UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LAUREN HAIDON	:	NO.: 3:19-cv-00119 (SRU)
	:	
v.	:	
	:	
TOWN OF BLOOMFIELD, PAUL HAMMICK, BRENDAN DANAHER, ZACHARY KLOMBERG, MATTHEW SUPLEE AND OTHER KNOWN OR UNKNOWN OFFICERS OF THE BLOOMFIELD POLICE DEPARTMENT	:	MAY 2, 2022

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The defendant, **Brendan Danaher** ("defendant"), hereby submits this memorandum of law in support of his Motion for Summary Judgment.

I. BACKGROUND FACTS

A. PROCEDURAL BACKGROUND

The plaintiff, Lauren Haidon ("plaintiff"), filed her Complaint with this Court against defendants, Town of Bloomfield, Paul Hammick, Brendan Danaher, Zachary Klomberg, Matthew Suplee, and "Other Known or Unknown Officers of the Bloomfield Police Department, on January 1, 2019. [Doc. 1.] Thereafter, on April 11, 2019, said defendants moved to dismiss all claims against them. [Doc. 11 (Mot. to Dismiss)]. The plaintiff then filed an Amended Complaint, on May 2, 2019. [Doc. 18.] The

defendants filed a motion to dismiss the plaintiff's Amended Complaint on May 7, 2019. [Doc. 24.]

Following the plaintiff's filing of a memorandum in opposition to the motion to dismiss, dated May 28, 2019, and oral argument on the motion on October 31, 2019, the Court granted the motion in part and denied it in part, granting the motion as to certain counts and as to all defendants with the exception of Brendan Danaher. (See Order [Doc. 44].) The plaintiff, thereafter, in response to the Court's Order to file an amended pleading, filed an Amended Complaint, on November 27, 2019 [Doc. 45], which is the operative complaint.

The plaintiff alleges that all claims directed toward Brendan Danaher are both in his official and individual capacity. The First and Second Claims for Relief purport to allege claims against him for malicious prosecution and false arrest, respectively, in violation of the Fourth Amendment and Fourteenth Amendment, pursuant to 42 U.S.C § 1983.

Plaintiff's Third Claim for Relief purports to allege a claim against Brendan Danaher for violation of the right to care and custody of her child and intimate association in violation of the First and Fourteenth Amendment.

Plaintiff's Fourth, Fifth, and Sixth Claims for Relief purport to allege claims under state law for abuse of process, false arrest, and malicious prosecution, respectively.

B. UNDISPUTED FACTS

The plaintiff's lawsuit directed toward the defendant stems from her arrest pursuant to a warrant, on March 6, 2017, on the charge of Custodial Interference in the First Degree, in violation of Connecticut General Statutes § 53a-97. The defendant incorporates by reference the facts and documents set forth and attached to the Defendant's Local Rule 56(a)1 Statement of Undisputed Material Facts. Additional facts may be set forth below where necessary.

II. LAW AND ARGUMENT

A. STANDARD OF REVIEW.

1. Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). "The substantive law governing the case will identify those facts that are material, and 'only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" Bouboulis

v. Transp. Workers Union of Am., 442 F.3d 55, 59 (2d Cir. 2006) (quoting Anderson, 477 U.S. at 248).

The moving party bears the burden of demonstrating the absence of a genuine issue as to any material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-25, 106 S.Ct. 2548 (1986). In determining whether a material issue of fact exists, the court must resolve all ambiguities and draw all inferences against the moving party. See Anderson, 477 U.S. at 255. The party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. Thus, once the moving party has satisfied its burden of identifying evidence which demonstrates the absence of a genuine issue of material fact, the non-moving party is required to go beyond the pleadings by way of affidavits, depositions, and answers to interrogatories in order to demonstrate specific material facts, which give rise to a genuine issue. See Celotex, 477 U.S. at 324. The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matasushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348 (1986).

The moving party seeking summary judgment satisfies their burden of demonstrating that there exists no genuine issue of material fact in dispute where they point to the absence of evidence to support an essential element of the non-moving

party's claim. See Celotex Corp. v. Catrett, 477 U.S. at 322-23. "A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial. It need only point to an absence of proof on the plaintiff's part, and, at that point, plaintiff must designate specific facts showing that there is a genuine issue for trial." Parker v. Sony Pictures Entertainment, Inc., 260 F.3d 100, 111 (2d Cir. 2001) (internal quotation marks omitted)(citing Celotex, 477 U.S. at 324).

2. Qualified Immunity

Qualified immunity shields law enforcement officers from § 1983 claims for money damages provided that their conduct does not violate clearly established constitutional rights of which a reasonable person would have been aware." Zalaski v. City of Hartford, 723 F.3d 382, 388 (2d Cir. 2013) (citing Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 2080, 179 L. Ed.2d 1149 (2011); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982)).

> Two questions inform qualified immunity analysis. First, do the facts show that the officer's conduct violated plaintiff's constitutional rights? If the answer to this question is no, further inquiry is unnecessary because where there is no viable constitutional claim, defendants have no need of an immunity shield. But if the answer is yes, or at least not definitively no, a second question arises: was the right clearly established at the time of defendant's actions?

Zalaski, 723 F.3d 388 (citing Ashcroft v. al-Kidd, 131 S. Ct. at 2080; Walczyk v. Rio, 496 F.3d at 154).

> If the answer to the first question is no, "there is no necessity for further inquiries concerning qualified immunity. *Saucier v. Katz*, 533 U.S. at 201, 121 S. Ct. 2151. That is because a defendant has no need for an immunity shield where there is no viable constitutional claim. *See Zalaski v. City of Hartford*, 723 F.3d at 388; *Holcomb v. Lykens*, 337 F.3d 217, 223-25 (2d Cir. 2003). But even if the answer is yes, or not definitively no, a defendant may still be entitled to qualified immunity if the right was not clearly established at the time of his challenged actions. Indeed, a court that decides this second question in a defendant's favor may award qualified immunity without conclusively answering the first. *See Aschcroft v. al-kidd,* 563 U.S. at 735, 131 S. Ct. 2074 (reaffirming lower courts' discretion to decide order in which to address two prongs of qualified immunity analysis).

Mara v. Rilling, 921 F.3d 48, 68 (2d Cir. 2019).

In deciding whether a right was clearly established at the time of the challenged actions,

> [T]he inquiry is not how courts or lawyers might have understood the state of the law at the time of the challenged conduct. Rather, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a *reasonable officer* that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. at 202, 121 S. Ct. 2151 (emphasis added); *accord Winfield v. Trottier,* 710 F.3d 49, 56–57 (2d Cir.2013). If the illegality of the conduct would not be so apparent, the officer is entitled to qualified immunity. *See Walczyk v. Rio,* 496 F.3d at 154. Thus, even if a right is clearly established in certain respects, qualified immunity will still shield an officer from liability if "officers of reasonable competence could disagree" on the legality of the action at issue in its particular factual context. *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.

> Ed.2d 271 (1986). ***In short, if at least some reasonable officers in the defendant's position "could have believed that [the challenged conduct] was within the bounds of appropriate police responses," the defendant officer is entitled to qualified immunity.*** *Saucier v. Katz,* 533 U.S. at 208, 121 S. Ct. 2151; *accord Walczyk v. Rio,* 496 F.3d at 154. ***As these precedents make clear, qualified immunity provides a broad shield. It does so to ensure "that those who serve the government do so with the decisiveness and the judgment required by the public good."*** *Filarsky v. Delia,* —— U.S. ——, 132 S. Ct. 1657, 1665, 182 L. Ed.2d 662 (2012) (internal quotation marks omitted). ***Toward that end, it affords officials "breathing room to make reasonable but mistaken judgments" without fear of potentially disabling liability***. *Messerschmidt v. Millender,* —— U.S. ——, 132 S. Ct. 1235, 1244, 182 L. Ed.2d 47 (2012) (internal quotation marks omitted). In sum, qualified immunity employs a deliberately "forgiving" standard of review, *Amore v. Novarro,* 624 F.3d 522, 530 (2d Cir.2010) (internal quotation marks omitted), that "provides ample protection to all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs,* 475 U.S. at 341, 106 S. Ct. 1092; *accord Ashcroft v. al-Kidd,* 131
> S. Ct. at 2085.

Zalaski v. City of Hartford, 723 F.3d 388–89 (emphasis added).

B. THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT AND PLAINTIFF'S CLAIMS FOR MALICIOUS PROSECUTION AND FALSE ARREST FAIL AS A MATTER OF LAW.

The plaintiff's Fourth Amendment and state law claims for false arrest and malicious prosecution fail for the reason that the undisputed facts establish that the plaintiff's arrest was supported by probable cause. In addition, the plaintiff's claims for

malicious prosecution fail on the additional basis that there exists no genuine issue of material fact that the defendant did not act with malice in seeking a warrant for the plaintiff's arrest. Accordingly, summary judgment should enter in favor of the defendant with respect to each of these claims, as more specifically set forth below.

> In analyzing a Section 1983 claim of false arrest or imprisonment, federal courts generally look to the law of the state where the arrest occurred. *Davis v. Rodriguez,* 364 F.3d 424, 433 (2d Cir.2004). Under Connecticut law, "[f]alse imprisonment, or false arrest, is the unlawful restraint by one person of the physical liberty of another." *Russo v. City of Bridgeport,* 479 F.3d 196, 204 (2d Cir.2007) (quoting *Outlaw v. City of Meriden,* 43 Conn. App. 387, 392, 682 A.2d 1112 (1996)). "The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest, whether that action is brought under state law or under § 1983." *Walczyk v. Rio,* 496 F.3d 139, 152 n. 14 (2d Cir.2007) (internal quotation marks and citation omitted). *Connecticut law places the burden on the false arrest plaintiff to prove the absence of probable cause*. *See Davis,* 364 F.3d at 433 (citing *Beinhorn v. Saraceno,* 23 Conn.App. 487, 491, 582 A.2d 208 (1990)); *Vangemert v. Strunjo,* No. 3:08CV00700 (AWT), 2010 WL 1286850, at *4 (D.Conn. Mar.29, 2010).

Rosen v. Alquist, No. 3:10-CV-01911 VLB, 2012 WL 6093909, at *6 (D. Conn. Dec. 7, 2012) (emphasis added).

"In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of rights under the Fourth Amendment, and establish the elements of a malicious prosecution claim under state law." Id. (quoting Fulton v. Robinson, 289 F.3d 188, 195 (2d Cir. 2002) (internal quotation

marks omitted)). Under Connecticut law, "[a]n action for malicious prosecution . . . requires a plaintiff to prove that: (1) the defendant initiated or procured the institution of criminal proceedings against the plaintiff; (2) the criminal proceedings have terminated in favor of the plaintiff; (3) the defendant acted without probable cause; and (4) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice." McHale v. W.B.S. Corp., 187 Conn. 444, 447, 446 A.2d 815 (1982). "Therefore, the existence of probable cause constitutes an affirmative defense against a malicious prosecution claim." Rosen v. Alquist, supra, at *6.

1. The Plaintiff Cannot Prove the Absence of Probable Cause

Because the plaintiff cannot prove the absence of probable cause, her claims for malicious prosecution and false arrest set forth in First and Second Claims for Relief fail as a matter of law.

"[P]robable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Jenkins v. City of New York, 478 F.3d 76, 84-85 (2d Cir. 2007) (quoting Weyant v. Okst, 101 F.3d 845, 852 (2d Cir. 1996) (alteration in original)). Federal courts evaluate probable cause in light of the totality of the circumstances. Id. at 90-91. Likewise, under Connecticut law, probable cause "comprises such facts 'as would reasonably persuade an impartial and reasonable

mind not merely to suspect or conjecture, but to believe' that criminal activity has occurred." State v. Barton, 219 Conn. 529, 548, 594 A.2d 917 (1991) (quoting Stone v. Stevens, 12 Conn. 219, 230 (1837)); see also, State v. Heinz, 193 Conn. 612, 617, 480 A.2d 452 (1984) (defining probable cause as a standard "less demanding than that which attends an inquiry into whether there has been a prima facie showing of criminal activity. Instead, all that is required is that the affidavit, read in a common-sense manner, gives objective evidence of a fair probability that proscribed activity has occurred." (citations omitted)).

> The Second Circuit has explained that "probable cause is a fluid concept ... not readily, or even usefully, reduced to a neat set of legal rules ... While probable cause requires more than a mere suspicion of wrongdoing, its focus is on probabilities, not hard certainties." *Walczyk,* 496 F.3d at 156 (internal quotation marks and citation omitted). "In assessing probabilities, a judicial officer must look to the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* In sum, probable cause "requires only such facts as make wrongdoing or the discovery of evidence thereof probable." *Id.* at 157.

Rosen v. Alquist, supra, at *7 (D. Conn. Dec. 7, 2012).

Further, "probable cause does not require a police officer to be certain that the individual arrested will be prosecuted successfully." Krause v. Bennett, 887 F.2d 362, 371 (2d Cir. 1989). Also, "[n]ormally, the issuance of a warrant by a neutral magistrate, which depends on a finding of probable cause, creates a presumption that

it was objectively reasonable for the officers to believe that there was probable cause . . . and a plaintiff who argues that a warrant was issued on less than probable cause faces a heavy burden." Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991).

Such a plaintiff may carry this burden if she can demonstrate that the defendant officer "knowingly and intentionally, or with reckless disregard for the truth, made a false statement in his affidavit or omitted material information, . . . [where] such false or omitted information was necessary to the finding of probable cause." Soares v. Connecticut, 8 F.3d 920 (citations and internal quotation marks omitted). Furthermore, even where a misrepresentation or an omission is included in an affidavit, the affidavit may nevertheless support the valid warrant if information contained in the affidavit, independent of the defective portion, supports a probable cause finding. United States v. Frost, 999 F.2d 737, 742-743 (3d Cir.1993), cert. denied, 510 U.S. 1001 (1993). This determination is a mixed question of law and fact, and "implicates what, in [the Second Circuit], has come to be known as the 'corrected affidavits doctrine.'" Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004).

Under the "corrected affidavits doctrine," the court must construct what a hypothetical, "corrected" warrant application would contain, based on the facts as they were known to the applicant, and must decide whether this corrected affidavit would support probable cause to arrest. See Smith v. Edwards, 175 F.3d 99, 105 (2d Cir.

1999). In so doing, the court also must "put aside allegedly false material, supply any omitted information, and then determine whether the contents of the 'corrected affidavit' would have supported a finding of probable cause." Martinez v. City of Schenectady, 115 F.3d 111, 115 (2d Cir. 1997) (quoting Soares, 8 F.3d at 920). If the corrected warrant application also objectively supported probable cause, "no constitutional violation of the plaintiff's Fourth Amendment rights has occurred." Soares, supra, 8 F.3d at 920.

Officer Danaher requested an arrest warrant be issued for the plaintiff for the charge of violation of General Statutes § 53a-97, Custodial Interference in the First Degree, and his affidavit was reviewed by both a state prosecutor and judge who found probable cause for the offense charged. (Def's Local Rule 56(a)1 Statement 35.)

General Statutes § 53a-97 provides, "[a] person is guilty of custodial interference in the first degree when he commits custodial interference in the second degree as provided in section 53a-98. . . . by taking, enticing or detaining the child . . . out of state" General Statutes § 53a-98 provides in pertinent part:

> (a) A person is guilty of custodial interference in the second degree when: (1) Being a relative of a child who is less than sixteen years old and intending to hold such child permanently or for a protracted period and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian; (2) knowing that he has no legal right to do so, he takes or entices from lawful custody any

> incompetent person or any person entrusted by authority of law to the custody of another person or institution; or (3) knowing that he has no legal right to do so, he holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child.

Conn. Gen. Stat. Ann. § 53a-98.

Applying the corrected affidavits doctrine to the instant matter, the corrected affidavit would have supported a finding of probable cause for the plaintiff's arrest on the charge of custodial interference in the first degree.

Plaintiff does not contend and there is no evidence that there are any false statements contained in the warrant. (Def's Local Rule 56(a)1 Statement 42.) The plaintiff however maintains that the following material information was omitted from the warrant affidavit: Plaintiff's ex-husband, Matthew Couloute had relocated to Georgia and was not a resident of Fairfield, Connecticut; the plaintiff had written permission from Couloute to leave the state, there was a protective order in place in New York. (Def's Local Rule 56(a)1 Statement ¶ 43.)

Brendan Danaher understood Matthew Couloute to live at 50 Duncaster Road, Bloomfield, Connecticut and to be in the process of relocating to Georgia—to still be a resident of Connecticut. (Id. at ¶ 30.) Nevertheless, the Uniform Custody Jurisdiction Act, which has been adopted by the State of Connecticut eliminates the concept of

physical presence in a state as necessary to creating jurisdiction. UCCJA § 3(a)(3) (1968).

Instead, the act gives jurisdiction to the home state, which is the state in which the child had been living for at least six months proceeding commencement of the action. Id. Since pursuant to the act all jurisdictional issues relate to the child, the home state is where the child lived within six months of the dispute and where the custody order was issued—in this case, the State of Connecticut. Id. Thus, whether or not Couloute was staying in Georgia/relocating to Georgia is irrelevant and would not negate probable cause for the crime charged.

The email from Mr. Couloute the plaintiff relies on as permission to leave the state is dated October 14, 2016, at 4:30 p.m., and states,

> I don't know who your listening to or what you think is happening. I've tried to get on the same page as you so that we both can move on. I do not let you try to pretend that [I am] abandoning you here in CT. That's not what's going on. No one has time to play this game you insist on playing. You're going to Buffalo, go. Just give me time with my daughter. If we can't figure this out, I'll bring another load of things to Atlanta and come back for my visitation.

(Def.'s Local Rule 56(a)1 Statement ¶ 44.) There is no indication in the e-mail that Couloute understood the plaintiff to be moving to Buffalo permanently or for an extended period of time with their child and that he permitted such an arrangement as was required by the separation agreement. (See Danaher Aff. attached as **Exhibit A**

to Def.'s Local Rule 56(a)1 Statement and attached Exhibit 1a, Haidon v. Danaher 00060.) Further, emails and other documentation provided to Danaher from both Couloute and the plaintiff, along with the plaintiff's own statements to Danaher and Danaher's conversations with members of New York law enforcement, support that Couloute did not give the plaintiff permission to move to New York permanently or for an extended period of time with Sophia, that the plaintiff was hiding Sophia from Couloute, and that the plaintiff knew her refusal to provide Couloute with access to Sophia upon his request was in violation of the separation agreement and court's order concerning custody. (Def's Local Rule 56(a)1 Statement ¶¶ 13-15, 17-21, 25-26 and police case file attached to **Exhibit A** as Exhibit 1.)

The Temporary Order in place in New York likewise does not impact the defendant's probable cause determination—is not a material omission. The order temporarily suspended Couloute's access to Sophia on January 9, 2017, pending further order of the court. (Id. at ¶ 45.) Couloute's complaint to Officer Danaher, however, concerned the plaintiff denying him access to Sophia from October of 2016 through to the date of submission of the warrant affidavit and application to the State's Attorney's office. Moreover, as set forth above, pursuant to the Uniform Custody Jurisdiction Act, the Connecticut family court rather than New York had jurisdiction over the matter of custody of Sophia in January of 2017.

In sum, none of omissions claimed by the plaintiff negate probable cause. Application of the corrected affidavits doctrine to the instant matter supports a finding of probable cause for the plaintiff's arrest on the charge of Custodial Interference in the First Degree, in violation of General Statutes §53a-98 (1) and (3). Accordingly, the plaintiff's federal and state law claims for false arrest and for malicious prosecution against the defendant Brendan Danaher fail as a matter of law, entitling him to summary judgment in their favor.

1. The Defendant Acted Without Malice

The plaintiff's malicious prosecution claim against the defendant must also be rejected because there is absolutely no evidence suggesting that the defendant acted with malice toward the plaintiff.

The Second Circuit defines malice as "wrong or improper motive, something other than a desire to see the ends of justice served." Lowth v. Town of Cheektowaga, 82 F.3d 563, 573 (2d Cir. 1996); see also, Fulton v. Robinson, 289 F.3d 188,198 (2d Cir. 2002). There exists no evidence in this case that would permit a trier of fact to conclude that the defendant acted with malice in connection with investigating the plaintiff's ex-husband's complaint and/or applying for a warrant for her arrest. In the absence of such evidence, the defendant officer is entitled to summary judgment as a matter of law. See Khan v. Costco Wholesale, Inc., 2001 WL 1602168, *10 (S.D.N.Y. Dec. 13, 2001) (the existence of probable cause and the absence of malice warranted

grant of summary judgment); Jenkins v. City of New York, 1992 WL 147647 7 (S.D.N.Y. June 15, 1992) ("Since under no view of [the] facts could probable cause be considered totally lacking, plaintiff still bears the burden of coming forward with some evidence of malice on the defendants' part in order to survive a motion for summary judgment. This they have not done, and the malicious prosecution claims must be dismissed.").

C. ANY FOURTEENTH AMENDMENT DUE PROCESS CLAIM FAILS AS A MATTER OF LAW.

The Fourteenth Amendment prohibits the state from depriving any person of life, liberty or property, without due process of law.

While unclear, it appears that the plaintiff claims that her arrest and prosecution on the charge of Custodial Interference in the First Degree was a violation of her Fourteenth Amendment due process. Such claims are inherently intertwined with her Fourth Amendment claims for false arrest and malicious prosecution and fail for all the reasons set forth above.

"Where a plaintiff has alleged sufficient facts to support a cause of action under the Fourth Amendment, a cause of action may not be pursued under the Fourteenth Amendment." Nadeau v. Anthony, No. CIV.A. 303CV834AWT, 2003 WL 22872150, at *2 (D. Conn. Dec. 2, 2003). In Nadeau, the plaintiff brought claims for violation of his right to be free from arrest without probable cause, as well as from malicious

prosecution; the court found that the Fourth Amendment, "not the more generalized notion of substantive due process must be the guide for analyzing [the plaintiff's claims]." Id. (internal citation and quotation marks omitted).

Here, the plaintiff has made specific allegations regarding claims of malicious prosecution and false arrest pursuant to the Fourth Amendment. As such, any claim for violation of her right to substantive due process under the Fourteenth Amendment in the First and Second Claims for Relief fail as a matter of law. Moreover, even if the claims may be analyzed under the Fourteenth Amendment, they fail as a matter of law for all the reasons set forth below in Section II, E.

D. THERE EXISTS NO GENUINE ISSUE OF MATERIAL FACT AND PLAINTIFF'S CLAIMS FOR DENIAL OF HER CONSTITUTIONAL RIGHT TO CARE AND CUSTODY OF HER CHILD AND TO INTIMATE ASSOCIATION FAIL AS A MATTER OF LAW.

The plaintiff purports to allege claims for denial of her due process right to care and custody of child and to intimate association pursuant to the First and Fourteenth Amendment. No such claim is available to the plaintiff under the First Amendment in the context of this case and, thus, the claim fails as a matter of law. With respect to the plaintiff's claim brought pursuant to the Fourteenth Amendment, there exists no genuine issue of material fact that plaintiff's relationship with her daughter did not end in its entirety for any period of time nor did defendant's challenged conduct have the likelihood of ending the plaintiff's relationship with her daughter. As such, the

defendant is entitled to summary judgment in his favor as to the plaintiff's claim for violation of the right to intimate association brought pursuant to the Fourteenth Amendment.

1. Plaintiff's First Amendment Claim Fails as a Matter of Law

"The Supreme Court has recognized a First Amendment right to 'enter into and maintain certain intimate human relationships' free from 'undue intrusion by the State,' *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-18 (1984), and a parent-child relationship is one such protected relationship, see *Pate v. Searles*, 305 F.3d 130, 136 (2d Cir. 2002) (parent-child relationship is constitutionally protected intimate relationship); *Talley v. Brentwoood Union Free Sch. Dist.* (Talley I), No. 08-CV-790, 2009 WL 1797627, at *6 n. 5 (E.D.N.Y. June 24, 2009) ('There is no dispute that plaintiff's relationship with her father falls within the ambit of constitutionally protected intimate associations.')." Agostino v. Simpson, No. 08-CV-5760 ("Agostino I"), No. 09-CV-10565 ("Agostino II"), 2012 WL 13209710 (S.D.N.Y. 2012).

Courts in the Second Circuit, however, have only "acknowledged a First Amendment right to intimate association is implicated where a plaintiff is allegedly retaliated against for the First Amendment activities of a family member." Id. (quoting Garten v. Hochman, No. 08-CV-9425, 2010 WL 2465479, at *3-4 (S.D.N.Y. June 16, 2010) (internal quotation marks omitted).

The plaintiff has not alleged and the factual record in this matter does not support that Officer Danaher sought a warrant for plaintiff's arrest in retaliation for the First Amendment activities of a family member. Accordingly, any claim for interference with plaintiff's intimate relationship with her daughter premised on the First Amendment fails as a matter of law on this basis and the defendant is entitled to summary judgment in his favor.

2. Plaintiff's Fourteenth Amendment Claim Fails as a Matter of Law

> Claims of interference with the familial right of intimate association that are not factually related to the exercise of speech, are analyzed as claims alleging the deprivation of a Fourteenth Amendment liberty right. Uwadiegwu v. Dep't of Soc. Servs. of the Cty. of Suffolk, 91 F. Supp. 3d 391, 397-98 (E.D.N.Y. 2015), aff'd, 2016 WL 158463 (2d Cir. January 14, 2016); see Garten, 2010 WL 2465479, at *4 (citing cases); see also Patel v. Searles, 305 F.3d 130, 135 (2d Cir. 2002) (stating that the right to intimate association receives protection as "a fundamental element of personal liberty" grounded in substantive due process under the Fourteenth Amendment); Lowery v. Carter, 2010 WL 4449370, at *2 (S.D.N.Y. 2010) ("When the right of intimate association does not implicate any First Amendment speech or retaliation concerns ... the court must analyze the case exclusively as a Fourteenth Amendment substantive due process claim").

Harris-Thomson v. Riverhead Charter Sch. Bd. of Trustees, No. CV145340JMAAYS, 2016 WL 11272084, at *14 (E.D.N.Y. Feb. 23, 2016), report and recommendation adopted, No. 14CV5340JMAAYS, 2016 WL 4617207 (E.D.N.Y. Sept. 6, 2016).

> It is not entirely clear that a claim of interference with the right of intimate familial association must allege a specific level of injury caused by defendant's conduct. Certain cases have held, however, that no Fourteenth Amendment claim is stated in the absence of an allegation that defendant's conduct "has the likely effect of ending the protected relationship," or that the purpose of the challenged action was to affect the relationship at issue. Garten, 2010 WL 2465479, at *4 (citing Adler, 185 F.3d at 43). Other cases have held that a plaintiff need not allege conduct aimed at ending a protected relationship, but must at least allege a burden that constitutes "undue intrusion" by defendant on the relationship. Adler, 185 F.3d at 43 (internal citations omitted).

Id.

The plaintiff has not alleged and the case facts do not support that the plaintiff's relationship with her daughter ended and/or that the defendant's conduct had the likely effect of ending the relationship or was for the purpose of terminating the relationship. Indeed, the plaintiff's relationship with her daughter was never terminated—she always maintained visitation rights and did not have custody from March 6, 2017 to June 18, 2018. (Def's Local Rule 56(a)1 Statement ¶¶ 50, 51, 54.) Further, plaintiff has not alleged and the facts do not support that Danaher's decision to seek a warrant for the plaintiff's arrest was motivated by a desire to interfere with the plaintiff's relationship with her daughter. Accordingly, there exists not genuine issue of material fact and the defendant is entitled to summary judgment in his favor as to any claim for violation of

the plaintiff's right to intimate association brought as a Fourteenth Amendment substantive due process claim.

Accordingly, the defendants are entitled to summary judgment in their favor as to Count Three of the Amended Complaint.

E. THE DEFENDANT IS OTHERWISE ENTITLED TO QUALIFIED IMMUNITY WITH REGARD TO THE PLAINTIFF'S CONSTITUTIONAL CLAIMS.

In the alternative, even if this Court finds that disputed factual issues remain on the plaintiff's Constitutional claims, the defendant officer is entitled to summary judgment in his favor because the doctrine of qualified immunity bars these claims.

Specifically, the defendant officer had, at a minimum, arguable probable cause to seek a warrant for the plaintiff's arrest. Further, it is was reasonable for him to believe he had arguable probably cause based upon his supervisor's instruction to submit the warrant to the State's Attorney's office after the supervisor's review of the warrant affidavit and documentation submitted by both the plaintiff and her ex-husband. Also, it is not clearly established in this jurisdiction that a voluntary surrender or voluntarily turning oneself in pursuant to an arrest warrant constitutes a seizure that implicates the Fourth Amendment. Finally, not every reasonable officer in this jurisdiction would have understood his conduct to implicate any right of the plaintiff to care and custody of her child or intimate association.

1. It was reasonable for the defendant to believe he had arguable probable cause

"The essential inquiry in determining whether qualified immunity is available to an officer accused of false arrest is whether it was objectively reasonable for the officer to conclude that probable cause existed." Jenkins v. City of New York, 478 F.3d 76, 87 (2d Cir. 2007) (citing Anderson v. Creighton, 483 U.S. 635, 644, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

> "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Id.,* quoting *Escalera v. Lunn,* 361 F.3d 737, 743 (2d Cir.2004). "In deciding whether an officer's conduct was objectively reasonable ..., we look to the information possessed by the officer at the time of the arrest, but we do not consider the subjective intent, motives, or beliefs of the officer." *Amore v. Novarro,* 624 F.3d 522, 536 (2d Cir.2010) (internal quotation marks omitted).

Garcia v. Does, 779 F.3d 84, 92 (2d Cir. 2015).

In the context of a false arrest claim based upon an arrest pursuant to a warrant, "[a]s a government official performing a discretionary function, Officer Danaher is entitled to qualified immunity under § 1983, even if he did not have probable cause, unless the corrected affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable.'" Kennedy v. Chamberland, No. 3:07-CV-214 (RNC), 2010 WL 1286789, *5 (D.Conn. 2010)

(quoting Malley v. Briggs, 475 U.S. 335, 344-45, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). "This test is met if officers of reasonable competence could disagree on whether the corrected affidavit establishes probable cause." Id. (citing Lennon v. Miller, 66 F.3d 416, 420 (2d Cir. 1995).

Here, even if the corrected affidavit does not establish probable cause, which the defendant denies, reasonable officers could disagree about whether the probable cause test is met. In fact, both Officer Danaher and Sergeant Klomberg were aware of the information that the plaintiff claims was omitted from the warrant—the temporary order from New York temporary suspending Couloute's right to access to Sophia, the email in which Couloute told the plaintiff to go to New York in October but to provide him access to his daughter, and that the plaintiff stated that Couloute was residing in Georgia, and both believed that there was probable cause for the crime charged in the warrant. (Def.'s Local Rule 56(a)1 Statement ¶¶ 28-32.)

Moreover, "[p]lausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exits (e.g. a warrant, probable cause, exigent circumstances)." Anthony v. City of New York, 339 F.3d 129, 138 (2d Cir. 2003) (quoting Bilida v. McCleod, 211 F.3d 166, 174-75 (1st Cir. 2000)).

In Anthony, supra, the plaintiffs, a woman with Down syndrome and her half-sister, brought claims against the defendant city and police officers alleging, inter alia, violations of the Fourth and Fourteenth Amendments which allegedly occurred when police officers entered the woman's apartment without a warrant, seized the woman, and involuntarily hospitalized her in a psychiatric ward. Anthony, 339 F.3d 131-32. The district court granted the defendants' motion for summary judgment and the plaintiffs appealed. With regard to the plaintiffs' § 1983 claims for unlawful seizure in violation of the Fourth Amendment directed toward the defendant officers, the Second Circuit affirmed the district court's decision on the basis that qualified immunity barred the claims on the following factual record:

The defendant officers described the woman as sitting calmly and quietly (although uncommunicatively) in her sister's apartment while the officers searched the apartment and attempted to contact the sister. Anthony, 339 F.3d 138. The officers knew they were responding to a 911 call from a woman inside the apartment who claimed to be at risk of immediate physical injury, requested assistance, and was potentially "emotionally disturbed." Anthony, 339 F.3d 138. The officers were responding to the order of a sergeant, their superior officer, when they seized the woman and removed her to the hospital. Id. at 138.

On this factual record, the Second Circuit held that the defendant officers "reasonably could have concluded, given [the Sergeant's order], that probable cause existed to seize [the woman]." Id.

Here, following the above law, even if the defendant Officer Danaher were somehow mistaken as to his belief regarding probable cause to arrest, it was objectively reasonable for him to believe that probable cause existed to seek a warrant for the plaintiff's arrest. In addition to all the facts and evidence known to Danaher, Sergeant Klomberg reviewed the affidavit and all supporting evidence and agreed with the defendant that there was probable cause for the plaintiff's arrest and instructed the defendant to seek a warrant. (Def's Local Rule 56(a)1 Statement ¶¶ 31-32.) It was reasonable for the defendant to conclude from this decision or instruction made by his supervisor, after the supervisor's independent review, (Id.), that the necessary legal justification for the plaintiff's arrest existed.

2. Not every reasonable officer in this jurisdiction would have understood the plaintiff to have been arrested or seized in a manner that implicates the Fourth Amendment.

Officer Danaher is entitled to qualified immunity as to the plaintiff's false arrest claim because not every reasonable officer would understand the plaintiff to be seized for purposes of the Fourth Amendment where she voluntarily surrendered to the warrant for her arrest, a bond was set by the court and not the police department, and the plaintiff did not post the bond which was $10,000.00.

"In general, damages for unlawful arrest cover from 'the time of detention up until issuance of process or arraignment, but no more. From that point on, any damages recoverable must be based on a malicious prosecution claim.' *Wallace v. Kato*, 549 U.S. 384, 390, 127 S. Ct. 1091, 166 L. Ed2d 973 (2007); *see Hygh v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992) (holding false arrest claim cognizable from period of arrest through arraignment)." Mara v. Rilling, 921 F.3d 72-73.

To date, neither the Supreme Court nor the Second Circuit has decided that an officer's acceptance of a voluntary surrender to an arrest constitutes a Fourth Amendment seizure. The Fifth, Seventh, Tenth, and Eleventh Circuits have found a seizure in this context. Mclin v. Ard, 866 F.3d 682, 696 (5th Cir. 2017; Whiting v. Traylor, 85 F.3d 581, 583 (11th Cir. 1996), abrogated on other grounds by Wallace v. Kato, 549 U.S. 384, 389-90, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007); Goad v. Town of Meeker, 654 F.App'x. 916, 921 (10th Cir. 2016 (unpublished); Cummisky v. Mines, 248 F.App'x. 962, 964, 965, n.1 (10th Cir. 2007) (unpublished); Albright v. Oliver, 975 F.2d 343, 344-45 (7th Cir. 1992). The Fifth Circuit, however, in considering the issue, observed that "there is no[t] a 'robust consensus of persuasive authority'. . . ." Mclin v. Ard, 866 F.3d 696.

In McLin, the plaintiff voluntarily surrendered to the sheriff's office and signed a misdemeanor summons pertaining to three purported criminal defamation violations upon learning of the warrants and the charges. McLin, 866 F.3d 687. The plaintiff

appealed, inter alia, the lower court's dismissal of his Fourth Amendment claim for false arrest. Id. at 688. The McLin court held that, although the plaintiff pleaded a Fourth Amendment violation, the defendants were still entitled to qualified immunity because the constitutional right at issue was not "clearly established." In so holding, the Fifth Circuit offered the following analysis:

> "When considering a defendant's entitlement to qualified immunity, we must ask whether the law so clearly and unambiguously prohibited his conduct that '*every* reasonable official would understand what he is doing violates [the law].'" *Morgan*, 659 F.3d at 371 (quoting *al-Kidd*, 563 U.S. at 741, 131 S. Ct. 2074) *see also Lane v. Franks*, —— U.S. ——, 134 S. Ct. 2369, 2381, 189 L. Ed.2d 312 (2014) (noting that the right must be clearly established "at the time of the challenged conduct"). "To answer that question in the affirmative, we must be able to point to controlling authority—or robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Morgan*, 659 F.3d at 371-72 (internal quotation marks omitted) (quoting *al-Kidd*, 563 U.S. at 742, 131 S. Ct. 2074); *see also Mullenix v. Luna*, —— U.S. ——, 136 S. Ct. 305, 308, 193L. Ed.2d 255 (2015) ("The dispositive question is whether the violative nature of *particular* conduct is clearly established." (internal citation and quotation omitted)). "Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established." *Morgan*, 659 F.3d at 372.

The McLin court went on to conclude that it could not be said that every reasonable officer would understand that the plaintiff was seized for purposes of the Fourth Amendment where the issue had not been previously decided by the Supreme

Court or the Fifth Circuit and there was "no robust consensus of persuasive authority." McLin, 866 F.3d 696.

McLin is a persuasive, well-reasoned decision and this Court should follow it in finding that Danaher is entitled to qualified immunity and dismissal of the plaintiff's false arrest claims on the additional basis that not every reasonable officer would understand the plaintiff to have been seized where Danaher contacted the plaintiff and let her know of the warrant, asked her to turn herself in, and she ultimately did so albeit over three weeks later. (Def's Local Rule 56(a)1 Statement ¶¶ 37, 38, 30, 41, 42.) The Second Circuit has yet to decide the issue of whether such a plaintiff is seized for purposes of the Fourth Amendment and there is not a "robust consensus" amongst the Circuit courts.

3. If the plaintiff could be understood to have been arrested, not every reasonable officer in this jurisdiction would understand the plaintiff's arrest to implicate a right to care and custody of her child and/or intimate association

With regard to plaintiff's claim for violation of the right to care and custody of her child and intimate association, the law was not so clear and the conduct of the defendant not so outside the bounds of the law, to defeat the defense of qualified immunity. It was reasonable for the defendant to believe, under the precedents of the Supreme Court and this Circuit, that his conduct did not implicate any Fourteenth Amendment right of the plaintiff to intimate association in that the plaintiff's relationship

with her daughter was not terminated nor was there any undue intrusion due to the defendant's conduct in seeking a warrant for the plaintiff's arrest. There is no evidence that plaintiff's separation from Sophia from March 6, 2017 to June 18, 2018 was due to plaintiff's arrest or pending criminal case. Rather, the plaintiff's criminal matter was dismissed on August 17, 2017, (Def's Local Rule 56(a)1 Statement ¶ 52), and the plaintiff subsequently took a job with Fenster Enterprises in September of 2017 requiring her to stay in Indiana for weeks at a time. (Def.'s Local Rule 56(a)1 Statement ¶ 53). The plaintiff alleges in her complaint that that the "contentious circumstances between her and Couloute" played a part in the New York court "stripping" her of custody. (Compl. ¶ 43.) This allegation constitutes a judicial admission the plaintiff is now estopped from denying. Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 332 F.3d 147, 167 (2nd Cir. 2003) ("[T]he allegations in the . . . Complaint are judicial admission by which [Plaintiffs are] bound throughout the course of the proceeding."]

Accordingly, the defendant is entitled to summary judgment in his favor as to the Third Claim for Relief set forth in the Complaint.

F. THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER THE STATE LAW CLAIMS.

The plaintiff's states law claims for false arrest and malicious prosecution fail for all the reasons set forth above. In addition and in the alternative, should this Court

grant summary judgment in the defendant's favor on any of the above grounds as to plaintiff's federal claims, it should decline to exercise jurisdiction over the pendant state law claims, including the plaintiff's claim for abuse of process. See United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial, even though not insubstantial in the jurisdictional sense, the state claims should be dismissed as well."); First Capital Asset Mgmt., Inc., 385 F.3d 159, 183 (2d Cir. 2004) (same); Travelers Ins. Co. v. Keeling, 996 F.2d 1485, 1490 (2d Cir. 1993) ("in the usual case in which all federal-law claims are eliminated before trial, th[e] balance of factors to be considered . . . will point toward declining to exercise jurisdiction over the remaining state-law claims") (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (1988)).

G. PLAINTIFF'S CLAIM FOR ABUSE OF PROCESS FAILS AS A MATTER OF LAW.

There exists no genuine issue of material fact and plaintiff's abuse of process claim fails as a matter of law on the basis that 1) the wrongful act at issue is the commencement of an action without legal justification, not the subsequent criminal proceedings in which the defendant officer was not involved and 2) any use of the legal process was not primarily to accomplish a purpose for which it is not designed.

Under Connecticut law,

> An action for abuse of process lies against any person using a legal process against another in an improper manner or to accomplish a purpose for which it was not

> designed. Because the tort arises out of the accomplishment of a result that could not be achieved by the proper and successful use of process, the Restatement Second (1977) of Torts, § 682, emphasizes that the gravemen of the action for abuse of process is the use of a legal process . . . against another *primarily* to accomplish a purpose for which it is not designed. . . . Comment b to § 682 explains that the addition of primarily is meant to exclude liability when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant.

Zak v. Robertson, 249 F.Supp.2d 203, (D.Conn. 2003) (quoting Suffield Development Assoc. Ltd. Partnership v. National Loan Investors, L.P., 260 Conn. 766, 772-73 802 A.2d 44 (2002); See also Rogan v. Rungee, 165 Conn. App. 209, 220, 140 A.3d 979, 987 (2016).

In Zak, applying the above law, the court granted summary judgment in the defendant city officials' favor as to the plaintiff claims of abuse of process stemming from the defendants' issuance of arrest warrants against the plaintiff property owner and plaintiff housing inspector. Id. at 204. The plaintiffs claimed, inter alia, that through falsification of arrest warrant affidavits and use of the criminal process the defendants sought to punish the plaintiffs for the plaintiff inspector's exercise of his First Amendment rights. Id. at 204-05. In so holding the court found,

> In this case, the plaintiffs asserted at oral argument that the defendants abused the criminal process in an effort to silence Huertas' exercise of his First Amendment rights. However, although the plaintiffs have come forward with evidence that the defendants may have intended to punish

> Huertas as result of his complaints about 1055-1057 Capital Avenue or a variety of job-related disputes . . . nothing in the record supports an inference that the defendants' primary purpose in instituting criminal process against Zak and Huertas was to alter Huertas' future behavior.

Id. at 209. The court went on to hold that plaintiffs' allegations that the criminal process was initiated without probable cause and with improper motive were sufficient to support a state law claim for malicious prosecution, but not for malicious abuse of process. Zak, 249 F.Supp. 209. In other words, initiation of criminal process does not constitute abuse of process.

Following the above law, the plaintiff's Complaint and the record evidence fail to establish a claim for abuse of process. As the complained of conduct is that the defendant wrongly initiated criminal charges against the plaintiff and does not concern the subsequent prosecution of the charges, her claim lies in malicious prosecution rather than abuse of process. There is no claim or record evidence to support that the defendant had any involvement in the criminal prosecution of the plaintiff following her arrest. As such, the plaintiff's claim for abuse of process fails as a matter of law.

Moreover, the record evidence is that the defendant used the legal process correctly. He applied for an arrest warrant based on probable cause in order to effect the lawful arrest of the plaintiff on the charge of Custodial Interference. The warrant was signed by an Assistant State's Attorney and Judge and the plaintiff was arrested.

Because there exists no genuine issue of material fact that the defendant used the legal process for the purpose for which it was intended, the plaintiff's claim for abuse of process fails as a matter of law on this additional basis.

Accordingly, there exists no genuine issue of material fact and the defendant is entitled to summary judgment in his favor as to plaintiff's claim for abuse of process alleged in her Fourth Claim for Relief.

III. CONCLUSION

WHEREFORE, for all of the foregoing reasons, the defendant requests that the Court grant him summary judgment on all claims set forth in the plaintiff's Complaint. In the alternative, the defendant requests that the Court review each of the plaintiff's claims individually and grant partial summary judgment as to those claims it finds the defendant is entitled to judgment as a matter of law.

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CERTIFICATION

This is to certify that on **May 2, 2022**, a copy of the foregoing **Memorandum of Law in Support of Motion for Summary Judgment** was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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