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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Steven Peck, et al.,

10 Plaintiffs,

11 v.

12 Margaret Hinchey, et al.,

13 Defendants.

No. CV-12-01371-PHX-JAT

ORDER

14
15 Pending before the Court are Plaintiffs' Motion for Leave to File a Third
16 Amended Complaint (Doc. 353), Defendant Margaret Hinchey's Motion to Strike
17 Plaintiffs' Motion for Leave to File a Third Amended Complaint (Doc. 354), and
18 Defendant's Motion to Dismiss Second Amended Complaint (Doc. 355). The Court now
19 rules on the motions.

20 **I. Background**

21 Steven Peck, Benjamin Sywarungsymun, Aaron Lentz, and Shannon Lentz
22 (hereinafter "Plaintiffs") filed a complaint against Margaret Hinchey (hereinafter
23 "Defendant" or "Hinchey") and numerous other defendants in June 2012. Plaintiffs were
24 subjected to a criminal investigation in which Hinchey, a Special Agent with the Arizona
25 Attorney General's Office, was involved. The investigation sought to determine whether
26 Defendants, who were employed by the Phoenix Police Department (PPD), were falsely
27 reporting the hours worked at their off-duty job working security at the Cotton Center
28 Townhomes. (Doc. 1 at 4). In November 2010, Plaintiffs were indicted by a grand jury on

1 felony theft of services charges. (Doc. 1 at 13). Plaintiffs also were suspended from their
2 jobs with the PPD. (Doc. 1 at 15).

3 After a review of Defendant's investigation, Plaintiffs filed a motion to remand
4 their indictments in Maricopa County Superior Court. The motion was granted, and a
5 second grand jury declined to re-indict Plaintiffs. The Attorney General's Office then
6 filed a motion to dismiss charges against Plaintiffs, and the charges were dismissed in
7 November 2011.

8 Subsequently, Plaintiffs filed a complaint in this Court, alleging *inter alia* that
9 Hinchey and the other defendants falsified evidence, presented false evidence to the
10 grand jury and prosecuting authorities, and maliciously prosecuted Defendants in
11 violation of their Constitutional rights and 42 U.S.C. § 1983. (Doc. 1). In April 2013, this
12 Court issued an order granting Plaintiffs leave to amend their complaint upon stipulation
13 of the parties. (Doc. 166). In that same order, the Court re-set the controlling Rule 16
14 deadlines and removed the previously-agreed to "floating date" for filing motions to
15 amend the complaint. The Court noted that Plaintiffs could no longer continue to amend
16 the complaint dependent upon the Court's future rulings, and required Plaintiffs to "file
17 any further motions to amend" the complaint by May 31, 2013. (Doc. 166 at 5). Upon
18 stipulation of the parties, Plaintiffs filed a Second Amended Complaint (hereinafter "the
19 Complaint") on May 8, 2013. (Doc. 180).

20 Later, Defendant filed a motion to dismiss the Complaint. (Doc. 197). The Court
21 granted the motion on the basis of absolute immunity under *Rehberg v. Paulk*, 132 S. Ct.
22 1497 (2012), and dismissed Plaintiffs' complaint without leave to amend. (Doc. 329).
23 Plaintiffs appealed the dismissal, and the Ninth Circuit Court of Appeals reversed this
24 Court's grant of absolute immunity to Hinchey. (Doc. 351; Doc. 351-2; *see also* Doc.
25 352). On appeal, Plaintiffs also argued this Court erred when it denied them leave to
26 amend the Complaint after the May 31, 2013 deadline. (Doc. 354 at Exhibit 1). The
27 Circuit Court disagreed and affirmed this Court's denial of leave to amend, determining
28 that Plaintiffs "did not demonstrate 'good cause' to amend past the deadline." (Doc. 351-

1 2 at 4). The Circuit Court also explained that as a result of its ruling, this Court “need
2 only consider the allegations in the Second Amended Complaint on remand.” (*Id.*)

3 After the Circuit Court’s ruling, this Court entered an Order clarifying the case’s
4 procedural posture. That Order explained that the Complaint, as limited by the Ninth
5 Circuit’s decision on appeal, now represents the “totality of the claims” remaining in the
6 case. (Doc. 352 at 3). The Court also required Defendant to respond to Counts I, II, and
7 III of the Complaint either by answer or by a “completely new” motion. (Doc. 352 at 3
8 n.2). Defendant did so by filing a motion to dismiss the Complaint. (Doc. 355). Plaintiffs
9 also filed a motion for leave to file a third amended complaint (Doc. 353), and Defendant
10 moved to strike Plaintiffs’ motion to amend (Doc. 354).

11 **II. Motion for Leave to File Third Amended Complaint**

12 **A. Legal Standard**

13 Plaintiffs’ request leave to file a third amended complaint was filed in August
14 2016 — well after the expiration of the May 31, 2013 deadline set by this Court in its
15 April 2013 ruling. (Doc. 166). Accordingly, the Court must evaluate Plaintiffs’ motion
16 under Rule 16(b) to determine if good cause exists for the delay in filing. *Coleman v.*
17 *Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *see also Taylor ex rel. Thomson*
18 *v. Zurich Am. Ins. Co.*, 2013 WL 1340014 at *5 (D. Ariz. Aug. 3, 2010). If the Court
19 finds good cause for granting leave to amend under Rule 16(b), it must then determine
20 whether leave to amend is also warranted under Rule 15(a). *Johnson v. Mammoth*
21 *Recreations*, 975 F.2d 604, 607–08 (9th Cir. 1992) (explaining that “a motion seeking to
22 amend pleadings is governed first by Rule 16(b), and only secondarily by Rule 15(a)”).
23 Whether to grant leave to amend a complaint is a decision “within the Court’s sound
24 discretion.” *In re Mortg. Elec. Registration Sys. Litig.*, 744 F.Supp.2d 1018, 1033 (D.
25 Ariz. 2010); *see also Ascon Prop., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir.
26 1989) (describing this Court’s discretion to deny further leave to amend as “particularly
27 broad” when the plaintiff has already had an opportunity to amend the complaint).

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1 **B. Good Cause under Rule 16(b)**

2 Federal Rule of Civil Procedure (“Rule”) 16(b) states that the Court’s scheduling
3 order “may be modified only for good cause and with the judge’s consent.” Fed. R. Civ.
4 P. 16(b). The primary consideration under Rule 16(b) is the “diligence of the party
5 seeking the amendment.” *Johnson*, 975 F.2d at 609. Although the Court may consider
6 whether an amendment would prejudice the non-moving party, the “focus of the inquiry
7 is upon the moving party’s reasons for seeking modification.” *Id.* To show good cause
8 under Rule 16(b), the moving party must prove: (1) that its need to seek a late
9 amendment of the complaint was not reasonably foreseeable or anticipated at the time of
10 the Rule 16 scheduling conference, and (2) that it was diligent in seeking to extend the
11 time for amending the complaint once it became apparent that amendment was necessary.
12 *Taylor*, 2013 WL 1340014 at *3.

13 Plaintiffs argue a third amended complaint is necessary to “remove reference to
14 dismissed Defendants and to further define earlier allegations.” (Doc. 353 at 4:2, 4:21).
15 Under the facts of this case, the Court does not find Plaintiffs’ argument compelling.
16 Plaintiffs assert the need to redefine the Complaint’s allegations arose based on
17 information learned during Defendant Hinchey’s depositions. (Doc. 353 Exhibit 1 at ¶
18 101, 104–05). But Hinchey’s depositions were completed as early as August 2013. (Doc.
19 95, Doc. 100, Doc 110, Doc. 116, Doc. 234). Plaintiffs therefore had reason to know of
20 the facts necessitating redefinition of their claims for seven months before this Court
21 ruled on Defendant’s motion to dismiss in March 2014. And although Hinchey’s
22 depositions concluded after the Court’s deadline for seeking leave to amend, waiting
23 three years to file such a motion was not diligent.

24 Neither does the more recent dismissal of several defendants serve as a compelling
25 reason for Plaintiffs to file a third amended complaint. Multiple defendants have
26 previously been dismissed from this lawsuit without Plaintiffs seeking leave to file an
27 entirely new complaint removing references to dismissed parties. (*See* Doc. 266, Doc.
28 299, Doc. 306 (voluntarily dismissing defendants)). The Court therefore finds Plaintiffs

1 were not diligent in seeking leave to amend the Complaint after they became aware that
2 such an amendment may be prudent.

3 **C. The Rule of Mandate**

4 The Ninth Circuit’s decision on appeal also has some bearing on whether this
5 court should grant Plaintiffs leave to amend. This Court must take care to follow the
6 terms of the Circuit Court’s mandate and may not issue an order “counter to the spirit of
7 the circuit court’s decision.” *Wininger v. SI Management L.P.*, 244 Fed.Appx. 156, 157–
8 58 (9th Cir. 2007) (quoting *United States v. Perez*, 475 F.3d 1110, 1113 (9th Cir. 2007)).

9 The Court finds that the spirit of the Ninth Circuit’s mandate is better sustained by
10 denying Plaintiffs leave to amend.¹ The Circuit Court determined that leave to amend the
11 Complaint was not warranted in this case, even in light of the dismissal of several
12 defendants and all but three of Plaintiff’s claims. Put another way, the Circuit Court
13 found the Complaint sufficient to outline Plaintiffs’ claims and explained that this court
14 “need only consider the allegations” contained in the Complaint upon remand. For this
15 Court to hold now that a third amended complaint is necessary and warranted, despite the
16 Circuit Court’s contrary conclusion, would run afoul of the spirit of the Circuit Court’s
17 directive. *See id.*

18 **D. Disposition**

19 Because Plaintiffs have not shown good cause for granting leave to amend, and in
20 keeping with the spirit of the Circuit Court’s holding, Plaintiffs’ motion for leave to file a
21 third amended complaint is denied. Defendant’s motion to strike is therefore denied as
22 moot.

23 **III. Motion to Dismiss Plaintiff’s Second Amended Complaint**

24 **A. Legal Standard**

25 Next, the Court addresses Defendant’s motion to dismiss the Complaint for failure

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27 ¹ Defendant argues the Ninth Circuit’s decision on appeal categorically prohibits
28 considering Plaintiffs’ motion for leave to amend. The Court disagrees. The Circuit
Court’s decision was permissive, explaining that this Court “*need* only consider the
allegations” in the Complaint; it did not hold that this Court “*may* only consider,” “*should*
only consider,” or “*must* only consider.” (Doc. 351-2 at 4).

1 to state a claim under Rule 12(b)(6). (Doc. 355). Rule 8(a)(2) requires a complaint to
2 include “a short and plain statement of the claim showing that the pleader is entitled to
3 relief.” In order to survive a challenge under Rule 12(b)(6), a complaint must contain
4 more than “a formulaic recitation of the elements of [the] cause of action.” *Bell Atlantic*
5 *Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Instead, it must plead facts sufficient to
6 “raise a right to relief above the speculative level.” *Id.* The Court construes the facts as
7 alleged in the light most favorable to the Plaintiffs and accepts all well-pleaded factual
8 allegations (and reasonable inferences to be drawn therefrom) as true. *Doe v. United*
9 *States*, 419 F.3d 1058, 1062 (9th Cir. 2005); *Shwarz v. United States*, 234 F.3d 428, 435
10 (9th Cir. 2000).

11 **B. Devereaux Claims**

12 Counts I and II of the complaint claim Defendant’s actions violated Plaintiffs’
13 right to be free from criminal charges based upon “false evidence that was deliberately
14 fabricated by the government.” *See Devereaux v. Abbey*, 263 F.3d 1070, 1074–75 (9th Cir.
15 2001). Claims that the government deliberately fabricated evidence must be supported by
16 proof of either: (1) an investigation against the plaintiff that continued despite the fact
17 that the government knew or should have known of the plaintiff’s innocence; or (2) the
18 government’s use of coercive and abusive investigative techniques that it should have
19 known would yield false information. *Id.* at 1076.

20 **1. Adequacy of Allegations**

21 Defendant first contends the Complaint does not state an adequate *Devereaux*
22 claim against her because it also alleges that former Attorney General Terry Goddard²
23 was the driving force behind Plaintiffs’ indictments. Defendant argues the complaint’s
24 factual allegations show that Goddard’s actions, independent of Hinchey’s investigation,
25 “subjected [Plaintiffs] to criminal charges.” (Doc. 355 at 7). Therefore, Defendant
26 contends the complaint cannot also support a conclusion that Hinchey’s actions were the

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28 ² Goddard was dismissed from this action by stipulation of the parties. (Doc. 162).
The dismissal was entered on April 15, 2013. (Doc. 166).

1 driving force behind the filing of criminal charges. (*Id.*)

2 This argument discounts the Federal Rule of Civil Procedure allowing for
3 inconsistent arguments within a party’s pleadings. Under Rule 8, “[a] party may state as
4 many separate claims or defenses as it has, regardless of consistency.” Fed. R. Civ. P.
5 8(d)(3). The Court allows such pleadings, even if the inconsistencies presented therein
6 are mutually exclusive. *See PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 859–60
7 (9th Cir. 2007). Accordingly, so long as the claims against this Defendant are sufficient
8 to establish a prima facie case against her, Plaintiffs’ claims regarding the actions of other
9 defendants do not vitiate the adequacy of their complaint.

10 Read independently, Plaintiffs’ allegations against Defendant herself are sufficient
11 to state a claim. The complaint sets forth facts alleging that Hinchey relied on unreliable
12 and incomplete sources in her investigation (Doc. 180 at ¶¶ 163, 222–23), did not take
13 steps to verify the information she received (*id.* at ¶¶ 159–63), discovered but did not
14 disclose potentially exculpatory evidence (*id.* at ¶¶ 192–96, 225), made false reports
15 regarding the extent of her investigation (*id.* at ¶¶ 160–62, 190), and disregarded or failed
16 to ascertain crucial information about the timekeeping and time reporting systems (*id.* at
17 ¶¶ 182–83, 187, 192–95). These are not mere formulaic recitations. *See Twombly*, 550
18 U.S. at 555–56. These are sufficient allegations from which the Court is able to draw
19 reasonable inferences that Defendant should have known either that Plaintiffs were not
20 guilty or that her investigation tactics would yield false results. *See Devereaux*, 263 F.3d
21 at 1074–75.

22 2. Plausibility of Allegations

23 Defendant also argues the facts do not give rise to a plausible *Devereaux* claim. A
24 plausible claim is one alleging “enough factual matter (taken as true) to suggest” the truth
25 of the purported conclusions. *Twombly*, 550 U.S. at 556. A claim has “facial plausibility”
26 when the plaintiff pleads factual content sufficient to allow the Court to “draw the
27 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*
28 *Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility does not

1 require that the allegations give rise to a probability of relief, but it does require sufficient
2 “factual enhancement” to push the claims over the line of “naked legal conclusions.” *Id.*
3 at 697 (quoting *Twombly*, 550 U.S. at 557).

4 Defendant asserts the claims are not plausible because they are equally as
5 suggestive of “carelessness or inaccurate investigation” as they are of deliberate
6 fabrication of evidence as required under *Devereaux*. See 263 F.3d at 1074–75. But as
7 outlined above, the facts in the complaint allege more than mere carelessness. Drawing
8 the reasonable factual inferences in the light most favorable to the Plaintiffs, the Court
9 finds the Plaintiffs set forth facts suggesting Hinchey had reason to know her
10 investigation was yielding or likely to yield false results. (See Doc. 180 at ¶¶ 159–63;
11 182–83; 187; 190; 192–95; 222–25). This is sufficient to satisfy *Devereaux*’s “stringent
12 test” for supporting a deliberate fabrication of evidence claim. See *Gausvik v. Perez*, 345
13 F.3d 813, 817 (9th Cir. 2003) (finding that careless investigation alone is insufficient to
14 support a *Devereaux* claim). Plaintiffs’ claims are therefore plausible.

15 C. Malicious Prosecution Claims

16 Finally, Defendant argues Count III does not set forth a cognizable claim for
17 malicious prosecution. A malicious prosecution claim under 42 U.S.C. § 1983 requires a
18 showing that the defendant “prosecuted [Plaintiffs] with malice and without probable
19 cause, for the purpose of denying [them] equal protection” under the Constitution.
20 *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (quoting *Freeman v.*
21 *City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995)).

22 1. Causation

23 First, Defendant argues the malicious prosecution claims do not demonstrate
24 causation because the Complaint does not demonstrate how Hinchey was “actively
25 instrumental” in initiating legal proceedings against Plaintiffs. See *Awabdy*, 368 F.3d at
26 1067. (Doc. 355 at 6). Defendant argues the Complaint’s factual allegations render her
27 actions irrelevant by supporting a conclusion that Goddard would have filed charges
28 against Plaintiffs irrespective of Defendant’s investigation. Accordingly, Defendant

1 asserts the complaint's allegations against her are "dispositively undermined" by the
2 complaint's other factual assertions. (Doc. 355 at 7). This argument fails again to take
3 into account the provisions for alternative and inconsistent pleadings contained in Rule
4 8(d)(3). And, because the complaint sets forth factual allegations specific to Defendant,
5 and from which the Court can reasonably infer Defendant should have known that
6 probable cause did not exist, it is sufficient to give rise to a plausible claim for malicious
7 prosecution. (*See* Doc. 180 at ¶¶ 159–63; 182–83; 187; 190; 192–95; 222–25).

8 2. **Malice**

9 Second, Defendant argues Plaintiffs did not sufficiently plead malice because they
10 did not allege that Defendant's conduct was undertaken for the purpose of violating
11 Plaintiffs' constitutional rights. (Doc. 355 at 7–8). But the existence of malice may be
12 inferred when there is no probable cause or a reckless disregard for the truth. *Lacy v.*
13 *Cnty. of Maricopa*, 631 F.Supp.2d 1197, 1211 (D. Ariz. 2008); *Donahoe v. Arpaio*, 986
14 F.Supp.2d 1091, 1128–29 (D. Ariz. 2013) (malice may be inferred when there is no
15 probable cause). As explained above, the complaint alleges Hinchey had reason to know
16 the evidence was insufficient to give rise to probable cause against Plaintiffs, yet
17 continued her investigation. The Complaint also alleges Defendant fabricated evidence
18 and made false reports to prosecuting authorities. Accordingly, the complaint sets forth
19 sufficient facts from which malice may be inferred.

20 **IV. Conclusion**

21 For the reasons outlined above,

22 **IT IS ORDERED** denying Plaintiffs' Motion for Leave to File Third Amended
23 Complaint. (Doc. 353). Defendant's Motion to Strike Plaintiff's Motion for Leave to File
24 Third Amended Complaint" is therefore denied as moot. (Doc. 354).

25 **IT IS FURTHER ORDERED** denying Defendant's Rule 12 Motion to Dismiss
26 Second Amended Complaint. (Doc. 355).

27 **IT IS FURTHER ORDERED** that Defendant shall file an answer to the Second
28 Amended Complaint within ten (10) days of this Order.

1 **IT IS FURTHER ORDERED** that within 7 days of Defendant Hinchey's filing
2 in response to the Second Amended Complaint, an order setting a Rule 16 scheduling
3 conference will follow.

4 Dated this 13th day of December, 2016.

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