York*, 607 N.Y.S.2d 721, 722 (2d Dep't 1994))).

b. Analysis

The Sentosa defendants' first argument as to why plaintiffs' false arrest claim fails is that they did not confine plaintiffs. (Sentosa's Br. 23.) However, as the Second Circuit has held, individuals can be held liable for false arrest if they affirmatively instigate or procure an arrest. *King*, 111 F.3d at 257.

Here, as discussed in detail *supra*, plaintiffs have created a material issue of fact as to whether the Sentosa defendants affirmatively instigated or procured the arrest. First, as background, they have provided evidence that the Sentosa defendants pursued a number of avenues for redress for the resignation, including by filing lawsuit in the New York State Supreme Court, requesting that the

Department of Education revoke the nurse plaintiffs' licenses and/or limited permits, filing a police report with the SCPD, and meeting with Spota when the SCPD declined to take action.[45] Second, based upon the circumstances surrounding the meeting with Spota, as well as the subsequent actions of the Sentosa defendants following the meeting, a rational jury could reasonably infer the Sentosa defendants instigated or procured the nurse plaintiffs' arrest. Therefore, there is no basis to grant summary judgment on this ground.

The Sentosa defendants' second argument as to why this claim should fail is that they did not cause plaintiffs' arrest. (Sentosa's Br. 24.) In particular, they argue that they did not cause the Grand Jury indictment, and that there is no evidence that they "induced" the County defendants to seek a Grand Jury indictment, that they influenced the County defendants in the presentation of evidence to the Grand Jury, that they presented false testimony to the Grand Jury, or that they otherwise induced the ultimate indictment from the Grand Jury. (*Id.*) However, as discussed in detail *supra*, there is circumstantial

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[45] The Court is not suggesting that pursuing redress for perceived wrongdoing is inherently problematic, or that, by itself, it would create a material issue of fact as to whether the Sentosa defendants had instigated plaintiffs' arrest. Indeed, such a conclusion would be contrary to well-established law that merely reporting information to authorities does not constitute actionable conduct for purposes of false arrest claims. However, a jury could infer from the fact that the Sentosa defendants pursued many avenues of redress, including by contacting the DA's Office after the SCPD declined to take action against plaintiffs, when considered alongside other evidence supporting plaintiffs' other assertions, that the Sentosa defendants in fact instigated plaintiffs' confinement and intended such a result.

evidence, when viewed most favorably to the plaintiffs in light of the entire record, that would permit a rational jury to reasonably infer that this is precisely what happened. Given the factual disputes in this case (and the reasonable inferences to be drawn from such facts), it is for the jury to decide what effect, if any, the Sentosa defendants' actions had on the DA's Office decision to initiate charges by seeking a Grand Jury indictment and, consequently, plaintiffs' arrest. Therefore, plaintiffs' false arrest claim as to the Sentosa defendants, under federal and state law, survives the summary judgment stage.

3. Attorneys' Fees

The Sentosa defendants request attorneys' fees pursuant to 42 U.S.C. § 1988 ("Section 1988"). Courts, in their discretion, are able to allow prevailing parties in Section 1988 claims reasonable attorneys' fees. 42 U.S.C. § 1988(b); *see also Blum v. Stenson*, 465 U.S. 886, 888 (1984) ("[I]n federal civil rights actions 'the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.'" (quoting 42 U.S.C. § 1988)). However, because the Court has determined that plaintiffs' malicious prosecution and false arrest claims against the Sentosa defendants survive the summary judgment stage, attorneys' fees are not available at this juncture. Therefore, the Court denies the Sentosa defendants' request for attorneys' fees.

IV. Conclusion

For the reasons set forth below, the Court grants the County defendants' motion for summary judgment. With respect to the Sentosa defendants' summary judgment motion, to the extent that plaintiffs have asserted a Section 1983 conspiracy claim against the Sentosa defendants for conspiring to fabricate evidence in the investigative stage with the County defendants, the motion for summary judgment is granted. However, the Court denies the Sentosa defendants' motion for summary judgment on the malicious prosecution and false arrest claims under federal and state law.

SO ORDERED.

/s/ [redacted]
JOSEPH F. BIANCO
United States District Judge

Dated: November 28, 2018
Central Islip, NY

* * *

Plaintiffs are represented by James Druker, Kase & Druker, Esqs., 1325 Franklin Avenue, Suite 225, Garden City, NY 11530; Paula Schwartz Frome, Esq., 1325 Franklin Ave., Suite 225, Garden City, NY 11530; and Oscar Michelen, Cuomo LLC, 200 Old Country Road, Suite 2 South, Mineola, NY 11501. Plaintiff Felix Vinluan is also represented by Sherri Anne Jayson, Cuomo LLC, 9 East 38th Street, 3rd Floor, New York, NY 10016. Defendant Thomas J. Spota is represented by Brian C. Mitchell, Suffolk County Dept. of Law, 100 Veterans Memorial

Highway, P.O. Box 6100, Hauppauge, NY 11788 and Garrett W. Swenson, Jr., Esq., 76 Bay Road, Brookhaven, NY 11719. Defendants Leonard Lato and the County of Suffolk are also represented by Brian C. Mitchell. Defendants Sentosa Care, LLC, Avalon Gardens Rehabilitation and Health Care Center, Prompt Nursing Employment Agency, LLC, Francris Luyun, Bent Philipson, and Berish Rubenstein are represented by Matthew Didora, Sarah C. Lichtenstein, and John Scanlan Cahalan, Abrams Fensterman, 1111 Marcus Avenue, Suite 107, Lake Success, NY 11042. Sarah C. Lichtenstein also represents defendants Susan O'Connor and Nancy Fitzgerald.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

№ 10-CV-00032 (JFB) (WDW)

JULIET ANILAO, ET AL.,

Plaintiffs,

VERSUS

THOMAS J. SPOTA, III, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL.,

Defendants.

MEMORANDUM AND ORDER
March 31, 2011

JOSEPH F. BIANCO, District Judge:

Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos, Ranier Sichon (the "nurse plaintiffs" or "nurses"), and Felix Q. Vinluan ("Vinluan") (collectively "plaintiffs") brought this action against Thomas J. Spota, III, individually and as District Attorney of Suffolk County ("District Attorney Spota" or "Spota"); the Office of the District Attorney of Suffolk County ("the DA's Office"); Leonard Lato, individually and as an Assistant District Attorney of Suffolk County ("Lato"); and the County of Suffolk (collectively the "County defendants"), as well as against Sentosa Care,

LLC ("Sentosa Care"); Avalon Gardens Rehabilitation and Health Care Center ("Avalon Gardens"); Prompt Nursing Employment Agency, LLC ("Prompt"); Francris Luyun ("Luyun"); Bent Philipson ("Philipson"); Berish Rubenstein[1] ("Rubenstein")[2]; Susan O'Connor ("O'Connor"); and Nancy Fitzgerald ("Fitzgerald")[3] (collectively the "Sentosa defendants"), alleging that the County defendants and the Sentosa defendants violated plaintiffs' constitutional rights pursuant to 42 U.S.C. § 1983.[4]

The claims in this case stem from what was originally a contractual employment dispute between the nurse

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[1] The caption of the complaint names Berish "Rubensten" as a defendant, but it is clear from the papers that this defendant's correct last name is "Rubenstein."

[2] According to the Amended Complaint, Avalon Gardens is a "Skilled Nursing Facility" in New York State. (Am. Compl. ¶ 8.) Philipson is a principal of Sentosa Care, Avalon Gardens, and Prompt. (*Id.* ¶ 11.) Luyun and Rubenstein are also principals of Prompt. (*Id.* ¶¶ 10, 12.)

[3] O'Connor was the "duly appointed administrator of Avalon Gardens," (Am. Compl. ¶ 13), and Fitzgerald was the Director of Nursing at Avalon Gardens. (*Id.* ¶ 14.)

[4] With regard to the individual defendants sued in their official capacities, these claims are duplicative of the municipal liability claim lodged against the County of Suffolk under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), discussed *infra*. *See*, *e.g.*, *Tsotesi v. Bd. of Educ.*, 258 F. Supp. 2d 336, 338 n.10 (S.D.N.Y. 2003) (dismissing claims against officials sued in their official capacities where plaintiff also sued municipality (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985))). Therefore, the Court dismisses all claims brought against defendants Spota and Lato in their official capacities. For the reasons discussed *infra*, however, certain of the claims against these individual defendants in their individual capacities survive defendants' motions.

plaintiffs and the Sentosa defendants.[5] According to the Amended Complaint, the nurse plaintiffs, who had been recruited to work in the United States by Sentosa-affiliated entities, were displeased with their employment conditions upon arriving here and believed that the Sentosa defendants had breached the promises they had made to the nurses during the nurses' recruitment. The nurses sought the advice of Vinluan, an attorney, who advised the nurses that the Sentosa defendants had breached their employment contracts with the nurses in a variety of respects and that, accordingly, the nurses could terminate their employment with Avalon Gardens. After the nurses resigned, however, the Sentosa defendants allegedly took a series of retaliatory actions against plaintiffs, including reporting the nurse plaintiffs to the New York State Education Department (which is in charge of licensing for nurses), seeking a preliminary injunction against plaintiffs, and attempting to report plaintiffs to the Suffolk County Police Department. However, each of these actions taken by the Sentosa defendants ultimately was unsuccessful. In particular, the Education Department's investigation exonerated plaintiffs of any wrongdoing, the preliminary injunction was denied for failure to prove a likelihood of success on the merits, and the Police Department refused to take action because, according to the Amended Complaint, the police did not believe that any crimes had been committed. Consequently, the Sentosa defendants approached the DA's Office and met with District

[5] The Court notes that the brief summary set forth herein does not constitute findings of fact by the Court, but rather merely sets forth the facts as they are alleged by plaintiffs.

Attorney Spota to induce him to prosecute plaintiffs. As a result of this pressure from the Sentosa defendants, Spota allegedly entered into an agreement with the Sentosa defendants to prosecute plaintiffs for the benefit of the Sentosa defendants. Plaintiffs claim that, pursuant to this agreement, Spota assigned one of his Assistant District Attorneys, defendant Lato, to investigate plaintiffs. There appears to be no dispute that the investigation was conducted in the absence of any police involvement and, accordingly, was conducted solely at the direction of the DA's Office. Ultimately, ADA Lato presented the case to the Grand Jury—including a presentation of allegedly false testimony by defendant Philipson and possibly others—and procured an indictment charging plaintiffs with endangering the welfare of a child, endangering the welfare of a physically disabled person, conspiring to do the same, and solicitation. This indictment was returned by a Grand Jury approximately one year after the nurse plaintiffs' resignations.

The prosecution of plaintiffs was halted, however, when the New York State Appellate Division granted plaintiffs' Article 78 petition for a writ of prohibition based upon the fact that plaintiffs were being "threatened with prosecution for crimes for which they cannot constitutionally be tried." *Matter of Vinluan v. Doyle*, 873 N.Y.S.2d 72, 83 (App. Div. 2009). Specifically, the Appellate Division found that the prosecution sought to punish the nurse plaintiffs for resigning from their employment at will and to punish Vinluan for providing legal advice to the nurses in connection with their resignation, and, as such, the court found that the prosecution violated plaintiffs' First

and Thirteenth Amendment rights. After the prosecution of plaintiffs was accordingly prohibited, plaintiffs commenced this action in federal court, alleging that defendants violated their constitutional rights in a variety of respects. Specifically, plaintiffs have claimed not only that defendants violated plaintiffs' First and Thirteenth Amendment rights, but also that the indictment was procured in violation of plaintiffs' Fourteenth Amendment due process rights "in that the Grand Jury was not properly charged on the law, was given false evidence, and was not presented with exculpatory evidence." (Am. Compl. ¶ 112.) Moreover, plaintiffs allege that the prosecutors also engaged in unconstitutional conduct during the investigative stage prior to the presentation of evidence to the Grand Jury. Accordingly, plaintiffs have brought this § 1983 action to vindicate the violation of the above-mentioned constitutional rights. Moreover, plaintiffs also have brought state-law claims for malicious prosecution and false arrest.

Before the Court now are the County defendants' and the Sentosa defendants' motions to dismiss plaintiffs' Amended Complaint. As a threshold matter, the County defendants contend that they are absolutely immune for the actions they took in prosecuting plaintiffs. Also as a threshold matter, the Sentosa defendants contend that they were not acting under color of state law at any point and that, accordingly, they cannot be held liable under § 1983. Additionally, the Sentosa defendants argue that plaintiffs have failed to plead essential elements of their malicious prosecution and false arrest claims.

For the reasons set forth herein, defendants' motions are granted in part and denied in part. Specifically, as to the County defendants, the Court concludes: (1) the individual County defendants are entitled to absolute immunity for conduct taken in their role as advocates in connection with the presentation of the case to the Grand Jury; (2) the individual County defendants are not entitled to absolute immunity for alleged misconduct during the investigation of plaintiffs, and the Court cannot determine at the motion to dismiss stage, given the allegations in the Amended Complaint, whether the individual County defendants are entitled to qualified immunity for their actions in the investigation phase; (3) plaintiffs have sufficiently pled § 1983 claims against the individual County defendants for alleged Due Process violations in the investigative stage; and (4) plaintiffs have sufficient pled a claim for municipal liability against the County of Suffolk. As to the defendants Philipson, Luyun, Rubenstein, Sentosa Care, Prompt, and Avalon Gardens, the Court concludes: (1) plaintiffs have sufficiently alleged that they were acting under color of state law, and (2) plaintiffs have sufficiently pled claims for malicious prosecution and false arrest under both § 1983 and state law, as well as a § 1983 conspiracy claim. As to defendants O'Connor and Fitzgerald, the Court dismisses the claims against them without prejudice for: (1) failure to plead that they were acting under color of state law, and (2) failing to set forth allegations to properly plead the state-law malicious prosecution and false arrest claims as to these two individual defendants. Finally, as to the § 1983 conspiracy claim against all defendants, the Court finds that plaintiffs have sufficiently pled a claim against all defendants except

O'Connor and Fitzgerald, who, as noted *supra*, were not alleged to have been acting under color of state law for purposes of the § 1983 claims.

With respect to the individual County defendants, the Court emphasizes that, although the Amended Complaint contains a panoply of serious allegations of misconduct by prosecutors in connection with the Grand Jury presentation and initiation of the prosecution of the plaintiffs, there is no question, as a matter of law, that the prosecutors are cloaked with absolute immunity for their role in presenting that case to the Grand Jury and, thus, the constitutional claims arising from that alleged conduct (although extremely troubling, if true) cannot form the basis for a Section 1983 claim for false arrest or malicious prosecution. Moreover, under well-settled Second Circuit jurisprudence, the fact that this prosecution was halted by a New York State appellate court via a writ of prohibition does not eviscerate the existence of absolute immunity in connection with their advocacy role in the Grand Jury. Based upon the allegations in the Amended Complaint and the New York State's writ of prohibition, it is clear that, even if the prosecutors' charges constituted an impermissible infringement upon the constitutional rights of the nurses and their attorney, the charges were still brought within the defendants' prosecutorial duties and, thus, the individual County defendants remain absolutely immune. As a result, the false arrest and malicious prosecution claims cannot proceed against the County defendants. However, there is no absolute immunity for any alleged unconstitutional acts violating due process (including any alleged fabrication of evidence) during the investigative

stage, not undertaken in preparation for the Grand Jury presentation or in the prosecutors' role as an advocate. Although the individual County defendants argue that everything was done in preparation for the Grand Jury presentation, the allegations in the Amended Complaint are that the Suffolk County Police Department declined to be involved in the investigation because the police did not believe a crime had been committed and that the prosecutors thus performed the role of investigators in the gathering of evidence *prior to the presentation to the Grand Jury.* Given these allegations, in the context of all of the allegations in the Amended Complaint, this factual issue cannot be resolved at the motion to dismiss stage. Moreover, although qualified (rather than absolute) immunity still exists for prosecutors in their investigative role, the Court cannot resolve that issue at this juncture because of the factual allegations in the Amended Complaint, which must be accepted as true for purposes of this motion. Therefore, a plausible (but limited) Section 1983 claim against the individual County defendants—based upon the alleged violation of due process in the investigative stage prior to the preparation of the case for the Grand Jury (including the alleged fabrication of evidence) which resulted in a subsequent deprivation of liberty—survives a motion to dismiss, as does a Section 1983 conspiracy claim to do the same with the Sentosa defendants. Similarly, for the reasons discussed below, the *Monell* claim against the County also withstands defendants' motion to dismiss.

Finally, with respect to the Sentosa defendants, they do not have the benefit of absolute or qualified immunity

as private actors. Moreover, although the Sentosa defendants argue that the fact that they are private actors precludes a Section 1983 claim against them, the Court disagrees given the factual allegations in the Amended Complaint. In other words, the Amended Complaint sufficiently alleges that these private actors engaged in a conspiracy with the state actors to jointly deprive plaintiffs of their constitutional rights. For example, the Amended Complaint goes beyond simply alleging that information was supplied to the prosecutors by the Sentosa defendants; rather, it alleges that the Sentosa defendants agreed with the County defendants to procure an indictment through knowingly presenting false testimony to the Grand Jury and withholding exculpatory evidence, and that the prosecution would not have taken place but for the pressure and influence of the Sentosa defendants on the County defendants. The allegations, taken as a whole, are sufficient to state a plausible Section 1983 claim against the Sentosa defendants (except defendants O'Connor and Fitzgerald)—for engaging in joint action with the County defendants in connection with an alleged false arrest and malicious prosecution of plaintiffs, as well as a violation of plaintiffs' due process rights, and conspiring to do the same with the County defendants—which survives a motion to dismiss.

I. BACKGROUND

A. Facts[6]

Each of the nurse plaintiffs is a citizen of the Philippines and a legal resident of the United States. (Am. Compl. ¶ 1.) In addition, each nurse plaintiff was trained as either a nurse or a physician in the Philippines and was duly licensed in his or her profession in the Philippines. (*Id.* ¶ 21.) As set forth in the Amended Complaint, due to a severe shortage of trained nurses in the United States, many health care providers recruit nurses in the Philippines to come and work as nurses in the United States. (*Id.* ¶ 22.) Among the entities engaged in such recruitment activities is Sentosa Recruitment Agency, Inc. ("Sentosa Recruitment"), which is owned by, or is related to entities owned or controlled by, defendant Philipson and which has the sole purpose of recruiting nurses for facilities affiliated with Sentosa Services LLC. (*Id.* ¶¶ 24, 26-27.) Sentosa Recruitment, operating through individual defendant Luyun, recruited the nurse plaintiffs in this case and, "[i]n order to induce each Nurse Plaintiff to sign a contract," Sentosa Recruitment made a number of promises, including that the nurse plaintiffs would be "direct hire" nurses rather than "agency" nurses[7] and that they

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[6] The following facts are taken from the Amended Complaint and are not findings of fact by the Court. Instead, the Court assumes these facts to be true for purposes of deciding the pending motions to dismiss and will construe them in a light most favorable to plaintiffs, the non-moving party.

[7] Plaintiffs note in the Amended Complaint that "direct hire" nurses are employed by the facility in which they work, while agency nurses are employed by an agency and assigned to a facility. (Am. Compl. ¶ 30.)

would have eight-hour shifts, night shift differentials, medical and dental benefits, malpractice insurance, two months of free housing, and a competitive salary. (*Id.* ¶¶ 25, 29-31.) The nurse plaintiffs claim that the Sentosa defendants (namely, Philipson, Luyun, Rubenstein, Sentosa Care, and Prompt) made the above-mentioned promises with the knowledge that these promises were false and without the intention to fulfill them. (*Id.* ¶ 32.) Acting in reliance on these promises, each nurse plaintiff signed a contract to work at a specific facility affiliated with Sentosa; none of the nurses, however, signed a contract with Avalon Gardens. (*Id.* ¶¶ 33-34, 39) The contracts provided, *inter alia*, that the nurse plaintiffs would be required to work at the facilities with which they contracted for a period of three years, and that if they resigned prior to that time, they would be required to pay a $25,000 penalty. (*Id.* ¶¶ 35-36.)

Upon arriving in the United States, the nurse plaintiffs were employed by Prompt and assigned to work at Avalon Gardens. (*Id.* ¶ 40.) Soon thereafter, the nurses began to complain both about the conditions at Avalon Gardens—including complaints that, *inter alia*, their housing was inadequate and overcrowded, they did not receive promised time off, and they were not paid their correct hourly and overtime wages—and about the fact that they were not direct hires. (*Id.* ¶¶ 41-43.) Their complaints, however, failed to resolve any of these alleged problems. (*Id.* ¶ 44.) Indeed, the nurse plaintiffs allege that the Sentosa defendants breached the promises made to the nurses in a variety of respects. (*Id.* ¶ 37.) For example, as indicated *supra*, not only were the nurse plaintiffs employed as agency nurses, rather than direct hires, but they also

did not receive insurance as they were promised, were not permitted to work eight-hour shifts, and did not receive vacation, time off, and pay. (*Id.*)

In order to ascertain their rights, the nurse plaintiffs contacted the Philippine Consulate in New York to provide them with a referral to an attorney who could advise them. (*Id.* ¶ 45.) The Consulate referred the nurse plaintiffs to Felix Vinluan, who advised the nurse plaintiffs that their employment contracts had already been breached in multiple ways by the Sentosa defendants and that, accordingly, the nurse plaintiffs were not bound under those contracts to continue their employment. (*Id.* ¶¶ 46-47.) Based upon this advice of counsel, and upon the fact that the Sentosa defendants refused to remedy the aforementioned breaches, the nurse plaintiffs resigned their employment on April 7, 2006. (*Id.* ¶ 48.) In addition, at or around the same time, other nurses who had been recruited in the Philippines by Sentosa Recruitment, were employed by Prompt, and were working at Sentosa-affiliated facilities also resigned their employment based on the same complaints about their employment. (*Id.* ¶ 49.) To prevent additional nurses from resigning, Philipson threatened that the nurse plaintiffs and the others who resigned would be prosecuted, deported, faced with license revocation, and subjected to a civil suit if they did not return. (*Id.* ¶ 50.) Philipson also threatened nurses who had not yet resigned that they would face these same consequences if they resigned. (*Id.* ¶ 51.) Plaintiffs allege that, insofar as all upcoming shifts had been covered and there were no legitimate future concerns about patient care, these

threats were made solely to coerce the nurses to remain as Sentosa employees. (*Id.*)

Avalon Gardens, Prompt, and other Sentosa-affiliated entities then began taking a series of retaliatory actions against plaintiffs, including filing a complaint in Nassau County Supreme Court alleging, *inter alia*, breach of contract and tortious interference with contract and seeking to enforce the $25,000 penalty in the nurse plaintiffs' contracts and $50,000 in punitive damages. (*Id.* ¶ 52.) These Sentosa entities also sought a preliminary injunction to enjoin plaintiffs from speaking with other nurses about resigning. (*Id.* ¶ 53.) Additionally, in April 2006, Avalon Gardens, through defendants O'Connor and Fitzgerald, filed a complaint with the New York State Education Department (the "Education Department"), which is responsible for licensing nurses and governing their conduct. (*Id.* ¶ 54.) Furthermore, approximately three weeks after the nurse plaintiffs resigned, defendant O'Connor, or another person acting at her behest and on behalf of Avalon Gardens, called the Suffolk County Police Department to file a complaint. (*Id.* ¶ 59.)

According to the Amended Complaint, these retaliatory actions ultimately failed. For example, the Suffolk County Police Department refused to take any action against plaintiffs because, "in their stated opinion, no crime had been committed." (*Id.*) Moreover, in June 2006, Justice Stephen Bucaria of the New York State Supreme Court denied the Sentosa entities' motion for preliminary injunction on the ground that they had failed to establish a likelihood of success on the merits. (*Id.* ¶ 55.) Finally, in September 2006, the Education Department sent an email

to Vinluan stating that the nurse plaintiffs had been fully exonerated of any wrongdoing. (*Id.* ¶ 57.) In particular, the Education Department determined that the nurses had not committed abandonment and had not engaged in unprofessional or immoral conduct in connection with their resignations. (*Id.*)

At this point, the attorney for Sentosa Care, Howard Fensterman ("Fensterman"), arranged to have a private meeting with District Attorney Spota and defendants Philipson, Luyun, and others. (*Id.* ¶ 60.) Plaintiffs assert that Fensterman and the principals of Sentosa have made substantial contributions to various politicians and, as such, have "amassed political power and influence" that enable them to obtain favorable actions from elected officials. (*Id.* ¶¶ 61-62.) According to plaintiffs, the meeting between the Sentosa defendants, their attorneys, and defendant Spota had the effect of pressuring Spota to file an indictment against plaintiffs that he would not otherwise have filed. (*Id.* ¶ 64.) Specifically, plaintiffs claim that, as a result of the meeting, Spota assigned the case to one of his deputies, defendant Lato, "for the purpose of gathering evidence and securing an indictment." (*Id.* ¶ 70.) In or around early November 2006, Lato interviewed Vinluan and assured Vinluan that he was not a target of the investigation. (*Id.* ¶ 71.) Vinluan then provided Lato with "significant exculpatory information," including the Education Department's decision, Justice Bucaria's order denying the motion for a preliminary injunction against plaintiffs, and information regarding the fact that none of the nurse plaintiffs had ceased working during a shift. (*Id.* ¶ 72.) Plaintiffs claim that "[n]onetheless[,] Lato, with the

consent and at the urging of Spota, presented the case to a Grand Jury." (*Id.*) Plaintiffs further claim that Lato and other unidentified investigators from the DA's Office interviewed the nurse plaintiffs and similarly informed them that they were not the targets of a criminal investigation. (*Id.* ¶ 73.) Plaintiffs assert that, had they known they were targets, they "would have chosen other courses of conduct, including not participating in the interviews, or demanding to testify before the Grand Jury." (*Id.* ¶ 74.)

Plaintiffs make numerous allegations of wrongdoing involving the presentation of evidence to, and the procuring of the indictment from, the Grand Jury. For example, plaintiffs allege that Lato "deliberately used lurid photographs of children on ventilators to inflame the passions of the grand jurors and to procure a constitutionally invalid indictment for the benefit of the Sentosa defendants." (*Id.* ¶ 75.) In addition, plaintiffs claim that the allegations in the indictment against Vinluan—that Vinluan "advised the defendant Nurses to resign" and that the purpose of the conspiracy was to obtain alternative employment for the nurses—were baseless and were founded upon the false testimony of Philipson and possibly other Sentosa employees or principals. (*Id.* ¶¶ 80-82.)[8] Likewise, plaintiffs assert

[8] Plaintiffs state that Vinluan was "a particular target of Defendant Philipson's wrath." (*Id.* ¶ 65.) For example, Philipson allegedly testified at his deposition in the civil action against plaintiffs that Vinluan "orchestrated" the resignation of the nurses, that Vinluan's "fingerprints" were "all over" the nurses' actions, and that Vinluan was acting in the interests of "Juno," an organization that competes with Sentosa Care in the Philippines. (*Id.* ¶¶ 66-67.) Plaintiffs assert that these assumptions regarding Vinluan's motivations and associations were false, and they plead, upon information and belief, that "it

that "the indictment was further based upon knowingly false testimony by Philipson or other Sentosa principals . . . that one or more of the Nurse Plaintiffs had walked off during a shift, that shifts were inadequately covered, and that patients, including the children on ventilators . . . were endangered." (*Id.* ¶ 84.) Plaintiffs claim that not only did the Sentosa witnesses know that this information was false, but also the County defendants "knew that this testimony was false, but nonetheless presented it to the Grand Jury pursuant to their agreement with the Sentosa Defendants." (*Id.* ¶¶ 85-86.) Finally, plaintiffs allege that the Grand Jury was not properly charged on the law, was falsely informed that one or more of the nurses had resigned during their shifts, and was not told that the Education Department had determined that the nurse plaintiffs had not violated the Education Law. (*Id.* ¶ 83.) The Education Department's determination, according to plaintiffs, would have been fatal to the indictment insofar as the indictment was "based entirely upon the duty to patients created by the Education Law." (*Id.*) Approximately one year after the nurse plaintiffs' resignations, the Grand Jury returned an indictment charging the nurse plaintiffs and Vinluan with endangering the welfare of a child, endangering the welfare of a physically disabled person, conspiring to do the same, and solicitation (for allegedly requesting and attempting to cause the nurses to resign).[9]

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was at Philipson's instance [sic] that Spota took the unusual step of indicting an attorney for giving advice to his clients." (*Id.* ¶ 69.)

[9] Only Vinluan was charged in the solicitation count of the indictment. (Pls.' Opp. at 8.)

(*Id.* ¶¶ 78-79.) Plaintiffs were arrested as a result of their indictment. (*Id.* ¶ 87.)

Plaintiffs moved to dismiss the indictment on the grounds that, *inter alia*, the prosecution violated the nurse plaintiffs' Thirteenth Amendment rights and Vinluan's First Amendment rights. (*Id.* ¶ 94.) Their motion was denied by the state trial court judge on September 27, 2007. (*Id.* ¶ 95.) Plaintiffs thereafter filed an application for a writ of prohibition with the Appellate Division, which stayed all proceedings pending a determination on plaintiffs' petition. (*Id.* ¶¶ 96-97.) In their petition, plaintiffs argued that the prosecution against them was "not a proper proceeding because it contravenes the Thirteenth Amendment proscription against involuntary servitude by seeking to impose criminal sanctions upon the nurses for resigning their positions, and attempts to punish Vinluan for exercising his First Amendment right of free speech in providing the nurses with legal advice." *Vinluan*, 873 N.Y.S.2d at 78. On January 13, 2009, the Appellate Division issued a writ of prohibition against further prosecution of the indictment, finding that the criminal prosecution "constitute[d] an impermissible infringement upon the constitutional rights of these nurses and their attorney, and that the insurance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter." *Id.* at 75. (*See also* Am. Compl. ¶ 98.) The court noted that, under New York law, "[t]he primary function of prohibition is to prevent 'an arrogation of power in violation of a person's rights, particularly constitutional rights.'" *Vinluan*, 873 N.Y.S.2d at 78 (quoting *Matter of Nicholson v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 597, 606 (1980)).

Thus, where plaintiffs were alleging violations of their First and Thirteenth Amendment rights, prohibition was an available remedy because if the court determined that "the prosecution impermissibly infringe[d] upon these constitutional rights, the act of prosecuting [plaintiffs] would be an excess in power, rather than a mere error of law." *Vinluan*, 873 N.Y.S.2d at 78.

Turning to the merits of plaintiffs' petition, the Appellate Division found, as an initial matter, that "the Penal Law provisions relating to endangerment of children and the physically disabled, which all the petitioners are charged with violating, do not on their face infringe upon Thirteenth Amendment rights . . . ." *Id.* at 80. Moreover, the court noted that "Thirteenth Amendment rights are not absolute, and that 'not all situations in which labor is compelled by . . . force of law' are unconstitutional." *Id.* at 81 (quoting *United States v. Kozminski*, 487 U.S. 931, 943 (1988)). However, because the indictment explicitly made "the nurses' conduct in resigning their positions a component of each of the crimes charged . . . the prosecution ha[d] the practical effect of exposing the nurses to criminal penalty for exercising their right to leave their employment at will." *Id.* at 80-81. In addition, "although an employee's abandonment of his or her post in an 'extreme case' may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment, the respondent District Attorney proffer[ed] no reason why this [was] an 'extreme case.' " *Id.* at 81. Indeed, the court noted that the nurses did not abandon their posts in the middle of their shifts, but instead resigned after the completion of their shifts. *Id.* Accordingly, although the

nurses' resignation may have made it difficult for Sentosa to find skilled replacement nurses in a timely fashion, it was "undisputed that coverage was indeed obtained, and no facts suggesting an imminent threat to the well-being of the children [were] alleged." *Id.* at 82. Thus, the court explained:

> [W]e cannot conclude that this is such an 'extreme case' that the State's interest in prosecuting the petitioners for misdemeanor offenses based upon the speculative possibility that the nurses' conduct could have harmed the pediatric patients at Avalon Gardens justifies abridging the nurses' Thirteenth Amendment rights by criminalizing their resignations from the service of their private employer.

Id.

As to Vinluan, the court found that his prosecution "impermissibly violate[d] [his] constitutionally protected rights of expression and association in violation of the First and Fourteenth Amendments." *Id.* In so holding, the court relied upon the Supreme Court's instruction that "'[t]he First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights including advising another that his legal rights have been infringed.'" *Id.* (quoting *In re Primus*, 436 U.S. 412, 432 (1978) (additional quotation marks and alterations omitted)). The Appellate Division found that the indictment impermissibly sought to punish Vinluan for exercising his First Amendment right to provide legal advice, and held that "it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if

an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice." *Id.* at 83.

Accordingly, the court concluded that "[w]here, as here, the petitioners are threatened with prosecution for crimes for which they cannot constitutionally be tried, the potential harm to them is 'so great and the ordinary appellate process so inadequate to redress that harm' that prohibition should lie." *Id.* (quoting *Matter of Rush v. Mordue*, 68 N.Y.2d 348, 354 (1986)). The court analogized the situation to one in which a defendant was about to be prosecuted in violation of his constitutional right against double jeopardy or in violation of his Fifth Amendment right against self-incrimination—which would likewise present situations in which a defendant was being prosecuted for a crime for which he could not be constitutionally tried—and, thus, granted plaintiffs' petition and prohibited District Attorney Spota from prosecuting plaintiffs under the indictment. *Id.* at 78, 83.

B. Procedural History

Plaintiffs filed their complaint on January 6, 2010. The County defendants filed their motion to dismiss on March 23, 2010 ("County Mem."), as did the Sentosa defendants ("Sentosa Mem."). On May 10, 2010, plaintiffs filed their opposition ("Pls.' Opp."). The Sentosa defendants filed their reply ("Sentosa Reply") on June 14, 2010, and the County defendants filed their reply on June 15, 2010 ("County Reply"). On July 8, 2010, the Court held oral argument and gave plaintiffs leave to file an Amended

Complaint. Plaintiffs filed their Amended Complaint on July 29, 2010. On August 19, 2010, the Sentosa defendants and the County defendants filed supplemental letters in support of their motion to dismiss the Amended Complaint (respectively, "Sentosa Supp." and "County Supp."). Plaintiffs filed supplemental responses in opposition on September 7, 2010 ("Pls.' Supp." and "Vinluan Supp."). Finally, the County defendants and the Sentosa defendants filed supplemental replies on September 21 and September 22, 2010, respectively ("County 2d Supp." and "Sentosa 2d Supp."). These motions are fully submitted and the Court has considered all of the parties' arguments.

II. Standard of Review

In reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See Cleveland v. Caplaw Enters.*, 448 F.3d 518, 521 (2d Cir. 2006). "In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege a plausible set of facts sufficient 'to raise a right to relief above the speculative level.'" *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). This standard does not require "heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

The Supreme Court recently clarified the appropriate pleading standard in *Ashcroft v. Iqbal*, setting forth a two-pronged approach for courts deciding a motion to dismiss. --- U.S. ----, 129 S. Ct. 1937 (2009). The Court instructed district courts to first "identify[ ] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." 129 S. Ct. at 1950. Though "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* Second, if a complaint contains "well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 1949 (quoting and citing *Twombly*, 550 U.S. at 556 (internal citations omitted)).

III. Discussion

Plaintiffs have asserted six causes of action in their Amended Complaint. In their first cause of action, plaintiffs allege that the County defendants "acted in concert with, and at the behest of" the Sentosa defendants to secure the indictment of plaintiffs in violation of plaintiffs' First, Thirteenth, and Fourteenth Amendment rights. (Am. Compl. ¶ 107; *see also id.* ¶¶ 88-93.) Plaintiffs claim not only that defendants knew or should have known that plaintiffs could not legally be prosecuted for their actions,

but also that the County defendants would not have prosecuted plaintiffs but for the pressure from "the politically powerful Sentosa Defendants." (*Id.* ¶¶ 109-10.) Plaintiffs assert that the motivation for the prosecution was to punish plaintiffs for their part in the nurses' resignation and to discourage other nurses from resigning. (*Id.* ¶ 108.) Moreover, plaintiffs allege that the improperly procured indictment violated their Fourteenth Amendment due process rights. (*Id.* ¶ 112.)

The Court construes plaintiffs' second cause of action as alleging claims against defendant Spota for failure to supervise and against defendant County of Suffolk for municipal liability under *Monell.* (*See id.* ¶¶ 123-27.) In their third cause of action, plaintiffs allege that the County defendants and the Sentosa defendants conspired to violate plaintiffs' constitutional rights. (*See id.* ¶¶ 134-38.) Plaintiffs's fourth and fifth causes of action allege claims for malicious prosecution (*see id.* ¶¶ 139-47) and false arrest. (*See id.* ¶¶ 148-51.) Finally, in their sixth cause of action, plaintiffs allege a claim against only the Sentosa defendants for conspiring to deprive plaintiffs of their civil rights. (*See id.* ¶¶ 152-72.)

As noted *supra*, plaintiffs have brought their claims pursuant to 42 U.S.C. § 1983.[10] Section 1983 "is not itself a

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[10] Plaintiffs have brought their claims for malicious prosecution and false arrest under both § 1983 and state law, but this distinction is inapposite to the Court's analysis given that § 1983 claims for either malicious prosecution or false arrest adopt the applicable state law standards for these causes of action. *See Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003) ("Claims for false arrest or malicious prosecution, brought under § 1983 to vindicate the Fourth and Fourteenth

source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). For claims under § 1983, a plaintiff must prove that "(1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." *Snider v. Dylag*, 188 F.3d 51, 53 (2d Cir. 1999) (citation omitted). Here, for purposes of their motion to dismiss, the County defendants do not dispute that they were acting under color of state law. Thus, to the extent that the County defendants are not immune from liability for their conduct, the question presented with regard to the County defendants is whether their conduct deprived plaintiffs of the various rights they assert under the Constitution. However, the Sentosa defendants contend that they were not acting under color of state law and that they therefore cannot be held liable under § 1983. As discussed *infra*, the Court finds that plaintiffs have sufficiently pled that the Sentosa defendants were acting under color of state law and, accordingly, the Court will assess whether plaintiffs have stated claims against the Sentosa defendants for deprivation of plaintiffs' constitutional rights.

Amendment right to be free from unreasonable seizures, are 'substantially the same' as claims for false arrest or malicious prosecution under state law." (citing *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (false arrest) and *Conway v. Vill. of Mount Kisco*, 750 F.2d 205, 214 (2d Cir. 1984) (malicious prosecution))).

A. The County Defendants

The County defendants move to dismiss the Amended Complaint on a number of grounds. As a threshold matter, the County defendants argue that defendants Lato and Spota are entitled to absolute immunity for their actions insofar as "[e]ach of the claims alleged by the plaintiffs against the [County] defendants relate to the decision to 'secure an indictment' . . . , the means or manner in which evidence was presented to the grand jury, or the conduct of the defendants after the indictment was handed up." (County Mem. at 2.) These actions, according to the County defendants, were "within the scope of their duties in initiating and pursuing the criminal prosecution, or taken in preparation for those functions," and, as such, are actions for which the County defendants are immune from liability. (*Id.*) However, for the reasons set forth herein, the Court finds that while certain of plaintiffs' allegations relate to actions taken by the County defendants in their role as advocates—*i.e.*, actions covered by the absolute immunity doctrine[11]—other allegations relate to the County defendants' conduct in connection with their investigation of plaintiffs prior to the initiation of any prosecution. As to this latter type of investigatory conduct, the Court concludes that, based upon the allegations in the Amended Complaint, it cannot grant absolute immunity to the

[11] Plaintiffs argue that the County defendants should not be absolutely immune even for actions taken in their role as advocates because, according to plaintiffs, the New York State Appellate Division decision issuing a writ of prohibition demonstrates that the County defendants were acting in clear absence of all jurisdiction and, thus, are not protected by the doctrine of absolute immunity. The Court, however, rejects this argument for the reasons discussed *infra.*

County defendants at this juncture under the motion to dismiss standard. Additionally, the Court concludes that, at this stage of the litigation, it also cannot grant the County defendants qualified immunity as a matter of law, given the allegations in the Amended Complaint.

In the alternative, the County defendants move to dismiss the Amended Complaint for failure to state a claim. Specifically, the County defendants argue: (1) plaintiffs have failed to state a conspiracy claim because they have not pled facts sufficient to establish that the Sentosa defendants were state actors;[12] (2) plaintiffs cannot establish a lack of probable cause in connection with their malicious prosecution or false arrest claims because the indictment serves as presumptive evidence of probable cause; (3) plaintiffs' allegations fail to satisfy Rule 8; and (4) the County cannot be held liable because plaintiffs have failed to allege that a County custom or policy caused a violation of plaintiffs' civil rights.[13] The Court will address each of these arguments in turn.

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[12] Because both the County defendants and the Sentosa defendants have argued that plaintiffs have failed to allege that the Sentosa defendants were state actors, the Court will address these arguments together in Section III.B. The conspiracy claims will be addressed in Section III.C.

[13] The County defendants also argue that the claims against District Attorney Spota for failure to supervise should be dismissed under the doctrine of absolute immunity. To the extent that certain claims are subject to absolute immunity, the Court agrees and, for the reasons set forth *infra*, finds that, where it applies, the absolute immunity doctrine would shield both defendant Lato and District Attorney Spota (acting as Lato's supervisor) from liability.

1. Absolute Immunity

a. Legal Standards

"It is by now well established that 'a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution' 'is immune from a civil suit for damages under § 1983.'" *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 410, 431 (1976)). "[D]istrict courts are encouraged to determine the availability of an absolute immunity defense at the earliest appropriate stage, and preferably before discovery. This is because '[a]n absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity.'" *Deronette v. City of New York*, No. 05-CV-5275, 2007 U.S. Dist. LEXIS 21766, at *12 (E.D.N.Y. Mar. 27, 2007) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) and quoting *Imbler*, 424 U.S. at 419 n.13 (additional citations omitted)). However, the Second Circuit has held that in the context of a motion to dismiss under Rule 12(b)(6), "when it may not be gleaned from the complaint whether the conduct objected to was performed by the prosecutor in an advocacy or an investigatory role, the availability of absolute immunity from claims based on such conduct cannot be decided as a matter of law on a motion to dismiss." *Hill v. City of New York*, 45 F.3d 653, 663 (2d Cir. 1995).

"In determining whether absolute immunity obtains, we apply a 'functional approach,' looking to the function being performed rather than to the office or identity of the defendant." *Hill*, 45 F.3d at 660 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993)). In applying this

functional approach, the Second Circuit has held that prosecutors are entitled to absolute immunity for conduct " 'intimately associated with the judicial phase of the criminal process.' " *Fielding v. Tollaksen*, 257 F. App'x 400, 401 (2d Cir. 2007) (quoting *Imbler*, 424 U.S. at 430); *Hill*, 45 F.3d at 661 (same). In particular, "[s]uch immunity . . . extends to 'acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as advocate for the State." *Smith v. Garretto*, 147 F.3d 91, 94 (2d Cir. 1998). On the other hand, "[w]hen a district attorney functions outside his or her role as an advocate for the People, the shield of immunity is absent. Immunity does not protect those acts a prosecutor performs in administration or investigation not undertaken in preparation for judicial proceedings." *Hill*, 45 F.3d at 661; *see also Carbajal v. Cnty. of Nassau*, 271 F. Supp. 2d 415, 421 (E.D.N.Y. 2003) ("[W]hen a prosecutor supervises, conducts, or assists in the investigation of a crime, or gives advice as to the existence of probable cause to make a warrantless arrest—that is, when he performs functions normally associated with a police investigation—he loses his absolute protection from liability." (citation omitted)).

The Second Circuit has noted that "[t]he line between a prosecutor's advocacy and investigating roles might sometimes be difficult to draw." *Zahrey v. Coffey*, 221 F.3d 342, 347 (2d Cir. 2000). The Court, however, may rely on certain established distinctions between these roles. For example, the Supreme Court has explained that "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial,

on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand." *Buckley*, 509 U.S. at 273. In addition, the Second Circuit has identified the juncture in the criminal process before which absolute immunity may not apply. Specifically, "[t]he majority opinion in [*Buckley*] suggests that a prosecutor's conduct prior to the establishment of probable cause should be considered investigative: 'A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.' " *Zahrey*, 221 F.3d at 347 n.2 (quoting *Buckley*, 509 U.S. at 274); *see also Hill*, 45 F.3d at 661 ("Before any formal legal proceeding has begun and before there is probable cause to arrest, it follows that a prosecutor receives only qualified immunity for his acts."). Thus, in interpreting *Buckley*, the Second Circuit has distinguished between "preparing for the presentation of an existing case," on the one hand, and attempting to "furnish evidence on which a prosecution could be based," on the other hand—only the former entitles a prosecutor to absolute immunity. *Smith*, 147 F.3d at 94. Notably, the mere fact that a prosecutor might later convene a grand jury and obtain an indictment does not automatically serve to cloak his prior investigatory actions with the protection of absolute immunity. As the Supreme Court stated in *Buckley*:

> That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial. A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after

> a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial . . . .

Buckley, 509 U.S. at 275-76. Furthermore, "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Id.* at 274 n.5; *see Zahrey*, 221 F.3d at 347 n.2 ("All members of the Court [in *Buckley*] recognized . . . that a prosecutor's conduct even after probable cause exists might be investigative.").

Once a court determines that a prosecutor was acting as an advocate, "a defendant's motivation in performing such advocative functions as deciding to prosecute is irrelevant to the applicability of absolute immunity." *Shmueli*, 424 F.3d at 237 (citation omitted); *see also Bernard v. Cnty. of Suffolk*, 356 F.3d 495, 503 & 507 (2d Cir. 2004) (noting that "once a court determines that challenged conduct involves a function covered by absolute immunity, the actor is shielded from liability for damages regardless of the wrongfulness of his motive or the degree of injury caused" and holding that "a political motive does not deprive prosecutors of absolute immunity from suit for authorized decisions made in the performance of their function as advocates").

However, a prosecutor may lose absolute immunity even for acts performed in his role as an advocate if the prosecutor acts in the "clear absence of all jurisdiction" or "without any colorable claim of authority." *Barr v. Abrams*,

810 F.2d 358, 361 (2d Cir. 1987). In determining whether a prosecutor has acted beyond the scope of any colorable authority in such a manner, "a court will begin by considering whether relevant statutes authorize prosecution for the charged conduct. If they do not, absolute immunity must be denied." *Bernard*, 356 F.3d at 504. However, "if the laws do authorize prosecution for the charged crimes, a court will further consider whether the defendant has intertwined his exercise of authorized prosecutorial discretion with other, unauthorized conduct," including tying the exercise of his discretion "to an unauthorized demand for a bribe, sexual favors, or the defendant's performance of a religious act." *Id.* Ultimately, a prosecutor "will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (citation omitted).[14]

[14] Although *Stump* involved judicial, rather than prosecutorial, immunity, the Court notes that the concepts underlying the two doctrines are the same. *See Barr*, 810 F.2d at 361 (applying *Stump* to issue of prosecutorial immunity and explaining "[s]ince it is well settled that the immunity of prosecutors is based on the same considerations that underlie the immunity of judges, and since there is no functional basis for according a greater degree of protection to prosecutors than to judges, a dissimilar standard would be incongruous" (internal citations omitted)).

b. Application

i. Functional Test

(1) Advocatory Conduct

Applying the functional test to this case, defendants are correct that plaintiffs have made a number of allegations regarding both the initiation of the prosecution against plaintiffs and defendants' presentation of evidence before the grand jury. For example, plaintiffs repeatedly allege that the County defendants' presented false or otherwise improper evidence to the Grand Jury, procured the indictment through false testimony, and conspired with the Sentosa defendants to present false evidence. (*See*, *e.g.*, Am. Compl. ¶ 75 ("Defendant Lato deliberately used lurid photographs of children on ventilators to inflame the passinos of the grand jurors . . . ."); *id.* ¶ 82 (noting that the allegations in the indictment were "based upon the false testimony of Philipson, and/or other Sentosa employees or principals, before the Grand Jury"); *id.* ¶ 83 ("[T]he presentation of evidence to the Grand Jury was improper, in that . . . the Grand Jury was falsely informed that one or more of the nurses had resigned and left the facility before completing his or her shift."); *id.* ¶¶ 84-85 ("[T]he indictment was further based upon knowingly false testimony by Philipson or other Sentosa principals and employees . . . ."); *id.* ¶ 86 ("[T]he [County] Defendants knew that this testimony was false, but nonetheless presented it to the Grand Jury pursuant to their agreement with the Sentosa Defendants.").) Plaintiffs also claim that the County defendants presented the case to the Grand Jury despite having knowledge of exculpatory information and that they failed to present this exculpatory information to the

Grand Jury. (*Id.* ¶¶ 72, 83.) Furthermore, plaintiffs allege that the County defendants failed to properly instruct the Grand Jury on the law. (*Id.* ¶¶ 83, 112.) While these allegations are certainly troubling (if true), these alleged actions were all undertaken as part of the prosecutor's role as an advocate and undoubtedly fall within the scope of the absolute immunity doctrine. *See Peay v. Ajello*, 470 F.3d 65, 67-68 (2d Cir. 2006) ("Plaintiff's claims against [his prosecutor], which encompass activities involving the initiation and pursuit of prosecution [including fabricating evidence used at trial, withholding exculpatory evidence, suborning perjury, and attempting to intimidate him into accepting a guilty plea], are foreclosed by absolute prosecutorial immunity, regardless of their alleged illegality."); *see Hill*, 45 F.3d at 661 (Assistant District Attorney's alleged acts of, *inter alia*, "conspiring to present falsified evidence to, and to withhold exculpatory evidence from, a grand jury" were "clearly protected by the doctrine of absolute immunity as all are part of his function as an advocate"); *Fields v. Soloff*, 920 F.2d 1114, 1120 & n.2 (2d Cir. 1990) (absolute immunity applied where plaintiff challenged actions undertaken by ADAs in their role as legal advisors to the Grand Jury because "[i]nforming the grand jury of the judge's orders and overseeing the wardens in confiscating [unauthorized material from grand jurors] were actions undertaken pursuant to their legal obligation to supervise the jury" and "constituted activity within the scope of their judicial duties"); *Urrego v. United States*, No. 00 CV 1203, 2005 WL 1263291, at *2-3 (E.D.N.Y. May 27, 2005) (finding prosecutor was entitled to absolute immunity where he was alleged to have presented false evidence in order to obtain a superseding indictment); *Storck v. Suffolk Cnty.*

Dep't of Soc. Servs., 62 F. Supp. 2d 927, 943 (E.D.N.Y. 1999) ("A prosecutor is also absolutely immune from charges alleging the withholding of exculpatory evidence from a grand jury and suppressing *Brady* material. An allegation of conspiracy to perform the foregoing acts does not change the conclusion that the acts are entitled to absolute immunity." (internal citations omitted)).

In addition, plaintiffs take issue with the motivation underlying defendants' decision to prosecute plaintiffs. Specifically, plaintiffs allege that the County defendants decided to prosecute plaintiffs only after being pressured to do so by the "politically powerful" Sentosa defendants. (*See*, *e.g.*, Am. Compl. ¶¶ 62-64 ("As a result of their amassed political power and influence, the Sentosa defendants are able to obtain favorable actions from elected officials, which would not be taken . . . without Sentosa's influence. . . . [T]he meeting between the Sentosa defendants, their attorneys, and Defendants Spota . . . had the effect of[ ] pressuring Spota to file an indictment that he would not otherwise have filed . . . ."); *id.* ¶ 69 ("[I]t was at Philipson's instance [sic] that Spota took the unusual step of indicting an attorney for giving advice to his clients."); *id.* ¶ 108 ("The reason for the indictment was to assist the Sentosa Defendants in their quest to punish the Plaintiffs for their part in resigning, and to discourage other nurses . . . from resigning . . . .").) However, as noted *supra*, it is well-settled that a prosecutor's motivation for initiating a prosecution has no impact on a determination of whether the prosecutor should be protected by absolute immunity. Indeed, both the Second Circuit and the Third Circuit have specifically found that allegations of improper political

motives—similar to the allegations here—are not sufficient to remove the prosecutor's actions from scope of absolute immunity where the prosecutor otherwise was acting in his role as an advocate in initiating the prosecution. *See Bernard*, 356 F.3d at 502 (holding that "district court erred in ruling that an improper political motive could take [prosecutors'] decisions to prosecute plaintiffs and their conduct before the grand jury outside the scope of official functions shielded by absolute prosecutorial immunity" because "a defendant's motivation in performing such advocative functions is irrelevant to the applicability of absolute immunity"); *Kulwicki v. Dawson*, 969 F.2d 1454, 1464 (3d Cir. 1992) ("In this case, [plaintiff] alleges that [the prosecutor] had charges brought against him because [plaintiff] was [the prosecutor's] political rival. [The prosecutor] allegedly knew that [plaintiff's actions] did not amount to a conspiracy or an attempt to deal in infant children, yet he directed Detective Loutzenhiser to file the baseless charges. . . . Consideration of personal motives is directly at odds with the Supreme Court's simple functional analysis of prosecutorial immunity, however. The Court has explicitly stated that even groundless charges are protected, in the interest of maintaining vigorous prosecution of crime. . . . . Functionally, [the prosecutor's] actions are absolutely immune. [He] was performing a core prosecutorial function in causing [the detective] to file criminal charges against [plaintiff]." (footnote and citations omitted)). Although plaintiffs object to the fact that the County defendants allegedly undertook this prosecution because of political reasons (*i.e.*, to appease the politically connected Sentosa defendants), this motivation does not change the fact that "the initiation

and pursuit of a criminal prosecution are quintessential prosecutorial functions" that fall squarely within the scope of the absolute immunity doctrine. *Shmueli*, 424 F.3d at 237. This conclusion does not change even if the County defendants shared a desire with the Sentosa defendants to "punish" plaintiffs for resigning. Stated simply, "as long as a prosecutor acts with colorable authority, absolute immunity shields his performance of advocative functions regardless of motivation." *Bernard*, 356 F.3d at 498.[15]

Likewise, the County defendants are also shielded from liability for their decision to prosecute Vinluan in retaliation for exercising his First Amendment rights.[16] Indeed, the Supreme Court has explicitly stated that an "action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official . . . who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory

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[15] The Court addresses plaintiffs' allegations that the County defendants were, in fact, acting without colorable authority *infra* in Section III.A.1.b.ii.

[16] Although Vinluan does not label his claim regarding the First Amendment as a "retaliatory prosecution" claim, it is clear from the Amended Complaint that his allegations should be construed as such. *(See* Am Compl. ¶ 69 ("[I]t was at Philipson's instance [sic] that Spota took the unusual step of indicting an attorney *for giving advice to his clients.*" (emphasis added)); *id.* ¶ 91 ("By prosecuting Vinluan *for exercising his constitutional rights* of free speech and free association the criminal action violated the First Amendment." (emphasis added)); *see also Vinluan*, 873 N.Y.S.2d at 78 (noting that the indictment "attempts to punish Vinluan for exercising his First Amendment right of free speech in providing the nurses with legal advice").)

prosecution, but for successful retaliatory inducement to prosecute." *Hartman v. Moore*, 547 U.S. 250, 261-62 (2006) (internal citation omitted)). Thus, to the extent that plaintiffs' claims are based upon the County defendants' initiation of the prosecution against plaintiffs or their conduct in front of the Grand Jury, the County defendants are absolutely immune from liability on these claims.[17]

However, construing the allegations in the Amended Complaint in plaintiffs' favor for purposes of this motion to dismiss, plaintiffs have also alleged improper investigatory conduct on the part of the County defendants. The County defendants argue that plaintiffs have done no more than merely label defendants' conduct as "investigatory," but, as set forth below, the Court disagrees and finds that plaintiffs have alleged conduct that, if true, would not be protected by the absolute immunity doctrine.[18]

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[17] The Court notes that this absolute immunity protection shields the actions of both defendant Lato, who presented the case to the Grand Jury, and defendant Spota, who acted as Lato's supervisor regarding the initiation of the prosecution and the presentation to the Grand Jury. *See Bodie v. Morgenthau*, 342 F. Supp. 2d 193, 205 (S.D.N.Y. 2004) ("To the extent the supervision or policies concern the prosecutorial decisions for which the ADAs have absolute immunity, then those derivative allegations against supervisors must also be dismissed on the ground that the supervising district attorneys have absolute immunity for the prosecution-related decisions of their subordinates and because Section 1983 supervisory liability depends upon the existence of an underlying constitutional violation." (internal quotation marks omitted)).

[18] The Court notes that defendants are correct that, as a threshold matter, plaintiffs' labeling of various actions as "investigative" or "administrative" in the Amended Complaint is of no moment. *See Wilson v. Barcella*, No. H-05-3646, 2007 U.S. Dist. LEXIS 22934, at *59 (S.D. Tex. Mar. 29, 2007) ("[T]he use of labels in the complaint, such

(2) Investigatory Conduct[19]

Based upon the allegations in the Amended Complaint, the Court is not presented here with a scenario in which the police conducted an investigation and the prosecutors merely took the evidence that the police uncovered and presented it to a Grand Jury. Instead, plaintiffs have alleged a highly unusual set of circumstances in which the police not only lacked involvement in the investigation of plaintiffs, but also had *expressly declined* to investigate plaintiffs because they felt that no crime had been committed. (*See* Am. Compl. ¶ 59 ("Approximately three weeks after the resignations of the Nurse Plaintiffs . . . O'Connor . . . called the Suffolk Police Department to file a complaint. Upon information and belief, the Police Department refused to take any action as, in their stated opinion, no crime had been committed.").) Indeed, drawing all reasonable

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as 'investigative' or 'administrative,' as opposed to 'advocatory,' [does not] resolve the immunity issue."); *Belot v. Wieshaupt*, No. 96 Civ. 3005, 1997 U.S. Dist. LEXIS 5772, at *7 (S.D.N.Y. Apr. 29, 1997) ("[I]t is not enough for plaintiff to allege simply that defendants 'performed investigative functions' or that they were 'involved' in the criminal investigation, plaintiff must also identify wrongdoing by defendants in their investigative capacity."). However, the Court here has looked beyond the labels plaintiffs have used and has examined the conduct alleged to determine whether it took place in the course of "administration or investigation not undertaken in preparation for judicial proceedings." *Hill*, 45 F.3d at 661. As set forth *infra*, this functional analysis of the conduct at issue reveals that, at this stage of the litigation, plaintiffs have provided sufficient factual allegations regarding investigatory misconduct on the part of the County defendants to allow them to survive defendants' motion to dismiss.

[19] The Court addresses the County defendants' argument that they are entitled to qualified immunity for any alleged investigatory conduct *infra* in Section III.A.2.

inference in plaintiffs' favor, plaintiffs allege that it was only after the police took no action on the Sentosa defendants' complaints about plaintiffs that the Sentosa defendants approached the District Attorney's office. (*See id.* ¶ 60.) In other words, it was only after the police declined to get involved that District Attorney Spota allegedly decided to have his staff investigate plaintiffs' conduct. (*See id.* ¶ 70 ("As a result of [the meeting with the Sentosa defendants], Defendant Spota assigned the case to one of his deputies, defendant Leonard Lato, chief of the Insurance Crimes Bureau, *for the purpose of gathering evidence* and securing an indictment." (emphasis added)).) Construing these allegations in the light most favorable to plaintiffs—as the Court must on a motion to dismiss—plaintiffs have pled sufficient facts to support a reasonable inference that the County defendants not only were involved in the investigation of plaintiffs but also were, by necessity, spearheading the investigation of plaintiffs due to the police's decision not to take action. (*See also* Vinluan Supp. at 2 (noting that the investigation was conducted entirely by the County defendants and not the police).)

The County defendants argue in response that, even if their conduct could be deemed investigatory, plaintiffs have not alleged any *wrongdoing* during the investigatory stage that could support a § 1983 action. The Court, however, disagrees. Assuming the allegations in the Amended Complaint to be true and construing them in plaintiffs' favor, plaintiffs' claims are clearly premised upon an allegation that the County defendants manufactured false evidence and testimony during their investigation of plaintiffs. In other words, if there was fabrication of evidence

by prosecutors in the Grand Jury, and the same prosecutors conducted the investigation prior to the Grand Jury presentation, it is certainly reasonable to infer that fabrication also took place in the investigative stage. Thus, the Court finds that plaintiffs have sufficiently pled allegations that the County defendants violated plaintiffs' "constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity, at least where the officer foresees that he himself will use the evidence with a resulting deprivation of liberty." *Zahrey*, 221 F.3d at 344. In *Zahrey*, the Second Circuit addressed similar allegations that the defendant prosecutor had "joined a conspiracy that coerced two witnesses ... to falsely accuse Zahrey of crimes."[20] *Id.* at 345. The defendant prosecutor argued—as do the County defendants here[21]—that "nothing he did *before* presenting evidence to the grand jury violated [the plaintiff's] rights or affected him in any way." *Id.* at 351 n.6 (emphasis in original). The Second Circuit, however,

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[20] The Court notes that in *Zahrey*, the Second Circuit only addressed the issue of qualified immunity, because the prosecutor conceded for purposes of the appeal that the alleged misconduct occurred while he was acting in an investigative capacity. However, the Second Circuit's reasoning is still relevant to the absolute immunity analysis here because it refutes the County defendants' argument that there are no allegations of any "wrongdoing" (*i.e.* that they did not violate any of plaintiffs' constitutional rights) during their investigation of plaintiffs.

[21] The County defendants argue that even if certain conduct was investigatory in nature, the ultimate harm that plaintiffs complain of here relates to events that occurred in relation to the Grand Jury, and thus "relates to conduct that is advocatory in nature and again falls within the ambit of absolute immunity." (County Supp. at 3.) For the reasons set forth *supra*, the Court disagrees.

rejected the defendant's arguments and held that the plaintiff's allegations were sufficient to state a claim for a violation of the plaintiff's constitutional rights. As an initial matter, the *Zahrey* court explained that "if Zahrey had claimed only that Coffey [the prosecutor] fabricated evidence and did nothing to precipitate the sequence of events that resulted in a deprivation of Zahrey's liberty, no constitutional violation would have been alleged." *Id.* at 348. Instead, what propelled the plaintiff's claim into the realm of constitutional violation was his allegation that he had been deprived of his liberty (because of his post-arrest confinement) without due process of law (because of the alleged manufacturing of evidence). *Id.* The court thus framed the constitutional right at issue as "the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity. . . . provided that the deprivation of liberty . . . can be shown to be the result of [the prosecutor's] fabrication of evidence." *Id.* at 349.

As to causation, the court explained that the plaintiff had sufficiently pled that deprivation of the plaintiff's liberty interest was the legally cognizable result of the prosecutor's claimed misconduct. In so holding, the court noted that the case involved "the unusual circumstance" in which "the same person took both the initial act of alleged misconduct and the subsequent intervening act." *Id.* at 352. When faced with analogous circumstances, other courts "have squarely sustained a claim of liability where the same person initiated a liberty deprivation by misconduct and subsequently took a further step in the chain of

causation in an immunized capacity." *Id.* at 353. Accordingly, the Second Circuit explained:

> Coffey acknowledged at oral argument that if he had fabricated evidence and handed it to another prosecutor who unwittingly used it to precipitate Zahrey's loss of liberty, Coffey would be liable for the initial act of fabrication. It would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty. If, as alleged, Coffey fabricated evidence in his investigative role, it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that Zahrey would be indicted and arrested. The complaint adequately alleges that the deprivation of Zahrey's liberty was the legally cognizable result of Coffey's alleged misconduct in fabricating evidence.

Id. at 353-54 (footnotes omitted).

Likewise, plaintiffs in this case have alleged that the County defendants entered "a scheme to deprive a person of liberty" during the investigative stage (prior to the presentation of evidence to the Grand Jury), and that the County defendants' actions pursuant to this scheme deprived plaintiffs of their due process rights.[22] Specifically,

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[22] Although plaintiffs have not specifically stated what kind of due process violation they are alleging, given plaintiffs' claim that they were arrested and detained as a result of the allegedly improper indictment, the Court construes their due process claim as one alleging

insofar as plaintiffs have alleged that the DA's office was in charge of (and was allegedly solely responsible for) the investigation of plaintiffs, plaintiffs' claims are necessarily predicated upon the defendant prosecutors' involvement in the underlying fabrication of evidence against plaintiffs pursuant to the County defendants' illicit agreement with the Sentosa defendants. In other words, drawing all reasonable inferences in plaintiffs' favor, plaintiffs' claims here go beyond a mere allegation that the County defendants conspired to present to the Grand Jury false evidence that they played no role in gathering or fabricating. Instead, reading the Amended Complaint as a whole, plaintiffs have alleged that the prosecutors orchestrated the investigation of plaintiffs after the police declined to get involved, and reached an agreement with the Sentosa defendants to manufacture testimony from the Sentosa defendants that the County defendants knew to be false. (*See*, *e.g.*, Am. Compl. ¶ 70 ("As a result of [the meeting with the Sentosa defendants], Defendant Spota assigned

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a deprivation of plaintiffs' Fourteenth Amendment liberty rights. Moreover, the Court notes that the fabrication of evidence claims are a core element of not only of plaintiffs' § 1983 due process claim, but also of their § 1983 malicious prosecution and false arrest claims. However, the malicious prosecution claim against the County defendants is predicated entirely upon their conduct before the Grand Jury, which is covered by absolute immunity and, therefore, cannot serve as the subject of an independent claim. Likewise, the false arrest claim suffers from the same defect. Instead, as explained in *Zahrey*, where a claim is based upon the alleged unconstitutional acts of a prosecutor during the investigative stage (including the fabrication of evidence), such a claim is properly classified as a due process violation, so long as the due process violation (*i.e.* the investigatory misconduct) causes a subsequent deprivation of liberty, which, in this case, was plaintiffs' arrest following their indictment.

the case to one of his deputies, defendant Leonard Lato . . . for the purpose of gathering evidence . . . ."); *id.* ¶ 86 ("[T]he Suffolk Defendants knew that [the Sentosa witnesses'] testimony was false . . . ."); *id.* ¶ 113 ("[T]he Suffolk Defendants and the Sentosa Defendants agreed that the indictment would be procured, in part, through the use of false testimony by the Sentosa Defendants . . . ."); ¶ 125 ("Spota knew or had reason to know about the improprieties in the investigation . . . ."); *id.* ¶¶ 135-36 ("The Suffolk Defendants agreed among themselves . . . and with the Sentosa Defendants . . . to deprive the Plaintiffs of their constitutional rights . . . . The overt acts in furtherance of this conspiracy . . . begin[ ] with the meeting among Spota and the Sentosa Defendants . . . .").) Thus, as was the case in *Zahrey*, this case "involves the unusual circumstance" in which "the same person took both the initial act of alleged misconduct [fabrication of evidence] and the subsequent intervening act [of presenting the evidence to the grand jury]." *Id.* at 352. Accordingly, the Court disagrees with the County defendants that plaintiffs have not alleged that any wrongdoing occurred during the investigation of plaintiffs and, instead, finds that plaintiffs have sufficiently alleged, for purposes of defendants' motion to dismiss, that the deprivation of plaintiffs' due process rights was caused by the County defendants' alleged investigatory conduct.[23]

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[23] The County defendants focus their arguments almost exclusively on plaintiffs' allegations that defendant Lato lied to plaintiffs that they were not targets of an investigation, which therefore induced plaintiffs to come in for interviews and led them to not demand that they testify before the Grand Jury. However, the County defendants ignore the fact that plaintiffs' allegations, construed in plaintiffs' favor, state a claim for the falsification of evidence and testimony during the investigation of plaintiffs. Because the Court finds that this

The County defendants are not entitled to absolute immunity for such conduct. *See Walker v. McGinnis*, No. 10-2236, 2011 WL 213475, at *1 (3d Cir. Jan. 24, 2011) (district attorney not entitled to absolute immunity where "complaint concern[ed] [DA's] pre-indictment investigation of the allegations against [plaintiff]," including allegations that the DA "manufactured evidence against [plaintiff] in order to establish probable cause to arrest [plaintiff]").

The County defendants respond that their alleged investigatory activity should be construed as mere preparation for the Grand Jury, which would be covered by absolute immunity. However, the Supreme Court has explicitly stated that "[a] prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial . . . ." *Buckley*, 509 U.S. at 275-76; *see also Kent v. Cardone*, No. 10-818-cv, 2011 WL 13906, at *1 (2d Cir. Jan. 5, 2011) ("Although the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom, absolute prosecutorial immunity is afforded only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." (internal quotation marks and citations omitted)); *Zahrey*, 221 F.3d at 353 ("[A] subsequent immunized act of a single

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manufacturing of evidence claim is sufficient to survive defendants' motion to dismiss, the Court need not address whether lying to plaintiffs about their status as targets would also state an independent constitutional violation.

official does not break the chain of causation traceable to his initial misconduct occurring in another capacity."). Defendants here cannot retroactively shield their actions with the protection of absolute immunity, at the motion to dismiss stage, by simply asserting in a conclusory fashion that their investigation was "preparation" for their eventual presentation of evidence to the Grand Jury. Indeed, it is not clear from the current record that a Grand Jury had even been empanelled at the time that the County defendants allegedly conspired with the Sentosa defendants and opened their investigation of plaintiffs. As noted *supra*, "when it may not be gleaned from the complaint whether the conduct objected to was performed by the prosecutor in an advocacy or an investigatory role, the availability of absolute immunity from claims based on such conduct cannot be decided as a matter of law on a motion to dismiss." *Hill*, 45 F.3d at 663.

* * *

In sum, although the Court is cognizant that the issue of absolute immunity should be resolved at the earliest possible stage of the litigation, the Court declines to rule as a matter of law at this stage, given the allegations of investigative misconduct in the Amended Complaint, that the County defendants are absolutely immune from liability for their conduct in investigating plaintiffs. The County defendants are entitled to renew this argument at the summary judgment stage. As to the remainder of plaintiffs' allegations, however, the Court finds that they pertain solely to activity that was undertaken in the County defendants' advocacy role and falls squarely within the scope of the absolute immunity doctrine.

Nonetheless, as to this latter type of "advocacy" conduct, plaintiffs contend that the County defendants are not protected by absolute immunity because, in prosecuting plaintiffs for constitutionally protected activity, the County defendants were acting in a "clear absence of all jurisdiction." For the reasons set forth below, the Court disagrees and finds that the County defendants are absolutely immune for actions that they took in their role as advocates in connection with the Grand Jury proceeding.

ii. The County Defendants Were Not Acting in a Clear Absence of All Jurisdiction

Plaintiffs argue that, because they were "threatened with prosecution for crimes for which they [could not] constitutionally be tried," *Vinluan*, 873 N.Y.S.2d at 83, the County defendants here should be deemed to have acted in a "clear absence of all jurisdiction," thereby removing their conduct from the protection of absolute immunity. In other words, because the indictment against plaintiffs was dismissed on the ground that, as charged, the prosecution violated the plaintiffs' constitutional rights, plaintiffs claim that the statutes at issue did not authorize prosecution for the "charged conduct." (Pls.' Opp. at 14-15.) In support of this argument, plaintiffs rely on the decision of the New York State Appellate Division, which, as described *supra*, granted a writ of prohibition in plaintiffs' favor. Plaintiffs assert that, in issuing the writ, "[t]he Second Department . . . has already undergone [the] analysis" for whether the prosecutors were acting outside the scope of their jurisdiction. (Pls.' Opp. at 14.) However, for the reasons set forth below, the Court finds that the Appellate Division's

decision does not necessitate the conclusion that the County defendants acted without any colorable authority in initiating the prosecution of plaintiffs for purposes of federal absolute immunity law. Instead, the Court concludes, based upon the allegations in the Amended Complaint, that the County defendants were acting with "at least a semblance of jurisdiction," *Shmueli*, 424 F.3d at 237 (internal quotation marks omitted), and, as such, should be protected by absolute immunity for actions taken in their role as advocates.

As an initial matter, a close reading of the Appellate Division's decision reveals that the issuance of a writ of prohibition does not automatically indicate that a prosecutor was acting without any jurisdictional basis. Instead, "prohibition lies to prevent a body or officer . . . from proceeding, or threatening to proceed, without *or in excess of* jurisdiction." *Vinluan*, 873 N.Y.S.2d at 77 (internal quotation marks omitted) (emphasis added). In other words, while the issuance of a writ *may* indicate that the official was acting "without" any authority, it may also indicate that the official was merely acting "in excess of" his jurisdiction. While acting in excess of jurisdiction may be sufficient to warrant granting a petition for prohibition, the Supreme Court has made clear that, for absolute immunity purposes under federal law, it is not enough for the official to have acted "in excess of his authority." *Stump*, 435 U.S. at 356. Instead, the official "will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" *Id.* at 356-57.

In this case, the Appellate Division found only the prosecution of plaintiffs "would be an excess in power."

Vinluan, 873 N.Y.S.2d at 78. This excess of power was more than "a mere error of law," but the court did *not* find that it indicated that the County defendants were acting without any jurisdiction. *Id.* In fact, the Appellate Division explicitly stated that "the Penal Law provisions relating to endangerment of children and the physically disabled, which all the petitioners are charged with violating, do not on their face infringe upon Thirteenth Amendment rights. . . ." *Id.* at 80. Moreover, the court noted that "an employee's abandonment of his or her post in an 'extreme case' may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment. . . ." *Id.* at 81. Similarly, as to the violation of Vinluan's First Amendment rights, at no point did the Appellate Division hold that the DA's Office was without any jurisdiction to initiate a prosecution for the crimes charged in the indictment. Instead, the court's decision focused on the facts of the instant case and held that, under these circumstances, prohibition was warranted to vindicate the threatened violation of plaintiffs' constitutional rights.

Although plaintiffs attempt to paint this situation as a "case of first impression," (Pls.' Opp. at 12), the Court's research has revealed other situations in which individuals were prosecuted in violation of their constitutional rights, but where courts nevertheless found the prosecutors to be absolutely immune from liability. For example, in *Barr*, 810 F.2d 358, the plaintiff had been charged in state court with criminal contempt after he invoked his Fifth Amendment privilege against self-incrimination and refused to produce any documents or answer any questions at an examination conducted by the New York Attorney General's Office. *Id.*

at 360. The state criminal court judge, however, dismissed the criminal information "on the ground that Barr had a fifth amendment right to refuse to answer questions . . . and to produce the requested documents." *Id.* Barr then filed a § 1983 action against the Assistant Attorneys General, among other people, alleging that defendants had "maliciously, without jurisdiction, and for the improper purpose of punishing him for exercising his fifth amendment rights, instigated criminal contempt proceeding against him . . . ." *Id.* In rejecting Barr's argument that "a prosecutor initiating a prosecution loses the protection of *Imbler* where state law did not empower the prosecutor to bring the charges," the Second Circuit explained:

> [A] crabbed reading of *Imbler*, and a holding that a prosecutor is without absolute immunity the moment he strays beyond his jurisdictional limits, would do violence to its spirit. The purpose of the immunity rule is to give to public officials entrusted with sensitive tasks a protected area of discretion within which to carry out their responsibilities. Because we believe that the rule Barr proposes would cause a deflection of the prosecutor's energies from his public duties, and force him to shade his decisions instead of exercising the independence of judgment required by his public trust, we reject it.

Id. at 361 (internal quotation marks and citations omitted).

The Second Circuit explained further that the prosecutors had not acted in the clear absence of jurisdiction because the statutes in question, "'if properly charged,'" authorized the Attorney General to bring contempt

charges for "'an underlying act of continuous concealment directly related to the securities fraud investigation.'" *Id.* at 361-62 (quoting criminal court judge's determination that contempt prosecution fell within the jurisdiction of the Attorney General).

The Court finds that *Barr* is directly on-point here and requires the Court to reject plaintiffs' argument that the County defendants in this case were acting beyond the scope of any colorable authority. Specifically, as in *Barr*, plaintiffs here claim that the state laws in question did not empower the prosecutors to bring the charges alleged in the indictment. However, the Second Circuit's decision in *Barr* clearly precludes the argument that a prosecutor is not jurisdictionally empowered to bring particular charges simply because those charges are predicated upon constitutionally protected conduct. Instead, the question is whether the statutes at issue, *if properly charged*, would authorize the prosecutor to initiate a criminal case. Here, there is no question that the Penal Law criminalizes conspiracy, solicitation, and endangerment, and that the District Attorney's Office is empowered to bring charges for those offenses. *See* N.Y. Penal Law § 105.00 ("A person is guilty of conspiracy in the sixth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct."); N.Y. Penal Law § 100.00 ("A person is guilty of criminal solicitation in the fifth degree when, with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct."); N.Y. Penal Law § 260.10

(endangering the welfare of a child); N.Y. Penal Law §§ 260.25, 260.32, 260.34 (defining various levels of offenses for endangering the welfare of a physically disabled person); Suffolk Cnty. Law § C19-2, L.L. No. 25-1975 ("The District Attorney shall have and exercise all the powers and duties now or hereafter conferred or imposed by any applicable law, including the power to hire assistants, clerical help, and such investigative personnel as the County Legislature may allow in the budget.").[24] Thus, the County defendants were not acting without any colorable claim of authority in initiating the prosecution of plaintiffs. *See Shmueli*, 424 F.3d at 238 (where plaintiff was alleged to have made several dozen harassing phone calls to victim in New York County, prosecutor had absolute immunity for bringing case where state laws prohibited harassment, granted jurisdiction to Criminal Court in New York County, and gave the District Attorney authority to prosecute offenses within that County and to appoint assistant district attorneys to assist him); *Schloss v. Bouse*, 876 F.2d 287, 289, 292 (2d Cir. 1989) (after charges against plaintiffs were not pursued when "it became apparent . . . that in fact plaintiffs had committed no crime," prosecutor was entitled to absolute immunity for demanding that plaintiffs sign forms releasing police and municipalities from liability because a demand for a release is analogous to plea bargaining, which "may be a valid part of the government attorney's function," and thus "is not beyond the

[24] The Court notes that the parties do not specify which provisions of the Penal Law plaintiffs were charged with in connection with the endangerment offenses. In any event, it is undisputed that the Penal Law authorizes charges for endangering the welfare of a child and endangering the welfare of a physically disabled person.

prosecutor's jurisdiction"); *Rudow v. City of New York*, 822 F.2d 324, 326, 329 (2d Cir. 1987) (Human Rights Commission prosecutor entitled to absolute immunity because although she failed to obtain prior HRC permission to participate in the case beyond the state Supreme Court stage, which "may have exceeded the specific jurisdictional authority delegated to her" and "carried her beyond the bureaucratic boundaries of her position," her conduct "[n]evertheless . . . remained within the general jurisdiction of the HRC and its staff" and thus her "practice before the appellate courts was not undertaken in the clear absence of jurisdiction").

Other courts have similarly found that absolute immunity still applies where a prosecutor brought a case in violation of a defendant's constitutional rights but was otherwise acting within his role as an advocate. For example, in *Nivens v. Gilchrist*, 444 F.3d 237, 250 (4th Cir. 2006), plaintiffs brought a § 1983 action alleging that the indictment and pending prosecution of plaintiffs violated their double jeopardy rights. In holding that the prosecutor was entitled to absolute immunity, the Fourth Circuit explained that, despite the alleged constitutional violation, "[t]here is no doubt that the actions complained of in this case form the essence of [the defendant's] prosecutorial duties," and, accordingly, "he is plainly afforded absolute immunity from Appellant's claim for damages." *Id. See also Alvarez v. Haley*, No. 10-cv-4263 (PAM/JJG), 2011 WL 825694, at *2 (D. Minn. Feb. 9, 2011) (recommending that, where plaintiff alleged that the county attorney violated the double jeopardy clause by bringing new charges against plaintiff, complaint should be summarily dismissed because

"Defendant [was] being sued for purely prosecutorial activities" for which she was "clearly entitled to prosecutorial immunity"); *Thomas v. Cnty. of Hawaii*, No. 07-00251 (JMS/LEK), 2008 WL 4483792, at *5-6 (D. Hawaii Oct. 1, 2008) (where plaintiff alleged that prosecutors violated his constitutional rights by, *inter alia*, instituting prosecution in violation of the double jeopardy clause, prosecutors were entitled to absolute immunity because the "decision to file the criminal charge goes to the essence of Defendants' prosecutorial duties" and "[p]laintiff's argument misses the point of absolute immunity," which "protects a prosecutor from civil liability 'whether or not he or she violated the civil plaintiff's constitutional rights'" (quoting *Broam v. Bogan*, 320 F.3d 1023, 1029 (9th Cir. 2003))). As an additional example, in *Smith*, 147 F.3d 91, plaintiff alleged that the defendant prosecutor had violated plaintiff's First Amendment rights by, *inter alia*, presenting a bribery case to the grand jury in alleged retaliation for plaintiff's exercise of his free speech rights. *Id.* at 92-93. Although the Second Circuit did not address the issue, the district court held that the prosecutor was entitled to absolute immunity for the institution of criminal proceedings, and the Second Circuit affirmed on appeal. *Id.* at 93, 95. Likewise, in *Walker*, 2011 WL 213475, the Third Circuit held that the defendant prosecutor was entitled to absolute immunity from monetary liability based on the decision to prosecute, even where prosecutor was alleged to have violated plaintiffs "First Amendment rights by prosecuting him based on false evidence in retaliation for his decision to seek political office." *Id.* at *1.

In fact, the Supreme Court spoke to this issue in *Hartman*, 547 U.S. 250, and explicitly stated that a § 1983 "action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute." *Id.* at 261-62. Instead, such a claim—which is premised upon a violation of the First Amendment—must be brought against "a nonprosecutor, an official . . . who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute." *Id.* at 262.

Accordingly, given the allegations in the Amended Complaint, this Court concludes that the County defendants were not acting in a clear absence of jurisdiction merely because the prosecution here was allegedly commenced to punish plaintiffs for engaging in constitutionally protected conduct. To hold otherwise "would totally abrogate the immunity doctrine because any allegation that an official, acting under color of law, has deprived someone of his rights necessarily implies that . . . the official exceeded his authority." *Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 678 (9th Cir. 1984) (internal quotation marks omitted) (rejecting plaintiff's argument that prosecutor's "action cannot fall within his scope of authority because it [was] unconstitutional" under *Brady*). Thus, the County defendants are entitled to absolute immunity for actions that they took in their role as advocates (*i.e.*, their decision to initiate the prosecution of plaintiffs and their presentation of evidence to the Grand Jury).

Moreover, the fact that this prosecution was halted via the issuance of a writ of prohibition does not distinguish

this case from other cases where prosecutors were found to be insulated from liability. Although the issuance of a writ of prohibition may be an unusual occurrence, the Appellate Division provided examples of other constitutional violations that would warrant prohibition, namely: a prosecution in violation of the Fifth Amendment privilege against self-incrimination or a prosecution in violation of an individual's right against double jeopardy. *Vinluan*, 873 N.Y.S.2d at 78. The Court notes that these were precisely the rights at issue in *Barr* (Fifth Amendment), *Nivens* (double jeopardy), *Alvarez* (double jeopardy), and *Thomas* (double jeopardy), and, as described *supra*, each of those courts found that the prosecutor was nonetheless entitled to absolute immunity. Thus, despite plaintiffs' claims to the contrary, the mere fact that the Appellate Division found prohibition to be appropriate here does not make this case so unique in the realm of constitutional violations as to warrant depriving the County defendants of absolute immunity for their conduct as advocates.[25]

* * *

In sum, having carefully reviewed the allegations in the Amended Complaint, the Court rejects plaintiffs' argument that the County defendants were acting without any colorable claim of authority when they initiated the prosecution of plaintiffs and presented the case to the Grand Jury. Accordingly, given that it is undisputed that the County defendants had the authority, as a general

[25] The Court notes that there are no allegations here that the defendants "intertwined [their] exercise of authorized prosecutorial discretion with other, unauthorized conduct," such as accepting bribes or other inappropriate personal favors. *Bernard*, 356 F.3d at 504.

matter, to initiate prosecutions for endangerment, solicitation, and conspiracy, the Court finds that the County defendants are entitled to absolute immunity for such actions.

2. Qualified Immunity

In the alternative to their absolute immunity argument, the County defendants assert that they should be entitled to qualified immunity for any alleged investigatory activity. As set forth below, the Court concludes that the Amended Complaint does not provide a sufficient basis at this juncture for the Court to determine whether defendants are entitled to qualified immunity. Again, the motion to dismiss is denied without prejudice to renew such motion at the summary judgment stage.

a. Legal Standard

If absolute immunity does not apply, government actors may be shielded from liability for civil damages by qualified immunity, *i.e.*, if their "conduct did not violate plaintiff's clearly established rights, or if it would have been objectively reasonable for the official to believe that his conduct did not violate plaintiff's rights." *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 385 (2d Cir. 2003); *see also Fielding*, 257 F. App'x at 401 ("The police officers, in turn, are protected by qualified immunity if their actions do not violate clearly established law, or it was objectively reasonable for them to believe that their actions did not violate the law."). As the Second Circuit has also noted, "[t]his doctrine is said to be justified in part by the risk that the 'fear

of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties.'" *McClellan v. Smith*, 439 F.3d 137, 147 (2d Cir. 2006) (quoting *Thomas v. Roach*, 165 F.3d 137, 142 (2d Cir. 1999)). Thus, qualified immunity, just like absolute immunity, is not merely a defense, but rather is also "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Accordingly, the availability of qualified immunity should similarly be decided by a court "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

Nonetheless, the Second Circuit has emphasized that "a defendant presenting an immunity defense on a Rule 12(b)(6) motion instead of a motion for summary judgment must accept the more stringent standard applicable to this procedural route." *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004); *see also McCray v. City of New York*, Nos. 03-cv-9685, 03-cv-9974, 03-cv-10080, 2007 U.S. Dist. LEXIS 90875, at *66 (S.D.N.Y. Dec. 11, 2007) ("A defendant asserting a qualified immunity defense at the 12(b)(6) stage . . . faces a formidable hurdle. Because the evidence supporting a finding of qualified immunity is normally adduced during the discovery process and at trial, the defense of qualified immunity [usually] cannot support the grant of a Fed.R.Civ.P. 12(b)(6) motion for failure to state a claim upon which relief can be granted." (internal citations and quotation marks omitted)). In particular, the facts supporting the defense must be clear from the face of the complaint. In addition, in such situations, "plaintiff is entitled to all reasonable inferences from the facts alleged, not only

those that support his claim, but also those that defeat the immunity defense." *Id.*

"The availability of the defense depends on whether a reasonable officer could have believed his action to be lawful, in light of clearly established law and the information he possessed." *Weyant v. Okst*, 101 F.3d 845, 858 (2d Cir. 1996) (internal quotation marks and alterations omitted). In the context of false arrest and malicious prosecution claims, an arresting officer is entitled to qualified immunity if either: (a) the arresting officer's belief that probable cause existed was objectively reasonable; or (b) officers of reasonable competence could disagree on whether the test for probable cause was met. *See Walczyk v. Rio*, 496 F.3d 139, 163 (2d Cir. 2007). The Second Circuit has defined this standard, which is often referred to as "arguable probable cause," as follows:

> Arguable probable cause exists when a reasonable police officer in the same circumstances and possessing the same knowledge as the officer in question *could* have reasonably believed that probable cause existed in the light of well established law. It is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they believe to be lawful—should not be held personally liable.

Cerrone v. Brown, 246 F.3d 194, 202-03 (2d Cir. 2001) (internal quotation marks and citations omitted) (emphasis in original). In particular, the Second Circuit has affirmed

that "'[a]rguable' probable cause should not be misunderstood to mean 'almost' probable cause .... If officers of reasonable competence would have to agree that the information possessed by the officer at the time of arrest did not add up to probable cause, the fact that it came close does not immunize the officer." *Jenkins v. City of New York*, 478 F.3d 76, 87 (2d Cir. 2007). Under this standard, an arresting officer is entitled to qualified immunity, as a matter of law, only "if the *undisputed facts* and all permissible inferences favorable to the plaintiff show . . . that officers of reasonable competence could disagree on whether the probable cause test was met." *McClellan*, 439 F.3d at 147-48 (quoting *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987)) (emphasis in original).

Although qualified immunity typically is asserted by police officers, the qualified immunity standard of arguable probable cause also applies to prosecutors. *See Murphy v. Neuberger*, No. 94 Civ. 7421, 1996 U.S. Dist. LEXIS 11164, at *37-38 (S.D.N.Y. Aug. 6, 1996) (applying arguable probable cause standard to prosecutor's actions after determining that prosecutor was not entitled to absolute immunity); *Hickey v. City of New York*, No. 01-CV-6506 (GEL), 2002 U.S. Dist. LEXIS 15944, at *14-15 (S.D.N.Y. Aug. 26, 2002) ("There is no question that the right not to be arrested and subjected to lengthy involuntary detention in police custody without probable cause to support the arrest is firmly established, and any reasonable police officer, let alone prosecutor, would reasonably be expected to know that." (internal citations omitted)).

b. Application

In the instant case, plaintiffs have alleged various violations of their constitutional rights against the County defendant prosecutors, including, for example, that the County defendants: (1) prosecuted plaintiffs despite the fact that plaintiffs had not committed a crime and that defendants knew or should have known that plaintiffs could not constitutionally be prosecuted for their conduct; (2) "agreed to do what was necessary to procure the indictment, for the sole benefit of the Sentosa defendants" (Am. Compl. ¶ 114); (3) maliciously prosecuted plaintiffs to punish them for exercising their constitutional rights; and (4) fabricated evidence that was ultimately used in the Grand Jury as a basis for plaintiffs' indictment and, consequently, resulted in a deprivation of plaintiffs' liberty. Moreover, plaintiffs allege that the County defendants were aware of significant exculpatory evidence prior to plaintiffs' indictment but that the County defendants nonetheless initiated an investigation of plaintiffs and presented knowingly false evidence to the Grand Jury. Specifically, plaintiffs allege that Vinluan provided ADA Lato with evidence regarding the State Education Department's decision exonerating plaintiffs of any wrongdoing, Justice Bucaria's decision denying Sentosa's application for a preliminary injunction due to a failure to prove a likelihood of success on the merits, and information demonstrating that none of the nurse plaintiffs had resigned during a shift. (*Id.* ¶ 72.) Further, plaintiffs allege that the Suffolk County Police Department declined to take any action against plaintiffs in response to a complaint from defendant O'Connor

because "in [the police's] stated opinion, no crime had been committed." (*Id.* ¶ 59.)

Although the County defendants dispute these allegations, there is simply insufficient information at this early stage to determine whether the conduct of the County defendants is protected by qualified immunity. In particular, if plaintiffs prove their allegations that defendants Spota and Lato falsified evidence during the investigation of plaintiffs and such falsification lead to the deprivation of plaintiffs' liberty in the form of an arrest, defendants would not be entitled to qualified immunity. *See Zahrey*, 221 F.3d at 357 (where plaintiff put forth sufficient allegations that he was deprived of liberty as a result of prosecutor's fabrication of evidence during the investigation of plaintiff, court could not grant defendant prosecutor qualified immunity as a matter of law on a motion to dismiss). Accordingly, the Court is presently unable to make a determination, as a matter of law, that plaintiffs do not have a plausible claim that would enable them to overcome the defense of qualified immunity and entitle them to relief. *See*, *e.g.*, *McCray*, 2007 U.S. Dist. LEXIS 90875, at *69 (where plaintiffs "made broad, general claims including that Defendants intentionally suppressed material, exculpatory evidence, . . . fabricated evidence wholesale, and . . . engaged in impermissibly coercive interrogation tactics," court denied qualified immunity on a motion to dismiss because "[i]f a jury were to believe Plaintiffs' accounts of what transpired in the course of their arrests and prosecution, then officers would not be able to establish that they had arguable probable cause to arrest and prosecute Plaintiffs. . . . Further factual

determinations are clearly prerequisite to determining whether [defendants] are entitled to a qualified immunity bar from Plaintiffs' suit."); *Bostic v. City of Binghamton*, No. 3:06-CV-540, 2006 U.S. Dist. LEXIS 73948, at *13 (N.D.N.Y. Oct. 11, 2006) ("While the facts that may be established through discovery might lead to the conclusion that the individual defendants possessed actual or arguable probable cause to arrest Plaintiff and commence his prosecution . . . that determination will have to await a summary judgment motion or trial."); *Murphy*, 1996 U.S. Dist. LEXIS 11164, at *39-40 (finding that because "[i]t is unclear from the undeveloped record before the Court whether it was objectively reasonable for the defendants to believe that they had probable cause to arrest plaintiff," police officers and prosecutor were not entitled to qualified immunity); *Hickey*, 2002 U.S. Dist. LEXIS 15944, at *16 (denying qualified immunity to police and prosecutors because "the fact-intensive question of what the defendants knew or reasonably believed, or indeed whether there is any material dispute about that question, can only be addressed on a fuller factual record, at summary judgment or trial").[26]

In sum, while the Court again recognizes that the qualified immunity issue should be decided at the earliest juncture where possible, the County defendants' motion to

[26] The Court is aware, as argued by defendants in their motion to dismiss, that a grand jury indictment gives rise to a presumption of probable cause. However, as discussed *infra*, the Court finds that plaintiffs have put forth sufficient allegations to overcome this presumption and, accordingly, the Court cannot, for purposes of the pending motions, rely on the indictment to infer probable cause for plaintiffs' prosecution.

dismiss plaintiffs' claims on the basis of qualified immunity is denied, given the allegations in the complaint. *See Posr v. Court Officer Shield # 207*, 180 F.3d 409, 416 (2d Cir. 1999) (finding insufficient factual basis to grant motion to dismiss on qualified immunity grounds); *Caidor*, 2006 U.S. Dist. LEXIS 22980, at *53 (denying motion to dismiss on qualified immunity grounds with leave to renew because "at this juncture, the complaint provides insufficient facts to make a determination regarding this issue"). *Cf. Castro v. United States*, 34 F.3d 106, 112 (2d Cir. 1994) ("Although a defense of qualified immunity should ordinarily be decided at the earliest possible stage in litigation . . . some limited and carefully tailored discovery may be needed before summary judgment will be appropriate." (internal citations and quotation marks omitted)).

3. Failure to State a Claim

a. Probable Cause

The County defendants argue that they had probable cause to prosecute and arrest plaintiffs, as demonstrated by the existence of the indictment, and that any alleged investigatory misconduct did not result in any deprivation of plaintiffs' liberty rights. Thus, the Court must examine whether, in this case, the existence of the indictment creates a presumption of probable cause that defeats the causation element of plaintiffs' § 1983 due process claim against the County defendants. For the reasons set forth below, the Court concludes that the allegations in the Amended Complaint are sufficient to overcome the

presumption of probable cause that normally attaches to an indictment.

As a threshold matter, defendants are correct that a grand jury indictment does give rise to a presumption of probable cause for purposes of a malicious prosecution claim. *See Bernard v. United States*, 25 F.3d 98, 104 (2d Cir. 1994). However, a showing of "fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith" can overcome this presumption. *Id.* (citation omitted); *see also Brogdon v. City of New Rochelle*, 200 F. Supp. 2d 411, 421 (S.D.N.Y. 2002) ("An indictment by a grand jury creates a presumption of probable cause that can only be overcome by establishing that the indictment itself was procured by 'fraud, perjury, the suppression of evidence or other police conduct undertaken in bad faith.' " (quoting *Bernard*, 25 F.3d at 104)). Where the perjury was alleged to have been committed by a civilian witness, a plaintiff must show that "the prosecuting authorities were complicit in the perjury" in order to overcome the presumption. *Watson v. Grady*, No. 09-cv-3055 (KMK), 2010 WL 3835047, at *9 (S.D.N.Y. Sept. 30, 2010) (internal quotation marks omitted). According to the Amended Complaint, the Grand Jury indicted plaintiffs based upon falsified evidence and testimony that was presented to the Grand Jury after the County defendants had been provided with significant exculpatory evidence regarding plaintiffs' conduct. Plaintiffs also allege that the Sentosa defendants and the County defendants agreed to present this false evidence to the Grand Jury in order to procure the indictment of plaintiffs, despite the fact that defendants knew or should have known that plaintiffs could not

be constitutionally prosecuted for their conduct. These allegations, taken as true for purposes of this motion, are sufficient to overcome the presumption of probable cause that the Grand Jury indictment might otherwise afford. Thus, the County defendants' motion to dismiss plaintiffs' claims because of the existence of probable cause is denied.

b. Rule 8

Rule 8 of the Federal Rules of Civil Procedure requires that pleadings present a "short and plain statement of the claim showing that the pleader is entitled to relief." *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 512 (2002). Pleadings are to give "fair notice of what the plaintiff's claim is and the grounds upon which it rests" in order to enable the opposing party to answer and prepare for trial, and to identify the nature of the case. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley v. Gibson*, 335 U.S. 41, 47 (1957), *overruled in part on other grounds by Twombly*, 550 U.S. at 554).

In *Twombly*, the Supreme Court clarified this pleading standard, declaring that:

> While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the

> claim, but also "grounds" on which the claim rests.

550 U.S. at 556 n.3 (emphasis in original) (quoting *Conley*, 355 U.S. at 47, and citing 5C, Wright & A. Miller, Federal Practice & Procedure § 1202, at 94, 95 (3d ed. 2004)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

Plaintiffs' claims here are clearly sufficient to satisfy the notice pleading requirements of Rule 8. Specifically, the Amended Complaint gives defendants' notice of plaintiffs' claims and sets forth sufficient detailed allegations, as outlined herein, to describe the bases for their claims. Indeed, there is no confusion as to the specific events that allegedly giving rise to plaintiffs' claims, including plaintiffs' resignation from Avalon Gardens, the subsequent retaliatory conduct by the Sentosa defendants, the County defendants' alleged agreement with the Sentosa defendants to maliciously prosecute plaintiffs, and the County defendants' alleged misconduct during their investigation of plaintiffs. Accordingly, the County defendants' motion to dismiss the Amended Complaint under Rule 8 is denied.

c. Municipal Liability

The County defendants move to dismiss the claim of municipal liability against the County of Suffolk on the

ground that the Amended Complaint is "void of any . . . facts sufficient to establish that a custom and/or policy of the County caused a violation of plaintiffs' constitutional rights. . . ." (Cnty. Defs. Mem. at 14.) For the reasons set forth below, the Court disagrees and denies their motion to dismiss at this juncture.

Under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), a municipal entity may be held liable under Section 1983 where a plaintiff demonstrates that the constitutional violation complained of was caused by a municipal "policy or custom." *Id.* at 694-95; *see also Patterson v. Cnty. of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004); *Abreu v. City of New York*, No. 04-CV-1721, 2006 WL 401651, at *4 (E.D.N.Y. Feb. 22, 2006) ("A municipality will not be held liable under Section 1983 unless the plaintiff can demonstrate that the allegedly unconstitutional action of an individual law enforcement official was taken pursuant to a policy or custom officially adopted and promulgated by that [municipality's] officers." (internal quotation marks omitted)). "The policy or custom need not be memorialized in a specific rule or regulation." *Kern v. City of Rochester*, 93 F.3d 38, 44 (2d Cir. 1996) (citing *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 870 (2d Cir. 1992)). Instead, a policy, custom, or practice of the municipal entity may be inferred where " 'the municipality so failed to train its employees as to display a deliberate indifference to the constitutional rights of those within its jurisdiction.' " *Patterson*, 375 F.3d at 226 (quoting *Kern*, 93 F.3d at 44). Likewise, a municipality's failure to supervise its officers "can rise to the level of an actionable policy or custom where it amounts to 'deliberate indifference' to the

constitutional rights of its citizens." *Hall v. Marshall*, 479 F. Supp. 2d 304, 315-16 (E.D.N.Y. 2007) (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) and *Thomas v. Roach*, 165 F.3d 137, 145 (2d Cir. 1999) ("A municipality may be liable under § 1983 . . . where the City's failure to supervise or discipline its officers amounts to a policy of deliberate indifference.")). However, "the mere assertion . . . that a municipality has such a custom or policy is insufficient in the absence of allegations of fact tending to support, at least circumstantially, such an inference." *Zahra v. Town of Southold*, 48 F.3d 674, 685 (2d Cir. 1995) (internal quotation marks omitted).

Furthermore, a municipal entity may only be held liable where the entity itself commits a wrong; "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691 (emphasis in original); *see also Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("*Monell* does not provide a separate cause of action for the failure by the government to train its employees; it *extends* liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." (emphasis in original)); *Zahra*, 48 F.3d at 685 ("A municipality may not be held liable in an action under 42 U.S.C. § 1983 for actions alleged to be unconstitutional by its employees below the policymaking level solely on the basis of *respondeat superior.*"); *Vippolis v. Vill. of Haverstraw*, 768 F.2d 40, 44 (2d Cir. 1985) ("A plaintiff who seeks to hold a municipality liable in damages under section 1983 must prove that the municipality was, in the language of the statute, the 'person who . . .

subjected, or cause[d] [him] to be subjected,' to the deprivation of his constitutional rights, 42 U.S.C. § 1983.").

The Court finds that plaintiffs have alleged sufficient facts to state a plausible claim for municipal liability based upon a failure to supervise.[27] Specifically, plaintiffs allege that District Attorney Spota, acting on behalf of the County of Suffolk, was obligated to supervise his employees at the District Attorney's Office but failed to do so "in that this indictment was procured through improper means and in violation of the constitutional rights of the Plaintiffs." (Am. Compl. ¶¶ 123-24.) Plaintiffs further allege that Spota "knew or had reason to know about the improprieties in the investigation," and about the fact that plaintiffs could not constitutionally be tried for their conduct, "but did not take any steps to terminate the prosecution." (*Id.* ¶ 125; *see also id.* ¶¶ 110-11.) In the context of the entire complaint, including allegations that Spota initiated the investigation of plaintiffs only after his meeting with the Sentosa defendants (who had been unable to spur the police to take any action against plaintiffs), the Court finds that these allegations provide "enough facts to state a claim to relief that is plausible on its face" and is,

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[27] The Court notes that, given the many allegations in the Amended Complaint regarding the personal involvement of the District Attorney, municipal liability in this case against the County can also be based upon District Attorney Spota's alleged role as the final policymaker. *See Gronowski v. Spencer*, 424 F.3d 285, 296 (2d Cir. 2005) ("Municipal liability may attach under § 1983 when a [municipal] policymaker takes action that violates an individual's constitutional rights.").

therefore, sufficient to avoid dismissal. *Twombly*, 550 U.S. at 570.[28]

B. The Sentosa Defendants

As a threshold matter, the Sentosa defendants have moved to dismiss the claims against them in the Amended Complaint on the ground that the Sentosa defendants were not acting "under color of state law" for purposes of § 1983 liability. However, for the reasons set forth below, the Court finds that, with the exception of defendants O'Connor and Fitzgerald, plaintiffs have alleged sufficient joint action between the Sentosa defendants and the County defendants to survive the Sentosa defendants' motion to dismiss.

Alternatively, the Sentosa defendants argue that plaintiffs have failed to state a claim under § 1983 and state law for malicious prosecution and false arrest. For the reasons set forth below, the Court disagrees, and finds that, except as to defendants O'Connor and Fitzgerald,

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[28] The Court is aware that a county cannot be liable for the acts of a district attorney related to the decision to prosecute or not prosecute an individual. *See Myers v. Cnty. of Orange*, 157 F.3d 66, 77 (2d Cir. 1998); *Pinaud v. Cnty. of Suffolk*, 52 F.3d 1139, 1153-54 (2d Cir. 1995) (finding no municipal liability for actions of ADA unless related to management of office or history of negligence). However, investigatory activity by a DA's office can subject the County to *Monell* liability. *See Myers*, 157 F.3d at 77. Here, as noted above, plaintiffs have alleged misconduct during the investigation of plaintiffs and that Spota was aware of that misconduct but took no action and, consequently, failed to supervise his employees. Construing the Amended Complaint in plaintiffs' favor, these allegations are sufficient at this juncture to survive a motion to dismiss.

plaintiffs have provided sufficient factual allegations to plead a claim for both malicious prosecution and false arrest. Accordingly, the motion to dismiss filed by defendants Philipson, Luyun, Rubenstein, Sentosa Care, Prompt, and Avalon Gardens is denied in its entirety. However, as to defendants O'Connor and Fitzgerald, the Court dismisses the claims against them without prejudice for failure to state a claim, and will provide plaintiffs with an opportunity to re-plead.

1. Color of State Law

a. Legal Standard

As noted *supra*, in order to prevail on a federal civil rights action under Section 1983, a plaintiff must demonstrate: (1) the deprivation of any rights, privileges, or immunities secured by the Constitution and laws; (2) by a person acting under the color of state law. 42 U.S.C. § 1983. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993). However, even if a plaintiff has adequately alleged a constitutional injury, a Section 1983 claim cannot be successful unless it can be demonstrated that such injury was caused by a party acting under the "color of state law," and thus the central question is whether the alleged infringement of federal rights is "fairly attributable to the State." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Wyatt v. Cole*, 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to

deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); *Tancredi v. Metro. Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003) ("A plaintiff pressing a claim of violation of his constitutional rights under § 1983 is thus required to show state action.").

It is axiomatic that private citizens and entities are not generally subject to Section 1983 liability. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002); *Reaves v. Dep't of Veterans Affairs*, No. 08-CV-1624 (RJD), 2009 WL 35074, at *3 (E.D.N.Y. Jan. 6, 2009) ("Purely private conduct is not actionable under § 1983, 'no matter how discriminatory or wrongful.'" (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999))). However, as the Second Circuit has explained:

> [T]he actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state ('the compulsion test'); (2) when the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the [s]tate,' or the entity's functions are 'entwined' with state policies ('the joint action test' or 'close nexus test'); or (3) when the entity 'has been delegated a public function by the [s]tate,' ('the public function test').

Sybalski v. Indep. Gr. Home Living Program, Inc., 546 F.3d 255, 257 (2d Cir. 2008) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 296 (2001)); *see also Luciano v. City of New York*, No. 09-CV-0539 (DC),

2009 WL 1953431, at *2 (S.D.N.Y. July 2, 2009) (stating that a private entity may only be considered a state actor for the purposes of § 1983 if the private entity fulfills one of the "state compulsion," "public function" or "close nexus" tests); *accord Faraldo v. Kessler*, No. 08-CV-0261 (SJF), 2008 WL 216608, at *4 (E.D.N.Y. Jan. 23, 2008). In addition, liability under § 1983 may also apply to a private party who "conspires with a state official to violate the plaintiff's constitutional rights . . . ." *Fisk v. Letterman*, 401 F. Supp. 2d 362, 378 (S.D.N.Y. 2005) (report and recommendation), *adopted in relevant part by Fisk v. Letterman*, 401 F. Supp. 2d 362 (S.D.N.Y. 2005). A plaintiff "bears the burden of proof on the state action issue." *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1083 n.3 (2d Cir. 1990).

In this case, plaintiffs have only put forth allegations related to either "joint action" or a conspiracy between the Sentosa defendants and the County defendants. Under the "joint action" doctrine, a private actor can be found "to act 'under color of' state law for § 1983 purposes . . . [if the private party] is a willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). "The touchstone of joint action is often a 'plan, prearrangement, conspiracy, custom, or policy' shared by the private actor and the police." *Forbes v. City of New York*, No. 05-CV-7331 (NRB), 2008 WL 3539936, at *5 (S.D.N.Y. Aug. 12, 2008) (citing *Ginsberg v. Healey Car & Truck Leasing, Inc.*, 189 F.3d 268, 272 (2d Cir. 1999)). "To establish joint action, a plaintiff must show that the private citizen and the state official shared a common unlawful goal; the true state actor and the jointly acting private

party must agree to deprive the plaintiff of rights guaranteed by federal law." *Bang v. Utopia Restaurant*, 923 F. Supp. 46, 49 (S.D.N.Y. 1996); *see also Burrell v. City of Mattoon*, 378 F.3d 642, 650 (7th Cir. 2004) (under joint action requirement, plaintiff must show that "both public and private actors share a common, unconstitutional goal" (internal quotation marks omitted)). The provision of information to, or the summoning of, police officers is not sufficient to constitute joint action with state actors for purposes of § 1983, even if the information provided is false or results in the officers taking affirmative action. *See Ginsberg*, 189 F.3d at 272 ("Healey's provision of background information to a police officer does not by itself make Healey a joint participant in state action under § 1983 . . . [and] Officer Fitzgerald's active role in attempting to resolve the dispute after Healey requested police assistance in preventing further disturbance also does not, without more, establish that Healey acted under color of law." (internal citations omitted)). Similarly, if a police officer's actions are due to the officer's own initiative, rather than the directive of a private party, the private party will not be deemed a state actor. *See Shapiro v. City of Glen Cove*, 236 F. App'x 645, 647 (2d Cir. 2007) ("[N]o evidence supports Shapiro's contention that Weiss-Horvath acted jointly with the Glen Cove defendants to deprive her of her constitutional rights, and ample evidence shows that the Glen Cove officials who searched her house exercised independent judgment rather than acting at Weiss-Horvath's direction."); *Serbalik v. Gray*, 27 F. Supp. 2d 127, 131-32 (N.D.N.Y.1998) ("[A] private party does not act under color of state law when she merely elicits but does not join in an exercise of official state authority." (quoting

Auster Oil & Gas Inc. v. Stream, 764 F.2d 381, 388 (5th Cir. 1985))). When the private actor takes a more active role, however, and jointly engages in action with state actors, he will be found to be a state actor. *See*, *e.g.*, *Lugar*, 457 U.S. at 942 (finding that, when a supplier sought prejudgment attachment of a debtor's property, supplier was a state actor because it "invok[ed] the aid of state officials to take advantage of state-created attachment procedures"); *Dennis*, 449 U.S. at 27-28 (holding that defendants who conspired with and participated in bribery with federal judge acted under color of state law).

Alternatively, to demonstrate that a private party defendant was a state actor engaged in a conspiracy with other state actors under § 1983, a plaintiff must allege: (1) an agreement between the private party and state actors, (2) concerted acts to inflict an unconstitutional injury, and (3) an overt act in furtherance of the goal. *See Carmody v. City of New York*, No. 05-CV-8084 (HB), 2006 WL 1283125, at *5 (S.D.N.Y. May 11, 2006) (citing *Ciambriello*, 292 F.3d at 324-25). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed. *See Ciambriello*, 292 F.3d at 325 (dismissing conspiracy allegations where they were found "strictly conclusory"); *see also Robbins v. Cloutier*, 121 F. App'x 423, 425 (2d Cir. 2005) (dismissing a § 1983 conspiracy claim as insufficient where plaintiff merely alleged that defendants "acted in a concerted effort" to agree not to hire plaintiff and to inform others not to hire plaintiff). "A plaintiff is not required to list the place and date of defendants['] meetings and the summary of their conversations when he pleads conspiracy, but the pleadings must present facts tending to show

agreement and concerted action." *Fisk*, 401 F. Supp. 2d at 376 (internal citations and quotation marks omitted).

Thus, if a plaintiff has sufficiently pled either the existence of joint activity between the private actor and the state or the existence of a conspiracy between the private actors and the government actors, he will have sufficiently alleged state action by the private party defendants for purposes of § 1983. In other words, although pleading sufficient facts to demonstrate that a conspiracy exists will suffice to establish that a private entity was acting under color of state law, "[t]he formal requirements of a conspiracy . . . are not required to fulfill the joint engagement theory." *Weintraub v. Bd. of Educ. of New York*, 423 F. Supp. 2d 38, 57 (E.D.N.Y. 2006).

b. Application

In the instant case, the Court concludes that plaintiffs' allegations of conspiracy and joint action between the Sentosa defendants and the County defendants are sufficient to survive a motion to dismiss with respect to all defendants except for O'Connor and Fitzgerald. As to O'Connor and Fitzgerald, the Court finds that plaintiffs have not alleged a sufficient factual basis to support a plausible claim that these two individual defendants were state actors.

When analyzing allegations of state action, the Court must begin "'by identifying the specific conduct of which the plaintiff complains.'" *Tancredi*, 316 F.3d at 312 (quoting *Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 51). Here, plaintiffs have alleged that the Sentosa defendants (defined in

the Amended Complaint to include defendants Philipson, Luyun, Rubenstein, Sentosa Care, and Prompt) and Avalon Gardens conspired with the County defendants, who were state actors, to deprive plaintiffs of their constitutional rights and then acted jointly with those state actors to effectuate the conspiracy.[29]

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[29] The Amended Complaint defines "the Sentosa defendants" to include Philipson, Luyun, Rubenstein, Sentosa Care, and Prompt. (Am. Compl. ¶ 32.) Thus, the Court reads all allegations in the Amended Complaint involving "the Sentosa defendants" to be lodged against these defendants. Defendants respond that, although there may be allegations made against Philipson, Luyun, Rubenstein, Sentosa Care, and Prompt, there are no individual allegations against Avalon Gardens, O'Connor, or Fitzgerald. (Sentosa Mem. at 14.) (In contradiction to their original moving papers, the Sentosa defendants also argue in their supplemental submission that there are no individual allegations made against Rubenstein. However, the Court rejects this argument, given the clear definition in the Amended Complaint that "the Sentosa defendants" includes Rubenstein.) As to Avalon Gardens, plaintiffs allege that Philipson is a principal of Avalon Gardens. (Am. Compl. ¶ 11.) Under the fundamental principles of agency law, "the misconduct of managers within the scope of their employment will normally be imputed to the corporation." *In re CBI Holding Co., Inc.*, 529 F.3d 432, 448 (2d Cir. 2008) (internal quotation marks omitted). "This principle is itself based on the presumption that an agent will normally discharge his duty to disclose to his principal all the material facts coming to his knowledge with reference to the subject of his agency, and thus any misconduct engaged in by a manager is with—at least—his corporation's tacit consent." *Id.* (internal quotation marks and alterations omitted). This presumption may be rebutted by "adverse inference exception," however, which provides a narrow exception pursuant to which "management misconduct will not be imputed to the corporation if the officer acted entirely in his own interests and adversely to the interests of the corporation." *Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000). Here, at the motion to dismiss stage where all of plaintiffs' allegations are accepted as true and construed in plaintiffs' favor, the Court see no reason why it should not apply traditional agency law principles and impute

Specifically, plaintiffs claim that, after the Sentosa defendants' initial efforts to retaliate against plaintiffs were unsuccessful (including their attempts to obtain a preliminary injunction against plaintiffs and to have the Education Department and the Police Department take action against plaintiffs), they arranged a meeting with defendant Spota. (Am. Compl. ¶ 60.) This meeting, which was attended by Spota, the Sentosa defendants, and the Sentosa defendants' attorneys, allegedly "was for the purpose of, and had the effect of, pressuring Spota to file an indictment that he would not otherwise have filed, against the plaintiffs, who were simply acting in a manner that they were constitutionally privileged to act." (*Id.* ¶ 64.) In particular, after the meeting, Spota allegedly assigned ADA Lato to the case "for the purpose of gathering evidence and securing an indictment." (*Id.* ¶ 70.) Further, plaintiffs claim that the Sentosa defendants and the County defendants "agreed that the indictment [of plaintiffs] would be procured, in part, through the use of false testimony by the Sentosa Defendants, as well as by the withholding of exculpatory evidence, the existence of which was known to the Sentosa defendants and the [County] Defendants . . . ." (*Id.* ¶ 113.) Pursuant to this alleged agreement, Philipson,

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Philipson's alleged misconduct to Avalon Gardens. Thus, the Court will construe all allegations involving "the Sentosa defendants" to be made not only against the above-mentioned defendants (*see* Am. Compl. ¶ 32) but also against Avalon Gardens. However, as to O'Connor and Fitzgerald, the Court finds for the reasons discussed *supra* that plaintiffs have not plead sufficient allegations to support an inference that O'Connor and Fitzgerald were acting under color of state law. Accordingly, the Court dismisses the § 1983 claims against O'Connor and Fitzgerald without prejudice for failure to state a claim, and will provide an opportunity for plaintiffs to re-plead.

and possibly other Sentosa employees or principals, allegedly provided false testimony before the Grand Jury, including that nurses had walked off a shift, that shifts were inadequately covered, or that patients were endangered, all of which the Sentosa witnesses allegedly knew was not true. (*Id.* ¶¶ 82, 84-85.) Also pursuant to the agreement, the County defendants allegedly presented such false testimony to the Grand Jury despite knowing that it was not true, (*id.* ¶ 86), and, as a general matter, "agreed to do what was necessary to procure the indictment, for the sole benefit of the Sentosa defendants." (*Id.* ¶ 114.) Moreover, plaintiffs claim that "this prosecution was begun and continued at the behest of the Sentosa defendants," and "had it not been for the influence and/or interference of the Sentosa defendants, Spota would not have initiated the prosecution and/or would have discontinued it when he learned of the impropriety of the indictment." (*Id.* ¶¶ 126-27; *see also id.* ¶ 109 ("[T]he [County] Defendants procured an indictment, and prosecuted an alleged crime, that they would not otherwise have prosecuted, because of the procurement by and pressure from the politically powerful Sentosa Defendants."); *id.* ¶ 69 ("[I]t was at Philipson's instance [sic] that Spota took the unusual step of indicting an attorney for giving advice to his clients.").) Indeed, plaintiffs claim that "[t]he reason for the indictment was to assist the Sentosa Defendants in their quest to punish the Plaintiffs for their part in resigning, and to discourage other nurses employed by Prompt and working at Sentosa facilities from resigning . . . ." (*Id.* ¶ 108.)

Plainly, plaintiffs have alleged that the Sentosa defendants did more than "merely elicit" an exercise of state

authority. Instead, plaintiffs have alleged that the Sentosa defendants incited the exercise of state authority by pressuring the County defendants to take action to satisfy the Sentosa defendants' goals and for the Sentosa defendants' sole benefit, and then joined and participated in the exercise of that authority by agreeing with the County defendants to present false testimony and thereafter giving such false testimony[30] before the Grand Jury.[31]

Defendants[32] are correct that a private party will not be deemed a state actor merely because he

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[30] The Sentosa defendants' argument that they should be entitled to witness immunity for their testimony in the Grand Jury is addressed *infra* in Section III.B.2.a.i.

[31] The Court notes that, although plaintiffs' allegations regarding false testimony before the Grand Jury only mention Philipson and other unidentified Sentosa witnesses, (Am. Compl. ¶¶ 82, 84), plaintiffs plainly allege that all of "the Sentosa defendants" met with defendant Spota and entered into an agreement with the County defendants to procure the indictment of plaintiffs through false testimony (*id.* ¶¶ 64, 113-14), and that the County defendants were acting "for the sole benefit of the Sentosa defendants." (*Id.* ¶ 114; *see also id.* ¶¶ 160-65 (describing false information provided by the Sentosa defendants to Spota).) Furthermore, plaintiffs allege that the sole reason for the indictment was to assist "the Sentosa Defendants" in their attempt to retaliate against plaintiffs, and that the prosecution would not have been brought—given the significant exculpatory evidence and the fact that plaintiffs' conduct was constitutionally protected—were it not for pressure from "the Sentosa defendants." (*Id.* ¶¶ 108-09, 126-27.) Thus, for the reasons stated *supra*, the Court finds that, accepting these allegations as true and construing them in plaintiffs' favor for purposes of the motion to dismiss, plaintiffs have plausibly alleged that the Sentosa defendants (as defined in note 29) were acting under color of state law.

[32] The County defendants incorporated by reference in their papers the Sentosa defendants' arguments regarding the insufficiency of

communicated with a state actor, reported a crime, or cooperated with state officials. However, plaintiffs' allegations here go beyond mere assertions of "communications" or "cooperation" and instead involve claims that the Sentosa defendants were actively involved in the investigation and prosecution of plaintiffs. In fact, plaintiffs have alleged that, given that plaintiffs could not constitutionally have been prosecuted for their conduct, the County defendants would not have pursued the prosecution of plaintiffs at all but for the pressure and influence of the Sentosa defendants. In other words, despite defendants' argument to the contrary, plaintiffs allege that the County defendants did not exercise independent judgment here, but instead acted at the direction of the Sentosa defendants and substituted the judgment of the Sentosa defendants for their own.[33] In support of their assertion that the County defendants would not have acted but for the direction of the Sentosa defendants, plaintiffs point to significant

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plaintiffs' allegations regarding conspiracy and joint action. (*See* County Supp. at 2.)

[33] The Sentosa defendants argue that plaintiffs' assertion that defendant Lato interviewed the nurses and Vinluan indicates that the County defendants "conducted an independent investigation." (Sentosa Mem. at 12.) However, the Court disagrees that this allegation, in light of all the other allegations in the Amended Complaint, would allow the Court to find, as a matter of law, that the Sentosa defendants were not acting under color of state law. The Court again emphasizes that it is faced here with a motion to dismiss—not a motion for summary judgment—and that at this stage of the litigation, plaintiffs need only allege a plausible claim that there was either a conspiracy or other joint action between the Sentosa defendants and the County defendants. As set forth *supra*, plaintiffs' Amended Complaint is sufficient in this regard, and defendants' motion to dismiss must therefore be denied.

exculpatory evidence that the County defendants allegedly were aware of prior initiating the prosecution of plaintiffs, including evidence regarding the State Education Department's decision exonerating plaintiffs of any wrongdoing, Justice Bucaria's decision denying Sentosa's application for a preliminary injunction due to a failure to prove a likelihood of success on the merits, and information demonstrating that none of the nurse plaintiffs had resigned during a shift. (*Id.* ¶ 72.) Accepting all of these allegations as true and construing them in favor of plaintiffs, the Court finds that these allegations are sufficient, at the motion to dismiss stage, to support an inference that the County defendants were acting under the control and influence of the Sentosa defendants and, as such, that the Sentosa defendants were acting under color of state law. *See Watson*, 2010 WL 3835047, at *8 (plaintiff plausibly alleged that private party was state actor where defendant allegedly met with co-defendant to frame allegations against plaintiff and other co-defendants ignored exculpatory information in order to protect defendant); *Friedman v. N.Y.C. Admin. for Children's Servs.*, No. 04-cv-3077 (ERK), 2005 WL 2436219, at *8 (E.D.N.Y. Sept. 30, 2005) ("[Defendant] Dr. Cohen provided ACS with false and malicious information, leading to the curtailment of plaintiff's substantive due process rights. . . . [A]ssuming the allegations of the complaint to be true, Dr. Cohen was a willing participant in the scheme which [was] set in motion by his false oral and written reports to ACS and caused the initiation of the Neglect Proceeding that resulted in the suspension of plaintiff's parental rights over the course of more than half a year. In order to curry favor with [his girlfriend and her sister, who was plaintiff's ex-wife], Dr.

Cohen invoked the aid of the ACS defendants to deny plaintiff his substantive due process rights to family integrity by using state-created procedures for the investigation of child abuse. Accordingly, . . . at least on this motion to dismiss, plaintiff has sufficiently pled the joint participation of Dr. Cohen and the ACS defendants to justify treating Dr. Cohen as a state actor . . . ."); *Coakley v. Jaffe*, 49 F. Supp. 2d 615, 624 (S.D.N.Y. 1999) ("[P]laintiffs allege[d] that defendants . . . wilfully caused defendant Driscoll, an Assistant District Attorney, to violate plaintiffs' rights by manipulating the evidence presented to the Grand Jury. Drawing every reasonable inference in favor of the plaintiffs, the Court concludes that the plaintiffs have, at least for present purposes, sufficiently pled the existence of joint action that warrants treating defendants . . . as state actors for purposes of assessing plaintiffs' federal false arrest claim."). *Cf. Alexis v. McDonald's Rest. of Mass., Inc.*, 67 F.3d 341, 345, 352 (1st Cir. 1995) (restaurant manager was not a state actor, although manager told police she "would like [an unruly customer] to leave" and officer thereafter forcibly removed customer from restaurant, because there was no evidence that the officer substituted the manager's judgment for his own); *Fisk*, 401 F. Supp. 2d at 377 ("[A] private party who calls the police for assistance does not become a state actor unless the police were influenced in their choice of procedure or were under the control of a private party.").[34]

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[34] The Court notes that the fact that the County defendants' are immune for some of this conduct does not change the Court's conclusion that plaintiffs have sufficiently alleged, for present purposes, that the Sentosa defendants were acting under color of state law. *See*

However, the Court finds that the allegations with respect to defendants O'Connor and Fitzgerald are not sufficient and cannot survive a motion to dismiss. Specifically, the only allegations against O'Connor are that she filed complaints against plaintiffs with the New York State Education Department and the Suffolk County Police Department. (Am. Compl. ¶¶ 54, 59.) Similarly, the only complaint against Fitzgerald is that she filed the complaint, along with O'Connor, with the Education Department. (*Id.* ¶ 54.) Both of these actions are alleged to have occurred prior to the formation of the conspiracy, which allegedly began when the Sentosa defendants had their meeting with District Attorney Spota. (*Id.* ¶ 136 ("The overt acts in furtherance of this conspiracy include the events described above in paragraphs 69-86 hereof, beginning with the meeting among Spota and the Sentosa Defendants . . . .").) As noted *supra*, merely reporting suspected criminal activity to law enforcement or other government officials is not sufficient to render a private party a "state actor" for purposes of § 1983 liability. Accordingly, in the absence of any allegations that O'Connor or Fitzgerald were more directly involved in the investigation and prosecution of plaintiffs or took any steps in furtherance of the alleged conspiracy, the § 1983 claims against O'Connor and Fitzgerald are dismissed without prejudice for failure to state a claim, and the Court will provide plaintiffs with an opportunity to re-plead these claims.

Coakley, 49 F. Supp. 2d at 624 ("'[P]rivate persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 [claims],' even if the state actor himself is immune from liability." (quoting *Dennis*, 449 U.S. at 27-28)).

2. Failure to State a Claim

The Sentosa defendants also argue that plaintiffs' malicious prosecution and false arrest claims must be dismissed for failure to state a claim.[35] For the reasons set

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[35] As a threshold matter, as noted *supra*, plaintiffs have asserted a § 1983 claim for deprivation of their Fourteenth Amendment "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity." *Zahrey*, 221 F.3d at 349. However, the Fourth Amendment, rather than the Fourteenth Amendment, provides the source of constitutional liberty rights upon which a § 1983 malicious prosecution or false arrest claim can be based. See *Murphy v. Lynn*, 118 F.3d 938, 944 (2d Cir. 1997); *Mayer v. City of New Rochelle*, No. 01 Civ. 4443(MBM), 2003 WL 21222515, at *8 (S.D.N.Y. May 27, 2003) (holding that a section 1983 claim of malicious prosecution without probable cause may not be based upon a denial of due process rights, but only upon denial of Fourth Amendment rights). Here, plaintiffs have not cited to the Fourth Amendment in their Amended Complaint. Nevertheless, insofar as defendants have addressed plaintiffs' malicious prosecution and false arrest claims on the merits as Fourth Amendment claims, and given that plaintiffs' have plainly asserted that these claims are based upon a deprivation of their liberty rights, the Court will construe these claims as alleging Fourth Amendment violations. *See Watson* 2010 WL 3835047, at *5 n.1 ("[A]lthough Plaintiff characterizes his malicious prosecution claims as violations of the Fourteenth Amendment Due Process Clause, such claims are cognizable only under the Fourth Amendment's guarantees against unlawful seizure .... [However,] [c]onsidering that Defendants address Plaintiff's malicious prosecution claims on the merits as Fourth Amendment claims, the Court is willing ... to construe [Plaintiff's] claims as alleging Fourth Amendment violations."); *accord Landon v. Cnty. of Orange*, No. 08-cv-8048, 2009 WL 2191335, at *4 (S.D.N.Y. July 23, 2009) (construing complaint as asserting a malicious prosecution claim under the Fourth Amendment where plaintiff alleged that defendants violated his "liberty interests and Fourteenth Amendment right to due process of law"). Again, as noted *supra*, the reason that the malicious prosecution and false arrest claims do not also exist against the County defendants is

forth below, the Court finds that plaintiffs have pled sufficient allegations to state a claim for both of these causes of actions and, accordingly, the motion to dismiss these claims is denied.

a. Malicious Prosecution

"Claims for . . . malicious prosecution, brought under § 1983 to vindicate the Fourth and Fourteenth Amendment right to be free from unreasonable seizures, are 'substantially the same' as claims for . . . malicious prosecution under state law." *Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003) (citations omitted)). "Because there are no federal rules of decision for adjudicating § 1983 actions that are based upon claims of malicious prosecution, [courts] are required by 42 U.S.C. § 1988 to turn to state law . . . for such rules." *Alicea v. City of New York*, No. 04-CV-1243 (RMB), 2005 WL 3071274, at *6 (S.D.N.Y. Nov. 15, 2005) (internal quotation marks omitted)). "A malicious prosecution claim under New York law requires the plaintiff to prove '(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions.'" *Jocks*, 316 F.3d at 136 (quoting *Murphy v. Lynn*, 118 F.3d 938, 947 (2d Cir. 1997)). Moreover, in addition to the state law elements of malicious prosecution, "to sustain a § 1983 malicious prosecution claim, there must be a seizure or other 'perversion of

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that the County defendants are absolutely immune from liability for these claims.

proper legal procedures' implicating the claimant's personal liberty and privacy interests under the Fourth Amendment." *Washington v. Cnty. of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004) (quoting *Singer v. Fulton Cnty. Sheriff*, 63 F.3d 110, 117 (2d Cir. 1995)).

The Sentosa defendants argue that plaintiffs have failed to plead sufficient facts regarding the first three elements of their malicious prosecution claim. The Court will address each of these arguments in turn.

i. Initiation

"Initiation" in the context of a malicious prosecution claim "is a term of art." *Rohman v. N.Y.C. Transit Auth.*, 215 F.3d 208, 217 (2d Cir. 2000). As with the state actor analysis, a person who merely reports to law enforcement that a crime has been committed has not "initiated" a prosecution and, thus, will not be exposed to liability for malicious prosecution. *Id.* Instead, "in order for an individual to 'initiate' a prosecution for these purposes . . . [']it must be shown that [the] defendant played an active role in the prosecution, such as giving advice and encouragement or importuning the authorities to act.'" *Id.* (quoting *DeFilippo v. Cnty. of Nassau*, 583 N.Y.S.2d 283, 284 (App. Div. 1992)); *see also Manganiello v. City of New York*, 612 F.3d 149, 163 (2d Cir. 2010) ("A jury may permissibly find that a defendant initiated a prosecution where he filed the charges or prepared an alleged false confession and forwarded it to prosecutors." (internal quotation marks and alterations omitted)). Thus, for example, "[a] defendant may be said to commence or continue a prosecution if that

defendant knowingly provides false information or fabricated evidence that is likely to influence the prosecutors or the grand jury." *Watson*, 2010 WL 3835047, at *5.

In this case, as explained in detail *supra*, plaintiffs have alleged that the Sentosa defendants[36] not only met with the District Attorney's Office to report a complaint about plaintiffs (Am. Compl. ¶ 64), but also pressured the DA's Office to file charges (*id.* ¶¶ 69, 109, 126-27), provided knowingly false information and testimony (*id.* ¶¶ 82, 84, 113, 160-64), and conspired and agreed with the County defendants to procure the indictment of plaintiffs through false testimony and the withholding of exculpatory information. (*Id.* ¶¶ 86, 113-14.) Indeed, plaintiffs allege that the Sentosa and County defendants knew that plaintiffs had not committed any crime, and that the sole reason for the prosecution was to benefit the Sentosa defendants and assist them "in their quest to punish" plaintiffs. (*Id.* ¶¶ 86, 108, 114.) In fact, plaintiffs claim that the County

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[36] As noted *supra* in note 29, for purposes of the malicious prosecution claim, the Sentosa defendants are defined to include Philipson, Luyun, Rubenstein, Sentosa Care, and Prompt (Am. Compl. ¶ 32), as well as defendant Avalon Gardens. As to defendants O'Connor and Fitzgerald, the Court construes the malicious prosecution claim against them as arising only under state law, given that neither O'Connor nor Fitzgerald can be deemed state actors for purposes of § 1983 based upon the current allegations in the Amended Complaint. However, there are no allegations that O'Connor or Fitzgerald did anything other than report plaintiffs' activities to the New York State Education Department and the Suffolk County Police Department. (*Id.* ¶¶ 54, 59.) Such activity does not constitute initiation of a prosecution under state law, and, accordingly, the state-law malicious prosecution claim against O'Connor and Fitzgerald is dismissed without prejudice for failure to plead initiation.

defendants would never have initiated the prosecution of plaintiffs, or at least would have abandoned the prosecution once the improprieties in the investigation became clear, were it not for the pressure and influence of the Sentosa defendants. (*Id.* ¶¶ 109, 127.)[37]

The Sentosa defendants claim that, even if they "brought Plaintiffs' conduct to the attention" of the County defendants, the independent decision of the DA's office to prosecute plaintiffs and the fact that the Grand Jury returned an indictment were "intervening acts" that severed the chain of causation between the Sentosa defendants' conduct and the prosecution of plaintiffs. (Sentosa Mem. at 17-18.) However, given the allegations cited *supra*, the Court finds that, at the motion to dismiss stage, the Sentosa defendants cannot hide behind the decision of the DA to prosecute and the subsequent indictment of plaintiffs when it was the Sentosa defendants who allegedly spurred the County defendants to act and fed them with false testimony in pursuit of that endeavour. *See*, *e.g.*, *Zahrey*, 221 F.3d at 352 ("[I]t is not readily apparent why the chain of causation should be considered broken where the initial

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[37] The Court notes that, while the County defendants may be shielded from liability for some of this conduct, insofar as it involves quintessentially prosecutorial functions, the Sentosa defendants (who are not prosecutors) would not share in this protection under the absolute immunity doctrine. *Cf. Hartman*, 547 U.S. at 261-62 ("[An] action for retaliatory prosecution will not be brought against the prosecutor, who is absolutely immune from liability for the decision to prosecute. Instead, the defendant will be a nonprosecutor, an official . . . who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute." (internal citation omitted)).

wrongdoer can reasonably foresee that his misconduct will contribute to an 'independent' decision that results in a deprivation of liberty."); *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) ("[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision."); *Adonis v. Coleman*, No. 08-cv-1726 (MGC), 2009 WL 3030197, at *5 (S.D.N.Y. Sept. 23, 2009) ("[T]he public prosecutor's role in a criminal prosecution will not necessarily shield a complaining witness from subsequent civil liability where the witness's testimony is knowingly and maliciously false."). Thus, the Court finds that plaintiffs have put forth sufficient allegations to support an inference that the Sentosa defendants initiated the prosecution of plaintiffs. *See Watson*, 2010 WL 3835047, at *9 (where plaintiff alleged that defendant provided false information to prosecutors about plaintiff and fabricated information in order to cover up her own involvement, plaintiff had sufficiently alleged initiation of prosecution).

Furthermore, the Court notes that this conclusion also precludes a finding at this stage of the litigation that the Sentosa defendants are entitled to witness immunity as a matter of law. As an initial matter, defendants are correct that, standing alone, an allegation that the Sentosa defendants gave perjured testimony would not be sufficient to render the Sentosa defendants liable under § 1983.[38]

[38] The Court notes that the Sentosa defendants raised this argument in connection with their argument that they should not be considered state actors. However, since the determination of whether a

See Sykes, 13 F.3d at 519 ("In *Briscoe*, the Supreme Court answered in the negative the question 'whether 42 U.S.C. § 1983 authorizes a convicted person to assert a claim for damages against a police officer for giving perjured testimony at his criminal trial.' " (quoting *Briscoe v. LaHue*, 460 U.S. 325, 326 (1983))); *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246, 254 (2d Cir. 1984) (extending "*Briscoe* grants" of immunity for perjurious trial testimony to also cover perjured grand jury testimony). However, witness immunity is lost when the witness acts as a "complaining witness"—that is, when the witnesses' role was not limited to merely providing testimony, but instead involved initiating the prosecution such that the witness can be deemed to have commenced or continued the proceedings against the plaintiff within the meaning of malicious prosecution law. *See White v. Frank*, 855 F.2d 956, 958-59 (2d Cir. 1988) ("[There is a] subtle but crucial distinction between two categories of witnesses with respect to their immunity for false testimony. Those whose role was limited to providing testimony enjoyed immunity; those who played a role in initiating a prosecution—complaining witnesses—did not enjoy immunity."); *Cipolla v. Rensselaer*, 129 F. Supp. 2d 436, 451 (N.D.N.Y. 2001) ("The question of whether a witness is a complaining witness is a factual one, resting on the determination of whether the witness played such a role in initiating the proceedings that it can be said the witness commenced or continued proceedings

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witness will be immune from liability for his testimony hinges upon a determination of whether that witness can be deemed to have "initiated" a prosecution under malicious prosecution law, the Court finds that it is more appropriate to address the witness immunity issue in this section rather than in the prior section.

against the plaintiff within the meaning of the law of malicious prosecution." (internal citations and quotation marks omitted)); *see also Mejia v. City of New York*, 119 F. Supp. 2d 232, 272 (E.D.N.Y. 2000) ("Whether a witness is a complaining witness a fact-based question that coincides with the determination of whether the witness played such a role in initiating the proceedings that it can be said the witness commenced or continued proceedings against the plaintiff within the meaning of the law of malicious prosecution."). In this case, as explained *supra*, plaintiffs have alleged sufficient facts to support an inference that the Sentosa defendants "initiated" the prosecution against plaintiffs for purposes of plaintiffs' malicious prosecution claim. Accordingly, the Court cannot grant the Sentosa defendants witness immunity as a matter of law at this juncture. *See Coggins v. Cnty. of Nassau*, No. 07-cv-3624 (JFB)(AKT), 2008 WL 2522501, at *8-9 (E.D.N.Y. June 20, 2008) (Court could not determine as a matter of law whether defendant acted as a complaining witness where plaintiff alleged that, *inter alia*, defendants "actively instigated and encouraged the prosecution of plaintiff," "'ordered and directed' plaintiff's arrest and detention," and "withheld information which would have exonerated Plaintiff").

ii. Termination in Favor

New York law does not require a malicious prosecution plaintiff to prove his innocence, or even that the termination of the criminal proceeding was indicative of innocence. Instead, the plaintiff's burden is to demonstrate a final termination that is not inconsistent with

innocence. *See*, *e.g.*, *Cantalino v. Danner*, 754 N.E.2d 164, 168 (N.Y. 2001) ("[T]he question is whether, under the circumstances of each case, the disposition was inconsistent with the innocence of the accused."). Under certain circumstances, a dismissal is considered to be a termination in a plaintiff's favor. For example, "the state's effective abandonment of a prosecution, [resulting] in a dismissal for violation of the accused's speedy trial rights, without an adjudication of his guilt or innocence, constitute[s] a favorable termination." *Fulton v. Robinson*, 289 F.3d 188, 196 (2d Cir. 2002) (citing *Murphy*, 118 F.3d at 949-50); *see also Smith-Hunter v. Harvey*, 734 N.E.2d 750, 755 (N.Y. 2000) (noting that a dismissal under New York Criminal Procedure Law § 30.30, based on New York's speedy trial statute, that is "sought and granted as a matter of statutory right based on the prosecutor's inaction" is a favorable termination in the absence of circumstances inconsistent with innocence).

The Second Circuit has identified certain types of dispositions that will not constitute a favorable termination, including: "dismissals for lack of subject matter jurisdiction, dismissals . . . for failure to allege sufficient facts to support the charge, . . . adjournment[s] in contemplation of dismissal, . . . [and] dismissals by the prosecution 'in the interests of justice.'" *Murphy*, 118 F.3d at 948-49 (internal citations and quotation marks omitted). As a general matter, "[d]ismissals that have been found to be inconsistent with innocence . . . fall into three categories: (1) misconduct on the part of the accused in preventing the trial from going forward, (2) charges dismissed or withdrawn pursuant to a compromise with the accused, and (3)

charges dismissed or withdrawn out of mercy requested or accepted by the accused." *Armatas v. Maroulleti*, No. 08-cv-310 (SJF) (RER), 2010 WL 4340437, at *13 (E.D.N.Y. Oct. 19, 2010) (internal citations omitted). However, "abandonment [of a prosecution] brought about by the accused's assertion of a constitutional or other privilege, . . . such as the right to a speedy trial, does not fall within these categories, for the accused should not be required to relinquish such a privilege in order to vindicate his right to be free from malicious prosecution." *Murphy*, 118 F.3d at 949. Finally, a termination will be deemed favorable only when "there can be no further proceeding upon the complaint or indictment, and no further prosecution of the alleged offense." *Smith-Hunter*, 734 N.E.2d at 753 (internal quotation marks omitted).

As a threshold matter, defendants do not dispute that, as a result of the Appellate Division's ruling, the prosecution of plaintiffs was final for purposes of the malicious prosecution claim. (*See* Sentosa Mem. at 19 (acknowledging dismissal of indictment and resulting "permanent stay" of proceedings against plaintiffs).) Instead, the Sentosa defendants contend that the issuance of the writ of prohibition was not an "acquittal" or a determination on the merits of plaintiffs' case and, as such, should not be considered a termination in plaintiffs' favor. However, for the reasons set forth below, the Court disagrees.

First, the New York Court of Appeals has explicitly rejected the notion that a plaintiff "must demonstrate innocence in order to satisfy the favorable termination prong on the malicious prosecution action." *Smith-Hunter*, 734 N.E.2d at 755 (plaintiff need not demonstrate innocence

where prosecution was abandoned for lack of merit and charges were dismissed on statutory speedy-trial grounds). Instead, all that is required is that the plaintiff show the disposition was not "inconsistent with innocence." *Id.* Accordingly, defendants' assertion that plaintiffs' claim fails solely because the Appellate Division's decision was not formally an "acquittal" that "reached the merits of the case," (Sentosa Mem. at 19) is simply an incorrect statement of the applicable law in this field.

Moreover, the termination of plaintiffs' prosecution clearly was "brought about by [plaintiffs'] assertion of a constitutional . . . privilege," which brings plaintiffs' claim within the ambit of the favorable termination doctrine. *Murphy*, 118 F.3d at 949 ("An abandonment brought about by the accused's assertion of a constitutional or other privilege . . . such as the right to a speedy trial, does not fall within these categories [of cases that do not constitute favorable terminations] . . . ."). Indeed, this case is clearly distinguishable from other cases in which a termination was found to not be in the accused's favor. Here, plaintiffs' prosecution was not dismissed because of a procedural flaw or because of misconduct on the part of plaintiffs that prevented the case from proceeding to trial. Instead, the prosecution was prohibited because it was based upon the exercise of plaintiffs' constitutional rights and, thus, "threatened [plaintiffs] with prosecution for crimes for which they cannot constitutionally be tried." *Vinluan*, 873 N.Y.S.2d at 83. Under these circumstances, the Court finds the reasoning of the New York Court of Appeals in *Smith-Hunter*, 734 N.E.2d 750, to be persuasive. In that case, the charges against the plaintiff were dismissed on statutory

speedy-trial grounds pursuant to New York Criminal Procedure Law Section 30.30. Although this dismissal did not, on its face, indicate the plaintiff's innocence, the Court of Appeals held that the termination was in plaintiff's favor:

> [R]equiring that a plaintiff demonstrate innocence after a prosecution has been dismissed on speedy trial grounds would have the anomalous effect of barring recovery for an innocent accused whose prosecution was abandoned for lack of merit. Moreover, an individual improperly charged with a criminal offense would be compelled to waive speedy trial rights in order to preserve a civil remedy. The law should not require one who is falsely and maliciously accused to proceed to trial—incurring additional financial and emotion costs—as a prerequisite to recovery for malicious prosecution.

Id. at 755. Similarly, given the Appellate Division's decision, there is no doubt here that plaintiffs were "improperly charged with a criminal offense." Under these circumstances, the Court finds that requiring plaintiffs to demonstrate their innocence of crimes for which they could not constitutionally be tried would have the "anomalous effect" of barring plaintiffs' recovery even though their prosecution was prohibited on constitutional grounds. The Court agrees with the New York Court of Appeals that plaintiffs should not be required to waive their constitutional rights and proceed to trial on charges for which they cannot constitutionally be tried for the sole purpose of preserving their civil remedies. *See also Murphy*, 118 F.3d at 949 ("[T]he accused should not be required to relinquish [a constitutional or other] privilege in order

to vindicate his right to be free from malicious prosecution.").

Furthermore, the disposition of plaintiffs' criminal case is not inconsistent with a finding of plaintiffs' innocence. To the contrary, the court noted that the nurses did not abandon their posts in the middle of their shifts, but instead resigned after the completion of their shifts. *Vinluan*, 873 N.Y.S.2d at 81. Thus, although the nurses' resignation may have made it difficult for Sentosa to find skilled replacement nurses in a timely fashion, it was "undisputed that coverage was indeed obtained, and no facts suggesting an imminent threat to the well-being of the children [were] alleged." *Id.* at 82. Moreover, not only did the Appellate Division find that plaintiffs' conduct was constitutionally protected, but it also noted that while "the relevant Penal Law sections underlying these prosecutions proscribe the creation of risk to children and the physically disabled[,] [u]nder the facts as presented herein, the greatest risk created by the resignation of these nurses was to the financial health of Sentosa." *Id.* Accordingly, insofar as plaintiffs' prosecution was terminated in order to vindicate plaintiffs' constitutional rights and in a manner that was not inconsistent with plaintiffs' innocence, the Court finds that the prosecution terminated in plaintiffs' favor for purposes of their malicious prosecution claim.

iii. Probable Cause

The Sentosa defendants argue that the Grand Jury indictment returned against plaintiffs creates a presumption of probable cause that defeats plaintiffs' malicious

prosecution claim. As explained *supra*, however, plaintiffs have presented sufficient evidence, at the motion to dismiss stage, to overcome the presumption of probable cause that the indictment would otherwise create.

In response, the Sentosa defendants contend that, because it was ADA Lato who made the presentation of evidence to the Grand Jury, any allegations of bad faith conduct should pertain only to him and should not preclude a finding of probable cause as to the Sentosa defendants. (Sentosa Reply at 8-9.) This argument is unpersuasive. As exhaustively described *supra*, plaintiffs have alleged that the Sentosa defendants agreed with the County defendants to procure the indictment of plaintiffs by false testimony and, furthermore, that the prosecution of plaintiffs would never have occurred were it not for pressure from the Sentosa defendants. Thus, despite the Sentosa defendants' arguments to the contrary, the allegations of bad faith here do not relate solely to defendant Lato and the County defendants. Accordingly, construing the allegations in the Amended Complaint in plaintiffs' favor, the Court finds that it cannot rely on the indictment to infer probable cause and, thus, rejects the Sentosa defendants argument that plaintiffs cannot pursue their malicious prosecution claim solely because of the Grand Jury indictment.

* * *

Accordingly, the Sentosa defendants' motion to dismiss plaintiffs' malicious prosecution claim for failure to state a claim is denied.

d. False Arrest

In New York, the claim colloquially known as "false arrest" is a variant of the tort of false imprisonment, and courts use that tort to analyze an alleged Fourth Amendment violation in the Section 1983 context. See *Singer*, 63 F.3d at 118. To prevail, a plaintiff must prove four elements: "(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not contest the confinement, and (4) the confinement was not otherwise privileged." *Broughton v. State*, 335 N.E.2d 310, 314 (N.Y. 1975).

In the instant case, the Sentosa defendants challenge the sufficiency of plaintiffs' allegations regarding the first element (intent to confine) and the last element (that the confinement was privileged). For the reasons set forth below, the Court finds that plaintiffs have set forth sufficient allegations regarding both of these elements and, accordingly, the Sentosa defendants' motion to dismiss this claim is denied, except as to defendants O'Connor and Fitzgerald.

i. Intent to Confine

The Second Circuit has explained that "[t]o hold a defendant liable as one who affirmatively instigated or procured an arrest, a plaintiff must show that the defendant or its employees did more than merely provide information to the police." *King v. Crossland Sav. Bank*, 111 F.3d 251, 257 (2d Cir. 1997). Merely identifying a potential culprit or erroneously reporting a suspected crime, without any other action to instigate the arrest, is not enough to

warrant liability for false arrest. *Id.* Instead, "a successful false arrest claim requires allegations that the private defendant 'affirmatively induced or importuned the officer to arrest . . . .'" *Delince v. City of New York*, No. 10 Civ. 4323 (PKC), 2011 WL 666347, at *4 (S.D.N.Y. Feb. 7, 2011) (quoting *LoFaso v. City of New York*, 886 N.Y.S.2d 385, 387 (App. Div. 2009)). Thus, where an individual instigates an arrest and does so based on knowingly false information, that individual may be held liable for false arrest. *Weintraub*, 423 F. Supp. 2d at 56 ("Contrary to defendants' argument, even where there is no claim that a defendant actually restrained or confined a plaintiff, a claim of false arrest or false imprisonment may lie where a plaintiff can 'show that . . . defendants instigated his arrest, thereby making the police . . . agents in accomplishing their intent to confine the plaintiff.'" (quoting *Carrington v. City of New York*, 607 N.Y.S.2d 721, 722 (App. Div. 1994))).

Here, as already described in detail, plaintiffs have alleged that the Sentosa defendants (*i.e.*, Philipson, Luyun, Rubenstein, Sentosa Care, Prompt, and Avalon Gardens), instigated the District Attorney's Office to indict plaintiffs (which led to plaintiffs' arrest) and provided knowingly false testimony in order to procure plaintiffs' indictment. Again, as explained *supra*, plaintiffs have alleged that the Sentosa defendants entered into an agreement with the County defendants to procure plaintiffs' indictment through false testimony and withholding exculpatory evidence (Am. Compl. ¶ 113) and that the County defendants substituted the Sentosa defendants' judgment for their own. (*Id.* ¶¶ 69, 109, 114, 127.) Construing the allegations in the Amended Complaint in plaintiffs' favor, the Court

finds that plaintiffs have provided sufficient allegations regarding the Sentosa defendants' intent to confine plaintiffs to survive a motion to dismiss.[39]

ii. Privileged Confinement

The Sentosa defendants' sole argument with respect to this element is that plaintiffs' confinement was privileged as a matter of law because plaintiffs' arrest, according to defendants, was made pursuant to an arrest warrant issued after an indictment. As an initial matter, defendants are correct that "[w]here an arrest is effected pursuant to an arrest warrant, a presumption of probable cause is created." *Mason v. Vill. of Babylon, N.Y.*, 124 F. Supp. 2d 807, 815 (E.D.N.Y. 2000). A plaintiff who seeks to overcome this burden "faces a heavy burden" and "must make a 'substantial preliminary showing' that the affiant knowingly and intentionally, or with reckless disregard for the truth, made a false statement in his affidavit and that the allegedly false statement was 'necessary to the finding of probable cause.'" *Golino v. City of New Haven*, 950 F.2d 864, 870-71 (2d Cir. 1991) (quoting *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978)).

However, the Court need not reach this issue because, based upon the pleadings, it is not clear that plaintiffs

[39] However, as with the malicious prosecution claim, the only allegations regarding O'Connor and Fitzgerald involve their reports to the Education Department and Police Department. As noted *supra*, even if these reports were erroneous, they are not sufficient to render O'Connor and Fitzgerald liable for false arrest under state law. Thus, the Court dismisses the state-law false arrest claim against O'Connor and Fitzgerald without prejudice for failure to state a claim.

were, in fact, arrested pursuant to an arrest warrant as defendants claim. In support of their argument that plaintiffs must have been arrested pursuant to a warrant, the Sentosa defendants point to New York Criminal Procedure Law Section 210.10, which provides, in part:

> If the defendant has not previously been held by a local criminal court for the action of the grand jury and the filing of the indictment constituted the commencement of the criminal action, the superior court must order the indictment to be filed as a sealed instrument until the defendant is produced or appears for arraignment, and must issue a superior court warrant of arrest.

N.Y. C.P.L. § 210.10(3). Taken in isolation, this provision would appear to support defendants' argument. However, the Sentosa defendants ignore the following provisions of this section, which state:

> Upon the request of the district attorney, *in lieu of a superior court warrant of arrest*, the court may issue a summons if it is satisfied that the defendant will respond thereto. Upon the request of the district attorney, *in lieu of a warrant of arrest or summons*, the court may instead authorize the district attorney to direct the defendant to appear for arraignment on a designated date if it is satisfied that the defendant will so appear.

Id. (emphasis added). Accordingly, based upon the plain language of the statute upon which defendants rely, the mere fact that plaintiffs were indicted does not mean that they were arrested pursuant to an arrest warrant. Indeed, plaintiffs argue in their opposition papers that no arrest

warrant was ever issued for plaintiffs. (Pls.' Opp. at 38.) Thus, construing the pleadings in the light most favorable to plaintiffs, the Court cannot conclude as a matter of law at this juncture that plaintiffs' arrest was privileged solely for purposes of their false arrest claim.

Furthermore, to the extent the Sentosa defendants are seeking to rely upon the existence of the indictment to establish a presumption of probable cause, the Court notes that, as discussed *supra*, plaintiffs have put forth sufficient allegations here to overcome the presumption of probable cause that might otherwise attach to the indictment.

* * *

Accordingly, the Sentosa defendants' motion to dismiss the false arrest claim is denied.

C. Conspiracy[40]

As noted *supra*, "[i]n order to survive a motion to dismiss on a § 1983 conspiracy claim, the plaintiff must allege (1) an agreement between two or more state actors, (2) concerted acts to inflict an unconstitutional injury, and (3) an overt act in furtherance of the goal." *Carmody*, 2006

[40] Although defendants subsumed their arguments regarding the insufficiency of plaintiffs' conspiracy claims within their arguments regarding the Sentosa defendants' status as state actors, the Court construes their motion papers as raising a separate argument that the conspiracy claims should be dismissed for failure to state a claim. The County defendants also incorporated the Sentosa defendants' arguments regarding the insufficiency of the conspiracy claims into their moving papers, so the Court also construes the motion to dismiss this claim as being raised jointly by both sets of defendants.

U.S. Dist. LEXIS 25308, at *16 (citing *Ciambriello*, 292 F.3d at 324-25). Vague and conclusory allegations that defendants have engaged in a conspiracy must be dismissed. *See Ciambriello*, 292 F.3d at 325 (dismissing conspiracy allegations where they were found "strictly conclusory"); *see also Robbins*, 121 F. App'x at 425 (dismissing a Section 1983 conspiracy claim as insufficient where plaintiff merely alleged that defendants "acted in a concerted effort" to agree "not to hire [p]laintiff and to inform others not to hire plaintiff"). "A plaintiff is not required to list the place and date of defendant[']s meetings and the summary of their conversations when he pleads conspiracy, . . . but the pleadings must present facts tending to show agreement and concerted action." *Fisk*, 401 F. Supp. 2d at 376 (internal citations and quotations omitted).

As already described in detail *supra*, the Court finds that plaintiffs have sufficiently alleged the elements of a Section 1983 conspiracy. In particular, plaintiffs have alleged that the Sentosa defendants met with defendant Spota and entered into an agreement with the County defendants to procure the indictment of plaintiffs through false testimony (*id.* ¶¶ 64, 113-14). Plaintiffs further claim that the County defendants were acting "for the sole benefit of the Sentosa defendants," (*id.* ¶ 114), and that the only reason for the indictment was "to assist the Sentosa Defendants in their quest to punish the Plaintiffs" and to discourage other nurses from resigning. (*Id.* ¶ 109.) Moreover, plaintiffs allege that the prosecution would not have been brought—given the significant exculpatory evidence and the fact that plaintiffs' conduct was constitutionally protected—were it not for pressure from the Sentosa

defendants. (*Id.* ¶¶ 108-09, 126-27.) At this stage of the litigation, plaintiffs have alleged more than enough facts to survive the minimal requirements for surviving a motion to dismiss on their § 1983 conspiracy claim. *See Twombly*, 550 U.S. at 563 ("[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."). Thus, defendants' motion to dismiss the conspiracy claim is denied.[41]

IV. Conclusion

For the foregoing reasons, the Court grants in part and denies in part defendants' motions to dismiss. Specifically, as to the County defendants, the Court concludes: (1) the individual County defendants are entitled to absolute immunity for conduct taken in their role as advocates in connection with the presentation of the case to the Grand Jury; (2) the individual County defendants are not entitled to absolute immunity for alleged misconduct during the investigation of plaintiffs, and the Court cannot determine at the motion to dismiss stage, given the allegations in the Amended Complaint, whether the

[41] The Court notes that plaintiffs have also alleged a cause of action for conspiracy against the Sentosa defendants only. (*See* Am. Compl. ¶¶ 152-72.) Plaintiffs have not stated what statute this claim arises under, or how this claim is different from their conspiracy claim against the County defendants and the Sentosa defendants jointly. Indeed, the allegations that this additional conspiracy claim is based on appear to be the same allegations upon which the § 1983 conspiracy is based. Accordingly, the Court treats this additional conspiracy claim as duplicative of the § 1983 conspiracy claim and, thus, need not address whether it, too, states a claim.

individual County defendants are entitled to qualified immunity for their actions in the investigation phase; (3) plaintiffs have sufficiently pled § 1983 claims against the individual County defendants for alleged Due Process violations in the investigative stage; and (4) plaintiffs have sufficient pled a claim for municipal liability against the County of Suffolk. As to the defendants Philipson, Luyun, Rubenstein, Sentosa Care, Prompt, and Avalon Gardens, the Court concludes: (1) plaintiffs have sufficiently alleged that they were acting under color of state law, and (2) plaintiffs have sufficiently pled claims for malicious prosecution and false arrest under both § 1983 and state law, as well as a § 1983 conspiracy claim. As to defendants O'Connor and Fitzgerald, the Court dismisses the claims against them without prejudice for: (1) failure to plead that they were acting under color of state law, and (2) failing to satisfy the elements of the state-law malicious prosecution and false arrest claims as to these two individual defendants. Finally, as to the § 1983 conspiracy claim against all defendants, the Court finds that plaintiffs have sufficiently pled a claim against all defendants except O'Connor and Fitzgerald, who, as noted *supra*, were not alleged to have been acting under color of state law for purposes of the § 1983 claims.

SO ORDERED.

JOSEPH F. BIANCO
United States District Judge

Date: March 31, 2011
Central Islip, NY

* * *

Plaintiffs are represented by James Druker of Kase & Druker, Esqs., 1325 Franklin Avenue, Suite 225, Garden City, NY 11530. Plaintiff Vinluan is also represented by Oscar Michelen of Cuomo LLC, 200 Old Country Road, Suite 2 South, Mineola, NY 11501. The County defendants are represented by Brian C. Mitchell, Suffolk County Department of Law, County Attorney, 100 Veterans Memorial Highway, P.O. Box 6100, Hauppauge, NY 11788. The Sentosa defendants are represented by Sarah C. Lichtenstein of Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, 1111 Marcus Avenue, Suite 107, Lake Success, NY 11042.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of July, two thousand twenty-two,

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Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, Theresa Ramos, Ranier Sichon, and James Millena,

Plaintiffs-Counter-Defendants-Appellants,

Felix Q. Vinluan,

Plaintiff - Appellant,

v.

Thomas J. Spota, III, Individually and as District Attorney of Suffolk County, Office of the District Attorney of Suffolk County, Leonard Lato, individually and as an Assistant District Attorney of Suffolk County, County of Suffolk, Karla Lato, as Administrator of the Estate of Leonard Lato,

Defendants - Appellees,

ORDER

Docket No: 19-3949

Susan O'Connor, Nancy Fitzgerald, Sentosa Care, LLC, Avalon Gardens Rehabilitation and Health Care Center, Prompt Nursing Employment Agency, LLC, Francris Luyun, Bent Philipson, Berish Rubenstein,

Defendants-Counter-Claimants.

Appellants Felix Q. Vinluan, Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos and Ranier Sichon, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe

60 A.D.3d 237
Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Felix VINLUAN, et al., petitioners,
v.
Robert W. DOYLE, etc., et al., respondents.

Jan. 13, 2009.
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As Amended July 21, 2009.

Attorneys and Law Firms

Sandback, Birnbaum & Michelen, Mineola, N.Y. (Oscar Michelen of counsel), for petitioner Felix Vinluan.

Kase & Druker, Garden City, N.Y. (James O. Druker and Paula Frome of counsel), for petitioners Elmer Jacinto, Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamiao, Jennifer Lampa, Rizza Maulion, James Millena, Ma. Theresa Ramos, and Ranier Sichon.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Leonard Lato of counsel), respondent pro se.

Spivak Lipton, LLP, New York, N.Y. (Elizabeth Orfan and Adrienne L. Saldana of counsel), for American Nurses Association and New York State Nurses Association, amici curiae.

Giskin, Solotaroff, Anderson & Steward, LLP, New York, N.Y. (Darnley D. Stewart of counsel), for National Employment Lawyers Association/New York, amicus curiae, and Steven Banks, New York, N.Y. (Adriene L. Holder,

Christopher D. Lamb, Amy M. Hong, and Richard Blum of counsel), for The Legal Aid Society, amicus curiae (one brief filed).

Levy Ratner, P.C., New York, N.Y. (David M. Slutsky of counsel), for 1199 SEIU United Healthcare Workers East, amicus curiae.

FRED T. SANTUCCI, J.P., DANIEL D. ANGIOLILLO, RANDALL T. ENG, and CHERYL E. CHAMBERS, JJ.

Opinion

ENG, J.

Ten nurses, all from the Republic of the Philippines, are under indictment in Suffolk County for the misdemeanor offenses of conspiracy in the sixth degree, endangering the welfare of a child, and endangering the welfare of a physically-disabled person. The prosecution of these individuals came in the aftermath of their simultaneous resignations from positions at a Long Island nursing home. The attorney who provided these nurses with legal advice was also indicted.

The Thirteenth Amendment to the United States Constitution, enacted at the conclusion of the Civil War primarily to abolish the institution of slavery, declares that involuntary servitude shall not be permitted to exist within the United States. In this proceeding, we are asked to determine whether the constitutional prohibition against involuntary servitude would be violated by prosecuting these nurses, and whether the prosecution of their attorney would violate constitutionally-protected

First Amendment rights. For the reasons which follow, we find that these criminal prosecutions constitute an impermissible infringement upon the constitutional rights of these nurses and their attorney, and that the issuance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter.

The petitioners Elmer Jacinto, Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamiao, Jennifer Lampa, Rizza Maulion, James Millena, Ma Theresa Ramos, and Ranier Sichon (hereinafter the nurses) were recruited to work in the United States by the Sentosa Recruitment Agency, a Philippines-based company that hires nurses for several nursing care facilities in New York controlled and managed by Sentosa Care, LLC (hereinafter Sentosa). According to the nurses, the recruitment agency promised that they would be hired directly by individual nursing homes within the Sentosa network. To this end, each of the nurses signed an employment contract with the specific nursing homes for which they had been selected to work. Under the terms of these employment contracts, the nurses were to receive free travel to the United States, two months of free housing and medical coverage, training, and assistance in obtaining legal residency and nursing licenses. In recognition of the substantial expenses incurred in the recruitment process, the contracts required the nurses to give their prospective employers a three-year commitment, and provided for liquidated damages in the amount of $25,000 should the nurses fail to honor their commitment.

When the nurses arrived in the United States, they learned that they would be working for an employment

agency instead of the specific nursing homes they had signed contracts with, which allegedly is a lower paid and less stable form of employment. The nurses were assigned by the employment agency to the Avalon Gardens Rehabilitation and Health Care Center (hereinafter Avalon Gardens), a nursing home located in Smithtown, New York. Among the patients at Avalon Gardens are chronically ill children who need the assistance of ventilators to breathe. All of the nurses were trained to care for children on ventilators, and five of the nurses worked almost exclusively with these children.

The nurses alleged that almost immediately upon their arrival at Avalon Gardens, issues arose concerning the terms of their employment, and the promises made to them in the Philippines were breached. When the nurses first arrived at the facility to begin their employment, they discovered that Avalon Gardens had not obtained their limited nursing licenses, and thus many of them were initially required to work as clerks for about $12 per hour. Furthermore, the nurses allegedly were housed in a single-family staff house with only one bathroom, inadequate heat, and no telephone service. After informal oral complaints about their working conditions and pay went unheeded, in February and March of 2006 the nurses wrote several letters to Sentosa and Avalon Gardens outlining their concerns, including the failure to compensate them properly for overtime and night shifts, short staffing, and last minute shift changes.

Believing that their complaints were not being properly addressed, the nurses sought assistance from the Philippine Consulate, and were referred to the petitioner

Felix Vinluan, an attorney specializing in immigration law. When Vinluan met with the nurses to discuss their options, they told him that they wanted to resign because they could not tolerate the working conditions they were experiencing much longer. Vinluan advised the nurses that under the New York Education Law, they could not leave their positions during a shift when they were on duty. Although Vinluan also counseled the nurses that they had the right to resign once their shifts had ended, he suggested that it might be in their best interest to remain at Avalon Gardens while he pursued other remedies on their behalf. Following his meeting with the nurses, on April 6, 2006, Vinluan traveled to Washington D.C., where he filed a complaint on their behalf with the Office of Special Counsel for Immigration Related Unfair Employment Practices.

On the following day, April 7, 2006, the nurses resigned from their employment either at the end of their shift, or in advance of their next shift, using an identical form letter which they had agreed upon together. The amount of notice provided before the next scheduled shift for each nurse ranged from 8 to 72 hours. Vinluan claims that he was unaware of the nurses' intention to resign on April 7. The nurses maintain that they decided to collectively resign with limited notice because they feared retaliation during any notice period they might have given. Fourteen other Filipino nurses employed by three other Sentosa nursing homes also resigned from their employment between April 6 and April 7.

In the wake of the resignations, Sentosa commenced a civil action against Vinluan and the nurses in the Nassau County Supreme Court seeking damages, inter alia, for

breach of contract and tortious interference with contract. In addition, on April 10, 2006, Avalon Gardens' Director of Nursing sent the New York State Education Department (hereinafter the Education Department) a letter of complaint charging that the nurses had abandoned their patients by simultaneously resigning without adequate notice. Following an investigation, on September 28, 2006, the Education Department closed the nurses' cases, concluding that they had not committed professional misconduct because none of them had resigned in mid-shift, and no patients were deprived of nursing care since the facility was able to obtain appropriate coverage.

However, in March 2007, nearly one year after the resignations, a Suffolk County Grand Jury handed down a 13-count indictment against the petitioners. The first count of the indictment charged Vinluan and the nurses with conspiracy in the sixth degree predicated upon their alleged intent to engage in conduct constituting the crimes of endangering the welfare of a child and endangering the welfare of a physically disabled person. The first count theorized that the object of the conspiracy was to obtain alternative employment for the nurses and a release from their three-year commitment to Sentosa without incurring a financial penalty of $25,000. Furthermore, the indictment alleged that Vinluan and the nurses pursued their objective "without regard to the consequences that their pursuit would have on Avalon Gardens' pediatric patients," and that the nurses resigned without notice despite "knowing that their resignations and the prior resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner,

skilled replacement nurses for Avalon Gardens' pediatric patients." The overt acts alleged to have been committed in furtherance of the conspiracy consisted of Vinluan's filing of a federal discrimination claim on behalf of the nurses, and the nurses' submission of their resignation letters.

The second count of the indictment charged Vinluan alone with criminal solicitation in the fifth degree, asserting that he, with the intent that the nurses engage in conduct constituting the crimes of endangering the welfare of a child and endangering the welfare of a physically-disabled person, "requested and otherwise attempted to cause the nurses to resign immediately from Avalon Gardens."

Counts three through seven of the indictment charged that all of the petitioners had acted in concert to endanger the welfare of five of Avalon Gardens' pediatric patients by knowingly acting in a manner likely to be injurious to the physical and mental welfare of the children. The six remaining counts further charged that the petitioners had acted in concert to endanger the welfare of six physically-disabled patients by knowingly acting in a manner likely to be injurious to their physical welfare.

Vinluan and the nurses separately moved to dismiss the criminal indictment in the Supreme Court, Suffolk County. In support of their motion, the nurses argued, among other things, that the prosecution violated their Thirteenth Amendment rights. The Supreme Court denied the motions to dismiss, concluding that there was ample evidence before the grand jury to support all of the counts against the petitioners. Addressing the nurses'

constitutional argument, the court found that the prosecution did not violate their Thirteenth Amendment rights because it could not be said that the People were attempting to compel their continued employment by any particular entity. Vinluan and the nurses commenced this proceeding pursuant to CPLR article 78 to prohibit the respondent Thomas J. Spota, District Attorney, from prosecuting them, and to prohibit the respondent Robert W. Doyle, Justice of the Supreme Court, Suffolk County, from presiding over the prosecution of the indictment, upon the grounds, inter alia, that the prosecution violates the nurses' Thirteenth Amendment rights and Vinluan's First Amendment rights. Justice Doyle has elected not to appear in this proceeding pursuant to CPLR 7804(i).

When a petitioner seeks relief in the nature of prohibition, the court must engage in a "two-tiered analysis" which requires it to determine, as a threshold question, "whether the issue presented is the type for which the remedy may be granted" (*Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 568, 528 N.Y.S.2d 21, 523 N.E.2d 297). Thus, we begin by examining whether a proceeding for a writ of prohibition is an appropriate vehicle in which to raise this challenge to the constitutionality of a pending criminal proceeding. Historically issued by the Crown of England to curb the powers of ecclesiastical courts, writs of prohibition have evolved into "a basic means of protection for the individual in his [or her] relations with the State" (*Matter of Rush v. Mordue*, 68 N.Y.2d 348, 353, 509 N.Y.S.2d 493, 502 N.E.2d 170; *see Matter of Dondi v. Jones*, 40 N.Y.2d 8, 386 N.Y.S.2d 4, 351 N.E.2d 650; *LaRocca v. Lane*, 37 N.Y.2d 575, 578-579, 376 N.Y.S.2d 93, 338 N.E.2d 606,

cert. denied 424 U.S. 968, 96 S.Ct. 1464, 47 L.Ed.2d 734). As codified by CPLR 7803(2), prohibition lies to prevent a body or officer acting in a judicial or quasi-judicial capacity from proceeding, or threatening to proceed, "without or in excess of jurisdiction" (*Matter of Town of Huntington v. New York State Div. of Human Rights*, 82 N.Y.2d 783, 786, 604 N.Y.S.2d 541, 624 N.E.2d 678; *see Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 51, 467 N.Y.S.2d 182, 454 N.E.2d 522).

The primary function of prohibition is to prevent "an arrogation of power in violation of a person's rights, particularly constitutional rights" (*Matter of Nicholson v. State Comm. on Jud. Conduct*, 50 N.Y.2d 597, 606, 431 N.Y.S.2d 340, 409 N.E.2d 818). Although "not all constitutional claims are cognizable by way of prohibition" (*Matter of Rush v. Mordue*, 68 N.Y.2d 348, 354, 509 N.Y.S.2d 493, 502 N.E.2d 170), the presentation of an "arguable and substantial claim" which implicates a fundamental constitutional right generally results in the availability of a proceeding in the nature of prohibition (*Matter of Nicholson v. State Comm. on Jud. Conduct*, 50 N.Y.2d 597, 606, 431 N.Y.S.2d 340, 409 N.E.2d 818). Thus, for example, a CPLR article 78 proceeding in the nature of prohibition has been permitted to interrupt pending criminal proceedings where a defendant is about to be prosecuted in violation of his constitutional right against double jeopardy (*see Matter of Rush v. Mordue*, 68 N.Y.2d 348, 354, 509 N.Y.S.2d 493, 502 N.E.2d 170; *Matter of Kraemer v. County Ct. of Suffolk County*, 6 N.Y.2d 363, 189 N.Y.S.2d 878, 160 N.E.2d 633), or in violation of his Fifth Amendment privilege against self-incrimination (*see Matter of Rush v. Mordue*,

68 N.Y.2d at 355, 509 N.Y.S.2d 493, 502 N.E.2d 170; *Matter of Lee v. County Ct. of Erie County*, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452 *cert. denied* 404 U.S. 823, 92 S.Ct. 46, 30 L.Ed.2d 50). In such circumstances, the Court of Appeals has concluded that a CPLR article 78 proceeding in the nature of prohibition may properly be utilized to prevent the defendants from being prosecuted for crimes for which they could not be constitutionally tried. The Court of Appeals also has found prohibition to be a proper vehicle to vindicate claimed infringements on the First Amendment rights of freedom of religion and freedom of association (*see Matter of Nicholson v. State Comm. on Jud. Conduct*, 50 N.Y.2d 597, 431 N.Y.S.2d 340, 409 N.E.2d 818; *LaRocca v. Lane*, 37 N.Y.2d 575, 376 N.Y.S.2d 93, 338 N.E.2d 606).

In the case before us, the petitioners raise claims of equally compelling constitutional dimension. They invoke the remedy of prohibition on the theory that the prosecution itself is not a proper proceeding because it contravenes the Thirteenth Amendment proscription against involuntary servitude by seeking to impose criminal sanctions upon the nurses for resigning their positions, and attempts to punish Vinluan for exercising his First Amendment right of free speech in providing the nurses with legal advice. If the prosecution impermissibly infringes upon these constitutional rights, the act of prosecuting the petitioners would be an excess in power, rather than a mere error of law, and prohibition would be an available remedy (*see Matter of Rush v. Mordue*, 68 N.Y.2d 348, 352, 509 N.Y.S.2d 493, 502 N.E.2d 170; *Matter of Nicholson v. State Comm. on Jud. Conduct*, 50 N.Y.2d 597, 606-607,

431 N.Y.S.2d 340, 409 N.E.2d 818; *Matter of Cohen v. Lotto*, 19 A.D.3d 485, 486, 797 N.Y.S.2d 106).

Where, as here, the issue presented allows for the issuance of a writ of prohibition, the court must proceed to the second tier of the analysis, which requires it to determine whether the remedy of prohibition is "warranted by the merits of the claim" (*Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 568, 528 N.Y.S.2d 21, 523 N.E.2d 297; *see Matter of Town of Huntington v. New York State Div. of Human Rights*, 82 N.Y.2d 783, 786, 604 N.Y.S.2d 541, 624 N.E.2d 678). We note that "even if prohibition lies and an act in excess of power is perceived, the remedy is not granted as of right but only in the sound discretion of the reviewing court" (*Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569, 528 N.Y.S.2d 21, 523 N.E.2d 297). Thus, if there is merit to the petitioners' claim that the subject prosecution violates their constitutional rights, as a final step in our inquiry we must decide whether a writ of prohibition should issue as a matter of discretion by weighing relevant factors, including the gravity of the potential harm caused by the threatened excess of power, whether the potential harm can be adequately corrected on appeal or by other proceedings in law or equity, and "whether prohibition would furnish 'a more complete and efficacious remedy . . . even though other methods of redress are technically available' " (*Matter of Rush v. Mordue*, 68 N.Y.2d 348, 354, 509 N.Y.S.2d 493, 502 N.E.2d 170, quoting *Matter of Dondi v. Jones*, 40 N.Y.2d 8, 14, 386 N.Y.S.2d 4, 351 N.E.2d 650).

Turning to the merits, the nurses contend that subjecting them to criminal sanctions for their act of resigning

effectively compels them to remain at their jobs and, therefore, subjects them to involuntary servitude in violation of the Thirteenth Amendment. The Thirteenth Amendment, added to the Constitution in 1865, declares that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States." It has been observed that "[b]y forbidding not only slavery but also factual situations that resemble slavery, the Framers expressed a view of personal liberty that extends beyond freedom from legal ownership by another person" (Kares, Lauren, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, Cornell Law Review, January 1995). "While the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define" (*United States v. Kozminski*, 487 U.S. 931, 942, 108 S.Ct. 2751, 101 L.Ed.2d 788). Nevertheless, Supreme Court precedent makes clear that absent "exceptional circumstances," the Thirteenth Amendment bars compulsory labor "enforced by the use or threatened use of physical or legal coercion" (*United States v. Kozminski*, 487 U.S. at 944, 108 S.Ct. 2751).

Compelling the performance of labor through legal coercion was at issue in three cases decided by the United States Supreme Court in the first half of the last century, *Pollock v. Williams*, 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095, *Taylor v. Georgia*, 315 U.S. 25, 62 S.Ct. 415, 86 L.Ed. 615, and *Bailey v. Alabama*, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191. In all three cases, the Supreme Court struck down state laws which criminalized the failure to perform a

contract for labor or services for which an advance had been received. The challenged statutes all made a worker's mere failure to perform services for which money had been obtained prima facie evidence of an intent to defraud. In the first of the three cases addressing this issue, *Bailey v. Alabama*, the Supreme Court explained that while the ostensible purpose of the statute under review was to punish fraud, "its natural and inevitable effect is to expose to conviction for a crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt." Continuing its analysis, the *Bailey* Court stated that "[w]hat the state may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question . . . and it is apparent that it furnishes a convenient instrument for the coercion" forbidden by the Thirteenth Amendment (*id.* at 244, 31 S.Ct. 145).

Confronted with a similar statutory provision in *Taylor v. Georgia*, the Supreme Court concluded that the challenged statute squarely contravened the Thirteenth Amendment because the necessary consequence of the law "is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of penal sanction to remain at his employment until the debt has been discharged."

More than 30 years after its decision in *Bailey*, the Supreme Court in *Pollock v. Williams* was again obligated to address the constitutionality of a law making it a crime to obtain property by fraudulently promising to perform labor or service when Florida enacted a statute essentially identical to those that it had previously struck down. In adhering to the conclusion that imposing criminal penalties for the mere failure to perform labor or services was unconstitutional, the Supreme Court emphasized in *Pollock* that the aim of the Thirteenth Amendment was not merely to end slavery, "but to maintain a system of completely free and voluntary labor throughout the United States" (*id.* at 18, 64 S.Ct. 792). In this regard, the court pointed out that as a general rule, the right to change employers was a worker's defense "against oppressive hours, pay, working conditions, or treatment," and that depriving workers of this right would result in "depression of working conditions and living standards" (*id.* at 18, 64 S.Ct. 792). Although the *Pollock* court recognized that there was great societal value in the enforcement of contracts and collection of debt, it concluded that the constitutional prohibition against compulsory service "means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor . . . the statutory test is a practical inquiry into the utilization of an act as well as its mere forms and terms" (*id.* at 18, 64 S.Ct. 792).

The New York Court of Appeals subsequently relied upon the Supreme Court's decisions in *Bailey, Taylor*, and *Pollock* to conclude that an Administrative Code provision which made it a misdemeanor to abandon or willfully fail

to perform a home improvement contract was unconstitutional (*see People v. Lavender*, 48 N.Y.2d 334, 422 N.Y.S.2d 924, 398 N.E.2d 530). The *Lavender* court found that the Administrative Code provision at issue violated the Thirteenth Amendment because it was directed at the failure to perform the services necessary to carry out the home improvement contract. Thus, the court reversed the defendant's conviction of three counts of an indictment which charged him with having abandoned three home improvement contracts without justification.

In the case at bar, the Penal Law provisions relating to endangerment of children and the physically disabled, which all the petitioners are charged with violating, do not on their face infringe upon Thirteenth Amendment rights by making the failure to perform labor or services an element of a crime. The Supreme Court's rationale in *Pollock, Taylor*, and *Bailey* is nevertheless instructive because the indictment handed down against the petitioners explicitly makes the nurses' conduct in resigning their positions a component of each of the crimes charged. Thus, the indictment places the nurses in the position of being required to remain in Sentosa's service after submitting their resignations, even if only for a relatively brief period of notice, or being subject to criminal sanction. Accordingly, the prosecution has the practical effect of exposing the nurses to criminal penalty for exercising their right to leave their employment at will. The imposition of such a limitation upon the nurses' ability to freely exercise their right to resign from the service of an employer who allegedly failed to fulfill the promises and commitments made to them is the antithesis of the free and voluntary system of labor

envisioned by the framers of the Thirteenth Amendment. While we are, of course, mindful that protecting vulnerable children from harm is of enormous importance, the fact that the prosecution may serve a legitimate societal aim does not suspend the nurses' constitutional right to be free from involuntary service (*see Pollock v. Williams*, 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095).

We are also cognizant of the fact that Thirteenth Amendment rights are not absolute, and that "not all situations in which labor is compelled . . . by force of law" are unconstitutional (*United States v. Kozminski*, 487 U.S. 931, 943, 108 S.Ct. 2751, 101 L.Ed.2d 788; *see United States v. Ballek*, 170 F.3d 871, 874, *cert. denied* 528 U.S. 853, 120 S.Ct. 318, 145 L.Ed.2d 114; *Immediato v. Rye Neck School Dist.*, 73 F.3d 454, 459, *cert. denied* 519 U.S. 813, 117 S.Ct. 60, 136 L.Ed.2d 22; *Jobson v. Henne*, 355 F.2d 129, 131). It has been recognized that the Thirteen Amendment "was not intended to apply to exceptional cases well established in the common law at the time" of its enactment (*United States v. Kozminski*, 487 U.S. at 944, 108 S.Ct. 2751, relying on *Robertson v. Baldwin*, 165 U.S. 275, 17 S.Ct. 326, 41 L.Ed. 715). Thus, the Amendment has been held inapplicable to a narrow class of civic duties that have traditionally been enforced by means of imprisonment, including military service (*see United States v. Kozminski*, 487 U.S. at 944, 108 S.Ct. 2751; *Selective Law Draft Cases*, 245 U.S. 366, 390, 38 S.Ct. 159, 62 L.Ed. 349; *United States v. Ballek*, 170 F.3d 871, 874, *cert. denied* 528 U.S. 853, 120 S.Ct. 318, 145 L.Ed.2d 114). Addressing this issue in *Bailey*, the Supreme Court explained that an individual's right to be free from involuntary service may be limited in

"exceptional cases, such as the service of a sailor . . . the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employee of his post of labor in any extreme cases" (*Bailey v. Alabama*, 219 U.S. at 243, 31 S.Ct. 145).

Guided by these principles, we conclude that this is not an exceptional case justifying a restriction of the petitioners' Thirteenth Amendment rights. The nurses in this case were engaged in private employment rather than the performance of public service. Moreover, while they possessed the education and training necessary to care for chronically ill patients, including children on ventilators, these skills are not so unique or specialized that they cannot be readily performed by other qualified nurses. Furthermore, although an employee's abandonment of his or her post in an "extreme case" may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment, the respondent District Attorney proffers no reason why this is an "extreme case." The nurses did not abandon their posts in the middle of their shifts. Rather, they resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and staff members. Moreover, while the indictment alleges that the nurses collectively resigned "knowing that their resignations and the prior resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses for Avalon Gardens' pediatric patients," it is undisputed that coverage was indeed obtained, and no facts suggesting an imminent

threat to the well being of the children have been alleged. Indeed, the fact that no children were deprived of nursing care played a large role in the Education Department's decision to clear the nurses of professional misconduct. Under these circumstances, we cannot conclude that this is such an "extreme case" that the State's interest in prosecuting the petitioners for misdemeanor offenses based upon the speculative possibility that the nurses' conduct could have harmed the pediatric patients at Avalon Gardens justifies abridging the nurses' Thirteenth Amendment rights by criminalizing their resignations from the service of their private employer.

Indeed, the relevant Penal Law sections underlying these prosecutions proscribe the creation of risk to children and the physically disabled. Under the facts as presented herein, the greatest risk created by the resignation of these nurses was to the financial health of Sentosa.

Furthermore, the prosecution impermissibly violates Vinluan's constitutionally protected rights of expression and association in violation of the First and Fourteenth Amendments. It cannot be doubted that an attorney has a constitutional right to provide legal advice to his clients within the bounds of the law (*see Matter of Primus*, 436 U.S. 412, 432, 98 S.Ct. 1893, 56 L.Ed.2d 417; *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 580, 91 S.Ct. 1076, 28 L.Ed.2d 339; *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7-8, 84 S.Ct. 1113, 12 L.Ed.2d 89; *National Assn. for Advancement of Colored People v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405; *see also Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 368 n. 16, 105 S.Ct. 3180, 87 L.Ed.2d 220

[Stevens, J., dissenting]). "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights' . . . including 'advis[ing] another that his legal rights have been infringed' " (*Matter of Primus*, 436 U.S. at 432, 98 S.Ct. 1893, quoting *National Assn. for Advancement of Colored People v. Button*, 371 U.S. at 437, 83 S.Ct. 328). Thus, in *Button*, the Supreme Court found constitutionally protected, as modes of expression and association, the actions of NAACP staff lawyers in, inter alia, advising African Americans "of their constitutional rights, [and] urging them to institute litigation of a particular kind" (*National Assn. for Advancement of Colored People v. Button*, 371 U.S. at 447, 83 S.Ct. 328; *see also Matter of Primus*, 436 U.S. at 425, n. 16, 98 S.Ct. 1893). Similarly, the Supreme Court concluded in *Primus* that an attorney's letter communicating an offer of free legal assistance by ACLU attorneys to a woman with whom she had previously discussed the possibility of seeking redress for an allegedly unconstitutional sterilization procedure was a form of protected expression.

As charged in the indictment, it is clear that Vinluan's criminal liability is predicated upon the exercise of ordinarily protected First Amendment rights. The indictment asserts that Vinluan committed the charged offenses by counseling the nurses to immediately resign from Avalon Gardens, and filing a discrimination claim on their behalf. Thus, the indictment affirmatively seeks to punish Vinluan for providing legal advice, which he avers was given in good faith. The District Attorney does not dispute that Vinluan acted in good faith, but urges this court to conclude that his legal advice to the nurses was not

constitutionally protected because he advised them to commit a crime. However, since the nurses' conduct in resigning cannot, under the circumstances of this case, subject them to criminal prosecution, we cannot agree that Vinluan advised the nurses to commit a crime.

More importantly, regardless of whether Vinluan's legal assessment was accurate, it was objectively reasonable. We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal, loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here are profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

Moreover, by placing an attorney in the position of being required to defend the advice that he or she has provided, the state compels revelation of, and thus places within its reach, confidential communications between attorney and client. Such communications have long been held to be privileged in order to enable citizens to safely and readily secure "the aid of persons having knowledge

of the law and [skill] in its practice" (*Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 32 L.Ed. 488). A prosecution which would compel the disclosure of privileged attorney-client confidences, and potentially inflict punishment for the good faith provision of legal advice is, in our view, more than a First Amendment violation. It is an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends.

Finally, the last step in our inquiry requires us to determine whether a writ of prohibition should issue as a matter of discretion. Upon weighing the relevant factors (*see Matter of Rush v. Mordue*, 68 N.Y.2d 348, 354, 509 N.Y.S.2d 493, 502 N.E.2d 170), we conclude that prohibition is an appropriate exercise of discretion. Where, as here, the petitioners are threatened with prosecution for crimes for which they cannot constitutionally be tried, the potential harm to them is "so great and the ordinary appellate process so inadequate to redress that harm" that prohibition should lie (*Matter of Rush v. Mordue*, 68 N.Y.2d at 354, 509 N.Y.S.2d 493, 502 N.E.2d 170).

Accordingly, the petition is granted, the respondent Thomas J. Spota, District Attorney, is prohibited from prosecuting the petitioners in the Supreme Court, Suffolk County, under Indictment No. 00769-07, and the respondent Robert W. Doyle is prohibited from presiding over the prosecution of the indictment.

In light of our determination, we need not reach the petitioners' remaining contentions.

ADJUDGED that the petition is granted, without costs or disbursements, the respondent Thomas J. Spota,

District Attorney, is prohibited from prosecuting the petitioners in the Supreme Court, Suffolk County, under Indictment No. 00769-07, and the respondent Robert W. Doyle is prohibited from presiding over the prosecution of the indictment.

SANTUCCI, J.P., ANGIOLILLO, CHAMBERS, JJ., concur.