UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CYNTHIA SPOON, SOPHIA COOK-PHILLIPS, and ERIC MOLL,

Plaintiffs,

v.

BAYOU BRIDGE PIPELINE LLC, et al.,

Defendants.

Case No. 3:19-cv-00516-SDD-EWD

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO BAYOU BRIDGE PIPELINE, LLC'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiffs Cynthia Spoon, Sophia Cook-Phillips, and Eric Moll oppose the Motion to Dismiss for Failure to State a Claim (ECF No. 34) filed by Defendant Bayou Bridge Pipeline, LLC ("BBP"). BBP claims that the First Amended Complaint[1] (ECF No. 28) is insufficiently concrete to put BBP on notice of the acts for which Plaintiffs hold them liable.

BBP is wrong: the First Amended Complaint sets out in sufficient detail the manner in which BBP participated in the arrest of Plaintiffs during their protect of the construction of the Bayou Bridge Pipeline on August 9, 2018. Of course, BBP could not, and did not, act alone in its suppression of the pipeline protests, but worked with its private security contractor HUB Enterprises ("HUB"), Sheriff Theriot and multiple deputies of the St. Martin Parish Sheriff's

[1] The First Amended Complaint will sometimes be referred to below as "FAC."

Office[2] (collectively "SMPSO"), and multiple officers of the Louisiana Department of Probation and Parole[3] (collectively "the P&P Officers").

BBP's specific role in these events is spelled out in the factual allegations of the First Amended Complaint in a manner that plausibly states claims against BBP for false arrest and excessive force under § 1983 and for the supplemental claims under the Louisiana Constitution and state law. The Motion to Dismiss for Failure to State a Claim should be denied.

A. A complaint states a claim for relief if it pleads specific facts demonstrating the defendant's liability for the alleged misconduct.

This Court has summarized the principles governing the review of a complaint to determine if it states a claim on which relief can be granted:

> When deciding a Rule 12(b)(6) motion to dismiss, the court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. The Court may consider the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face.

Wearry v. Perrilloux, 391 F.Supp.3d 620, 624 (M.D. La. 2019) (*citing In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007), and *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (quotations omitted)).

In *Wearry*, this Court then cited the Supreme Court's definition of "facial plausibility" in this context:

> 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. In order to satisfy

[2] Deputies Sharay Arabie, Stacey Blanchard, Troy Dupuis, Gabe Gauthier, Waversun Guidry, Norris Huval, and Chris Martin.
[3] Officers Herman Matherne, Mark Ward, Jon Barbera, Heather Pennington, Douglas Black, and Angela Adams.

> the plausibility standard, the plaintiff must show more than a sheer possibility that the defendant has acted unlawfully.

Wearry, 391 F.Supp.3d at 624 (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted)).

The question, then, is whether the First Amended Complaint sets forth sufficient factual content to allow this Court to draw the reasonable inference that BBP is liable for the false arrests of the Plaintiffs and for the excessive force used against them during those arrests.

B. The First Amended Complaint alleges facts sufficient to infer that BBP participated in the false arrest and imprisonment of the Plaintiffs.

1. <u>The First Amended Complaint states plausible constitutional claims against BBP as it alleges facts showing a close nexus between BBP's actions and the unconstitutional arrests of the Plaintiffs.</u>

In this case, the sufficiency of the allegations to support the Federal claims brought against BBP[4] is based on Supreme Court and Fifth Circuit jurisprudence establishing when a private entity such as BBP can be liable for the violation of constitutional rights under color of law. As the Fifth Circuit has explained, "the focus of the inquiry into whether a private actor can be subjected to constitutional liability is whether such a close nexus between the State and the challenged action exists that seemingly private behavior may be fairly treated as that of the State itself." *Morris v. Dillard Dep't Stores, Inc.*, 277 F.3d 743, 747 (5th Cir. 2001) (*citing Brentwood Acad. v. Tennessee Secondary Sch. Athletic Assoc.*, 531 U.S. 288, 295 (2001) (internal quotation

[4] These are: Claim I (False Detention, Arrest and Imprisonment in Violation of the Fourth and Fourteenth Amendments), Claim II (Failure to Intervene to Prevent Unlawful Arrests), and Claim III (Retaliatory Arrest for Violation of First Amendment Rights). The language of Claim IV (Monell Liability for Violations of Plaintiffs' Civil Rights), FAC ¶¶ 77-85, makes clear that it seeks liability against Sheriff Theriot in his official capacity under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). BBP acknowledges this. ECF No. 34-1 at 8 n.2.

omitted)). This inquiry is "highly circumstantial and far from precise." *Morris*, 277 F.3d at 748 (*citing Brentwood Acad*., 531 U.S. at 295-96).

"A plaintiff can make such a showing by demonstrating that the private citizen was a willful participant in joint activity with the State or its agents, or by demonstrating that the citizen conspired with or acted in concert with state actors." *Stire v. Watson*, No. 12-2982, 2013 WL 3944423 at *2 (E.D. La. July 30, 2013) (*quoting Glotfelty v. Karas*, 512 Fed. App'x 409, 414 (5th Cir. 2013)).

The Fifth Circuit's nexus test has an extensive pedigree. The earliest case applying that nexus test for imposing liability on a private entity for a § 1983 false arrest claim is *Smith v. Brookshire Bros., Inc*., 519 F.2d 93 (5th Cir. 1975). In that case, two shoppers were stopped by the store on suspicion of shoplifting. The store called the police department, which dispatched two officers to arrest the shoppers. The evidence in a bench trial showed that the store management had an arrangement with the police department whereby the police would respond to the store's call and arrest persons accused of shoplifting without an independent investigation. The district court entered judgment against the store under § 1983.

On Brookshire's appeal, the Fifth Circuit stated that in order to establish a claim against the store for constitutional violations arising from their arrest by the police, "[t]he plaintiffs had to show that the police and the store managers were acting in concert; that Brookshire and the police had a customary plan whose result was the detention in the present case." *Smith*, 519 F.2d at 94. The dissent expanded on the majority's elucidation of the facts:

> [T]he trial court found that company officials had devised a plan to confine shoplifters in the store while police were called to make the arrest. Further, the police then arrested those held without prior filing of a complaint or investigation "all of which was pursuant to said preconceived plan." More than 300 persons were apprehended over a period of several months.

Id. at 97 (Gee, J., dissenting).[5] The majority concluded that "the district court was not clearly erroneous in his finding from such evidence that a plan existed which made the defendant-appellant an actor under color of law and thus liable for damages under 42 U.S.C. § 1983." *Id*. at 95.

Similarly, in *Duriso v. K-Mart No. 4195, Division of S.S. Kresge Company*, 559 F.2d 1274 (5th Cir. 1977), a shopper was stopped in the parking lot by the assistant manager of the store and accused of shoplifting. The police were called, and the shopper was arrested for petty theft after a complaint form was signed by the assistant manager. Testimony at trial showed that this form, which indicated the store's intent to file charges, was the predicate for the arrest. The shopper won a jury verdict. Citing *Smith*, the Fifth Circuit held that "a detention by store employees is under color of state law if it is demonstrated that the store employees and the police were acting in concert and that the store and police had a customary plan which resulted in the detention." *Duriso*, 559 F.2d at 1277. The Court of Appeals affirmed the § 1983 judgment against K-Mart.

Morris introduced a slightly different wrinkle. Where the defendants' employees in *Smith* and *Duriso* called the municipal police department after detaining the wrongly-accused shoppers, *Morris* involved the arrest of a patron at Dillard's on a shoplifting charge by an off-duty Bossier City police officer working as a private security guard for the store. The district court granted summary judgment for Dillard's, which the plaintiff appealed. The Fifth Circuit noted that "this court has developed a consistent doctrine applying a nexus-type test to determine when a private

[5] The source of the quote is not cited, but from the context it appears the dissent was quoting from the district court's ruling.

enterprise such as Dillard's may be subject to constitutional liability." *Morris*, 277 F.3d at 748 (*citing Bartholomew v. Lee*, 889 F.2d 62, 63 (5th Cir. 1989), *Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc.*, 673 F.2d 771, 772 (5th Cir. 1982), *White v. Scrivner Corp.*, 594 F.2d 140, 141 (5th Cir. 1979), *Duriso*, 559 F.2d at 1277, and *Smith*, 519 F.2d at 94).

The Court of Appeals interpreted its "consistent doctrine," beginning with *Smith*, as imposing constitutional liability on the private entity where "the police and merchant maintained a pre-conceived policy by which shoplifters would be arrested based solely on the complaint of the merchant." *Morris*, 277 F.3d at 748-49 (*citing Smith*, 519 F.2d at 94-95). Reviewing the cases in this series after *Smith* and *Duriso*, the *Morris* Court stated that "the 'crucial' focus of the inquiry is whether an officer 'acted according to a preconceived plan and on the say-so of the private actor, not on the basis of [the officer's] own investigation.'" *Morris*, 277 F.3d at 749 (*quoting Bartholomew*, 889 F.2d at 63).

2. <u>In this case, the First Amended Complaint alleges specific facts bringing BBP within the ambit of the Fifth Circuit's nexus test.</u>

Contrary to BBP's argument, Plaintiffs allege specific facts which, if proved, would subject BBP to liability under the nexus test described above. Those facts, which must be accepted as true for purposes of BBP's 12(b)(6) motion, include the following:

a. BBP with its contractor HUB entered into a "preconceived plan" with the law enforcement Defendants to make felony arrests of pipeline protesters.

- At the time of Plaintiffs' arrests, BBP was attempting construction of a crude oil pipeline crossing 163 miles from the Texas-Louisiana border to St. James Parish, Louisiana, a stretch referred to as the Bayou Bridge Pipeline. FAC ¶ 25.
- The Pipeline was confronted with vehement opposition from environmental activists. FAC ¶ 28.
- BBP contracted with Defendant HUB Enterprises to provide security during the construction of the pipeline. FAC ¶¶ 7, 8.

- Protests of the Bayou Bridge Pipeline had taken place before August 2018. In those protests, persons were arrested, charged with misdemeanors, and released. FAC ¶30.
- On August 1, 2018, an amendment of La. R.S. § 14:61 became effective, broadening the definition of "critical infrastructure" for which unauthorized entry can be punished as a felony carrying up to five years' imprisonment at hard labor. FAC ¶ 31.
- To silence the growing dissent about construction of the Bayou Bridge Pipeline, BBP and HUB contracted with law enforcement officials to make felony arrests of protesters of the Pipeline. FAC ¶ 29.
- To effectuate their plan to suppress protests against the Pipeline, BBP and/or HUB communicated with Defendant Sheriff Theriot about the need for law enforcement officials to be available at or near construction sites in St. Martin's Parish. FAC ¶32.
- BBP and/or HUB provided information about the August 1, 2019 amendment to La. R.S. § 14:61 to Sheriff Theriot and explained that felony arrests should be made to end the Bayou Bridge Pipeline protests. FAC ¶ 32.
- At some point prior to July 27, 2018, Sheriff Theriot agreed that deputies of the St. Martin's Parish Sheriff's Office would be allowed to work "details" with HUB at or near the construction site, and that after August 1, 2018, these deputies would make felony arrests under La. R.S. § 14:61 as directed by employees of BBP and/or HUB. FAC ¶33.
- BBP and/or HUB also contacted other law enforcement officials, including officers of the Louisiana Department of Public Safety and Corrections' Probation and Parole Department. FAC ¶33.
- The P&P Officer Defendants, among others, agreed to work "details" under the supervision of employees of BBP and HUB, and were given information by BBP and/or HUB regarding the 2018 amendments to La. R.S. § 14:61 and instructed that felony arrests should be made to end the Bayou Bridge Pipeline protests. FAC ¶ 33.

b. BBP's employees were directly involved in the detention of the Plaintiffs.

- BBP's and HUB's employees and agents were in close contact with Sheriff Theriot, his agents, and SMPSO deputies throughout the construction of the pipeline section passing through St. Martin Parish. FAC ¶ 52.
- Employees and agents of BBP, together with employees and agents of HUB Enterprises, directed Defendants Adams, Barbera, Black, Matherne, Pennington, and Ward to arrest Plaintiffs. FAC ¶¶ 7-8.
- Plaintiffs paddled in a canoe and kayak in the public, navigable waterways of Bayou Bee in St. Martin's Parish on August 8, 2018. They intended to travel to

the area bordering the construction site, where they planned to protest the pipeline's construction. FAC ¶¶ 35-36.

- At around 7:40 a.m., the group encountered a construction barge accompanied by multiple fan boats carrying agents and employees of BBP and HUB Enterprises. The pilots of the fan boats attempted to blow the Plaintiffs' vessels into the banks of the bayou by pointing their boats' fans at Plaintiffs. FAC ¶37.
- At around 8 a.m., two additional fan boats arrived carrying Defendant P&P officers including Adams, Barbera, Black, Matherne, Pennington, and Ward. FAC ¶38.
- An agent or employee of BBP and/or HUB, shown in the picture below FAC ¶40 and identified as "Larry," pointed toward Plaintiffs Spoon, Cook-Phillips, and Moll, instructing Defendants Adams, Barbera, Black, Matherne, Pennington, and Ward: "You need to arrest those three. They're in the right-of-way. I'm filing charges." FAC ¶40.[6]
- Following the directions of BBP and HUB's agent, P&P Defendants Adams and Black grabbed Plaintiff Cook-Phillips, dragged her to their fan boat, and handcuffed her, without telling her that she was under arrest or what crime she had allegedly committed. FAC ¶ 42.
- P&P Defendants Adams, Black, and Matherne then grabbed Plaintiff Spoon, tying her arms behind her and dragging her onto the fan boat. FAC ¶43.
- As Defendants Adams, Black, and Matherne brought Phillips Cook-Phillips and Spoon to the bank, an agent or employee of BBP blocked the camera of Plaintiffs' companion, Karen Savage, in an attempt to prevent her from recording the arrests. FAC ¶¶ 44-45.
- During that same time, an employee or agent of BBP grabbed Plaintiff Moll's paddle away from him. When Moll entered the water and began swimming back toward his camp site, P&P Defendants followed him to the bank, knocked him to the ground, and dragged him into their fan boat. FAC ¶46.
- While Plaintiffs were detained at the construction site, two agents and employees of BBP, including the one who attempted to block the recording of the arrests, had a conversation about when Sheriff Theriot would "come down" to the site. FAC ¶ 51.
- Shortly after Plaintiffs' initial detention, SMPSO Defendants Dupuis and Gauthier arrived and conferred with the P&P Defendants and agents and employees of BBP and HUB. FAC ¶ 53.

[6] Notably, Defendant HUB Enterprises has denied the allegations of ¶ 40 "insofar as they pertain to HUB." The only sensible construction of this denial is that "Larry" was an employee of BBP when he pointed out the Plaintiffs to the P&P Defendants and directed the law enforcement officers to arrest Plaintiffs. *See* ECF No. 38 at 7 ¶ XIX.

c. The law enforcement Defendants did not exercise independent judgment concerning the selection of the statutes under which Plaintiffs would be charged, but were directed by BBP and HUB to use La. R.S. § 14:61.

- None of the law enforcement defendants were willing to inform the Plaintiffs or Ms. Savage of the charges under which the Plaintiffs were arrested. FAC ¶¶ 47-49.
- In particular, Defendant Ward, who was asked by Ms. Savage about the charges against Plaintiff Moll, stated "I'm not sure what the statute is. We'll find out when we get to the landing. I don't have all the statutes with me." FAC ¶ 49.
- While in the SMPSO cruiser, Moll could see that Defendant Ward had a piece of paper with the HUB Enterprises logo and the text of La. R.S. § 14:61, "Unauthorized entry of a critical infrastructure." Defendant Ward was typing on the SMPSO deputy's computer, writing what Moll believes to have been the probable cause affidavit for his arrest. FAC ¶ 60.,
- SMPSO Defendants Arabie, Dupuis, Gauthier, Huval and Martin took Plaintiffs into custody and booked them for alleged violations of La. R.S. § 14:61. The SMPSO deputies acted at the direction of the same BBP and HUB agents and employees who had ordered P&P Defendants to arrest Plaintiffs. FAC ¶¶ 54, 56.
- SMPSO Defendants booked Plaintiffs into the St. Martin Parish jail, charging all three with violating La. R.S. § 14:61(B), "Unauthorized entry of a critical infrastructure," and La. R.S. § 14:108, "Resisting an officer." Plaintiff Moll had an additional charge under La. R.S. § 14:329 "Interfering with a Law Enforcement Investigation." FAC ¶61.

These allegations make explicit how the Plaintiffs hold BBP responsible for their false arrests: BBP, HUB, Sheriff Theriot, and the P&P Officers had a preconceived plan for Louisiana law enforcement officers to make felony arrests of protesters at the direction of BBP and HUB employees. BBP employees were present in the barge encountered by Plaintiffs on Bayou Bee at 7:40 a.m. on August 8, 2018. The fan boats carrying P&P Defendants arrived from behind the barge twenty minutes later. An employee of either BBP or its contractor HUB pointed out Plaintiffs and directed that they be arrested. A BBP employee attempted to block Plaintiffs' companion from recording the arrests. A BBP employee grabbed Plaintiff Moll's paddle out of his hands to assist the arrests. Although none of the law enforcement officers could identify the statute or grounds on which Plaintiffs were charged, BBP and HUB employees directed that they

use La. R.S. § 14:61. P&P Defendant Ward had a document with HUB letterhead which had the title of that statute when he typed what appeared to be the probable cause affidavits for the arrests.

These facts fit squarely within the Fifth Circuit's nexus test for the imposition of liability of a private actor for an unconstitutional arrest made by a law enforcement officer: BBP and HUB had arranged a preconceived policy by which protesters would be arrested at the direction of BBP and HUB's employees. *Morris*, 277 F.3d at 748-49 (*citing Smith*, 519 F.2d at 94-95). The arrests of August 8, 2018, were made according to this preconceived plan and on the say-so of BBP and HUB employees, not on the basis of any investigation by the P&P Defendants or the SMPSO Defendants. *Morris*, 277 F.3d at 749 (*quoting Bartholomew*, 889 F.2d at 63).

3. <u>These same allegations are sufficient to impose liability on BBP for Plaintiffs' claims under State law.</u>

The above cited paragraphs of the First Amended Complaint also support the allegation that BBP employees participated in the actions that comprise Plaintiffs' State law claims. This participation includes (a) the arrangement made with Sheriff Theriot and the P&P Defendants for the arrests of protesters, (b) giving specific direction to the P&P Defendants to arrest the Plaintiffs on Bayou Bee on August 8, 2018, and (c) giving further direction to the P&P Defendants and the SMPSO Defendants to charge Plaintiffs with violations of La. R.S. § 14:61.

Where a private person or entity directs the making of a false arrest, that person is liable under Louisiana tort law. *See*, *e.g.*, *Douzat v. Dolgencorp, LLC*, No. 2015-1096 (La. App. 3rd Cir. 4/16/16), 215 So. 3d 833; *Johnson v. Montoya*, No. 2013-1951 (La. App. 1st Cir. 5/2/14), 145 So. 3d 418. The First Amended Complaint makes specific allegations to support the claims that, like the defendants in those two cases, employees of BBP caused, and participated in, the false arrest of the Plaintiffs.

Article 2320 of the Louisiana Civil Code provides that "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Vicarious liability attaches under this article for acts committed by an employee after consideration of four factors: (1) whether the tortious act was primarily employment rooted; (2) whether the [tort] was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment. *Baumeister v. Plunkett*, No. 95-2770 (La. 5/21/96), 673 So. 2d 994, 996-97. This is a balancing test; as the Louisiana Supreme Court explained, "This does not mean that all four of these factors must be met before liability may be found." *Id*.

C. BBP's specific 12(b)(6) arguments are defeated by the application of the nexus test for a private entity's participation in a state actor's constitutional violations and Louisiana state law principles of vicarious liability.

With the legal principles governing BBP's liability and the specific facts alleged in the First Amended Complaint in focus, the deficiencies of BBP's arguments are easily seen.

1. <u>The First Amended Complaint adequately identifies the claims against BBP as a separate Defendant.</u>

First, BBP contends that the claims in the First Amended Complaint fail to specify the specific Defendants addressed by each claim. ECF No. 34-1 at 4-8. BBP seems to ignore that Paragraphs 25 through 68 are captioned "Facts Relevant to All Claims." Under the Fifth Circuit's nexus test as discussed above, these allegations state plausible claims against BBP sufficient for a finding of liability against it on the first three § 1983 claims. Consequently, the cases on which BBP relies do not undermine the plausibility of the claims alleged in the First Amended Complaint.

BBP cites *Lasslett v. Tetra Tech*, No. DR-13-CV-072-AM-CW, 2015 U.S. Dist. LEXIS 194966 at *4 (W.D. Tex. Feb. 20, 2015), *report and recommendation adopted*, 2015 WL 13805181 (W.D. Tex. Sept. 30, 2015), but that court denied the motion to dismiss with respect to the collective use of the term "Defendants" noting that "Nothing in Rule 8 prohibits collectively referring to multiple defendants where the complaint alerts defendants that identical claims are asserted against each defendant." The court's analysis fits this case perfectly:

> Here, only one tortious act is in question, and it is fully evident that Lasslett is attributing the same conduct to both defendants and asserting an identical claim against each one. Furthermore, several times in the complaint, Lasslett explicitly refers to Vestas by name, rather than just lumped in with TTC. Either one or both of the defendants is alleged to be responsible for the acts in question, and, as Lasslett points out in his response to the motion to dismiss, only discovery can shed light on the proper party.

Lasslett, 2015 U.S. Dist. LEXIS 194966 at *8.[7] On this analysis, the *Lasslett* court distinguished three other cases cited by BBP in this case: *Robbins v. Oklahoma*, 519 F.3d 1242 (10th Cir. 2008) (complaint named sixteen different defendants, "lumping tortious acts together" that were "entirely different in character" and therefore "mistakenly grouped in a single allegation"), *Atuahene v. City of Hartford*, 10 F. App'x 33 (2d Cir. 2001) (complaint lumped seven defendants

[7] This aspect of *Lasslett* disposes of BBP's complaint that six paragraphs of the First Amended Complaint refer to "employees of BBP and/or HUB" or "BBP and/or HUB." ECF No. 34-1 at 6 n.1. "Either one or both of the defendants is alleged to be responsible for the acts in question, and, as Lasslett points out in his response to the motion to dismiss, only discovery can shed light on the proper party." *Lasslett*, 2015 U.S. Dist. LEXIS 194966 at *8-9 (*citing Hudak v. Berkley Grp., Inc*., No. 13-89, 2014 WL 354676, at *4 (D. Conn. Jan. 23, 2014) ("Prior to discovery, plaintiff need not explain the details of each defendant's role . . . ."), and *United States ex. rel. Howard v. Urban Inv. Trust, Inc.*, No. 3-C-7668, 2010 WL 148643, at *4 (N.D. Ill. Jan. 14, 2010) (At the complaint stage, plaintiffs are not expected to know or allege the complete details of each defendant's precise role in the complex transactions that supposedly took place. It is sufficient to state that the group of named defendants was responsible for the alleged misconduct specified in the complaint. The discovery process is used to determine the exact particulars of each transaction.")).

together and provided no factual basis to distinguish their conduct), and *Medina v. Bauer*, No. 02 Civ. 8837(DC), 2004 WL 136636 (S.D.N.Y. Jan. 27, 2004).[8]

Unlike the complaints in both *Lasslett* and this case, in *Marceaux v. Lafayette Consol. Gov't*, 921 F.Supp. 2d 605 (W.D. La. 2012), fifteen current or former police officers with the Lafayette police department brought claims for retaliatory discharge, wrongful discharge, and deprivation of procedural due process against the municipality and several individual municipal employees. While plaintiffs claimed various similarities between the way they were treated, ultimately the case involved fifteen separate sets of events which required at least as many individual sets of claims. The court struggled to interpret the pleading as a whole. The First Amended Complaint in this case, by contrast, involves one set of events centered on the Plaintiffs' August 8, 2018 arrests.

Landing Council of Co-Owners v. Fed. Ins. Co., No. H-12-2760, 2013 U.S. Dist. LEXIS 17884 (S.D. Tex. Feb. 11, 2013), was an action filed in the Texas courts against the Council's insurance agent and the insurance company which issued a liability policy to the Council through the agent. The insurance company alleged that the agent had been improperly joined to frustrate removal to Federal court. In that context the district court examined the complaint, which had already been amended as the result of a previous motion to dismiss, and held that claims against the agent were "lumped in" with the insurance company without cause. Although BBP states that "[t]his situation is much like the one addressed by" *Landing Council*, ECF No. 34-1 at 8, it is nothing of the sort.

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[8] The *Lasslett* Court did not explain how it distinguished *Medina*, but in that case, the district court found that three defendants were barely mentioned in the complaint, with no factual basis to distinguish their conduct from the others. *Medina*, 2004 WL 136636 at *6.

Even less applicable is the opinion in *De Leon v. City of San Antonio*, No. SA-14-CA-204-XR, 2014 U.S. Dist. LEXIS 94501 (W.D. Tex. May 23, 2014), *report and recommendation accepted*, 2014 WL 3407385 (W.D. Tex. July 10, 2014). As described by the Magistrate Judge in that opinion, Plaintiff attempted to assert the following claims:

> First, plaintiff claims defendants are "acting in conspiracy to complete the genocide of the People of whom [plaintiff] constitutes one." Second, plaintiff claims defendants "affect[] a policy of denying access to these courts to 'Indians,'" through the "on-going racist establishment by the Americans of foreign governance under false pretenses." Third, plaintiff claims "the putative 'government' now here in place is a fraud because it is the governance of Invaders." Specifically, plaintiff claims the state of Texas was "void ab initio." Fourth, plaintiff claims on March 3, 2014, defendants evicted him from land which plaintiff claims was "a part of the land his Ancestors once owned entirely and completely outright before the Invaders then arriving," but which defendants claim is the private property of defendant Christina Velazquez.

Id. at *5-6. Similarly, *Cox v. Phase III, Invs*., No. H-12-3500, 2013 U.S. Dist. LEXIS 85725 (S.D. Tex. May 14, 2013) involves a *pro se* complaint with a rambling discussion of facts seemingly alleging racial harassment by the landlord of his apartment and otherwise appearing to allege issues with the quality of his premises and his treatment by the manager of the apartment. The district court made a valiant effort to interpret the pleading and discuss the potential Federal claims therein before dismissing the complaint with leave to amend. The First Amended Complaint in this case cannot be fairly compared to those involved in *De Leon* and *Cox*.

Finally, *Thibodeaux v. Normand*, No. 13-5903, 2015 U.S. Dist. LEXIS 80668 (E.D. La. Mar. 2, 2015), is a summary judgment case with no application to the Rule 12(b)(6) context.

2. <u>The First Amended Complaint specifically alleges how BBP participated in the events leading up to and including the false arrests of the Plaintiffs.</u>

Next, BBP argues that the claims of the First Amended Complaint "are based on acts and omissions which Bayou Bridge is not alleged to have engaged in . . . there are no factual

allegations in the First Amended Complaint that Bayou Bridge detained, arrested or imprisoned anyone." ECF No. 34-1 at 8.

As discussed at length above, BBP is liable to Plaintiffs for both the Federal and State law claims because of its participation in their arrests and imprisonment. This argument has no merit. The lack of identification of individual BBP employees has no bearing on the plausibility of the allegations against BBP. That is a matter for discovery.

3. <u>The First Amended Complaint sufficiently alleges how BBP's employees were acting in the course and scope of their employment.</u>

In the last two sections of its memorandum, BBP contends that the First Amended Complaint fails to detail how the employees whose conduct are attributed to BBP were acting within the course and scope of their employment. ECF No. 34-1 at 10-13. The authorities cited by BBP all involve situations where an employee's conduct was based on personal motives manifestly unrelated to employment. In *Crawford v. Wal-Mart Stores, Inc*., No. 10-805-M2, 2011 U.S. Dist. LEXIS 82264 at *1 (M.D. La. July 26, 2011), the plaintiff was struck randomly by a Wal-Mart employee who stated "he believed Crawford to be someone else and that he was attempting to scare that person." The court described the issue as follows:

> In the present case, although the facts alleged in the petition indicate that the battery in question occurred on the subject Wal-Mart store premises during working hours, the allegations do not indicate that the battery was, in any way, employment-rooted or incidental to the Wal-Mart employee's duties. The petition simply alleges that the Wal-Mart employee hit Crawford in an attempt to scare her, believing her to be someone else. Such playful behavior was not the type of conduct that the Wal-Mart employee was employed to perform and appears, **based upon plaintiff's own allegations**, to have been motivated by a purely personal consideration (i.e., to scare an individual with whom the employee had a personal relationship), rather than to any type of interest on Wal-Mart's part.

Id. at 6-7 (emphasis added).

In this case, the actions Plaintiffs attribute to BBP before August 9, 2018, involve such matters as the provision of security for the pipeline construction, the making of arrangements with law enforcement agencies and officers for the felony arrests of protesters, and actively providing direction and information about the statute under which BBP wanted arrests to be made. Unlike *Crawford*, nothing in these allegations can be read as unrelated to BBP's business. And the point is amplified with respect to the day of the arrest itself: the BBP employees at issue were on the barge, assisting and directing arrests. So, unlike *Crawford*, Plaintiffs here have not alleged any conduct that cannot be fairly proved to be attributable to BBP as a matter of vicarious liability.

BBP also relies on *Stidham v. United States*, No. 99-2794, 2000 U.S. Dist. LEXIS 12055 (E.D. La. Aug. 15, 2000), a Federal Tort Claims Act case regarding U.S. Army recruiters who allegedly sexually assaulted the plaintiff. While the Government moved both to dismiss and for summary judgment, the court entered summary judgment. The opinion therefore has little to say about the standard for alleging a claim against an employer for the sexual misconduct of an employee. In any event, the court's ruling was based on its finding that the torts alleged by plaintiff were committed for purely personal reasons and were unrelated to the recruiting officers' employment. *Id*. at *24-27. *Stidham* has no possible application to this case.

The same is true of *Poullard v. Turner*, 1999 U.S. App. LEXIS 40636 (5th Cir. 1999), which, like *Stidham* and *Thibodeaux*, was decided on a motion for summary judgment, not on a motion to dismiss. There, the plaintiff was a prisoner at a state corrections institution who alleged that he had been beaten by guards in retaliation for his supposed litigiousness. The Fifth Circuit held that "[n]either beating an inmate in retaliation for litigiousness nor allowing such an

attack to occur comes within the scope of a correctional officer's assigned duties or furthers the state's penological objectives," *id*. at *6, and thereby affirmed the denial of summary judgment.

There is no credible similarity between the actions alleged in the First Amended Complaint and those in the cases cited by BBP. In this case, the actions for which Plaintiffs hold BBP responsible related directly to BBP's goal to construct the pipeline, including the arrests of protesters. Nothing in the First Amended Complaint supports the existence of any personal, non-employment related motive for the conduct of BBP's employees.

D. If the Court grants BBP's motion in whole or part, Plaintiffs should be allowed leave to amend.

For the reasons set forth above, Plaintiffs believe that BBP's motion to dismiss should be denied. In the alternative only, Plaintiffs request leave to amend if the Court grants BBP's motion in whole or in part. The Fifth Circuit teaches that a court should not dismiss an action for failure to state a claim under Rule 12(b)(6) without giving a plaintiff "at least one chance to amend." *Hernandez v. Ikon Ofc. Solutions, Inc.*, 306 Fed.Appx. 180, 182 (5th Cir. 2009). "In view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

Although Plaintiffs amended their Complaint to name specific P&P Defendants and SMPSO Defendants after the Court allowed pre-Rule 26 discovery, that amendment was not occasioned by a motion to dismiss or order granting same. This would be, then, the "one opportunity to amend, in the face of motions that spelled out the asserted defects in the original

pleadings," as allowed by Fifth Circuit jurisprudence. *United States ex rel. Adrian v. Regents of Univ. of Calif.*, 363 F.3d 398, 404 (5th Cir. 2004) (approving quoted language of lower court).

E. Conclusion

The First Amended Complaint gives BBP ample notice of how the Plaintiffs hold it responsible for their false arrests and imprisonment. BBP's Motion to Dismiss for Failure to State a Claim has no merit and should be dismissed.

Respectfully submitted,

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