

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KARIM KOUBRITI,

Plaintiff,

Case No. 2:07-cv-13678

v.

Hon. Marianne O. Battani

RICHARD CONVERTINO,
MICHAEL THOMAS and
HARRY RAYMOND SMITH,
Jointly and Severally
and in their Individual Capacities
Defendants.

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**DEFENDANT MICHAEL THOMAS'
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

Defendant Michael Thomas, by undersigned counsel, moves this Court under Federal Rule of Civil Procedure 12(b)(6) to dismiss Plaintiff's Complaint and action for failure to state a claim upon which relief may be granted. Following are the grounds of this Motion.

1. Plaintiff Karim Koubriti filed his Complaint asserting causes of action under 42 U.S.C. § 1983 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Each of the asserted causes of action restates a malicious prosecution theory. The gravamen of the Complaint is that Defendant Thomas acted in concert with the other Defendants Convertino and Smith to violate Plaintiff's rights in a criminal matter by manufacturing evidence and failing to turn over exculpatory evidence to Plaintiff's criminal defense counsel. As a result, the Complaint contends, Plaintiff was wrongfully convicted on terrorism-related charges.

2. As the Complaint fails to allege that Defendant Thomas took any action under color of state law, the Complaint fails to plead an essential element of a cause of action under 42 U.S.C. § 1983, and thus it must be dismissed.

3. As the Complaint fails to plead any facts demonstrating misconduct by Defendant Thomas, the Complaint fails to meet the pleading requirement of the Federal Rules of Civil Procedure, Rules 8(a) and 12(b)(6), and thus it must be dismissed.

4. As the Complaint fails to allege any facts demonstrating a lack of probable cause for arrest or prosecution, the Complaint's claims resting on malicious prosecution

under the Fourth, Fifth and Fourteenth Amendments must be dismissed.

5. As the Complaint adverts to 42 U.S.C. § 1985 but supplies no legal or factual allegations at all based on that statute, the Complaint's ostensible claims on that ground must be dismissed.

6. The grounds for this Motion are set forth more fully in the accompanying brief in support.

7. Counsel for Defendant Thomas has contacted Plaintiff's counsel to explain the legal and factual basis of this motion and requested consent for this motion; Plaintiff's counsel has not assented to the relief sought by this motion.

Defendant Michael Thomas respectfully requests this Court to enter an order dismissing the Complaint and action in its entirety.

Respectfully submitted,

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Date: January 25, 2008

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**BRIEF IN SUPPORT OF
DEFENDANT MICHAEL THOMAS'
MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

STATEMENT OF QUESTIONS PRESENTED

- I. Does Plaintiff's Complaint adequately allege facts necessary to support a malicious prosecution claim under 42 U.S.C. § 1983 against Defendant Thomas?

Defendant's contention: No.

- II. Does Plaintiff's Complaint adequately allege a malicious prosecution claim against Defendant Thomas under 42 U.S.C. § 1983 when the Complaint lacks any allegation that Thomas committed misconduct under color of state law?

Defendant's contention: No.

- III. Does Plaintiff's Complaint adequately allege a malicious prosecution action against Defendant Thomas under the Fourth, Fifth or Fourteenth Amendment, when the Complaint lacks factual allegations showing a prosecution in absence of probable cause?

Defendant's contention: No.

- IV. Does Plaintiff's Complaint adequately allege a violation of any law requiring disclosure of exculpatory evidence, when no evidence is identified or described?

Defendant's contention: No.

- V. Does Plaintiff's Complaint adequately allege any cause of action under 42 U.S.C. § 1985?

Defendant's contention: No.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

I. The Complaint offers labels and conclusions that fail to satisfy the requirements of rule 8(a) and rule 12(b)(6) to plead facts needed to support the causes of action.

Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955 (2007)

Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545 (2007).

II. The Complaint fails to allege Defendant Thomas acted under color of state law.

Hartman v. Moore, 547 U.S. 250 (2006).

Redding v. St. Edward, 241 F.3d 530 (6th Cir. 2001).

Ana Leon T. v. Fed. Reserve Bank, 823 F.2d 928 (6th Cir. 1987).

III. The Complaint lacks factual allegations to support the probable cause element of a malicious prosecution claim against Defendant Thomas.

Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003).

Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006).

IV. The Complaint lacks factual allegations to support the malice element of a malicious prosecution claim against Defendant Thomas.

Matthews v. Blue Cross and Blue Shield of Michigan, 572 N.W.2d 603 (Mich. 1998).

Voyticky v. Village of Timberlake, Ohio, 412 F.3d 669 (6th Cir. 2005).

V. The Complaint cannot validly plead claims under both the Fifth and Fourteenth Amendments.

Scott v. Clay County, 205 F.3d 867 (6th Cir. 2000).

Myers v. Village of Alger, 102 Fed. Appx. 931 (6th Cir. 2004).

Erdman v. Granholm, 2007 WL 757894 (W.D. Mich. 2007).

STATEMENT OF FACTS

Plaintiff Karim Koubriti's instant Complaint purports to assert three counts against Defendant Michael Thomas, under a malicious prosecution theory based on 42 U.S.C. § 1983 ("Section 1983") and the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution. The Complaint conclusorily charges that Defendant Thomas, together with Defendant Richard Convertino and Defendant Harry Raymond Smith, manufactured evidence against Koubriti and failed to disclose exculpatory evidence to Koubriti's counsel, resulting in Koubriti's conviction on terrorism related charges (which was later vacated). *See* Complaint, ¶¶ 5, 13, 15-18, 22-30.

The Complaint lacks any allegation of a specific action that Defendant Thomas took or failed to take at any time.

ARGUMENT

I. The Complaint Fails to State Any Cause of Action Against Defendant Thomas

A. The Complaint Offers Labels and Conclusions That Fail to Satisfy the Requirements of Rule 8(a) and Rule 12(b)(6) to Plead Facts Needed to Support the Causes of Action.

Plaintiff's Complaint must, but fails to, plead sufficient facts to withstand dismissal. Following the Supreme Court's precedent in *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1555 (2007), the Sixth Circuit has quite recently stated the pleading requirements that a complaint must satisfy:

The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. *Bell Atl. Corp. v. Twombly*, [127 S.Ct. 1955 (2007)]. The Court stated that “a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* at 1964-65 (citations and quotation marks omitted). Additionally, the Court emphasized that even though a complaint need not contain “detailed” factual allegations, its “[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.” *Id.* (internal citation and quotation marks omitted).

Association of Cleveland Fire Fighters v. City of Cleveland, Ohio, 502 F.3d 545, 548 (2007).

In *Association of Cleveland Fire Fighters*, the Sixth Circuit highlighted that, on a Rule 12(b)(6) challenge, a complaint must not be indulged inferences that lack grounding in pleaded facts:

In so holding, the Court disavowed the oft-quoted Rule 12(b)(6) standard of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed.2d 80 (1957) (recognizing “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”), characterizing that rule as one “best forgotten as an incomplete, negative gloss on an accepted pleading standard.” *Twombly*, 127 S.Ct. at 1969.

Association of Cleveland Fire Fighters, 502 F.3d at 548.

Under *Twombly* and *Association of Cleveland Fire Fighters*, Plaintiff Koubriti's Complaint cannot survive. The Complaint lacks a single pleaded fact that shows misconduct by Defendant Thomas. Rather, the Complaint presents “labels and conclusions” only, and these amount to “a formulaic recitation of the elements of a cause

of action [that] will not do.” *Twombly*, 127 S.Ct. at 1964-65.

Consider the Complaint’s paragraph that comes closest to a factual allegation. Paragraph 13 alleges: “The Defendants caused manufactured evidence and prepared testimony to be developed against Plaintiff while his criminal case was pending.” Lacking is even a shred of factual support for the boilerplate accusation of wrongdoing against Defendant Thomas. What did Thomas do? What evidence was “manufactured” by Thomas? What testimony was “prepared” by Thomas?

The Complaint’s “[f]actual allegations must be enough to raise a right to relief *above the speculative level* on the assumption that all the allegations in the complaint are true.” *Twombly*, 127 S.Ct. at 1964-65, *quoted in Association of Cleveland Firefighters*, 502 F.3d at 548 (emphasis added). Koubriti’s Complaint gives nothing to support the bald assertion of wrongdoing, and a bald assertion can support only a speculation, not a legal judgment.

Equally speculative is Paragraph 17's allegation that Defendant Thomas “intentionally withheld exculpatory evidence showing that Plaintiff was not guilty of terrorist related charges.” The Complaint nowhere identifies a single item of withheld evidence. Nowhere does the Complaint offer any proof of “intentional” misconduct.

The Complaint’s failure to offer even a single item of withheld evidence, and the failure to connect Defendant Thomas to that misconduct, is profound. After all, Paragraph 18 alleges that Koubriti’s terrorism convictions were “subsequently vacated ...

due to the Defendants' unconstitutional actions.” If there is a judicial finding of manufactured or withheld evidence that underlies the vacated conviction, then Koubriti should be able to allege the item of evidence and Thomas's connection to it. The absence of any supporting facts renders Koubriti's Complaint a collection of “labels and conclusions” that fall short of the pleading requirements under Rule 8(a) and Rule 12(b)(6). *Association of Cleveland Firefighters*, 502 F.3d at 548. The Complaint should thus be dismissed.

B. The Complaint Fails to Allege Defendant Thomas Acted Under Color of State Law.

Koubriti's Complaint purports to allege its causes of action under Section 1983. A cause of action under Section 1983 must rest upon alleged misconduct under color of *state law*. See *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006); *Redding v. St. Edward*, 241 F.3d 530, 432 (6th Cir. 2001). Koubriti's Complaint, however, has been alleged and filed against only federal officials, not state officials. See Complaint, ¶¶ 4-6. Federal officials do not act under color of state law. *Ana Leon T. v. Fed. Reserve Bank*, 823 F.2d 928, 931 (6th Cir. 1987). Without the allegation of action under color of state law, Koubriti's Complaint fails to state a cause of action under Section 1983, and therefore must be dismissed.

C. The Complaint Lacks Allegations to Support A Malicious Prosecution Claim Against Defendant Thomas.

1. No factual allegations support probable cause element.

To prevail on his malicious prosecution theory, Koubriti must plead and prove, at a minimum, that there was no probable cause to justify his arrest and prosecution. *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003); *Barnes v. Wright*, 449 F.3d 709, 716 (6th Cir. 2006) (same). Koubriti's Complaint lacks any factual allegation that could lead to inferring a lack of probable cause for Koubriti's arrest or prosecution.

The Complaint also fails to allege how any conduct by Defendant Thomas was connected to an arrest or prosecution that lacked probable cause. As with the rest of the Complaint, the allegations are mere "labels and conclusions" that fall short of the pleading requirements under Rule 8(a) and Rule 12(b)(6). *See Association of Cleveland Firefighters*, 502 F.3d at 548.

2. No factual allegations support malice element.

Assuming *arguendo* that Plaintiff's Complaint stated a state law claim for malicious prosecution, the Complaint would have to plead and prove: (1) that the plaintiff had an criminal prosecution initiated against him, (2) that the criminal proceedings terminated in his favor, (3) that the person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender (plaintiff) to justice. *Matthews v. Blue Cross and Blue Shield of Michigan*, 572 N.W.2d 603, 609-610

(Mich. 1998). The fourth element of the cause of action is “malice” or other wrongful purpose.

Plaintiff’s Complaint fails to allege any facts to suggest that Defendant Thomas harbored malice or wrongful purpose in investigating Koubriti’s activities or in testifying at Koubriti’s trial. Without proof of such malice, under Michigan or federal law, no malicious prosecution claim can survive. *See Voyticky v. Village of Timberlake, Ohio*, 412 F.3d 669, 676 (6th Cir. 2005) (plaintiff’s lacking “any evidence” of defendants’ “malice,” “under either federal or [Ohio] state law” the defendants were “entitled to summary judgment”). Without any pleaded facts to support even an inference of malice, the Complaint is insufficient and should be dismissed. *See Association of Cleveland Firefighters*, 502 F.3d at 548.

II. Koubriti’s Complaint Cannot Validly Plead Claims Under Both the Fifth And Fourteenth Amendments

In its Section 1983 malicious prosecution allegation, the Complaint purports to allege violations of both the Fifth and the Fourteenth Amendments by the Defendants (including Thomas). It is improper to allege the same cause of action under both Amendments, because the Fifth Amendment applies only to the federal government and the Fourteenth Amendment applies only to state and local government. *Scott v. Clay County*, 205 F.3d 867, 973 n.8 (6th Cir. 2000). Where violations of both Amendments are pleaded against the same individual or entity, the court properly prunes the complaint

by dismissing the claim under the Amendment that does not apply. *See, e.g. Myers v. Village of Alger*, 102 Fed. Appx. 931, 933 (6th Cir. 2004) (if state action then Fifth Amendment claim does not apply); *Erdman v. Granholm*, 2007 WL 757894, *6 n.4 (W.D. Mich. 2007) (same).

As a matter of law, Koubriti's Complaint improperly combines the same claims under the two Amendments. One or the other constitutional ground must be stricken. As the Complaint fails to allege any specific facts of misconduct against Defendant Thomas, it is impossible to determine which ground must be stricken; the Complaint should thus be dismissed for uncured ambiguity.

CONCLUSION

For all of the reasons set forth in this Motion and Brief, as well as for those stated in the similar motions and briefs filed by Defendants Convertino and Smith as they may apply, Plaintiff's Complaint and action should be dismissed in its entirety.

Respectfully submitted,

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Date: January 25, 2008

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2008, I presented the foregoing **Defendant Michael Thomas' Motion to Dismiss for Failure to State a Claim, Brief in Support of Michael Thomas' Motion to Dismiss for Failure to State a Claim** and this **Certificate of Service** to the Clerk of the Court for filing and uploading to the ECF system which will send notification of such filing to the following:

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Dated: January 24, 2008