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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge
Roger M. Young, Sr., Circuit Court Judge

Appellate Case No.: 2021-001439
Case No. 2019-CP-10-01379

LIAM WALLIS.....Appellant,

v.

THE BOEING COMPANY, ANTHONY TIMMS, and MONICA WILLIAMS.....Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Liam Wallis,	)	
	)	Case No.: 2019-CP-10-01379
Plaintiff,	)	
vs.	)	ORDER DENYING DEFENDANTS'
	)	12(b)(6) MOTION TO DISMISS
The Boeing Company; Anthony	)	PLAINTIFF'S CAUSES OF ACTION
Timms; and Monica Williams	)	FOR WRONGFUL TERMINATION IN
	)	VIOLATION OF PUBLIC POLICY AND
Defendants.	)	CIVIL CONSPIRACY

THIS MATTER came before the Court on February 27, 2020 pursuant to all named Defendants' 12(b)(6) SCRCP Notice of Motion and Motion to Dismiss Plaintiff's Causes of Action for Wrongful Termination in Violation of Public Policy and Civil Conspiracy, which was filed on October 11, 2019. The Plaintiff's attorney Michael Ellis, and the Defendants attorney, Cherie W. Blackburn, appeared and presented oral argument. The record before the Court consists of the pleadings on file, the memorandums of the parties, the Amended Complaint filed while this action was in federal court but did not make it into the State file upon remand, and the Order and Opinion of the Honorable Richard Gergel in the United States District Court case of Carlos Lugo v. The Boeing Company, case number 2:19-cv-2995-RMG. Both the Amended Complaint and Judge Gergel's order were produced at the motion hearing.

STANDARD OF REVIEW

Under Rule 12(b)(6), a claim may be dismissed when the facts alleged in the pleadings fail to establish a cause of action. *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). The question for the Court is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553

S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion must be granted only if the facts alleged and the inferences reasonably deducible from the pleadings show that the plaintiff could not prevail on any theory of the case. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

CONCLUSION

After a thorough review of the entire record, including the Pleadings, Motion, Relevant Case Law, Memoranda and oral arguments, the Court respectfully denies Defendants' Motion to Dismiss.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE PAGE TO FOLLOW]



Charleston Common Pleas

Case Caption: Liam Wallis VS Boeing Company The
Case Number: 2019CP1001379
Type: Order/Other

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2020-03-19 13:41:36 page 3 of 3

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

v.

The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-01379

ORDER

THIS MATTER COMES BEFORE THE COURT on Defendants The Boeing Company ("Boeing"), Anthony Timms ("Timms") and Monica Williams ("Williams"), pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Motion to Reconsider, Alter or Amend this Court's Order Denying Defendants' Motion to Dismiss Plaintiff's wrongful termination in violation of public policy claim against Boeing and his civil conspiracy claim against Anthony Timms and Monica Williams.

A hearing was held on the Motion to Dismiss February 27, 2020. Present at the hearing were Mike Ellis, counsel for Plaintiff, Cherie Blackburn, counsel for Defendants, C. Edward Rawl, Jr., Senior Counsel for Boeing, and Defendants Anthony Timms and Monica Williams. This Court issued an Order Denying Defendants' Motion to Dismiss on March 19, 2020 ("the Order"). All named Defendants filed a Motion to Reconsider on March 26, 2020. Defendants' Motion to Reconsider, Alter or Amend is granted in part and denied in part as stated herein.

I. APPLICABLE LEGAL STANDARD

"It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as a vehicle to seek 'reconsideration' of issues and arguments." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004).

“There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” *Id.* at 22, 602 S.E.2d at 779.

II. PLAINTIFF'S CAUSE OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY.

Boeing asserts this Court should reconsider the Order because it does not consider that Plaintiff has a statutory remedy for his wrongful termination claim. Under South Carolina law, a cause of action for wrongful termination in violation of public policy exists as a narrow exception to the doctrine of at will employment when an employee's discharge violates a clear mandate of public policy. *See Ludwick v This Minute of Carolina, Inc.*, 287 S.C. 219, 223, 337 S.E.2d 213, 215 (1985). The public policy exception to the doctrine of employment at-will does not extend to situations where the employee has an existing statutory remedy for wrongful termination. *Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 615, 713 S.E.2d 634, 637 (2011). As evidenced by the foregoing cases, “the *Ludwick* exception [to at-will employment] is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999).

Boeing asserts that Plaintiff cannot state a claim for wrongful termination in violation of public policy because he has an existing statutory remedy available under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), which provides that:

“[n]o air carrier or contractor . . . may discharge an employee . . . because the employee . . . provided . . . or caused to be provided to the employer . . . information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety” 49 U.S.C. § 42121(a)(1).

In January of this year, the United States District Court for the District of South Carolina, Charleston Division, addressed the issue of whether AIR21 provided a statutory remedy to the plaintiff, an at-will employee of Boeing, warranting dismissal of his wrongful termination cause of action. In *Lugo v. The Boeing Co.*, the plaintiff alleged that he was wrongfully terminated for his “safety complaints regarding lighting, failure for more stringent walk-throughs, tool accountability and his involvement in the union.” No. 2:19-CV-2995-RMG, 2020 WL 495336, at *3 (D.S.C. January 30, 2020). The district court dismissed plaintiff’s wrongful termination in violation of public policy claim under Fed. R. Civ. P. 12(b)(6), stating that “AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer that related to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law related to air carrier safety. . . .” *Id.* at *3. The court held the plaintiff had an existing statutory remedy under AIR21 and, as a result, the public policy exception to at will employment did not apply. *Id.*

In reconsidering the Order, this Court finds that AIR21 expressly includes employees lodging internal airplane safety complaints directly with their employers, as alleged by Plaintiff in this lawsuit. 49 U.S.C. § 42121(a)(1); see also *Lugo*, 2020 WL 495336, at *3, (citing *Hobek*, 2017 WL 9250342, at *4). This Court finds that Plaintiff has an existing statutory remedy under AIR 21 and his termination did not contravene a clear mandate of public policy. As such, Plaintiff’s cause of action for wrongful termination in violation of public policy is hereby dismissed.

II. PLAINTIFF’S CAUSE OF ACTION FOR CIVIL CONSPIRACY AGAINST THE INDIVIDUAL DEFENDANTS TIMMS AND WILLIAMS.

Timms and Williams assert this Court should reconsider its Order because the Amended Complaint fails to properly allege a claim for civil conspiracy. The elements of a civil conspiracy

tort claim in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which cause the plaintiff special damages. *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988). In his Amended Complaint, Plaintiff has alleged:

“...Anthony Timms and Monica Williams conspired to have Plaintiff terminated” (Amended Complaint, para. 45)... “Anthony Timms and Monica Williams engaged in this conspiracy to minimize findings being reported to their bosses in an attempt to further their own careers” (Amended Complaint, para. 46)... “Anthony Timms and Monica Williams furthered their conspiracy to harm Plaintiff for their gain by depriving Plaintiff access to the internal computer systems that allowed Plaintiff to verify whether planes on the flight line were indeed ready for his inspection” (Amended Complaint, para. 47)... “the conspiracy by Anthony Timms and Monica Williams resulted in Plaintiff being forced to rely on others that two planes were ready to be inspected rather than being able to verify for himself on the computer system to which he was denied access by Timms and Williams” (Amended Complaint, para. 48)... “As a result of their civil conspiracy, Plaintiff has suffered special damages including but not limited to a loss of standing in the aviation community including being effectively “black listed” resulting in being denied employment opportunities for which he is well qualified...” (Amended Complaint, para. 58).

Thus, the civil conspiracy cause of action against Timms and Williams is for the alleged loss of future alternate wages Plaintiff could have earned in the aviation industry due to their alleged tarnishing of his good name. This Court finds Plaintiff has properly pled a civil conspiracy cause of action. As pled, two or more persons, Timms and Williams, allegedly conspired against Plaintiff to have him terminated from Boeing, and allegedly caused the Plaintiff special damages of not being able to obtain future employment in the aviation industry.

For the reasons set forth herein, Defendants’ Motion to Reconsider, Alter or Amend is hereby GRANTED in part and DENIED in part and Plaintiff’s cause of action for wrongful termination in violation of public policy against Boeing is dismissed.

IT IS SO ORDERED.

[JUDGE SIGNATURE PAGE TO FOLLOW]



Charleston Common Pleas

Case Caption: Liam Wallis VS Boeing Company The
Case Number: 2019CP1001379
Type: Order/Other

It is so Ordered

s/ Perry M Buckner III 2122

Electronically signed on 2020-04-22 10:07:11 page 5 of 5

ELECTRONICALLY FILED - 2020 Apr 23 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001379

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

The Boeing Company, Anthony Timms, and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C/A NO.: 2019-CP-10-01379

**ORDER DENYING MOTION TO
RECONSIDER ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS**

Plaintiff, Liam Wallis, filed a motion pursuant to Rule 59(e), SCRCP, asking this Court to reconsider its Order dated April 23, 2020, granting Defendants' Motion to Dismiss Plaintiff's Wrongful Termination Cause of Action. Because Judge Buckner is now retired and therefore unavailable to address the motion, it has been presented to me in my capacity as Charleston County Court of Common Pleas Chief Judge for Administrative Purposes.

Plaintiff is essentially asking the Court to reconsider Judge Buckner's decision in view of the evidence presented at the hearing on February 27, 2020. South Carolina recognizes a long-standing rule that one judge of the same court cannot overrule another. *Tisdale v. Amer. Life Ins. Co.*, 216 S.C. 10 (1950); *Dinkins v. Robbins*, 203 S.C. 199 (1943). Similarly, a successor judge may not substitute his own judgment for that of the original issuing trial judge. *Charleston County DSS v. Father*, 317 S.C. 283 (1995). Accordingly, I recognize the filing of the motion to the extent such filing is necessary to preserve any matters on appeal, but decline to reconsider the order under challenge.

As such, the Court hereby DENIES Plaintiff's Motion for Reconsideration.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW



Charleston Common Pleas

Case Caption: Liam Wallis VS Boeing Company The , defendant, et al

Case Number: 2019CP1001379

Type: Order/Amend

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Electronically signed on 2021-11-08 17:36:45 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

LIAM WALLIS

Plaintiff(s)

CIVIL ACTION COVERSHEET

vs.

2019-CP - 10- 1379

THE BOEING COMPANY,

Defendant(s)

Submitted By: Michael H. Ellis

Address: Query Sautter & Associates, LLC

147 Wappoo Creek Drive, Suite 202

Charleston, South Carolina 29482

SC Bar #: 101524

Telephone #: 843-795-9500

Fax #: 843-762-1500

Other:

E-mail: mellis@qlawsc.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☒ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☒ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 ____-____-____ ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
Family Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
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Submitting Party Signature: Michael H. Ellis

Date: 3/18/2019

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.
SCCA / 234 (03/2016)

Page 1 of 2

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LIAM WALLIS

Plaintiff(s)

vs.

THE BOEING COMPANY,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2019-CP - 10-

Submitted By: Michael H. Ellis
Address: Query Sautter & Associates, LLC
147 Wappoo Creek Drive, Suite 202
Charleston, South Carolina 29482

SC Bar #: 101524
Telephone #: 843-795-9500
Fax #: 843-762-1500
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Submitting Party Signature: Michael H. Ellis

Date: 3/18/2019

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SCCA / 234 (03/2016)

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICAL CIRCUIT
Case No.: 2019-CP-10-_____

Liam Wallis,)

Plaintiff,)

v.)

The Boeing Company, Anthony)
Timms, and Monica Williams,)

Defendants.)

SUMMONS
(Jury Trial Demanded)

2019 MAR 18 PM 2:53
FILED
CLERK OF COURT

TO: THE DEFENDANT, ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy upon the subscriber at Query Sautter & Associates, LLC, The Wappoo Centre, 147 Wappoo Creek Drive, Suite 202, Charleston, South Carolina, within thirty (30) days after service thereof, exclusive of such date of service. If you fail to answer the Complaint within that time, the Plaintiff will apply to the Court, and demand judgment by default rendered against you for the relief demanded in the Complaint.

QUERY SAUTTER & ASSOCIATES, LLC



Michael H. Ellis (SC Bar # 101524)

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147 Wappoo Creek Drive, Suite 202

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ATTORNEY FOR PLAINTIFF

Dated: 3/18/2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Liam Wallis,)

Plaintiff,)

v.)

The Boeing Company, Anthony)
Timms, and Monica Williams)

Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICAL CIRCUIT

Case No.: 2018-CP-10-_____

COMPLAINT
(Jury Trial Demanded)

FILED
2019 MAR 18 PM 2:31
JULIE AGUIRRE
CLERK OF COURT

NOW COMES Plaintiff, Liam Wallis, by and through his undersigned counsel,
complaining of the above named Defendants as follows:

Parties and Jurisdiction

1. Plaintiff is a resident of Charleston County, South Carolina.
2. Defendant The Boeing Company (hereinafter "Boeing") is a foreign corporation doing business in the State of South Carolina, maintains offices in Charleston County, and transacts business in Charleston County, South Carolina.
3. Based upon information and belief, Defendant Anthony Timms is a resident of Charleston County, South Carolina.
4. Based upon information and belief, Defendant Monica Williams is a resident of Charleston County, South Carolina.
5. All transactions and occurrences giving rise to this action occurred in Charleston County, South Carolina.
6. This Court has jurisdiction over the parties and subject matter and venue is proper.

Facts

7. Plaintiff has extensive experience in the aviation industry and is a Federal Airframe and Powerplant Licensee (hereinafter "A&P").
8. Plaintiff was hired by Boeing in April of 2011 as a Quality Assurance Conformity Manager (hereinafter "QACM").
9. QACM's are paid on an hourly basis and do not have any executive or administrative duties.
10. QACM's are trained on the job to perform their job duties, not requiring any specific degree or certifications.
11. Plaintiff was an employee required to be paid an overtime pay of his base hourly rate plus half for any hours worked in excess of forty (40) hours per week.
12. Defendant did not pay Plaintiff his proper overtime pay for the hours Plaintiff worked in excess of forty (40) hours per work week.
13. QACM's are Boeing employees tasked with inspecting all newly manufactured aircraft for compliance with Boeing's internal engineering and safety specifications.
14. Any non-conformity found by a QACM is referred to as "a finding" and must be documented and all repairs and subsequent inspections must be well documented.
15. Findings must be properly addressed in accordance with Boeing policies and ultimately can delay the sale of an aircraft to the purchaser.
16. The documentation of findings and any necessary repairs are commonly used by the purchaser of an aircraft to negotiate a reduced price for a Boeing aircraft.
17. In or about August of 2016, Plaintiff slipped a disk in his neck that required surgery.

18. Plaintiff missed time at Boeing under the Family and Medical Leave Act to recover from his injury.
19. Immediately prior to Plaintiff leaving for his injury, Defendant Monica Williams was promoted to supervise Plaintiff and the other Conformity Managers.
20. Plaintiff returned to Boeing on January 20, 2017 with some medical restrictions.
21. Upon Plaintiff's return to work, he was constantly followed and observed by Monica Williams.
22. Plaintiff immediately realized there was a back log of non-conformities or findings that needed to be inspected by the QACM's, fixed, and signed off by the QACM's.
23. Upon making an inquiry, Plaintiff's colleagues informed him that upon Monica Williams being promoted, all Boeing policies and procedures were disregarded and they were not willing to sign their names on documents containing all the shortcuts on the safety inspections of the planes they were building that were initiated by Monica Williams and Anthony Timms acting in concert and upon information and belief without the knowledge of the Boeing officers and policy makers.
24. While Plaintiff was out on FMLA Boeing systematically engaged in:
 - a. "Goldplating" which is repeating a test until it is successful and then having the records show that the test was successful on the first attempt;
 - b. Knowingly using out of date engineering specifications;
 - c. Knowingly using uncertified technicians to perform maintenance and repairs;
 - d. Violating the internal Boeing policy and procedures that were put in place to achieve final approval of each stage of production and make the plane immediately saleable;

- e. Disabling the automated system that notified all pertinent employees of mandatory inspections of newly manufactured aircraft; and
 - f. Submitting conformities without documented repairs.
25. Upon confronting Defendant Monica Williams about all the Boeing policy violations and safety concerns he discovered, Plaintiff was told by Monica Williams and Anthony Timms that he was not to write up any findings of non-conformity without first receiving permission from them.
26. Plaintiff continued to do his job of inspecting all newly manufactured aircraft to ensure the safety of the public that relies upon Boeing's internal engineering and safety specifications and documented his findings of non-conformities.
27. Defendant Monica Williams yelled at Plaintiff that "you are not to write up violations".
28. On March 9, 2017, Plaintiff complained to Defendant Monica Williams's boss, Anthony Timms, that Monica Williams continuously removed documents from his desk and treated him harshly for documenting his findings of non-conformity, and creating a hostile work environment including but not limited to making threats against Plaintiff's life.
29. Anthony Timms told Plaintiff that Plaintiff already got Boeing all the training to qualify for certifications that they needed from him so they did not need him anymore and that Plaintiff would never be getting any more raises or promotions.
30. The day after Plaintiff spoke with Anthony Timms, Defendant Williams told Plaintiff that he needed to start looking for another job.

31. Immediately prior to Plaintiff leaving in November of 2016 for his neck surgery, an inspection was required to be done of the first barrel that came off the new enclave oven in Boeing's building 19.
32. This inspection was assigned to Plaintiff.
33. Upon Plaintiff's return to Boeing, he learned that this required inspection was not conducted in his absence and immediately worked on providing a report regarding the absence of the inspection.
34. Plaintiff discovered that the barrel was manufactured using obsolete engineering, all subsequent barrels were manufactured using obsolete engineering, undocumented repairs were made to the barrels, and that a fictitious QACM signed off on the repairs.
35. Plaintiff brought these non-conformities with Boeing's engineering specifications to management's attention and the investigation was pulled from Plaintiff and reassigned to Monica Williams.
36. Plaintiff feared that there was an escapement of all barrels produced in the new enclave oven, meaning that non-conforming aircraft barrels were being used to manufacture aircraft that were making their way into the fleet of aircraft used to transport passengers and freight.
37. Plaintiff pursued the matter, demanding that management of Boeing comply with Boeing's policies and self-report this escapement as required.
38. Directly after Plaintiff's ultimatum to Boeing, Plaintiff was informed by human resources that Boeing would no longer honor his medical work restrictions and Plaintiff was placed on a leave of absence without pay.

39. Plaintiff had his doctor lift the restrictions and he returned to work after being gone for a week.
40. Upon his return to Boeing, Plaintiff's every action was unduly scrutinized by Monica Williams and Anthony Timms in an attempt to find justification for Plaintiff's termination.
41. Plaintiff was wrongfully terminated from Boeing on June 15, 2017.
42. Based upon information and belief, Boeing sacrificed compliance with their own policies and regulations put in place for the protection of the public in exchange for the expedited completion of aircraft and profit from the sale of those aircraft.
43. Boeing confronted Plaintiff with the dilemma of choosing to maintain his livelihood by cooperating in Boeing's scheme of fraudulently concealing non-conformities in the aircraft they were selling, or complying with Boeing's established safety specifications and protecting the public that relies upon those regulations for their safety in air travel.
44. Based upon information and belief, Boeing continues to manufacture and place into the stream of commerce non-conforming barrels.
45. Based upon information and belief, Boeing has blackballed Plaintiff from the aircraft industry.
46. Plaintiff has never received his past due proper pay for his overtime work performed.

For A First Cause of Action
(Wrongful Discharge as to Defendant The Boeing Company)

47. Plaintiff reiterates paragraphs 1-46 above as if set forth here in verbatim.
48. Plaintiff was an at-will-employee of Defendant.

49. He was terminated in retaliation for complying with Boeing's safety and engineering policies and regulations rather than acquiescing to Boeing's policy of concealing non-conformities in the planes they were selling.

50. Plaintiff's termination constitutes a violation of a clear mandate of public policy.

51. Plaintiff is entitled to damages including punitive damages.

For A Second Cause of Action

(Civil Conspiracy as to Defendants Monica Williams and Anthony Timms)

52. Plaintiff reiterates paragraphs 1-51 above as if set forth here in verbatim.

53. Monica Williams and Anthony Timms combined and conspired for the purpose of injuring Plaintiff and advancing their own interests.

54. As a result of their civil conspiracy, Plaintiff has suffered special damages including but not limited to a loss of standing in the aviation community, lost wages, and mental anguish.

55. The Defendants' actions evidence a willful and wanton disregard of Plaintiff's rights.

56. Plaintiff is entitled to damages to include punitive damages.

For A Third Cause of Action

(Failure to Pay Wages)

57. Plaintiff reiterates paragraphs 1-56 above as if set forth here in verbatim.

58. Plaintiff was an employee of Defendant.

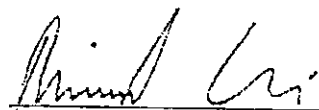
59. Plaintiff regularly provided labor for Defendant in excess of forty (40) hours per work week.

60. Plaintiff was not properly compensated for his hours worked in excess of forty (40) hours per work week.

61. Plaintiff prays for relief in an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow.

WHEREFORE, Plaintiff prays for actual and punitive damages based upon the forgoing causes of action along with any further relief as this Court deems just and proper.

QUERY SAUTTER & ASSOCIATES, LLC



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March 18, 2019

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-1379

ANSWER OF DEFENDANTS

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JULIE J. ARMSTRONG
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Subject to Defendants' Motion to Dismiss filed with the Court on October 11, 2019, Defendants The Boeing Company ("Boeing"), Anthony Timms ("Timms") and Monica Williams ("Williams") (referred to collectively as "Defendants"), do hereby respond to the Complaint of Liam Wallis ("Plaintiff" or "Wallis") as follows:

INTRODUCTION

Defendant Boeing has moved to dismiss Plaintiff's cause of action for wrongful termination, and Defendants Timms and Williams have moved to dismiss Plaintiff's cause of action for civil conspiracy. These causes of action fail to state facts sufficient to constitute causes of action and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina of Civil Procedure. Defendants file this Answer subject to Defendants' Motion to Dismiss. *Id.*

Each and every allegation contained in the Complaint not specifically admitted herein is denied and strict proof thereof is demanded.

PARTIES AND JURISDICTION

1. Defendants lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 1 of the Complaint and, therefore, deny same and demand strict proof thereof.

FILED

OCT 11 2019

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

2. Defendants admit the allegations contained in Paragraph 2 of the Complaint.
3. Defendants deny the allegations contained in Paragraph 3 of the Complaint and demand strict proof thereof.
4. Defendants deny the allegations contained in Paragraph 4 of the Complaint and demand strict proof thereof.
5. Defendants admit so much of Paragraph 5 of the Complaint as alleges, or may be construed to allege, that Plaintiff alleges transactions and occurrences that allegedly took place in Charleston County, South Carolina. However, Defendants deny that all such transactions and occurrences occurred or that any transactions or occurrences constitute cognizable causes of action against Defendants.
6. Defendants admit the allegations contained in Paragraph 6 of the Complaint.

FACTS

7. Answering Paragraph 7 of the Complaint, Defendants object to the phrase “extensive experience” to the extent it is vague, ambiguous and undefined. Subject to that objection, Defendants admit so much thereof as alleges, or may be construed to allege, that Plaintiff has a Federal Airframe and Powerplant License. Defendants deny the remaining allegations contained in Paragraph 7 of the Complaint and demand strict proof thereof.
8. Defendants deny the allegations contained in Paragraph 8 of the Complaint, demand strict proof thereof and would further state that Plaintiff was hired as a Flight Readiness Technician B.
9. Defendants deny the allegations of Paragraph 9 of the Complaint and demand strict proof thereof. Defendants further state that Plaintiff, during the relevant time period, was a Quality

Systems Specialist and was an exempt employee under the Fair Labor Standards Act and was not entitled to overtime under the Act.

10. Defendants deny the allegations contained in Paragraph 10 of the Complaint and demand strict proof thereof. Defendants further state that Plaintiff was a Quality Systems Specialist during the relevant time period.

11. Defendants deny the allegations contained in Paragraph 11 of the Complaint and demand strict proof thereof.

12. Defendants deny the allegations contained in Paragraph 12 of the Complaint, demand strict proof thereof, and further state that Plaintiff was an exempt employee under the Fair Labor Standards Act and was not entitled to overtime under the Act.

13. Defendants deny the allegations contained Paragraph 13 of the Complaint and demand strict proof thereof.

14. Answering Paragraph 14 of the Complaint, Defendants admit so much thereof as alleges, or may be construed to allege, that a Quality Systems Specialist may issue a finding, which must be documented and that any repairs and subsequent inspections must be documented. Defendants deny the remaining allegations contained in Paragraph 14 of the Complaint and demand strict proof thereof.

15. Answering Paragraph 15 of the Complaint, Defendants admit so much thereof as alleges, or may be construed to allege, that a finding must be properly addressed in accordance with Boeing policies. Defendants deny the remaining allegations contained in Paragraph 15 of the Complaint and demand strict proof thereof.

16. Defendants object to the use of the word “common” on the grounds that such term is vague and ambiguous. Subject to such objection, Defendants deny the allegations contained in Paragraph 16 of the Complaint.

17. Upon information and belief, Defendants admit the allegations contained in Paragraph 17 of the Complaint.

18. Defendants admit the allegations contained in Paragraph 18 of the Complaint.

19. Defendants deny the allegations contained in Paragraph 19 of the Complaint, demand strict proof thereof, and further state that Defendant Monica Williams became Plaintiff’s supervisor in June of 2016.

20. Defendants admit the allegations contained in Paragraph 20 of the Complaint.

21. Defendants deny the allegations contained in Paragraph 21 of the Complaint and demand strict proof thereof.

22. Defendants deny the allegations contained in Paragraph 22 of the Complaint and demand strict proof thereof.

23. Defendants deny the allegations contained in Paragraph 23 of the Complaint and demand strict proof thereof.

24. Defendants deny the allegations contained in Paragraph 24 of the Complaint, including all subparts thereof, and demand strict proof thereof.

25. Defendants deny the allegations contained in Paragraph 25 of the Complaint and demand strict proof thereof.

26. Defendants deny the allegations contained in Paragraph 26 of the Complaint and demand strict proof thereof.

27. Defendants deny the allegations contained in Paragraph 27 of the Complaint and demand strict proof thereof.

28. Defendants admit so much of Paragraph 28 as alleges, or may be construed to allege that, on March 9, 2017, Plaintiff complained to Anthony Timms, Monica Williams' director supervisor, that Ms. Williams was creating a hostile work environment. Defendants deny the remaining allegations contained in Paragraph 28 of the Complaint and demand strict proof thereof.

29. Defendants deny the allegations contained in Paragraph 29 of the Complaint and demand strict proof thereof.

30. Defendants deny the allegations contained in Paragraph 30 of the Complaint and demand strict proof thereof.

31. Defendants deny the allegations contained in Paragraph 31 of the Complaint and demand strict proof thereof.

32. Defendants deny the allegations contained in Paragraph 32 of the Complaint and demand strict proof thereof.

33. Defendants deny the allegations contained in Paragraph 33 of the Complaint and demand strict proof thereof.

34. Defendants deny the allegations contained in Paragraph 34 of the Complaint and demand strict proof thereof.

35. Defendants deny the allegations contained in Paragraph 35 of the Complaint and demand strict proof thereof.

36. Defendants lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 36 of the Complaint relating to Plaintiff's mindset and,

therefore, deny same and demand strict proof thereof. Defendant further denies the substantive allegations contained in Paragraph 36 of the Complaint and demand strict proof thereof.

37. Defendants deny the allegations contained in Paragraph 37 of the Complaint and demand strict proof thereof.

38. Defendants admit so much of Paragraph 38 as alleges or may be construed to allege, that Boeing's business needs no longer allowed for a four day workweek accommodation to Plaintiff and that Plaintiff was on a leave of absence beginning May 5, 2017 for approximately one week, but deny the remaining allegations contained in Paragraph 38 of the Complaint and demand strict proof thereof.

39. Answering Paragraph 39 of the Complaint, Boeing admits so much thereof as alleges, or may be construed to allege, that Boeing received updated medical restrictions from Plaintiff's physician on May 5, 2017, stating that Plaintiff could work a five-day workweek, and that Plaintiff's schedule returned to a five-day workweek. Defendants deny the remaining allegations of Paragraph 39 of the Complaint and demand strict proof thereof.

40. Defendants deny the allegations contained in Paragraph 40 of the Complaint and demand strict proof thereof.

41. Defendants admit so much of Paragraph 41 of the Complaint as alleges, or may be construed to allege, that Plaintiff was terminated on June 15, 2017. Defendants deny the remaining allegations contained in Paragraph 41 of the Complaint and demand strict proof thereof.

42. Defendants deny the allegations contained in Paragraph 42 of the Complaint and demand strict proof thereof.

43. Defendants deny the allegations contained in Paragraph 43 of the Complaint and demand strict proof thereof.

44. Defendants deny the allegations contained in Paragraph 44 of the Complaint and demand strict proof thereof.

45. Defendants deny the allegations contained in Paragraph 45 of the Complaint and demand strict proof thereof.

46. Defendants deny the allegations contained in Paragraph 46 of the Complaint, demand strict proof thereof, and would further state that Plaintiff received all pay for work he performed as an employee of Boeing.

ANSWERING THE FIRST CAUSE OF ACTION
(Wrongful Discharge as to Defendant Boeing)

47. Defendant Boeing repeats and reiterates the above paragraphs, as if set forth verbatim herein. Defendant Boeing answers this cause of action subject to its Motion to Dismiss filed with the Court.

48. Defendant Boeing admits the allegations contained in Paragraph 48 of the Complaint.

49. Defendant Boeing denies the allegations contained in Paragraph 49 of the Complaint and demands strict proof thereof.

50. Defendant Boeing denies the allegations contained in Paragraph 50 of the Complaint and demands strict proof thereof.

51. Defendant Boeing denies the allegations contained in Paragraph 51 of the Complaint and demands strict proof thereof.

ANSWERING THE SECOND CAUSE OF ACTION
(Civil Conspiracy as to Defendants Monica Williams and Anthony Timms)

52. Defendants Williams and Timms repeat and reiterate the above paragraphs, as if set forth verbatim herein. Defendants Williams and Timms answer this cause of action subject to their Motion to Dismiss filed with the Court.

53. Defendants Williams and Timms deny the allegations contained in Paragraph 53 of the Complaint and demand strict proof thereof.

54. Defendants Williams and Timms deny the allegations contained in Paragraph 54 of the Complaint and demand strict proof thereof.

55. Defendants Williams and Timms deny the allegations contained in Paragraph 55 of the Complaint and demand strict proof thereof.

56. Defendants Williams and Timms deny the allegations contained in Paragraph 56 of the Complaint and demand strict proof thereof.

ANSWERING THE THIRD CAUSE OF ACTION
(Failure to Pay Wages as to Defendant Boeing)

57. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

58. Defendants admit the allegations contained in Paragraph 58 of the Complaint and demand strict proof thereof.

59. Defendants deny the allegations contained in Paragraph 59 of the Complaint and demand strict proof thereof.

60. Defendants deny the allegations contained in Paragraph 60 of the Complaint and demand strict proof thereof.

61. Answering Paragraph 61 of the Complaint, Defendants deny that Plaintiff is entitled to the relief set forth therein or in the prayer for damages and demand strict proof thereof.

DEFENDANTS' DEFENSES

Defendants incorporate herein the defenses and legal arguments set forth in their Motion to Dismiss filed with the Court.

**FURTHER ANSWERING THE COMPLAINT AND AS A SECOND
DEFENSE THERETO**
(Rule 12(b)(6))

62. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

63. Plaintiff's Complaint fails to state facts sufficient to constitute any cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING THE COMPLAINT AND AS A THIRD
DEFENSE THERETO**
(Estoppel)

64. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

65. Plaintiff's claims are barred by the doctrine of estoppel.

**FURTHER ANSWERING THE COMPLAINT AND AS A FOURTH
DEFENSE THERETO**
(Waiver)

66. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

67. Plaintiff's claims are barred by the doctrine of waiver.

FURTHER ANSWERING THE COMPLAINT AND AS A FIFTH
DEFENSE THERETO
(Failure to Mitigate)

68. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

69. Plaintiff's damages are barred, in whole or in part, to the extent he failed to mitigate his damages.

70. Likewise, without admitting any wrongful conduct, Defendants assert that Plaintiff's damages, if any, should be offset by any subsequent earnings obtained by Plaintiff.

FURTHER ANSWERING THE COMPLAINT AND AS A SIXTH
DEFENSE THERETO
(Unclean Hands)

71. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

72. Plaintiff's claims are barred by the doctrine of unclean hands.

FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTH
DEFENSE THERETO
(Good Faith, Legitimate Reasons for Actions)

73. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

74. Plaintiff's claims are barred, in whole or in part, because Defendants at all times acted in good faith and in a lawful manner towards Plaintiff, with legitimate business reasons for the actions about which Plaintiff complains.

**FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTH
DEFENSE THERETO**

(Failure to Exhaust Administrative Remedies)

75. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

76. To the extent that Plaintiff failed to exhaust his administrative remedies, his claims are barred.

**FURTHER ANSWERING THE COMPLAINT AND AS A NINTH
DEFENSE THERETO**

(After-Acquired Evidence Rule)

77. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

78. The Complaint, and each purported cause of action alleged therein, is barred in whole or in part by the doctrine of after-acquired evidence, or alternatively, the doctrine of after-acquired evidence limits and reduces Plaintiff's alleged damages.

**FURTHER ANSWERING THE COMPLAINT AND AS A TENTH
DEFENSE THERETO**

(Laches)

79. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

80. Plaintiff's claims are barred by the doctrine of laches.

**FURTHER ANSWERING THE COMPLAINT AND AS AN ELEVENTH
DEFENSE THERETO**

(Statute of Limitations)

81. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

82. Plaintiff's claims are barred to the extent he failed to comply with the applicable statute of limitations.

**FURTHER ANSWERING THE COMPLAINT AND AS A TWELFTH
DEFENSE THERETO**
(Equitable Relief)

83. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

84. Plaintiff's allegations and demands for equitable relief are questions for the Court, not the jury.

**FURTHER ANSWERING THE COMPLAINT AND AS A THIRTEENTH
DEFENSE THERETO**
(Scope of Employment)

85. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

86. At all times Defendants Williams and Timms acted within the scope of their employment. Therefore, Plaintiff's claim for civil conspiracy is barred.

**FURTHER ANSWERING THE COMPLAINT AND AS A FOURTEENTH
DEFENSE THERETO**
(No Special Damages)

87. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

88. Plaintiff's claim of civil conspiracy is barred because he has not suffered, nor has he alleged to have suffered, special damages sufficient to constitute such a claim.

**FURTHER ANSWERING THE COMPLAINT AND AS A FIFTEENTH
DEFENSE THERETO**

(Intracorporate Conspiracy Doctrine)

89. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

90. Plaintiff's claims are barred by the doctrine of intracorporate conspiracy.

**FURTHER ANSWERING THE COMPLAINT AND AS A SIXTEENTH
DEFENSE THERETO**

(Failure to Plead Separate Facts and Damages)

91. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

92. Plaintiff's Complaint fails to plead separate facts and damages or allegations sufficient to show separate facts and damages, related to a viable civil conspiracy claim, and therefore, such cause of action should be dismissed.

**FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTEENTH
DEFENSE THERETO**

(Existing Statutory Remedy)

93. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

94. Plaintiff has an existing statutory remedy and, therefore, his claim of wrongful termination is barred.

**FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTEENTH
DEFENSE THERETO**

(No Violation of a Clear Mandate of Public Policy)

95. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

96. Plaintiff has failed to allege or show a violation of a clear mandate of public policy, and, therefore, his claim of wrongful termination is barred.

**FURTHER ANSWERING THE COMPLAINT AND AS A NINETEENTH
DEFENSE THERETO**
(Exempt under FLSA)

97. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

98. Plaintiff was exempt from overtime pay under the Fair Labor Standards Act and, therefore, his cause of action for overtime pay should be dismissed.

**FURTHER ANSWERING THE COMPLAINT AND AS A TWENTIETH
DEFENSE THERETO**
(FLSA Preemption)

99. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein

100. Plaintiff's cause of action for payment of wages is preempted by the Fair Labor Standards Act of 1938, as amended, 29 U.S.C § 201 *et seq.*

**FURTHER ANSWERING THE COMPLAINT AND AS A TWENTY-FIRST
DEFENSE THERETO**
(Reservation of Right to Make Other Assertions)

101. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

100. Defendants reserve the right to assert, via amended pleadings, any and all additional and/or further defenses as may be revealed by additional information and/or documentation produced and/or acquired through discovery or otherwise herein.

WHEREFORE, having fully answered the Complaint, Defendants pray that it be dismissed, that this Court award Defendant its costs and attorneys' fees incurred in defending the claims contained in the Complaint and that this Court grant such other and further relief as it deems just and proper.



Cherie W. Blackburn (SC Bar No. 10812)

Melissa F. Spence (SC Bar No. 78172)

NEXSEN PRUET, LLC

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Charleston, South Carolina 29402

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cblackburn@nexsenpruet.com

mspence@nexsenpruet.com

ATTORNEYS FOR DEFENDANTS

October 11, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANTS' ANSWER TO COMPLAINT** has been served upon the following counsel of record by email and by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this this 11th day of October, 2019.

O. Grady Query, Esquire
 Michael H. Ellis, Esquire
 Query Sutter & Associates
 147 Wappoo Creek Road, Suite 202
 Charleston, SC 29412

ATTORNEYS FOR PLAINTIFF

Nexsen Pruet
 NEXSEN PRUET, LLC
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 Charleston, South Carolina 29402
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OCT 11 2019

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-1379

**AMENDED ANSWER OF
DEFENDANTS AND DEFENDANT
BOEING'S COUNTERCLAIM**

Defendants The Boeing Company ("Boeing"), Anthony Timms ("Timms") and Monica Williams ("Williams") (referred to collectively as "Defendants"), do hereby Amend their Answer to the Complaint of Liam Wallis ("Plaintiff" or "Wallis") filed on October 11, 2019, and set forth Defendant Boeing's counterclaim as follows:

Each and every allegation contained in the Complaint not specifically admitted herein is denied and strict proof thereof is demanded.

PARTIES AND JURISDICTION

1. Defendants lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 1 of the Complaint and, therefore, deny same and demand strict proof thereof

2. Defendants admit the allegations contained in Paragraph 2 of the Complaint.

3. Defendants deny the allegations contained in Paragraph 3 of the Complaint and demand strict proof thereof

4. Defendants deny the allegations contained in Paragraph 4 of the Complaint and demand strict proof thereof

5. Defendants admit so much of Paragraph 5 of the Complaint as alleges, or may be construed to allege, that Plaintiff alleges transactions and occurrences that allegedly took place in Charleston County, South Carolina. However, Defendants deny that all such transactions and occurrences occurred or that any transactions or occurrences constitute cognizable causes of action against Defendants.

6. Defendants admit the allegations contained in Paragraph 6 of the Complaint.

FACTS

7. Answering Paragraph 7 of the Complaint, Defendants object to the phrase "extensive experience" to the extent it is vague, ambiguous and undefined. Subject to that objection, Defendants admit so much thereof as alleges, or may be construed to allege, that Plaintiff has a Federal Airframe and Powerplant License. Defendants deny the remaining allegations contained in Paragraph 7 of the Complaint and demand strict proof thereof.

8. Defendants deny the allegations contained in Paragraph 8 of the Complaint, demand strict proof thereof and would further state that Plaintiff was hired as a Flight Readiness Technician B.

9. Defendants deny the allegations of Paragraph 9 of the Complaint and demand strict proof thereof. Defendants further state that Plaintiff, during the relevant time period, was a Quality Systems Specialist and was an exempt employee under the Fair Labor Standards Act and was not entitled to overtime under the Act.

10. Defendants deny the allegations contained in Paragraph 10 of the Complaint and demand strict proof thereof. Defendants further state that Plaintiff was a Quality Systems Specialist during the relevant time period.

11. Defendants deny the allegations contained in Paragraph 11 of the Complaint and demand strict proof thereof.

12. Defendants deny the allegations contained in Paragraph 12 of the Complaint, demand strict proof thereof, and further state that Plaintiff was an exempt employee under the Fair Labor Standards Act and was not entitled to overtime under the Act.

13. Defendants deny the allegations contained Paragraph 13 of the Complaint and demand strict proof thereof.

14. Answering Paragraph 14 of the Complaint, Defendants admit so much thereof as alleges, or may be construed to allege, that a Quality Systems Specialist may issue a finding, which must be documented and that any repairs and subsequent inspections must be documented. Defendants deny the remaining allegations contained in Paragraph 14 of the Complaint and demand strict proof thereof.

15. Answering Paragraph 15 of the Complaint, Defendants admit so much thereof as alleges, or may be construed to allege, that a finding must be properly addressed in accordance with Boeing policies. Defendants deny the remaining allegations contained in Paragraph 15 of the Complaint and demand strict proof thereof.

16. Defendants object to the use of the word "common" on the grounds that such term is vague and ambiguous. Subject to such objection, Defendants deny the allegations contained in Paragraph 16 of the Complaint.

17. Upon information and belief, Defendants admit the allegations contained in Paragraph 17 of the Complaint.

18. Defendants admit the allegations contained in Paragraph 18 of the Complaint.

19. Defendants deny the allegations contained in Paragraph 19 of the Complaint, demand strict proof thereof, and further state that Defendant Monica Williams became Plaintiff's supervisor in June of 2016.

20. Defendants admit the allegations contained in Paragraph 20 of the Complaint.

21. Defendants deny the allegations contained in Paragraph 21 of the Complaint and demand strict proof thereof.

22. Defendants deny the allegations contained in Paragraph 22 of the Complaint and demand strict proof thereof.

23. Defendants deny the allegations contained in Paragraph 23 of the Complaint and demand strict proof thereof.

24. Defendants deny the allegations contained in Paragraph 24 of the Complaint, including all subparts thereof, and demand strict proof thereof.

25. Defendants deny the allegations contained in Paragraph 25 of the Complaint and demand strict proof thereof.

26. Defendants deny the allegations contained in Paragraph 26 of the Complaint and demand strict proof thereof.

27. Defendants deny the allegations contained in Paragraph 27 of the Complaint and demand strict proof thereof.

28. Defendants admit so much of Paragraph 28 as alleges, or may be construed to allege that, on March 9, 2017, Plaintiff complained to Anthony Timms, Monica Williams' direct supervisor, that Ms. Williams was creating a hostile work environment. Defendants deny the remaining allegations contained in Paragraph 28 of the Complaint and demand strict proof thereof.

29. Defendants deny the allegations contained in Paragraph 29 of the Complaint and demand strict proof thereof.

30. Defendants deny the allegations contained in Paragraph 30 of the Complaint and demand strict proof thereof.

31. Defendants deny the allegations contained in Paragraph 31 of the Complaint and demand strict proof thereof.

32. Defendants deny the allegations contained in Paragraph 32 of the Complaint and demand strict proof thereof.

33. Defendants deny the allegations contained in Paragraph 33 of the Complaint and demand strict proof thereof.

34. Defendants deny the allegations contained in Paragraph 34 of the Complaint and demand strict proof thereof.

35. Defendants deny the allegations contained in Paragraph 35 of the Complaint and demand strict proof thereof.

36. Defendants lack sufficient knowledge or information to admit or deny the allegations contained in Paragraph 36 of the Complaint relating to Plaintiff's mindset and, therefore, deny same and demand strict proof thereof. Defendant further denies the substantive allegations contained in Paragraph 36 of the Complaint and demand strict proof thereof.

37. Defendants deny the allegations contained in Paragraph 37 of the Complaint and demand strict proof thereof.

38. Defendants admit so much of Paragraph 38 as alleges or may be construed to allege, that Boeing's business needs no longer allowed for a four day workweek accommodation to Plaintiff and that Plaintiff was on a leave of absence beginning May 5, 2017 for approximately one

week, but deny the remaining allegations contained in Paragraph 38 of the Complaint and demand strict proof thereof.

39. Answering Paragraph 39 of the Complaint, Boeing admits so much thereof as alleges, or may be construed to allege, that Boeing received updated medical restrictions from Plaintiff's physician on May 5, 2017, stating that Plaintiff could work a five-day workweek, and that Plaintiff's schedule returned to a five-day workweek. Defendants deny the remaining allegations of Paragraph 39 of the Complaint and demand strict proof thereof.

40. Defendants deny the allegations contained in Paragraph 40 of the Complaint and demand strict proof thereof.

41. Defendants admit so much of Paragraph 41 of the Complaint as alleges, or may be construed to allege, that Plaintiff was terminated on June 15, 2017. Defendants deny the remaining allegations contained in Paragraph 41 of the Complaint and demand strict proof thereof.

42. Defendants deny the allegations contained in Paragraph 42 of the Complaint and demand strict proof thereof.

43. Defendants deny the allegations contained in Paragraph 43 of the Complaint and demand strict proof thereof.

44. Defendants deny the allegations contained in Paragraph 44 of the Complaint and demand strict proof thereof.

45. Defendants deny the allegations contained in Paragraph 45 of the Complaint and demand strict proof thereof.

46. Defendants deny the allegations contained in Paragraph 46 of the Complaint, demand strict proof thereof, and would further state that Plaintiff received all pay for work he performed as an employee of Boeing.

ANSWERING THE FIRST CAUSE OF ACTION¹
(Wrongful Discharge as to Defendant Boeing)

47. Defendant Boeing repeats and reiterates the above paragraphs, as if set forth verbatim herein.

48. Defendant Boeing admits the allegations contained in Paragraph 48 of the Complaint.

49. Defendant Boeing denies the allegations contained in Paragraph 49 of the Complaint and demands strict proof thereof.

50. Defendant Boeing denies the allegations contained in Paragraph 50 of the Complaint and demands strict proof thereof.

51. Defendant Boeing denies the allegations contained in Paragraph 51 of the Complaint and demands strict proof thereof.

ANSWERING THE SECOND CAUSE OF ACTION
(Civil Conspiracy as to Defendants Monica Williams and Anthony Timms)

52. Defendants Williams and Timms repeat and reiterate the above paragraphs, as if set forth verbatim herein.

53. Defendants Williams and Timms deny the allegations contained in Paragraph 53 of the Complaint and demand strict proof thereof.

54. Defendants Williams and Timms deny the allegations contained in Paragraph 54 of the Complaint and demand strict proof thereof.

55. Defendants Williams and Timms deny the allegations contained in Paragraph 55 of the Complaint and demand strict proof thereof.

¹ The Court dismissed this cause of action on April 23, 2020. Plaintiff filed a motion to reconsider on May 4, 2020, which remains pending with the Court.

56. Defendants Williams and Timms deny the allegations contained in Paragraph 56 of the Complaint and demand strict proof thereof

ANSWERING THE THIRD CAUSE OF ACTION

(Failure to Pay Wages as to Defendant Boeing)

57. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

58. Defendants admit the allegations contained in Paragraph 58 of the Complaint and demand strict proof thereof

59. Defendants deny the allegations contained in Paragraph 59 of the Complaint and demand strict proof thereof

60. Defendants deny the allegations contained in Paragraph 60 of the Complaint and demand strict proof thereof

61. Answering Paragraph 61 of the Complaint, Defendants deny that Plaintiff is entitled to the relief set forth therein or in the prayer for damages and demand strict proof thereof

DEFENDANTS' DEFENSES

Defendants incorporate herein the defenses and legal arguments set forth in their Motion to Dismiss filed with the Court.

FURTHER ANSWERING THE COMPLAINT AND AS A SECOND

DEFENSE THERETO

(Rule 12(b)(6))

62. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

63. Plaintiff's Complaint fails to state facts sufficient to constitute any cause of action and, therefore, should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

**FURTHER ANSWERING THE COMPLAINT AND AS A THIRD
DEFENSE THERETO**

(Estoppel)

64. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

65. Plaintiff's claims are barred by the doctrine of estoppel.

**FURTHER ANSWERING THE COMPLAINT AND AS A FOURTH
DEFENSE THERETO**

(Waiver)

66. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

67. Plaintiff's claims are barred by the doctrine of waiver.

**FURTHER ANSWERING THE COMPLAINT AND AS A FIFTH
DEFENSE THERETO**

(Failure to Mitigate)

68. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

69. Plaintiff's damages are barred, in whole or in part, to the extent he failed to mitigate his damages.

70. Likewise, without admitting any wrongful conduct, Defendants assert that Plaintiff's damages, if any, should be offset by any subsequent earnings obtained by Plaintiff.

**FURTHER ANSWERING THE COMPLAINT AND AS A SIXTH
DEFENSE THERETO**

(Unclean Hands)

71. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

72. Plaintiff's claims are barred by the doctrine of unclean hands.

**FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTH
DEFENSE THERETO**

(Good Faith, Legitimate Reasons for Actions)

73. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

74. Plaintiff's claims are barred, in whole or in part, because Defendants at all times acted in good faith and in a lawful manner towards Plaintiff, with legitimate business reasons for the actions about which Plaintiff complains.

**FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTH
DEFENSE THERETO**

(Failure to Exhaust Administrative Remedies)

75. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

76. To the extent that Plaintiff failed to exhaust his administrative remedies, his claims are barred.

**FURTHER ANSWERING THE COMPLAINT AND AS A NINTH
DEFENSE THERETO**

(After-Acquired Evidence Rule)

77. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

78. The Complaint, and each purported cause of action alleged therein, is barred in whole or in part by the doctrine of after-acquired evidence, or alternatively, the doctrine of after-acquired evidence limits and reduces Plaintiff's alleged damages.

**FURTHER ANSWERING THE COMPLAINT AND AS A TENTH
DEFENSE THERETO**

(Laches)

79. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

80. Plaintiff's claims are barred by the doctrine of laches.

**FURTHER ANSWERING THE COMPLAINT AND AS AN ELEVENTH
DEFENSE THERETO**
(Statute of Limitations)

81. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

82. Plaintiff's claims are barred to the extent he failed to comply with the applicable statute of limitations.

**FURTHER ANSWERING THE COMPLAINT AND AS A TWELFTH
DEFENSE THERETO**
(Equitable Relief)

83. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

84. Plaintiff's allegations and demands for equitable relief are questions for the Court, not the jury.

**FURTHER ANSWERING THE COMPLAINT AND AS A THIRTEENTH
DEFENSE THERETO**
(Scope of Employment)

85. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

86. At all times Defendants Williams and Timms acted within the scope of their employment. Therefore, Plaintiff's claim for civil conspiracy is barred.

**FURTHER ANSWERING THE COMPLAINT AND AS A FOURTEENTH
DEFENSE THERETO**
(No Special Damages)

87. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

88. Plaintiff's claim of civil conspiracy is barred because he has not suffered, nor has he alleged to have suffered, special damages sufficient to constitute such a claim.

**FURTHER ANSWERING THE COMPLAINT AND AS A FIFTEENTH
DEFENSE THERETO**

(Intracorporate Conspiracy Doctrine)

89. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

90. Plaintiff's claims are barred by the doctrine of intracorporate conspiracy.

**FURTHER ANSWERING THE COMPLAINT AND AS A SIXTEENTH
DEFENSE THERETO**

(Failure to Plead Separate Facts and Damages)

91. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

92. Plaintiff's Complaint fails to plead separate facts and damages or allegations sufficient to show separate facts and damages, related to a viable civil conspiracy claim, and therefore, such cause of action should be dismissed.

**FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTEENTH
DEFENSE THERETO**

(Existing Statutory Remedy)

93. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

94. Plaintiff has an existing statutory remedy and, therefore, his claim of wrongful termination is barred.

**FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTEENTH
DEFENSE THERETO**

(No Violation of a Clear Mandate of Public Policy)

95. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

96. Plaintiff has failed to allege or show a violation of a clear mandate of public policy, and, therefore, his claim of wrongful termination is barred.

**FURTHER ANSWERING THE COMPLAINT AND AS A NINETEENTH
DEFENSE THERETO**
(Exempt under FLSA)

97. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

98. Plaintiff was exempt from overtime pay under the Fair Labor Standards Act and, therefore, his cause of action for overtime pay should be dismissed.

**FURTHER ANSWERING THE COMPLAINT AND AS A TWENTIETH
DEFENSE THERETO**
(FLSA Preemption)

99. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein

100. Plaintiff's cause of action for payment of wages is preempted by the Fair Labor Standards Act of 1938, as amended, 29 U.S.C § 201 *et seq.*

**FURTHER ANSWERING THE COMPLAINT AND AS A TWENTY-FIRST
DEFENSE THERETO**
(S.C. Code Ann. §§ 15-32-510 *et seq.*)

101. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

102. Defendants reserve all rights provided under S.C. Code Ann. §§ 15-32-510 to -540, including the limits on recovery of punitive damages under Section 15-32-530.

**FURTHER ANSWERING THE COMPLAINT AND AS A TWENTY-SECOND
DEFENSE THERETO**

(Reservation of Right to Make Other Assertions)

103. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

104. Defendants reserve the right to assert, via amended pleadings, any and all additional and/or further defenses as may be revealed by additional information and/or documentation produced and/or acquired through discovery or otherwise herein.

**FURTHER ANSWERING THE SECOND AMENDED COMPLAINT AND BY WAY OF
FIRST COUNTERCLAIM BY DEFENDANT BOEING**
(Breach of Contract)

105. Defendant Boeing repeats and reiterates the above paragraphs as if set forth verbatim herein.

106. Defendant Boeing has designed and is manufacturing the 787 Dreamliner, a one-of-its-kind commercial aircraft using composite materials and advanced technologies.

107. Plaintiff was employed by Defendant Boeing from March 14, 2011 through July 26, 2012 as a Flight Readiness Technician B. He became a Quality Systems Specialist 3 on July 27, 2012, and held this position until his termination on June 17, 2017.

108. In his position with Defendant Boeing, Plaintiff had access to, and used for business purposes, confidential proprietary information belonging to Defendant Boeing.

109. Plaintiff knew that the information and documentation he was using in his employment with Defendant Boeing was confidential and proprietary information regarding the design and manufacture of the 787 Dreamliner and other company business and that it was not to be taken, disclosed or misappropriated.

110. Plaintiff entered into an Intellectual Property and Confidentiality Agreement (the "Confidentiality Agreement") with Defendant Boeing dated March 14, 2011, a copy of which is attached hereto as Exhibit A.

111. The execution of the Confidentiality Agreement was a condition of Plaintiff working for Defendant Boeing and is supported by valuable consideration.

112. Pursuant to the terms of the Confidentiality Agreement, Plaintiff agreed, in Section 2 thereof, that all proprietary information (as defined in the Confidentiality Agreement) which he conceived or developed while an employee of Defendant Boeing "shall be the exclusive property of [Boeing]." The term "Proprietary Information" is defined in the Confidentiality Agreement as "information not generally known outside the Boeing Group [which is defined as The Boeing Company and all subsidiaries] or information entrusted to any member of The Boeing Group by third parties."

113. Plaintiff further agreed, pursuant to Section 2 of the Confidentiality Agreement, as follows: "I will preserve in confidence and will not disclose or use, either during or after the term of this Agreement, any Proprietary Information known to me as a result of my employment except as required in my work for [Boeing] or as authorized in writing by [Boeing]."

114. Plaintiff also agreed that upon termination of his employment he would "deliver to [Boeing] all materials in my possession which contain Proprietary Information."

115. Pursuant to Section 4 of the Confidentiality Agreement, Plaintiff agreed that all work product produced by him, and all copyrights in works authored by him, either alone or with others, shall be the exclusive property of Defendant Boeing.

116. The Confidentiality Agreement was a valid and enforceable contract between Plaintiff and Defendant Boeing.

117. Plaintiff had training related to Defendant Boeing's rights in its information and the importance of protecting those rights and maintaining the confidentiality of Defendant Boeing's documents and information.

118. Upon termination from Defendant Boeing, Plaintiff failed to deliver to Defendant Boeing all documents in his possession that contained Proprietary Information. Further, Plaintiff took from Defendant Boeing, prior to his termination, documents, electronic material and/or other material containing Proprietary Information and trade secrets belonging to Defendant Boeing.

119. Defendant Boeing was unaware that Plaintiff violated the Confidentiality Agreement until he produced documents marked as "Boeing Proprietary" on June 19, 2020, following Plaintiff's production of these documents.

120. Some or all of the documents taken by Plaintiff were produced by Plaintiff in this case and contain information related to the 787 Dreamliner and Defendant Boeing's operations. Several of these documents, including PowerPoint presentations for training purposes, product installation orders, internal e-mail correspondence, and 787 Software Loader User's Guide, are marked "Boeing Proprietary," and/or contain a Boeing copyright notice.

121. Without Defendant Boeing's knowledge or permission, Plaintiff had, and has, unauthorized possession and control over the documents he misappropriated.

122. Plaintiff's actions constitute a material breach of the Confidentiality Agreement.

123. Plaintiff's actions in taking and misappropriating proprietary information and trade secrets belonging to Defendant Boeing were willful and wanton, and Defendant Boeing has suffered damages as a result thereof.

124. Defendant Boeing has and will continue to suffer irreparable harm for which it has no adequate remedy at law if Plaintiff is allowed to maintain any documents or electronic or other material belonging to Defendant Boeing, whether or not Plaintiff has produced them in this case, containing proprietary information and trade secrets that Plaintiff has taken from Defendant Boeing.

WHEREFORE, having fully answered the Complaint, Defendants pray that it be dismissed, that this Court award Defendants their costs and attorneys' fees incurred in defending the claims contained in the Complaint and that this Court grant such other and further relief as it deems just and proper. Defendant Boeing further prays for the following relief with regard to its counterclaim:

- a. Actual and consequential damages;
- b. An injunction (i) prohibiting Plaintiff from using, copying, maintaining, disclosing or otherwise misappropriating any and all documents and information taken by Plaintiff or belonging to Defendant Boeing and in Plaintiff's possession, and (ii) requiring Plaintiff to turn over to Defendant Boeing all hard and electronic originals and copies of any and all documents and information which Plaintiff took from Defendant Boeing or which belong to Defendant Boeing and are in Plaintiff's possession;
- c. An accounting of the location of all documents, including electronic and hard copies thereof, taken by Plaintiff from Defendant Boeing; and
- d. Such other and further relief as the Court deems just and proper.

s/Cherie W. Blackburn

Cherie W. Blackburn (SC Bar No. 10812)

Melissa F. Spence (SC Bar No. 78172)

NEXSEN PRUET, LLC

205 King Street, Suite 400 (29401)

P.O. Box 486

Charleston, South Carolina 29402

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ATTORNEYS FOR DEFENDANTS

October 9, 2020
Charleston, South Carolina

LIAM WALLIS V. THE BOEING COMPANY, ET AL.
CASE NO. 2019-CP-10-1379

EXHIBIT "A"

INTELLECTUAL PROPERTY AND CONFIDENTIALITY AGREEMENT DATED 3/14/11

ELECTRONICALLY FILED - 2020 Oct 09 3:04 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001379



THE BOEING COMPANY AND SUBSIDIARIES
INTELLECTUAL PROPERTY AND CONFIDENTIALITY AGREEMENT

In consideration of my employment by the Employer, any opportunities for advancement or reassignment which the Employer may from time to time offer me, the compensation paid to me in connection with such employment, and the mutual understandings set forth below, the Employer and I agree as follows:

1. For purposes of this Agreement the term:
 - a. "Subsidiaries" means business organizations in which The Boeing Company now or hereafter owns or controls, directly or indirectly, 50 percent or more of the outstanding voting interest.
 - b. "Boeing Group" means The Boeing Company and all Subsidiaries.
 - c. "Employer" means every member of the Boeing Group which has adopted this form of agreement and to which I am or have been assigned at any time during the term of this Agreement.
 - d. "Inventions" includes inventions, discoveries, developments, and improvements to existing technology, whether patentable or unpatentable.
 - e. "Proprietary Information" means information not generally known outside the Boeing Group or information entrusted to any member of the Boeing Group by third parties. This information may relate, for example, to inventions, formulas, patterns, devices, methods, processes, computer technology and programming, research, development, engineering, manufacturing, purchasing, accounting, marketing, or selling. This information may be contained in materials such as drawings, models, data, specifications, records, reports, compilations, or computer programs, or may be in the nature of unwritten knowledge or know-how.
 - f. "Work Product," means any and all tangible results of work performed by an employee. Work Product includes, for example, documents, drawings, specifications, software, computer programs, images, photo and video materials, sound recordings, and music.
2. Except as limited by applicable law, all Proprietary Information which I conceive or develop during the term of this Agreement, either alone or with others, shall be the exclusive property of the Employer. I will preserve in confidence and will not disclose or use, either during or after the term of this Agreement, any Proprietary Information known to me as a result of my employment except as required in my work for the Employer or as authorized in writing by the Employer. Upon termination of my employment, I will deliver to the Employer all materials in my possession which contain Proprietary Information.
3. Except for Proprietary Information which is provided to me by the Employer (which is subject to the requirements of Article 2 above), I will not in my work for the Employer, use or disclose information which is confidential to or owned by former employers or other third parties, and will not bring any such information into the facilities of the Employer.
4. Except as limited by applicable law and Article 12 below, all Work Product produced by me, and all copyrights in works authorized by me, either alone or with others, during the term of this Agreement, are and shall be the exclusive property of the Employer. To the maximum extent permitted under the copyright laws, all such works shall be works made for hire with the copyright automatically vesting in the Employer. In all other cases, I hereby irrevocably assign and transfer all right, title, and interest in and to the copyrights in such works to the Employer upon request.
5. Except as limited by applicable law, I consent to the recording of my photograph, name, voice, signature, image, likeness, and identity while on the Employer's premises or engaged in activities for the Employer and I further consent to the use of such recordings (whether in photo, video, audio, or any other form) in any manner, at any time, and for any legitimate business or regulatory purpose.
6. Except as limited by applicable law and as set forth in Article 12 below, all inventions which I conceive, develop, or first actually reduce to practice, either alone or with others, during the term of this Agreement and for six months hereafter, shall be the exclusive property of the Employer. I will disclose such inventions to the Employer promptly and in writing in accordance with written Employer procedures, a copy of which shall be provided to me upon request. When requested, I will assist the Employer or its designee in efforts to protect such inventions.
7. I understand and agree that the Employer or its designee will determine, in its sole and absolute discretion, whether an application for patent will be filed on any invention which is the exclusive property of the Employer, as set forth above, and whether such an application will be abandoned prior to issuance of a patent.
8. I waive all claims arising either during or after the term of this Agreement against every member of the Boeing Group with respect to information, works of authorship and inventions in which I have an ownership interest on the date of this Agreement, except for claims based on patent rights resulting from applications filed prior to or within 90 days after the date of this Agreement.
9. I understand and agree that the rights and obligations under this Agreement shall automatically extend to each member of the Boeing Group which has adopted this form of agreement upon my assignment thereto, whether that assignment be formally designated as a transfer, hire, rehire, or by a similar term, and that such rights and obligations, once extended, shall continue throughout the term of this Agreement.
10. This Agreement is not a contract of employment, and no rights to hire or continuation of employment, or to advancement or reassignment, are hereby created. This Agreement supersedes and replaces any prior agreement between me and any member of the Boeing Group relating to the same subject matter, but shall not affect any rights or obligations, other than those pertaining to release of the Employer's rights in inventions, already established under such a prior agreement.
11. I will not assign this Agreement or any of my rights and obligations hereunder, either during or after the term of this



THE BOEING COMPANY AND SUBSIDIARIES
INTELLECTUAL PROPERTY AND CONFIDENTIALITY AGREEMENT

Agreement, without the written consent of the Employer. This Agreement shall be binding upon my heirs and personal representative, and upon the Employer and its successors and assigns.

12. This Agreement does not apply to an Invention or Work Product for which no property, equipment, supplies, facilities, resources, or intellectual property (including, but not limited to, Proprietary Information or trade secret information) of the Employer was used and which was developed entirely on my own time, unless: (a) the Invention or Work Product relates (i) directly or indirectly to the business of the Employer, or (ii) the Employer's actual or demonstrably anticipated research or development, or (b) the Invention or Work Product results from any work performed by me for the Employer. Furthermore, this Agreement may be limited by the laws of the state where I am employed by a member of the Boeing Group as set forth below:
- a. If I am to be employed by the Employer within the States of Washington, Kansas or Minnesota, the Agreement shall not apply to an Invention for which no equipment, supplies, facility or trade secret information of the Employer was used and which was developed entirely on my own time, unless (a) the Invention relates (i) directly to the business of the Employer, or (ii) to the Employer's actual or demonstrably anticipated research or development, or (b) the Invention results from any work performed by me for the Employer.
 - b. If I am to be employed by the Employer within the States of Illinois, Delaware or North Carolina, the Agreement shall not apply to an Invention for which no equipment, supplies, facility or trade secret information of the Employer was used and which was developed entirely on my own time, unless (a) the Invention relates (i) to the business of the Employer, or (ii) to the Employer's actual or demonstrably anticipated research or development; or (b) the Invention results from any work performed by me for the Employer.
 - c. If I am to be employed by the Employer within the State of California, the Agreement shall not apply to an Invention that I developed entirely on my own time without using the Employer's equipment, supplies, facilities or trade secret information, except for those inventions that either (a) relate at the time of conception or reduction to practice of the Invention to the Employer's business or actual or demonstrably anticipated research or development of the Employer, or (b) result from any work performed by me for the Employer.
 - d. If I am to be employed by the Employer within the State of Utah, the Agreement shall not apply to an Invention that is created by me entirely on my own time and is not an Invention or part thereof (a) conceived, developed, reduced to practice or created by me (i) within the scope of my employment; (ii) on the Employer's time; or (iii) with the aid, assistance or use of any of the Employer's property, equipment, facilities, supplies, resources or intellectual property; (b) resulting from any work, services, or duties performed by me for the Employer; (c) related to the industry or trade of the Employer; or (d) related to the current or demonstrably anticipated business, research or development of the Employer.
13. When signed by me, this Agreement shall be deemed accepted by every member of the Boeing Group which has adopted this form of agreement. This Agreement is effective as of the date of my initial employment by the Boeing Group and shall continue in effect until, and terminate when, my employment is terminated for any reason other than to effect assignment to another member of the Boeing Group, provided, that termination of this Agreement shall not affect the continuing rights and obligations set forth above.

BEMSID	FULL NAME OF EMPLOYEE Wallis, Liam Patrick	SIGNATURE OF EMPLOYEE Wallis, Liam Patrick (On File)	DATE 03/14/2011

ELECTRONICALLY FILED - 2020 Oct 09 3:04 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001379

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

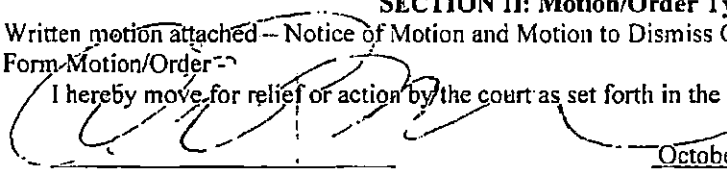
The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

CASE NO. 2019-CP-10-1379

Plaintiff: O. Grady Query S.C. Bar No. 4610 Michael H. Ellis S.C. Bar No. 101524 Address: Query Sautter & Associates 147 Wappoo Creek Road, Suite 202 Charleston, SC 29412 phone: 843.795.9500 fax: E-mail: gquery@qlawsc.com other:	Defendant: Cherie W. Blackburn S. C. Bar No. 10812 Melissa F. Spence S.C. Bar No. 78172 Address: Nexsen Pruet, LLC P.O. Box 486 Charleston, SC 29402 phone: 843.577.9440 fax: 843.414.8236 E-mail: cblackburn@nexsenpruet.com other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion: Motion to Dismiss Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached -- Notice of Motion and Motion to Dismiss Complaint Against Defendants ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff ☒ Defendant Date submitted <u>October 11, 2019</u>	
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-1379

NOTICE OF MOTION AND MOTION
TO DISMISS PLAINTIFFS CAUSES
OF ACTION FOR WRONGFUL
TERMINATION IN VIOLATION OF
PUBLIC POLICY AND CIVIL
CONSPIRACY

2019 OCT 11 PM 3:13
FILED
BY
JULIA S. HARRIS
CLERK OF COURT

PLEASE TAKE NOTICE THAT Defendants The Boeing Company ("Boeing"), Anthony Timms and Monica Williams (collectively "Defendants") hereby move for an Order dismissing Plaintiff's causes of action for wrongful termination in violation of public policy¹ against Boeing and civil conspiracy against Anthony Timms and Monica Williams, as set forth in the Complaint of Plaintiff Liam Wallis, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, on the grounds that the Complaint fails to state facts sufficient to constitute these causes of action against the Defendants.

Plaintiff's cause of action for wrongful termination in violation of public policy against Defendant Boeing should be dismissed because Plaintiff has an existing statutory remedy for his claim that he was terminated "in retaliation for complying with Boeing's safety and engineering policies" (Compl. ¶ 49) under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. Moreover, Plaintiff has failed to allege facts to support a "clear mandate of public policy" that Defendant Boeing allegedly violated under South Carolina jurisprudence.

¹ The Complaint has captioned Plaintiff's cause of action as "wrongful discharge"; however, based on South Carolina Jurisprudence, this cause of action is appropriately referred to as "wrongful termination in violation of public policy."

Plaintiff's cause of action for civil conspiracy against Defendants Anthony Timms and Monica Williams should be dismissed because the claim is barred by the intracorporate conspiracy doctrine. Additionally, Plaintiff has not plausibly alleged that Defendants Timms and Williams combined for the primary purpose of injuring him, Plaintiff has failed to plead any wrongful acts by Defendants Timms and Williams independent of the alleged acts giving rise to his other claims, and Plaintiff has failed to plead special damages.

For the above reasons, Plaintiff has failed to state facts sufficient to allege causes of action for wrongful termination in violation of public policy against Defendant Boeing and civil conspiracy against Defendants Timms and Williams. Therefore, these causes of action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

This Motion is based on the pleadings, applicable law and a supporting memorandum that will be submitted at or before the hearing on this motion.



Cherie W. Blackburn (SC Bar No. 10812)
Melissa F. Spence (SC Bar No. 78172)
NEXSEN PRUET, LLC
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ATTORNEYS FOR DEFENDANTS

October 11, 2019
Charleston, South Carolina

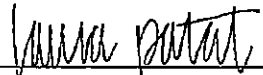
2019-CP-10-1379

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S CAUSES OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY AND CIVIL CONSPIRACY** has been served upon the following counsel of record by email and by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 11th day of October, 2019.

O. Grady Query, Esquire
Michael H. Ellis, Esquire
Query Sautter & Associates
147 Wappoo Creek Road, Suite 202
Charleston, SC 29412

ATTORNEYS FOR PLAINTIFF



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FILED
2019 OCT 11 PM 3:13
JULIE J ARMSTRONG
CLERK OF COURT
BY _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
 Liam Wallis,	)	 Case No.: 2019-CP-10-1379
	)	
Plaintiff,	)	Plaintiff's Reply to Defendants'
	)	Counterclaim
vs.	)	
	)	
The Boeing Company; Anthony	)	
Timms; and Monica Williams	)	
	)	
Defendants.	)	
_____	)	

NOW COMES, Plaintiff, Liam Wallis, by and through his undersigned counsel, replying to Defendants' Counterclaim as follows:

1. Each and every allegation not specifically admitted shall be deemed denied.
2. Paragraph 105 of Defendants' Counterclaim is a reiteration paragraph requiring no answer from Plaintiff.
3. Plaintiff admits in part the allegations contained in paragraph 106 of Defendants' Counterclaim in that Boeing designs and manufactures the 787 Dreamliner, but denies the remaining allegations.
4. Plaintiff admits the allegations contained in paragraphs 107 and 108 of Defendants' Counterclaim.
5. Plaintiff denies the allegations contained in paragraph 109 of Defendants' Counterclaim.
6. Plaintiff admits in part the allegations contained in paragraph 110 of Defendants' Counterclaim in that he entered into a Confidentiality Agreement with Boeing, but lacks sufficient information to form a belief as to whether Exhibit A is the Confidentiality Agreement.

7. Plaintiff denies the allegations contained in paragraph 111 of Defendants' Counterclaim.
8. Plaintiff lacks sufficient information to form a belief as to the allegations contained in paragraphs 112-115 of Defendants' Counterclaim.
9. Plaintiff denies the allegations contained in paragraphs 116-119 of Defendants' Counterclaim.
10. Plaintiff admits the allegations contained in paragraph 120 of Defendants' Counterclaim.
11. Plaintiff denies the allegations contained in paragraphs 121-124 of Defendants' Counterclaim.

For A First Defense
(Failure to Mitigate)

12. Plaintiff reiterates paragraphs 1-11 here in verbatim.
13. Defendants' failed to mitigate their damages.

For A Second Defense
(Laches)

14. Plaintiff reiterates paragraphs 1-13 here in verbatim.
15. Defendants neglected for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.

For A Third Defense
(Statute of Limitations)

16. Plaintiff reiterates paragraphs 1-15 here in verbatim.
17. Defendants' claims are barred by the applicable statute of limitations.

For A Fourth Defense
(Comparative Negligence)

18. Plaintiff reiterates paragraphs 1-17 here in verbatim.

19. Defendants damages are caused by their own comparative negligence.

For A Fifth Defense
(Unclean Hands)

20. Plaintiff reiterates paragraphs 1-19 here in verbatim.

21. Defendants are barred from recovery by the doctrine of unclean hands.

WHEREFORE, having fully replied to Defendants' Counterclaim, Plaintiff prays for the same to be dismissed and he be awarded costs of having to defend against this action including reasonable attorneys and for such further and other relief as this court deems just and proper.

Respectfully submitted by,

QUERY SAUTTER & ASSOCIATES, LLC

/s/ Michael H. Ellis

O. Grady Query, 3188

Michael H. Ellis, Jr.12309

147 Wappoo Creek Drive, Suite 202

Charleston, South Carolina 29412

Telephone: 843-795-9500

Facsimile: 843-762-1500

Attorney for the Plaintiff

This 6th day of November, 2020
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a copy of the foregoing upon Cherie W. Blackburn, attorney for the Defendant, via email as follows:

Cherie W. Blackburn, Esquire
cblackburn@nexsenpruet.com

Dated: November 6, 2020

/S MICHAEL H. ELLIS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Liam Wallis,	)	Case No.: 2:19-CV-1115-RMG
	)	
Plaintiff,	)	
	)	AMENDED COMPLAINT
vs.	)	
	)	
The Boeing Company; Anthony	)	
Timms; and Monica Williams	)	
	)	
Defendants.	)	

NOW COMES Plaintiff, Liam Wallis, by and through his undersigned counsel,
complaining of the above named Defendants as follows:

Parties and Jurisdiction

1. Plaintiff is a resident of Charleston County, South Carolina.
2. Defendant The Boeing Company (hereinafter "Boeing") is a foreign corporation doing business in the State of South Carolina, maintains offices in Charleston County, and transacts business in Charleston County, South Carolina.
3. Based upon information and belief, Defendant Anthony Timms is a resident of Charleston County, South Carolina.
4. Based upon information and belief, Defendant Monica Williams is a resident of Charleston County, South Carolina.
5. All transactions and occurrences giving rise to this action occurred in Charleston County, South Carolina.
6. This Court has jurisdiction over the parties and subject matter and venue is proper.

Facts

7. Plaintiff has extensive experience in the aviation industry and is a Federal Airframe and Powerplant Licensee (hereinafter "A&P").
8. Plaintiff was hired by Boeing in April of 2011 as a Quality Assurance Conformity Manager (hereinafter "QACM").
9. QACM's are paid on an hourly basis and do not have any executive or administrative duties.
10. QACM's are trained on the job to perform their job duties, not requiring any specific degree or certifications.
11. Plaintiff was an employee required to be paid an overtime pay of his base hourly rate plus half for any hours worked in excess of forty (40) hours per week.
12. Defendant did not pay Plaintiff his proper overtime pay for the hours Plaintiff worked in excess of forty (40) hours per work week.
13. QACM's are Boeing employees tasked with inspecting all newly manufactured aircraft for compliance with Boeing's internal engineering and safety specifications.
14. Any non-conformity found by a QACM is referred to as "a finding" and must be documented and all repairs and subsequent inspections must be well documented.
15. Findings must be properly addressed in accordance with Boeing policies and ultimately can delay the sale of an aircraft to the purchaser.
16. The documentation of findings and any necessary repairs are commonly used by the purchaser of an aircraft to negotiate a reduced price for a Boeing aircraft.
17. In or about August of 2016, Plaintiff slipped a disk in his neck that required surgery.

18. Plaintiff missed time at Boeing under the Family and Medical Leave Act to recover from his injury.
19. Immediately prior to Plaintiff leaving for his injury, Defendant Monica Williams was promoted to supervise Plaintiff and the other Conformity Managers.
20. Plaintiff returned to Boeing on January 20, 2017 with some medical restrictions.
21. Upon Plaintiff's return to work, he was constantly followed and observed by Monica Williams.
22. Plaintiff immediately realized there was a back log of non-conformities or findings that needed to be inspected by the QACM's, fixed, and signed off by the QACM's.
23. Upon making an inquiry, Plaintiff's colleagues informed him that upon Monica Williams being promoted, all Boeing policies and procedures were disregarded and they were not willing to sign their names on documents containing all the shortcuts on the safety inspections of the planes they were building that were initiated by Monica Williams and Anthony Timms acting in concert and upon information and belief without the knowledge of the Boeing officers and policy makers.
24. While Plaintiff was out on FMLA Boeing systematically engaged in:
 - a. "Goldplating" which is repeating a test until it is successful and then having the records show that the test was successful on the first attempt;
 - b. Knowingly using out of date engineering specifications;
 - c. Knowingly using uncertified technicians to perform maintenance and repairs;
 - d. Violating the internal Boeing policy and procedures that were put in place to achieve final approval of each stage of production and make the plane immediately saleable;

- e. Disabling the automated system that notified all pertinent employees of mandatory inspections of newly manufactured aircraft; and
 - f. Submitting conformities without documented repairs.
25. Upon confronting Defendant Monica Williams about all the Boeing policy violations and safety concerns he discovered, Plaintiff was told by Monica Williams and Anthony Timms that he was not to write up any findings of non-conformity without first receiving permission from them.
26. Plaintiff continued to do his job of inspecting all newly manufactured aircraft to ensure the safety of the public that relies upon Boeing's internal engineering and safety specifications and documented his findings of non-conformities.
27. Defendant Monica Williams yelled at Plaintiff that "you are not to write up violations".
28. On March 9, 2017, Plaintiff complained to Defendant Monica Williams's boss, Anthony Timms, that Monica Williams continuously removed documents from his desk and treated him harshly for documenting his findings of non-conformity, and creating a hostile work environment including but not limited to making threats against Plaintiff's life.
29. Anthony Timms told Plaintiff that Plaintiff already got Boeing all the training to qualify for certifications that they needed from him so they did not need him anymore and that Plaintiff would never be getting any more raises or promotions.
30. The day after Plaintiff spoke with Anthony Timms, Defendant Williams told Plaintiff that he needed to start looking for another job.

31. Immediately prior to Plaintiff leaving in November of 2016 for his neck surgery, an inspection was required to be done of the first barrel that came off the new enclave oven in Boeing's building 19.
32. This inspection was assigned to Plaintiff.
33. Upon Plaintiff's return to Boeing, he learned that this required inspection was not conducted in his absence and immediately worked on providing a report regarding the absence of the inspection.
34. Plaintiff discovered that the barrel was manufactured using obsolete engineering, all subsequent barrels were manufactured using obsolete engineering, undocumented repairs were made to the barrels, and that a fictitious QACM signed off on the repairs.
35. Plaintiff brought these non-conformities with Boeing's engineering specifications to management's attention and the investigation was pulled from Plaintiff and reassigned to Monica Williams.
36. Plaintiff feared that there was an escapement of all barrels produced in the new enclave oven, meaning that non-conforming aircraft barrels were being used to manufacture aircraft that were making their way into the fleet of aircraft used to transport passengers and freight.
37. Plaintiff pursued the matter, demanding that management of Boeing comply with Boeing's policies and self-report this escapement as required.
38. Directly after Plaintiff's ultimatum to Boeing, Plaintiff was informed by human resources that Boeing would no longer honor his medical work restrictions and Plaintiff was placed on a leave of absence without pay.

39. Plaintiff had his doctor lift the restrictions and he returned to work after being gone for a week.
40. Upon his return to Boeing, Plaintiff's every action was unduly scrutinized by Monica Williams and Anthony Timms in an attempt to find justification for Plaintiff's termination.
41. Plaintiff was wrongfully terminated from Boeing on June 15, 2017.
42. Based upon information and belief, Boeing sacrificed compliance with their own policies and regulations put in place for the protection of the public in exchange for the expedited completion of aircraft and profit from the sale of those aircraft.
43. Boeing confronted Plaintiff with the dilemma of choosing to maintain his livelihood by cooperating in Boeing's scheme of fraudulently concealing non-conformities in the aircraft they were selling, or complying with Boeing's established safety specifications and protecting the public that relies upon that compliance for their safety in air travel.
44. Based upon information and belief, Boeing continues to manufacture and place into the stream of commerce non-conforming barrels.
45. **Based upon information and belief, Anthony Timms and Monica Williams conspired to have Plaintiff terminated after he refused to fraudulently document planes as having no findings.**
46. **Based upon information and belief, Anthony Timms and Monica Williams engaged in this conspiracy to minimize findings being reported to their bosses in an attempt further their own careers and obtaining promotions.**
47. **Based upon information and belief, Anthony Timms and Monica Williams furthered their conspiracy to harm Plaintiff for their gain by denying Plaintiff**

access to the internal computer systems that allowed Plaintiff to verify whether planes on the flight line were indeed ready for his inspection.

48. Based upon information and belief, the conspiracy by Anthony Timms and Monica Williams resulted in Plaintiff being forced to rely on others that two planes were ready to be inspected rather than being able to verify for himself on the computer system to which he was denied access by Timms and Williams.

49. Based upon information and belief, Boeing has blackballed Plaintiff from the aircraft industry.

50. Plaintiff has never received his past due proper pay for his overtime work performed.

For A First Cause of Action

(Wrongful Discharge as to Defendant The Boeing Company)

51. Plaintiff reiterates paragraphs 1-50 above as if set forth here in verbatim.

52. Plaintiff was an at-will-employee of Defendant.

53. He was terminated in retaliation for complying with Boeing's safety and engineering policies and regulations rather than acquiescing to Boeing's policy of concealing non-conformities in the planes they were selling.

54. Plaintiff's termination constitutes a violation of a clear mandate of public policy.

55. Plaintiff is entitled to damages including punitive damages.

For A Second Cause of Action

(Civil Conspiracy as to Defendants Monica Williams and Anthony Timms)

56. Plaintiff reiterates paragraphs 1-55 above as if set forth here in verbatim.

57. Monica Williams and Anthony Timms combined and conspired for the purpose of injuring Plaintiff and advancing their own interests.

58. As a result of their civil conspiracy, Plaintiff has suffered special damages including but not limited to a loss of standing in the aviation community **including being effectively “black listed” resulting in being denied employment oppurtunities for which he is well qualified, lost wages, and mental anguish.**

59. The Defendants’ actions evidence a willful and wanton disregard of Plaintiff’s rights.

60. Plaintiff is entitled to damages to include punitive damages.

For A Third Cause of Action
(Failure to Pay Wages)

61. Plaintiff reiterates paragraphs 1-60 above as if set forth here in verbatim.

62. Plaintiff was an employee of Defendant.

63. Plaintiff regularly provided labor for Defendant in excess of forty (40) hours per work week.

64. Plaintiff was not properly compensated for his hours worked in excess of forty (40) hours per work week.

65. Plaintiff prays for relief in an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney’s fees as the court may allow.

WHEREFORE, Plaintiff prays for actual and punitive damages based upon the forgoing causes of action along with any further relief as this Court deems just and proper.

QUERY SAUTTER & ASSOCIATES, LLC

/S MICHAEL. H. ELLIS

O. Grady Query

Michael Ellis,

147 Wappoo Creek Drive, Suite 202

Charleston, South Carolina 29412

Telephone: 843.795.9500

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Liam Wallis,

Plaintiff,

vs.

The Boeing Company; Anthony
Timms; and Monica Williams

Defendants.

Case No.: 2:19-CV-1115-RMG

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a copy of the foregoing upon Cherie W. Blackburn, attorney for the Defendant, by placing a copy of same in the United States mail with sufficient postage attached thereto and addressed as follows:

Cherie W. Blackburn, Esquire
Nexsen Pruet
P.O. Box 486
Charleston, SC 29402

Dated: 05/01/2019

/S MICHAEL H. ELLIS

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

LIAM WALLIS,

Plaintiff,

vs.

THE BOEING COMPANY, INC.,
ANTHONY TIMMS and MONICA
WILLIAMS,

Defendants.

C/A No.: 2:19-cv-1115-RMG

ANSWER OF DEFENDANTS

Subject to Defendants' Motion to Dismiss filed with the Court on May 14, 2019 (Entry # 16), Defendants The Boeing Company ("Boeing"), Anthony Timms ("Timms") and Monica Williams ("Williams") (referred to collectively as "Defendants"), do hereby respond to the Amended Complaint of Liam Wallis ("Plaintiff" or "Wallis") as follows:

INTRODUCTION

Defendant Boeing has moved to dismiss Plaintiff's cause of action for wrongful termination, and Defendants Timms and Williams have moved to dismiss Plaintiff's cause of action for civil conspiracy (Entry # 16). These causes of action fail to state claims upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendants file this Answer subject to Defendants' Motion to Dismiss. *Id.*

Each and every allegation contained in the Amended Complaint not specifically admitted herein is denied and strict proof thereof is demanded.

PARTIES AND JURISDICTION

1. Defendants lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 1 of the Amended Complaint and, therefore, deny same and demand strict proof thereof.

2. Defendants admit the allegations contained in Paragraph 2 of the Amended Complaint.

3. Defendants deny the allegations contained in Paragraph 3 of the Amended Complaint and demand strict proof thereof.

4. Defendants deny the allegations contained in Paragraph 4 of the Amended Complaint and demand strict proof thereof.

5. Defendants admit so much of Paragraph 5 of the Amended Complaint as alleges, or may be construed to allege, that Plaintiff alleges transactions and occurrences that allegedly took place in Charleston County, South Carolina. However, Defendants deny that all such transactions and occurrences occurred or that any transactions or occurrences constitute cognizable causes of action against Defendants.

6. Answering Paragraph 6 of the Amended Complaint, Defendants admit that the United States District Court for the District of South Carolina has jurisdiction over the parties and subject matter and that venue is proper in this Court.

FACTS

7. Answering Paragraph 7 of the Amended Complaint, Defendants object to the phrase "extensive experience" to the extent it is vague, ambiguous and undefined. Subject to that objection, Defendants admit so much thereof as alleges, or may be construed to allege, that Plaintiff

has a Federal Airframe and Powerplant License. Defendants deny the remaining allegations contained in Paragraph 7 of the Amended Complaint and demand strict proof thereof.

8. Defendants deny the allegations contained in Paragraph 8 of the Amended Complaint, demand strict proof thereof and would further state that Plaintiff was hired as a Flight Readiness Technician B.

9. Defendants deny the allegations of Paragraph 9 of the Amended Complaint and demand strict proof thereof. Defendants further state that Plaintiff, during the relevant time period, was a Quality Systems Specialist and was an exempt employee under the Fair Labor Standards Act and was not entitled to overtime under the Act.

10. Defendants deny the allegations contained in Paragraph 10 of the Amended Complaint and demand strict proof thereof. Defendants further state that Plaintiff was a Quality Systems Specialist during the relevant time period.

11. Defendants deny the allegations contained in Paragraph 11 of the Amended Complaint, and demand strict proof thereof, based upon the general and vague nature of the allegations, which are unlimited in time or scope.

12. Defendants deny the allegations contained in Paragraph 12 of the Amended Complaint, and demand strict proof thereof, based upon the general and vague nature of the allegations, which are unlimited in time or scope.

13. Defendants deny the allegations contained Paragraph 13 of the Amended Complaint and demand strict proof thereof.

14. Answering Paragraph 14 of the Amended Complaint, Defendants admit so much thereof as alleges, or may be construed to allege, that a Quality Systems Specialist may issue a finding, which must be documented and that any repairs and subsequent inspections must be

documented. Defendants deny the remaining allegations contained in Paragraph 14 of the Amended Complaint and demand strict proof thereof.

15. Answering Paragraph 15 of the Amended Complaint, Defendants admit so much thereof as alleges, or may be construed to allege, that a finding must be properly addressed in accordance with Boeing policies. Defendants deny the remaining allegations contained in Paragraph 15 of the Amended Complaint and demand strict proof thereof.

16. Defendants object to the use of the word "common" on the grounds that such term is vague and ambiguous. Subject to such objection, Defendants deny the allegations contained in Paragraph 16 of the Amended Complaint.

17. Upon information and belief, Defendants admit the allegations contained in Paragraph 17 of the Amended Complaint.

18. Defendants admit the allegations contained in Paragraph 18 of the Amended Complaint.

19. Defendants deny the allegations contained in Paragraph 19 of the Amended Complaint, demand strict proof thereof, and further state that Defendant Monica Williams became Plaintiff's supervisor in June of 2016.

20. Defendants admit the allegations contained in Paragraph 20 of the Amended Complaint.

21. Defendants deny the allegations contained in Paragraph 21 of the Amended Complaint and demand strict proof thereof.

22. Defendants deny the allegations contained in Paragraph 22 of the Amended Complaint and demand strict proof thereof.

23. Defendants deny the allegations contained in Paragraph 23 of the Amended Complaint and demand strict proof thereof.

24. Defendants deny the allegations contained in Paragraph 24 of the Amended Complaint, including all subparts thereof, and demand strict proof thereof.

25. Defendants deny the allegations contained in Paragraph 25 of the Amended Complaint and demand strict proof thereof.

26. Defendants deny the allegations contained in Paragraph 26 of the Amended Complaint and demand strict proof thereof.

27. Defendants deny the allegations contained in Paragraph 27 of the Amended Complaint and demand strict proof thereof.

28. Defendants admit so much of Paragraph 28 as alleges, or may be construed to allege that, on March 9, 2017, Plaintiff complained to Anthony Timms, Monica Williams' director supervisor, that Ms. Williams was creating a hostile work environment. Defendants deny the remaining allegations contained in Paragraph 28 of the Amended Complaint and demand strict proof thereof.

29. Defendants deny the allegations contained in Paragraph 29 of the Amended Complaint and demand strict proof thereof.

30. Defendants deny the allegations contained in Paragraph 30 of the Amended Complaint and demand strict proof thereof.

31. Defendants deny the allegations contained in Paragraph 31 of the Amended Complaint and demand strict proof thereof.

32. Defendants deny the allegations contained in Paragraph 32 of the Amended Complaint and demand strict proof thereof.

33. Defendants deny the allegations contained in Paragraph 33 of the Amended Complaint and demand strict proof thereof.

34. Defendants deny the allegations contained in Paragraph 34 of the Amended Complaint and demand strict proof thereof.

35. Defendants deny the allegations contained in Paragraph 35 of the Amended Complaint and demand strict proof thereof.

36. Defendants lacks sufficient knowledge or information to admit or deny the allegations contained in Paragraph 36 of the Amended Complaint relating to Plaintiff's mindset and, therefore, deny same and demand strict proof thereof. Defendant further denies the substantive allegations contained in Paragraph 36 of the Amended Complaint and demand strict proof thereof.

37. Defendants deny the allegations contained in Paragraph 37 of the Amended Complaint and demand strict proof thereof.

38. Defendants admit so much of Paragraph 38 as alleges or may be construed to allege, that Boeing's business needs no longer allowed for a four day workweek accommodation to Plaintiff and that Plaintiff was on a leave of absence beginning May 5, 2017 for approximately one week, but deny the remaining allegations contained in Paragraph 38 of the Amended Complaint and demand strict proof thereof.

39. Answering Paragraph 39 of the Amended Complaint, Boeing admits so much thereof as alleges, or may be construed to allege, that Boeing received updated medical restrictions from Plaintiff's physician on May 5, 2017, stating that Plaintiff could work a five day workweek, and that Plaintiff's schedule returned to a five day workweek. Defendants deny the remaining allegations of Paragraph 39 of the Amended Complaint and demand strict proof thereof.

40. Defendants deny the allegations contained in Paragraph 40 of the Amended Complaint and demand strict proof thereof.

41. Defendants admit so much of Paragraph 41 of the Amended Complaint as alleges, or may be construed to allege, that Plaintiff was terminated on June 15, 2017, and further state that the termination occurred as a result of Plaintiff falsifying records and falsely representing to the FAA that a plane had been tested and was ready for inspection when, in fact, the plane was undergoing work and was not ready for inspection. Plaintiff's conduct was in violation of Boeing's requirement to process and report information accurately, honestly and properly. Defendants deny the remaining allegations contained in Paragraph 41 of the Amended Complaint and demand strict proof thereof.

42. Defendants deny the allegations contained in Paragraph 42 of the Amended Complaint and demand strict proof thereof.

43. Defendants deny the allegations contained in Paragraph 43 of the Amended Complaint and demand strict proof thereof.

44. Defendants deny the allegations contained in Paragraph 44 of the Amended Complaint and demand strict proof thereof.

45. Defendants deny the allegations contained in Paragraph 45 of the Amended Complaint and demand strict proof thereof.

46. Defendants deny the allegations contained in Paragraph 46 of the Amended Complaint and demand strict proof thereof.

47. Defendants deny the allegations contained in Paragraph 47 of the Amended Complaint and demand strict proof thereof.

48. Defendants deny the allegations contained in Paragraph 48 of the Amended Complaint and demand strict proof thereof.

49. Defendants deny the allegations contained in Paragraph 49 of the Amended Complaint and demand strict proof thereof.

50. Defendants deny the allegations contained in Paragraph 50 of the Amended Complaint and demand strict proof thereof.

ANSWERING THE FIRST CAUSE OF ACTION
(Wrongful Discharge as to Defendant Boeing)

51. Defendant Boeing repeats and reiterates the above paragraphs, as if set forth verbatim herein. Defendant Boeing answers this cause of action subject to its Motion to Dismiss filed with the Court. (Entry # 16).

52. Defendant Boeing admits the allegations contained in Paragraph 52 of the Amended Complaint.

53. Defendant Boeing denies the allegations contained in Paragraph 53 of the Amended Complaint and demands strict proof thereof.

54. Defendant Boeing denies the allegations contained in Paragraph 54 of the Amended Complaint and demands strict proof thereof.

55. Defendant Boeing denies the allegations contained in Paragraph 55 of the Amended Complaint and demands strict proof thereof.

ANSWERING THE SECOND CAUSE OF ACTION
(Civil Conspiracy as to Defendants Monica Williams and Anthony Timms)

56. Defendants Williams and Timms repeat and reiterate the above paragraphs, as if set forth verbatim herein. Defendants Williams and Timms answer this cause of action subject to their Motion to Dismiss filed with the Court (Entry # 16).

57. Defendants Williams and Timms deny the allegations contained in Paragraph 57 of the Amended Complaint and demand strict proof thereof.

58. Defendants Williams and Timms deny the allegations contained in Paragraph 58 of the Amended Complaint and demand strict proof thereof.

59. Defendants Williams and Timms deny the allegations contained in Paragraph 59 of the Amended Complaint and demand strict proof thereof.

60. Defendants Williams and Timms deny the allegations contained in Paragraph 60 of the Amended Complaint and demand strict proof thereof.

ANSWERING THE THIRD CAUSE OF ACTION
(Failure to Pay Wages as to Defendant Boeing)

61. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

62. Defendants admit the allegations contained in Paragraph 62 of the Amended Complaint and demand strict proof thereof.

63. Defendants deny the allegations contained in Paragraph 63 of the Amended Complaint and demand strict proof thereof.

64. Defendants deny the allegations contained in Paragraph 64 of the Amended Complaint, and demand strict proof thereof, based upon the general and vague nature of the allegations, which are unlimited in time or scope.

65. Answering Paragraph 65 of the Amended Complaint, Defendants deny that Plaintiff is entitled to the relief set forth therein or in the prayer for damages and demand strict proof thereof.

DEFENDANTS' DEFENSES

Defendants incorporate herein the defenses and legal arguments set forth in their Motion to Dismiss filed with the Court. (Entry #16).

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A SECOND
DEFENSE THERETO**
(Rule 12(b)(6))

66. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

67. Plaintiff's Amended Complaint fails to state any claim upon which relief can be granted and, therefore, should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A THIRD
DEFENSE THERETO**
(Estoppel)

68. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

69. Plaintiff's claims are barred by the doctrine of estoppel.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A FOURTH
DEFENSE THERETO**
(Waiver)

70. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

71. Plaintiff's claims are barred by the doctrine of waiver.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A FIFTH
DEFENSE THERETO**
(Failure to Mitigate)

72. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

73. Plaintiff's damages are barred, in whole or in part, to the extent he failed to mitigate his damages.

74. Likewise, without admitting any wrongful conduct, Defendants assert that Plaintiff's damages, if any, should be offset by any subsequent earnings obtained by Plaintiff.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A SIXTH
DEFENSE THERETO**
(Unclean Hands)

75. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

76. Plaintiff's claims are barred by the doctrine of unclean hands.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A SEVENTH
DEFENSE THERETO**
(Good Faith, Legitimate Reasons for Actions)

77. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

78. Plaintiff's claims are barred, in whole or in part, because Defendants at all times acted in good faith and in a lawful manner towards Plaintiff, with legitimate business reasons for the actions about which Plaintiff complains.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS AN EIGHTH
DEFENSE THERETO**

(Failure to Exhaust Administrative Remedies)

79. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

80. To the extent that Plaintiff failed to exhaust his administrative remedies, his claims are barred.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A NINTH
DEFENSE THERETO**

(After-Acquired Evidence Rule)

81. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

82. The Amended Complaint, and each purported cause of action alleged therein, is barred in whole or in part by the doctrine of after-acquired evidence, or alternatively, the doctrine of after-acquired evidence limits and reduces Plaintiff's alleged damages.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A TENTH
DEFENSE THERETO**

(Laches)

83. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

84. Plaintiff's claims are barred by the doctrine of laches.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS AN ELEVENTH
DEFENSE THERETO**

(Statute of Limitations)

85. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

86. Plaintiff's claims are barred to the extent he failed to comply with the applicable statute of limitations.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A TWELTH
DEFENSE THERETO**
(Equitable Relief)

87. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

88. Plaintiff's allegations and demands for equitable relief are questions for the Court, not the jury.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A THIRTEENTH
DEFENSE THERETO**
(Scope of Employment)

89. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

90. At all times Defendants Williams and Timms acted within the scope of their employment. Therefore, Plaintiff's claim for civil conspiracy is barred.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A FORTEENTH
DEFENSE THERETO**
(No Special Damages)

91. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

92. Plaintiff's claim of civil conspiracy is barred because he has not suffered, nor has he alleged to have suffered, special damages sufficient to constitute such a claim.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A FIFTEENTH
DEFENSE THERETO**

(Intracorporate Conspiracy Doctrine)

93. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

94. Plaintiff's claims are barred by the doctrine of intracorporate conspiracy.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A SIXTEENTH
DEFENSE THERETO**

(Failure to Plead Separate Facts and Damages)

95. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

96. Plaintiff's Amended Complaint fails to plead separate facts and damages or allegations sufficient to show separate facts and damages, related to a viable civil conspiracy claim, and therefore, such cause of action should be dismissed.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A SEVENTEENTH
DEFENSE THERETO**

(Existing Statutory Remedy)

97. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

98. Plaintiff has an existing statutory remedy and, therefore, his claim of wrongful termination is barred.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS AN EIGHTEENTH
DEFENSE THERETO**

(No Violation of a Clear Mandate of Public Policy)

99. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

100. Plaintiff has failed to allege or show a violation of a clear mandate of public policy, and, therefore, his claim of wrongful termination is barred.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A NINETEENTH
DEFENSE THERETO**
(Exempt under FLSA)

101. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

102. Plaintiff was exempt from overtime pay under the Fair Labor Standards Act and, therefore, his cause of action for overtime pay should be dismissed.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS A TWENTIETH
DEFENSE THERETO**
(Reservation of Right to Make Other Assertions)

103. Defendants repeat and reiterate the above paragraphs, as if set forth verbatim herein.

104. Defendants reserve the right to assert, via amended pleadings, any and all additional and/or further defenses as may be revealed by additional information and/or documentation produced and/or acquired through discovery or otherwise herein.

WHEREFORE, having fully answered the Amended Complaint, Defendants pray that it be dismissed, that this Court award Defendant its costs and attorneys' fees incurred in defending the claims contained in the Amended Complaint and that this Court grant such other and further relief as it deems just and proper.

s/ Cherie W. Blackburn

Cherie W. Blackburn (Federal ID No. 1575)

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ATTORNEYS FOR DEFENDANTS

May 15, 2019

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-1379

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
PLAINTIFF'S CAUSES OF ACTION
FOR WRONGFUL TERMINATION IN
VIOLATION OF PUBLIC POLICY AND
CIVIL CONSPIRACY**

Defendants The Boeing Company ("Boeing"), Anthony Timms, and Monica Williams (collectively "Defendants"), by and through their undersigned attorneys, file this Memorandum in Support of their Motion to Dismiss filed with the Court on October 11, 2019. Defendants move, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, to dismiss Plaintiff's civil conspiracy claim against Anthony Timms and Monica Williams and his wrongful termination in violation of public policy claim against Boeing. Boeing does not move to dismiss his remaining cause of action for failure to pay wages.

FACTS ALLEGED BY PLAINTIFF IN THE AMENDED COMPLAINT

The material allegations in Plaintiff's Amended Complaint pertaining to his civil conspiracy and wrongful termination claims are as follows: Plaintiff worked as a quality assurance conformity manager ("QACM") for Boeing. (Am. Compl. ¶ 8). Plaintiff's duties included inspecting aircraft for compliance with Boeing's internal engineering and safety specifications. (Am. Compl. at ¶ 13). Plaintiff claims that when he returned to work from a medical leave of absence with medical restrictions on January 20, 2017, he witnessed a backlog of non-conformities on the aircraft that required inspection by the QACMs. (Am. Compl. at ¶ 22). Defendant Monica Williams, his supervisor, and Defendant Anthony Timms (Ms. Williams's supervisor) began

allegedly taking “shortcuts” on the safety inspections of the planes, ignoring Boeing policies and procedures. (Am. Compl. at ¶ 23).

Plaintiff allegedly reported his concerns to Ms. Williams and Mr. Timms, and they told him not to write up any findings of non-conformity without first receiving permission from them. (Am. Compl. at ¶ 25). Following his report, Ms. Williams allegedly removed documents from his desk and treated him “harshly” for documenting findings of non-conformity. (Am. Compl. at ¶ 28). As a result, Plaintiff contends that he went to Mr. Timms, who told him that he would not be receiving any additional raises or promotions. (Am. Compl. at ¶¶ 28-29). The next day, Plaintiff alleges Ms. Williams told him to start looking for another job. (Am. Compl. at ¶ 30).

Upon Plaintiff’s return from medical leave, he discovered that barrels were being manufactured using obsolete engineering, repairs to the barrels were undocumented, and that a fictitious QACM signed off on the repairs. (Am. Compl. at ¶¶ 31-34). Plaintiff claims he brought these concerns to “management’s attention,” at which time his inspections were reassigned to Ms. Williams. (Am. Compl. at ¶ 35). Shortly thereafter, Boeing’s human resources department allegedly informed Plaintiff that Boeing would no longer honor his medical restrictions and he was placed on an unpaid leave of absence. (Am. Compl. at ¶ 38). He contends that when he returned following his doctor’s removal of his medical restrictions, his “every action was unduly scrutinized” by Ms. Williams and Mr. Timms. (Am. Compl. at ¶¶ 39, 40).

Boeing terminated Plaintiff on June 15, 2017. (Am. Compl. at ¶ 41). Plaintiff alleges his termination was in retaliation for “complying with Boeing’s established safety specifications and protecting the public that relies upon those regulations for their safety in air travel.” (Am. Compl. at ¶ 43). He alleges that Ms. Williams and Mr. Timms conspired to have him terminated “after he refused to fraudulently document planes as having no findings,” in order to somehow “further their

own careers and obtain[] promotions.” (Am. Compl. at ¶¶ 45-46). Because none of these allegations give rise to or otherwise state a claim for wrongful termination in violation of public policy or civil conspiracy, these causes of action should be dismissed as a matter of law.

LEGAL STANDARD

Under Rule 12(b)(6), a claim may be dismissed when the facts alleged in the pleadings fail to establish a cause of action. *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). The question for the Court is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion must be granted if the facts alleged and the inferences reasonably deducible from the pleadings show that the plaintiff could not prevail on any theory of the case. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

ARGUMENT

I. Plaintiff’s Claim for Civil Conspiracy Should Be Dismissed.

Mr. Timms and Ms. Williams are entitled to dismissal of Plaintiff’s cause of action for civil conspiracy. Plaintiff makes the following allegations in support of his conspiracy claim:

45. Based upon information and belief, Anthony Timms and Monica Williams conspired to have Plaintiff terminated after he refused to fraudulently document planes as having no findings.
46. Based upon information and belief, Anthony Timms and Monica Williams engaged in this conspiracy to minimize findings being reported to their bosses in an attempt [sic] further their own careers and obtaining [sic] promotions.
47. Based upon information and belief, Anthony Timms and Monica Williams furthered their conspiracy to harm Plaintiff for their gain by denying Plaintiff access to the internal computer systems that allowed Plaintiff to verify whether planes on the flight line were indeed ready for his inspection.
48. Based upon information and belief, the conspiracy by Anthony Timms and Monica Williams resulted in Plaintiff being forced to rely on others that two planes were ready to be inspected rather than being able to verify for himself

on the computer system to which he was denied access by Timms and Williams.

58. As a result of their civil conspiracy, Plaintiff has suffered special damages including but not limited to a loss of standing in the aviation community including being effectively “black listed” resulting in being denied employment opportunities [sic] for which he is well qualified, lost wages, and mental anguish.

(Am. Compl. ¶¶ 45 – 48, 58)

Plaintiff fails to state a cause of action for civil conspiracy because: (1) the claim is barred by the intracorporate conspiracy doctrine; (2) Plaintiff’s Amended Complaint fails to sufficiently plead that Defendants Timms and Williams somehow combined together for the unlawful purpose of injuring Plaintiff; (3) Plaintiff has failed to plead any wrongful acts by Defendants Timms and Williams independent of the alleged acts giving rise to his claim for wrongful termination in violation of public policy; and (4) Plaintiff has failed to plead any special damages that are independent from and do not overlap with or are subsumed by the damages allegedly resulting from Plaintiff’s claim for wrongful termination in violation of public policy.

A. Plaintiff’s Claim Against Mr. Timms and Ms. Williams is Barred by the Intracorporate Conspiracy Doctrine.

Plaintiff’s claim for civil conspiracy is barred under the intracorporate conspiracy doctrine. As a threshold matter, Plaintiff’s civil conspiracy claim fails because Plaintiff fails to plead facts sufficient to allege that Mr. Timms and Ms. Williams were acting outside the scope of their employment at any time relevant to Plaintiff’s Amended Complaint, placing their allegedly conspiratorial conduct squarely within the scope of the “intracorporate conspiracy doctrine.”

Simply stated, Boeing cannot conspire with itself. *McClain v. Pactiv, Corp.*, 360 S.C. 480, 486, 602 S.E.2d 87, 90 (Ct. App. 2004) (holding “the law is clear that a corporation cannot conspire with itself” and affirming dismissal of civil conspiracy against defendant corporation). For the

same reasons, Plaintiff cannot state a viable civil conspiracy claim against Mr. Timms and Ms. Williams, both Boeing managers at all relevant times herein, to the extent they were acting within the scope of their employment with Boeing when taking the alleged action described in Plaintiff's Amended Complaint.¹ See *McMillan v. Oconee Memorial Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886-87 (2006) (holding that "a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities"); *Lawson v. S.C. Dep't. of Corrs.*, 340 S.C. 346, 352 S.E.2d 259, 260 (2000) (holding that allegation that two of plaintiff's supervisors conspired to terminate his employment could not sustain civil conspiracy cause of action and dismissing claim).

Mr. Timms and Ms. Williams are presumptively immune from liability for civil conspiracy unless Plaintiff pleads facts plausibly implicating one of two limited exceptions to the intracorporate conspiracy doctrine, specifically, facts alleging that: (1) their acts were not authorized by Boeing; or (2) they had a "personal stake" in their alleged conspiratorial conduct, independent of their relationship to Boeing. *Id.* Plaintiff has failed to plead such facts.

1. Plaintiff has not Plead Facts Sufficient to Allege that Mr. Timms and Ms. Williams' Acts Were Not Authorized By Boeing.

Plaintiff has not plead any facts in the Amended Complaint indicating that Mr. Timms and Ms. Williams' alleged acts were not authorized by Boeing. This failure alone warrants dismissal of the cause of action. In fact, all allegations in the Amended Complaint involving Ms. Williams and Mr. Timms indicate that they were acting, at all times, within the scope of their authority as Boeing managers. Even more telling, Plaintiff explicitly alleges that his termination was in

¹ Pursuant to this "intracorporate conspiracy doctrine," Plaintiff's attempt to plead a civil conspiracy claim against Mr. Timms and Ms. Williams in their individual capacities does not destroy their immunity from liability. *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 353 (4th Cir. 2013) (holding that "suing the agents individually does not destroy the immunity granted under the [intracorporate conspiracy] doctrine") (internal citations omitted).

retaliation for not cooperating in “*Boeing’s* scheme of fraudulently concealing non-conformities in the aircraft.” (Am. Compl. ¶ 43) (emphasis added).

Furthermore, the allegations demonstrate that Plaintiff’s civil conspiracy claim *only* arises out of his termination by Mr. Timms and Ms. Williams while they were acting within the scope of their authority at Boeing. Under South Carolina law, an at-will employee cannot sue his employer or anyone acting within his or her authority on behalf of his or her employer for civil conspiracy arising out of his termination. *See Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 765, 249 S.E.2d 814, 815 (1979) (finding appellant failed to state a cause of action for civil conspiracy arising out of his termination when appellant was an at-will employee and could be “terminated at any time for any reason or for no reason at all”); *Mills v. Leath*, 709 F. Supp. 671, 675 (D.S.C. 1988) (relying on *Ross v. Life Ins.* to find that plaintiff, an at-will employee, “is precluded from maintaining an action or civil conspiracy to terminate his employment.”); *see, e.g., Faile v. Lancaster Cty.*, No. 0:11-2205-CMC, 2013 WL 786447, at *4 (D.S.C. Mar. 1, 2013)² (granting motion to dismiss civil conspiracy claim against individual defendants related to their role in terminating plaintiff’s employment because “as agents authorized to act on behalf of County, [they] cannot be sued by Plaintiff for civil conspiracy that resulted in Plaintiff’s termination.”) (citing *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 503, 596 S.E.2d 67, 70 (Ct. App. 2004), *reversed on other grounds*, 368 S.C. 167, 628 S.E.2d 261 (2006) (dismissing conspiracy claims against individual council members because they “acted within their authority when they fired [the plaintiff] and they cannot be sued for doing what they had a right to do.”)). Thus, Mr. Timms and Ms. Williams’s undisputed authority to terminate Plaintiff, an at-will employee, is fatal, standing alone, to Plaintiff’s civil conspiracy claim.

² Cases with a Westlaw citation are attached as Exhibit A for the Court’s reference.

2. Plaintiff has not Plead Facts Sufficient to Allege that Mr. Timms and Ms. Williams had a Personal Stake in their Alleged Conspiratorial Conduct.

Plaintiff cannot meet the second exception to the intracorporate conspiracy doctrine because Plaintiff pleads no facts indicating that Mr. Timms and Ms. Williams had a “personal stake” in Plaintiff’s termination, sufficient to place them outside the scope of the intracorporate conspiracy doctrine.³ Plaintiff’s allegation that Defendants Williams and Timms minimized his alleged findings of nonconformity to “further their own careers and obtain[] promotions” (Am. Compl. at ¶ 46), is insufficient to establish a “personal stake” by Defendants because it does not allege that Mr. Timms and Ms. Williams had a stake in his termination *independent* of their relationship with Boeing. “[W]here a corporate agent’s participation in the conspiracy merely yields higher compensation to the employee or officer from the corporation, courts have generally considered the interests of the company and the employee/officer conspirator to be aligned.” *Bailey v. Atl. Auto. Corp.*, 992 F. Supp. 2d 560, 569 (D. Md. 2014) (citing *United States v. Gwinn*, No. 5:06–CV–00267, 2008 WL 867927, at *25–26 (S.D.W.Va. Mar. 31, 2008)); *see also Douty v. Irwin Mortg. Corp.*, 70 F. Supp. 2d 626, 633 (E.D. Va. 1999) (“According to plaintiff, the individual defendants had a personal stake in the increased commissions available to them after her termination. We find this pleading insufficient because it does not allege that defendants had a stake in her termination independent of their relationship with [their employer].”).

At best, Plaintiff alleges that Mr. Timms and Ms. Williams conspired by disregarding Boeing policies and procedures and shortcutting safety inspections. (Am. Compl. at ¶ 23). But even if Plaintiff’s allegations could be construed to imply that Mr. Timms and Ms. Williams were motivated to shortcut safety inspections in order to not delay the sale of an aircraft to the purchaser

³ It is disingenuous, at best, for Plaintiff to argue that Mr. Timms and Ms. Williams had a personal stake in Plaintiff’s termination, while at the same time arguing that the purpose of Plaintiff’s termination was to boost Boeing’s profits. (Am. Compl. at ¶¶ 42 & 43).

(Am. Compl. at ¶ 15), the intracorporate conspiracy doctrine “is not avoided simply by showing that corporate employees were motivated in part by personal bias,” but it is avoided only upon a showing that they were motivated “*solely* by personal bias.” *Painter's Mill Grille*, 716 F.3d at 353 (holding that “where corporate employees are shown to have been motivated *solely* by personal bias . . . the interests of the corporation would have played no part in the employees’ collective action, so the action could not have been taken within the scope of employment”) (emphasis in original).⁴

Therefore, Plaintiff’s allegation that Defendants Timms and Williams had a personal stake in the civil conspiracy to further their own careers does not meet the narrow exception to the intracorporate conspiracy doctrine, such that this claim should be dismissed.

B. Plaintiff Fails to Plausibly Allege that Mr. Timms and Ms. Williams Combined for the Purpose of Injuring Plaintiff.

Plaintiff’s claim for civil conspiracy should be dismissed because he has not plead that Mr. Timms and Ms. Williams combined together for the purpose of injuring Plaintiff. A civil conspiracy exists when there is: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes the plaintiff special damage. *Scott v. Chrome Capital, LLC*, 2016 WL 7638135, at *9 (D.S.C. July 25, 2016) (citing *Pye v. Estate of Fox*, 369 S.C. 555, 556-57, 633 S.E.2d 505, 511 (2006)); see also *Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005). To adequately allege a conspiratorial “combination,” Plaintiff must plead sufficient facts “from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.” *Cowburn*, 366 S.C. at 49, 619 S.E.2d

⁴ Because any financial interest that Mr. Timms and Ms. Williams had in Plaintiff’s termination necessarily arose from—and was not independent of—the interests of Boeing, Plaintiff fails to plausibly allege that their alleged “conspiracy” arose outside the scope of their employment, warranting dismissal under the intracorporate conspiracy doctrine.

at 453; *see also* *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601–02, 358 S.E.2d 150, 153 (Ct. App. 1987) (holding that a viable claim for civil conspiracy requires “[p]roof showing *concert of action* in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators”) (emphasis in original).

Plaintiff’s Amended Complaint fails to plead facts describing a conspiratorial combination between Mr. Timms and Ms. Williams for the purpose of injuring Plaintiff. Rather, the Amended Complaint purports to allege a common plan between Mr. Williams and Ms. Timms to terminate Plaintiff’s employment. (Am. Compl. at ¶ 45). Indeed, all of the allegations in the Amended Complaint pertain to alleged efforts by Defendants to terminate Plaintiff’s employment, including Plaintiff’s allegation that Defendants Timms and Williams conspired together to deny him access to the internal computer systems. (Am. Compl. at ¶ 47). As discussed above, under South Carolina law, an at-will employee cannot sue his employer or anyone acting within his or her authority on behalf of the employer for civil conspiracy arising out of his termination. *See* discussion at I.A.1.

Even if Plaintiff’s conclusory allegations were sufficient to allege a “combination” between Mr. Timms and Ms. Williams, Plaintiff fails to allege that their alleged combination was for the “primary purpose” of injuring him. The “essential consideration” in civil conspiracy is “whether the primary purpose or object of the combination is to injure the plaintiff.” *See Pye*, 369 S.C. at 567, 633 S.E.2d at 511; *see LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988) (holding that lawful acts are actionable as a civil conspiracy “if the objective is to ruin or damage the business of another”). Plaintiff alleges that a purported purpose of Mr. Timms’ and Ms. Williams’ alleged combination was not to injure the Plaintiff, but to fraudulently conceal non-conformities in the planes Boeing was selling in order to further their own careers and obtain

promotions. (Am. Compl. at ¶ 46). Plaintiff plainly fails to allege that Mr. Timms and Ms. Williams harbored any personal ill will or malicious intent against Plaintiff sufficient to raise a plausible inference that their “primary purpose” was to willfully injure Plaintiff.

Because Plaintiff fails to plead sufficient facts alleging Mr. Timms and Ms. Williams “jointly assented” to any plan to terminate Plaintiff, or that they did so with the “primary purpose” of harming him, Plaintiff’s civil conspiracy claim fails, and Mr. Timms and Ms. Williams are entitled to dismissal of this cause of action.

C. Plaintiff Fails to Plead Any Wrongful Acts by Mr. Timms and Ms. Williams Other than Alleged Acts Giving Rise to His Other Claims.

Plaintiff’s civil conspiracy claim should be dismissed because he has failed to plead any wrongful acts independent from the alleged acts giving rise to his wrongful termination in violation of public policy claim. “In a civil conspiracy claim, one must plead acts in furtherance of the conspiracy that are separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.” *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324–25, 701 S.E.2d 39, 46 (Ct. App. 2010). “Importantly, where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.” *Scott*, 2016 WL 7638135, at *9 (internal citation and quotation omitted).

In Plaintiff’s Amended Complaint, the only alleged wrongful act supporting his civil conspiracy claim is that Defendants conspired to terminate his employment to fraudulently conceal non-conformities in the aircraft—the identical alleged wrongful act underlying Plaintiff’s claim for wrongful termination in violation of public policy. (*Compare* Am. Compl. at ¶¶ 45, 46 and Am. Compl. at ¶¶ 42, 43, 53). Plaintiff does not allege any overt act arising from Mr. Timms and

Ms. Williams's alleged conspiracy *except* for his termination allegedly in retaliation for complying with Boeing's safety and engineering policies and regulations, resulting in his "black listing" from future employment.⁵ Indeed, Plaintiff's conspiracy claim incorporates the same facts alleged in support of his wrongful termination in violation of public policy claim. Plaintiff cannot seek to recover for both his alleged wrongful termination and for an alleged "conspiracy" based upon the same wrongful acts and same resulting harm. Because Plaintiff fails to plead facts specifying some conspiratorial and wrongful act beyond the termination serving as the basis of his other claims, Plaintiff fails to state a viable claim for civil conspiracy.

D. Plaintiff Fails to Plead Special Damages.

Lastly, Plaintiff's civil conspiracy claim should be dismissed because he has failed to plead any special damages. The gravamen of a civil conspiracy claim is the damage resulting to the plaintiff from the acts taken in furtherance of the combination. *Pye*, 369 S.C. at 568, 633 S.E.2d at 511. "Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Id.* Thus, to state a viable claim for civil conspiracy, Plaintiff "must allege and prove special damages, i.e., damages that are directly attributable to the conspiracy itself, over and above any damages alleged as a result of any other claims." *May v. City of N. Augusta*, No. 1-05-cv-0752-MBS, 2007 WL 2823015, at *23 (D.S.C. Sept. 27, 2007) (citing *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91, 95 (Ct. App. 1989)). Here, Plaintiff must plead damages that are separate and independent from and do not overlap with or are subsumed by the damages allegedly resulting from Plaintiff's claims for wrongful termination in violation of public policy and failure to pay wages. *See id.*; *Benedict College v. National Credit Sys., Inc.*, 400 S.C. 538, 546-47, 735 S.E.2d 518, 522 (Ct. App. 2012)

⁵ Like the cause of action against Boeing for wrongful termination, the cause of action against Mr. Timms and Ms. Williams for civil conspiracy is based solely upon allegations that fall within the scope of AIR21.

(finding the requirement that a plaintiff plead and prove “special damages” requires that the plaintiff allege damages that are separate and independent of those alleged for other causes of action in the Amended Complaint); *see also, e.g., Allegro, Inc. v. Scully*, 418 S.C. 24, 34, 791 S.E.2d 140, 145 (2016) (holding that trial court should have granted JNOV on civil conspiracy claim because “[t]here was no indication of specific damages emanating solely from the conspiracy”).

Plaintiff attempts to satisfy this requirement by alleging that he “has suffered special damages including but not limited to a loss of standing in the aviation community including being effectively ‘black listed’ resulting in being denied employment opportunities [sic] for which he is well qualified, lost wages, and mental anguish.” (Am. Compl. at ¶ 58). However, Plaintiff has not alleged special damages, “i.e., damages that are directly attributable to the conspiracy itself, over and above any damages alleged as a result of any other claims” to state a viable claim for civil conspiracy. *May*, 2007 WL 2823015, at *23 (citing *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91, 95 (Ct. App. 1989)).

Instead, Plaintiff has pled “special damages” merely by placing the misnomer “special damages” on his alleged lost employment opportunities, which, undoubtedly, overlap and are subsumed by the damages resulting from his claim for wrongful termination in violation of public policy. *See id.*; *Benedict College v. National Credit Sys., Inc.*, 400 S.C. 538, 546-47, 735 S.E.2d 518, 522 (Ct. App. 2012) (finding the requirement that a plaintiff plead and prove “special damages” requires that the plaintiff allege damages that are separate and independent of those alleged for other causes of action in the Complaint); *see also, e.g., Allegro, Inc. v. Scully*, 418 S.C. 24, 34, 791 S.E.2d 140, 145 (2016) (holding that trial court should have granted JNOV on civil

conspiracy claim because “[t]here was no indication of specific damages emanating solely from the conspiracy”).

Because Plaintiff fails to articulate any special damages plausibly exceeding the damages Plaintiff seeks under his other claims, Plaintiff fails to state a viable claim for civil conspiracy, and Defendants Timms and Williams are entitled to dismissal. *See e.g., May*, 2007 WL 2823015, at *23 (dismissing conspiracy claim because plaintiff’s allegation regarding special damages “merely repeats the allegations of damages” sought for plaintiff’s others claims).

II. Plaintiff’s Claim for Wrongful Termination in Violation of Public Policy Should Be Dismissed.

South Carolina recognizes the doctrine of at-will employment, which provides that an employee may be terminated for any reason and at any time, absent a contrary contractual provision. *See Taghivand v. Rite Aid Corp*, 411 S.C. 240, 243, 768 S.E.2d 385, 386 (2015). South Carolina courts have carved out a narrow exception to the doctrine when an at-will employee’s discharge violates a clear mandate of public policy, thereby creating a cause of action for wrongful termination in violation of public policy. *See Ludwick v This Minute of Carolina, Inc.*, 287 S.C. 219, 223, 337 S.E.2d 213, 215 (1985). However, Plaintiff’s cause of action for wrongful termination in violation of public policy fails as a matter of law because he has an existing statutory remedy under federal law governing air carrier related safety, and 2) his termination did not contravene a clear mandate of public policy.

A. Plaintiff Has an Existing Statutory Remedy.

South Carolinas courts have carved out a narrow exception to the doctrine of at-will employment when an employee’s discharge violates a clear mandate of public policy, thereby creating a cause of action for wrongful termination in violation of public policy. *See Ludwick v This Minute of Carolina, Inc.*, 287 S.C. 219, 223, 337 S.E.2d 213, 215 (1985). The public policy

exception to the doctrine of employment at-will does not extend to situations where the employee has an existing statutory remedy for wrongful termination. *Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 615, 713 S.E.2d 634, 637 (2011); *See also, Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992) (employee allegedly terminated in retaliation for filing complaint under FLSA had existing statutory remedy for wrongful termination); *Epps v. Clarendon County*, 304 S.C. 424, 405 S.E.2d 386 (1991) (per curiam) (employee had an existing remedy for wrongful termination under § 1983); *Addison v. CMH Homes, Inc.*, 47 F. Supp. 3d 404, 428 (D.S.C. 2014), *appeal docketed*, No. 14-2166 (4th Cir. Oct. 29, 2014), (“Title VII exists for [Plaintiff’s] claims of wrongful termination . . . his public policy claims based on the same allegations are barred as a matter of law.”). As evidenced by the foregoing cases, “the *Ludwick* exception [to at-will employment] is not designed to *overlap* an employee’s *statutory* or *contractual* rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where *no other reasonable means of redress exists*.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999) (emphasis added).

Because Plaintiff has an existing statutory remedy available under federal occupational health and safety laws, he cannot assert a claim for wrongful termination in violation of this same, overlapping “public policy.” Specifically, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”) provides that “No air carrier or contractor . . . may discharge an employee . . . because the employee. . . provided . . . or cause to be provided to the employer . . . information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety” 49 U.S.C. § 42121(a)(1). The statute expressly includes employees lodging internal airplane safety complaints directly with their employers, as alleged by Plaintiff in this lawsuit. *Id.*;

see also, Lugo v. The Boeing Co., No. 2:19-CV-2995-RMG, 2020 WL 495336 (D.S.C. January 30, 2020) (citing *Hobek v. The Boeing Co.*, No. 2:16-CV-3840-RMG-MGB, 2017 WL 9250342, at *2 (D.S.C. June 8, 2017), *report and recommendation adopted*, No. 2:16-CV-3840-RMG, 2017 WL 3085856 (D.S.C. July 20, 2017) (stating that “AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer that related to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law related to air carrier safety. . . .”)).

AIR21 sets forth specific complaint procedures through the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”), and 49 U.S.C. § 42121 delineates the remedies available to aggrieved employees. AIR21 provides the following complaint procedure: “A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination.” *Id.* at § 42121(b)(1). Thus, “AIR21 ‘creates a detailed administrative regime to protect whistleblowers who inform their employers or the federal government about violations of federal laws relating to air carrier safety.’” *Hobek*, 2017 WL 9250342, at *2 (quoting *Bombardier, Inc. v. United States Dep’t of Labor*, 145 F. Supp. 3d 21, 25 (D.D.C. 2015)).

In January of this year, the United States District Court for the District of South Carolina, Charleston Division, addressed this exact AIR21 remedy issue in *Lugo*. The plaintiff alleged that he was wrongfully terminated for his “safety complaints regarding lighting, failure for more stringent walk throughs, tool accountability and his involvement in the union.” *Lugo*, 2020 WL 495336, at *3. The court dismissed plaintiff’s wrongful termination in violation of public policy

claim under Fed. R. Civ. P. 12(b)(6), holding that the plaintiff had an existing statutory remedy under AIR21 and, as a result, the public policy exception to at will employment did not apply and plaintiff's wrongful termination claim must be dismissed. *Id.*⁶

Similarly, in *Hobek*, the plaintiff, a quality manager for Boeing, claimed he was concerned about the quality and safety of the aircraft being manufactured and reported his concerns to his supervisors. The plaintiff alleged that his complaints were ignored and that he was later terminated in retaliation for his complaints "regarding quality and safety." *Hobek*, 2017 WL 9250342, at *1. Boeing moved to dismiss the cause of action under Fed. R. Civ. P. 12(b)(6), asserting the plaintiff's retaliation-based complaints regarding the safety and quality of the aircraft was improperly pled as a wrongful discharge claim because he had an existing statutory remedy under AIR21. **The district court agreed and dismissed the claim**, holding that the plain language of AIR21 "provides a statutory remedy for individuals who were retaliated against for providing information to their employer that related to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States." *Id.* (citing 49 U.S.C. § 42121).

B. Plaintiff has not Alleged Facts to Support a Violation of a Clear Mandate of Public Policy.

Notwithstanding that Plaintiff's claim is barred by his existing statutory remedy, his claim should also be dismissed because he has not alleged facts to support a violation of a clear mandate of public policy. Plaintiff's allegations that he was terminated in violation of public policy "in

⁶ In *Lugo*, the plaintiff argued in opposition to Boeing's motion to dismiss that AIR21 did not apply to him because he must have engaged in protective activity under AIR21 not merely done his job. The court found "as AIR21 was specifically enacted to protect 'whistleblowers' like Plaintiff 'who inform their employers . . . about violations of federal laws relating to air carrier safety,' *Plaintiff's argument is wrong and directly contradicted by the plain language of AIR21.*" *Lugo*, 2020 WL 495336, at *3 n. 3 (emphasis added).

retaliation for complying with Boeing's safety and engineering policies and regulations rather than acquiescing to Boeing's policy of concealing non-conformities in the planes they were selling," (Am. Compl. ¶ 53) does not support a clear mandate of public policy, nor does it give rise under South Carolina law to a cause of action for wrongful termination in violation of public policy.

The public policy exception to the at-will employment doctrine is a narrow one, to be narrowly applied. *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216; *see also Taghivand*, 411 S.C. at 244, 768 S.E.2d at 387. In *Ludwick*, the South Carolina Supreme Court explained, "[w]here the retaliatory discharge of an at-will employee constitutes violation of *a clear mandate of public policy*, a cause of action in tort for wrongful discharge arises." *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216 (emphasis added). The South Carolina Supreme Court has recognized only two instances in which the public policy exception has been upheld: "(1) where an employer requires an employee, as a condition of continued employment, to break the law . . . and (2) where an employer's termination is itself illegal." *Taghivand*, 411 S.C. at 243, 768 S.E.2d at 387 (citing *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 422 S.E.2d 91 (1992)).

In a case with facts similar to the case at hand, the district court refused to apply the public policy exception to the at-will employment doctrine. *See Desmarais v. Scientific Research Corp.*, 145 F. Supp. 3d 595, 600 (D.S.C. 2015). In *Desmarais*, the plaintiff, a former air traffic controller brought an action for wrongful discharge in violation of public policy, arguing that his discharge was in retaliation for raising internal safety issues, which he argued violated FAA Regulations. *Desmarais*, 145 F. Supp. 3d at 599. **In its order dismissing the case as a matter of law**, the court held that there was no "clear mandate of public policy supporting the rights of employees to internally complain about alleged violations of FAA regulations." *Id.*; *see also Hobek, supra*.

Like the allegations of the plaintiffs above, (1) Plaintiff was not required to violate a criminal law, (2) his termination itself was not a violation of a criminal law, and (3) his internal complaints regarding alleged safety violations do not constitute a clear mandate of public policy under South Carolina law. Plaintiff's cause of action for wrongful termination in violation of public policy must fail as a matter of law because: 1) he has an existing statutory remedy under federal law governing air carrier related safety; and 2) his termination did not contravene a clear mandate of public policy.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Motion to Dismiss be granted and that Plaintiff's causes of action for civil conspiracy and wrongful termination in violation of public policy be dismissed as a matter of law.

s/ Cherie W. Blackburn

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ATTORNEYS FOR DEFENDANTS

February 24, 2020
Charleston, South Carolina

Liam Wallis v. The Boeing Company, et al.
Case No. 2019-CP-10-01379
DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

EXHIBIT A

2013 WL 786447

Only the Westlaw citation is currently available.
United States District Court, D.
South Carolina, Rock Hill Division.

Kevin FAILE, Plaintiff,

v.

LANCASTER COUNTY, SOUTH CAROLINA; Steve
Willis, in his official and individual capacities;
Jeffrey Naftal, in his official and individual
capacities; Lancaster County Sheriff's Department;
Barry S. Faile, in his official and individual
capacities; J. David Belk, in his official and
individual capacities; and Kendra Moseley Howell,
in her official and individual capacities, Defendants.

C.A. No. 0:11-2206-CMC.

March 1, 2013.

Attorneys and Law Firms

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OPINION & ORDER

CAMERON MCGOWAN CURRIE, District Judge.

*1 This matter is before the court on motion of Defendants Lancaster County, South Carolina ("County"); Steve Willis ("Willis"); and Jeffrey Naftal ("Naftal") (collectively "County Defendants") to dismiss or, in the alternative, for summary judgment as to Plaintiff's claims for malicious prosecution, abuse of process, and civil conspiracy. For reasons set forth below, County Defendants' motion to dismiss is granted in part and denied in part.

STANDARD

County Defendants contend that their motion is for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of

Civil Procedure or, in the alternative, for summary judgment pursuant to Rule 56. Dkt. No. 36 at 1. County Defendants argue that Plaintiff "fails to plead sufficient facts to support any of his state law causes of action" and that "the conspiracy cause of action is barred as a matter of law." Dkt. No. 36-1 at 2. The court, therefore, construes County Defendants' motion as one to dismiss Plaintiff's claims for malicious prosecution, abuse of process, and civil conspiracy pursuant to Rule 12(b)(6). In any event, a motion under Federal Rule of Civil Procedure 12(c) is assessed under the same standards as a Rule 12(b)(6) motion. *See Walker v. Kelly*, 589 F.3d 127, 139 (4th Cir.2009).

A motion under Federal Rule of Civil Procedure 12(b)(6) should be granted only if, after accepting all well-pleaded allegations in the complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claims that entitles him to relief. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir.1999). Although the court must take the facts in the light most favorable to the plaintiff, it "need not accept the legal conclusions [the plaintiff would draw] from the facts." *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir.2008) (quoting *Eastern Shore Mks., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir.2000)). The court may also disregard any "unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

The Rule 12(b)(6) standard has often been expressed as precluding dismissal unless it is certain that the plaintiff is not entitled to relief under any legal theory that plausibly could be suggested by the facts alleged. *See Mylan Labs., Inc. v. Markari*, 7 F.3d 1130, 1134 (4th Cir.1993). Nonetheless, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quoted in *Giarratano*, 521 F.3d at 302).

Thus, in applying Rule 12(b)(6), the court also applies the relevant pleading standard. Despite the liberal pleading standard of Rule 8, a plaintiff in any civil action must include more than mere conclusory statements in support of a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (court need only accept as true the complaint's *factual* allegations, not its legal conclusions); *see also Walters v. McMahan*, 684 F.3d 435, 439 (4th Cir.2012) (citing *Robertson v. Sea Pines Real Estate Companies, Inc.*,

679 F.3d 278 (4th Cir.2012) for proposition plaintiff need not forecast *evidence* sufficient to prove the elements of a claim, but must allege sufficient *facts* to establish those elements).

PROCEDURAL BACKGROUND

*2 This action was filed on August 22, 2011 by Plaintiffs Kevin Faile and Meredith Gainey against the County Defendants. Dkt. No. 1. On December 18, 2011, the court dismissed three claims asserted in the original complaint:

civil rights conspiracy pursuant to 42 U.S.C. § 1985(3), negligent failure to prevent a conspiracy pursuant to 42 U.S.C. § 1986, and wrongful discharge in violation of public policy. Dkt. No. 18. Pursuant to the Consent Amended Scheduling Order, entered April 25, 2012, discovery was to be completed by October 1, 2012. Dkt. No. 24. On July 2, 2012, Plaintiffs filed a motion to amend their complaint to (1) add Lancaster County Sheriff's Department ("Sheriff's Department"), Barry S. Faile ("Faile"), J. David Belk ("Belk"), and Kendra Moseley Howell ("Howell") as Defendants;¹ (2) add a cause of action for false imprisonment and civil conspiracy; and (3) delete the previously-dismissed claims. Dkt. No. 25. The court granted Plaintiffs' motion the following day.² Dkt. No. 26. On August 14, 2012, the parties filed a consent motion to amend the complaint to remove Meredith Gainey as a Plaintiff due to a stipulation of dismissal. Dkt. No. 30. On August 15, 2012, the court granted that motion and Plaintiff Faile filed his Amended Complaint. Dkt. No. 31. County Defendants answered the Amended Complaint on August 16, 2012. Dkt. No. 35. The remaining Defendants answered on October 4, 2012. Dkt. Nos. 42–44.

On September 7, 2012, County Defendants filed the instant motion to dismiss. Dkt. No. 36. Plaintiff responded on October 4, 2012 (Dkt. No. 47), to which County Defendants replied on October 15, 2012 (Dkt. No. 48).

FACTUAL BACKGROUND³

Plaintiff has been an employee of Lancaster County's EMS Department since 1990 and became a full-time employee in October 2001. Am. Compl. ¶ 14. On October 29, 2010, Plaintiff filed a lawsuit against Lancaster County in this court as lead Plaintiff in a collective action under the Fair Labor Standards Act ("FLSA") for unpaid overtime compensation and a class action under the South Carolina Payment of

Wages Act for improperly paid wages. On March 8, 2012, the court granted a consent motion for settlement approval and dismissed that action. This action arises from Plaintiff's termination on June 28, 2011.

At some time prior to his termination, Plaintiff alleges that he was charged with public disorderly conduct and harassment in the second degree. *Id.* ¶ 45. The alleged victim of the crimes, Mr. Hargett, submitted a request to dismiss the warrant, requesting that any prosecution of Plaintiff be terminated. *Id.* ¶ 46. Plaintiff contends that Defendant "Howell contacted or visited Mr. Hargett on six or more occasions to try to pressure him into signing a warrant against Plaintiff for Harassment." *Id.* Howell eventually signed the warrant herself. *Id.* ¶ 47.

Plaintiff alleges that, on April 7, 2011,⁴ Defendant Naftal, former Deputy County Administrator, "used the pendency of the criminal charges as a basis to force Plaintiff to sign a 'Last Chance Agreement' as a condition of his continued employment with the County." *Id.* ¶ 55. Plaintiff alleges he was terminated from Lancaster County on June 28, 2011 without cause. Plaintiff alleges Naftal and County Administrator Willis "used the terms of the 'Last Chance Agreement' in an attempt to justify Plaintiff's wrongful termination." *Id.* ¶ 17. He exhausted his internal remedies by filing a grievance under the County's grievance policy. *Id.* ¶ 18. On August 9, 2011, the Grievance Committee submitted its findings to Willis, recommending that Plaintiff be reinstated to his position in the EMS Department. *Id.* ¶ 18. On August 17, 2011, Willis rejected the Grievance Committee's recommendation and upheld Plaintiff's termination. *Id.* ¶ 18. Two days later, Plaintiff received notice of Willis's decision to uphold the termination. *Id.* ¶ 18.

*3 The charge of public disorderly conduct was terminated in Plaintiff's favor on May 12, 2011. *Id.* ¶ 49. The charge of harassment in the second degree was dismissed by *nolle prosequi* on August 31, 2011. *Id.* ¶ 50.

Based on these facts, Plaintiff asserts claims for (1) malicious prosecution against all Defendants for "institut[ing] and/or continu[ing] the criminal proceedings against Plaintiff with malice and for the improper purposes of creating a pretextual reason for Plaintiff's termination;" (2) abuse of process against County, Naftal, and Willis based on Willis and Naftal's commission of "a willful act in the use of the criminal process that is not proper in the regular conduct of the proceeding;" and (3) civil conspiracy against all Defendants for "engaging in a campaign to have him terminated from his employment

with Defendant Lancaster County.” *Id.* ¶ 66. Plaintiff also asserts claims for retaliation under the FLSA against County Defendants; retaliation under the First Amendment against Willis and Naftal; deprivation of civil rights under Section 1983 against Faile, Belk and Howell; and false arrest against the Sheriff’s Department, Faile, Belk, and Howell. The pending motion to dismiss does not seek dismissal of these last four claims. Plaintiff seeks, *inter alia*, money damages for back pay and benefits, and with liquidated damages in an equal amount under the FLSA; compensatory damages; reinstatement to his previous position or, alternatively, front pay and benefits; and punitive damages.

DISCUSSION

Malicious Prosecution. County Defendants seek dismissal of Plaintiff’s malicious prosecution claim based on lack of factual allegations. “[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff’s favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage.” *Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d 642, 648 (S.C.2006). County Defendants argue that, even assuming Plaintiff can establish the other five elements, Plaintiff fails to plead that the proceedings were “by or at the instance of the [County] [D]efendant[s].” Dkt. No. 36-1 at 12.

The court finds that Plaintiff’s Amended Complaint alleges facts that County Defendants were involved in instituting and/or continuing the criminal proceedings against Plaintiff. Plaintiff alleges Willis and Naftal, acting with employees or agents of Lancaster County Sheriff’s Department (including Defendants Faile, Belk, and Howell), initiated or caused proceedings to be conducted against Plaintiff for public disorderly conduct and harassment in the second degree “with malice and for the improper purposes of creating a pretextual reason for Plaintiff’s termination of employment.” Am. Compl. ¶¶ 45, 48. Plaintiff further alleges Willis and Naftal “insist[ed] that the above-described criminal proceedings be initiated, continued, or reinstated against Plaintiff for the alleged crimes of Public Disorderly Conduct and Harassment Second Degree.” *Id.* ¶ 54. Although Plaintiff does not specify how County Defendants were able to insist on the initiation or continuation of the criminal proceedings against him, Plaintiff has alleged that County Defendants were in contact

with the Sheriff’s Department and “obtained the criminal warrants against Plaintiff” from the Sheriff’s Department. *Id.* ¶ 55. The court finds that Plaintiff has alleged that the criminal proceedings were “by or at the instance of the [County] [D]efendant[s].” The court, therefore, denies County Defendants’ motion to dismiss Plaintiff’s claim for malicious prosecution.

***4 Abuse of Process.** County Defendants also argue that Plaintiff fails to state a claim for abuse of process. The two essential elements of an abuse of process claim are (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 697 S.E.2d 551, 556 (S.C.2010). “The abuse of process tort provides a remedy for one damaged by another’s perversion of a legal procedure for a purpose not intended by the procedure.” *Id.* ⁵

Plaintiff alleges that “Willis and Naftal had an ulterior purpose in insisting that the above-described criminal proceedings be initiated, continued, or reinstated against Plaintiff for the alleged crimes of Public Disorderly Conduct and Harassment Second Degree.” Am. Compl. ¶ 54. Plaintiff also alleges:

Defendants Willis and Naftal committed a willful act in the use of the criminal process that is not proper in the regular conduct of the proceeding; specifically, they improperly obtained the criminal warrants against Plaintiff from the Lancaster County Sheriff’s Department; Defendant Naftal used the pendency of the criminal charges as a basis to force Plaintiff to sign a “Last Chance Agreement” as a condition of his continued employment with the County; and Defendants Naftal and Willis used the terms of the “Last Chance Agreement” in an attempt to justify Plaintiff’s wrongful termination.

Id. ¶ 55.

The court finds that Plaintiff has pled an ulterior purpose and an improper act. Plaintiff alleges County Defendants had an

ulterior purpose for initiating, continuing, and/or using the criminal proceedings against Plaintiff to wrongfully terminate him and that they improperly obtained the criminal warrants against him. The court finds that Plaintiff has stated a claim for abuse of process. The court, therefore, denies County Defendants' motion to dismiss Plaintiff's abuse of process claim.

Civil Conspiracy. County Defendants seek dismissal of Plaintiff's civil conspiracy claim against them based on *Ross v. Life Insurance Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (S.C.1979), and *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (S.C.Ct.App.2004) ("*Angus I*"). In *Ross*, the South Carolina Supreme Court held that an at-will employee cannot maintain a claim for civil conspiracy against his employer based on his termination. In *Angus I*, the South Carolina Court of Appeals held that an at-will employee cannot sue his employer, or anyone acting within his authority on behalf of his employer, for civil conspiracy arising out of his termination.⁶ County Defendants argue that County, as employer, and Willis and Naftal, as agents authorized to act on behalf of County, cannot be sued by Plaintiff for civil conspiracy that resulted in Plaintiff's termination.⁷

Plaintiff argues that his claim is not barred by South Carolina's prohibition of claims by at-will employees against employers for civil conspiracy based on termination. Dkt. No. 47 at 7. First, Plaintiff contends his civil conspiracy claim is not merely a challenge to his termination, but that his "allegations of civil conspiracy go beyond the termination." *Id.* Plaintiff has alleged a claim for civil conspiracy against all Defendants for "engaging in a campaign to have him terminated from his employment with Defendant Lancaster County." Although Plaintiff argues that his civil conspiracy claim goes beyond his termination, Plaintiff's Amended Complaint is devoid of any such allegations and even specifies that the purpose and result of the civil conspiracy was to terminate him from his employment.

*5 Second, Plaintiff argues that, based on Plaintiff's protected status under the FLSA, he "could not be treated disparately from similarly situated co-workers without

creating liability for retaliation." Dkt. No. 47 at 8. According to Plaintiff, to accomplish termination while avoiding a retaliation claim, "various County employees and officials maliciously seized on the incident" that led to the criminal proceedings and "tried to make more of it than was really there in an effort to drag Plaintiff through the mud." *Id.* Plaintiff's argument relates to his FLSA retaliation claim, not his civil conspiracy claim. Further, Plaintiff has advanced no legal argument that his protected status under the FLSA has any bearing on South Carolina's prohibition of claims for civil conspiracy against employers arising out of termination.

Third, Plaintiff argues that County Defendants misinterpret the holdings in *Angus I* and *II*. *Id.* "Those cases do not hold that an employee, even an at-will employee, can never bring a civil conspiracy claim for something bad that happens to him incident to his employment." *Id.* (citing *Reed v. Aiken County*, No. 09-1744, 2010 WL 2985805, *3 (D.S.C. July 26, 2010) ("The Individual Defendants read *Angus II* to preclude all civil conspiracy actions by at-will employees against their employers. Such a reading of *Angus II* is overly broad." ⁸)). The court agrees that all civil conspiracy claims by at-will employees against employers are not barred by *Angus I* or *II*. However, a civil conspiracy claim by an at-will employee against an employer *arising out of the employee's termination* is barred by *Ross*, and *Angus I* and *II*.⁹ The court, therefore, grants County Defendants' motion to dismiss Plaintiff's civil conspiracy claim against them.

CONCLUSION

For the reasons set forth above, the court denies County Defendants' motion to dismiss Plaintiff's claims for malicious prosecution and abuse of process, and grants County Defendants' motion to dismiss Plaintiff's claim for civil conspiracy.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 786447

Footnotes

- 1 Plaintiff alleges that Faile is the Sheriff of Lancaster County, and that Howell is a current employee, and Belk
a former employee, of the Sheriff's Department.
- 2 The motion to amend was granted, but the proposed amended complaint was never filed as the amended
complaint.
- 3 Both sides have included additional facts in their briefs in the event the court converts the motion to one for
summary judgment. Because the court resolves this motion under Rule 12(b)(6), the court considers only
Plaintiff's factual allegations set forth in the Amended Complaint.
- 4 The court relies on the date found in a copy of the Last Chance Agreement referenced in the Amended
Complaint and attached to County Defendants' motion to dismiss and Plaintiff's response. ¹ ² ³ ⁴ ⁵ ⁶ ⁷ ⁸ ⁹ ¹⁰ ¹¹ ¹² ¹³ ¹⁴ ¹⁵ ¹⁶ ¹⁷ ¹⁸ ¹⁹ ²⁰ ²¹ ²² ²³ ²⁴ ²⁵ ²⁶ ²⁷ ²⁸ ²⁹ ³⁰ ³¹ ³² ³³ ³⁴ ³⁵ ³⁶ ³⁷ ³⁸ ³⁹ ⁴⁰ ⁴¹ ⁴² ⁴³ ⁴⁴ ⁴⁵ ⁴⁶ ⁴⁷ ⁴⁸ ⁴⁹ ⁵⁰ ⁵¹ ⁵² ⁵³ ⁵⁴ ⁵⁵ ⁵⁶ ⁵⁷ ⁵⁸ ⁵⁹ ⁶⁰ ⁶¹ ⁶² ⁶³ ⁶⁴ ⁶⁵ ⁶⁶ ⁶⁷ ⁶⁸ ⁶⁹ ⁷⁰ ⁷¹ ⁷² ⁷³ ⁷⁴ ⁷⁵ ⁷⁶ ⁷⁷ ⁷⁸ ⁷⁹ ⁸⁰ ⁸¹ ⁸² ⁸³ ⁸⁴ ⁸⁵ ⁸⁶ ⁸⁷ ⁸⁸ ⁸⁹ ⁹⁰ ⁹¹ ⁹² ⁹³ ⁹⁴ ⁹⁵ ⁹⁶ ⁹⁷ ⁹⁸ ⁹⁹ ¹⁰⁰ ¹⁰¹ ¹⁰² ¹⁰³ ¹⁰⁴ ¹⁰⁵ ¹⁰⁶ ¹⁰⁷ ¹⁰⁸ ¹⁰⁹ ¹¹⁰ ¹¹¹ ¹¹² ¹¹³ ¹¹⁴ ¹¹⁵ ¹¹⁶ ¹¹⁷ ¹¹⁸ ¹¹⁹ ¹²⁰ ¹²¹ ¹²² ¹²³ ¹²⁴ ¹²⁵ ¹²⁶ ¹²⁷ ¹²⁸ ¹²⁹ ¹³⁰ ¹³¹ ¹³² ¹³³ ¹³⁴ ¹³⁵ ¹³⁶ ¹³⁷ ¹³⁸ ¹³⁹ ¹⁴⁰ ¹⁴¹ ¹⁴² ¹⁴³ ¹⁴⁴ ¹⁴⁵ ¹⁴⁶ ¹⁴⁷ ¹⁴⁸ ¹⁴⁹ ¹⁵⁰ ¹⁵¹ ¹⁵² ¹⁵³ ¹⁵⁴ ¹⁵⁵ ¹⁵⁶ ¹⁵⁷ ¹⁵⁸ ¹⁵⁹ ¹⁶⁰ ¹⁶¹ ¹⁶² ¹⁶³ ¹⁶⁴ ¹⁶⁵ ¹⁶⁶ ¹⁶⁷ ¹⁶⁸ ¹⁶⁹ ¹⁷⁰ ¹⁷¹ ¹⁷² ¹⁷³ ¹⁷⁴ ¹⁷⁵ ¹⁷⁶ ¹⁷⁷ ¹⁷⁸ ¹⁷⁹ ¹⁸⁰ ¹⁸¹ ¹⁸² ¹⁸³ ¹⁸⁴ ¹⁸⁵ ¹⁸⁶ ¹⁸⁷ ¹⁸⁸ ¹⁸⁹ ¹⁹⁰ ¹⁹¹ ¹⁹² ¹⁹³ ¹⁹⁴ ¹⁹⁵ ¹⁹⁶ ¹⁹⁷ ¹⁹⁸ ¹⁹⁹ ²⁰⁰ ²⁰¹ ²⁰² ²⁰³ ²⁰⁴ ²⁰⁵ ²⁰⁶ ²⁰⁷ ²⁰⁸ ²⁰⁹ ²¹⁰ ²¹¹ ²¹² ²¹³ ²¹⁴ ²¹⁵ ²¹⁶ ²¹⁷ ²¹⁸ ²¹⁹ ²²⁰ ²²¹ ²²² ²²³ ²²⁴ ²²⁵ ²²⁶ ²²⁷ ²²⁸ ²²⁹ ²³⁰ ²³¹ ²³² ²³³ ²³⁴ ²³⁵ ²³⁶ ²³⁷ ²³⁸ ²³⁹ ²⁴⁰ ²⁴¹ ²⁴² ²⁴³ ²⁴⁴ ²⁴⁵ ²⁴⁶ ²⁴⁷ ²⁴⁸ ²⁴⁹ ²⁵⁰ ²⁵¹ ²⁵² ²⁵³ ²⁵⁴ ²⁵⁵ 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plaintiffs have succeeded in civil conspiracy claims in the employment context. *Id.* at 9, 259 S.E.2d 814 (citing *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (S.C.Ct.App.2010); *Lee v. Chesterfield Gen. Hosp.*, 289 S.C. 6, 344 S.E.2d 379 (S.C.Ct.App.1986)). However, neither of the cases cited by Plaintiff involve a terminated employee suing an employer for civil conspiracy. In *Pridgen*, the court upheld a civil conspiracy claim against co-workers and specifically stated that "Pridgen's civil conspiracy claim was not against his employer." 705 S.E.2d at 63. "Rather, Pridgen's claim was against the Appellants, who did not have the power to terminate his employment." *Id.* Further, the plaintiffs in *Lee* were not employees of defendants. 344 S.E.2d 380. Rather, the plaintiffs were a physician's assistant, physician, and professional association that employed the physician's assistant. *Id.* The plaintiffs sued defendant hospital for civil conspiracy to injure their trade by limiting staff privileges at the hospital. *Id.* at 381. The court, therefore, finds Plaintiff's arguments unavailing.

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2008 WL 867927
United States District Court, S.D. West Virginia.

UNITED STATES of America, Plaintiff,
v.
Charles E. GWINN, et al., Defendants.

Civil Action No. 5:06-cv-00267.

March 31, 2008.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

THOMAS E. JOHNSTON, District Judge.

*1 Pending before the Court are: (1) Defendant Charles E. (Eric) Gwinn's Motion to Dismiss [Docket 102]; (2) Defendant David P. Murphy's Motion to Set Aside Entry of Default [Docket 112] and Motion to Dismiss [Docket 118];¹ (3) Defendant Charles E. (Charlie) Gwinn's Motion for Judgment on the Pleadings [Docket 119]; and (4) Defendant Thomas M. Binetti's Motion to Dismiss [Docket 121].²

For the reasons stated below, the Court grants Defendant Murphy's motion to set aside default, grants in part and denies in part the motions to dismiss of Defendants Eric Gwinn, Murphy, and Binetti, and grants in part and denies in part Defendant Charlie Gwinn's motion for judgment on the pleadings.

I. BACKGROUND

This action arises out of Defendants' operation of a Medicare durable medical equipment (DME) supply company called

Group II Medical Supports LLC (Group II). According to the Second Amended Complaint (Complaint), Group II was a West Virginia Limited Liability Company wholly owned and operated by Defendant Charlie Gwinn and Tracy Webber. (Second Am. Compl. ¶¶ 2, 20.) Defendants Eric Gwinn, David Murphy, and Thomas Binetti were employed by Group II as sales representatives. (*Id.* ¶¶ 3-5.)

Group II specialized in the marketing and placement of DME, specifically Group II Support Surfaces (group II mattresses). (*Id.* ¶ 26.) This type of mattress is a specialized mattress used for the treatment of pressure ulcers, also known as decubitus ulcers, and is covered by Medicare if certain criteria are met. (*Id.* ¶¶ 26-28, 35.) A group II mattress is covered by Medicare if a beneficiary meets: (a) criteria 1 and 2 and 3; (b) criterion 4; or (c) criteria 5 and 6. (*Id.* ¶ 35.) The criteria are:

1. Multiple stage II pressure ulcers located on the trunk or pelvis;
2. Beneficiary has been on a comprehensive ulcer treatment program for at least the past month that has included the use of an appropriate group I support surface;
3. The ulcers have worsened or remained the same over the past month;
4. Large or multiple stage III or IV pressure ulcer(s) on the trunk or pelvis;
5. Recent myocutaneous flap or skin graft for a pressure ulcer on the trunk or pelvis (surgery within the past 60 days); and
6. The beneficiary has been on a group II or III support surface immediately prior to a recent discharge from a hospital or nursing facility (discharge within the past 30 days).

(*Id.*)

If these criteria are met, and as long as the healing process continues, Medicare covers use of a group II mattress until the pressure ulcer is healed. (*Id.* ¶ 36.) If these criteria are met, but healing does not continue, Medicare continues to cover the group II mattress if there are medical records to show that: (a) other aspects of the care plan are being modified to promote healing; or (b) the use of the group II mattress is medically necessary for wound management. (*Id.* ¶ 37.) Once the pressure ulcer is healed, Medicare no longer covers the group II mattress. (*Id.* ¶ 38.)

*2 In order to receive reimbursement for a group II mattress in compliance with Medicare regulations, certain documentation must be properly filled out. (*Id.* ¶ 39.) Medicare provides DME suppliers with a suggested form, entitled "Statement of Ordering Physician Group 2 Support Surfaces" (Medicare SOP), for the collection of information concerning which, if any, criteria the beneficiary meets. (*Id.* ¶¶ 44-45.) The Complaint alleges that the Medicare SOP contains six questions used to evaluate medical necessity and beneficiary eligibility for a group II mattress, which may only be answered by the treating physician or their staff or other health care professional, and not DME suppliers. (*Id.* ¶¶ 46-47.)

The Government alleges that beginning in or about January of 1998, and continuing to sometime in April of 2004, Eric Gwinn, Murphy, and Binetti were employed by Group II, and conspired with one another, Charlie Gwinn, Tracy Webber, and other Group II employees to defraud the United States through a scheme involving the placement of group II mattresses billed to Medicare for patients who did not meet the aforementioned criteria.

Allegedly, Defendants created false documents that included false diagnoses for pressure ulcers and other material misrepresentations. (*Id.* ¶ 96.) Defendants also allegedly falsified answers to questions regarding patients' medical conditions on Medicare SOPs-forms that were required to be completed by a qualified health care provider-and caused false claims to be submitted for the use of the mattresses, which resulted in significant losses to Medicare. (*Id.* ¶ 85-94.)

Furthermore, the Complaint alleges that Defendants developed and employed deceptive marketing practices, (*Id.* ¶ 67), and that Charlie Gwinn trained other Group II sales representatives on the marketing, placement and servicing of group II mattresses, and the completion of standardized Group II forms. (*Id.* ¶¶ 31, 32, 77.) The Government contends that Eric Gwinn, Binetti, and Murphy were compensated through commissions paid by Group II based upon the revenue generated for the mattresses that they placed or serviced. (*Id.* ¶ 30.)

Originally, the United States filed a complaint against only Charlie Gwinn.³ Then, on January 18, 2007, the United States moved for leave to file its second amended complaint. This time, the Government sought to add claims against Eric Gwinn, Murphy, and Binetti. The Court granted leave, and on

April 16, 2007, the Government filed the seven-count second amended complaint against Defendants.⁴

Counts I-III of the Complaint are brought pursuant to the provisions of the False Claims Act, 31 U.S.C. §§ 3729-33.⁵ Count I alleges that Defendants "knowingly presented and caused to be presented ... false or fraudulent claims for payment or approval by the United States in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)." (*Id.* ¶ 110.) Count II asserts that Defendants "knowingly made, used, or caused to be made or used ... a false record to get a false or fraudulent claim paid or approved by the United States in violation of the False Claims Act, 31 U.S.C. § 3729(a)(2)." (*Id.* ¶ 115.) In Count III, the Government contends that Defendants "conspired with each other and Tracy Webber and other Group II employees to defraud the United States by getting false or fraudulent claims allowed or paid by the United States in violation of the False Claims Act, 31 U.S.C. § 3729(a)(3)." (*Id.* ¶ 120.) Count IV alleges a common law cause of action for unjust enrichment. Count V alleges a "Payment by Mistake" claim, and Count VI states a common law cause of action for "Recovery of Monies Unlawfully Paid Contrary to Statute or Regulation." Finally, Count VII asserts a "Constructive Trust" cause of action.

*3 The Complaint includes the following specific allegations against Defendants (who are listed individually in each paragraph), Tracy Webber, and other Group II employees:

68. [Defendants] targeted personal care homes (PCHs) where Medicare beneficiaries resided, to engage in the fraudulent marketing practices and place group II mattresses.

69. [Defendants] falsely represented to PCH representatives and others that the group II mattresses were approved by Medicare at no cost to the facility and no cost to the resident for the prevention of skin problems, including red or irritated skin, decubitus ulcers, pressure spots, bed sores, or "whatever they are called."

70. [Defendants] knowingly withheld information from PCH representatives regarding Medicare coverage criteria for group II mattress placement and continued use, and Medicare documentation criteria.

71. [Defendants] routinely marketed group II mattresses to PCH representatives knowing that beneficiaries did not have qualifying pressure ulcers and did not otherwise meet Medicare coverage criteria.
72. [Defendants] created false patient information sheets on which they routinely included a diagnosis for two stage II decubitus ulcers without regard to medical evidence, documentation or other information to support such diagnosis and in many instances knowing the same to be false.
73. [Defendants] created false "capped rental agreements" on which they misrepresented that Medicare would pay for the group II mattresses for 15 months of continuous use without regard to Medicare coverage criteria for continued use and without medical evidence, documentation or other information to support continued need.
74. [Defendants] had the false capped rental agreements signed by PCH representatives prior to delivery of the group II mattress.
75. [Defendants] included on the capped rental agreement, "See attached sheet for '10th month' rental/purchase option" when, oftentimes, no sheet was attached.
76. [Defendants] created false [Medicare] SOPs by answering the six questions regarding medical necessity according to a standard formula and without regard to [the] individual beneficiary[']s condition.
77. Tracy Webber, Charlie Gwinn, and other Group II employees trained Binetti, Murphy, Eric Gwinn, and other Group II employees to complete the [Medicare] SOPs as follows: "Information must be circled as follows: 1. Y; 2. Y; 3. 3[sic]; 4. N; 5. N; 6. N."
78. [Defendants] routinely answered the six questions on the [Medicare] SOPs according to the standard formula without regard to the individual beneficiary's condition and without medical evidence, documentation or other information to support the answers.
79. [Defendants] routinely answered the six questions on the [Medicare] SOP with the knowledge that the answers did not accurately reflect the individual beneficiary's condition.
80. [Defendants] routinely answered the six questions on the [Medicare] SOP without input from wound care providers, treating physicians or other health care professionals.
- *4 81. [Defendants] routinely obtained a "Signature of Information Supplier" on each [Medicare] SOP to make it appear that the answers to the six questions were provided by the signatory, when in fact, the signatories were not asked the questions and did not provide the answers.
83. [Defendants] routinely completed the [Medicare] SOPs with knowledge and in direct violation of the Medicare prohibition against such completion.
85. [Defendants] routinely presented the false or fraudulent [Medicare] SOPs to physicians for signature.
86. [Defendants] often used a standard cover letter drafted by Group II to accompany the false or fraudulent SOPs.
87. The physician cover letter contained false or misleading information regarding the completion of the [Medicare] SOP and physician responsibility in connection with the authorization of the group II mattress.
88. The physician cover letter indicated that the group II mattress was requested by the "Supplier of Information" and that the "Supplier of Information" provided all of the applicable information when, in fact, the information was supplied entirely by [Defendants].
89. The physician cover letter indicated that "all that is required for your approval for placement of this product is the doctor's signature, Medicare UPIN # and Date" when, in fact, the physician should have exercised independent medical judgment regarding medical necessity for the group II mattress.
90. [Defendants] knew that physicians regularly signed the [Medicare] SOPs without adequate consideration and evaluation of beneficiary condition or Medicare coverage criteria.
94. [Defendants] presented and caused the presentation of false or fraudulent claims by Group II to Medicare for the placement of group II mattresses knowing that the beneficiaries did not meet the Medicare coverage criteria.

95. [Defendants] presented and caused the presentation of false or fraudulent claims to Medicare for the placement of group II mattresses knowing that they did not have the documentation on file required for use of the KX or ZX modifier.⁶

96. [Defendants] created false documents in order to get false claims for continued use of group II mattresses reimbursed by Medicare.

97. [Defendants] completed a false "Monthly Patient Information Update Sheet" (update sheet) for each group II mattress placed.

100. [Defendants] completed the update sheets each month or upon each visit to a PCH in which a group II mattress had been placed.

101. [Defendants] routinely wrote "yes" in the column regarding continued need, without regard to [the] individual beneficiary[s] condition and without regard to Medicare coverage criteria for continued use.

102. [Defendants] routinely wrote "yes" in the column regarding continued need and wrote the name of the purported contact person at the PCH when, in fact, they had not inquired about [the] individual beneficiary[s] condition.

103. [Defendants] were aware of the Medicare coverage criteria for continued use and Medicare documentation requirements for continued need and routinely disregarded the same.

*5 104. [Defendants] presented and caused the presentation of false or fraudulent claims to Medicare for the continued use of group II mattresses knowing that the majority of beneficiaries did not meet the Medicare coverage criteria for continued use because they did not meet the Medicare coverage criteria for initial placement.

Additionally, attached to the Complaint as Exhibit A, is a document entitled "Redacted Claims Summary Without Patient Names" that details approximately 1,900 claims submitted to the Government. The information contained in this exhibit includes: (1) the date of service; (2) billed amount; (3) allowed amount; (4) sum; (5) facility; and (6) whether the service was necessary.⁷

After the Government filed its Complaint, all defendants except for Murphy filed timely answers. Following their answers, Eric Gwinn and Binetti each filed motions to dismiss, and Charlie Gwinn filed a motion for judgment on the pleadings.⁸ Defendants make essentially the same legal arguments in their motions.

When Murphy failed to file a timely answer by June 20, 2007, the Government filed an application for entry of default by the Clerk on June 26, 2007, which the Clerk entered on June 29, 2007. Thereafter, on July 3, 2007, Murphy filed a motion to set aside entry of default, and then subsequently filed a motion to dismiss, where he adopted Eric Gwinn's motion to dismiss, and added a few of his own arguments.

Initially, all of the defendants argue that the Government improperly pled Counts I-III, which allege violations of the False Claims Act, because those claims were not brought pursuant to 31 U.S.C. § 3730. Next, Defendants assert that the allegations contained in Counts I-III of the Complaint do not meet the specificity requirements of Fed.R.Civ.P. 9(b). Third, Defendants contend that Count III should be dismissed because the intracorporate conspiracy doctrine precludes the Government from pursuing a conspiracy claim against them. Fourth, Defendants argue that Counts I and II fail because the treating physician, and not Defendants, certified the need for the group II mattresses, and thus, Defendants did not "knowingly" submit false claims.⁹

Eric Gwinn,¹⁰ Murphy, and Binetti also have arguments exclusive to them. Eric Gwinn, Murphy, and Binetti argue that this Court lacks personal jurisdiction over them, and that this action should be dismissed as a result. Alternatively, Murphy and Binetti argue that venue should be transferred to districts more convenient for them.¹¹ Finally, Murphy also filed motions to sever due to misjoinder, to dismiss for failure to name Group II as a necessary and indispensable party, and to dismiss for improper venue. Beginning with Murphy's motion to set aside default, the Court will address each motion in turn.

II. DISCUSSION

A. Murphy's Motion to Set Aside Default

The docket reflects that Murphy was served with a summons and the Complaint on May 31, 2007. His answer was therefore

due by June 20, 2007. (See Docket 99.) When he did not answer by June 26, 2007, the Government filed an application for entry of default, which the Clerk entered on June 29, 2007. Murphy then filed his answer on July 2, 2007, and his motion to set aside entry of default on July 3.¹² In his motion to set aside entry of default, Murphy states that before the Government filed its Complaint, his counsel had been in contact with the Government and discussed the matter in an ongoing dialogue to try to resolve the claims without court intervention. Apparently, his discussions continued after the Complaint was filed and until the day before the Government filed for entry of default. Murphy states that the sides spoke via telephone on June 25, 2007, and, although his answer was late and had not yet been filed, the Government gave him no indication that an application for default would be forthcoming.

*6 After the Government filed its application, Murphy's counsel, in an effort to prevent the unnecessary filing of a motion to set aside entry of default, immediately requested that the Government withdraw its application, and inform the Court of the parties' conversation. Obviously, the Government declined and Murphy filed this motion. In support of his motion, Murphy recites the conversations of the parties and includes, as an exhibit, a letter to the Government that details those interactions.

(1) Standard

Pursuant to ¹ Fed.R.Civ.P. 55(c), a court may, "for good cause shown," set aside an entry of default. "The disposition of motions made under ¹ Rule [] 55(c) ... is a matter which lies largely within the discretion of the trial judge...." ¹ *Consol. Masonry & Fireproofing, Inc. v. Wagman Constr. Corp.*, 383 F.2d 249, 251 (4th Cir.1967). There are several factors a district court should consider in deciding whether to set aside an entry of default. These factors include: "whether the moving party has a meritorious defense, whether it acts with reasonable promptness, the personal responsibility of the defaulting party, the prejudice to the [other] party, whether there is a history of dilatory action, and the availability of sanctions less drastic." *Payne v. Brake*, 439 F.3d 198, 204-05 (4th Cir.2006). In weighing and evaluating these factors, the Court must consider the "extensive line of decisions that [hold] ¹ Rule [] 55(c) ... [should] be liberally construed in order to provide relief from the onerous consequences of defaults and default judgments." *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir.1969). Accordingly, "[a]ny doubts about

whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits." *Id.*

(2) Analysis

Importantly, the defense need not be *proven* at this stage in order for it to be "meritorious" for purposes of the Court's analysis. ¹ *Wainwright's Vacations, LLC v. Pan Am. Airways, Corp.*, 130 F.Supp.2d 712, 718 (D.Md.2001) ("[T]he moving party does not have to prove conclusively that he would prevail, only that there is sufficient evidence to permit a court to find in his favor."); cf. *Md. Nat'l Bank v. M/V Tanicorp I*, 796 F.Supp. 188, 190 (D.Md.1992) ("The mere assertion of a meritorious defense is not enough, Defendant must state the underlying facts to support the defense."). In fact, even if a defense is tenuous, then the "meritorious defense" factor should weigh in favor of granting a motion to set aside entry of default. See *Rasmussen v. Am. Nat'l Red Cross*, 155 F.R.D. 549, 552 (S.D.W.Va.1994) (Haden, J.) ("Although the Court finds the Defendant's 'meritorious defense' argument tenuous, it nonetheless recognizes the general policy of deciding cases on their merits."). "[A]ll that is necessary to establish the existence of a 'meritorious defense' is a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party." ¹ *United States v. Moradi*, 673 F.2d 725, 727 (4th Cir.1982).

*7 Murphy mentions in his conversations with the Government that because he was not an officer, director, or shareholder of Group II, he is not liable for the allegations contained in the Complaint. Unfortunately for Murphy, this is not a meritorious defense because the False Claims Act does not require an individual to be an officer, director, or shareholder in order to be held liable. See ¹ 31 U.S.C. § 3729(a) (imposing liability on "any person" who violates the statute). However, in his motion to dismiss, filed after this motion to set aside entry of default, Murphy sets forth a meritorious defense to Count III-the intracorporate conspiracy doctrine, which is discussed in detail *infra*. Moreover, as noted by Eric Gwinn in his motion to dismiss, many claims may be barred by the statute of limitations. Thus, there appear to exist meritorious defenses to some of the Government's claims and this factor weighs heavily in favor of setting aside entry of default.

Next, considering whether Murphy acted with reasonable promptness, the Court **FINDS** that he moved quickly in filing both his answer and a motion to set aside entry of default. His motion was filed a mere six days after the Clerk entered default.¹³ Other courts have held that responses given within similar time frames were reasonably prompt. See *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir.1988) (two weeks); *Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894, 896 (4th Cir.1987) (fifteen days); *Colleton Preparatory Acad., Inc. v. Beazer E. Inc.*, 223 F.R.D. 401, 406 (D.S.C.2004) (nine days); *Bank United v. Hamlett*, 286 B.R. 839, 843 (W.D.Va.2002) (nineteen days); *Rasmussen*, 155 F.R.D. at 551 (three days).

Further, there is neither a history of dilatory actions by Murphy, nor will the brief delay in any way prejudice the Government. Murphy filed his answer almost immediately after the Government filed its application, and only twelve days after it was due. Additionally, because this case is proceeding against the other defendants, the Government will not be prejudiced by setting aside the entry of default.

Moreover, the Government had been in contact with Murphy's counsel the day before it filed its motion for entry of default. Thus, because of the communications the Government had with Murphy's counsel over the disputed issues, it knew that he sought an amicable resolution to the case, and if one was not available, then an answer and defense should be expected.¹⁴ As such, the fact that the Government will suffer no prejudice also weighs in favor of setting aside the entry of default.

Courts applying these factors have placed the greatest weight on determining whether the defaulting party or its counsel bears the responsibility for the delay. See *Palmetto Fed. Sav. Bank v. Indus. Valley Title Ins. Co.*, 756 F.Supp. 925, 932 (D.S.C.1991), *vac. by agreement of parties*, 1991 U.S. Dist. LEXIS 21831, 1991 WL 832830 (D.S.C. May 15, 1991) (listing cases). While there may have been some degree of personal responsibility on behalf of Murphy for not contacting and working with his counsel, the primary delay seemed to be caused by Murphy's counsel thinking that a resolution with the Government, and without court intervention, was a possibility. This is apparent because of the relatively short time frame in which the answer was filed following the entry of default. Thus, the Court **FINDS** that there is little degree of personal responsibility on behalf

of Murphy, and this factor accordingly weighs in favor of setting aside default. See *Moradi*, 673 F.2d at 728 ("justice also demands that a blameless party not be disadvantaged by the errors or neglect of his attorney which cause a final, involuntary termination of proceedings"). Additionally, the record does not reflect that the delay was a result of bad faith.

*8 Finally, other less drastic sanctions seem to be available, specifically, the availability of the Court's power to award the Government fees associated with bringing the motion for entry of default. *Prods. Belvac Prod. Mach., Inc. v. Std. Indus. Co.*, No. 6:06-00034, 2007 U.S. Dist. LEXIS 29812, at *8-9, 2007 WL 1189644 (W.D.Va. Apr. 23, 2007) (unpublished) ("Finally, there appear to be less drastic sanctions available: [the parties] have agreed that [the third-party defendant] will reimburse [the third-party plaintiff] for the latter's fees and costs associated with filing the motion for default and with the original discovery plan."); see also *Lolatchy v. Arthur Murray, Inc.*, 816 F.2d 951, 954 (4th Cir.1987) ("The attorney, for example, could have been charged with all costs and expenses attendant to the delay, including attorneys' fees, or even held in contempt of court."). Regardless of its availability, however, the Court declines to exercise its discretion in awarding fees because had the Government informed Murphy's counsel of its intent to file the motion for entry of default, Murphy's motion, the Government's response, and this discussion would have likely been avoided. While the Government is technically correct in its assertion that it is "unaware" of any "obligation to advise [defense] counsel of its intention to seek default[.]" such a notice would have likely caused Murphy to file an answer immediately, thereby facilitating the litigation in this case.

Therefore, given the applicable factors, including the possibility of meritorious defenses, the fact that there will be no prejudice to the United States, and the policy of deciding cases on the merits, the Court **FINDS** that good cause exists to set aside the entry of default. Accordingly, Murphy's motion to set aside entry of default by the Clerk is **GRANTED**.

B. Defendants' Motions to Dismiss Counts I-III for Failing to Bring Those Counts Under 31 U.S.C. § 3730

Defendants argue that the United States improperly pled Counts I-III because those counts were brought under 31 U.S.C. § 3729, and not under 31 U.S.C. § 3730. Their

argument is based on the fact that under each count in the Complaint, the Government states: "This is a claim under the False Claims Act, 31 U.S.C. §§ 3729(a)(1) [(a)(2), (a)(3)], as amended." (See Second Am. Compl. ¶¶ 108, 113, 118.) Defendants contend that because the Government failed to cite 28 U.S.C. § 3730 specifically, Counts I-III should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

(1) Applicable Law

Pursuant to Fed.R.Civ.P. 8(a), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." "[U]nder the liberal standards of the Federal Rules of Civil Procedure ... a plaintiff 'must at least set forth enough details so as to provide defendant and the court with a fair idea of the basis of the complaint and the legal grounds claimed for recovery.'" *Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1227 (4th Cir.1998) (quoting *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir.1990)). "[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." *Bell Atl. Corp. v. Twombly*, — U.S. —, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007). The plaintiff is required to allege sufficient facts, which, if proven, would entitle him to relief. Fed.R.Civ.P. 8(a).

*9 A motion to dismiss under Fed.R.Civ.P. 12(b)(6) tests the legal sufficiency of the complaint, and the factual allegations must be taken as true and construed in the light most favorable to the plaintiff. See *Randall v. United States*, 30 F.3d 518, 522 (4th Cir.1994). Consequently, a motion to dismiss should be granted only if, after accepting all well-pleaded allegations contained in the complaint as true, the plaintiff fails to allege enough facts to state a cognizable legal claim that is plausible on its face. *Twombly*, 127 S.Ct. at 1974. "Factual allegations must be enough to raise a right to relief above the speculative level," and if a plaintiff does not "nudge" his claim "across the line from conceivable to plausible," then the complaint should be dismissed. *Id.* at 1965, 1974.

Under the Federal Rules, a plaintiff is not required to plead a legal theory. *Vidimos, Inc. v. Laser Lab*, 99 F.3d 217, 222 (7th Cir.1996) ("The Federal Rules of Civil Procedure do not require a plaintiff to plead legal theories."). He must merely give the defendant and the court a fair idea of the

legal grounds claimed for recovery. *Karpel*, 134 F.3d at 1227. "[M]any federal courts have held that a complaint is sufficient against a motion to dismiss under Rule 12(b)(6), if it appears from the complaint that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely are not appropriate." 5 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1219 (3d ed.2007).

(2) Analysis

Defendants provide no law in support of their argument that failure to cite § 3730 under each cause of action is fatal to that count. Accordingly, the Court rejects this argument. Further, contrary to Defendants' position, the United States does in fact bring its claims against them under § 3730. The introductory paragraph of the Complaint specifically states that the action is brought "under the provisions of the False Claims Act, 31 U.S.C. §§ 3729-3733[.]" which includes § 3730. (Second Am. Compl. at 1.)

Additionally, even if the Court accepts Defendants' argument that Counts I-III were not brought under § 3730, the Complaint does not fail as a matter of law because all that must be pled are enough factual allegations to show that the plaintiff is entitled to relief. See *Twombly*, 127 S.Ct. at 1974. The Court is unaware of any rule of law which requires a plaintiff to list specific statutes under each count in a complaint.

Moreover, any argument that Counts I-III should be dismissed for lack of subject matter jurisdiction because § 3730 is not listed under each count of the Complaint is without merit. "If facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded. After all, 'It is well settled that the recitation of a statute can neither deprive a court of jurisdiction nor confer jurisdiction upon it.'" *Blue v. Craig*, 505 F.2d 830, 844 (4th Cir.1974) (citations and footnote omitted). The Complaint clearly allows the Court to ascertain its jurisdictional basis. ¹⁵

*10 For these reasons, the Court rejects Defendants' argument, and their motions to dismiss Counts I-III for failure to plead under § 3730 are **DENIED**.

C. Defendants' Motions to Dismiss Counts I-III Pursuant to Fed.R.Civ.P. 9(b)

(1) Applicable Law

Rule 9(b) of the Federal Rules of Civil Procedure requires that the circumstances constituting fraud be stated with particularity. The Fourth Circuit has held that this standard is met when "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby []" are set forth in a complaint. ¹ *Harrison v. Westinghouse Savannah River Co. (Harrison I)*, 176 F.3d 776, 784 (4th Cir.1999) (internal quotation marks and citation omitted). Conclusory allegations will not satisfy the particularity requirement. ² *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 684 (4th Cir.1989).

In cases where there are multiple defendants, "[a] complaint fails to meet the particularity requirements of Rule 9(b) when a plaintiff asserts merely conclusory allegations of fraud against multiple defendants without identifying each individual defendant's participation in the alleged fraud."

³ *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D.Md.2000) (citing *Wang Labs., Inc. v. Burts*, 612 F.Supp. 441, 445 (D.Md.1984); *Wiener v. Napoli*, 760 F.Supp. 278, 284 (E.D.N.Y.1991) (holding that where "multiple defendants are involved in the alleged fraud, it is especially important that the fraud be particularized as to each one of them []").

Importantly, "[a] court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial pre-discovery evidence of those facts."

⁴ *Harrison I*, 176 F.3d at 784. "The most basic consideration in making a judgment as to the sufficiency of a pleading is the determination of how much detail is necessary to give adequate notice to an adverse party and enable him to prepare a responsive pleading." ⁵ *Nat'l Mort'g Warehouse, LLC v. Trikeriotis*, 201 F.Supp.2d 499, 505 (D.Md.2002) (internal quotation marks and citations omitted). As the Fourth Circuit explained in *Harrison I*, Rule 9(b) has four purposes:

First, the rule ensures that the defendant has sufficient information to

formulate a defense by putting it on notice of the conduct complained of.... Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

⁶ 176 F.3d at 784 (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F.Supp. 1055, 1056-57 (S.D.Ga.1990)).

*11 In cases where there have been extensive allegations resulting in numerous instances of fraud, other courts have held that "[s]trict application of the requirements of Rule 9(b) may be relaxed...." *California, ex rel. Ven-A-Care of the Fla. Keys, Inc. v. Abbott Labs., Inc. (In re Pharm. Indus. Average Wholesale Price Litig.)*, 478 F.Supp.2d 164, 171-72 (D.Mass.2007) ("For instance, an alleged scheme of fraud may involve numerous transactions that occur over a long period of time, and pleading the precise specifics with regard to every instance of fraudulent conduct may be impractical.") (citing ⁷ *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1050 (7th Cir.1998) (applying relaxed standard to allegations of fraud in plaintiff's racketeering complaint)); ⁸ *United States ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 206-07 (E.D.Tex.1998) (collecting cases that apply relaxed standard)); ⁹ *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F.Supp.2d 258, 268 (D.D.C.2002) ("Additionally, where a complaint covers a multi-year period, Rule 9(b) may not require a detailed allegation of all facts supporting each and every instance of submission of a false claim.").

(2) Analysis

Because Counts I-III are brought under the False Claims Act, an anti-fraud statute, the Complaint must comply with Rule 9(b). See *Harrison I*, 176 F.2d at 783-84. As detailed above, the Complaint contains specific allegations against all of the defendants, individually, and describes the scheme to defraud Medicare, including the methods used, paperwork falsified, and the locations targeted. Additionally, Exhibit A provides approximately 1,900 examples of the actual false

claims submitted, and includes information regarding the date of service for the alleged false claim, the amount claimed, and the PCH where the mattress was placed. The Government also provided Defendants with an unredacted copy of the exhibit that includes the name of the Medicare beneficiary for each alleged false claim.

There is no dispute that neither the Complaint nor the exhibits describe which Defendant submitted or caused any particular claim to be submitted, when the claim was submitted, or why the mattress was unnecessary. Thus, the issue is whether the failure to provide that information causes the Complaint to fall short of the Rule 9(b) standard. The Court **HOLDS** that, given the facts of this case, it does not.

Defendants rely heavily on ¹⁵ *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1312 (11th Cir.2002), and ¹⁶ *United States ex rel. Brooks v. Lockheed Martin Corp.*, 423 F.Supp.2d 522, 526 (D.Md.2006), for the proposition that because the Complaint is missing certain information, it fails to satisfy Rule 9(b).¹⁶ These cases are unpersuasive. Initially, the Court notes that other courts have joined the dissent's criticism of the majority in *Clausen* as focusing too much on "particularity," and not enough on the purpose of Rule 9(b)-to give defendants notice of the claims against them.¹⁷ *Pogue*, 238 F.Supp.2d at 268-69. Further, requiring the Government to provide the information requested by Defendants in the Complaint for all 1,900 claims neither comports with the purposes of Rule 9(b), nor the Fourth Circuit's cautionary instruction in *Harrison I*.

*12 Three of the purposes behind Rule 9(b) are to protect defendants from frivolous suits, eliminate fraud actions in which all the facts are learned after discovery, and protect defendants from harm to their goodwill and reputation.

¹⁷ *Harrison I*, 176 F.3d at 784. Given that the Government alleges that Group II has already pled guilty to conduct it engaged in during the time Defendants worked for the company, finding that the allegations in the Complaint are sufficient to support a fraud claim does not run contrary to these purposes. First, because Group II pled guilty to making false statements relating to health care matters in violation of 18 U.S.C. § 1035(a)(2), and because a corporation acts through its agents, a civil lawsuit based on the false claims submitted by the corporation's agents is not frivolous. Likewise, because Defendants worked for Group II during the time in which the allegations in the information took place,

the Government's lawsuit does not further the harm to their goodwill and reputation as they are already associated with the organization. Finally, and most importantly, as discussed in more detail below, the Government already has substantial prediscovery evidence of the allegations in the Complaint.

With respect to the Fourth Circuit's language in *Harrison I*, the Court is satisfied that Defendants have been made aware of the particular circumstances for which they will have to prepare a defense at trial, and is satisfied that the Government has substantial prediscovery evidence of those facts. Regarding the first part of that inquiry, "Rule 9(b) was not intended to require a plaintiff to know every detail before he or she could plead fraud." ¹⁸ *United States v. Kensington Hosp.*, 760 F.Supp. 1120, 1125 (E.D.Pa.1991). Rather, the Government must make sufficient allegations to give Defendants enough information to prepare a defense for trial. Given the allegations in the Complaint, the Government has not only clearly alleged the particular circumstances of the scheme-how Defendants targeted certain PCHs and how they answered the Medicare SOPs-but also sufficiently alleged particular circumstances of the claims, including the date of service, the amount billed to Medicare, and the patient's name. The Court is satisfied that this information is sufficient enough to allow Defendants to prepare a defense for trial.

Next, it is clear that the Government has substantial prediscovery evidence of the relevant facts. In order to receive compensation for the group II mattresses, the alleged false claims had to be submitted to the Government, and thus the Government is in possession of those claims and the information contained therein. This is evidenced by the specificity detailed in Exhibit A, where the Government used the information contained in the submitted false claims to create the exhibit. In fact, Eric Gwinn acknowledges this in his reply brief. (Docket 115 at 7.) ("It is the Government that has control over the evidence in this case. Group II's corporate documents were turned over to the Government by Group II's new owners prior to suit being filed. Therefore, it is the Government that has control over all of the evidence in this matter. The Defendant has no documentary evidence in this case other than that which has been provided by the Government."). Accordingly, both conditions of *Harrison I* are met.

*13 Also, the Complaint does not run contrary to the cases that hold "where there are multiple defendants, plaintiffs must allege all claims with particularity as to each defendant." *See*,

e.g., ¹ *Dealers Supply Co. v. Cheil Indus.*, 348 F.Supp.2d 579, 589 (M.D.N.C.2004); ² *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 251 (D.Md.2000); *Juntti v. Prudential-Bache Sec.*, 993 F.2d 228 (4th Cir.1993) (table format), reported in full, 1993 U.S.App. LEXIS 10345, at *5, 1993 WL 138523 (unpublished) ("Further indicative of the insufficiently particular character of the complaint is its impermissible aggregation of defendants without specifically alleging which defendant was responsible for which act."). In this case, the Government individually lists each defendant in many of its allegations. Although Defendants argue that this is impermissibly grouping them together, it is clear from the allegations that the Government is indicating that all defendants undertook the actions described.

Furthermore, other courts have noted that, "[p]articularly in the context of federal FCA cases, the courts have recognized the impracticality of requiring the plaintiff to plead the facts of each individual claim, particularly where the claims are numerous and extend over the course of several years." *United States ex rel. Landsberg v. Argentis Med., P.C.*, No. 03-1263, 2006 U.S. Dist. LEXIS 96621, at *11-12 (W.D.Pa. Apr. 17, 2006), adopted by, 2006 U.S. Dist. LEXIS 43355, 2006 WL 1788381 (W.D. Pa. June 27, 2006) (unpublished) (citing ³ *Kensington Hosp.*, 760 F.Supp. at 1123; ⁴ *Pogue*, 238 F.Supp.2d at 268; ⁵ *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F.Supp.2d 1017, 1049 (S.D.Tex.1998) ("The basic framework, procedures, the nature of fraudulent scheme, and the financial arrangements and inducements among the parties and physicians that give rise to Relator's belief that fraud has occurred have been alleged with specificity; Plaintiffs are entitled to discovery before being required to list every false claim, its dates, the individuals responsible, and why each patient was not eligible for Medicare.")). The Court finds this rationale persuasive.

The Fourth Circuit insists that a district court hesitate to dismiss a case where it is satisfied that the defendant has been made aware of the particular circumstances for which he or she will have to prepare a defense at trial, and that the plaintiff has substantial prediscovery evidence of those facts. ⁶ *Harrison I*, 176 F.3d at 784. In a False Claims Act case that spans several years and consists of hundreds of alleged false claims, a complaint could meet those conditions without alleging which defendant submitted each false claim or why it was unnecessary. That is the case here. The Government alleges that the claims were submitted

to Medicare for payment, it informs Defendants how much those claims were, and details the scheme to defraud. The fact that the date each claim was submitted, the identity of the individual that caused the claim to be made, and the reason why the claim was unnecessary are absent from the Complaint is not fatal. The detail provided by the Government gives the Complaint an "indicia of reliability" that supports the allegation of an actual false claim for payment being made to the Government. See ⁷ *Clausen*, 290 F.3d at 1311. Accordingly, although a complaint unquestionably meets the particularity requirement of Rule 9(b) when the time, place, and contents of the false representations, identity of the person making the misrepresentation, and what was obtained thereby are pled, ⁸ *Harrison I*, 176 F.3d at 784, that information is not necessary where the number of claims is substantial, and the court is satisfied that the defendant has been made aware of the particular circumstances for which the defendant will have to prepare a defense at trial, and that the plaintiff has substantial prediscovery evidence of those facts. Otherwise, the court's instruction in *Harrison I* would be meaningless.

*14 Because of the detailed factual allegations in the Government's Complaint, the exhibits attached to the Complaint and provided to Defendants, and the Government's control over the evidence in this case, the Court FINDS that the Complaint meets the specificity requirements of Rule 9(b). Therefore, the Court DENIES Defendants' motions to dismiss Counts I-III for failure to plead with particularity.

D. Defendants' Motions to Dismiss Counts I-II Because Defendants Did Not "Knowingly" Submit False Claims

Defendants next argue that the Government has not alleged that they "knowingly" submitted false claims because the treating physician certified the need for the group II mattresses and because there are no allegations that Defendants "ever 'submitted' any 'claim' to anyone." (Docket 123 at 4.) Specifically, they argue that the United States cannot require DME suppliers, such as Group II, to obtain Medicare beneficiaries' medical records and make a judgment as to whether the equipment is medically necessary and reasonable. Because the determination of the need for the group II mattresses is made by a physician, Defendants argue that they could not "knowingly" submit a false claim to the United States.

The False Claims Act provides, in pertinent part, that "[a]ny person who [] knowingly presents or causes to be presented, to an officer or employee of the United States Government ...

a false or fraudulent claim for payment or approval[.]” or who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government ... is liable to the United States Government for a civil penalty....” 31 U.S.C. §§ 3729(a)(1), (a)(2) (emphasis added).

The plain language of the statute does not require an individual to actually submit the false claim in order to be liable. The False Claims Act “applies to anyone who knowingly assists in causing the government to pay claims grounded in fraud, without regard to whether that person has direct contractual relations with the government.” *United States ex rel. Riley v. St. Luke’s Episcopal Hosp.*, 355 F.3d 370, 378 (5th Cir.2004) (citations and internal quotation marks omitted). “[A] person need not be the one who actually submitted the claim forms in order to be liable.”

Id. (quoting *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir.2001)). Thus, Defendants’ argument that they never actually “submitted” a claim is without merit because the Government alleges that they “presented and caused the presentation of false or fraudulent claims by Group II to Medicare....” (Second Am. Compl. ¶ 94.)

Furthermore, regarding actions under the False Claims Act, the term “knowingly” means:

[W]ith respect to information—(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

*15 31 U.S.C. § 3729(b).

The Government alleges that Defendants supplied the information about the beneficiaries’ medical conditions with knowledge that the answers did not accurately reflect those conditions because Defendants “created false Medicare SOPs by answering the six questions regarding medical necessity according to a standard formula and without regard to [the] individual beneficiary[’s] condition.” (Second Am. Compl. ¶

76.) Also, the Government avers that Defendants “presented and caused the presentation of false or fraudulent claims ... to Medicare ... knowing that the beneficiaries did not meet the Medicare coverage criteria.” (*Id.* ¶ 94) (emphasis added.) Therefore, the Government has sufficiently alleged that Defendants acted “knowingly.”

Because the Government alleges that Defendants knowingly caused fraudulent claims to be presented and knowingly caused a false record or statement to be made or used to get a false or fraudulent claim paid or approved by the Government, it has stated valid claims, and Defendants’ motions to dismiss on these bases are **DENIED**.

E. Motions to Dismiss for Lack of Personal Jurisdiction of Eric Gwinn, Murphy, and Binetti, or in the Alternative, Motions to Transfer Venue

(1) Personal Jurisdiction

Eric Gwinn, Murphy, and Binetti claim that the False Claims Act does not give this Court personal jurisdiction over them, and, even if the Act did grant personal jurisdiction over them, it violates due process.

“As prerequisites to exercising personal jurisdiction over a defendant, a federal court must have jurisdiction over the subject matter of the suit, venue, ‘a constitutionally sufficient relationship between the defendant and the forum,’ and ‘authorization for service of a summons on the person.’”

ESAB Group v. Centricut, Inc., 126 F.3d 617, 622 (4th Cir.1997) (quoting *Omni Capital Int’l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987)).

The Court clearly has subject matter jurisdiction over the suit because it arose “under the ... laws ... of the United States[.]” namely the False Claims Act. See 28 U.S.C. § 1331. Next, with respect to the authorization for service of a summons on the person, “Federal Rule of Civil Procedure 4(k)(1) provides that ‘service of a summons or filing a waiver of service is effective to establish [a federal court’s] jurisdiction over the person of a defendant’ if such service is accomplished on a defendant whom the law has made amenable to the court’s process.” *ESAB Group*, 126 F.3d at 622. Rule 4(k) sets forth “five sources authorizing service to effect *in personam* jurisdiction”—one of them is a federal statute. *Id.* Here, the False Claims Act authorizes such service. Section 3732(a) provides that “[a] summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district

court and served at any place within or outside the United States." Because Defendants were served within the United States, service was valid.

*16 Third, the Act provides that venue is appropriate where, "in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by [§] 31 U.S.C. § 3729 occurred." 31 U.S.C. § 3732(a). Because Group II had its primary business in or around Raleigh County, and because the Government sufficiently alleges that at least one act proscribed by [§] 31 U.S.C. § 3729 occurred in the Southern District of West Virginia-Defendants allegedly presented and caused the presentation of false or fraudulent claims to Medicare-venue is appropriate.

The final requirement is that a constitutionally sufficient relationship exist between the defendant and the forum. To be permissible, Defendants must "have certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [§] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quoting [§] *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940)). "Where Congress has authorized nationwide service of process by federal courts under specific federal statutes, so long as the assertion of jurisdiction over the defendant is compatible with due process, the service of process is sufficient to establish the jurisdiction of the federal court over the person of the defendant." [§] *Hogue v. Milodon Eng'g. Inc.*, 736 F.2d 989, 991 (4th Cir.1984); see also [§] *Boon Partners v. Advanced Fin. Concepts*, 917 F.Supp. 392, 397 (W.D.N.C.1996).

In order to be compatible with due process, courts have determined that "[w]here ... there is a federal statute that permits worldwide service of process, the relevant inquiry is whether the defendants have *minimum contacts with the United States as a whole*[]" and is not the traditional inquiry of whether the defendants have minimum contacts with the forum state. [§] *United States ex rel. Thistlethwaite v. Dowty Woodville Polymer*, 976 F.Supp. 207, 210 (S.D.N.Y.1997) (emphasis added) (citing [§] *Busch v. Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir.1994) (listing cases); [§] *Tex. Trading & Milling Corp. v. Fed.*

Republic of Nig., 647 F.2d 300, 314 (2d Cir.1981), cert. denied, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982)). This is commonly referred to as the "national contacts" test. See *Schrader v. Trucking Employees of N. Jersey Welfare Fund, Inc.-Pension Fund*, 232 F.Supp.2d 560, 572 (M.D.N.C.2002) (applying the "national contacts" test to the Employee Retirement Income Security Act, which provides for nationwide service of process).

Here, the False Claims Act "provides for worldwide service of process." [§] *United States ex rel. Vallejo v. Investronica, Inc.*, 2 F.Supp.2d 330, 334 (W.D.N.Y.1998) (citing 31 U.S.C. § 3732(a)). Although the Fourth Circuit has not adopted this test as applied to the False Claims Act, the court has adopted it in the context of the Racketeer Influenced and Corrupt Organizations Act, "as well as the Bankruptcy Act, both of which contain provisions for nationwide service of process." *Schrader*, 232 F.Supp.2d at 571 n. 13 (citing [§] *ESAB Group, Inc.*, 126 F.3d at 626; [§] *Hogue*, 736 F.2d at 989). Thus, the Court **FINDS** that the application of the "national contacts" test is appropriate in this case, and the Court's due process analysis focuses not on Defendants' minimum contacts with West Virginia, but rather on the Defendants' minimum contacts with the United States as a whole. See *United States ex rel. Finks v. Huda*, 205 F.R.D. 225, 227-28 (S.D.Ill.2001) (finding that the proper forum on which to base a minimum contacts analysis in a False Claims Act case is the United States, and not the state where the district court sat); *Sedona Corp. v. Ladenburg Thalmann & Co.*, No. 03 Civ. 3120, 2006 WL 2034663, 2006 U.S. Dist. LEXIS 49067, at *24 (S.D.N.Y. July 18, 2006) (unpublished) (holding where a federal statute permits worldwide service of process, "the relevant 'forum state' is the entire United States[]").

*17 Because Eric Gwinn and Binetti are residents of Virginia, and because Murphy is a resident of North Carolina, they clearly have "minimum contacts with the United States as a whole[]" and satisfy the "national contacts" test. [§] *Thistlethwaite*, 976 F.Supp. at 210.

However, this does not end the due process inquiry. "The Fifth Amendment's Due Process Clause not only limits the extraterritorial scope of federal sovereign power, but also protects the liberty interests of individuals against unfair burden and inconvenience." [§] *ESAB Group, Inc.*, 126 F.3d at 627. "However, ... it is only in highly unusual cases that inconvenience will rise to a level of constitutional concern[.]"

Id. (internal quotation marks and citation omitted). Thus, unless Defendants can prove that litigating this case in West Virginia places an unfair burden or inconvenience upon them, personal jurisdiction is compatible with the Due Process Clause of the Fifth Amendment.

Defendants have not put forth any evidence to establish “extreme inconvenience or unfairness as would outweigh the congressionally articulated policy of allowing the assertion of *in personam* jurisdiction” in this Court. *Id.* at 627. Thus, because the “national contacts” test is satisfied, and because there is neither extreme inconvenience nor unfairness in this case, any argument focusing on fairness can be resolved through application of the federal venue and transfer statutes, 28 U.S.C. §§ 1391, 1404, which is discussed *infra*. See *id.* at 627 (citing *Hogue*, 736 F.2d at 991).

Accordingly, the Court has personal jurisdiction over the Government's False Claims Act counts against Eric Gwinn, Murphy, and Binetti, and their motions to dismiss on that ground are **DENIED**. Likewise, the Court also has jurisdiction over the Government's state law claims. See *id.* at 628 (“[W]e conclude that under the doctrine of pendent personal jurisdiction, the district court has authority over the defendants to decide both the federal and the state claims alleged against them.”).

(2) Improper Venue

Alternatively, Murphy moves for dismissal for improper venue under Fed.R.Civ.P. 12(b)(3) and 28 U.S.C. § 1406, and in the event that his motion to dismiss is unsuccessful, he, along with Eric Gwinn, move to transfer under 28 U.S.C. § 1404(a). In a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(3), the plaintiff has the burden to establish that venue is proper. *Bartholomew v. Va. Chiropractors Ass'n, Inc.*, 612 F.2d 812, 816 (4th Cir.1979), *overruled on other grounds* by *Ratino v. Med. Serv. of D.C.*, 718 F.2d 1260 (4th Cir.1983). As discussed above, pursuant to 31 U.S.C. § 3732(a), in actions brought under the False Claims Act, venue is appropriate where, “in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by [31 U.S.C. § 3729] occurred.” Because the Court has already determined that the Complaint alleges that acts proscribed by 31 U.S.C. § 3729 were performed within the Southern District of West Virginia, venue is proper, and dismissal is not warranted.

(3) Transfer of Venue

*18 With respect to the motions to transfer venue of Eric Gwinn and Murphy pursuant to 28 U.S.C. § 1404(a), the Court *may*, for the convenience of the parties and in the interests of justice, transfer the case to any other district or division where the action might have been brought. 28 U.S.C. § 1404(a). Thus, the Court must first determine if the case could have been brought in the districts to which Eric Gwinn and Murphy request their cases be moved—the Eastern District of Virginia and the Eastern District of North Carolina. See *Hoffman v. Blaski*, 363 U.S. 335, 342-44, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1959). Because each defendant resides in their requested district, 31 U.S.C. § 3732(a) permits the case to have been brought in both of those districts.

The next inquiry is whether a transfer would be for the convenience of the parties and in the interests of justice. A transfer under § 1404(a) is dependent upon the weighing “a number of case-specific factors.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29, 108 S.Ct. 2239, 101 L.Ed.2d 22 (1988).

Factors commonly considered in ruling on a transfer motion include: (1) ease of access to sources of proof; (2) the convenience of parties and witnesses; (3) the cost of obtaining the attendance of witnesses; (4) the availability of compulsory process; (5) the possibility of a view; (6) the interest in having local controversies decided at home; and (7) the interests of justice.

AFA Enters., Inc. v. Am. States Ins. Co., 842 F.Supp. 902, 909 (S.D.W.Va.1994) (Haden, J.). However, the plaintiff's forum selection is accorded considerable weight. *Id.*; *Collins v. Straight, Inc.*, 748 F.2d 916, 921 (4th Cir.1984). Indeed, “unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). Moreover, deference to the plaintiff's choice of forum is especially important when the plaintiff “has

not chosen a foreign forum or one bearing little or no relation to the cause of action.” ¹⁷ *Reynolds Metals Co. v. F.MALI, Inc.*, 862 F.Supp. 1496, 1501 (E.D.Va.1994) (quotation marks and citations omitted). Importantly, “transfer ... will be denied if it would merely shift the inconvenience from the defendant to the plaintiff.” *AFA Enters., Inc.*, 842 F.Supp. at 909.

Here, neither Murphy nor Eric Gwinn have established that the balance strongly weighs in their favor, and thus the Court will not disturb the Government's choice of forum. First, as the United States notes, it filed in this district because Group II operated, submitted claims, received payments from Medicare, and pled guilty to criminal charges within the Southern District of West Virginia. The Court gives that choice considerable weight and deference because the Government neither chose a foreign forum nor one bearing little or no relation to the cause of action. See ¹⁸ *Reynolds Metals Co.*, 862 F.Supp. at 1501. Furthermore, it would not be in the “interests of justice” to all the parties in this case to transfer either defendant's case to a different district because the claims against Binetti and Charlie Gwinn would proceed in this district regardless, with many issues being the same. Further, the Court notes that this case has been pending since 2006, and there are currently several discovery motions pending before the magistrate judge. Any transfer would severely inhibit progress toward a resolution. Whatever inconvenience Eric Gwinn and Murphy would sustain is outweighed by the Government's burden of having to conduct three trials in three different districts based on facts and legal issues arising from the same set of circumstances.

See ¹⁹ *United States ex rel. Penizotto v. Bates E. Corp.*, No. 94-3626, 1996 WL 417172, 1996 U.S. Dist. LEXIS 10316, at * 14 (E.D.Pa. July 19, 1996) (unpublished) (“After all, the administration of justice will ordinarily not be served by permitting litigation with virtually the same parties and issues to proceed in different jurisdictions at the same time.”) (citing ²⁰ *Ballard Med. Prods. v. Concord Lab., Inc.*, 700 F.Supp. 796, 801 (D.Del.1988); ²¹ *Blanning v. Tisch*, 378 F.Supp. 1058, 1061 (E.D.Pa.1974)). Thus, a transfer would merely shift the inconvenience from Eric Gwinn and Murphy to the Government for having to expend costs on separate litigation, to the witnesses for having to appear at trial in three different states, and to the federal court system. If the Court granted both motions, then substantially more judicial and governmental resources would be used in bringing these cases to trial. Accordingly, it would be in the interests of judicial economy to retain the entire case in this district.

*19 With respect to the other factors, compulsory process of unwilling witnesses is available pursuant to the False Claims Act, 31 U.S.C. § 3731(a), ¹⁷ and neither defendant has shown that the cost of obtaining attendance of willing witnesses will be any greater than in North Carolina or Virginia. Additionally, it appears that the “ease of access to sources of proof” disfavors transfer to another district. Although some witnesses may be located in the other districts, the presence of these witnesses does not outweigh the other factors that weigh in favor of retaining the entire case in this district.

For these reasons, the Court declines to transfer this case as to either Eric Gwinn or Murphy, and Defendants' motions on this basis are **DENIED**.

F. Murphy's Motion to Sever, and Motion to Dismiss for Failure to Name Group II as a Necessary and Indispensable Party

(1) Severance

Murphy argues, without citing any legal authority, that, pursuant to Fed.R.Civ.P. 21, he was misjoined and the Government's claims against him should be severed and proceed separately.

Rule 21 of the Federal Rules of Civil Procedure reads: “Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.” Joinder of defendants is permissible if (1) “any right to relief is asserted against [the defendants] jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences;” and (2) “any question of law or fact common to all defendants will arise in the action.” Fed.R.Civ.P. 20(a)(2). The joinder rule “should be construed in light of its purpose, which ‘is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.’” *Carbon Fuel Co. v. USX Corp.*, 867 F.Supp. 414, 418 (S.D.W.Va.1994) (Haden, J.) (quoting ²² *Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (4th Cir.1983)).

The claims against Murphy arise out of the same series of transactions, and share common questions of law and fact as the claims against his co-defendants. The claims arise out of the same series of transactions because Defendants

allegedly participated in the marketing of group II mattresses for Medicare beneficiaries who did not meet Medicare coverage criteria and subsequently submitted false claims to Medicare for those mattresses. Further, the claims share common questions of law and fact. These questions include whether the beneficiaries met the Medicare coverage criteria, whether the claims submitted were false, whether Defendants caused the submission of the claims by Group II, and whether Defendants acted knowingly. Consequently, joinder is appropriate, and Murphy's request for severance is **DENIED**.

(2) Group II as a Necessary and Indispensable Party

Murphy also contends, again without citing any legal authority, that the Government's Complaint fails to name Group II as a necessary and indispensable party and therefore should be dismissed pursuant to Fed.R.Civ.P. 19. Specifically, he argues that his ability to protect his interests and rights will be impaired and impeded with the absence of Group II as a named defendant because he will be unable to fully and completely defend the Government's allegations, as critical discovery from Group II would be unavailable and he will be at risk of multiple or inconsistent obligations. He gives no explanation as to how or why this would occur. The Government counters that Murphy can conduct third-party discovery and initiate a separate action against the company should he choose.

*20 "To determine whether a party should be joined, Rule 19 of the Federal Rules of Civil Procedure sets forth a two-step inquiry, examining: (1) whether the party is 'necessary' to the action under Rule 19(a); and (2) whether the party is 'indispensable' under Rule 19(b)." ¹⁸ *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir.2005). Importantly, "[t]he burden of proof rests on the party raising the defense ... to 'show that the person who was not joined is needed for a just adjudication.'" *Id.* (citation omitted).

Because Murphy offers no explanation as to why the absence of Group II will affect his ability to protect his interests and rights, he fails to meet his burden of proof, and his motion to dismiss for failure to name Group II is also **DENIED**.

G. Defendants' Motions to Dismiss Count III Pursuant to the Intracorporate Conspiracy Doctrine

Finally, Defendants argue that Count III of the Government's complaint is barred by the intracorporate conspiracy doctrine. Count III alleges that Defendants conspired with each other,

Tracy Webber, and other Group II employees to defraud the United States by getting false or fraudulent claims allowed or paid by the United States. ¹⁹

The Government responds by asserting first, that the doctrine does not apply because it derives from antitrust law, and unlike antitrust law, the purpose of the False Claims Act is not furthered by immunizing a conspiracy among employees of a corporation and allowing them to hide behind the corporate shield. Second, the Government argues that even if the doctrine does apply, then the so-called "independent personal stake" exception, which precludes use of the doctrine where an employee has an independent personal stake in achieving a corporation's illegal objective, permits the conspiracy claim. According to the Government, because Defendants earned commissions on revenue Group II generated from the group II mattresses, they had an independent personal stake in the conspiracy and therefore the exception applies.

(1) The Intracorporate Conspiracy Doctrine's Applicability

"Under the intra-corporate [conspiracy] doctrine, which has been applied in the [False Claims Act] context, a corporation cannot conspire with its own officers while the officers are acting in their official capacity." ²⁰ *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F.Supp.2d 617, 651 (E.D.Va.2005) (*Custer Battles*) (quotation marks and footnote omitted). Similarly, under the doctrine, agents of the same principal cannot conspire with one another. *See* ²¹ *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir.1985) (quoting ²² *Cole v. Univ. of Hartford*, 391 F.Supp. 888, 893 (D.Conn.1975) ("Simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation."); *Grose v. Mansfield Corr. Inst.*, No. No. 1:06-cv-2720, 2007 U.S. Dist. LEXIS 71017, at *8, 2007 WL 2781654 (N.D. Ohio Sept. 24, 2007) (unpublished) ("Thus, under the intracorporate conspiracy doctrine, two employees or agents of the same corporation cannot form a conspiracy with one another because they are not considered 'two or more separate persons.'"); ²³ *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 509-10 (6th Cir.1991) (dismissing, pursuant to the intracorporate conspiracy doctrine, a conspiracy claim brought against agents of a school board); ²⁴ *Runs After v. United States*,

766 F.2d 347, 354 (8th Cir.1985) (no conspiracy involving members of Indian tribal council).

*21 The rationale for the doctrine is that since the acts of a corporate agent are the acts of the corporation, a conspiracy among the agents of the corporation, or among an agent and the corporation, is in effect a conspiracy with only one actor—the corporation. See *Buschi*, 775 F.2d at 1251-54; but see *Kirwin v. Price Communs. Corp.*, 391 F.3d 1323, 1327 (11th Cir.2004) (“Corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions.”).

The intracorporate conspiracy doctrine finds its roots in antitrust law, and was first developed in *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir.1952), cert. denied, 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953), an antitrust case brought because of an alleged conspiracy between the defendant corporation and its officers, employees, and agents. In *Nelson*, the court stated:

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

200 F.2d at 914.

The United States Supreme Court has endorsed this view with respect to antitrust actions under § 1 of the Sherman Act.

For example, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the Court held that § 1 of the Sherman Act does not “exclude [] coordinated conduct among officers or employees of the same company ... [nor does] an internal ‘agreement’ to implement a single, unitary firm’s policies ... raise the antitrust dangers that § 1 was designed to police.” This concept rests upon the basic principles of agency and conspiracy law, and the obvious notion that a conspiracy among agents of one corporation will not restrain trade. See David Warner, Comment, *Are the Corporation and Its Employees the Same?: Piercing the Intracorporate Conspiracy Doctrine in a Post-*

Enron World, 55 Kan. L.Rev. 1057 (2007) (“The theory makes sense logically in [the antitrust] context because a single corporation could not attempt to restrain trade or monopolize a particular market acting only with its agents.”).

The Supreme Court again addressed the intracorporate conspiracy doctrine in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (*Cedric Kushner*), where the Court held that an agent and a corporation could be sued under § 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) without conflicting with the doctrine. Specifically, the Court stated:

[The Court’s holding] does not deny that a corporation acts through its employees; it says only that the corporation and its employees are not legally identical. It does not assert that ordinary *respondeat superior* principles make a corporation legally liable under RICO for the criminal acts of its employees; that is a matter of congressional intent not before us. Neither is it inconsistent with antitrust law’s intracorporate conspiracy doctrine; *that doctrine turns on specific antitrust objectives*. Rather, we hold simply that the need for two distinct entities is satisfied; hence, the RICO provision before us applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority.

*22 *Id.* (citations omitted and emphasis added).

The Government contends that because of this language in the Supreme Court’s *Cedric Kushner* opinion, the intracorporate conspiracy doctrine is inapplicable in a non-antitrust case such as this one.²⁰ Although the Supreme Court’s language does not explicitly state this limitation, the Government argues that the language requires the application of the

doctrine to "turn on" the specific objectives of the statute in question.

In *Cedric Kushner*, the Court found that the doctrine was not applicable in the RICO context under § 1962(c) because the legislative intent of RICO is "clearly aimed at individual 'racketeers' infiltrating legitimate business [,]" whereas the antitrust laws "are ultimately intended to prevent corporations from exerting monopolizing anticompetitive force[.]" *USA Certified Merchs., LLC v. Koebel*, 262 F.Supp.2d 319, 330, n. 3 (S.D.N.Y.2007) (citing *Cedric Kushner*, 533 U.S. at 166). Thus, as the argument goes, because the antitrust statutes are designed to prevent the restraint on trade, two separate and distinct entities must be present, or else there would not be any restraint. See *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542 (4th Cir.1991) ("Fundamentally, for there to be a violation of § 1 of the Sherman Act two or more persons must act in concert. Generally, a business has the right to deal or not deal with whomever it likes, as long as it does so independently."). As such, in an antitrust case, application of the doctrine is consistent with statutory objectives. Typically, this is not the case with the False Claims Act because the purpose of the Act is to fight the fraudulent and false submission of claims to the Government. See *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1041 (10th Cir.2004) (citing S.Rep. No. 99-345, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 5266). Thus, in applying the doctrine, a court would not further this goal, but rather would inhibit it by allowing defendants to hide behind the corporate shield. Due to the different statutory objectives, the Government asserts that the doctrine should not bar its conspiracy claim against Defendants.

In analyzing this issue, it is important to note that the context of the Supreme Court's discussion in *Cedric Kushner* did not arise under § 18 U.S.C. § 1962(d), which is the civil RICO conspiracy statute.²¹ Rather, it arose under § 18 U.S.C. § 1962(c), which, by definition, requires a person and an enterprise.²² Thus, even though the Supreme Court has said that the intracorporate conspiracy doctrine does not apply to subsection (c), it left open the question of whether it applies to subsection (d) (the conspiracy statute), which is an issue that is currently the subject of a circuit split. See *Broussard v. Meineke Discount Muffler Shops*, 945 F.Supp. 901, 911 (W.D.N.C.1996) (noting the split).

Prior to *Cedric Kushner*, the Seventh and Ninth Circuits addressed this issue and held that a defendant may not bar a plaintiff's RICO conspiracy claim by relying on the intracorporate conspiracy doctrine. See *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 787 (9th Cir.1996) ("We agree with the reasoning of our sister circuit, and hold that § 1962(d) applies to intracorporate conspiracies."); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir.1989) (stating that the intracorporate conspiracy doctrine threatens the purpose of RICO).²³ After *Cedric Kushner*, the Eleventh Circuit relied on the Seventh Circuit, Ninth Circuit, and *Cedric Kushner*, and also held that the doctrine does not apply in a RICO conspiracy case. See *Kirwin*, 391 F.3d at 1327. In *Kirwin*, the Eleventh Circuit held that "the intracorporate conspiracy doctrine cannot be invoked to defeat a § 1962(d) claim[.]" and stated: "Corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions."²⁴ 391 F.3d at 1327 (citing *Cedric Kushner*, 533 U.S. at 163).

²³ Contrary to *Kirwin*, other courts interpreting the Supreme Court's language regarding the objectives of the statute in question find that *Cedric Kushner* is limited in its holding. See generally *United States ex rel. Bartlett v. Tyrone Hosp., Inc.*, 234 F.R.D. 113, 128 (E.D.Pa.2006). In *Bartlett*, the court applied the intracorporate conspiracy doctrine in a civil rights discrimination case and held that the doctrine is not limited to antitrust litigation, by finding that no express language in *Cedric Kushner* restricted the doctrine to antitrust cases.²⁵

Unfortunately, the Fourth Circuit has yet to comment on *Cedric Kushner's* impact on the intracorporate conspiracy doctrine. Based on its recent case law, however, it would likely reject the Government's argument and the reasoning and language of the Eleventh Circuit in *Kirwin* by continuing to hold that the doctrine is generally applicable to conspiracy actions against agents of a corporation. See, e.g., *ePlus Tech., Inc. v. Aboud*, 313 F.3d 166, 179-80 (4th Cir.2002).²⁶ Although the intracorporate conspiracy doctrine originally arose in antitrust cases, "the Fourth Circuit has consistently applied it in other contexts[.]" See *Veney v. Ojeda*, 321 F.Supp.2d 733, 748 (E.D.Va.2004). Because it relies on cases which cite the basic principles of agency and conspiracy law in support of the application of the intracorporate conspiracy

doctrine, it is apparent that the Fourth Circuit gives these principles great weight. See *Buschi*, 775 F.2d at 1251 (citing *Nelson Radio & Supply Co.*, 200 F.2d at 914); *Broussard*, 945 F.Supp. at 911-12 (discussing the Fourth Circuit's "fundamental tenet"). It has continuously reaffirmed the principle that the "doctrine dictates that a single entity cannot conspire amongst itself." *Cohn v. Bond*, 953 F.2d 154, 159 (4th Cir.1991); see also *Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 224 (4th Cir.2004).

Since *Cedric Kushner*, the Fourth Circuit has continued to utilize the doctrine in other non-antitrust conspiracy cases, albeit mostly in state conspiracy claims. See, e.g., *Lewin v. Cooke*, 28 F. App'x 186 (4th Cir.2002) (unpublished) (applying the doctrine to a plaintiff's state conspiracy claim); *ePlus*, 313 F.3d at 179-80. Prior to *Cedric Kushner*, in *Detrick*, 108 F.3d at 544, the Fourth Circuit applied the intracorporate conspiracy doctrine to a conspiracy claim based on Virginia law, without commenting on the doctrine's limited applicability. Then, in another case, *Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 224 (4th Cir.2004), which is a post-*Cedric Kushner* case, the Fourth Circuit cited both *Detrick* and *ePlus* to support the general proposition that a conspiracy cannot exist between agents of a corporation without restricting the doctrine's applicability to an antitrust case.

Further, there are several district court cases within the Fourth Circuit that have applied the doctrine to other types of non-antitrust cases. See *Custer Battles*, 376 F.Supp.2d at 651; *Chavez v. McIntyre*, 424 F.Supp.2d 858, 860-61 (W.D.Va.2006) (applying the "unauthorized acts" exception to the doctrine in a civil rights case); *Godfredson v. JBC Legal Group, P.C.*, 387 F.Supp.2d 543, 550 (W.D.N.C.2005) (applying the doctrine to a civil conspiracy case under North Carolina law); *Hoffman v. Balt. Police Dep't*, 379 F.Supp.2d 778, 796 n. 15 (D.Md.2005) (noting that the Fourth Circuit has applied the doctrine in the civil rights context); *Thomas v. N. Telecom, Inc.*, 157 F.Supp.2d 627, 634 (M.D.N.C.2000) (noting that the Fourth Circuit has not recognized the "policy or custom" exception to the intracorporate conspiracy doctrine and has applied it in the civil rights context); see also *Sadighi*, 36 F.Supp.2d at 297 (applying the doctrine to § 1962(d)).

*24 Additionally, the Second, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have extended the doctrine to federal civil rights conspiracy claims.²⁷ See, e.g., *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.1978); *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir.1994); *Doherty v. Am. Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir.1984); *Payton v. Rush-Presbyterian*, 184 F.3d 623, 632 (7th Cir.1999) (under the intracorporate conspiracy doctrine, a conspiracy cannot exist between members of the same entity); *Baker v. Stuart Broad. Co.*, 505 F.2d 181, 183 (8th Cir.1974); *Dickerson v. Alachua County Cmm'n*, 200 F.3d 761, 768-69 (11th Cir.2000).²⁸

Thus, on one hand, there are the basic principles of conspiracy and agency law, and on the other, there is the Supreme Court's comment that the intracorporate conspiracy doctrine "turns on" the applicable statute's objectives. Given that the Supreme Court did not expand its language and explicitly hold that the doctrine was limited to the antitrust context, the basic principles of conspiracy and agency law require that the intracorporate conspiracy doctrine bar conspiracy claims under the False Claims Act, § 31 U.S.C. § 3729(a)(3). As the district court in *Bartlett* stated, there is no express language in *Cedric Kushner* that restricts the application of the doctrine to antitrust cases, and the Fourth Circuit, and other courts within the circuit, have had the opportunity to restrict the application of the doctrine after *Cedric Kushner* but have declined to do so. In fact, as other courts have noted, the doctrine's "application should not depend on the perceived importance of the issue or public policy involved[.]" *Hoefer v. Fluor Daniel, Inc.*, 92 F.Supp.2d 1055, 1059 (C.D.Cal.2000), but rather on the well-established basic principles of conspiracy law.

Specifically, with respect to the False Claims Act, several courts hold that the intracorporate conspiracy doctrine applies to cases brought under the Act. See *Custer Battles*, 376 F.Supp.2d at 651 n. 89 (citing *United States v. Warning*, No. 93-4541, 1994 WL 396432, 1994 U.S. Dist. LEXIS 10402, at * 12 (E.D.Pa. July 27, 1994) (unpublished); *United States v. EER Sys. Corp.*, 950 F.Supp. 130, 133 (D.Md.1996)). Although no court has discussed in detail the doctrine's applicability to a conspiracy under the False Claims Act,²⁹ the Court notes that at least two other

district courts, in addition to *Custer Battles*, have applied the doctrine to the False Claims Act after *Cedric Kushner*. See *United States ex rel. Fago v. M & T Mortgage Corp.*, 518 F.Supp.2d 108, 117-18 (D.D.C.2007); *United States ex rel. Fent v. L-3 Communs. Aero Tech LLC*, No. 05-cv-0265-CVE-SAJ, 2007 U.S. Dist. LEXIS 81976, at *14-15, 2007 WL 3283689 (N.D.Okla. Nov. 2, 2007) (unpublished) (applying the intracorporate conspiracy doctrine to the False Claims Act although the Tenth Circuit has not yet adopted it in such a case).

Given the applicable law in this circuit, it is clear that the Fourth Circuit accords a significant amount of weight to the basic principal that it is a legal impossibility for a corporation to conspire with its agents, and likewise, for its agents to conspire with one another. *Broussard*, 945 F.Supp. 911-12 (discussing the Fourth Circuit's "fundamental tenet"). Thus, the Court will not construe the Supreme Court's language in *Cedric Kushner* as limiting the application of the doctrine to antitrust cases because the basic principles of agency and conspiracy law trump the Government's argument that the statute's purpose and policy should govern. See ¹ *Thomas*, 157 F.Supp.2d at 634. In fact, in order for the Government's argument to prevail, the Court would have to ignore decades of Fourth Circuit case law. The language in *Cedric Kushner* is simply not strong enough to discredit the cases within the Fourth Circuit that have recently applied the doctrine outside the antitrust context. For the doctrine not to apply in this case, and for the Court to be internally consistent, it would also have to hold that the doctrine was inapplicable in civil rights, RICO, and state civil conspiracy cases as well because the purposes of those statutory objectives are equally different than the objectives of antitrust laws. The Fourth Circuit has thus far declined to so hold.

*25 Accordingly, the Court **HOLDS** that the intracorporate conspiracy doctrine applies to conspiracy claims against agents of a corporation brought under the False Claims Act. Thus, unless an exception applies, the Government's conspiracy claims must be dismissed.

(2) *Exceptions to the Intracorporate Conspiracy Doctrine*
The Fourth Circuit has recognized two exceptions to the general rule that agents of a principal cannot conspire with one another or the principal: the so-called "independent personal stake" exception, and where the corporate agents are alleged to have acted outside the normal course of their corporate duties-the "unauthorized acts" exception. See

¹ *Hodgin v. Jefferson*, 447 F.Supp. 804, 807 (D.Md.1978);

² *Buschi*, 775 F.2d at 1252-53 ("Thus, while authorized acts of the officials would constitute corporate action, (and hence would avoid a conspiracy charge), unauthorized acts would not."); ³ *Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir.1974) ("We agree with the general rule but think an exception may be justified when the officer has an independent personal stake in achieving the corporation's illegal objective.").

Initially, the Court notes that the "unauthorized acts" exception is not applicable because the Government did not allege in its Complaint that Defendants acted outside the scope of their employment. Thus, the only inquiry is whether the "independent personal stake" exception applies.

Under the "independent personal stake" exception, the agent must have a personal interest in the illegal activity "wholly separable" and independent of his relationship with the corporation. See *Douty v. Irwin Mortgage Corp.*, 70 F.Supp.2d 626, 633 (E.D.Va.1999) (quoting ⁴ *Selman v. Am. Sports Underwriters, Inc.*, 697 F.Supp. 225, 239 (W.D.Va.1988)); ⁵ *ePlus*, 313 F.3d at 179-80. For example, in *Greenville*, the court held that the personal stake exception applied in an antitrust case where an individual defendant, who served as president, director and stockholder of the corporation he was alleged to have conspired with, had a separate affiliation with a competing newspaper, and, due to that affiliation, he would personally benefit from destroying the plaintiff's business. ⁶ 496 F.2d at 399. Likewise, in ⁷ *ePlus*, 313 F.3d at 179-80, the court held the exception applied when an agent stood to gain from the alleged conspiracy, and her personal stake was "wholly separate from her connection to [the principal]" because the purpose of the conspiracy was to send the principal into bankruptcy.

The Fourth Circuit has not decided whether sales commissions earned through sales of a principal-corporation's product are considered a wholly independent personal stake. However, in *Douty*, the district court held that such a stake was insufficient. 70 F.Supp.2d at 633 ("According to plaintiff, the individual defendants had a personal stake in the increased commissions available to them after her termination. We find this pleading insufficient because it does not allege that defendants had a stake in her termination independent of their relationship with [the corporation]. To the contrary, any

'personal stake' defendants had in increased commissions was incidental to their employment relationship with [the corporation] because their commissions were determined and paid by [the corporation]."). This analysis is persuasive.³⁰ Where a corporation's success is directly dependent on the agent's success in furthering the illegal activity, the two are directly related and are not "wholly independent" of one another. If one benefits, so will the other. This was not the case in either *Greenville*, where the individual defendant's separate affiliation with a different company was not related to the success of the company with which he served as president, director, and shareholder, or *ePlus*, where the agent conspired with other employees to siphon money from the principal in order to drive the principal into bankruptcy. The agent and principal in those cases did not benefit proportionally.

*26. Applying these principles to this case, if Defendants sold more mattresses, both they and Group II profited. Their success was intertwined and not wholly independent. The more fraudulent claims that were submitted through the course of their employment with Group II, the more sales commissions Defendants earned. (See Second Am. Compl. ¶ 30.) Thus, as is the case here, when an agent of a corporation is working within the scope of his employment and acts in a manner that benefits both himself and his corporation for similar reasons, the narrow "independent personal stake" exception is not applicable.

Accordingly, because the intracorporate conspiracy doctrine applies to False Claims Act conspiracies, and because the

personal stake exception does not apply, Defendants' motions to dismiss Count III of the Complaint are **GRANTED**.

III. CONCLUSION

In summary, the Court **ORDERS** that: (1) David Murphy's Motion to Set Aside Default [Docket 112], Motion to Exceed Page Limit for Memorandum of Law in Support of his Motion to Dismiss [Docket 125], and Motion for Leave to File Reply Brief Out of Time [Docket 133] be **GRANTED**; (2) the Motions to Dismiss of Eric Gwinn, David Murphy, and Thomas Binetti, [Dockets 102, 118, & 121], and the Motion for Judgment on the Pleadings of Charlie Gwinn [Docket 119] be **GRANTED IN PART AND DENIED IN PART**; and (3) the Government's Motions for Leave to File Surreplies and a Supplemental Response [Dockets 116, 136, & 164] and Motion to Substitute Page One of Exhibit A to the Second Amended Complaint [Docket 130] be **GRANTED** and those documents be **FILED**.

The Court **DIRECTS** the Clerk to send a copy of this Memorandum Opinion and Order to counsel of record and any unrepresented party. Furthermore, the Court **DIRECTS** the Clerk to publish this decision on the Court's website at [http:// www.wvsc.uscourts.gov](http://www.wvsc.uscourts.gov).

All Citations

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Footnotes

- 1 Murphy also filed a Motion to Exceed Page Limit for Memorandum of Law in Support of Motion to Dismiss [Docket 125]. There being no objection by the Government, Murphy's motion is **GRANTED**. However, after reading the memorandum, the Court notes that the arguments contained therein could have easily been articulated and developed in less than twenty pages. Additionally, Murphy filed a Motion for Leave to File Reply Brief Out of Time [Docket 133]. There also being no objection to this motion, it is **GRANTED**, and his reply will be considered timely.
- 2 In addition to Defendants' motions, the Government filed motions for leave to file two surreplies and a supplemental response. For good cause shown, the Government's motions [Dockets 116, 136, & 164] are **GRANTED**. Accordingly, the Court **ORDERS** that those documents be filed. Additionally, the Government filed a Motion to Substitute Page One of Exhibit A to the Second Amended Complaint [Docket 130]. There being no objection to the Government's motion, it is also **GRANTED**.

- 3 The Government's original complaint against Charlie Gwinn was filed on April 7, 2006, and amended once on April 13, 2006.
- 4 As a side note, on October 11, 2005, Group II pled guilty to a single-count information in this Court. See *United States v. Group II Med. Supports, LLC*, Criminal No. 5:05-0127. The information alleges that between January 1998, and February 2004, Group II made false statements in connection with the delivery of payment for health care benefits, in violation of 18 U.S.C. § 1035(a)(2).
- 5 The introductory paragraph on the first page of the Complaint reads: "This action is brought against defendants ... under the provisions of the False Claims Act, 31 U.S.C. §§ 3729-[]33...." (Second Am. Compl. at 1.)
- 6 According to the Complaint, the KX or ZX modifier indicates that the supplier has the requisite Medicare documentation on file and can make it available to Medicare upon request. (See Second Am. Compl. ¶ 62.)
- 7 The Government has also provided Defendants with an un-redacted supplemental exhibit that includes the beneficiaries' names.
- 8 When considering Charlie Gwinn's motion for judgment on the pleadings pursuant to Rule 12(c), the Court applies the same standard as when considering a motion to dismiss pursuant to Rule 12(b)(6). See *Burbach Broad. Co. of Del. v. Elkins Radio Corp.*, 278 F.3d 401, 405-06 (4th Cir.2002).
- 9 Binetti was the only defendant who did not make this argument.
- 10 In his motion to dismiss, Eric Gwinn argues that the statute of limitations prohibits the Government from pursuing hundreds of claims contained in Exhibit A of the Complaint. Eric Gwinn abandons this argument in his reply, but he reserves his right to make this argument again on summary judgment. Accordingly, his motion to dismiss the claims based on the statute of limitations is **DENIED WITHOUT PREJUDICE**.
- 11 Binetti requests transfer to the Eastern District of Virginia, and Murphy asks for a transfer to the Eastern District of North Carolina.
- 12 Murphy states that his answer would have been filed electronically on Friday June 29, 2007, but for computer related difficulty with the attempted electronic filing.
- 13 Although the Court finds that Murphy's response was reasonably prompt, the Court notes that it in no way condones counsel's chosen course of conduct. There are certain deadlines in civil litigation that should not, under any circumstances, be missed. Filing an answer is one of them.
- 14 The Court does not look with favor upon the fact that the Government had been in settlement discussions with Murphy and apparently led him to believe that resolution of this case was possible, but then subsequently filed a motion for entry of default without discussing that course of action with him. This behavior on the part of the Government is unnecessary in the pursuit of justice and falls short of this Court's notion of civility and collegiality in the practice of law.
- 15 Even if the Government did not properly plead Counts I-III, Defendants' motion to dismiss on this ground would be denied because dismissal is not the appropriate remedy. Under Fed.R.Civ.P. 15(a), the United States would be permitted to amend its complaint to correct any minor error.
- 16 While not of great significance, unlike in both *Clausen* and *Brooks*, this is not a *qui tam* action, and therefore some concerns of preventing meritless cases from surviving a motion to dismiss under Rule 9(b) are not present. See generally *Clausen*, 290 F.3d at 1313 n. 24 ("This is especially so in cases involving the False Claims Act, which provides a windfall for the first person to file and permits recovery on behalf of the real victim, the Government.").
- 17 See *Little ex rel. U.S. Gov't v. ENI Petroleum Co.*, No. 06-120-M, 2007 U.S. Dist. LEXIS 56979, at * 11, 2007 WL 2254318 (W.D.Okla. Aug. 3, 2007) (unpublished); *Penizotto*, 1996 U.S. Dist. LEXIS 10316, at * 13 (citing 31 U.S.C. § 3731(a)) ("Under the [False Claims Act], parties have nationwide power to subpoena all witnesses to testify at trial, regardless of the location of the pending action.... Therefore, all potential witnesses are available for compulsory service of process, irrespective of whether the trial proceeds in California or Pennsylvania.").
- 18 Fed.R.Civ.P. 19(a) provides, in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

- 19 § 3729(a)(3) imposes [False Claims Act] liability on any person who 'conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.' *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F.Supp.2d 617, 651 (E.D.Va.2005) (quoting § 31 U.S.C. § 3729(a)(3)).
- 20 Notably, at least one other district court within the Fourth Circuit has rejected this precise argument. See *Culver v. JBC Legal Group, P.C.*, No. 5:04-cv-389, 2005 U.S. Dist. LEXIS 45426, at *17-18 (W.D.N.C. June 28, 2005) (unpublished) (rejecting the plaintiff's argument that the doctrine should be limited only to cases alleging conspiracy with respect to the Sherman Anti-Trust Act and applying it to a civil conspiracy case under North Carolina law); see also *Locus v. Fayetteville State Univ.*, 870 F.2d 655 (table), 1989 WL 21442, at *2 (4th Cir. Mar.8, 1989).
- 21 'It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.' § 18 U.S.C. § 1962(d).
- 22 § 1962(c) provides, in pertinent part:
 It shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate ... in the conduct of [the] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
- 23 In *Ashland Oil, Inc.*, the Seventh Circuit found that intracorporate conspiracies were actionable under RICO by distinguishing the Supreme Court's contrary ruling in antitrust cases:
 Since a subsidiary and its parent theoretically have a community of interest, a conspiracy 'in restraint of trade' between them poses no threat to the goals of antitrust law-protecting competition. In contrast, intracorporate conspiracies do threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits.
 § 875 F.2d at 1281.
- 24 Courts within the Fourth Circuit have rejected this reasoning by noting that the court relies on the "fundamental tenet" that a corporation cannot conspire with itself. *Broussard*, 945 F.Supp. at 911-12; *Sadighi v. Daghighfekr*, 36 F.Supp.2d 279, 297 (D.S.C.1999); *Huntingdon Life Sciences v. Rokke*, 986 F.Supp. 982, 991 (E.D.Va.1997) (noting that there are no Fourth Circuit cases addressing the doctrine in the context of a RICO claim). The court in *Kirwin* cited *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 544 (4th Cir.1997), in support of the statement that the Fourth Circuit has reached the conclusion that the intracorporate conspiracy doctrine bars § 1962(d) claims. However, it appears the conspiracy claim at issue in *Detrick* was under the Virginia conspiracy statute. *Id.* ("Panalpina argues that the district court erred in dismissing Panalpina's breach of contract and Virginia conspiracy statute counterclaims.").
- 25 The plaintiff in *Bartlett* alleged a conspiracy between the principal entity and the agent, and the district court specifically stated it could not practically envision how the two could conspire to discriminate. § 234 F.R.D. at 128. That situation is not analogous to the case before the Court, as it is entirely possible for the employees of Group II to conspire with one another.
- 26 In *ePlus*, it is unclear whether the doctrine was applied to a state civil conspiracy under Virginia law, or the RICO civil conspiracy claim under § 1962(d), or both. Regardless, the court ultimately did not prohibit

- the plaintiff's conspiracy claim because the court found that the personal stake exception applied. See also *1* *Sadighi*, 36 F.Supp.2d at 297 (applying the doctrine to *1* § 1962(d)).
- 27 There are a minority of circuits that do not apply the doctrine to these claims. See *1* *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1038 (11th Cir.2000) (citing *1* *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1127 (10th Cir.1994) (declining to apply the intracorporate conspiracy doctrine to a § 1985(2) claim because the intracorporate conspiracy doctrine, "designed to allow one corporation to take actions that two corporations could not agree to do, should not be construed to permit the same corporation and its employees to engage in civil rights violations"); *1* *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir.1984) (finding that the "boundaries of an 'intracorporate' exception to § 1985(3) conspiracy provision should be narrower than in antitrust" and holding the intracorporate conspiracy doctrine did not apply in the present case because "defendants' activities [] went beyond 'a single act' of discrimination"); *1* *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1256-59 (3d Cir.1978), *vacated on other grounds*, *1* 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979)).
- 28 Like the Eleventh Circuit, although the Seventh Circuit holds that a RICO conspiracy claim is not subject to the intracorporate conspiracy doctrine, *1* *Ashland Oil, Inc.*, 875 F.2d at 1281, it does hold that a civil rights conspiracy claim against members of the same entity should be dismissed pursuant to the doctrine. See *1* *Payton*, 184 F.3d at 632. This is internally inconsistent. There is no reason to apply the doctrine in the civil rights cases, but not in the RICO context. Neither statutory objective is analogous to the antitrust objective, and thus, if a court applies the doctrine in one context, it should also apply it to the other. The Eleventh Circuit stated in *Kirwin* that "agents may be held liable for their own conspiratorial actions[.]" *1* 391 F.3d at 1327. In order to stay true to that language, the doctrine should not apply in either RICO cases or a civil rights cases. However, the court holds otherwise. See, e.g., *1* *Albra v. City of Fort Lauderdale*, 232 F. App'x 885, 890 (11th Cir. Apr.25, 2007) (unpublished) ("Under the doctrine of intracorporate conspiracy, [in a civil rights case] 'a corporation cannot conspire with its employees, and its employees, when acting in the scope of their employment, cannot conspire among themselves' because a corporation and its employees are considered to be 'a single legal actor.' ").
- 29 In *1* *United States v. President & Fellows of Harvard College*, 323 F.Supp.2d 151, 199 n. 40 (D.Mass.2004) (emphasis added), the court noted that the intracorporate conspiracy doctrine "holds a corporation cannot conspire with its own employees or agents, because that would be conspiring with itself[.]" but cited *Cedric Kushner* and opined that "it is questionable whether [the doctrine] would apply to an FCA case."
- 30 Given the limited nature of the personal stake exception, the Court is not persuaded by the only case cited by the Government in support of its argument that the exception applies to sales commissions, *United States ex rel. Regan v. Medtronic*, No. 95-1236-MLB, at * 12-13 (D.Kan. May 3, 1999) (unpublished). The district court in that case cited no law in support of its holding, and it is directly opposite of the holding of a court within this circuit, *Douty*, 70 F.Supp.2d at 633. Further, the Fourth Circuit has declined "to extend the personal stake exception beyond the rationale underlying the *Greenville* decision []" because further expansion of the exception would threaten to swallow the doctrine. *Oksanen*, 945 F.2d at 705; *1* *Selman*, 697 F.Supp. at 239. By accepting the Government's argument, the Court would be doing just that-extending the exception beyond *Greenville*.

2016 WL 7638135

Only the Westlaw citation is currently available.
United States District Court, D. South Carolina.

Maurice Wyman SCOTT, Plaintiff,
v.
CHROME CAPITAL, LLC, Defendant.

C/A No.: 3:15-2692-CMC-SVH

Signed 07/25/2016

Attorneys and Law Firms

Maurice Wyman Scott, Columbia, SC, pro se.

Christian Hart Staples, Shurnaker Loop and Kendrick,
Charlotte, NC, for Defendant.

REPORT AND RECOMMENDATION

Shiva V. Hodges, United States Magistrate Judge

*1 Maurice Wyman Scott ("Plaintiff"), proceeding pro se and in forma pauperis, brought this action against Chrome Capital, LLC ("Defendant"). This matter comes before the court on Defendant's motion to dismiss filed on September 2, 2015, pursuant to Fed. R. Civ. P. 12(b)(2), (4), (5), and (6). [ECF No. 21]. On September 2, 2015, the court issued an order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), notifying Plaintiff of the dismissal procedures and possible consequences if he failed to adequately respond to Defendant's motion. [ECF No. 24]. Defendant accepted service of process on May 24, 2016, which rendered its arguments under Fed. R. Civ. P. 12(b)(2), (4), and (5) moot. [ECF No. 31]. Because the parties presented evidence outside of the pleadings, the undersigned informed them that Defendant's motion would be construed as a motion for summary judgment and permitted them to submit additional evidence, if any, for the court's consideration. [ECF Nos. 29, 33]. The motion having been fully briefed [ECF Nos. 21, 25, 26, 28, 35, 37], it is ripe for disposition.

All pretrial proceedings in this case were referred to the undersigned pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civ. Rule 73.02(B)(2)(e) (D.S.C.). Because Defendant's motion is dispositive, this report

and recommendation is entered for the district judge's consideration. For the reasons that follow, the undersigned recommends the district judge grant the motion.

I. Factual and Procedural Background

A. Complaint

Plaintiff alleges the court has jurisdiction under the Fair Debt Collection Practices Act ("the FDCPA"); 41 U.S.C. § 6503; and 28 U.S.C. § 1332, the diversity statute. [ECF Nos. 10 at 1 and 12]. He maintains Defendant conspired with Capital City Cycles ("CCC") to illegally repossess his motorcycle. [ECF No. 12 at 3]. He contends individuals affiliated with CCC invaded his privacy by visiting his home repeatedly and without invitation or authorization. *Id.* at 4. He maintains Defendant wrongly asserted its contract with him was incomplete as a result of a failed payment to CCC¹ that was not covered under the terms of the contract. *Id.* at 3. He alleges Defendant violated his privacy rights² under the contract by communicating with CCC regarding the debt. *Id.* He contends Defendant did not give him an effective right to cure the default because it notified him of its intention to sell the motorcycle before the expiration of the period it had previously given him to acquire insurance. *Id.* at 3, 4. He alleges Defendant failed to notify him of the time, date, and outcome of the motorcycle's sale and did not provide him with a reconciliation of the debt after the sale. *Id.* at 4. He maintains Defendant fraudulently misrepresented the amount due under the contract. *Id.* at 5. He contends Defendant conspired with CCC to obtain funds in addition to those specified under the terms of the contract. *Id.* at 4.

*2 Plaintiff seeks the following relief: (1) return of all listed down payments, fees, and payments made to Defendant; (2) statutory damages for violations of the FDCPA; and (3) punitive damages in the amount of \$100,000. [ECF No. 12 at 5].

B. Factual Background

On August 27, 2014, Plaintiff entered into an agreement ("Lease Agreement") with CCC for the lease of a used 2011 Harley Davidson FXDB motorcycle with Vehicle Identification Number 1HD1GX413BC303642 ("the Motorcycle").³ [ECF No. 21-2 at 1-7]. The Lease Agreement provided that \$3,309.26, which included a capitalized cost reduction ("down payment")⁴ of \$2,515.00, a first monthly payment of \$394.26, and a refundable security

deposit of \$400.00, was the “[a]mount to be paid in cash” to CCC at lease signing. [ECF No. 21-2 at 2]. It reflected a total gross capitalized cost of \$14,120.00. *Id.* However, that amount was reduced to an adjusted capitalized cost of \$11,600.00 after the down payment of \$2,515.00. *Id.* The adjusted capitalized cost was further reduced by subtraction of the residual value of the Motorcycle after the lease term. *Id.* Thus, the payment breakdown reflected a charge for the Motorcycle’s depreciation in the amount of \$5,870.25 and a “rent charge” of \$8,323.11, for total base payments of \$14,193.36. *Id.* It indicated the lease term was for 36 months and that Plaintiff would be required to make 35 additional monthly payments of \$394.26. *Id.* Plaintiff agreed to maintain insurance throughout the lease term at his own expense. *Id.* at 4. The Lease Agreement provided that CCC “may sell, assign or in any other way transfer our rights and responsibilities in the Vehicle and this Lease.” [ECF No. 21-2 at 5]. On the last page of the Lease Agreement, CCC assigned the “Lease and all right and title to the Vehicle” to Defendant. *Id.* at 7.

Plaintiff also completed a form labeled “Lease Application–Customer Statement.” [ECF No. 21-2 at 10–11]. The form indicated “[t]his Lease Application–Customer Statement will be submitted to Chrome Capital, and its successors and assigns at 3073 S. Horseshoe Dr, Naples, FL 34104, for consideration of whether it meets the credit requirements of Chrome Capital and its successors and assigns.” *Id.* at 11. It specified that Plaintiff, as “[a]pplicant” would be “required to obtain and pay for vehicle insurance covering the vehicle for the full term of the lease.” *Id.*

*3 Plaintiff signed a separate document titled “Acknowledgements.” [ECF No. 21-2 at 8]. The document was provided “as a summary of certain key points involved” in his “motorcycle lease package.” *Id.* It reiterated that Plaintiff had agreed to maintain insurance coverage during the term of the lease; may have to pay a substantial charge if he terminated the lease before the end of the term; consented to make payments pursuant to an ACH authorization; agreed to maintain the Motorcycle as recommended in the owner’s manual; consented to allow ACH drafts from his bank account for payment of personal property taxes for the Motorcycle; and agreed to pay certain fees at the end of the lease term. *Id.* Plaintiff executed an ACH Debit Authorization Form that authorized Defendant to automatically debit his bank account in the amount of \$394.26 once a month beginning on October 1, 2014, for a term of 35 months. [ECF No. 35 at 23].

Plaintiff made a monthly payment through ACH debit on October 1, 2014. Fleming Aff. ¶ 11⁵; [ECF No. 35 at 26]. On October 15, 2014, Sarah Skare (“Ms. Skare”), Defendant’s Senior Compliance Officer, sent Plaintiff an email noting that his Progressive insurance coverage for the Motorcycle had lapsed on October 7, 2014. Fleming Aff. ¶ 14; [ECF No. 35 at 28]. Ms. Skare informed Plaintiff that he was required to maintain insurance under the terms of the Lease Agreement and that a failure to immediately reinstate insurance would constitute a default. [ECF No. 35 at 28–29]. Plaintiff made a monthly payment through ACH debit on November 1, 2014. Fleming Aff. ¶ 11; [ECF No. 35 at 26]. Defendant attempted to debit Plaintiff’s ACH account for the monthly payment on December 1, 2014, but the charge was declined because Plaintiff stopped payment on the transaction. *Id.* at ¶ 12; ECF No. 35 at 27.

On December 4, 2014, Ms. Skare sent a letter informing Plaintiff that Defendant received notice that his Geico insurance policy⁶ was cancelled on November 16, 2014, and that he had until December 11, 2014, to provide proof of insurance coverage for the Motorcycle. [ECF No. 25-2 at 1].

On or about December 4, 2014, Plaintiff sent a text message to Brandon Collins, assistant manager at CCC, that stated as follows: “Please be advised that you can come pick up the motorcycle as stated at 237 branchview dr, key is in the switch.” Fleming Aff. ¶ 16; [ECF No. 35 at 31]; *see also* ECF No. 12 at 3. CCC notified Defendant of the text message from Plaintiff and Defendant authorized CCC to act as its agent to repossess the Motorcycle. [ECF No. 24-2 at 8]. CCC took possession of the Motorcycle on December 4, 2014. [ECF No. 12 at 3]; *see also* ECF No. 25-2 at 2.

On December 8, 2014, Ms. Fleming⁷ sent a letter to Plaintiff that indicated Defendant had repossessed the Motorcycle and executed an affidavit of repossession. [ECF Nos. 25-2 at 2 and 35 at 32]. Ms. Fleming informed Plaintiff that the Motorcycle would be returned to him if he paid the full past due amount, including recovery expenses, within 10 days of the date of repossession. *Id.* Ms. Fleming indicated Plaintiff should contact Defendant by telephone to obtain the exact amount that must be paid for the Motorcycle to be returned and the Lease Agreement to be reinstated. *Id.* She stated the Motorcycle would be sold at private sale after December 14, 2014, if Plaintiff failed to take the steps necessary to reinstate the Lease Agreement. *Id.*

On December 11, 2014, Defendant's attorney, Brian C. Willis ("Mr. Willis"), wrote a letter to Plaintiff that stated Plaintiff had entered into a Lease Agreement with CCC and had agreed to make an initial payment of \$3,309.26. [ECF No. 25-2 at 7]. Mr. Willis indicated that Plaintiff had authorized CCC to electronically debit his account for the initial payment, but that the transaction was rejected on 15 separate occasions because he had insufficient funds in his account. *Id.* He noted that Plaintiff had failed to make his most recent monthly payment to Defendant and had cancelled his insurance coverage for the Motorcycle. *Id.* He indicated Defendant had repossessed the Motorcycle on December 4, 2014, and that Plaintiff had until December 14, 2014, to pay the entire past due amount. *Id.*

*4 On December 18, 2014, Mr. Willis sent a second letter to Plaintiff in response to his inquiry as to the amount required to reinstate the lease. [ECF No. 25-2 at 3]. Mr. Willis indicated Plaintiff would need to pay \$2,953.97, which represented the \$2,515.00 due at lease signing, the December 1 payment of \$394.26, a five percent late fee of \$19.71, and a stop payment fee of \$25.00. *Id.* He indicated the \$2,515.00 should be paid directly to CCC, as per the terms of the Lease Agreement. *Id.* He noted that CCC was storing the Motorcycle and that Defendant would send a notification of release to CCC, once it received payment, notice that insurance was reinstated, and notice that payments would resume on the first day of each month from the ACH account on file. *Id.* Plaintiff failed to take the steps necessary to cure the default. Fleming Aff. ¶ 22.

On or about January 28, 2015, Defendant sold the Motorcycle to CCC for \$10,650.00 and credited the sale price to Plaintiff's outstanding account balance. [ECF No. 35 at 36]; Fleming Aff. ¶ 24. Plaintiff failed to pay Defendant the additional amount outstanding on his account. Fleming Aff. ¶ 27.

II. Discussion

A. Standard on Summary Judgment

The court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden of demonstrating that summary judgment is appropriate; if the movant carries its burden, then the burden shifts to the non-movant to set forth specific facts shows that there is a genuine issue for trial. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). If a movant asserts that a fact

cannot be disputed, it must support that assertion either by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" or by "showing ... that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

In considering a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party.

See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Further, while the federal court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case, see, e.g., *Cruz v. Beto*, 405 U.S. 319 (1972), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts that set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact when none exists. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990).

B. Analysis

Plaintiff alleges Defendant violated provisions of the FDCPA, breached its contractual obligations under 41 U.S.C. § 6503, breached the terms of the Lease Agreement, fraudulently misrepresented the terms of the Lease Agreement, and engaged in a civil conspiracy with CCC. [ECF Nos. 10, 12].

1. The FDCPA

Plaintiff alleges Defendant violated 15 U.S.C. §§ 1692d, 1692e, 1692f, and 1692g of the FDCPA. [ECF Nos. 10 at 1, 12, and 25 at 1]. He maintains individuals employed by CCC repeatedly visited his home without invitation or authorization and threatened to repossess the Motorcycle. [ECF No. 12-2 at 3]. He contends Defendant failed to provide him a notice of right to cure, notice of repossession, notice of sale, notice of proceeds for such sale of repossessed

merchandise, and notice of actual date of sale, as required under the FDCPA. [ECF No. 25 at 1].

*5 The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not completely disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). To establish a violation of the FDCPA, a plaintiff must prove (1) he has been the object of collection activity arising from consumer debt, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA. ¹ *Chatman v. GC Services, LP*, No. 3:14-526-CMC, 57 F. Supp. 3d 560, 65 (D.S.C. 2014), citing *Webster v. ACB Receivables Mgmt., Inc.*, 15 F. Supp. 3d 619, 624-25 (D. Md. 2014).

The FDCPA defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." ² 15 U.S.C. § 1692a(6). The following are not considered debt collectors under the FDCPA:

(A) any officer or employee of a creditor, while in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity is (i) incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

Id.

The general distinction between debt collectors and non-debt collectors under the FDCPA is whether the individual or business is attempting to collect money owed to it or to another. *See* ³ 15 U.S.C. § 1692a(6); *see also Brown v. Wachovia Bank, C/A* No. 8:10-1816-HMH-JDA, 2011 WL 5024297, at *3 (D.S.C. Sept. 30, 2011) ("[C]reditors collecting their own debts are not 'debt collectors' for purposes of the FDCPA and are exempt from the FDCPA's provisions.") (citing *Glover v. Univ. Motor Co., C/A* No. 3:08-2254, 2010 WL 234903, at *3 (D.S.C. Jan. 15, 2010); *Serfass v. CIT Group/Consumer Fin., Inc., C/A* No. 8:07-90, 2008 WL 351116, at *3 (D.S.C. Feb. 7, 2008) (finding the defendant was not regulated by the FDCPA because the defendant was a creditor collecting its own debts); ⁴ *Scott*, 326 F. Supp. 2d at 717 ("[C]reditors are not liable under the FDCPA." (citing ⁵ *Perry v. Stewart Title Co.*, 756 F.2d 1197 (5th Cir. 1985))); *Davis v. Dillard Nat'l Bank, C/A* No. 1:02-546, 2003 WL 21297331, at *4 (M.D.N.C. June 4, 2003) ("Crediting institutions, such as banks, are not debt collectors under ⁶ section 1692a(6)(A) because they collect their own debts and are in the business of lending money to consumers." (citing ⁷ *Thomasson v. Bank One, La., N.A.*, 137 F. Supp. 2d 721, 724 (E.D. La. 2001)); ⁸ *Meads v. Citicorp Credit Servs., Inc.*, 686 F. Supp. 330, 333 (S.D. Ga. 1988))).

*6 The facts establish that Defendant is a creditor, as opposed to a debt collector. Plaintiff entered into the Lease Agreement for the Motorcycle with CCC, which was immediately assigned to Defendant. [ECF No. 21-2 at 1-7]. Plaintiff does not dispute the assignment of the Lease Agreement to Defendant and recognizes that Defendant funded and financed the Lease Agreement, which was secured by the Motorcycle. [ECF No. 12 at 3]. Because Plaintiff

fails to allege Defendant is a debt collector, his cause of action under the FDCPA must fail with regard to any efforts Defendant took to collect its own debt. *See Dempsey v. Greenville Heritage Federal Credit Union*, No. 6:15-664-TMC, 2015 WL 1564780, at *3 (D.S.C. Apr. 8, 2015) (“Plaintiff does not plausibly allege a violation of the FDCPA because the only reasonable inference from the Complaint is that Defendants were creditors because the Credit Union was the entity to whom the debt was owed and it was secured by Plaintiff’s car.... The FDCPA does not create a right of action against a creditor for unfair practices....”).

Plaintiff alleges Defendant violated the FDCPA by inducing CCC to violate the FDCPA to collect the debt. The undersigned’s review of the facts reveals that Defendant did not induce CCC to violate the FDCPA. As an initial matter, liability under the FDCPA is imposed only on debt collectors, and the undersigned’s research has yielded no cases in which creditors have been held liable for the actions of debt collectors who attempted to collect the debt owed to the creditor. *See* 15 U.S.C. § 1692(e). Because the FDCPA does not create a cause of action for individuals to sue creditors for inducing debt collectors to perform actions in violation of the FDCPA, Defendant cannot be held liable for CCC’s actions to collect the debt, even if Defendant had induced CCC to violate the FDCPA. In addition, Plaintiff has alleged no specific acts on the part of CCC to collect Defendant’s debt that violate 15 U.S.C. § 1692d, 1692e, 1692f, or 1692g. While he alleges employees of CCC visited his home on multiple occasions to obtain payment of the debt, he does not allege they engaged in any of the prohibited behaviors under 15 U.S.C. § 1692d and does not allege CCC’s actions were taken to obtain the funds owed to Defendant. He does not allege CCC used false, deceptive, or misleading representations or means to secure the debt owed to Defendant. *See* 15 U.S.C. § 1692e. He does not allege CCC engaged in any unfair or unconscionable means to collect or attempt to collect the debt owed to Defendant. *See* 15 U.S.C. § 1692f. The fact that Defendant authorized CCC to repossess the Motorcycle does not indicate a violation of the FDCPA because Defendant had a right to possession of the Motorcycle as collateral under the Lease Agreement. *See* 15 U.S.C. § 1692f(6). Finally, Plaintiff does not allege CCC failed to send the written notice required under 15 U.S.C. § 1692g with regard to any debt owed to Defendant.

Furthermore, the record suggests CCC’s actions were taken for the purpose of collecting its own debt and were not induced by Defendant. Although Plaintiff argues to the contrary, the record reflects that he entered into a contractual relationship with CCC. *See* ECF No. 21-2 at 1-7. As part of the Lease Agreement, Plaintiff agreed to pay CCC a down payment of \$2,515.00. *Id.* at 2. The down payment was subtracted from the total gross capitalized cost⁸ of the transaction to determine the total of base payments. *Id.* Therefore, Plaintiff received the benefit of the down payment because the cost of the Motorcycle was reduced over the lease period by \$2,515.00. According to Ms. Fleming, Plaintiff verbally authorized CCC to debit the down payment from his MasterCard, but CCC never collected the down payment because the transaction was denied by MasterCard on 15 separate occasions.⁹ Fleming Aff. ¶ 2, 8-10; *see also* ECF No. 35 at 24-25. Plaintiff alleges he was provided a receipt by CCC that showed he paid the down payment on August 27, 2014, but he declines to specify the total amount he paid or to attach proof of payment.¹⁰ *Id.* at 1. He states in the complaint that “the lender stated first that the plaintiff failed to process the down payment to the dealer, a fact that wasn’t known to the lender.” [ECF No. 12 at 4]. He further states in his response that “Capital City Cycle, having provided a cash receipt to the lender, as stated in the contract, amount of cash provided, and if such collection wasn’t accomplished, then that’s an issue for the dealer but bears no bearing upon the contract.” [ECF No. 25 at 4]. Although Plaintiff disputes the validity of it, the record reveals that CCC claimed a \$2,515.00 lien on the Motorcycle based on Plaintiff’s alleged failure to pay the down payment. *See* Fleming Aff. ¶¶ 8-10. Plaintiff has alleged no violation of the FDCPA on the part of CCC that can be attributed to CCC’s attempt to collect Defendant’s debt, as opposed to its own debt.

*7 The facts also fail to corroborate Plaintiff’s claim that Defendant acted as a debt collector for CCC. Defendant had a contractual relationship with CCC that pertained to the Motorcycle under the Assignment Agreement.¹¹ *See* ECF No. 21-2 at 7. Defendant received the benefit of the down payment because it acquired title to the Motorcycle for a lesser amount than if Plaintiff had not agreed to provide the \$2,515.00 down payment. Although Defendant held the title to the Motorcycle, CCC communicated to Defendant that it was unable to collect the down payment, which meant that CCC had a lien on the Motorcycle for the \$2,515.00 it was promised under the Lease Agreement. Fleming Aff. ¶¶ 8-10. The only evidence that suggests Defendant attempted to

collect a debt for CCC is the December 18, 2014 letter from Mr. Willis that states “[p]ursuant to the terms of your Lease, the amount due at signing should be paid directly to Capital City Cycles (‘CCC’).” [ECF No. 25-2 at 3]. To the extent Plaintiff suggests this letter represents “false, deceptive, or misleading representation or means in connection with the collection of a debt” under 15 U.S.C. § 1692e, the undersigned rejects this argument. Mr. Willis’s assertion that Plaintiff would have to pay the \$2,515.00 down payment to CCC to reinstate the lease was “[p]ursuant to the terms” of the Lease Agreement, and shows that Defendant did not believe Plaintiff had provided the agreed-upon down payment.¹² See ECF No. 35 at 34. Defendant did not attempt to collect the debt for CCC, but rather informed Plaintiff of his obligation to satisfy the debt under the terms of the Lease Agreement. Therefore, Defendant did not assume the role of a debt collector by informing Plaintiff of his obligations under the Lease Agreement.

As discussed above, Plaintiff has failed to affirmatively state that he paid the down payment to CCC and has instead suggested that whether he paid the down payment to CCC was irrelevant to his contract with Defendant. See ECF No. 25 at 4. If Plaintiff did not pay the down payment to CCC, CCC had a lien on the Motorcycle, and Defendant correctly asserted that Plaintiff would have to satisfy that lien as part of the terms to reinstate the Lease Agreement. Defendant’s communication to Plaintiff regarding the debt owed to CCC was based on CCC’s representations to Defendant and their relationship under the Assignment Agreement and does not demonstrate any “unfair or unconscionable means to collect or attempt to collect any debt.” See 15 U.S.C. § 1692f.

For the foregoing reasons, the undersigned recommends the court grant Defendant summary judgment on Plaintiff’s causes of action under the FDCPA.

2. Breach of Contract Under 41 U.S.C. § 6503

Plaintiff argues Defendant breached the contract in violation of 41 U.S.C. § 6503. [ECF No. 10 at 1]. Pursuant to 41 U.S.C. § 6503(a), the section applies only to contracts made by an agency of the United States for manufacture or furnishing of materials, supplies, articles, or equipment in an amount exceeding \$10,000. See 41 U.S.C. § 6502. Because Plaintiff alleges a violation of a consumer contract that does not pertain to the manufacture or furnishing of

materials, supplies, articles, or equipment, 41 U.S.C. § 6503 is inapplicable. Therefore, Plaintiff has failed to state a cause of action under 41 U.S.C. § 6503.

3. Breach of Contract Generally

Plaintiff alleges Defendant breached its contractual obligations by repossessing the Motorcycle, providing no effective right to cure, failing to provide a notification of sale, selling the Motorcycle prior to the designated period, and failing to provide debt reconciliation after sale. [ECF No. 12 at 4]. Plaintiff alleges he cancelled the extended warranty agreement on September 1, 2014, within the 30-day period allowed for cancellation, but was not refunded the amount paid for the extended warranty. [ECF No. 12-2 at 5]. He argues Defendant violated his right to privacy under the contract by communicating with CCC regarding his debt. *Id.* at 4.

To recover for a breach of contract, South Carolina law requires a plaintiff prove the following: (1) the existence of a binding contract entered into by the parties; (2) a breach or unjustifiable failure to perform the contract; and (3) damage suffered by the plaintiff as a direct and proximate result of the breach. *Bank v. How Mad, Inc.*, No. 4:12-3159, 2013 WL 5566038, at *3 (D.S.C. Oct. 18, 2013), citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (S.C. 1962). The primary purpose of all rules of contract construction is to determine the intent of the parties. *Goldston v. State Farm Mut. Auto. Ins. Co.*, 594 S.E.2d 511, 518 (S.C. Ct. App. 2004). “If the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 579 S.E.2d 132, 134 (S.C. 2003).

*8 Plaintiff has demonstrated the existence of a binding contract between the parties in the form of the Lease Agreement. See ECF No. 21-2 at 1–7. The Lease Agreement provided that Plaintiff would be in default if he failed to make a payment as required by the lease or if “the prospect of payment, performance, or realization of collateral [was] significantly impaired.” [ECF No. 21-2 at 4]. It also allowed Defendant to take any one or more of the following actions in the event of a default: (1) to terminate the Lease Agreement and Plaintiff’s right to use the Motorcycle; (2) “to take any reasonable action” to correct Plaintiff’s default or to prevent Defendant’s loss, to include purchasing insurance that Plaintiff agreed to provide; (3) to require Plaintiff to

return the Motorcycle and any related records or make them available to Defendant in a reasonable manner; (4) to take back the Motorcycle by legal process or "self help," but without breaching the peace or violating the law; or (5) to use any other remedy available to Defendant in the Lease Agreement or by law. *Id.*

The undersigned's review of the Lease Agreement reveals that Plaintiff breached its terms in several ways. Under the terms of the Lease Agreement, Plaintiff was required to maintain insurance on the Motorcycle. [ECF No. 21-2 at 4]. Plaintiff first breached the terms of the contract on October 7, 2014, when he allowed his insurance to lapse. *See* ECF No. 35 at 28. He next breached the terms of the Lease Agreement on November 16, 2014, when he again allowed his insurance to lapse. [ECF No. 25-2 at 1]. He breached the terms of the Lease Agreement for a third time on December 1, 2014, when he directed his bank to stop payment. [ECF No. 35 at 27]. Because Plaintiff breached the contract by failing to make a payment and by failing to maintain insurance, which impaired Defendant's ability to realize its collateral, Defendant was entitled to take one or more of the actions specified under the contract. *See* ECF No. 21-2 at 4.

The evidence fails to support Plaintiff's allegation that Defendant breached his privacy rights under the contract by communicating with CCC. The contract does not preclude Defendant from communicating with CCC regarding Plaintiff's debt. *See* ECF No. 21-2 at 1-7. Defendant and CCC were both parties to the Lease Agreement in that Plaintiff originally contracted with CCC and CCC assigned its rights to Defendant. *See id.* Furthermore, Defendant's communication with CCC was necessitated by CCC's alleged lien on the Motorcycle and the fact that Defendant held the title to the Motorcycle. Thus, the facts do not support Plaintiff's allegation that Defendant breached his right to privacy under the Lease Agreement.

The evidence also fails to corroborate Plaintiff's allegation that Defendant breached the terms of the contract by directing CCC to repossess the Motorcycle. Plaintiff alleges Defendant was not allowed to repossess the Motorcycle without first giving him an opportunity to cure the default. A review of the Lease Agreement provides no provisions for cure of default.¹³ Furthermore, Plaintiff's voluntary relinquishment of the Motorcycle negated any obligation Defendant had to provide a right to cure prior to repossessing the Motorcycle.¹⁴ *See* Fleming Aff. ¶ 16; ECF No. 35 at 31; *see also* ECF No. 12 at 3. Defendant provided Plaintiff

with notice of his right to cure after the repossession, but Plaintiff failed to exercise his option to cure. [ECF No. 35 at 34]; Fleming Aff. ¶ 22. The evidence disproves Plaintiff's assertion that Defendant sold the Motorcycle prior to the expiration of the period he was allowed to cure the default and shows Defendant did not sell the Motorcycle until January 28, 2015. [ECF No. 35 at 36]. Plaintiff has cited no provisions of the Lease Agreement that required Defendant to provide debt reconciliation after sale. To the extent Plaintiff argues Defendant erred in failing to cancel or to return the payment for the extended warranty, the undersigned notes Plaintiff paid no upfront cost for the extended warranty and that the \$1,190.00 for the extended warranty and service contract was included in the gross capitalized costs to be paid over the 36 month payment term. *See* ECF No. 21-2 at 2. Because Plaintiff made only three payments under the Lease Agreement and provided no proof that he cancelled the extended warranty agreement, the undersigned finds he has failed to show that he is entitled to compensation for Defendant's alleged failure to cancel the extended warranty.

4. Fraudulent Misrepresentation

*9 Plaintiff has generally alleged that Defendant "made assertions that the contract wasn't complete due to a failed payment to Capital City Cycle, which wasn't subjective to the contract." [ECF No. 12 at 3]. He also alleges Defendant indicated in its December 4, 2014 letter that he would have until December 11, 2014, to provide proof of insurance coverage, but had already repossessed the Motorcycle on December 3, 2014. *Id.* Plaintiff contends Defendant initially stated the Motorcycle was repossessed because of a failed payment to the dealer, but stated in the alternative that the Motorcycle was repossessed through his voluntary act. *Id.* at 4. He maintains Defendant ultimately stated it had nothing to do with the down payment and that the down payment was a matter between Plaintiff and the dealer. *Id.*

To state a claim for fraudulent misrepresentation, a plaintiff must allege (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of the falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *M.B. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston*, 271 S.E.2d 414, 415 (S.C. 1980). "Failure to prove any one of the foregoing elements is fatal to recovery."

Id., citing *O'Shields v. South Fountain Mobile Homes, Inc.*, 204 S.E.2d 50 (S.C. 1974).

Although Plaintiff points specifically to the December 4, 2014 letter and generally to Defendant's statements that he considers to be contradictory, he has not alleged facts that support a claim for fraudulent misrepresentation against Defendant. Plaintiff essentially argues that Defendant should not have received information from CCC or should not have relied on information about the alleged failed payment to CCC because they were outside the terms of the Lease Agreement. *See* ECF Nos. 12 at 4; *see* *M.B. Kahn Constr. Co.*, 271 S.E.2d at 415. He does not allege the statements regarding the down payment owed to CCC were false. *See* *M.B. Kahn Constr. Co.*, 271 S.E.2d at 415. He fails to allege Defendant knew the statements regarding the down payment to CCC were false or recklessly disregarded their truth or falsity. *See id.* He does not allege he was unaware of the falsity of Defendant's statements, relied on the truth of Defendant's statements, or was injured based on his reliance on Defendant's statements. *See id.*

Plaintiff incorrectly asserts the Motorcycle was repossessed the day before Ms. Skare wrote the December 4, 2014 letter that purported to give him until December 11, 2014, to provide proof of insurance. The record shows the Motorcycle was repossessed on December 4, 2014. *See* Fleming Aff. ¶ 16; [ECF No. 35 at 31]. It is possible the letter was drafted before the Motorcycle was repossessed. However, even if the letter were drafted after the Motorcycle was repossessed, Plaintiff has not alleged an injury based on his reliance on the December 4, 2014 letter. Therefore, he has failed to allege facts sufficient to support a cause of action for fraudulent misrepresentation.

5. Civil Conspiracy

Plaintiff alleges Defendant conspired with CCC to breach the Lease Agreement, to violate the terms of the FDCPA, and to obtain funds that were not included in the terms of the contract through fraudulent misrepresentation. [ECF No. 12 at 4].

"The elements of civil conspiracy in South Carolina are (1) the combination of two or more people; (2) for the purpose

of injuring the plaintiff; (3) which causes special damages." *Workman v. Nationwide Mut. Ins. Co.*, No. 4:12-2567-JMC,

2013 WL 3353910, at *3 (D.S.C. July 3, 2013), citing *Pye v. Estate of Fox*, 369 S.C. 555, 556-57, 633 S.E.2d 505, 511 (S.C. 2006). A cause of action for civil conspiracy must show that the parties to the conspiracy agreed to do an unlawful act or to do a lawful act in an unlawful way. *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1012 (D.S.C. 1981). "Importantly, 'where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.'" *Turnage v. JP Morgan Chase Bank*, No. 2:11-2916-RMG,

2012 WL 12354226 (D.S.C. Apr. 13, 2012), citing *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293 (S.C. 1981). "A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *Id.*, citing *Hackworth v. Greywood at Hammett, LLC*, 385 (S.C. Ct. App. 2009). In addition, to adequately plead special damages, the plaintiff must cite damages that "go beyond the damages alleged in other causes of action." *Id.*

*10 Plaintiff has failed to cite any evidence that Defendant and CCC conspired to perform an unlawful act or to perform a lawful act in an unlawful way. *See Ryan*, 514 F. Supp. at 1012. He has not asserted any acts as part of a conspiracy or resulting damages that are separate from his allegations that Defendant conspired with CCC to violate the FDCPA, breach the contract, or engage in fraudulent misrepresentation of the terms of the contract. Viewing Plaintiff's allegations in light of the relevant case law, the undersigned recommends the court find he has failed to adequately plead a claim for civil conspiracy.

III. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends the court grant Defendant's motion for summary judgment.

IT IS SO RECOMMENDED.

All Citations

Not Reported in Fed. Supp., 2016 WL 7638135

Footnotes

- 1 In his Response in Opposition to Defendant's Motion, Plaintiff alleges that Defendant violated the Truth in Lending Act ("TILA") if it accepted the assignment of the contract from CCC with knowledge that he had not paid the amount due at lease signing. [ECF No. 25 at 4–5]. Because Plaintiff fails to allege a violation of the TILA in the complaint and only speculates as to Defendant's awareness of his payment of the amount due at lease signing, the undersigned declines to address whether the TILA is applicable to the contract between the parties or whether Defendant complied with the requirements of the TILA.
- 2 Plaintiff indicates in his response that Defendant violated the Privacy Act of 1974 by disclosing information regarding the contract and payments to CCC. [ECF No. 25 at 1–2]. The undersigned notes that the Privacy Act of 1974 pertains exclusively to federal agencies. See 5 U.S.C. § 551, § 552; see also *Thompson v. Vista View, LLC*, 2009 WL 2705857, at *7 (S.D.W. Va. Aug. 24, 2009) ("While the Privacy Act creates a private right of action for a violation of the Act, such an action 'is specifically limited to actions against agencies of the United States Government.'") *Ent v. Aerospace Corp.*, 765 F.2d 1440, 1447 (9th Cir. 1985).). Because Defendant is not a federal agency, Plaintiff cannot bring a cause of action under the Privacy Act of 1974.
- 3 Although Plaintiff identified the agreement in his amended complaints as one for the sale of the Motorcycle [ECF No. 12 at 3], the agreement was labeled as "Motor Vehicle Lease Agreement—Closed End" and "Monthly Payment Lease" was checked on the first page of the document. [ECF No. 21-2 at 1]. The Lease Agreement further provided that it was "a lease only" and that Plaintiff had "no ownership interest in the Vehicle except for any future options to purchase provided in this Lease." *Id.* at 5. The last page of the Lease Agreement contained the following text "Notice. You have no ownership rights in the vehicle unless and until you exercise your option to purchase the Vehicle." [ECF No. 21-2 at 7]. Furthermore, a Certificate of Title was issued to Defendant, as owner of the Motorcycle, on October 6, 2014. [ECF No. 35 at 35].
- 4 The charge of \$2,515.00 is referred to elsewhere as a "Down Payment." [ECF No. 21-2 at 10].
- 5 The Affidavit of Tiffany Fleming ("Ms. Fleming"), Defendant's Chief Compliance Officer, may be found at ECF No. 35, 1–5.
- 6 Although it is not entirely clear from the pleadings, it seems Plaintiff obtained insurance coverage through Geico after Progressive terminated his coverage.
- 7 Ms. Fleming stated her former name was "Tiffany Davies." Fleming Aff. ¶ 19.
- 8 The agreed on value of the Motorcycle was \$11,900.00, and CCC assessed charges for sales tax, an extended warranty and service contract, a documentation fee, and an acquisition fee for total gross capitalized costs of \$14,120.00. [ECF No. 21-2 at 2].
- 9 Ms. Fleming indicated Plaintiff paid a \$400.00 security deposit and a first monthly payment of \$394.26 on August 27, 2014. *Id.* at ¶ 11; [ECF No. 35 at 26]. Thus, the undersigned interprets Ms. Fleming's affidavit to indicate CCC attempted to charge the \$2,515.00 down payment to Plaintiff's MasterCard on 15 separate occasions. Plaintiff disputes that he paid a \$400.00 security deposit and maintains the trade-in-value of his used motorcycle was applied to the security deposit. [ECF No. 37 at 2].
- 10 To the extent that Plaintiff references "[a]mount to be paid in cash" on the Lease Agreement and the check marks beside "Proof of Amounts Due at Lease Signing (copy of check, credit card/debit slip or receipt for cash)" on the funding checklist and "Enter Billing Master/Lease Sign Payment" on the Lease/Asset-Routing/Checklist to represent a receipt of payment, the undersigned rejects this argument. See ECF No. 21-2 at 2, 16. "Amount to be paid in cash" implies a future action and does not show that the amount has already been paid. The check mark beside "Proof of Amounts Due at Lease Signing," refers to "Amounts Due" as opposed to amount collected or paid, and because proof may be in the form of a credit card slip, it does not refute that CCC attempted to collect this amount from Plaintiff's MasterCard. While the Lease/Asset-Routing/Checklist contains a check mark beside "Enter Billing Master/Lease Sign Payment," the document indicates beside Lease Approval Status: FUNDING DELAY 8/29/2014. See ECF No. 25-2 at 10.

11 The Assignment Agreement is referenced in the Lease Agreement but is not attached to the pleadings. 9

- 12 Although 15 U.S.C. § 1692e requires that a debt collector communicate that a disputed debt is disputed, the record does not indicate Defendant was aware of any dispute regarding payment of the down payment. See Fleming Aff. ¶¶ 8–10.
- 13 Although there are some requirements for notice of a consumer's right to cure under state and federal law, Plaintiff does not cite any particular law that Defendant allegedly violated.
- 14 Although Plaintiff argues his communication to Brandon Collins at CCC authorizing him to come pick up the Motorcycle was not an authorization for Defendant to repossess the Motorcycle [ECF No. 12 at 3], the undersigned rejects this argument for the reasons discussed above.

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 United States District Court, D.
 South Carolina, Aiken Division.

Allison MAY, Plaintiff,

v.

CITY OF NORTH AUGUSTA and Skip Grkovic,
 in his individual capacity, Defendants.

Civil Action No. 1-05-cv-0752-MBS.

Sept. 27, 2007.

Attorneys and Law Firms

James Lewis Cromer, Columbia, SC, for Plaintiff.

Lakesha White Jeffries, Hedrick Eatman Gardner and
 Kincheloe, Columbia, SC, Scott Timothy Justice, Scott T.
 Justice Law Office, North, SC, for Defendants.

ORDER and OPINION

MARGARET B. SEYMOUR, United States District Judge.

*1 On March 10, 2005, Plaintiff Allison May ("Plaintiff") filed this action against her employer, the City of North Augusta ("Defendant"), alleging gender discrimination, retaliation, and sexually hostile work environment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. She also alleges a violation of her First Amendment right to free speech, pursuant to 42 U.S.C. § 1983; violation of South Carolina public policy; and claim for civil conspiracy against her supervisor, George M. "Skip" Grkovic ("Grkovic").

In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02, D.S.C., this matter was referred to United States Magistrate Judge Joseph R. McCrorey for pretrial handling. Defendants moved for summary judgment on September 15, 2006. *See* Fed.R.Civ.P. 56. Plaintiff filed a memorandum in opposition on November 15, 2006. Defendants filed a reply on November 27, 2006. On June 11, 2007, the Magistrate Judge filed a Report and Recommendation in which he recommended that Defendant's motion for summary

judgment be granted. Plaintiff filed objections ("Plaintiff's Objections") to the Report on July 26, 2007.¹

The Magistrate Judge makes a only recommendation to this court. The recommendation has no presumptive weight. Upon review of the Magistrate Judge's recommendation, this court bears the responsibility for making a de novo determination of any portions of the Report and Recommendation to which a specific objection is made. ¹ *Mathews v. Weber*, 423 U.S. 261, 270, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or may recommit the matter to the Magistrate Judge with instructions.

² 28 U.S.C. § 636(b)(1).

I. FACTS

The facts are thoroughly set forth in the Report and Recommendation. In August 1998, Plaintiff accepted a position as Senior Planner with the City of North Augusta ("the City") Department of Economic and Community Development ("the Department"). (Pl. Dep. 16; Grkovic Dep. 58). Her supervisor was department director George M. "Skip" Grkovic, who had recruited Plaintiff and encouraged her to apply for the position. (Pl. Dep. 15). As Senior Planner, Plaintiff's responsibilities included zoning compliance and residential site plan review, sign permitting, website maintenance, and production of the City of North Augusta's newsletter. (Pl. Dep. 16). Prior to assuming her role as Senior Planner, Plaintiff had no formal training and minimal experience in municipal planning. (Pl. Dep. 17). Not long after Plaintiff was hired, her title was changed to Planner/Development Project Coordinator. (Pl. Dep. 18). The change in title did not affect Plaintiff's job duties. (Pl. Dep. 18).

As an employee of the Department, Plaintiff receives an annual performance review, conducted by Grkovic. The review surveys several categories of job performance, including knowledge of job, judgment, quality of work, attendance, and cooperation. (Pl. Ex. 2, 3, 5). Each category includes several subcategories. For each subcategory, Plaintiff is graded on a five-point scale, with 1.0 representing "substantially below expectations" and 5.0 representing "substantially exceeds expectations." A 3.0 on this scale represents "meets expectations." The point totals in each category are averaged and weighted to calculate an overall rating score. If an employee scores below a 3.0, she is

ineligible for a Merit Performance Adjustment ("MPA"), or pay increase. (Pl.Dep.42, 80).

*2 From 1999 to 2002, Plaintiff's year-end performance evaluations remained above the "meets expectations" threshold. In each of these years, Plaintiff was eligible for, and received, an MPA. However, after her first year-end review, conducted on November 30, 1999, her scores declined every year until 2005. In Plaintiff's first three evaluations, Grkovic consistently indicated that Plaintiff needed to improve her "understanding of the planning and land use regulation process." (Pl.Dep.Ex. 2-5). He also gave Plaintiff low marks for her inability to complete tasks on time, which he attributed in part to her poor understanding of regulatory standards.

By August 2002, Grkovic had decided to hire a full-time planner and submitted a budget request with the City to do so. (Grkovic Dep. 105). Grkovic's comments on Plaintiff's 2002 performance review reflected this change. "Allison's role in the planning and zoning administration activities of the Department will be reduced with the addition of a Planner to the staff." (Pl.Dep.Ex. 2). According to Plaintiff, she did not meet the advertised requirements for the full time planner position. She did not apply. (Pl.Dep.31). Scott Sterling was eventually hired to fill the position in the Fall of 2003. (Pl.Dep.32). Mr. Sterling has a degree in city planning and two to three years planning experience. (Grkovic Dep. 132).

On September 29, 2003, Grkovic wrote Plaintiff a memorandum indicating that her job responsibilities in the areas of zoning and development regulation would be temporarily reduced so she could focus more on her marketing project assignments. Grkovic claimed "the quality of [Plaintiff's] work in the review of residential site plans and sign permits has been below what is expected and acceptable." (Def.Ex. 1). In the memorandum, Grkovic expressed three particular concerns. First, he noted that Plaintiff had recently approved an illegal swimming pool permit that Grkovic had previously denied. Second, Grkovic called attention to a recent instance where Plaintiff had approved a sign in violation of applicable zoning standards. Third, Grkovic indicated to Plaintiff that her emotional reactions to his directions and suggestions were "unprofessional and [] not acceptable." *Id.* Grkovic asked Plaintiff not to discuss his memorandum with other personnel until they had a chance to review the matter together. Plaintiff's zoning and regulatory duties were assigned to Matthew Taylor, a "code enforcement officer," who

was otherwise responsible for enforcing sign ordinances. (Pl.Dep.26-27).

On November 30, 2003, Grkovic conducted Plaintiff's 2003 performance review. In this evaluation, Plaintiff received her first "below expectations" rating—a score of 2.92—which rendered her ineligible for an MPA. (Pl.Ex. 2). Grkovic's assessment cited Plaintiff's difficulty completing tasks on time, organizing and planning tasks and projects, listening, and following directions. On January 28, 2004, Plaintiff challenged Grkovic's evaluation. On February 11, 2004, Grkovic notified Plaintiff that the change in her job duties would be permanent, and that her new title would be Community Development Project Coordinator. Soon after, Plaintiff met with Grkovic and Diana Miller, the City of North Augusta's Human Resources Manager, to review her 2003 performance appraisal and set performance goals for the new year. (Miller Dep. 55-56).

*3 According to Plaintiff, Grkovic often subjected her to harsh treatment. (Pl.Dep.85). Grkovic has been described as "dismissive" and "rude" (Pl.Dep.85), "tough," (Miller Dep. 49), "difficult to work with" and a "taskmaster" (Martin Dep. 12), "demeaning and a very strong personality" (Gilliland Dep. 37, 40), "intimidating and critical" (Wegner Aff.), and "mean spirited" (Mims Aff.). Female employees have suspected that Grkovic is biased towards women and treats them differently than he does the male employees he supervises.² (Pl. Dep. 97-100, Gilliland Dep. 37-44, Wegner Aff., Mims Aff.). Sometime prior to the removal of Plaintiff's planning duties in September 2003, she began contacting Diana Miller ("Miller"), the City's Manager of Human Resources, with complaints about Grkovic. According to Miller, Plaintiff was very upset about Grkovic, and reported that she had "difficulty communicating with him and that she felt she couldn't please [him], or do her job ... to his satisfaction." (Miller Dep. 47). Miller suspected that Plaintiff and Grkovic's problems were largely the result of "not being able to communicate with each other." *Id.* Miller spoke with Grkovic about Plaintiff's complaints, talked to him about communication problems, and "encouraged him to please try and talk to [Plaintiff]." (Miller Dep. 53, 54).

Plaintiff also reported to Miller that Grkovic had a habit of "groping" his crotch.³ This behavior, according to Plaintiff, was observed and discussed by many of his employees and colleagues, both male and female. According to Plaintiff, Grkovic's behavior was never accompanied by any comments, expressions, or gestures. (Pl.Dep.91).

Sometime prior to August 19, 2004, the Department recommended approval of a site plan for a Waffle House in close proximity to property owned by Plaintiff. Plaintiff informed Scott Sterling, the City Planner, that she objected to the proposed plan. On August 19, the Planning Commission met to consider and hear public comment on the plan. Prior to the meeting, Plaintiff informed Grkovic that she intended to speak in opposition to the proposed plan. Plaintiff appeared before the commission and expressed her views.

On August 31, 2004, Grkovic sent Plaintiff a memorandum describing Plaintiff's decision to appear before the Planning Commission as "inappropriate, unprofessional, and disrespectful to the Department." (Pl.Dep.Ex. 7). Grkovic claimed that her appearance before the Commission had confused certain attendees, who were unclear whether Plaintiff was speaking in her capacity as a private citizen or a City employee.

On September 8, 2004, Plaintiff filed a charge of sex discrimination with the South Carolina Human Affairs Commission ("SCHAC"). (Def.Mem.26).

On September 9, 2004, Plaintiff responded in a memorandum that she had appeared before the Planning Commission as a private citizen to speak on a matter of public concern. (Def. Mem. 26). Grkovic replied to Plaintiff on September 27. In this memorandum, Grkovic was careful to point out that his August 31 memorandum was not a reprimand, but "related to the manner in which you chose to exercise those rights, the level of knowledge you exhibited, and the degree of respect you showed for the department in making a presentation." *Id.*

*4 Grkovic cited Plaintiff's decision to appear before the Planning Commission in her 2004 performance evaluation, conducted on November 30, 2004. In this evaluation, Plaintiff again scored "below expectations"—a score of 2.88—which disqualified her from an MPA. Grkovic gave Plaintiff low marks for her judgment, based in part on her appearance before the Commission.⁴ "Allison showed a significant lack of judgment in her appearance before the Planning Commission related to a downtown area site plan application. There were a number of other approaches that she could have taken to better understand the situation and alternative solutions." (Pl.Dep.Ex. 3). Grkovic also noted other problems, giving Plaintiff low marks for her ability to listen, follow directions, understand expectations, and

organize her tasks. Grkovic also cited Plaintiff's absenteeism and lack of enthusiasm.

On March 10, 2005, Plaintiff instituted this action.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered when a moving party has shown "[that] 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 judgment as a matter of law." Fed.R.Civ.P. 56(c). The evidence presents a genuine issue of material fact if a "reasonable jury could return a verdict for the non-moving party." ¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the burden of proving that there are no facts from which a jury could draw inferences favorable to the non-moving party. ² *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party makes this showing, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Id.* Summary judgment should only be granted in those cases where it is perfectly clear that there remains no genuine dispute as to material fact and inquiry into the facts is unnecessary to clarify the application of the law. ³ *McKinney v. Bd. of Trustees of Mayland Cmty. College*, 955 F.2d 924, 928 (4th Cir.1992).

A. Disparate Treatment Claim

Plaintiff alleges gender discrimination under Title VII. Title VII makes it "an unlawful employment practice for an employer ... to discharge ... or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." ¹ 42 U.S.C. § 2000e-2(a) (1). In the absence of direct evidence of discrimination, Plaintiff may proceed under the *McDonnell Douglas* burden-shifting framework. See ² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); ³ *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir.1998). Under this method, Plaintiff must first establish a prima

facie case of discrimination. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Once Plaintiff establishes a prima facie case of discrimination, the burden shifts to Defendant to articulate a legitimate, nondiscriminatory reason for Plaintiff's treatment.

See *McDonnell Douglas*, 411 U.S. at 802. If Defendant articulates such a reason, Plaintiff bears the ultimate burden of persuasion and must show, by a preponderance of the evidence, that Defendant's proffered reason for the treatment is pretextual. See *id.* at 804. Although the evidentiary burdens shift between the parties under the *McDonnell Douglas* framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207, (1981); see also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

1. Prima Facie Case

*5 Generally, the prima facie case for a discrimination claim under Title VII requires a plaintiff to show that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for her job and her performance was satisfactory; and (4) other employees outside the protected class were treated more favorably.⁵ See

Love-Lane v. Martin, 355 F.3d 766, 787 (4th Cir.2004). The Magistrate Judge found that (1) Plaintiff was a member of a protected class, and (2) that the removal of Plaintiff's planning duties and job title, and her evaluations in 2003 and 2004 that deprived her of a merit-based cost of living increase, constituted adverse employment actions. As to the third prong of Plaintiff's prima facie case, however, the Magistrate Judge found that Plaintiff was not meeting her employer's legitimate job expectations in 2003 and 2004, which resulted in the poor performance evaluations and the removal of her planning duties. Plaintiff asserts that the Magistrate Judge erroneously concluded that she had failed to produce evidence that her job performance was satisfactory. The court disagrees.

Defendant has proffered evidence that throughout the course of her employment, Plaintiff had trouble meeting Grkovic's expectations in several different areas.⁶ To establish a genuine issue of material fact as to whether she was performing adequately, Plaintiff need only counter this

evidence with evidence of her own demonstrating that Grkovic's assessment was wrong. See *King v. Rumsfeld*, 328 F.3d 145, 150 (4th Cir.2003). Plaintiff has failed to present any evidence that Grkovic was incorrect in his assessment of Plaintiff's non-planning duties, notably her absenteeism, inability to complete tasks in a timely manner, organizational shortcomings, and trouble listening and following directions. Plaintiff's objections to the Magistrate Judge's finding that she was not meeting her employer's legitimate job expectations are therefore without merit.

Plaintiff challenges Grkovic's assessment of her performance only with respect to her planning and regulatory duties. Plaintiff alleges that two city managers believed "her work for them was more than satisfactory"; that Charles Martin, the City Manager, found her work preparing city events to be "wonderful"; and that the building superintendent with whom she worked to approve the erroneous swimming pool site plan, which ultimately contributed to the removal of her planning and regulatory duties, believed there was nothing wrong with the approval.

Among the proffered evidence, only the testimony from the building superintendent who participated in the swimming pool site plan approval would aid Plaintiff in demonstrating that Grkovic's assessment of her job performance was inaccurate. At most, this evidence establishes a genuine issue of fact as to whether the approval of the site plan for the swimming pool was erroneous. Standing alone, however, it fails to establish a genuine issue of material fact as to whether Plaintiff was performing to her employer's legitimate job expectations. See *Anderson*, 477 U.S. at 248 (noting that Rule 56(c) provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact") (emphasis in original).

*6 Plaintiff's perceived job performance for city officials other than Grkovic, in matters other than those for which he deemed her performance inadequate, is not relevant to this inquiry. See *King*, 328 F.3d at 150. Plaintiff's evidence that she performed satisfactorily for other city officials has no bearing on the question of whether she did so for Grkovic, her supervisor. See *Evans v. Technologies Applications & Svc. Co.*, 80 F.3d 954, 960-61 (4th Cir.1996). Plaintiff's objections are without merit.

2. Pretext

Plaintiff next asserts that the Magistrate Judge erred in finding that, even if Plaintiff made out a prima facie case, Defendants articulated a legitimate, nondiscriminatory reason for the adverse employment actions. The court disagrees.

Defendants aver that Plaintiff's poor performance, not discriminatory animus, led to the removal of her planning duties and her poor performance evaluations. Plaintiff asserts that this explanation is unworthy of credence. Plaintiff must prove pretext "either by directly persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." ¹ *Burdine*, 450 U.S. at 256. As the Magistrate Judge correctly found, the record reveals no evidence that Defendants were motivated by discriminatory animus or that their proffered explanation for Plaintiff's treatment is unworthy of credence. Plaintiff's objection is without merit.

B. Hostile Work Environment Claim

The Magistrate Judge found that Plaintiff failed to establish a claim for hostile work environment because she has not presented sufficient evidence demonstrating that Grkovic's conduct, while offensive, was based on Plaintiff's gender. Plaintiff argues that the Magistrate Judge erred in concluding that Plaintiff failed to establish a hostile work environment. The court disagrees.

In order to prevail on a hostile work environment claim, Plaintiff must establish that the offending conduct was (1) unwelcome, (2) based on her sex, (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment, and (4) imputable to her employer. ¹ *Ocheltree v. Scollon Prod., Inc.*, 335 F.3d 325, 331 (4th Cir.2003) (en banc) (quoting ¹ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)). In order to establish the second prong of this test, Plaintiff must show that she "is the individual target of open hostility because of her sex, or ... harassed in such sex-specific and derogatory terms ... as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." ¹ *Ocheltree*, 335 F.3d at 331-32 (quoting ¹ *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (internal citations omitted)).

Plaintiff has alleged only one instance of verbal abuse that could support an inference of gender-based animus: when Grkovic warned Plaintiff that she "[didn't] want to get into a pissing match with someone who can write his name in the snow." (Pl.Dep.94). However, it is well-established that even if "offensive and entirely unacceptable, one comment alone cannot support a hostile work environment claim." ¹ *Parker v. Smithfield Packing Co., Inc.*, No. 06-0468, 2007 WL 983845 at *5 (E.D.Va. March 26, 2007) (discussing ¹ *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir.2006)).

*7 Plaintiff has also failed to demonstrate that Grkovic's habit of "groping" his crotch was either directed at her or based on her sex. According to Plaintiff, many men and women in the Department had observed Grkovic's behavior and it was never accompanied by any sexualized comments, facial expressions, or gestures. (Pl.Dep.91). Based on this testimony, the Magistrate Judge found that Plaintiff has failed to show that Grkovic's behavior, although offensive, was directed at Plaintiff or any other woman because of gender. The court agrees. Plaintiff's objections are without merit.

C. Retaliation Claim

Plaintiff next asserts that the Magistrate Judge erred in finding that Plaintiff failed to make a prima facie case of retaliation because she failed to establish a causal connection between her protected activity and the adverse actions she suffered. The court disagrees.

In order to establish a prima facie case of unlawful retaliation, an employee must show "(1) that she engaged in protected activity; (2) that her employer took an adverse employee action against her; and (3) that a causal connection existed between the protected activity and the asserted adverse action." ¹ *Parker*, 2007 WL 983845, at *6 (quoting ¹ *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 188 (4th Cir.2004)). An employer may defend itself by producing evidence of a legitimate, non-discriminatory reason for taking the adverse employment action. *Id.* If the employer produces such reasons, the employee must demonstrate that the proffered reasons are pretextual. ¹ *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 242 (4th Cir.1997).

Plaintiff objects to the Magistrate Judge's Report by arguing that "retaliation was always swift and immediate." Plaintiff's

Objections, 5. With regard to Plaintiff's conversations with Miller, Plaintiff has offered nothing more specific than that this protected activity took place prior to September 2003, when Grkovic removed her planning duties.⁷ The court agrees with the Magistrate Judge's finding that this allegation is insufficient to establish "very close" temporal proximity.

See *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (cases relying solely on temporal proximity to establish causation must show that the employer's knowledge of the protected activity and the adverse employment action were "very close"). Plaintiff's objections are without merit.⁸

D. First Amendment Claim

Plaintiff has alleged that Defendants retaliated against her for exercising her First Amendment right to free speech. Plaintiff argues that her written reprimand and her "below expectations" 2004 performance assessment constituted retaliatory employment actions. The Magistrate Judge found that Plaintiff failed to show her rights had been violated because she has not shown that she suffered a retaliatory action. The court disagrees with this particular finding, but concurs in the result.

*8 In order to determine whether Plaintiff has been unlawfully retaliated against for exercising her First Amendment freedom of speech, she must show: (1) she spoke as a private citizen on a matter of public concern; (2) her interest in the expression at issue must have outweighed the Department's interest in providing effective and efficient services to the public; and (3) there was a sufficient causal nexus between Plaintiff's speech and a retaliatory employment action. *Smith v. Frye*, 488 F.3d 263, 267 (4th Cir.2007) (citing *Ridpath v. Bd. of Governors of Marshall Univ.*, 447 F.3d 292, 316 (4th Cir.2006)).

Plaintiff argues that the Magistrate Judge erred because the written reprimand Plaintiff received for her appearance before the Planning Commission, compounded with her 2004 performance evaluation, which rendered her ineligible for a merit pay increase, amounts to a retaliatory act. In the First Amendment context, a formal, written reprimand included in an employee's file may constitute a retaliatory act. See *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir.1999). In this case, the parties dispute whether Grkovic's letter to Plaintiff criticizing her appearance before the Planning Commission was placed in her employment

file. Because that question is relevant in determining whether Grkovic's letter constituted a formal reprimand, the court declines to grant summary judgment on this ground. The court also finds that Plaintiff's "below expectations" performance evaluation, which rendered her ineligible for a pay increase, could reasonably constitute a retaliatory employment action.

Nevertheless, Plaintiff has failed to establish a sufficient causal nexus between her speech and her poor performance evaluation. In order to establish a prima facie case of First Amendment retaliation, Plaintiff must demonstrate that her protected speech was a "substantial" or "motivating" factor in the negative performance evaluation. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, at 270-71, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977)). Although Grkovic specifically referenced Plaintiff's appearance before the Planning Commission in his negative assessment of Plaintiff's judgment, this assessment was but one of many negative assessments in Plaintiff's 2004 performance evaluation. Plaintiff has not put forth any evidence indicating that Grkovic's disapproval of her appearance before the Planning Commission was a substantial or sufficiently motivating factor in the adverse quality of her overall performance rating. The court finds that Plaintiff has failed to establish a sufficient causal connection between her speech and the adverse affect of the 2004 performance evaluation, and therefore cannot prevail on her claim for violation of her First Amendment freedom of speech.

III. CONCLUSION

For the reasons stated, the court hereby grants Defendants' Motion for Summary Judgment.

*9 IT IS SO ORDERED.

REPORT AND RECOMMENDATION

JOSEPH R. McCROREY, United States Magistrate Judge.

Plaintiff, Allison May ("May"), is an employee of the City of North Augusta ("the City"). She filed her complaint on March 10, 2005, alleging gender discrimination, a sexually hostile work environment, violation of her First Amendment

right to freedom of speech, retaliation, and a violation of the public policy of South Carolina against the City.¹ She also alleges a civil conspiracy in violation of South Carolina law against her supervisor, George M. "Skip" Grkovic ("Grkovic"). Defendants filed a motion for summary judgment on September 15, 2006. May filed an opposition memorandum on November 15, 2006. The defendants filed a reply on November 27, 2006.

Standard for Summary Judgment

When no genuine issue of any material fact exists, summary judgment is appropriate. *Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir.1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* Courts take special care when considering summary judgment in employment discrimination cases because states of mind and motives are often crucial issues. *Ballinger v. North Carolina Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir.), *cert. denied*, 484 U.S. 897, 108 S.Ct. 232, 98 L.Ed.2d 191 (1987). This does not mean that summary judgment is never appropriate in these cases. To the contrary, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir.1985).

In this case, defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 718 (4th Cir.1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). If defendant carries this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." *Id.* at 718-19 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Moreover, "once the moving party has met his burden, the nonmoving party must come forward with some evidence

beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." *Baber v. Hosp. Corp. of Am.*, 977 F.2d 872, 874-75 (4th Cir.1992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *Id.* and *Doyle v. Sentry Inc.*, 877 F.Supp. 1002, 1005 (E.D.Va.1995). Rather, the non-moving party is required to submit evidence of specific facts by way of affidavits [see Fed.R.Civ.P. 56(e)], depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Baber*, citing *Celotex Corp.*, *supra*. Moreover, the non-movant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." *Mitchell v. Data General Corporation*, 12 F.3d 1310, 1316 (4th Cir.1993) and *DeLeon v. St. Joseph Hospital, Inc.*, 871 F.2d 1229, 1233 (4th Cir.1989), n. 7. Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547 (5th Cir.1987) and *Evans v. Technologies Applications & Services Co.*, 875 F.Supp. 1115 (D.Md.1995).

Facts

*10 The facts, either undisputed, or according to the plaintiff as the non-moving party, with all reasonable inferences therefrom, to the extent supported by the record, are as follows:

1. May is a female.
2. In 1997, the City created a Department of Economic and Community Development ("the Department") whose function was to provide "planning, development regulation, code enforcement, and economic development activities." (Grkovic Dep. 4).
3. Grkovic was hired as the Director of the Department (*Id.*).
4. Initially, the City funded only two other positions in the Department, a secretary (later "Administrative Assistant") and a planner (*Id.* at 49; Pl. Dep. 20).
5. May was hired in 1998 as "Senior Planner" although she had no prior experience as a planner. Her experience lent itself to the Department's economic development function. (Pl. Dep. 16; Grkovic Dep. 53 and Ex. 1).

6. May described her duties as including "residential site plan review, zoning compliance review, sign permits, ..., initiated a new website for the City ... worked on various projects as assigned, ... research ..., answered questions about zoning and questions from the public about zoning and set backs and things related to the zoning ordinance, (a)nd ... worked ... on the [City's] newsletter." (Pl. Dep. 16).
7. Shortly after May was hired, her position was changed to Planner/Development Project Coordination, but her duties and salary remained the same. (*Id.* at 18).
8. At relevant times:
- A. Charles Martin ("Martin") was the City's Administrator and Grkovic's supervisor (Grkovic Dep. 4); and
- B. Diana Miller ("Miller") was the City's Manager of Human Resources.
9. Matthew Taylor ("Taylor") was hired as a Code Enforcement Officer in 2001 or 2002 (Pl. Dep. 26; Grkovic Dep. 105).
10. Review of the record shows that Grkovic does not have a pleasing personality. He is variously described as "dismissive" and "rude" (Pl. Dep. 85), "tough" (Miller Dep. 49), "difficult to work with" and a "task master" (Martin Dep. 12), demeaning and a "very strong personality" (Gilliland Dep. 37 and 40), "intimidating" and "critical" (Wegner Aff.), and "mean spirited" (Mims Aff.).
11. May, and other women with whom Grkovic has worked, feel that he is biased toward women, demeans them, and treats them differently than male employees (Pl. Dep. 85-98; Gilliland² Dep. 37-44; Wegner Aff.; Mims Aff.).³
12. According to Mims, she observed Mr. Grkovic on a continuing and almost daily basis perform a lewd and disgusting habit of placing his hands in and around his crotch (sic) area and manipulating the same. He did this by placing his hands in the front of his parts in the crotch area or by placing his right hand in his pocket and appearing to "jiggle" his genitals. He performed this act repeatedly in the presence of women as well as men and it was totally disgusting. (Mims Aff.).
- *11 This conduct was confirmed by others (Pl. Dep. 89; Brit Dep. 17-18).
13. May and Mims reported the conduct to Miller. (Pl. Dep. 89-90; Mims Aff.).
14. May reported her other difficulties with Grkovic to Miller on several occasions prior to September of 2003. (Pl. Dep. 85-86; Miller Dep. 48-49).
15. As early as August 2002, Grkovic made a budget request to fund and hire a full time planner. (Pl. Dep. 27 and Dep. 105).
16. On September 29, 2003, Grkovic issued a memorandum to May addressing performance issues. He stated that the "quality of [May's] work in the review and approval of residential site plans and sign permits has been below what is expected and acceptable." Grkovic cited specific errors concerning the approval of a residential swimming pool permit and a sign permit for a business. Grkovic criticized May for "the manner in which you react to direction or suggestions I offer." Last, Grkovic temporarily removed May's "job responsibilities in the areas of zoning and development regulation" and assigned them to Taylor. Grkovic specifically instructed May not to discuss "this matter or other personnel issues with members of the department or city staff until we have fully discussed each issue." (Pl. Dep. 100-105; Pl. Dep. Ex. 6).
17. May responded to Grkovic's memorandum on October 23, 2003. (*Id.*).
18. The City uses a numerical system for annual evaluation of its employees ("MPA"). Under the MPA, a rating of 3 is defined as "meets expectations." Rating of 4 means "exceeds expectations" and 5, the highest score, means "substantially exceeds expectations." A rating of 2 is "below expectations" and 1 is "substantially below expectations." The employee is rated in several categories using these numbers. The numbers are then averaged to determine an "MPA Rating." An employee who is rated 3 or higher is automatically entitled to a raise, i.e., an "MPA Salary Adjustment."
19. Grkovic has evaluated May on all of her annual performance appraisals (Pl. Dep., 5 and 73; Grkovic Dep. 58 and 130).

20. May received an MPA Rating above 3 on her first four annual appraisals (1999–2002).
21. On January 20, 2004, Grkovic evaluated May for 2003 giving her an MPA rating of 2.92. She did not receive a salary increase. (Pl.Dep.Ex. 2).
22. May responded with a “Request for Review and Revision of Performance Appraisal” on January 28, 2004, challenging specific aspects of her evaluation. Attached to her memorandum were testimonial letters she solicited from several department heads. (Grkovic Dep. 16).
23. Grkovic denied May’s request for review and revision by memorandum of February 11, 2004. Grkovic also advised May that the temporary removal of her planning duties was permanent and provided her with a job description as “Development Project Coordinator.” Further, Grkovic reprimanded May for inappropriate conduct and insubordination for soliciting testimonial letters because such action was contrary to his previous instruction not to discuss personnel matters with other city employees until she had discussed any issue with him. (Grkovic Dep., Ex. 17; Pl. Dep. 74).
- *12 24. May and Grkovic met with Miller after the evaluation (Grkovic Dep. 108; Miller Dep. 54–55).
25. Scott Sterling (“Sterling”) was hired as Planner.
26. The Department recommended approval of a site plan for a Waffle House which was in close proximity to property owned by May. During the planning process, May told Sterling that she objected to the site plan. On the late afternoon before the Planning Commission met, May told Grkovic that she intended to speak against the proposed site plan.
27. On August 19, 2004, May attended a meeting of the City’s Planning Commission and spoke, as a private citizen, in opposition to a site plan for a Waffle House that had been recommended for approval by the Department. (Pl.Dep.Ex. 7).
28. Grkovic sent May a memorandum on August 31, 2004, questioning her judgment for appearing before the Planning Commission and describing her actions as “inappropriate, unprofessional, and disrespectful to the Department.” (*Id.*).
29. May filed a charge of discrimination with the South Carolina Human Affairs Commission (“SCHAC”) on September 8, 2004 (Def.Mem., 26).⁴
30. May responded to Grkovic with a memorandum on September 9, 2004, explaining that her appearance was based on her First Amendment right as a private citizen and requesting him to “withdraw any negative reference from my personnel file relating to the assertion of my protected rights.” (*Id.*).
31. Grkovic responded with a memorandum on September 27 stating that his previous memorandum was not a reprimand but “related to the manner in which you chose to exercise those [First Amendment] rights, the level of knowledge you exhibited, and the degree of respect you showed for the department in making a presentation.” (*Id.*).
32. On November 30, 2004, Grkovic rated May’s performance for that year, giving her an MPA rating of 2.88. In the category of “Judgment” Grkovic rated May as “Below Expectations” and specifically stated that May “showed a significant lack of judgment in her appearance before the Planning Commission.” (Pl.Dep.Ex. 3). May did not receive a salary increase.
33. Grkovic gave May an MPA rating of 3.12 on her 2005 evaluation and she received a salary increase.

Discussion

A. Disparate Treatment

May alleges that the City subjected her to disparate treatment because of her gender. Title VII makes it “an unlawful employment practice for an employer—(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race ... or national origin.” In a disparate treatment case, the plaintiff must prove that “but for” his race or national origin, he would not have been subjected to an adverse employment action.¹ *Holmes v. Bevilacqua*, 794 F.2d 142 (4th Cir.1986). A plaintiff can prove the defendant’s discriminatory motive by two methods. First, the “plaintiff may meet this burden under the ordinary standards of proof

by direct and indirect evidence relevant to and sufficiently probative of the issue. In the alternative, a plaintiff may resort to the judicially created scheme established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 729 (1973) and ¹ *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).² *EEOC v. Clay Printing Company*, 955 F.2d 936 (4th Cir.1992).

*13 The *McDonnell-Douglas* proof scheme consists of three stages. First, the plaintiff must produce sufficient evidence to establish a prima facie case of discrimination. Generally, the plaintiff must show that (1) he is a member of a protected class; (2) he was qualified for his job and his job performance was satisfactory; (3) he was subjected to an adverse employment action; and (4) other employees who are not members of the protected class were treated more favorably.³ *Hughes v. Bedsole*, 48 F.3d 1376, 1383 (4th Cir.), cert. denied, 516 U.S. 870, 116 S.Ct. 190, 133 L.Ed.2d 126 (1995). If the plaintiff succeeds in submitting sufficient evidence to the Court to establish a prima facie case, the burden then shifts to the defendant to articulate a legitimate non-discriminatory reason for the employment action taken.

⁴ *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir.1996). Once the defendant has satisfied its burden, it then shifts to plaintiff to prove that the proffered reason is merely a pretext for discrimination.⁵ *Carter v. Ball*, 33 F.3d 450, 458 (4th Cir.1994).

The City argues that May cannot establish a prima facie case of gender discrimination because the record shows that she was not performing her duties at an acceptable level and that she did not suffer an adverse employment action.

The undersigned concludes, in the light most favorable to May, that she suffered two adverse employment actions: (1) change in job duties and title and (2) 2003 and 2004 annual evaluations which deprived her of a merit based cost of living increase.

In *Webster v. Rumsfeld*, 156 Fed.Appx. 571, 2005 WL 3229753, *7 (4th Cir.2005), Judge Traxler summarized precedent on what constitutes an adverse employment action:

"An adverse employment action is a discriminatory act which adversely affects the terms, conditions, or benefits of the plaintiff's employment. Conduct short of ultimate employment decisions can constitute adverse employment

action."⁶ *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375-76 (4th Cir.2004). "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

Thus, a reassignment can "form the basis of a valid Title VII claim if the plaintiff can show that the reassignment had some significant detrimental effect."⁸ *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir.1999). However, a mere change in an employee's job assignment, even if "less appealing to the employee, ... does not constitute adverse employment action."⁹ *Booz-Allen*, 368 F.3d at 376. "Absent any decrease in compensation, job title, level of responsibility, or opportunity for promotion, reassignment to a new position commensurate with one's salary level does not constitute an adverse employment action even if the new job does cause some modest stress not present in the old position." *Id.*

*14 Under this standard, Grkovic's removal of planning duties and change of job title constitutes an adverse employment action. May's level of responsibility was dramatically changed when her planning duties were stripped and assigned to males, first Taylor then Sterling. Likewise, Grkovic's MPA ratings of May should be considered adverse employment actions because they resulted in the denial of a merit pay increase,¹⁰ a deprivation of a benefit.

The City asserts that May was not performing her job duties in 2003 and 2004 which resulted in the poor performance evaluations and change of job title. Based on the record, the undersigned concludes that May has failed to establish this element of her prima facie case.

(B)ecause a plaintiff must show by a preponderance of the evidence that he met the employer's legitimate job expectations to prove his prima facie case, the employer may counter with evidence defining the expectations as well as evidence that the employee was not meeting those expectations.

* * *

Although on summary judgment an employer is free to assert that the job expectation has not been met, nothing prohibits the employee from countering this assertion with evidence that demonstrates (or at least creates a question of fact) that the proffered "expectation" is not, in fact, legitimate at all. Thus, where application of the ... expectation element of the prima facie case seems to preclude an otherwise meritorious claim, the plaintiff is free to demonstrate that the employer's ... expectations are not, in fact, "legitimate."

¹ *Warch v. Ohio Casualty Insurance Co.*, 435 F.3d 510, 515–17 (4th Cir.2006).

The City has provided evidence of its expectations of May and that she was not meeting those expectations in the form of the written performance evaluations. For 2003 and 2004 May was rated on the basis of knowledge of job, quality of work, quantity of work, dependability, attendance, initiative and enthusiasm, judgment, cooperation, relationship with others, coordination of work, and safety and housekeeping. Each of these expectations was broken down into three subcategories, a total of 33 subcategories. Grkovic rated May on each expectation and subcategory with specific comment.

May does not assert that the City's expectations are not legitimate, but merely disagrees with Grkovic's rating. A major part of May's 2003 rating (and the removal of her planning duties) were the decisions she made regarding approval of the swimming pool and sign discussed above. In her responsive memorandum, May stated that her decision to approve the swimming pool was "an unfortunate misunderstanding," and her approval of the sign was a mistake. The 2003 performance evaluation reflected these performance errors.

May's disagreement with her performance evaluation is insufficient to defeat summary judgment. See ¹ *King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir.2003) (employee's own testimony cannot establish a genuine issue of material fact as to whether the employer's legitimate expectations were met, because "it is the perception of the decision maker which is relevant" (internal quotation marks and citation omitted)). This holding also precludes May's argument that other department heads and employees of the City found no fault with her work. They did not supervise May and had no hand in management of the Department.

*15 The City argues that even if May could establish a prima facie case of gender discrimination, it has articulated legitimate, non-discriminatory reasons for removing her duties as a planner and her poor performance evaluations. The reasons were planning errors and the MPA evaluation reviews.⁶ May does not directly address the City's pretext argument, but instead lapses into a largely irrelevant argument about retaliation and a hostile work environment. (Pl.Mem.9). May has not shown that the reasons articulated by the City are a pretext for discrimination.

B. Hostile Work Environment/Sexual Harassment

Title VII makes it unlawful for an employer to discriminate against an employee with respect to compensation, terms, conditions or privileges of employment on the basis of sex.

¹ 42 U.S.C. § 2000e–2(a). This includes creating or allowing a hostile work environment based on gender. ¹ *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). To prove a hostile work environment, the plaintiff must show: (1) that she was harassed because of her sex; (2) the harassment was unwelcome; (3) the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) some basis exists for imputing liability to the employer. ⁷ ¹ *Howard v. Winter*, 446 F.3d 559, 565 (4th Cir.2006); ¹ *Ocheltree v. Scollon Products, Inc.*, 335 F.3d 325, 331 (4th Cir.2003) (en banc).

In ¹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), the Supreme Court reaffirmed its previously articulated standard for determining when a plaintiff has established a hostile work environment in violation of Title VII, stating that a plaintiff must establish that the environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." ¹ *Faragher*, 524 U.S. at 787 (citing ¹ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–22, 114 S.Ct. 367, 126 L.Ed.2d 295(1993)). Actionable sexual harassment occurs when the workplace is "permeated with discriminatory intimidation, ridicule, and insult." ¹ *Harris*, 510 U.S. at 21. Title VII does not reach "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex ... [I]t forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment." ¹ *Oncale v. Sundowner Offshore Servs., Inc.*,

523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), *citing*,
11 *Harris* 510 U.S. at 21.

Among the circumstances examined are “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” 11 *Harris v. Forklift Sys., Inc.*, 510 U.S. at 21. “While we do not approve of [the employer’s] apparent willingness to offend and provoke employees with his ambiguously sexual innuendos, Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace.” *Id.* at 754; *see also* 11 *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430 (7th Cir.1995) (“The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women ... It is not designed to purge the workplace of vulgarity.”).

*16 Defendants assert entitlement to summary judgment because none of the actions about which plaintiff complains were based on her gender, nor were those actions sufficiently severe or pervasive to create an abusive working environment. May does not specifically address this argument. (Pl.Mem., pp. 9–11).

An employee is harassed “because of” her gender if, “but for” her gender, she would not have been the victim of discrimination. 11 *Smith v. First Union National Bank*, 202 F.3d 234, 242 (4th Cir.2000); 11 *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 142 (4th Cir.1996); 11 *Miller v. Washington Workplace, Inc.*, 298 F.Supp.2d 364 (E.D.Va.2004); and 11 *Ensko v. Howard County, Md.*, 423 F.Supp.2d 502, 508 (D.Md.2006). A workplace filled by actions or remarks that intimidate, ridicule, and maliciously demean the status of women can create a hostile environment. 11 *Smith*, 202 F.3d at 242. In *Smith*, plaintiff’s supervisor, Scoggins, constantly “repeated remarks that belittled her because she was a woman.” The Court summarized those remarks.

Scoggins’ discriminatory remarks to Smith included the following: (1) Scoggins would have preferred a male in the team leader position because males are “natural leaders”; (2) Smith would “crack” because women “are not emotionally capable of handling the management role”;

(3) Scoggins would frequently remark to Smith that a woman who was upset “must be menstruating” or that she needed “a good banging”; (4) women were “out to get him” and that women generally conspire with each other against men; (5) Scoggins wished he were a woman so that he could “whore his way through life”; (6) Smith was lucky to have her job, and she would not get any further at First Union because she was not attractive; (7) the “only way for a woman to get ahead at First Union is to spread her legs”; (8) women had no place in management and did not even belong in college; (9) women should be “barefoot and pregnant”; (10) women go through life looking for a man to marry; (11) Barbara Judge, a female supervisor, was “sleeping her way to the top” and therefore she was a “classic example of why women should not be in management”; (12) women’s hormones do not allow them to handle work matters in a professional manner.

11 *Smith*, 202 F.3d at 243, n. 6. The other cases cited above which found that the plaintiff was harassed because of her gender cite similar utterances.

In contrast, none of the memoranda written by May complain of sexual harassment. According to Miller, May’s complaints to her involved poor communication (Miller Dep. 49–50). She testified, “I recall [May] talking about she couldn’t do anything to please him, had a difficult time in communicating. He wouldn’t work with her, he wouldn’t explain things, he would cut her off, be abrupt, that kind of thing.” (*Id.* 73). According to May, she complained about Grkovic to Miller prior to September of 2003⁸ concerning “his treatment, his derogatory remarks, attitude, dismissive, rude, some peculiar habits that he has [i.e. groping], inability to do anything that meets his expectations....” (Pl.Dep.85). When specifically asked to identify derogatory remarks, May testified, “I would write something for the newsletter, and he would say did you spend five minutes on this ..., and you know, just general demeanor, tone, attitude....” (*Id.* 86). The record contains no evidence that Grkovic ever used language that demeaned or objectified May as a woman.

*17 Grkovic’s “habit”⁹ (Pl.Dep.85) of groping himself gives one pause. Such an action could certainly be viewed as offensive. May testified that she observed the behavior on numerous occasions during the entire time of her employment. Also that it had been observed by others in the Department, men and women, and had been a topic of discussion. May also testified that Grkovic never made any comments related to this behavior, never made any gestures

to her related to the behavior, and never made any facial expressions related to the behavior. (Pl.Dep.89-91). When May complained to Miller about Grkovic's behavior, she did not say that she was being harassed, but that it made her "uncomfortable." (Miller Dep. 75). Thus, the undersigned concludes based on this record that while Grkovic's behavior was offensive, it was not directed at May, or any other female, because of gender.

Defendants also argue that the alleged conduct was not objectively severe or pervasive. May asserts that the work environment was objectively hostile, emphasizing that Grkovic could not get along with other females with whom he worked. May cites the affidavits of Grkovic's two former administrative assistants, Mims and Weger (Pl.Mem.10). Weger was Grkovic's administrative assistant for five months. She had "interaction problems with Grkovic" and stated that "(h)e appeared to have a problem working with women." Weger described Grkovic as having an "intimidating and critical style" and giving "no positive feedback." She resigned because of the "hostile environment." (Weger Aff.).

A portion of the Mims' affidavit is quoted above. Mims' description of Grkovic is much like that of Weger. She states that she was Grkovic's Administrative Assistant for two or three years and that he "subjected [her] to an extremely hostile work environment." According to Mims, Grkovic "occasionally referred to her in negative and sometimes slanderous terms such as 'idiot' and once as a 'f... ing bitch.'" (Mims Aff.).

May does not assert that Grkovic talked to her in the manner in which he spoke to Mims. Further, May does not assert that she heard Grkovic say these things to Mims or any other female. As discussed above, there is no evidence that Grkovic used such remarks to belittle May because she was a woman.

May has shown that Grkovic was unpleasant but she has not shown that his conduct was objectively offensive based on her gender.

C. Retaliation

May asserts that the removal of her planning duties, Grkovic's written reprimands, and her poor performance evaluations were in retaliation for her complaints to Miller and Martin concerning Grkovic.

To establish a prima facie case of retaliation, it must be demonstrated that:

- (1) the employee engaged in protected activity;
- (2) the employer took some adverse employment action against the employee; and
- (3) a causal connection existed between the protected activity and the adverse action.

*18 See *Anderson v. G.D.C., Inc.*, 281 F.3d 452, 458 (4th Cir.2002); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir.1998); *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir.1994). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to produce evidence of a legitimate, non-retaliatory reason for the adverse action. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 254. If the defendant meets this burden, the plaintiff must show by a preponderance of the evidence that the proffered reason was pretextual, and that the adverse action was imposed because the plaintiff engaged in protected activity. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

A plaintiff need not have filed a formal complaint with the Equal Employment Opportunity Commission or a state deferral agency to engage in a protected activity. Complaints to supervisory or management employees concerning harassment or discriminatory treatment as well as informal complaints, filing of internal grievances, and complaints to an agency are included within the definition of protected activity. *Warren v. Halstead Industries, Inc.*, 802 F.2d 746, cert. denied, 487 U.S. 1218, 108 S.Ct. 2872, 101 L.Ed.2d 907 (1988) and *Mitchell v. Baldrige*, 759 F.2d 80 (D.C.Cir.1985).

For the purpose of summary judgment, defendants concede that May engaged in protected activity when she spoke with Miller and Martin. Defendants contend that May cannot show that she suffered an adverse action or a causal connection between her protected activity and the employment decisions about which she complains.

The Fourth Circuit, in *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir.2001), addressed what an "adverse employment action" is for purposes of a Title VII retaliation claim. Although "ultimate employment actions" are adverse employment actions, a Title VII retaliation claim does not

require an ultimate employment action. In *Burlington Northern & Santa Fe R.R. Co. v. White*, — U.S. —, 126 S.Ct. 2405, 2410, 165 L.Ed.2d 345 (2006), the Supreme Court held that a plaintiff is not required to show “an adverse effect on the ‘terms, conditions, or benefits’ of employment” to support a retaliation claim (quoting *Von Gintzen*, 243 F.3d at 866). It is sufficient if the plaintiff shows that a reasonable employee finds the employment action “materially adverse” or likely to “dissuade a reasonable worker from making or supporting a charge of discrimination.” *Id.* at 2415 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C.Cir.2006)). The undersigned concludes that the removal of May’s planning duties and her negative performance evaluations were adverse employment actions.

However, the undersigned further concludes that May has failed to establish a causal connection. May relies on temporal proximity to establish the required nexus. The flaw in this argument is that May has not sufficiently established when she engaged in protected activity.

In *Garrett v. Lujan*, 799 F.Supp. 198 (D.D.C.1992), the court observed that “[w]hile a causal nexus is inferred when the adverse employment action occurs shortly after participation in a protected activity,” such inference is not appropriate when the time interval is too great. *Id.* at 202 (concluding that the passage of nearly a year precluded an inference of causal connection); see *Parrott v. Cheney*, 748 F.Supp. 312 (D.Md.1989) (even the passage of as little as five months between filing EEOC complaint and adverse action may be enough to negate causal connection in a particular factual context), *aff’d per curiam*, 914 F.2d 248 (4th Cir.1990). The Fourth Circuit recognized these concepts in *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir.1998):

*19 This Court has held that evidence that the alleged adverse action occurred shortly after the employer became aware of the protected activity is sufficient to “satisf[y] the less onerous burden of making a prima facie case of causa[tion]” *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir.1989). We believe the opposite to be equally true. A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action, as was the case here, negates any inference that a causal connection exists between the

two. See *Burrus v. United Tel. Co.*, 683 F.2d 339, 343 (10th Cir.1982) (holding that three years between the protected activity and the adverse employment action was too long to establish the third element); *Clark v. Chrysler Corp.*, 673 F.2d 921, 930 (7th Cir.1982) (holding that two-year time lapse negated any inference of causal connection). Indeed, were this not the case, an employee could guarantee his job security simply by filing a frivolous complaint with the EEOC on his first day of work. Title VII was not enacted to guarantee tenure in the workplace.

Generally, temporal evidence alone is insufficient to establish causation for completing a prima facie cause of retaliation, unless the “temporal proximity between an employer’s knowledge of the protected activity and an adverse employment action” was “very close.” *Clark County School District v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

May only testified that her protected activity occurred prior to September of 2003 when her planning duties were removed. Thus, she has failed to establish causation based on temporal proximity and a prima facie case of retaliation.

D. First Amendment

May asserts that defendants retaliated against her in violation of 42 U.S.C. § 1983 because she exercised her First Amendment right to free speech. The speech in question is May’s appearance before the Planning Commission on August 19, 2004, in opposition to a site plan for a Waffle House near her home.

Section 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights ... secured by the constitution ... shall be liable to the party injured in an action at law....

The First Amendment to the Constitution guarantees freedom of speech. Citizens do not forfeit all their First Amendment rights when they become public employees. ¹ *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) and ² *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). “(A) State may not discharge an employee on a basis that infringes that employee’s constitutionally protected interest in freedom of speech.” ³ *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315, 383 (1987). Whether a restriction imposed by an employer on a public employee’s speech violates the First Amendment requires a balance between the employee’s interest, as a citizen, in speaking on matters of public concern and the employer’s interest in delivering its services to the public. *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir.2000).

*20 The primary issue is whether the speech in question was that of a private citizen commenting on a matter of public concern. If this is shown to be the case, the Court must then balance the employee’s interest in First Amendment expression against the State’s interest in maintaining proper operation of its workplace. ⁴ *Pickering*, 391 U.S. at 568. The Court must examine the content, context, and form of the speech at issue in light of the entire record to determine whether the speech involves a matter of public concern. *Urofsky*, 216 F.3d at 406. Generally, speech that involves social, political, or other issues of interest to the community constitutes a matter of public concern. *Id.* It is recognized that speech by public employees made in the course of their job duties will frequently involve matters of public concern without giving those employees a First Amendment right to dictate to the employer how they will perform their job. *Id.*

To prevail on a First Amendment retaliation claim, a plaintiff must show that: (1) he engaged in protected speech on a matter of public concern; (2) his interest in First Amendment expression outweighs his employer’s interest in efficient operation of the workplace; (3) he was deprived of some valuable benefit; and (4) a causal relationship exists between his protected speech on matters of public concern and the loss of the benefit. ⁵ *Huang v. Board of Governors of the Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir.1990); ⁶ *McVey v. Stacy*, 157 F.3d 271, 277–78 (4th Cir.1998) and ⁷ *Peters v. Jenney*, 327 F.3d 307, 322–33 (4th Cir.2003).

For the purpose of their summary judgment motion, defendants concede that May spoke as a private citizen on a matter of public concern before the Planning Commission. (Def.Mem.32). Defendants contend that May’s expression does not outweigh the Department’s interest in efficient operation of the workplace, she was not deprived of a valuable benefit, and she cannot establish a causal nexus between her speech and any alleged retaliatory action.

In this Circuit, the “*McVey* test” is used in balancing the employee’s interest in speaking on matters of public concern with the employer’s interest in maintaining an effective and efficient workplace. Factors to be considered are the nature of the employee’s position, the context of the employee’s speech, and the extent to which it disrupts the Department’s activity. ⁸ *McVey*, 157 F.3d at 278. In considering these factors, the Court looks at whether the speech: (1) “impairs discipline by superiors”; (2) impairs “harmony among co-workers”; (3) “has a detrimental impact on close relationships”; (4) impedes the performance of the public employee’s duties; (5) interferes with the operation of the agency; (6) undermines the mission of the [Department]; (7) is communicated to the public or to co-workers in private; (8) conflicts with the “responsibilities of the employee within the [Department]”; and (9) makes use of the “authority and public accountability the employee’s role entails.” *Id.* (quoting *Rankin v. McPherson*, 483 U.S. 378, 388–91 (1987)).

*21 Defendants do not specifically discuss these factors, but make four points. First, the Department was undermined because May could have spoken internally instead of appearing before the Planning Commission. Second, her actions showed a lack of respect for Grkovic and the Department.¹⁰ Third, defendants speculate that some members of the Planning Commission may have been confused because some of its members were aware that May was a member of the Department. Last, May gave the Planning Commission inaccurate information regarding development standards, i.e., the requirement for a buffer between commercial and residential property. (Def.Mem.34). There is little evidence in the record with respect to any of the factors cited above.

Defendants argue that May cannot establish a causal nexus between her speech and a retaliatory action. (*Id.*). The actions in question are Grkovic’s memorandum to May of August 31, 2004 (which May asserts in a written reprimand) and May’s 2004 evaluation which rated her “Below Expectations” depriving her of a merit increase. Unquestionably, May’s

appearance before the Planning Commission was the "cause" of Grkovic's memorandum. Further, May's 2004 performance evaluation specifically gave her an adverse rating mentioning the Planning Commission appearance.

However, the undersigned concludes that May fails to show the deprivation of a valuable benefit. In the context of a retaliation claim, "a public employee employer contravenes a public employee's First Amendment rights when it discharges or 'refuses to rehire [the] employee,' or when it makes decisions relating to 'promotion, transfer, recall, and hiring based on the exercise of that employee's free speech rights.'

"¹ *Ridpath v. Board of Governors Marshall Univ.*, 447 F.3d 292, 316 (4th Cir.2006) quoting ¹ *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir.2000). In *Suarez*, the Court cited two cases as examples of *de minimus* retaliatory acts:

courts have declined to find that an employer's actions have adversely affected an employee's exercise of his First Amendment rights where the employer's alleged retaliatory acts were criticism, false accusations, or verbal reprimands. See ¹ *Benningfield v. City of Houston*, 157 F.3d 369, 376-77 (5th Cir.1998) (holding that employees "falsely accused" of criminal wrongdoing and "verbally reprimanded" by their employer failed to allege adverse employment actions sufficient to constitute retaliation), *cert. denied*, 526 U.S. 1065, 119 S.Ct. 1457, 143 L.Ed.2d 543 (1999); ¹ *Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir.1997) (holding that an employer's criticism of employees and failure to award them merit pay increases did not constitute actionable adverse employment actions.).

May basically asserts that due to her appearance before the Planning Commission she was criticized and denied a merit

pay increase. Under *Suarez*, these actions do not constitute retaliation in violation of her First Amendment rights.

E. Public Policy Discharge

*22 In *Ludwick*, the South Carolina Supreme Court established an exception to South Carolina's common law at-will employment doctrine. It held that "(w)here the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises." *Id.* at 216. *Ludwick* involved an at-will employee who was discharged because she chose to honor a subpoena against her employer's wishes and testify before the South Carolina Employment Security Commission. The *Ludwick* exception is limited and "applies in cases when an employer requires an employee to violate the law or the reason for the employee's termination was itself a violation of the criminal law." ¹ *Lawson v. South Carolina Dep't. of Corr.*, 340 S.C. 346, 532 S.E.2d 259, 260-61 (S.C.2000). With respect to the second part of the exception, S.C.Code Ann. § 16-17-560 provides that "(i)t is unlawful for a person to ... discharge a citizen from employment ... because of political opinions or the exercise of political rights and privileges guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of this State." This statute "makes it a 'crime against public policy' to fire any person in this State because of their political beliefs." ¹ *Culler v. Blue Ridge Elec. Co-op., Inc.*, 309 S.C. 243, 422 S.E.2d 91, 92 (S.C.1992) (plaintiff discharged due to refusal to contribute to a political action committee has a wrongful discharge claim under *Ludwick* and S.C.Code Ann. § 16-17-560).

The main problem with this claim is that May has not been terminated. She is still employed within the Department. She argues that "discrimination and retaliation are clear violations of public policy." (Pl.Mem.13). While this may be true, May cites no cases which would stretch South Carolina's public policy cause of action to any action other than termination based on the situation in *Ludwick* or because of political beliefs.

F. Civil Conspiracy

May alleges that "(t)hroughout 2003 and 2004, the defendant Grkovic¹¹ met, planned, schemed and conspired with others, including city administrator Charles Martin, to implement an agenda to harass and threaten plaintiff and to take away and erode her responsibilities to cause her harm and ultimately

to remove her from employment with the city.” (Complaint ¶ 26). She further alleged that “(b)ecause of the positions of the conspirators with the city, special damages, proximately resulted.” (Complaint ¶ 27).

Under South Carolina law the tort of civil conspiracy has three essential elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. ¹ *Angus v. Burroughs & Chapin, Co.*, 368 S.C. 167, 628 S.E.2d 261, 262 (S.C.2006). “In order to establish a conspiracy, evidence either direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. Conspiracy may be inferred from the nature of the acts committed, the relationship of the parties, the interests of the alleged conspirators, and other relevant circumstances. Because civil conspiracy is by its very nature covert and clandestine, it is usually not provable by direct evidence.” ² *Moore v. Weinberg*, 373 S.C. 209, 644 S.E.2d 740, 2007 WL 521944, *10 (S.C.Ct.App.2007) (internal quotation marks and citations omitted).

*23 May has presented no evidence that Grkovic colluded with Martin or anyone else for the purpose of injuring her. In her memorandum, May merely repeats the allegation, quoted above, that Grkovic “met, planned, schemed and conspired with others.” (Pl.Mem., 14). She cites no portion of the record as evidence to support the allegation. The only evidence in the record is that Grkovic, Martin and others performed their supervisory functions. See ³ *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505, 511–12 (S.C.2006) (at summary judgment stage plaintiff has burden of producing evidence of an agreement between alleged conspirators to injure him).

Further, May has not pled or presented evidence of special damages. In connection with a civil conspiracy claim, a plaintiff must allege and prove special damages, i.e., damages that are directly attributable to the conspiracy itself, over and above to any damages alleged as a result of any other claims. ⁴ *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91, 95 (S.C.Ct.App.1989). “That is, the damages allegedly resulting from the conspiracy must not overlap with or be subsumed by the damages allegedly resulting from other claims.” *Parkman v. University of South Carolina*, 44 Fed. Appx. 606, 2002 WL 1792098, *12 (D.S.C.2002). *Accord Holmes v. Donahoe*, 2006 WL 859178, *2 (D.S.C.2006).

With respect to her civil conspiracy claim, May alleges that she “has sustained a loss of earning capacity, all well as intangible damages, including embarrassment, humiliation and mental suffering, as well as reputational injury.”¹² (Complaint ¶ 28). This allegation of damages merely repeats the allegations of damages for gender discrimination and retaliation. (Complaint, ¶ 15) and violation of First Amendment rights (Complaint, ¶ 21). Therefore, this claim must fail.¹³

Conclusion

Based on a review of the record, it is recommended that defendants' motion for summary judgment be granted.

All Citations

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Footnotes

- 1 Plaintiff objected only to the Magistrate Judge's recommendation that summary judgment be granted as to the Plaintiff's claims of gender discrimination, retaliation, hostile work environment, and violation of her civil rights under ¹ Section 1983. Plaintiff did not object to the recommendation that summary judgment be granted as to the Plaintiff's two state law claims for public policy discharge and civil conspiracy. In the absence of objections to the Report, this court is not required to give any explanation for adopting the recommendation. *Camby v. Davis*, 718 F.2d 198, 199 (4th Cir.1983).
- 2 In her deposition, Plaintiff cited five instances of what she believed to be different treatment. First, Plaintiff claimed that when the Department's secretary position has been vacant, she has “been the one that has had

to answer the phone, take messages, take minutes for planning commission meetings, cover during lunch, cover during vacations." To Plaintiff's knowledge, Grkovic had never asked any of the male employees to perform these secretarial tasks. (Pl.Dep.96). Second, Plaintiff has claimed that when she was hired, she was told not to worry about her inexperience as a planner and that she would be trained. However, Grkovic never let her sit in on the meetings with him. Mr. Sterling, the new full time planner, sits in on all the meetings. Third, Plaintiff says she was graded harshly for not being in her work area. But when Michael Baldy, GIS/GPS planner, was absent from his work area, Grkovic procured him a beeper. (Pl.Dep.98). Fourth, Plaintiff argues that although she never received a vehicle, Scott Sterling was allowed to drive a company car. (Pl.Dep.100). Finally, Plaintiff is the only person Grkovic has ever written up and taken responsibility away from because of an error in her permitting, even though he has acknowledged that other employees have made permitting mistakes. (Grkovic Dep. 142). Grkovic said when other employees had made mistakes, he had "readjusted some responsibilities" and increased oversight where necessary, but had not made any major changes to their job duties. (Grkovic Dep. 88, 105).

3 According to Tish Mims, a former employee of Grkovic's, Grkovic would do so by "placing his hands in the front of his pants in the crotch area or by placing his right hand in his pocket and appearing to 'jiggle' his genitals." (Mims Aff.). See also Pl. Dep. 89, 90.

4 Grkovic noted another specific example of Plaintiff's poor judgment, which he described as "her approach to modifying the utility bill insert mailing schedule as well as her personal desires."

5 A different analysis is used in cases involving the enforcement of disciplinary actions. In this context, the plaintiff must show that: (1) she is a member of a protected class, (2) she "engaged in prohibited conduct similar to that of a person of another race, color, sex, religion, or national origin," and (3) "disciplinary measures enforced against the plaintiff were more severe than those enforced against the other person."

¹ *Anthony v. South Carolina Dep't of Corrections*, No. 05-1636, 2007 WL 1032440, at *4 (D.S.C. March 30, 2007) (quoting ² *Moore v. Charlotte*, 754 F.2d 1100, 1105-06 (4th Cir.1985)). Plaintiff has alleged that she was reprimanded more harshly for her mistakes than her male coworkers. However, the court finds that this is not a disparate discipline case. Such cases typically involve employees disciplined for acts of egregious conduct outside the realm of merely poor job performance. See ³ *Forrest v. Transit Mgmt. of Charlotte, Inc.*, No. 06-2245, 2007 WL 2348698 (4th Cir. August 15, 2007) (employee disciplined for a physical altercation with a coworker); ⁴ *Moore*, 754 F.2d 1100 (police officer demoted for fixing tickets); *Jenks v. City of Greensboro*, 495 F.Supp. 72d 524 (M.D.N.C.2007) (firefighter terminated because she assaulted a civilian); ⁵ *Anthony*, 2007 WL 1032440 (employee charged with gross negligence and falsification of official inspection reports).

6 Grkovic noted in Plaintiff's first review, conducted six months into her employment with the City, that Plaintiff was a "fairly quick study in planning areas and issues," but she would benefit from "[p]articipation in planning and economic development seminars and training sessions and self study...." (Pl.Dep.Ex. 2). In Plaintiff's 2000 evaluation, Grkovic commented that "Allison should work on improving [sic] her understanding of the planning and land use regulation process. Her ability to complete project reviews will be improved with more research and possibly more formal training in zoning administration." *Id.* Grkovic further noted that Plaintiff "should work on improving her ability to listen to and follow directions on technical assignments or those assignments that specific regulations and standards apply." *Id.* In Plaintiff's 2001 evaluation, Grkovic observed, "Allison needs to expand her knowledge of planning and land use regulation processes. More timely research and formal training should be pursued in 2002." *Id.* By Plaintiff's 2002 evaluation, Grkovic had decided that "Allison's role in the planning and zoning administration activities of the Department will be reduced with the addition of a Planner to the staff." *Id.* By 2003, Grkovic's comments indicate that Plaintiff was no longer involved in planning and zoning. However, Grkovic indicated that Plaintiff's work on the newsletter could use improvement. Grkovic also noted that Plaintiff continued to experience difficulty completing tasks on time, listening, and following directions. Grkovic observed that Plaintiff experienced occasional difficulty

organizing and planning tasks and projects. In Plaintiff's 2004 performance evaluation, Grkovic again gave Plaintiff low marks for her ability to listen, follow directions, and organize her tasks. Grkovic also cited Plaintiff's absenteeism, lack of enthusiasm, and poor judgment.

7 Plaintiff alleges in her objection to the Magistrate Judge's report that she first complained of poor treatment in 2001. Plaintiff does not cite any authority for this assertion, and the court finds that it is not supported in the record. However, if true, this evidence would only hinder, rather than help, Plaintiff's claim that her protected activities and adverse actions were temporally proximate, because it would establish a two-year gap between the first instance of protected conduct and the first alleged retaliatory action. See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir.1998) (holding that "[a] lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action ... negates any inference that a causal connection exists between the two."); *Parrott v. Cheney*, 748 F.Supp. 312 (D.Md.1989) (noting that five months between protected activity and adverse action enough to negate causal connection).

8 Plaintiff's points of objection do not appear to include the Magistrate Judge's refusal to consider the possibility Defendants retaliated against Plaintiff for the charge of discrimination she filed with SCHAC on September 8, 2004. Plaintiff has never alleged that Defendants were made aware of this charge prior to the 2004 performance evaluation. Therefore, the Magistrate Judge did not err in excluding the SCHAC charge from his analysis of Plaintiff's retaliation claim.

1 Pretrial matters were referred to the undersigned pursuant to Local Rule 73.02(B)(2)(g), D.S.C.

2 Gilliland is a female but is not an employee of the City. She worked with Grkovic in his position with a non-profit organization.

3 Wegner and Mims are former employees of the City who were supervised by Grkovic.

4 The SCHAC charge is not a part of the record.

5 Generally, a poor performance evaluation is not considered an adverse employment action. However, it may be an adverse employment action where it has a direct, tangible adverse consequence with respect to the employees. *Nye v. Roberts*, 2005 WL 1870027 (4th Cir.2005) (unpublished) citing *Speaks v. Missouri Dep't. of Corr. & Human Res.*, 210 F.3d 850, 854 (8th Cir.2000).

6 In *Warch*, the Fourth Circuit recognized that an employer may use the same evidence at different stages of the *McDonnell Douglas* framework. 435 F.3d at 516.

7 Since Grkovic was May's supervisor, his actions are attributable to the City. *Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261, 266 (4th Cir.2001).

8 After September of 2003, Miller's complaints centered upon poor evaluations and the aftermath.

9 Phillis Britt described the habit as a nervous tick which she had observed in public forums and in Grkovic's office in the presence of both men and women.

10 These arguments relate to several of the factors cited above. However, May did speak internally to Sterling during the planning process.

11 Grkovic is sued in his individual capacity with respect to this claim.

12 May also alleges entitlement to punitive damages from Grkovic "for his intentional and malicious actions."

13 May does not discuss the requirement to plead and prove special damages in her memorandum. (Pl.Mem.13-14). However, she alleges in her complaint that "(b)ecause of the positions of the conspirators with the city, special damages proximately resulted." (Complaint, ¶ 27). As discussed above, the relationship of the parties is a factor to be considered in showing the existence of the alleged conspiracy. May gives no clue as to how the existence of a supervisor/employee relationship creates special damages.

2017 WL 9250342

Only the Westlaw citation is currently available.
United States District Court, D. South Carolina.

William HOBEK, Plaintiff,

v.

The BOEING COMPANY, Defendant.

C/A No. 2:16-CV-3840-RMG-MGB

Signed 06/06/2017

Filed 06/08/2017

Attorneys and Law Firms

Bonnie Travaglio Hunt, Hunt Law, Goose Creek, SC, for Plaintiff.

Melissa Fried Spence, Molly Hughes Cherry, Nexsen Pruet, Charleston, SC, for Defendant.

**REPORT & RECOMMENDATION
OF MAGISTRATE JUDGE**

MARY GORDON BAKER, UNITED STATES
MAGISTRATE JUDGE

*1 This matter is before the court on the Defendant's Motion to Dismiss in Part. (Dkt. No. 6.) In his Complaint, the Plaintiff alleges causes of action for age discrimination under the Age Discrimination Employment Act and for wrongful termination in violation of public policy. (Dkt. No. 1-1.) The Plaintiff filed his Complaint in the Court of Common Pleas for Charleston County. (Dkt. No. 1-1.) Boeing removed this action to federal court on December 8, 2016. (Dkt. No. 1.)

Pursuant to the provisions of 28 U.S.C. § 1332(a)(1), Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge.

Alleged Facts

The Plaintiff formerly worked as a quality manager for Boeing. (Dkt. No. 1-1 ¶ 19.) During the final two years of his employment at Boeing, the Plaintiff began to have "serious concerns regarding the Quality and Safety" of the aircraft

being manufactured by Boeing. (*Id.* ¶¶ 24-26.) The Plaintiff reported his concerns to his supervisors but the concerns were not addressed. (*Id.* ¶¶ 24, 25, 29, and 31.) The Plaintiff then addressed his concerns to Boeing's ethics department in August of 2015 and February of 2016 but again his complaints were ignored. (*Id.* ¶¶ 35, 36, and 40.)

The Plaintiff was transferred to a different supervisor in March of 2016. (Dkt. No. 1-1 ¶ 42.) The Plaintiff alleges that he was transferred in retaliation for his complaints and the transfer was made with the intent to terminate the Plaintiff's employment. (*Id.* ¶ 42.) On April 5, 2016, the supervisor placed the Plaintiff on a Performance Improvement Plan ("PIP"). (*Id.* ¶ 44.) The Plaintiff's supervisor continued to discipline the Plaintiff for "pretextual and petty" reasons in retaliation for making complaints. (*Id.* ¶ 47.) The Plaintiff was terminated on May 5, 2016. (*Id.* ¶ 55.) The Plaintiff alleges that his discipline and termination were due to his age and in retaliation for his complaints regarding quality and safety. (*Id.* ¶¶ 59-61 and 66.)

Following his termination, the Plaintiff entered Boeing's Alternative Dispute Resolution ("ADR") process. (Dkt. No. 1-1 ¶¶ 55-58.) The Plaintiff alleges that Boeing changed the ADR process during his appeal to retaliate against the Plaintiff and to "prevent the Plaintiff from addressing [Boeing's] Safety and Quality Failures, [Boeing's] discrimination in violation of the Law against Older Americans and [Boeing's] wrongful termination of the Plaintiff." (*Id.* ¶ 58.) (capitalization in original).

Standard of Review

On a motion to dismiss pursuant to Rule 12(b)(6), a "complaint must be dismissed if it does not allege 'enough facts to state a claim to relief that is plausible on its face.'"

"*Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In reviewing a motion to dismiss an action pursuant to Rule 12(b)(6) ... [a court] must determine whether it is plausible that the factual allegations in the complaint are 'enough to raise a right to relief above the speculative level.' " *Andrew v. Clark*, 561 F.3d 261, 266 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). "A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a

formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

*2 For purposes of a motion to dismiss, the district court must “take all of the factual allegations in the complaint as true.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “In considering a motion to dismiss, [the court] accept[s] the complainant’s well-pleaded allegations as true and view[s] the complaint in the light most favorable to the non-moving party.” *Stansbury v. McDonald’s Corp.*, 36 F. App’x 98, 98-99 (4th Cir. 2002) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). However, while the court must draw all reasonable inferences in favor of the plaintiff, it need not accept the “legal conclusions drawn from the facts, ... unwarranted inferences, unreasonable conclusions or arguments.” *Nemet Chevrolet, Ltd. v. Consumer Affairs, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Giarratano*, 521 F.3d at 298).

Analysis

Boeing’s Motion is a partial motion to dismiss seeking to have the district court dismiss the Plaintiff’s claim for wrongful termination in violation of public policy. Boeing argues that the Plaintiff has failed to state a viable claim for wrongful discharge in violation of public policy because he has an existing statutory remedy and he has not alleged facts to show a violation of a clear mandate of public policy. (Dkt. No. 6.) The Plaintiff argues that a statutory remedy does not exist for the Plaintiff and that he has alleged sufficient facts to support a violation of a clear mandate of public policy. (Dkt. No. 13.)

Absent a specific contract, employment in South Carolina is at-will. *Mathis v. Brown & Brown of S. Carolina, Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); see also *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 768 S.E.2d 385 (2015). “An at-will employee may be terminated at any time for any reason or for no reason, with or without cause.” *Mathis*, 389 S.C. at 310. “Under the ‘public policy exception’ to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public

policy.” *Barron v. Labor Finders of S. Carolina*, 393 S.C. 609, 614, 713 S.E.2d 634, 636-37 (2011). The public policy exception does not apply in cases where there is an existing statutory remedy. *Id.* at 615, 713 S.E.2d at 637. The public policy exception “is not designed to overlap an employee’s statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999).

Existing Statutory Remedy

Boeing argues that the Plaintiff’s claim alleging retaliation for complaints regarding the safety and quality of aircraft is not proper as a wrongful discharge claim for violation of public policy because the Plaintiff has an existing statutory remedy under the Wendell H. Ford Air and Investment Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121. (Dkt. No. 6 at 4-6.) The Plaintiff argues that the complaints that led to the retaliation were not limited to safety but included quality, performance, and discrimination as well. (Dkt. No. 13 at 8.) The Plaintiff additionally argues that AIR21 does not apply because it only “protects employee[s] who provide information or participate in proceedings related to violations of [AIR21].” (*Id.*)

AIR21 “creates a detailed administrative regime to protect whistleblowers who inform their employers or the federal government about violations of federal laws relating to air carrier safety.” *Bombardier, Inc. v. United States Dep’t of Labor*, 145 F. Supp. 3d 21, 25 (D.D.C. 2015). In pertinent part, AIR21 provides as follows:

*3 (a) **Discrimination against airline employees.**—No air carrier¹ or contractor or subcontractor of an air carrier² may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) **provided**, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of

the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;

....

(b) Department of Labor complaint procedure.--

(1) Filing and notification.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

49 U.S.C. § 42121 (emphasis added).

The Plaintiff argues that AIR21 is limited to reports regarding safety and does not include quality complaints or age discrimination. (Dkt. No. 13 at 8.) The Plaintiff asserts that his reports to Boeing included “safety, quality, performance, and discrimination” and therefore are outside the scope of AIR21. (*Id.*) “A motion to dismiss tests the sufficiency of a complaint, and [a court’s] evaluation is thus generally limited to a review of the allegations of the complaint itself.” ¹ *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165–66 (4th Cir. 2016) (internal citation and quotations omitted).

*4 The Plaintiff’s Complaint is clear that the public policy allegedly violated was “because he reported Safety and Quality issues regarding the aircraft produced by the Defendant.” (Dkt. No. 1-1 ¶ 66.) The Plaintiff alleges that he informed Boeing that its interpretation of quality

documents was “incorrect and needed to be corrected to follow the law.” (*Id.* ¶ 31.) The Plaintiff alleges that the concerns he raised “were significant as the Safety of the planes being produced by the Charleston facility were directly affected.” (*Id.* ¶ 36.) Under the heading “For a Second Cause of Action Wrongful Termination” the Plaintiff alleges “the Defendant wrongfully terminated the Plaintiff in violation of public policy when it terminated him because he reported Safety and Quality issues regarding the aircraft produced by the Defendant.” (*Id.* ¶ 83.)

The Complaint limits the wrongful termination claim to termination for safety and quality reports, which in aircraft manufacturing are one in the same. The quality of aircraft manufacturing necessarily affects safety of the aircraft. In addition to the clear language of the Complaint, the Plaintiff obviously has a statutory remedy for discrimination as he alleges a discrimination claim under the Age Discrimination in Employment Act. (Dkt. No. 1-1 at 25.) *See Addison v. CMH Homes, Inc.*, 47 F. Supp. 3d 404, 428 (D.S.C. 2014) (holding a statutory remedy precluded a wrongful termination in violation of public policy claim where the public policy claims were based on the same allegations as the Plaintiff’s Title VII claims.)

Reviewing the plain language of the statute, AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer that related to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States. 49 U.S.C. § 42121. The Plaintiff argues that “the Plaintiff was terminated for his refusal to violate the law by passing a plane that did not meet the safety standards and Quality [sic] standards.” (Dkt. No. 13 at 14–15.) By the Plaintiff’s own argument, the allegations surrounding his termination fall within the statutory remedy found in AIR21.

The Plaintiff also argues that protections in AIR21 are limited to employees who make a report under AIR21. (Dkt. No. 13 at 8.) The Plaintiff cites 49 U.S.C. § 42121 to support his assertion. The Plaintiff’s failure to exercise his rights under AIR21 does not create a cause of action in court. Section 42121 clearly states that the protection applies to reporting “information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of

the United States.” 49 U.S.C. § 42121(a). The remedy for any form of retaliation based on reporting is outlined in § 42121(b). The public policy exception “is not designed to overlap an employee’s statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists.” ¹ *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999). The Plaintiff has a reasonable means of redress under AIR21 based on his allegations. This court concludes that the Plaintiff had an existing statutory remedy for the allegations supporting the wrongful discharge in violation of public policy claim.

Sufficiency of Facts Alleged

Boeing additionally argues that the Plaintiff has not alleged facts to support a clear mandate of public policy. (Dkt. No. 6 at 6-9.) South Carolina courts have recognized only two instances where the public policy exception to at-will employment was actionable: “(1) where an employer requires an employee, as a condition of continued employment, to break the law ... and (2) where an employer’s termination is itself illegal....” *Taghivand*, 411 S.C. at 243, 768 S.E.2d at 387 (citing ¹ *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985)) (holding that an employee could maintain a wrongful discharge in violation of public policy claim where he was forced to choose between disobeying a subpoena or losing his job); ² *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 422 S.E.2d 91 (1992) (holding that termination of an employee because he refused to contribute to a political action fund would violate a state criminal statute and therefore was actionable as a claim for wrongful discharge in violation of public policy). The public policy exception “is not limited to these situations,” but no others have been recognized by South Carolina courts. *Id.* (quoting ³ *Barron*, 393 S.C. at 614, 713 S.E.2d at 637).

*5 Boeing argues that the Plaintiff has not identified what clear mandate of public policy his termination violated. The Complaint does not allege that Boeing required the Plaintiff to violate criminal law or that his termination was itself illegal. *See Martin v. Boeing Co.*, No. 2:16-cv-02797-DCN, 2016 WL 7239914, at *3 (D.S.C. Dec. 15, 2016). As discussed *supra*, the Plaintiff argues that he was terminated because he refused “to violate the law by passing a plane that did not meet the safety standards and Quality [sic] standards.” (Dkt. No. 13

at 14-15.) However, the Plaintiff had a statutory remedy for such allegations. Courts in this district have held that there is no “clear mandate of public policy supporting the rights of employees to internally complain about alleged violations of FAA regulations.” *Desmarais v. Sci. Research Corp.*, 145 F. Supp. 3d 595, 599 (D.S.C. 2015); *Martin v. Boeing Co.*, No. 2:16-CV-02797-DCN, 2016 WL 7239914, at *4 (D.S.C. Dec. 15, 2016).

Additionally, the Plaintiff does not state in his Complaint what specific law he was required to break as a condition of his employment or how his termination was in itself illegal. (Dkt. No. 1-1 ¶ 86 (alleging that the Plaintiff’s termination violated “South Carolina law” in general)). This court concludes that Plaintiff has not alleged any facts that would support finding the existence of a public policy exception to at-will employment.³ *See* ¹ *Barron*, 713 S.E.2d at 637.

Recommendation

Accordingly, the Magistrate Judge **RECOMMENDS** that the Defendant’s Motion to Dismiss in Part (Dkt. No. 6) be **GRANTED**.

IT IS SO RECOMMENDED.

Attachment

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” ¹ *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. ² 28 U.S.C. § 636(b)(1); Fed. R. Civ. P.

72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

All Citations

Slip Copy, 2017 WL 9250342

Footnotes

- 1 " 'air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C.A. § 40102.
- 2 The Plaintiff has not disputed that Boeing is an "air carrier or contractor or subcontractor of an air carrier" under AIR21. Administrative law courts have allowed employees who engaged in protected activities under AIR21 to proceed against Boeing and other airplane and airplane component manufacturers under AIR21. See *In the Matter of: John J. Woods v. Boeing-South Carolina*, ARB Case No. 13-035, 2014 WL 1314287 (March 20, 2014); *In the Matter of: Charles D. Ferguson v. Boeing Company*, ARB Case No. 04-084, 2005 WL 3619263 (March 20, 2014); *Michael Leon v. Securaplane Techs., Inc.*, ARB Case No. 11-069, 2013 WL 1874817 (April 15, 2013) *petition for review denied*, *Leon v. Securaplane Techs. Inc.*, 595 F. App'x 710, 711 (9th Cir. 2015).
- 3 The court notes that quality and safety in airplane manufacturing generally implicates the public's interest. However, the public policy exception is "a very narrow exception" under South Carolina law. *Gray v. Am. Homepatient, Inc.*, No. 2:14-cv-1207-DCN, 2014 WL 7965987, at *2 (D.S.C. Oct. 24, 2014), *report and recommendation adopted*, No. 2:14-cv-01207-DCN, 2015 WL 892780 (D.S.C. Mar. 3, 2015). The Plaintiff's allegations in the Complaint are not sufficient to make a claim for wrongful discharge in violation of public policy.

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2017 WL 3085856

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United States District Court, D.
South Carolina, Charleston Division.

William HOBEK, Plaintiff,
v.
The BOEING COMPANY, Respondent.

Case No 2:16-cv-3840-RMG

Signed July 19, 2017

Filed 07/20/2017

Attorneys and Law Firms

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Plaintiff.

Mary Hughes Cherry, Melissa Ashley Fried, Nexsen Pruet,
Charleston, SC, for Respondent.

ORDER AND OPINION

Richard Mark Gergel, United States District Court Judge

*1 This matter is before the Court on the Report and Recommendation ("R. & R.") of the Magistrate Judge (Dkt. No. 24) recommending that the Court grant Defendant's partial motion to dismiss (Dkt. No. 6). For the reasons set forth below, this Court adopts the R. & R. as the order of the Court. Defendant's partial motion to dismiss (Dkt. No. 6) is granted.

I. Background

In his Complaint, Plaintiff alleges causes of action based on age discrimination under the Age Discrimination Employment Act ("ADEA") and wrongful termination in violation of public policy. (Dkt. No. 1-1.) The Magistrate has provided a thorough summary of the alleged facts in the R. & R. (Dkt. No. 24 at 1-2), so the Court need not repeat them here. Essentially, Plaintiff alleges that he was disciplined and terminated due to his age and in retaliation for his complaints about quality and safety.

II. Legal Standard—Magistrate's Report and Recommendation

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility for making a final determination remains with this Court. See *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). This Court is charged with making a *de novo* determination of those portions of the R. & R. to which specific objection is made. Fed. R. Civ. P. 72(b)(2). Additionally, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). If the plaintiff fails to file any specific objections, this Court "need not conduct a *de novo* review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." See *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation omitted).

III. Discussion

In the R. & R., the Magistrate recommended that this Court grant Boeing's motion to dismiss Plaintiff's claim for wrongful termination in violation of public policy because (1) Plaintiff had an existing statutory remedy to pursue his claims under the Wendell H. Ford Air and Investment Reform Act for the 21st Century ("AIR21"), 49 U.S.C. § 42121; and (2) Plaintiff has not alleged facts which show a violation of a clear mandate of public policy. The Magistrate explained that while an at-will employee may have a cause of action in tort for a wrongful termination that violates a clear mandate of public policy, the public policy exception does not apply in cases where Plaintiff could avail himself of an existing statutory remedy. (Dkt. No. 24 at 4.)

Although Plaintiff has argued that his complaints related to both safety and quality so were not adequately covered by the AIR21 statutory remedy, the Magistrate found that, in the aircraft context, safety and quality are one and the same. In response to Plaintiff's argument that the AIR21 statutory remedy is only available to individuals who had made a report within the AIR21 framework, the Magistrate explained that Plaintiff's failure to exercise his rights under AIR21 does not create a cause of action in federal court. (Dkt. No. 24 at 7.) Finally, the Magistrate explained that Plaintiff did not identify any specific law that he was required to break as a condition of employment or how his termination was illegal, so he has not alleged facts that support invocation of the public policy exception to at-will employment. (Dkt. NO. 24 at 8-9.)

*2 The document filed by Plaintiff's counsel as Objections to the Magistrate's R. & R. (Dkt. No. 29) is in fact an almost verbatim copy of Plaintiff's Response to Defendant's Motion to Dismiss (Dkt. No. 13.) Pages 1-8 of the Objections are copied directly from Plaintiff's response to the motion to dismiss (Dkt. No. 13) with the sole addition of the legal standard for a district Court's review of the Magistrate's R. & R. Pages 9 and 10 of the Objections are a verbatim copy of factual allegations from Plaintiff's complaint. (Dkt. No. 1-1 at 12-13.) Only the final two paragraphs of Plaintiff's twelve pages of Objections have not been copied and pasted from prior pleadings. (Dkt. No. 29 at 10-11.) In those paragraphs, Plaintiff argues that "The Defendant interfered with the Plaintiff's position as a quality inspector and refused to allow the Plaintiff to do his job as a Quality inspector. The Plaintiff reported those refusals of the Defendant. The Plaintiff was terminated in retaliation for his refusal to pass planes that did not meet guidelines as established by the Federal Government and Boeing." (Dkt. No. 29 at 10-11.) This argument is a paraphrased version of the argument advanced by Plaintiff's counsel in Plaintiff's Response to Defendant's Motion to Dismiss. (Dkt. No. 13 at 14-15.)

The United States District Court for the Western District of Virginia once had the opportunity to review Objections to a Magistrate's Report and Recommendation that were copied directly from prior pleadings and determined that this practice does not constitute specific written objections so is not entitled to *de novo* review:

A general objection such as that offered by Plaintiff fails to satisfy the requirements of Rule 72(b) and 28 U.S.C. § 636(b)(1)(C). See *United States v. Midgette*, 478 F.3d 616, 621-22 (4th Cir. 2007) ("Section 636(b)(1) does not countenance a form of generalized objection to cover all issues addressed by the magistrate judge; it contemplates that a party's objection to a magistrate judge's report be specific and particularized...."); *Page v. Lee*, 337 F.3d 411, 416 n. 3 (4th Cir. 2003) ("[P]etitioner's failure to object to the magistrate judge's recommendation with the specificity required by the Rule is, standing alone, a sufficient basis upon which to affirm the judgment of the district court...."). Accordingly, "[a] general objection to the entirety of the magistrate's report has the same effects as would a failure to object." *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991); see also *Hyatt v. Town of Lake Lure*, 314 F.Supp.2d 562, 580 (W.D.N.C. 2003).

Veney v. Astrue, 539 F. Supp. 2d 841, 845 (W.D. Va. 2008). The court went on to explain why general objections in the form of repackaged prior pleadings are disfavored:

In short, unsatisfied by the findings and recommendations in the Report, Plaintiff has simply ignored it, attempting instead to seek re-argument and reconsideration of her entire case in the guise of objecting.

...

Allowing a litigant to obtain *de novo* review of her entire case by merely reformatting an earlier brief as an objection "mak[es] the initial reference to the magistrate useless. The functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act." *Howard*, 932 F.2d at 509.

Veney, 539 F. Supp. 2d 844-46 (W.D. Va. 2008). Further, as the Fourth Circuit explained in *Midgette*,

To conclude otherwise would defeat the purpose of requiring objections. We would be permitting a party to appeal any issue that was before the magistrate judge, regardless of the nature and scope of objections made to the magistrate judge's report. Either the district court would then have to review every issue in the magistrate judge's proposed findings and recommendations or courts of appeals would be required to review issues that the district court never considered. In either case, judicial resources would be wasted and the district court's effectiveness based on help from magistrate judges would be undermined.

Midgette, 478 F.3d at 622. As Plaintiff has not made a specific objection to any portion of the R. & R., the Court need only satisfy itself that the Magistrate has made no

clear error on the face of the record. *See Howell v. Holland*, No. 4:13-CV-00295-RBH, 2015 WL 751590, at *4 (D.S.C. Feb. 23, 2015). Finding no clear error in the Magistrate's determination, the Court adopts the R. & R. as the order of the Court.

IV. Conclusion

*3 For the reasons set forth above, Defendant's partial motion for summary judgment (Dkt. No. 6) is granted.

AND IT IS SO ORDERED.

All Citations

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2020 WL 495336
United States District Court, D.
South Carolina, Charleston Division.

Carlos LUGO, Plaintiff,
v.
The BOEING COMPANY, Defendant.

Case No. 2:19-cv-2995-RMG

Signed 01/30/2020

Attorneys and Law Firms

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ORDER AND OPINION

Richard Mark Gergel, United States District Court Judge

*1 Before the Court is Defendant the Boeing Company's Motion to Dismiss. (Dkt. No. 4). For the reasons set forth below, Defendant's Motion to Dismiss is granted and Plaintiff Carlos Lugo's Complaint is dismissed.

I. Background

Plaintiff was employed by Defendant from July 16, 2010 through November 29, 2018 as a "FRTI." (Dkt. No. 1-1 ¶¶ 7, 35). "As part of the Plaintiff's position as an FRTI the Plaintiff was required to ... walk around and visually inspect [planes that had just landed] ... for bird strikes and other damage to the fuselage of the airplane...." (*Id.* ¶ 21). In 2013, Plaintiff attended multiple company meetings and "had discussions where managers and supervisors encouraged the Plaintiff and other employees to vote no to the union." (*Id.* ¶ 14). During this "first campaign" on the "election to vote in a union," Plaintiff "did not wear union gear" and was "not involved in the vote." (*Id.*). In January 2018, Plaintiff was informed that "there was going to be another union vote." (*Id.* ¶ 15). Plaintiff attended a meeting where labor representatives from the Defendant and lawyers for Defendant were present and encouraged "the employees to vote no to the union." (*Id.* ¶ 16). Plaintiff, a union supporter, did not wear union gear, but

delivered remarks supporting the union. (*Id.* ¶¶ 16, 17, 20). "The Labor rep and lawyer [for Defendant] had no response to the Plaintiff[s]" remarks. (*Id.* ¶ 16). At a subsequent meeting, Plaintiff delivered the identical remarks. (*Id.* ¶ 19). The "Boeing Executive" who led this second meeting did "not respond." (*Id.*).

On October 10, 2018 Plaintiff performed a bird strike inspection on Airplane 731. (*Id.* ¶ 23). Though unclear, it appears Plaintiff alleges that on October 9, 2019, the "day before the inspection Boeing ... removed all flashlights from the line," making Plaintiff's work more difficult. (*Id.*). Plaintiff did not find any issues with Airplane 731. (*Id.*). On November 6, 2018, however, an HR Representative told Plaintiff he was being suspended due to "an open investigation into a bird strike" on Airplane 731. (*Id.* ¶ 29). On November 13, 2018, an investigator from Boeing called Plaintiff to discuss the alleged bird strike and, on November 29, 2018, Plaintiff was terminated for negligence in the performance of his duties. (*Id.* ¶¶ 33, 35).

Plaintiff filed this action in state court on September 20, 2019. (Dkt. No. 1-1). Plaintiff brought three causes of action: wrongful termination in violation of public policy, slander, and negligent supervision. Defendant was served on October 16, 2019 and removed this action on October 22, 2019. (Dkt. No. 1). On January 2, 2020, the Court denied Plaintiff's October 29, 2019 motion to remand. (Dkt. Nos. 5, 9). Defendant filed its Motion to Dismiss on October 29, 2019 and Plaintiff opposes. (Dkt. Nos. 4, 7, 8).

II. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the dismissal of an action if the complaint fails "to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of the complaint and "does not resolve contests surrounding the facts, the merits of the claim, or the applicability of defenses.... Our inquiry then is limited to whether the allegations constitute 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"¹ *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (citations omitted). In a Rule 12(b)(6) motion, the Court is obligated to "assume the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations."² *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship.*, 213 F.3d 175, 180 (4th Cir. 2000). However, while the Court must accept the facts in a light most favorable to the non-moving

party, it “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.” *Id.*

*2 To survive a motion to dismiss, the complaint must state “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although the requirement of plausibility does not impose a probability requirement at this stage, the complaint must show more than a “sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint has “facial plausibility” where the pleading “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

III. Discussion

Absent a specific contract, employment in South Carolina is at-will. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309 (2010); *see also Tughivand v. Rite Aid Corp.*, 411 S.C. 240, 243 (2015). “An at-will employee may be terminated at any time for any reason or for no reason, with or without cause.” *Mathis*, 389 S.C. at 310. “Under the ‘public policy exception’ to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy.” *Barron v. Labor Finders of S.C.*, 393 S.C. 609, 614 (2011). “The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination.” *Id.* at 615; *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 497-98 (1992) (employee allegedly terminated in retaliation for filing complaint under Fair Labor Standards Act had existing statutory remedy for wrongful termination). The public policy exception “is not designed to overlap an employee’s statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228 (1999) (emphasis supplied).

As this Court has held before, a clear statutory remedy exists for “whistleblowers who inform their employers or the federal government about violations of federal laws relating to air carrier safety.” *Hobek v. Boeing Co.*, No. 2:16-CV-3840-RMG-MGB, 2017 WL 9250342, at *2 (D.S.C. June 8, 2017),

report and recommendation adopted, 2017 WL 3085856 (D.S.C. July 20, 2017). That statutory remedy is the Wendell H. Ford Air and Investment Reform Act for the 21st Century (“AIR21”), 49 U.S.C. § 42121. *Id.* AIR21 provides:

(a) **Discrimination against airline employees.**--No air carrier¹ or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(1) **provided**, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States

49 U.S.C. § 42121.

A statutory remedy also exists for individuals who allege “unfair labor practice charges such as discharge for union activity or anti-union animus.” *Scott v. Wackenhut Services, Inc.*, No. 1:08-3863, 2010 WL 1254866, at *3 (D.S.C. Mar. 1, 2020), *report and recommendation adopted*, 2010 WL 1254860 (D.S.C. Mar. 23, 2010). The National Labor Relations Act (“NLRA”), 29 U.S.C. § 151 *et seq.* establishes that the National Labor Relations Board (“NLRB”) has “the exclusive original jurisdiction” over allegations of “wrongful termination based on ... union activities.” *Id.* (citing *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 242–45 (1959) (exclusive jurisdiction rests with the NLRB for disputes that are arguably subject to § 7 or § 8 of the NLRA));² *Papa v. Truland Sys. Corp.*, 162 F.3d 1155 (4th Cir. 1998) (affirming dismissal of wrongful termination and defamation claims as preempted by NLRA where “the real reason for [Plaintiff’s] termination was” his “engaging in labor activities.”).

*3 Plaintiff alleges he was wrongfully terminated for his “safety complaints regarding lighting, failure for more stringent walk throughs, tool accountability and his involvement in the union.” (Dkt. No. 1-1 ¶¶ 37, 39, 42, 43, 49, 56) (emphasis supplied). To the extent Plaintiff’s complaint concerns his wrongful termination for reporting safety conditions that violated, *inter alia*, Federal Aviation

Administration regulations, Plaintiff has an existing statutory remedy, AIR21. *Hobek*, 2017 WL 9250342, at *4. “[T] he plain language of ... AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer that related to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.” *Id.*; (Dkt. No. 1-1 ¶ 56) (noting “Defendants published false statements regarding the Plaintiff’s ... alleged failure ... to report a bird strike[.] [a] FAA violation and against the law.”) (emphasis supplied).³ To the extent Plaintiff alleges his wrongful termination claim is based on his union support, exclusive jurisdiction lies with the NLRB. *Scott*, 2010 WL 1254866, at *4. Because Plaintiff has existing statutory remedies, the South Carolina public policy exception does not apply, and Plaintiff’s wrongful termination claim must be dismissed.⁴

Plaintiff next alleges Defendant slandered him by publishing “false statements regarding the Plaintiff’s work performance.” (Dkt. No. 1-1 ¶ 56). Plaintiff alleges Defendant published “internal and external memoranda regarding the Plaintiff’s involvement in the alleged bird strike and the union” in order to “have an escape [sic] goat” and “strike fear into the hearts of others that had made safety complaints and joined the union.” (*Id.* ¶¶ 57, 59). “Under South Carolina law, to [state a claim for] defamation a plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged communication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” ¹ *Campbell v. International Paper Co.*, No. 3:12-cv-3042, 2013 WL 1874850, at *3 (D.S.C. May 3, 2013) (citing *Argoe v. Three Rivers Behavioral Health, LLC*, 392 S.C. 462, 474 (2011)); see also *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 1999 WL 89125, at *3 (4th Cir. Feb. 23, 1999) (recognizing in dicta that, in order to plead defamation, a plaintiff “should allege specific defamatory comments [including] ‘the time, place, content, and listener of the alleged defamatory matter’” (quoting ¹ *Caudle v. Thomason*, 942 F.Supp. 635, 638 (D.D.C. 1996))). Here, Plaintiff has not pled with particularity the second element of defamation, that the communications at issue were “made to a third party.” “Nowhere in the complaint is it alleged to whom [Defendant] made the statements at issue.” ¹ *Campbell*, 2013 WL 1874850, at *3

(dismissing a slander claim where plaintiff alleged only that defendant made the defamatory statement “publicly known” to “countless others”). As pled, Plaintiff’s allegation that Defendant made the offending statements to third parties is conclusory. “A pleading that merely offers ... ‘labels and conclusions,’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ ” *Id.* (citing ¹ *Twombly*, 550 U.S. at 555). As Plaintiff has not adequately pled the second element of slander, Plaintiff’s slander claim is dismissed.

*4 Lastly, Plaintiff alleges Defendant negligently supervised its employees because “Boeing was aware there was no bird strike but allowed its employees to lie about the Plaintiff’s involvement.” (Dkt. No. 1-1 ¶ 65). Defendant contends that the South Carolina Workers’ Compensation Act (“the Act”) preempts this claim. The Act provides:

The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee ... as against his employer, at common law or otherwise, on account of such injury, loss of service or death

S.C. Code Ann. § 42-1-540. “Every employer and employee ... shall be presumed to have accepted the provisions of the [Act] respectively to pay and accept compensation for personal injury ... arising out of and in the course of the employment and shall be bound thereby.” § 42-1-310. A “personal injury” is “an injury by accident arising out of and in the course of employment.” § 42-1-160(A). Further, “the Supreme Court of South Carolina has stated that the only exceptions to the Act’s exclusivity provisions are: (1) where the injury results from the act of a subcontractor who is not the injured person’s direct employer; (2) where the injury is not accidental but rather results from the intentional act of the employer or its alter ego; (3) where the tort is slander and the injury is to reputation; or (4) where the Act specifically excludes certain occupations.” *Kerr v. Hammond School*, No. 3:17-3109, 2018 WL 3132409, at *2 (D.S.C. Feb. 22, 2018).

Because Plaintiff's negligent supervision claim clearly arises out of and in the course of his employment with Defendant, and as "[b]oth federal and state courts in South Carolina have" held the Act "preempt[s]" "negligent hiring and supervision" claims, Plaintiff's negligent supervision claim is dismissed. *See, e.g., Kerr*, 2018 WL 3132409, at *2 (string citing cases on point); *Taylor v. Science Applications Int'l Corp.*, No. 2:12-cv-0659-RMG-BM, 2012 WL 5301333 (D.S.C. Oct. 25, 2012) (adopting recommendation of Magistrate Judge and dismissing claim for negligent supervision based on the Act's exclusivity provision); *Whicker v. Science Applications Int'l Corp.*, No. 2:11-3193-SB-BHH, 2012 WL 4983864 (D.S.C. Sept. 20, 2012) (recommending dismissal of claim for negligent supervision based on the Act's exclusivity provision), *report and recommendation adopted*, 2012 WL 4982634 (D.S.C. Oct. 17, 2012); *Crawford v. Limehouse & Sons, Inc.*, No. 2:10-2094-CWH-BM, 2010 WL 5136213

(D.S.C. Nov. 10, 2010), *report and recommendation adopted*, 2010 WL 5140035 (D.S.C. Dec. 10, 2010) (same); *Sabb v. S.C. State Univ.*, 567 S.E.2d 231, 234 (S.C. 2002) (holding plaintiff's claims against employer for negligent supervision and retention of a co-employee were covered by the Act).

IV. Conclusion

For the reasons set forth above, Defendant's Motion to Dismiss (Dkt. No. 4) is **GRANTED**. Plaintiff's Complaint is dismissed.

AND IT IS SO ORDERED.

All Citations

Slip Copy, 2020 WL 495336, 2020 IER Cases 33,436

Footnotes

- 1 " '[A]ir carrier' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation." 49 U.S.C. § 40102(a)(2).
- 2 "Section 7 of the NLRA guarantees employees not only the 'right to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively,' but also the right 'to engage in other concerted activities for the purpose of ... mutual aid or protection.' 29 U.S.C.A. § 157. Section 8(a)(1) implements these guarantees by making it an unfair labor practice for an employer to 'interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in ... section 157[.]' 29 U.S.C.A. § 158(a)(1). Section 8(a)(3) makes it an unfair labor practice to discriminate 'in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...' " *Scott*, 2010 WL 1254866, at *3 & n.5.
- 3 Plaintiff argues AIR21 does not apply to him because "Plaintiff must have engaged in protected activity under AIR21 not merely done his job." (Dkt. No. 7 at 18). As AIR21 was specifically enacted to protect "whistleblowers," like Plaintiff, "who inform their employers ... about violations of federal laws relating to air carrier safety," Plaintiff's argument is wrong and directly contradicted by the plain language of AIR21. *See Bombardier, Inc. v. United States. Dep't. Of Labor*, 145 F. Supp. 3d 21, 25 (D.D.C. 2015); *Hobek*, 2017 9250342, at *4.
- 4 Plaintiff contends in Opposition that such a conclusion would be "an error in the interpretation of the law as AIR21 [and presumably the NLRA] [are] defense[s] that may not be properly determined through a 12(b)(6) motion.... [S]crutiny of facts is required, therefore discovery must be completed prior to the Defense under AIR21." (See Dkt. No. 7 at 17). Plaintiff is incorrect. The cases cited herein demonstrate that, assuming all Plaintiff's facts to be true, as a *matter of substantive law*, Plaintiff is not entitled to relief. *See, e.g., Hobek*, 2017 9250342, at *4.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Liam Wallis,	)	Case No.: 2019-CP-10-1379
	)	
Plaintiff,	)	PLAINTIFF'S RETURN TO
	)	DEFENDANTS' MOTION TO DISMISS
vs.	)	CAUSES OF ACTION FOR
	)	WRONGFUL TERMINATION AND
The Boeing Company; Anthony	)	CIVIL CONSPIRACY IN
Timms; and Monica Williams	)	AMENDED COMPLAINT
	)	
Defendants.	)	
	)	

Plaintiff Liam Wallis issues this return to Defendants' motion to dismiss in part and requests that Defendants' motion to dismiss this action in part be denied based upon Plaintiffs well pled Complaint showing he is entitled to relief.

Standard of Review

R. 12(b)(6) SCRCP is a defense made by motion for "failure to state facts sufficient to constitute a cause of action". "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to relief on any theory of the case" Flateau v. Harrelson, 355 S.C. 197, 202 (Ct.App.2003). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief" Patterson v. Witter, 418 S.C. 66, 76 (Ct.App.2016). "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true" Fabian v. Lindsay, 410 S.C. 475, 481 (S.C.2014). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action" Doe v. Bishop of Charleston, 407

S.C. 128, 134 (S.C.2014). “[A] judgment on the pleadings is considered to be a drastic procedure by our courts” HHHunt Corp. v. Town of Lexington, 389 S.C. 623, 632 (Ct.App.2010).

Plaintiff Has a Well Pled Claim for Relief for Civil Conspiracy

“The tort of civil conspiracy has three elements (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage Hackworth v. Greywood at Hammett, LLC, 682 S.E.2d 871, 874 (Ct.App. 2009) *citing to* Vaught v. Waites, 387 S.E.2d 91, 95 (Ct.App. 1989). In his Amended Complaint, Plaintiff has alleged:

“...Anthony Timms and Monica Williams conspired to have Plaintiff terminated” (Amended Complaint, para. 45)... “Anthony Timms and Monica Williams engaged in this conspiracy to minimize findings being reported to their bosses in an attempt to further their own careers” (Amended Complaint, para. 46)... “Anthony Timms and Monica Williams furthered their conspiracy to harm Plaintiff for their gain by depriving Plaintiff access to the internal computer systems that allowed Plaintiff to verify whether planes on the flight line were indeed ready for his inspection” (Amended Complaint, para. 47)... “the conspiracy by Anthony Timms and Monica Williams resulted in Plaintiff being forced to rely on others that two planes were ready to be inspected rather than being able to verify for himself on the computer system to which he was denied access by Timms and Williams” (Amended Complaint, para. 48)... “As a result of their civil conspiracy, Plaintiff has suffered special damages including but not limited to a loss of standing in the aviation community including being effectively “black listed” resulting in being denied employment opportunities for which he is well qualified...” (Amended Complaint, para. 58)

Plaintiff has properly pled his civil conspiracy cause of action. Two or more persons, Timms and Williams, conspired against Plaintiff to have him terminated from Boeing, causing the

Plaintiff special damages in not being able to obtain future employment in the aviation industry. The causes of action against Boeing are for failure to pay proper overtime and for the loss of his job at Boeing and therefore losing that source of income. The civil conspiracy cause of action against Timms and Williams are for the loss of future alternate wages Plaintiff could have earned in the aviation industry due to their tarnishing of his good name.

Plaintiff's claim for civil conspiracy is not barred by the intracorporate conspiracy doctrine. The intracorporate conspiracy doctrine holds that "[a] civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, **conspiring with the corporation**" McMillan v. Oconee Memorial Hosp., Inc., 626 S.E.2d 884, 886 (Ct.App. 2010) (emphasis added). Nowhere in his pleadings has Plaintiff alleged that Timms and Williams conspired with the Boeing Corporation. "However, although a corporation cannot conspire with itself, 'the agents of a corporation are legally capable as individuals, of conspiracy among themselves or with third parties'" Pridgen v. Ward, 705 S.E.2d 58, 391 S.C. 238, 244 (Ct.App. 2010) *citing to* Lee v. Chesterfield General Hosp., Inc., 344 S.E.2d 379, 383 (Ct.App. 1986). Plaintiff's allegations for civil conspiracy involve Timms and Williams, as individuals, conspiring amongst themselves.

Defendant's make the case that Plaintiff can only escape the intracorporate conspiracy doctrine by "...alleging that: (1) their acts were not authorized by Boeing; or (2) they had a "personal stake" in their alleged conspiratorial conduct, independent of their relationship to Boeing" *Defendant's Memorandum in Support of Motion to Dismiss*, p. 5. While it is Plaintiff's contention that the intracorporate conspiracy doctrine does not apply to individuals conspiring only amongst themselves rather than with the corporate entity, Plaintiff still has pled the two scenarios that Defendants contend must be pled. Plaintiff has pled that Timms and Williams conspired with

one another to get Plaintiff fired. While it is still early in the discovery of this case, it is inferred that Boeing has not authorized its employees to conspire against one another. "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to relief on any theory of the case" Fleteau v. Harrelson, 355 S.C. 197, 202 (Ct.App.2003). Also, Plaintiff has pled that Timms and Williams had a "personal stake" in the conspiracy as they were conspiring to get Plaintiff fired in order to advance their own careers.

Plaintiff has properly pled his cause of action for civil conspiracy and requests that Defendants' motion to dismiss this cause of action be denied.

Plaintiff Has a Well Pled Claim for Relief for Wrongful Termination

I. The Termination of Plaintiff was in Violation of a Clear Mandate of Public Policy

"The doctrine of employment at will has been recognized in this State since Shealy v. Fowler, 188 S.E. 499 (1936)" Culler v. Blue Ridge Elec. Co'op, Inc., (S.C.1992). "In [Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 219 (1985)] this Court joined a growing majority of state[s] that recognize the "public policy" exception to the doctrine of employment at will. Under the public policy exception, an employee has a cause of action in tort for wrongful discharge where there is a 'retaliatory discharge of the at-will employee in violation of a clear mandate of public policy'" id.

The termination of Mr. Wallis is in violation of a clear mandate of public policy. As a Quality Assurance Conformity Manager, Mr. Wallis was "...tasked with inspecting all newly manufactured aircraft for compliance with Boeing's internal engineering and safety specifications." (Amended Complaint, para. 13). In his well pled Complaint, Plaintiff alleges to have properly done "...his job of inspecting all newly manufactured aircraft to ensure the safety

of the public that relies upon Boeing's internal engineering and safety specifications and documented his findings of non conformities" (Amended Complaint, para. 26). Upon Plaintiff demonstrating to his managers and to Boeing Human Resources that he would continue to properly perform his job he was subjected to undue scrutiny, impediments, and reprimands (Amended Complaint, paras. 21; 25; 27; 29; 30; 38; and 40). Because of his complying with his normal job duties of inspecting the newly manufactured planes for compliance with the Boeing's internal engineering and safety inspections, "Plaintiff was wrongfully terminated from Boeing on June 15, 2017" (Amended Complaint, para. 41).

It was made abundantly clear to Plaintiff that he was to do nothing to slow down the sale of planes and profit for Boeing, including ensuring that the planes met Boeing's standards for safety. As Plaintiff was faced with either losing his job or endangering the flying public that relies upon Boeing's design specifications and safety procedures (Amended Complaint, para. 43), the termination of Plaintiff falls within the public policy exception to employment at will. South Carolina has recognized the safety and lives of the people of this state as a mandate of public policy (S.C. Const. Art. XII §1 "The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern"). "The South Carolina Supreme Court has held that 'for purposes of judicial application it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions'" Desmaraias v. Scientific Research Corp., 145 F.Supp.3d 595, 598 (D.S.C. 2015) *citing to* Batchelor v. Am. Health Ins. Co., 234 S.C 103 (S.C. 1959). South Carolina, "by clear implication from the law of the state as found in its Constitution", has established the

health, welfare and safety of the lives of the people of South Carolina to be a “clear mandate of public policy”.

II. Air 21 Does Not Bar Plaintiff’s State Claim for Wrongful Termination

Defendants argue that 49 U.S. Code § 42121 (also known as “AIR 21) bars Plaintiff’s State claim for wrongful termination. However, the Court should not even consider this statute when considering whether or not to grant Defendant’s 12(b)(6) motion as Plaintiff’s allegations do not qualify as protected activity under Air 21, as discussed in greater detail below. “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) **must be based solely on the factual allegations set forth in the complaint**, and court must consider all well-pled allegations as true” Fabian v. Lindsay, 410 S.C. 475, 481 (S.C.2014). Defendants’ contend that Plaintiff was wrongfully terminated based upon engaging in a protected activity under AIR 21 whereas Plaintiff contends that he was wrongfully terminated for complying with his normal work duties that are not protected under AIR 21. Under R. 12(b)(6) it is Plaintiff’s contentions that the court must consider in whether or not to grant a motion to dismiss. “The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief” Patterson v. Witter, 418 S.C. 66, 76 (Ct.App.2016).

In order for § 42121 to provide Plaintiff with an existing statutory remedy, as Defendants contend, he must have been discriminated against for engaging in protected activity. As defined by § 42121, protected activity is when an employee:

(a)(1) “provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information **relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States...**” (emphasis added)

Nowhere in Plaintiff's Complaint does he allege being terminated for providing to the employer or the Federal Government information regarding violation of Federal regulations, standards or laws. Plaintiff's job was to inspect the planes for compliance with Boeing specifications and standards. There was a whole separate division of Boeing, the Organization Designation Authority (hereinafter "ODA"), that consists of Boeing employees with the Federal Aviation Administration (hereinafter "FAA") authority to ensure the compliance with any "order, regulation or standard of the [FAA] or any other provision of Federal law relating to air carrier safety under this subtitled or any other law of the United States. "Although a complainant need not cite to a specific violation, allegations under AIR 21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)" Simpson v. United Parcel Service, ARB Case No.: 06-065 (March 14, 2008).

Plaintiff does not have a claim under AIR 21 because he was merely doing his job, which involved looking for problems with a newly manufactured plane including any safety concerns. Under the Sarbanes-Oxley Act, which "...adopts the burden-shifting framework applicable to whistleblower claims brought under [AIR 21]" Welch v. Chao, 536 F.3d 269 (4th Cir. 2008), activity is not protected activity when an employee is merely performing his work duties of reporting discovered issues (see Robinson v. Morgan Stanley, 2005-SOX-44 (A.L.J. Mar. 26, 2007) "[Plaintiff's] report to [employer] also fails to constitute protected activity because his job duties as Information Security Officer included reporting issues and concerns with the network, and an action that is part of an employee's assigned duties cannot be protected activity").

Defendant contends that Plaintiff has an existing statutory remedy under AIR 21. However,

"[t]he doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction

of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided and administrative remedy. **A litigant need not exhaust administrative remedies where there are no administrative remedies for the wrongs it assertedly suffered”** Capital City Ins. Co. v. BP Staff, Inc., 674 S.E.2d 524, 530 (S.C.App.2009) *citing to* Thomas Sand Co. v. Colonial Pipeline Co., 563 S.E.2d 109 (Ct.App.2002). (emphasis added)

Plaintiff’s well pled complaint only invokes a claim under South Carolina’s Wrongful Termination law, not Air 21. “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true” Fabian supra. The well pled facts in Plaintiff’s Complaint only infer he was wrongfully terminated because of his determination to adhere to the Boeing safety standards, not any FAA or any other Federal government safety standards that would be protected activity under AIR 21.

Furthermore, assuming arguendo that Plaintiff was alleging protected activity under Air 21, Plaintiff would have to believe that he was terminated for engaging in protected activity. “Even if her complaints were specific, Simpson must also prove that she had a reasonable belief that a violation of an FAA regulation or order existed” Simpson v. UPS, supra. All inferences to be drawn from Plaintiff’s well pled Complaint show that Plaintiff believes to have been fired for attempting to comply with Boeing’s internal safety procedures and regulations, rather than for any FAA or governmental procedures and regulations.

Conclusion

Based upon Plaintiff’s well pled complaint and the Court’s analysis being limited to the sufficiency of the Complaint, Defendants’ 12(b)(6) motion to dismiss should be denied.

Respectfully submitted by,

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Attorney for the Plaintiff

This 26th day of February, 2020
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a copy of the foregoing upon Cherie W. Blackburn, attorney for the Defendant, via email as follows:

Cherie W. Blackburn, Esquire
cblackburn@nexsenpruet.com

Dated: February 26, 2020

/S MICHAEL H. ELLIS

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-1379

**NOTICE OF MOTION, MOTION AND
MEMORANDUM IN SUPPORT OF
MOTION TO RECONSIDER, ALTER
OR AMEND ORDER DENYING
DEFENDANTS' MOTION TO
DISMISS**

Defendants The Boeing Company ("Boeing"), and Anthony Timms and Monica Williams ("Individual Defendants"), by and through their undersigned attorneys, respectfully move the Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider, alter, or amend its Order filed on March 19, 2020, denying Defendants' Motion to Dismiss Causes of Action for Wrongful Termination in Violation of Public Policy and Civil Conspiracy. The Defendants respectfully request that the Court alter its March 19, 2020 Order ("the Order") and dismiss Plaintiff's claims for wrongful termination in violation of public policy against Boeing and civil conspiracy against the Individual Defendants.

Rule 59(e) not only allows parties to request that the trial court "alter or amend the judgment," it also allows parties to move for "'reconsideration' of issues and arguments." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). A Rule 59(e) motion "long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule." *Id.* A party may file a motion for reconsideration under Rule 59(e) when it "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id.* at 24, 602 S.E.2d at 780. For the reasons that follow, Boeing respectfully requests that the Court amend the Order and dismiss the two

causes of action discussed herein.

I. Plaintiff Has a Statutory Remedy for his Wrongful Termination Claim and Has Failed to Identify a Specific Mandate of Public Policy to Support His Claim.

The Order does not consider that Plaintiff has a statutory remedy for his wrongful termination claim under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), a finding supported by two recent decisions, *Louis Migliaccio v. The Boeing Company and Kevin Martin*, No. 2019-CP-10-04197 (S.C. Ct. Com. Pl March 12, 2020)¹ and *Lugo v. The Boeing Co*, No. 2:19-CV-2995-RMG, 2020 WL 495336, at *3 (D.S.C. January 30, 2020).

On March 12, 2020, the Honorable J. Derham Cole issued a Form 4 Order dismissing the plaintiff’s claim for wrongful termination in violation of public policy pursuant to Rule 12(b)(6), SCRCF. See *Louis Migliaccio v. The Boeing Company and Kevin Martin*, No. 2019-CP-10-04197. A copy of the Form 4 Order and the Complaint are attached as Exhibit 1 for this Court’s review.² In *Migliaccio*, the plaintiff, a former at-will employee, alleged that Boeing terminated him for his “safety complaints” and for his support of the union. Boeing argued that the plaintiff’s wrongful termination claim was barred because he had a statutory remedy under AIR21 for his claim that he was terminated for reporting safety concerns.

In January of this year, the United States District Court for the District of South Carolina, Charleston Division, also addressed the issue of whether AIR21 provided a statutory remedy, warranting dismissal of plaintiff’s wrongful termination cause of action. In *Lugo v. The Boeing Co*, the plaintiff alleged that he was wrongfully terminated for his “safety complaints regarding lighting, failure for more stringent walk throughs, tool accountability and his involvement in the

¹ The decision was issued after this Court heard arguments on Defendants’ Motion to Dismiss on February 27, 2020.

² The Form 4 Order provided, “Counsel for the defendants is requested to prepare and submit a proposed order for the court’s consideration in the event a formal order is desired by the parties.” Counsel submitted a proposed formal order for Judge Cole’s consideration on March 16, 2020. Once Judge Cole issues a formal Order, Defendants will submit the formal order for this Court’s review.

union.” No. 2:19-CV-2995-RMG, 2020 WL 495336, at *3 (D.S.C. January 30, 2020). The district court dismissed the plaintiff’s wrongful termination in violation of public policy claim under Fed. R. Civ. P. 12(b)(6), stating that “AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer *that related to* any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law related to air carrier safety. . . .”. *Id.* at *3 (emphasis added). The court held that the plaintiff had an existing statutory remedy under AIR21 and, as a result, the public policy exception to at will employment did not apply. *Id.*

In his Return, Plaintiff argues that his allegations do not qualify as protected under AIR 21 because he contends he was terminated for complying with “his normal work duties that are not protected under AIR 21.” (Plaintiff’s Return at p. 6). Similarly, in *Lugo*, the plaintiff argued that AIR21 did not apply to him because he must have engaged in protective activity under AIR21, not merely done his job. The court noted that the plaintiff’s argument was “wrong and directly contradicted by the plain language of AIR21.” *Lugo*, 2020 WL 495336, at *3 n. 3.

Plaintiff’s allegations fall within the scope of AIR 21. His allegations include that Boeing engaged in “shortcuts on the safety inspections of planes they were building;” “knowingly...[used] out of date engineering specifications;” “sacrificed compliance with their own policies *and regulations* put in place for the protection of the public;” engaged in a “scheme of fraudulently concealing non-conformities in the aircraft they were selling;” and gave Plaintiff the dilemma of choosing to maintain his livelihood or “protecting the public.” (Am. Compl. ¶¶ 24, 34, 42 – 43). AIR21 expressly includes employees lodging internal airplane safety complaints directly with their employers, as alleged by Plaintiff in this lawsuit. 49 U.S.C. § 42121(a)(1); *see also Lugo*, 2020

WL 495336, at *3. Plaintiff's claim for wrongful discharge fails for that reason alone and should be dismissed.

The Court should also reconsider its Order because Plaintiff has not alleged facts to support a violation of a clear mandate of public policy. Plaintiff contends that the South Carolina Constitution, Article XII § 1 provides a clear mandate of public policy that Boeing violated. (Plaintiff's Return at p. 5 - 6). Article XII, Section 1 states:

SECTION 1. Matters of public concern; General Assembly to provide appropriate agencies.

The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern. The General Assembly shall provide appropriate agencies to function in these areas of public concern and determine the activities, powers, and duties of such agencies.

S.C. Const. Art. XII § 1.

Plaintiff has not alleged that he was terminated for exercising any specific right or duty, and he has not cited to any South Carolina case or other authority in support of his argument that Section 1 of Article XII sets forth a clear mandate of public policy. Instead, Plaintiff incorrectly relies on a general constitutional provision authorizing **the creation of state agencies** to protect matters of public concern. *S.C. Pub. Interest Found. v. S.C. DOT*, 421 S.C. 110, 125 (holding Section 1 authorizes the General Assembly to establish agencies to protect the public health, safety, and welfare and to set the limits within which those agencies may operate). Allowing for the creation of government agencies to function in broad areas of "public concern" does not equate to a "clear mandate of public policy" for purposes of the common law claim of wrongful termination in violation of public policy.³ To determine otherwise would extend the application of this narrow exception to an infinite number of issues that fall within the wide-ranging ambit of public concern,

³ In the employment context, Section 1 – at most – establishes the state's ability to stand up an agency like the Department of Labor, Licensing and Regulation to promote the health, safety and well-being of the public through regulation, licensing, enforcement, training and education.

such that this exception would swallow the rule of at-will employment. *Desmarais v. Sci. Research Corp.*, 145 F. Supp. 3d 595, 598 (D.S.C. 2015) (“[I]f a plaintiff could maintain a cause of action for violation of public policy by simply alleging that a retaliatory termination violated South Carolina’s public policy, there would be a substantial risk that the public policy exception would swallow the general rule allowing an employer to terminate an at-will employee at any time and for any reason.”).

The South Carolina Supreme Court has recognized only two instances in which the public policy exception has been upheld: “(1) where an employer requires an employee, as a condition of continued employment, to break the law . . . and (2) where an employer’s termination is itself illegal.” *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 243, 768 S.E.2d 385, 387 (2015) (citing *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 422 S.E.2d 91 (1992)). Neither situation applies to the case at hand.

This Court should reconsider its Order on the grounds that Plaintiff has an existing statutory remedy under AIR 21 and has not identified a clear mandate of public policy that Boeing allegedly violated.

II. Plaintiff Has Not Alleged a Claim for Civil Conspiracy Against the Individual Defendants.

The Court should reconsider its Order because the Complaint fails to properly allege a claim for civil conspiracy against the Individual Defendants.

First, Plaintiff has failed to plead special damages sufficient to state a claim for civil conspiracy against the Individual Defendants. The gravamen of a civil conspiracy claim is the damage resulting to the plaintiff from the acts taken in furtherance of the combination. *Pye v. Estate of Fox*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 (2006). “Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged *must go beyond the*

damages alleged in other causes of action.” *Id.* (emphasis added). Thus, to state a viable claim for civil conspiracy, Plaintiff “must allege and prove special damages, i.e., damages that are directly attributable to the conspiracy itself, over and above any damages alleged as a result of any other claims.” *May v. City of N. Augusta*, No. 1-05-cv-0752-MBS, 2007 WL 2823015, at *23 (D.S.C. Sept. 27, 2007) (citing *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91, 95 (Ct. App. 1989)). Plaintiff’s special damages must be separate and independent from and cannot overlap with or be subsumed by the damages allegedly resulting from Plaintiff’s other causes of action. *See id.*; *Benedict College v. National Credit Sys., Inc.*, 400 S.C. 538, 546-47, 735 S.E.2d 518, 522 (Ct. App. 2012); *see also, e.g., Allegro, Inc. v. Scully*, 418 S.C. 24, 34, 791 S.E.2d 140, 145 (2016).

Plaintiff’s allegations of “special damages” expressly arise out of Boeing’s alleged conduct, not the actions of Defendants Monica Williams or Anthony Timms. Plaintiff alleges that he “has suffered special damages including but not limited to a loss of standing in the aviation community including being effectively ‘black listed’ resulting in being denied employment opportunities [sic];” however, Plaintiff alleges that *Boeing* has blackballed Plaintiff from the aircraft industry,” not the individual Defendants. (Am. Compl. ¶ 49, 58). Plaintiff’s claim of damages from “blacklisting” is the same as his claim for back wages (i.e., lost wages following his termination from Boeing), that he alleges as a result of his claim for wrongful termination in violation of public policy. Such damages are not separate and apart from his wrongful termination claim. Thus, Plaintiff has not alleged “damages that are directly attributable to the conspiracy itself, over and above any damages alleged as a result of any other claims” to state a viable claim for civil conspiracy. *May*, 2007 WL 2823015, at *23 (citing *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91, 95 (Ct. App. 1989)).

In that same regard, a plaintiff “must plead acts in furtherance of the conspiracy that are *separate* and *independent* from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.” *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 324–25, 701 S.E.2d 39, 46 (Ct. App. 2010) (emphasis added). Plaintiff’s only alleged wrongful act supporting his civil conspiracy claim is that the Individual Defendants conspired to terminate his employment in order to fraudulently conceal non-conformities in the aircraft—the *identical alleged wrongful act underlying Plaintiff’s claim for wrongful termination in violation of public policy*. (Compare Am. Compl. at ¶¶ 45, 46 and Am. Compl. at ¶¶ 42, 43, 53). Plaintiff does not allege any overt act arising from the Individual Defendants’ alleged conspiracy *except* for his termination.

Finally, the Order fails to consider that Plaintiff has not plead that the Individual Defendants were acting outside the scope of their employment. A civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because, by virtue of the relationship, such acts do not involve separate entities. *McMillan v. Oconee Memorial Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886-87 (2006); *see also Lawson v. S.C. Dep’t. of Corrs.*, 340 S.C. 346, 352 S.E.2d 259, 260 (2000) (holding that allegation that two of plaintiff’s supervisors conspired to terminate his employment could not sustain civil conspiracy cause of action and dismissing claim).⁴ Simply stated, “a corporation cannot conspire with itself.” *McClain*

⁴ An at-will employee cannot sue his employer, or anyone acting within his or her authority on behalf of the employer, for civil conspiracy arising out of his termination. *See Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 765, 249 S.E.2d 814, 815 (1979) (finding appellant failed to state a cause of action for civil conspiracy arising out of his termination when appellant was an at-will employee and could be “terminated at any time for any reason or for no reason at all”); *Mills v. Leath*, 709 F. Supp. 671, 675 (D.S.C. 1988) (relying on *Ross v. Life Ins.* to find that plaintiff, an at-will employee, “is precluded from maintaining an action or civil conspiracy to terminate his employment.”); *see, e.g., Faile v. Lancaster Cty.*, No. 0:11-2205-CMC, 2013 WL 786447, at *4 (D.S.C. Mar. 1, 2013) (granting motion to dismiss civil conspiracy claim against individual defendants related to their role in terminating plaintiff’s employment because “as agents authorized to act on behalf of County, [they] cannot be sued by Plaintiff for civil conspiracy that resulted in Plaintiff’s termination.”) (citing *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 503, 596 S.E.2d 67, 70 (Ct. App. 2004), *reversed on other grounds*, 368 S.C. 167, 628 S.E.2d 261 (2006) (dismissing conspiracy claims against

v. Pactiv, Corp., 360 S.C. 480, 486, 602 S.E.2d 87, 90 (Ct. App. 2004). Plaintiff acknowledges that a corporation cannot conspire with itself, but argues that the agents of a corporation are legally capable as individuals of conspiring among themselves. (Plaintiff's Return, p. 3 (citing *Pridgen v. Ward*, 391 S.C. 238, 244, 705 S.E.2d 58 (Ct. App. 2010))). This is true only to the extent the agents were acting outside the scope of their employment. *Id.* However, Plaintiff has not plausibly plead that Mr. Timms and Ms. Williams were acting outside the scope of their employment.

"An act is within the scope of a servant's employment where [it is] reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." *Pridgen*, 391 S.C. at 244, 705 S.E.2d at 62 (citing *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006)). To state a claim for civil conspiracy Plaintiff must plausibly allege that Mr. Timms and Ms. Williams were acting "for some independent purpose" of their own, "wholly disconnected with the furtherance of... [Boeing's] business." *Id.* (citing *Crittenden v. Thompson-Walker Co., Inc.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986)) (emphasis added). It is only upon such a showing that their conduct falls outside the scope of their employment. *Id.* Plaintiff has not plead that the Individual Defendants were acting for an independent purpose of their own, wholly disconnected with the furtherance of Boeing's business.

Because Plaintiff fails to state a claim for civil conspiracy against the Individual Defendants, this Court should reconsider its Order and dismiss this claim.

CONCLUSION

The Defendants respectfully request that their Motion to Alter or Amend the Order be granted and that Plaintiff's claims for wrongful termination in violation of public policy and civil conspiracy be dismissed as a matter of law.

individual council members because they "acted within their authority when they fired [the plaintiff] and they cannot be sued for doing what they had a right to do.")).

Defense counsel certifies that consultation with Plaintiff's counsel would serve no useful purpose.

s/ Cherie W. Blackburn

Cherie W. Blackburn (SC Bar No. 10812)

Melissa F. Spence (SC Bar No. 78172)

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March 26, 2020

Charleston, South Carolina

ATTORNEYS FOR DEFENDANTS

Liam Wallis v. The Boeing Company, et al.
Case No. 2019-CP-10-1379
DEFENDANTS' MOTION AND MEMO IN SUPPORT OF MOTION TO ALTER OR AMEND

EXHIBIT 1

ELECTRONICALLY FILED - 2020 Mar 26 2:07 PM - CHARLESTON - COMMON PLEAS - CASE#2019CP1001379

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019-CP-10-04197

Louis MIGLIACCIO,

THE BOEING COMPANY and Kevin MARTIN,

Plaintiff(s)

Defendant(s)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED** (CHECK REASON): ☒ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other.
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other .

IT IS ORDERED AND ADJUDGED: ☐ formal order to follow; ☒ **Statement of Judgment by the Court:**

This matter came before this court on **MOTION** of the defendants to **DISMISS** the plaintiff's complaint pursuant to *Rule 12(b)(6), SCRPC*.

After consideration of the argument of counsel, memoranda submitted, and the applicable statutory and case law, this Court finds that the defendants' **MOTION** should be and **IS** therefore **GRANTED**.

Counsel for the defendants is requested to prepare and submit a proposed order for the court's consideration in the event a formal order is desired by the parties.

J. Derham Cole,

Presiding Judge

This judgment was entered on the _____ day of _____ and a copy mailed first class this _____ day of _____ to attorneys of record or to parties (when appearing pro se) as follows:

Bonnie Travaglio Hunt, Esq.**Molly Hughes Cherry, Esq.**

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Julie J. Armstrong, CLERK OF COURT



Charleston Common Pleas

Case Caption: Louis Migliaccio VS Boeing Company The , defendant, et al
Case Number: 2019CP1004197
Type: Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-03-10 14:50:52 page 2 of 2

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LOUIS MIGLIACCIO

Plaintiff(s)

vs.

THE BOEING COMPANY

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2019-CP - 10 - 4197

Submitted By: Bonnie Travaglio Hunt
Address: Post Office Box 1845, Goose Creek SC 29445

SC Bar #: 012341
Telephone #: 843-553-8709
Fax #:
Other:
E-mail: bthunt@huntlawllc.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/Warranty (160) ☐ Employment Discrim (170) ☒ Employment (180) ☐ Other (199) _____	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20____-NI-_____ ☐ Notice/ File Med Mal (230) ☐ Other (299) _____	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399) _____	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499) _____
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599) _____	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899) _____	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Incapacitated Adult Settlement (790) ☒ Other (799) _____	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999) _____
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) _____ ☐ Sexual Predator (510) ☐ Permanent Restraining Order (680) ☐ Interpleader (690)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Submitting Party Signature: _____

Date: August 8, 2019

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (02/2018)

Page 1 of 2

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

LOUIS MIGLIACCIO,

Plaintiff,

vs.

THE BOEING COMPANY,
KEVIN MARTIN,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No:

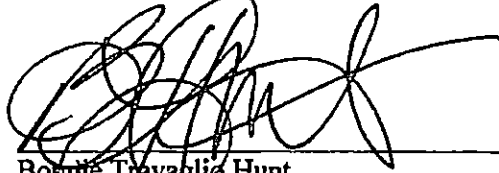
2019-CPD-4197

SUMMONS
(JURY TRIAL REQUESTED)

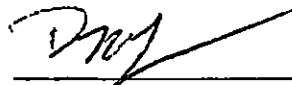
FILED
2019 AUG -9 AM 9:50
JULIE J. ARMSTRONG
CLERK OF COURT

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action a copy of which is hereby served upon you, and to serve a copy of your Answer to the Complaint on the subscriber at his office at 4000 Faber Place Drive, Suite 300, North Charleston, SC 29405 within thirty (30) days after the service thereof, exclusive of the day of service. If you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you.

Respectfully Submitted,



Bonnie Travaglia Hunt
Hunt Law LLC
Federal Bar # 07760
SC Bar # 12341
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August 8, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C.A. No:

2019-CP-10-4197

LOUIS MIGLIACCIO,

Plaintiff,

vs.

THE BOEING COMPANY,
KEVIN MARTIN,

Defendant.

COMPLAINT
(JURY TRIAL REQUESTED)

FILED
2019 AUG -9 AM 9:50
JULIE J. ADAMS, CLERK OF COURT

The Plaintiff, Louis Migliaccio, by and through his undersigned attorneys Bonnie Travaglio Hunt of Hunt Law LLC and Peter M. Kaufman of Kaufman Labor Employment Solutions, LLC, does hereby make the following claims and allegations against the Defendants, The Boeing Company and Kevin Martin:

PARTIES AND JURISDICTION

1. The Plaintiff is a resident of the State of South Carolina.
2. The Defendant, The Boeing Company (hereinafter referred to as Defendant) is a foreign corporation, which does business in, contracts in, and derives benefit from the laws of the State of South Carolina.
3. The Defendant, Kevin Martin is a resident of the State of South Carolina and is subject to the jurisdiction of this Court.
4. All parties and events herein mentioned are within the jurisdiction of this Honorable Court.
5. This Court has jurisdiction over the parties and subject matter and venue is proper.

FACTS

6. The Plaintiff has extensive experience in the Aircraft Industry.
7. That the Plaintiff was hired by the Defendant in August of 2007 as an Aircraft Assembler.
8. That the Plaintiff began his employment in Seattle Washington where he was a member of the IAM Local 751 union. After Seattle Washington the Plaintiff worked at the Boeing facility in Maryland.
9. That the Plaintiff's last position held was as an FRTI (Flight Readiness Technician Inspector).
10. That the Plaintiff was considered an exemplary employee during his employment at Boeing. The Plaintiff only had one issue where he received a CAM (Corrective Action Measure). In early 2017, the Plaintiff received a CAM for a disagreement with another co-worker. The Plaintiff was not suspended for the incident. The Plaintiff received no other discipline throughout his employment.
11. As an employee, the Plaintiff was very familiar with all policies and procedures of the Defendant, Boeing including but not limited to all policies and procedures regarding safety requirements from the FAA. Included in Boeing's policies was "Field Operations Foreign Object Debris and Damage Prevention", the purpose of the policy was "This business process guide (BPG) describes a method used for the gathering of facts and data that are to be used to improve foreign object elimination."
12. That the Plaintiff worked in the Quality Department and worked primarily in Stall A1/A2. The Plaintiff's direct supervisor was Chris Skidmore.

13. That Alton Owen was the direct supervisor over the FRTs in Stall A1/A2 until shortly before the plaintiff was fired.
14. All Flight Line Employees are scheduled to come in at 6:00 am with a 10-minute break at 9:00 am and a 30-minute break at 11:00 am for lunch.
15. FRTs, FRTIs and K Level Managers are assigned to Stalls. At the Flight Line Stalls 1-5 were considered to be pre-flight delivery stalls. However, in 2018 that procedure changed, and Stalls 1-3 specialized on pre-deliver work after B1 flights. After the election Boeing changed this procedure again and Stalls 1-5 began doing all of their own work from pre-flight to pre-delivery work.
16. That during the Plaintiff's employment over several years, FRTs and FRTIs have quit but have not been replaced. That each stall has gone from having twelve FRTs per stall to only have five or six per stall. That Boeing has compensated for this overwhelming short staff condition by implementing mandatory overtime. Unfortunately, many of the decisions for overtime is made by Executive Level Managers who have no idea the skillset required to complete the unfinished work and only required bodies instead of tailoring the work force to the tasks. The frustration of the employees in regarding to the Defendant, Boeing's failure to properly handle the overtime assignment is what led to the union being voted into the facility.
17. That the employees who were mechanics voted in the union.
18. As a result of the union vote the treatment towards the employees that voted the union in was changed.

19. That the majority of employees in Stall A3/A4 are not union supporters. The majority of the other employees working in A1/A2 were supporters of the union.
20. On October 12, 2018 the Plaintiff was moved from his regular Stall to work in Stall 3/4.
21. October 12, 2018, the Plaintiff was working shortly after 9 am the Plaintiff walked across the Flight Line taxiway where the aircraft come in and leave from the stalls where work will be performed on the planes. As required by policy and practice the Plaintiff looked to see the status of the lights. The Plaintiff observed that the blue lights were flashing. The Plaintiff did not see any planes moving on the taxiway and there were no marshallers present. A marshaller is a person that uses wands to direct planes around on the taxiway. The Plaintiff observed that one plane had a red beacon light on. The red beacon light means that a plane is either may move or that a slat or flap may open or that the hydraulic power is on. The Plaintiff headed to 8830 factory building to go to the ATM. The Plaintiff was on break at the time. While on the Flight Line the Plaintiff was about 50 feet across the taxiway when he was approached by a cart. The Plaintiff heard someone yelling but could not hear them. The Plaintiff continued to walk. The Plaintiff went past the taxiway gate and walked into 8830 building. When the Plaintiff was walking alongside the building the Plaintiff saw a airplane come down the taxiway. The Plaintiff deposited his check in the ATM and returned to work taking the same route to Stall 3/4. The Plaintiff did not break any policies and procedures.
22. During work, the blue lights come on several times a day depending on how many planes are moving around on the taxiway. Boeing's rule is that if the blue light is

on employees should not enter the taxiway. However, employees frequently enter the taxiway when the blue light is on and were not disciplined, suspended or terminated. Supervisors and Managers are consistently on the flight line area.

23. When the Plaintiff returned to work he was talking to Cody Bunch, who is an FRT and Union Steward.
24. That while having this discussion, the Plaintiff and Bunch were approached by First Level FRTI Supervisor Kevin Martin and Second Level FRTI Manager Ron Pence with two armed security guards. Pence informed the Plaintiff that they needed to talk to him about something. The Plaintiff responded with "Go ahead. Is this about the blue light incident?" Pence responded to the Plaintiff "It sure is. As a matter of fact we need your badge." Pence then stated "Everyone out of the room." There were several other employees in the room. The Plaintiff requested "where is my union representation?" The Plaintiff further stated that "Oh yeah Cody is my union representative he gets to stay." Pence then stated that "We don't recognize the Union." The Plaintiff then stated "No. He get's to stay." Cody stayed in the room. Kevin Martin then informed the Plaintiff "Get your personal things and give us your stamp." The Plaintiff handed Martin his stamp and his badge. The Plaintiff logged off of his computer. Pence then informed the Plaintiff that he was going to be suspended until the completion of an investigation into the incident. The Plaintiff stated, "Really. You brought two armed guards over here." The Plaintiff further stated "Let's talk. Who was driving that vehicle while the blue light was on? Was it Kevin because it sure seems like something he would do?" Pence

refused to discuss the incident. The Plaintiff further asked if he would be paid during the investigation? Pence informed the Plaintiff he would be paid.

25. As the Plaintiff was being locked out, he asked why nobody else gets sent to different stalls, it is only the Plaintiff and Robert McHouston who are sent to other stalls.
26. The Plaintiff started that "This is some petty shit." The Plaintiff was allowed to get his lunch and empty his locker.
27. That on October 12, 2018, the Plaintiff was suspended.
28. A week after being suspended the Plaintiff received a phone call from a Boeing Representative who informed the Plaintiff that they were conducted an investigation and requested that the Plaintiff come to the Visitor Center in a few days to issue a statement.
29. The Plaintiff called Chris Jones, an employee and union representative, to request that a Union Representative be present at the meeting. Some time later prior to the meeting Jones called the Plaintiff back and told him that Skidmore had approved Jones attending the meeting.
30. The Plaintiff arrived for the meeting. The meeting was attended by company representatives Bob and Paul and Chris Jones. Paul informed the Plaintiff that the company was conducting an investigation. Paul further informed the Plaintiff that he was being suspended because of the blue light incident. Paul then informed Jones that they were there to get the Plaintiff's statement and that if Jones badgered them or interrupted in any way they would end the meeting. Paul then proceeded to ask the Plaintiff questions regarding the incident. Paul printed the statement that

he typed, the Plaintiff reviewed it. Paul informed the Plaintiff that he was not to discuss the incident with anyone. Boeing did not provide the Plaintiff a copy of the Statement.

31. During the meeting Paul asked the Plaintiff if he wore any Union apparel at work. Paul further asked the Plaintiff if he felt like he was being targeted because he was a Union supporter. At the end of the meeting Paul informed the Plaintiff that he would hear from the Boeing Company. No one provided the Plaintiff any information regarding the incident.
32. After the meeting the Plaintiff requested by text to three different managers, Kevin Martin, Chris Skidmore and Steve Demasio that he be allowed to attend an anger management program through EAP (Employee Assistance Program). No one responded to the Plaintiff's text messages.
33. The Plaintiff had no other communications with the Defendant regarding his Suspension.
34. The Plaintiff was terminated by Chris Skidmore per Ron Pence for Crossing a closed Flight line.
35. That the Defendant terminated the Plaintiff for his safety complaints regarding lighting, failure for more stringent walk throughs, tool accountability, and his involvement in the union.
36. That as a direct and proximate result of the Defendant's intentional and unlawful action of wrongfully terminating the Plaintiff, the Plaintiff has suffered lost wages, emotional damages, compensatory and consequential damages.

37. That the Plaintiff is entitled to an award of actual damages, compensatory, consequential, and punitive damages against the Defendant for his unlawful suspension and termination.
38. That the Defendant retaliated against the Plaintiff for reporting the violation of safe working conditions.
39. That the Defendant willfully and wrongfully terminated the Plaintiff for reporting the safety concerns.
40. That the Plaintiff was terminated from his employment for his support of the union. That the Plaintiff has the right as an employee to support the union.
41. That the Defendant terminated the Plaintiff in violation of a clear mandate of public policy and in violation of South Carolina Law. The Defendant terminated the Plaintiff for his concerns regarding safety to include but not limited to lighting, FOD, Tool Accountability and Flight of planes without proper search for lost tools.
42. That as a direct and proximate cause of the Defendant's wrongful termination of the Plaintiff, the Plaintiff:
 - a. Suffered the loss of his job;
 - b. Suffered the loss of benefits associated with his job;
 - c. Suffered future lost wages and benefits;
 - d. Suffered consequential and compensatory damages;
 - e. Suffered emotional damages;
 - f. Incurred attorney's fees and costs as a result of having to bring this action.
43. That the Plaintiff is entitled to an award of damages against the Defendant for actual damages, consequential damages, punitive damages, attorney's fees, costs of

this action and other damages, such as this Honorable Court deems appropriate and just appropriate.

**FOR FIRST CAUSE OF ACTION
WRONGFUL TERMINATION IN VIOLATION OF
PUBLIC POLICY AGAINST BOEING**

44. Paragraphs one (1) through forty-three (43) are hereby incorporated verbatim.
45. That the Defendant wrongfully terminated the Plaintiff in violation of public policy when it terminated him because he was a supporter of the union.
46. That, as direct and proximate result of the Defendant's unlawful actions, the Plaintiff suffered significant damages to his reputation. The Plaintiff further suffered lost wages, lost benefits, emotional damages, compensatory damages, and consequential damages.
47. That the Plaintiff is entitled to recover an award against the Defendant in the amount of actual, consequential, compensatory and punitive damages.
48. That the Defendant terminated the Plaintiff in violation of a clear mandate of public policy and in violation of South Carolina Law.
49. That as a direct and proximate cause of the Defendant's wrongful termination of the Plaintiff, the Plaintiff:
 - a. Suffered the loss of his job;
 - b. Suffered lost wages, the loss of his salary; and future increases thereof;
 - c. Suffered the loss of benefits associated with his job;
 - d. Suffered the loss of future benefits associated with his job;
 - e. Suffered consequential economic damages as a result of the loss of his job;

- f. Embarrassment;
 - g. Severe Emotional Distress
 - h. Incurred attorney's fees and costs as a result of having to bring this action.
50. That the Plaintiff is entitled to an award of damages against the Defendant for actual damages, consequential damages, punitive damages, attorney's fees, costs of this action and other damages, such as this Honorable Court deems appropriate and just.

FOR A SECOND CAUSE OF ACTION

SLANDER

AGAINST KEVIN MARTIN

51. Paragraphs one (1) through fifty (50) are hereby incorporated verbatim.
52. The Defendants published false statements regarding the Plaintiff's work performance and issues regarding violations of policy.
53. The purpose of the termination of the Plaintiff was to strike fear into the hearts of others that had made safety complaints and joined the union.
54. That the false statements were intentionally made by the Defendants, in order to have the Plaintiff terminated from his employment and damage his reputation in the Airline Industry.
55. That the Defendant Boeing has continued the publication of the false narrative regarding the Plaintiff in order to damage the reputation of the Plaintiff further by publishing internal and external memorandums regarding the Plaintiff's performance issues.

56. That the Defendants are the direct and proximate cause of significant damage to the Plaintiff.
57. That the Plaintiff is entitled to damages from the Defendants in the amount of actual, compensatory, consequential and punitive damages for their unlawful actions of slandering his name.

FOR A THIRD CAUSE OF ACTION

NEGLIGENT SUPERVISION OF AN EMPLOYEE AGAINST

BOEING

58. Paragraphs one (1) through fifty-seven (57) are hereby incorporated verbatim.
59. That the Defendant, negligently supervised its employees, Kevin Martin and Chris Skidmore.
60. That the Defendant owed the Plaintiff a duty to protect the Plaintiff from the wrongful acts of its employees.
61. The Plaintiff was the only employee terminated for crossing the flight line.
62. That the Defendant breached the duty it owed to the Plaintiff by not properly supervising its employees.
63. That the negligent supervision of these employees caused the Plaintiff significant damages.
64. That Boeing had knowledge of the Defendants actions of making false statements regarding the employees in the union in order to have them terminated from employment.
65. However, Boeing failed and refused to protect its employees in order to have the union driven out of the South Carolina Plant.

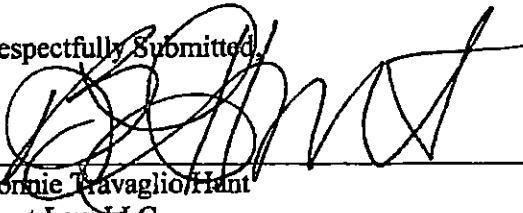
66. That the Defendant is the proximate and direct cause of damages to the Plaintiff.
67. That the Plaintiff is entitled to an award of damages from the Defendant for their negligent supervision of their employees in the amount of actual, compensatory, and punitive damages.

PRAYER FOR DAMAGES

WHEREFORE, the Plaintiff prays for an award of damages against the Defendant in the amount of:

- A. Actual damages;
- B. Consequential damages;
- C. Compensatory
- D. Punitive damages;
- E. All other damages under South Carolina Law;
- F. Other damages such as this Honorable Court deems appropriate and just.

Respectfully Submitted,



Bonnie Travaglio Hunt

Hunt Law LLC

Federal Bar # 07760

SC Bar # 12341

Attorney for the Plaintiff

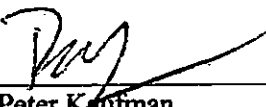
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August 8, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Liam Wallis,	)	Case No.: 2019-CP-10-1379
	)	
Plaintiff,	)	PLAINTIFF'S RETURN TO
	)	DEFENDANTS' MOTION TO RECONSIDER,
vs.	)	ALTER OR AMEND ORDER DENYING
	)	DEFENDANTS' MOTION TO DISMISS
The Boeing Company; Anthony	)	
Timms; and Monica Williams	)	
	)	
Defendants.	)	

Plaintiff Liam Wallis issues this return to Defendants' motion to reconsider, alter or amend order denying Defendant's motion to dismiss:

1. Plaintiff believes that, upon viewing the complaint in the light most favorable to the Plaintiff, the court correctly denied Defendants' 12(b)(6) motion to dismiss.
2. Plaintiff respectfully requests that the court deny Defendants' motion to reconsider, alter or amend order denying Defendants' motion to dismiss.

Respectfully submitted by,

QUERY SAUTTER & ASSOCIATES, LLC

/s/ Michael H. Ellis
O. Grady Query, 3188
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Charleston, South Carolina 29412
Telephone: 843-795-9500
Facsimile: 843-762-1500

Attorney for the Plaintiff

This 7th day of April, 2020
Charleston, South Carolina

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I served a copy of the foregoing upon Cherie W.

Blackburn, attorney for the Defendant, via email as follows:

Cherie W. Blackburn, Esquire
cblackburn@nexsenpruet.com

Dated: April 7, 2020

/S MICHAEL H. ELLIS

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Liam Wallis,)
Plaintiff,)
v.)
The Boeing Company, Anthony)
Timms, and Monica Williams,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICAL CIRCUIT
Case No.: 2019-CP-10-1379

**Plaintiff's Notice of Motion and R. 59 Motion
to Reconsider the April 23, 2020 Order
Dismissing Plaintiff's Wrongful Termination
Cause of Action**

TAKE NOTICE that Plaintiff, by and through his undersigned counsel, moves the Honorable Perry M. Buckner, III to alter or amend his April 23, 2020 Order granting in part Defendants' R. 12(b)(6) motion dismissing Plaintiff's cause of action for wrongful termination on the basis that Plaintiff had an existing statutory remedy under AIR 21 and his termination did not contravene a clear mandate of public policy.

This motion is made pursuant to SCRCP R. 59(e). "The purpose of rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172 (1992). "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. Indeed, it is inherently unfair to disallow such an opportunity" Elam v. SC Dep't of Transp., 602 S.E.2d 772 (S.C.2004).

49 U.S. Code § 42121 is not an administrative remedy available to Plaintiff

Defendants argue that 49 U.S.C. § 42121 (hereinafter known as "AIR 21") is a statutory remedy available to Plaintiff, thereby baring his claim for wrongful discharge under the public

policy exception to the doctrine of at-will employment¹. To prevail on their argument, Defendants must show that the remedy provided in AIR 21 is available to the Plaintiff.

In the case of Rayfield v. SC Dept. of Corr., 374 S.E.2d 910 (Ct.App.1988), Judge Bell provided guidance for determining when a statute applies to a Plaintiff's claims. In that case, Plaintiff sought to impose a statutory duty to act upon Defendant. The court held that for Defendant to owe Plaintiff a duty,

“...the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered, and (2) that he is a member of the class of persons the statute intended to protect” Rayfield, supra. at 914.

In support of their holding, the Rayfield court cited to Bell v. Atlantic Coast Line Railway Co., 24 S.E.2d 177, 183 (1943).

“An action for negligence based upon an alleged violation of a statute...cannot be maintained where it appears that the statute...was enacted...for a purpose wholly different from that of preventing the injury of which complaint is made. To afford a right of action for injury from the violation of a statute...the complainant's injury must have been such as the statute...was intended to prevent. If none of the consequences which the enactment was designed to guard against have resulted from its breach, such a breach does not constitute an actionable wrong, even though some other injurious consequence has resulted. It is not enough for a plaintiff to show that the defendant neglected a duty imposed by the statute and that he would not have been injured if the duty had been performed. He must go further and show that his injury was caused by his exposure to a hazard from which it was the purpose of the statute to protect him” Rayfield, at 915 citing to Bell, supra.

Using Judge Bell's analysis, this court must determine (1) whether the essential purpose of AIR 21 is to protect from the kind of harm the plaintiff has suffered, and (2) whether the plaintiff is a member of the class of persons the statute intended to protect. The pertinent part of AIR 21 provides:

¹ “The public policy exception does not, however, extend to situations where the employee has an existing statutory remedy for wrongful termination” Barron v. Labor Finders of South Carolina, 713 S.E.2d 634, 637 (S.C.2011).

§42121. Protection of employees providing air safety information

- (a) **Discrimination Against Airline Employees.**—No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—
- (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
 - (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
 - (3) testified or is about to testify in such a proceeding; or
 - (4) assisted or participated or is about to assist or participate in such a proceeding.

§ 42121(a)(1)-(a)(4) provides anti-discrimination protection for employees providing air safety information to either the employer or the Federal Government. The protected air safety information is “...any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States” *id.* at (a)(1). A reading of this statute clearly and unambiguously shows that that Congress intended for AIR 21 to only protect those employees that are reporting to the employer or the Federal government:

- any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration, or

- any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature” Charleston County Sch. Dist. V. State Budget and Control Bd., 313 S.C. 1, 5 (S.C. 1993) *citing to* Banker Trust of South Carolina v. Bruce, 275 S.C. 35 (1980). “Under the plain meaning rule, it is not the court’s place to change the meaning of a clear and unambiguous statute” Hodges v. Rainey, 341 S.C. 79, 85 (S.C. 2000) *citing to* In re Vincent J., 333 S.C. 233 (S.C. 1998). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning” id.

Defendant relies upon Carlos Lugo v. The Boeing Company, case number 2:19-cv-2995-RMG to expand AIR 21 beyond its clear and unambiguous meaning to show that a statutory remedy is available to Plaintiff. However, in that case Judge Gergel found that the Plaintiff did engage in activity protected by AIR 21 because his complaint alleged the reporting of safety conditions that violated Federal Aviation Administration regulations². This court must determine whether any allegations pled by Plaintiff in his Amended Complaint invokes the protection provided for in AIR 21.³ Plaintiff’s Amended Complaint is replete with concerns about violations of Boeing’s safety procedures,⁴ but does not allege any violations of Federal Aviation Administration requirements or Federal law relating to air carrier safety. Plaintiff has not pled “...his exposure to a hazard from which it was the purpose of the statute to protect him”⁵ and he

² “To the extent Plaintiff’s complaint concerns his wrongful termination for reporting safety conditions that violated, *inter alia*, Federal Aviation Administration regulations, Plaintiff has an existing statutory remedy, AIR21” Lugo, *supra* at 5.

³ “A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true” Fabian v. Lindsay, 410 S.C. 475, 481 (S.C.2014).

⁴ Amended Complaint, paragraphs 15, 24, 25, 26, 35, 37, and 42

⁵ Bell v. Atlantic Coast Line Railway Co.

is not "...a member of the class of persons the statute intended to protect"⁶. Therefore, Plaintiff has no statutory remedy barring him from proceeding with his claim of wrongful discharge under the public policy exception to the doctrine of at-will employment. "A litigant need not exhaust administrative remedies where 'there are no administrative remedies for the wrongs it assertedly suffered'" Capital City Ins. Co. v BP Staff, Inc., 382 S.C. 92, 102 (Ct.App.2009) *citing to* Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 413 (Ct.App.2002).

In Debbie Simpson v. United Parcel Service, ARB Case No.: 06-065 (**Exhibit A**), the Administrative Review Board affirmed the Administrative Law Judge's dismissal of the Complainant's AIR 21 claim based upon her failing to have engaged in protected activity. The Review Board specified that "[p]rotected activities under AIR 21 include: providing to the employer or (with knowledge of the employer) the Federal Government 'information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety...'" Simpson, at 5 *citing to* 49 U.S.C.A. § 42121(a)(1). The Administrative Review Board further stated that to qualify for relief under AIR 21, a Complainant's "...**allegations under AIR 21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety)** (emphasis added)" Simpson, at 5. Nowhere in the present complaint has Plaintiff alleged to have engaged in the defined protected activity that makes AIR 21 an available statutory remedy.

"In ruling on a motion to dismiss a complaint for failure to state facts sufficient to constitute a cause of action, **the court must look to the allegations set forth in the complaint**. A defendant cannot assert an affirmative defense on a Rule 12(b)(6) motion unless the allegations of the complaint demonstrate the existence of the affirmative defense" Crocker v. Barr, 295 S.C. 195, 197 (Ct.App. 1988). (emphasis added)

⁶ Rayfield v. SC Dept. of Corr.

Plaintiff falls into the exact class that is meant to be protected by the public policy exception to the doctrine of at-will employment. Plaintiff alleges that Boeing placed him in the position that he had to choose between sacrificing the safety, welfare, and health of the persons of this State to maintain his career and livelihood from Boeing, or sacrificing his career and livelihood for the maintenance of the safety, welfare, and health of the persons of this State⁷. Plaintiff alleges to have been wrongfully terminated for choosing public policy over his career and livelihood, which is in violation of a clear mandate of public policy. Plaintiff's pled allegations do not invoke any statutory remedies including AIR21, leaving his only actionable recourse as wrongful discharge under the public policy exception to the doctrine of at-will employment.

Plaintiff has properly pled the public policy exception to the doctrine of employment at will

South Carolina recognized the public policy exception to the doctrine of employment at will in Ludwick v. This Minute of Carolina, Inc., 287 S.C. 219 (S.C.1985)⁸. South Carolina recognizes public policy to be that which is "...derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions" Batchelor v. American Health Ins. Co., 107 S.E.2d 36, 38 (S.C.1959). In the Constitution, South Carolina clearly implicates the "health, welfare and safety of the lives of the people of this State" to be a mandate of public policy⁹.

As Defendants' Motion is based upon R. 12(b)(6), this court's review is limited to whether Plaintiff has properly pled a public policy exception to the doctrine of at-will employment¹⁰. In his Amended Complaint, Plaintiff pled that his job duties with Boeing included "...inspecting all

⁷ *Amended Complaint* paragraph 43

⁸ "Where the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises" Ludwick at 225.

⁹ "The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern" S.C.Const. Art. XII § 1.

¹⁰ "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true" Fabian v. Lindsay, 410 S.C. 475, 481 (S.C.2014)

newly manufactured aircraft for compliance with Boeing's internal engineering and safety specifications" *Amended Complaint* para. 13. Plaintiff pled that he was out of work due to a medical issue and upon his return discovered that Boeing had engaged in a systematic disregard for Boeing's safety standards regarding planes being newly manufactured¹¹. Plaintiff pled that, despite Boeing's policy of disregarding the safety of the manufactured planes, he "...continued to do his job of inspecting all newly manufactured aircraft to ensure the safety of the public that relies upon Boeing's internal engineering and safety specifications and documented his findings and non-conformities" *Amended Complaint*, para. 26. Plaintiff pled that the performance of his job duties finding non-conformities with Boeing's safety standards resulted in delay of production while addressing those non-conformities and that Boeing management engaged in harassment of Plaintiff in retaliation¹². Plaintiff pled that he "...was wrongfully terminated from Boeing on June 15, 2017" *Amended Complaint*, para. 41. Plaintiff pled that his termination was in retaliation for not endangering the health, welfare, and safety of the lives of the people of this State¹³. Plaintiff properly pled the elements of wrongful termination in violation of public policy¹⁴.

Viewed in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states a valid claim for relief for wrongful discharge in violation of public policy.

Conclusion

Plaintiff respectfully requests that the court reconsider its April 23, 2020 Order granting Defendants' 12(b)(6) motion dismissing Plaintiff's cause of action for wrongful termination and deny Defendants' motion.

¹¹ *Amended Complaint* paragraphs 18, 23, and 24.

¹² *Amended Complaint* paragraphs, 14, 15, 21, 25, 27, 28, 29, 30, 37, 38, and 40

¹³ *Amended Complaint* paragraph 43

¹⁴ *Amended Complaint* paragraphs 52-55; "A cause of action for wrongful discharge of an at-will employee shall exist only where the alleged retaliatory discharge constitutes a clear violation of a mandate of public policy" *Ludwick*, supra. at 225.

Respectfully submitted by,

QUERY SAUTTER & ASSOCIATES, LLC

/s/ Michael H. Ellis
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Michael H. Ellis, Jr.12309
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Charleston, South Carolina 29412
Telephone: 843-795-9500
Facsimile: 843-762-1500

Attorneys for the Plaintiff

This 4th day of May, 2020
Charleston, South Carolina

EXHIBIT

A



In the Matter of:

DEBBIE SIMPSON,

ARB CASE NO. 06-065

COMPLAINANT,

ALJ CASE NO. 2005-AIR-031

v.

DATE: March 14, 2008

UNITED PARCEL SERVICE,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Debbie Simpson, *pro se*, Lexington, South Carolina

For the Respondent:

David Hoskins, *Frost Brown Todd, LLC*, Louisville, Kentucky

FINAL DECISION AND ORDER

This case arises under section 519 (the whistleblower protection provision) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), 49 U.S.C.A. § 42121 (West 2008). Regulations implementing section 519 appear at 29 C.F.R. Part 1979 (2007).

The Complainant, Debbie Simpson, filed a complaint of unlawful discrimination against United Parcel Service (UPS) which, after investigation, the Occupational Safety and Health Administration (OSHA) found to be without merit. Following timely

objection, an Administrative Law Judge (ALJ) heard the complaint and ultimately issued a Decision and Order (D. & O.) denying the complaint. Simpson petitioned for review of the D. & O. We affirm the ALJ's decision as described below.

BACKGROUND

Substantial evidence in the record supports the ALJ's exposition of the facts. D. & O. at 2-4. We summarize them briefly.

UPS offers commercial air freight service worldwide. D. & O. at 2. Federal Aviation Administration (FAA) air safety regulations govern its operations. *Id.* Simpson worked for UPS as a licensed mechanic for 17 years prior to the incident in question at the UPS facility in West Columbia, South Carolina. D. & O. at 2; Transcript (Tr.) at 7-8.

When a typical flight arrived at the airport in West Columbia, the mechanics, working with a crew, would observe the airplane exterior and interior, checking for noticeable problems, would discuss malfunctions with the flight crew, and would review the flight log for defects not previously remedied, referred to as "deferrals," noted in the plane's logbook. Tr. at 8-11. Simpson reviewed and fixed defects in the airplane, noting them in the logbook and signing off on a plane as completed. Tr. at 52, 56-57.

On April 20, 2005, Simpson worked the night shift, from 10 p.m. to 8 a.m., with fellow mechanic Dave Rose, under the guidance of Rock Underwood, acting supervisor. D. & O. at 2; Tr. at 7-9, 11. Early the next morning, UPS aircraft N122UP arrived from Louisville, Kentucky. D. & O. at 2; Tr. at 8. Simpson and Rose received the aircraft, checked the log for defects, and talked to the flight crew to discern the nature of any problems. D. & O. at 2; Tr. at 10. The flight crew reported that they had been unable to pressurize the cabin and had been forced to wear oxygen masks during the flight. *Id.*, Tr. at 44. The cabin pressurization system was designed with built-in redundancies: two independent automatic control systems, a manual control system, and two independent outflow valves. The aircraft was safe to fly under FAA regulations, even if one of each of the systems was inoperative. D. & O. at 3; Joint Exhibits (JX) 2 (Pressurization Description Chart), 4 (Aircraft Minimum Equipment List). When N122UP left Louisville, it had been marked as safe and airworthy in the aircraft log, despite the fact that one of the pressurization systems was inoperative and one of the outflow valves was inoperative. D. & O. at 3; JX 2; Tr. at 92-93. But by the time of N122UP's arrival in West Columbia, both automatic control systems had malfunctioned. D. & O. at 3; Tr. at 88.

Around 7 a.m. on April 21, Simpson informed Underwood that she, along with Rose, had decided to take N122UP out of service to correct the defective redundant system. D. & O. at 3; Tr. at 11. Underwood instructed Simpson and Rose to return the aircraft to working status as soon as possible and to continue working until the next shift arrived at 8:30 a.m. *Id.*; Tr. at 47, 99. At 8:10 a.m., Underwood returned to the aircraft. *Id.* Simpson and Rose reported that the deficient pressurization control system had been

fixed. *Id.* They signed the logbook to confirm the correction. D. & O. at 3; JX 3 at 5 (Mechanic's Logbook). Underwood then informed his manager, Darrell Crier, at 8:30 a.m. that the mechanics had signed the logbook and N122UP could be dispatched. D. & O. at 3; Tr. at 103-04.

At 8:50 a.m. Underwood found Simpson in the cockpit of N122UP. D. & O. at 3; Tr. at 104. Simpson stated she was working on the aircraft because there were "too many deferrals" and something was "illegal." Tr. at 104-06. Underwood called Crier and had him speak to Simpson over the phone to determine what the problem was with the aircraft. Tr. at 104-05. Underwood then asked Simpson to talk with Scott Wahls, a mechanic in Aircraft Maintenance Control (AMC) about her concerns. Underwood listened to the conversation but Simpson handed the phone back to Underwood while Wahls was in midsentence and went back to work. D. & O. at 3; Tr. at 105-6. Underwood then said to Simpson that the aircraft was "green," ready to fly, as noted by Simpson's own log entry, and that she needed to sign out for the day and go home. D. & O. at 3; Tr. at 106. Underwood called Wahls again to discuss his thoughts. Regarding that conversation he testified:

I didn't see anything wrong with the airplane. We fully complied with the DMP procedures. We said, "It's green, it's good to go." Signed off. We haven't heard anything specific as the - to a problem, any - and I've asked on several occasions as to what specific problem there is? What's illegal? What's wrong[?] I've never been pointed to anything in particular, just that it doesn't seem right. There's [sic] too many deferrals, which there's no such thing. Nothing that I can grab onto. I gave Ms. Simpson the opportunity to talk to AMC several times to help clarify the issue and feel comfortable with it. I didn't get anywhere with that.

Tr. at 105-106.

Shortly before 9 a.m., Underwood and Simpson left the aircraft and returned to the maintenance office, where Simpson proceeded to enter into a conversation with Ram Logan, another mechanic, about the discrepancy on N122UP. Tr. at 107. Underwood once again told Simpson she needed to "punch out." *Id.* Simpson refused. *Id.* Underwood left the office to consult with Crier about Simpson's refusal to leave the premises. Tr. at 107-08. Underwood and Crier discussed Simpson's concerns about the aircraft. Underwood contacted Wahls to determine the specific nature of the complaint and to insure that the aircraft was safe to fly. Tr. at 110. Wahls told Underwood that N122UP was airworthy, since several mechanics had signed off on the logbook that the aircraft was ready to go for the next flight. *Id.* Further, Wahls commented that he could not act on Simpson's concerns since they were too vague. *Id.* Satisfied that N122UP was safe, Crier left his office and approached Simpson, telling her to sign out and go home. D. & O. at 4; Tr. at 108-11, 128. Simpson clocked out at 9:18 a.m. Tr. at 25.

On April 29, following a hearing with Simpson's union representative, UPS issued Simpson a warning letter for insubordination for not clocking out and leaving the premises when instructed to do so. D. & O. at 4; Tr. at 26-27. The warning letter states that it serves as a "formal warning" in accordance with the union bargaining agreement. JX 1 (April 29 Warning Letter). The warning letter was part of a progressive discipline scheme, stating that "any further behavior of this nature will result in further disciplinary action up to and including discharge," which allowed UPS to suspend Simpson if she engaged in further insubordination over a period of nine months, at the end of which she was no longer subject to the disciplinary period. D. & O. at 4; JX 1; Tr. at 140- 41.

After a one-day hearing in Columbia, South Carolina, the ALJ issued a decision in February 2006, finding no violation of AIR 21. The ALJ found that Simpson's complaints were not specific enough to be protected under AIR 21, and that the April 29 warning letter was not an unfavorable personnel action, since it had no effect on the terms and conditions of her employment. Simpson filed a timely petition for review and the parties submitted briefs.

ISSUES PRESENTED

The issues before the Board are: whether the ALJ erred in finding that (1) Simpson's allegations about the unsafe nature of Aircraft N122UP were not protected activity under AIR 21, and that (2) the warning letter UPS issued to Simpson was not an unfavorable personnel action under AIR 21.

JURISDICTION AND STANDARD OF REVIEW

The Secretary has jurisdiction to review the ALJ's decision under AIR 21. 49 U.S.C.A. § 42121(b)(3) and 29 C.F.R. § 1979.110. The Secretary has delegated to this Board her authority to review cases under, inter alia, AIR 21. Secretary's Order 1-2002, 67 Fed. Reg. 64, 272 (Oct. 17, 2002).

This Board reviews the ALJ's factual determinations under the substantial evidence standard. 29 C.F.R. § 1979.110(b). We review conclusions of law de novo. *Negron v. Vieques Air Links, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-010, slip op. at 4-5 (ARB Dec. 30, 2004).

DISCUSSION

I. Elements of an AIR 21 Whistleblower Complaint

AIR 21 provides that "[no] air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with

respect to compensation, terms, conditions, or privileges of employment,” 49 U.S.C.A. § 42121(a), because the employee has engaged in certain protected activities.

The AIR 21 complainant must allege and later prove that she was an employee who engaged in activity the statute protects; that an employer subject to the act had knowledge of the protected activity; that the employer subjected her to an “unfavorable personnel action;” and that the protected activity was a “contributing factor” in the unfavorable personnel action. 49 U.S.C.A. § 42121(a), (b)(2)(B)(iii). Cf. 29 C.F.R. § 1979.104(b)(1)(i)-(iv). If the employer has violated AIR 21, the employee is entitled to relief unless the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity. 49 U.S.C.A. § 42121(b)(2)(B)(iv). Cf. 29 C.F.R. § 1979.104(d). See, e.g., *Negron*, slip op. at 6 (ARB Dec. 30, 2004); *Peck v. Safe Air Int’l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-003, slip op. at 9 (ARB Jan. 30, 2004).

In this case, it is undisputed that Simpson was an employee of UPS, and that UPS was an employer subject to AIR 21. We turn to whether she engaged in protected activity, and alternatively whether she suffered an unfavorable personnel action.

II. Protected Activity

Protected activities under AIR 21 include: providing to the employer or (with knowledge of the employer) the Federal Government “information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety . . .” 49 U.S.C.A. § 42121(a)(1). See also 29 C.F.R. § 1979.102. While they may be oral or in writing, protected complaints must be specific in relation to a given practice, condition, directive or event. A complainant reasonably must believe in the existence of a violation. *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 19-21 (1st Cir. 1998); *Peck*, slip op. at 13.

Simpson’s complaints must relate to a regulation or order, she must be specific, and she must reasonably believe them. Simpson expressed her concern that Aircraft N122UP was “illegal” and “unsafe.” Tr. at 17, 19. She expressed concern that the aircraft suffered from too many deferrals, but she did not know the exact problem with the aircraft. Tr. at 107. Although a complainant need not cite to a specific violation, allegations under AIR 21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety). It is undisputed that following Simpson and Rose’s work, the pressurization system on N122UP was once again in compliance with FAA regulations. Simpson was never able to indicate to any supervisor a concern related to a violation of any other safety regulation or order.

In her brief before the Board, Simpson argued that Underwood forced her out of the cockpit of N122UP before she was allowed to perform a “turnover” as required by 14 C.F.R. § 121.369 (2007). Brief by Complainant (CB) at 3-4. However, by signing the

logbook at the end of her shift on April 21, Simpson had successfully turned over the maintenance of the aircraft to the next shift. *See* 14 C.F.R. § 121.701.

In addition to relating to a regulation, the complaint must be specific. When both Underwood and Cried asked her to detail the issue with N122UP, Simpson asserted that she did not know the exact problem. When AMC asked her over the phone to explain the problem, she ended the conversation. In her brief before the Board, Simpson states she “was not sure exactly what the problem was.” CB at 3. In contrast to her complaints, she signed in the aircraft safety log that N122UP was safe and airworthy. Simpson has failed to communicate any specific safety defect that her employer could take corrective action on as required by AIR 21.

Even if her complaints were specific; Simpson must also prove that she had a reasonable belief that a violation of an FAA regulation or order existed. Although she insisted that the plane was still illegal, she had signed off on its safety in the mechanic logbook prior to her complaints. JX 3. By signing the logbook reporting the correction of problems, Simpson was taking ultimate responsibility for the safety of the aircraft. Tr. at 39; *see* 14 C.F.R. § 121.701. Both AMC and Underwood believed that the aircraft was properly configured and airworthy. D. & O. at 3, 6. Given that she signed off on the safety of N122UP in the log, and others involved believed the aircraft was safe, Simpson did not demonstrate a reasonable belief that a violation of an air safety regulation or order existed.

Since Simpson failed to prove that she engaged in protected activity, a requisite element of her case, her entire claim must fail. *Eash v. Roadway Express*, ARB No. 04-063, ALJ No. 1998-STA-028, slip op. at 5 (ARB Sept. 30, 2005); *Forrest v. Dallas & Mavis Specialized Carrier Co.*, ARB No. 04-052, ALJ No. 2003-STA-053, slip op. at 3-4 (ARB July 29, 2005).

III. Unfavorable Personnel Action

Even assuming that Simpson engaged in protected activity, her AIR 21 claim fails because the April 29 warning letter did not constitute an adverse action.

Under AIR 21, an employer may not “discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment.” 42 U.S.C.A. § 42121(a). The implementing regulations specify that it is a violation of the act for an employer “to intimidate, threaten, coerce, blacklist, discharge or in any other manner discriminate against any employee” for engaging in protected activity. 29 C.F.R. § 1979.102(b).

ARB precedents have held that warning letters do not meet the adverse action requirement of the whistleblower statutes because they do not have tangible job consequences. For example, in *West v. Kasbar*, ARB No. 04-155, 2004-STA-034 (ARB Nov. 30, 2005), the respondent issued a second formal written warning to the complainant that he violated company policy by taking naps in the cab of the truck and

logging the time as on rather than off duty. The letter advised that future violations would result in more severe disciplinary action up to and including discharge. We noted that written reprimands under a progressive discipline system did not have tangible job consequences and could lead to corrected performance. *Id.* at 4.

In *Agee v. ABF Freight Sys., Inc.*, ARB No. 04-182, 2004-STA-040 (ARB Dec. 29, 2005), the respondent issued a warning letter to the complainant for excessive absenteeism. The respondent could discipline a driver for absenteeism only within nine months of issuance of the written warning. The complainant challenged issuance of the warning but made no claim that it resulted in actual consequences. Therefore, we held that the complainant failed to allege an element of his whistleblower retaliation claim, an adverse action. *Id.* at 3.

As in *West* and *Agee*, the burden rests on the complainant to demonstrate that the personnel action in question is adverse. Simpson must show that the warning letter affected the terms, conditions, or privileges or her employment. The letter served as a “formal warning” for “fail[ing] to work as directed,” indicating that future incidents of similar behavior would “result in further disciplinary action.” JX 2. Simpson argues that “the warning letter is discipline [as] it relates to discrimination.” CB at 5. She did not produce evidence that the letter caused a tangible effect on her employment. Although the letter could lead to future consequences during the nine months, the warning letter did not suspend Simpson, nor did it change her salary, employment status, or benefits. The ALJ found that the warning letter had no effect on Simpson’s present “compensation, terms, conditions, or privileges of employment.” D. & O. at 6. We are bound by the ALJ’s findings of fact since substantial evidence in the record supports them. Simpson has thus failed to demonstrate that she suffered an adverse action under AIR 21.

CONCLUSION

In sum, we hold that substantial evidence in the record supports the ALJ’s findings of fact and that he correctly applied the law. Accordingly, we **AFFIRM**, the ALJ’s D. & O. and **DENY** Simpson’s complaint.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Liam Wallis,

Plaintiff,

vs.

The Boeing Company, Anthony Timms and
Monica Williams,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-1379

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFF'S
MOTION TO RECONSIDER THE
APRIL 23, 2020 ORDER DISMISSING
PLAINTIFF'S WRONGFUL
TERMINATION CAUSE OF ACTION**

Defendants The Boeing Company, Anthony Timms, and Monica Williams ("Defendants"), by and through their undersigned attorneys, respectfully submit this Response in Opposition to Plaintiff's Motion to Reconsider the April 23, 2020 Order Dismissing Plaintiff's Wrongful Termination Cause of Action ("Response").

Plaintiff's Motion to Reconsider the April 23, 2020 Order Dismissing Plaintiff's Wrongful Termination Cause of Action ("Motion to Reconsider") is merely an unsuccessful attempt by Plaintiff to present his arguments for a third time before this Court. Plaintiff asserted each of these arguments in his Return to Defendants' Motion to Dismiss, filed on February 26, 2020, and in his proposed written order submitted to this Court on March 5, 2020.¹ In its Order filed April 23, 2020, the Court correctly ruled that Plaintiff has a statutory remedy for his wrongful termination claim under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21") and failed to identify a clear mandate of public policy that has been recognized by the

¹ Plaintiff had the opportunity to raise these arguments in response to Defendants' Motion to Reconsider, but chose not to address the substantive arguments contained in Defendant's Motion to Reconsider and, instead, submitted a six-line response stating he believed the Court ruled correctly. (See, Plaintiff's Return to Defendant's Motion to Reconsider, Alter or Amend Order Denying Defendant's Motion to Dismiss, filed April 8, 2020). Defendants respectfully preserve the ability to contest the timeliness of any notice of appeal filed by Plaintiff on the grounds that Plaintiff's Motion to Reconsider does not stay the time for filing a notice of appeal.

courts of this state. The Court's decision dismissing the cause of action for wrongful termination in violation of public policy follows the law of this state and is consistent with rulings from this Court as well as the United States District Court for the District of South Carolina. Plaintiff has failed to present any argument in his Motion to Reconsider to show that the cases relied upon by the Court are inapplicable to his allegations. For the reasons discussed herein, Plaintiff's Motion to Reconsider should be denied.

I. LEGAL ARGUMENT

A. The Allegations Before the District Court in *Lugo v. Boeing* are Consistent with the Allegations before this Court.

Plaintiff's wrongful discharge in violation of public policy claim fails because he has an existing statutory remedy under AIR21. However, in his Motion to Reconsider, Plaintiff argues, once again, that the decision in *Lugo v. Boeing*, No. 2:19-CV-2995-RMG, 2020 WL 495336, at *3 (D.S.C. January 30, 2020) is distinguishable because it involved reporting safety conditions that violated Federal Aviation Administration ("FAA") regulations. (Mot. to Reconsider, p. 4, stating, the district court "found Plaintiff engaged in activity protected by AIR21 because his complaint alleged the reporting of safety conditions that violated Federal Aviation Administration regulations.").²

Plaintiff's argument incorrectly summarizes the holding in *Lugo v. Boeing* and seemingly ignores a footnote from the decision in which the district court stated:

Plaintiff argues AIR21 does not apply to him because "Plaintiff must have engaged in protected activity under AIR21 not merely done his job." (Dkt. No. 7 at 18). As AIR21 was specifically enacted to protect "whistleblowers," like Plaintiff, "who inform their employers ... about violations of federal laws relating to air carrier safety," *Plaintiff's argument is wrong and directly contradicted by the plain language of AIR21.*

² In *Lugo v. Boeing*, the plaintiff alleged that he was wrongfully terminated for his "safety complaints regarding lighting, failure for more stringent walk throughs, tool accountability and his involvement in the union." No. 2:19-CV-2995-RMG, 2020 WL 495336, at *3 (D.S.C. January 30, 2020) (emphasis in original).

Lugo, 2020 WL 495336, at *3, n. 3 (emphasis added). The district court dismissed the plaintiff's wrongful termination in violation of public policy claim under Fed. R. Civ. P. 12(b)(6), stating, "AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer *that related to* any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law related to air carrier safety. . . .". *Id.* (emphasis added) citing *Hobek v. Boeing*, No. 2:16-CV-3840-RMG-MGB (D.S.C. June 8, 2017).

Plaintiff has argued throughout this litigation that AIR21 does not apply for the sole reason that he has not alleged a violation of any standard or regulation of the FAA in his Amended Complaint. Removing any reference to the FAA or federal law governing safety standards for manufacturing aircrafts in the Complaint does not somehow negate Plaintiff's existing statutory remedy under AIR21. This argument is nonsensical and ignores the clear language of the statute which provides a remedy for providing information to an employer "*relating to* any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety." 49 USC § 42121(a)(1) (emphasis added).

Plaintiff's argument wholly and fundamentally ignores that the FAA is the federal agency responsible for the safety and regulation of aviation, such that any internal engineering and safety regulation necessarily implicates the FAA. Congress has delegated broad authority to the FAA to "promote safe flight of civil aircraft in air commerce by prescribing . . . minimum standards required in the interest of safety" for aircraft design, construction, quality of work, and performance. 49 U.S.C. § 44701(a). Even Plaintiff acknowledges in his Amended Complaint that he had "safety concerns" and was attempting to "ensure the safety of the public." [Am. Compl. at

¶¶ 25, 26]. Plaintiff alleges that he “feared . . . non-conforming aircraft barrels were being used to manufacture aircraft . . . used to transport passengers and freight.” [Am. Compl. at ¶ 36]. Plaintiff’s concerns, indeed, implicate the standards prescribed by the FAA.

Plaintiff’s argument that his concerns only pertain to Boeing’s safety procedures and not to FAA requirements or federal law relating to air carrier safety is irrelevant, at best, and is a disingenuous, if not misguided, effort to reverse the dismissal of his wrongful termination claim. Plaintiff’s allegations and assertions fall squarely within the coverage of AIR21, which affords him an adequate, already-existing statutory remedy precluding his wrongful termination in violation of public policy claim.

B. Plaintiff’s Safety Complaints Amount to Protected Activity under AIR21 Based on Recent and Relevant Jurisprudence.

This Court correctly ruled that Plaintiff has an existing statutory remedy by relying on recent and relevant case law addressing allegations that are the same as or substantially similar to Plaintiff’s allegations in this case. Like the plaintiff in *Lugo* (*supra*, § A), other plaintiffs alleging wrongful termination in violation of public policy as a result of reporting safety concerns related to aircraft manufacturing have unsuccessfully argued that their “safety complaints” did not give them a statutory remedy under AIR21.

On March 31, 2020, this Court issued a formal written order in *Louis Migliaccio v. The Boeing Company and Kevin Martin*, No. 2019-CP-10-04197, dismissing the plaintiff’s claim for wrongful termination in violation of public policy pursuant to Rule 12(b)(6), SCRCP. *See* Order attached as **Exhibit A**). Like Plaintiff, Migliaccio, a former at-will employee, alleged that Boeing terminated him for his “safety complaints” and for his support of the union.

In response to Boeing’s Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, Migliaccio argued that he did not engage in activity that was protected by AIR21, but was “merely doing his

job.” Exhibit A, p. 7. The court, viewing the allegations in a light most favorable to the plaintiff found that his allegations fell within the parameters of AIR21, as AIR21, “expressly includes employees lodging internal airplane safety complaints directly with their employers as alleged by Plaintiff in this lawsuit.” *Id.*, pp. 7-8 (citing 49 U.S.C. § 42121(a)(2) and *Lugo*, 2020 WL 495336, at *3).

Even more recently, the United States District Court for the District of South Carolina issued a Report and Recommendation finding similar allegations could not amount to a wrongful termination in violation of public policy claim because the plaintiff had a statutory remedy under AIR21. *See Dixon v. Boeing*, No. 2:20-01356-BHH-MG (May 11, 2020). In *Dixon v. Boeing*, the plaintiff asserted that he was terminated for raising “safety concerns” and that his actions were not covered by AIR21. The federal magistrate found “that AIR21 clearly provides a statutory remedy for Plaintiff” and that “Plaintiff’s complaints about safety and quality standards clearly fall into the category of ‘information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.’” *Id.* at *7. *See Order*, attached as **Exhibit B**.

Plaintiff’s argument also directly contradicts the holding of the district court in *Hobek v. The Boeing Company*, No. 2:16-cv-3840-RMG, 2017 WL 3085856 (D.S.C. July 20, 2017). The plaintiff in *Hobek*, like Plaintiff here, was a quality manager for Boeing and alleged he had “serious concerns regarding the Quality and Safety” of the Boeing aircraft production and that, despite reporting his concerns to supervisors, they were not addressed. *Hobek*, 2017 WL 9250342 at * 1. Although he argued that AIR21 did not apply to him, the district court disagreed, finding that AIR21 provided a statutory remedy, and dismissed Mr. Hobek’s claim for wrongful termination in violation of public policy under facts that are almost identical to Plaintiff’s lawsuit. *Id.*

Plaintiff's allegations are no different than those before the courts in *Migliaccio v. Boeing*, *Dixon v. Boeing*, *Lugo v. Boeing*, and *Hobek v. Boeing*. This Court's decision is consistent with these decisions and with the well settled law in this state that a cause of action for wrongful termination does not exist where the plaintiff has a statutory remedy.³ For these reasons, Plaintiff's Motion to Reconsider should be denied.

C. Plaintiff's Remaining Arguments for Reconsideration of this Court's Order Are Meritless.

1. Plaintiff's Allegations in this Lawsuit Are Not Similar to Allegations before the Administrative Review Board in *Simpson v. UPS*.

In his Motion to Reconsider, Plaintiff relies upon the Administrative Review Board ("ARB") decision in *Debbie Simpson v. United Parcel Service*, ARB Case No. 06-065, ALJ Case No. 2005-AIR-031 (March 14, 2008). (Mot. to Reconsider, p. 5). In *Simpson*, the ARB ruled that the plaintiff's concerns that the aircraft was "illegal" and unsafe," were too vague and that she had "failed to communicate any specific safety defect that her employer could take corrective action on as required by AIR21." *Simpson v. UPS*, 2005-AIR-31, p. 5. Therefore, she had not engaged in activity protected by AIR 21. *Simpson v. UPS*, 2005-AIR-31, p. 5. ("[a]lthough a complainant need not cite to a specific violation, allegations under AIR21 must at least relate to violations of FAA orders, regulations, or standards (or any other violations of federal law relating to aviation safety))."

³ *Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 615, 713 S.E.2d 634, 637 (2011); See also, *Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992) (employee allegedly terminated in retaliation for filing complaint under FLSA had existing statutory remedy for wrongful termination); *Epps v. Clarendon County*, 304 S.C. 424, 405 S.E.2d 386 (1991) (per curiam) (employee had an existing remedy for wrongful termination under § 1983); *Addison v. CMH Homes, Inc.*, 47 F. Supp. 3d 404, 428 (D.S.C. 2014), appeal docketed, No. 14-2166 (4th Cir. Oct. 29, 2014), ("Title VII exists for [Plaintiff's] claims of wrongful termination . . . his public policy claims based on the same allegations are barred as a matter of law."); *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999) ("the *Ludwick* exception [to at-will employment] is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists." *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999)).

Plaintiff's allegations before this Court are far from similar to those before the ARB in *Simpson v. UPS*. In the Amended Complaint, Plaintiff has specifically alleged that "there was a back log of non-conformities or findings that needed to be inspected by the QACM's, fixed, and signed off" when he returned to Boeing on January 20, 2017, that he reported. [Am. Compl. ¶ 22, 23]. He further alleges that Boeing engaged in the following violations that he claims to have reported: "[g]oldplating which is repeating a test until it successful and then having the records show that the test was successful on the first attempt," "[k]nowingly using out of date engineering specifications," [k]nowingly using uncertified technicians to perform maintenance and repairs," "[d]isabling the automated system that notified all pertinent employees of mandatory inspections of newly manufacture aircraft," and "[su]bmitting conformities without documented repairs." [Am. Compl. ¶ 24, 25]. Finally, Plaintiff alleges that barrels were being "manufactured using obsolete engineering," and that he reported "an escapement of all barrels produced in the new enclave oven, meaning that non-conforming aircraft barrels were being used to manufacture aircraft that were making their way into the fleet of aircraft used to transport passengers and freight." [Am. Compl. ¶¶ 34, 35, 36].

Unlike the plaintiff in *Simpson v. UPS*, Plaintiff's complaints were specific and were complaints on which Boeing "could have taken corrective action as required by AIR21." *Simpson v. UPS*, 2005-AIR-31, p. 6. The ARB decision in *Simpson v. UPS* is neither binding nor applicable based on the distinguishable and specific factual allegations raised by Plaintiff before this Court.

2. The Court Correctly Found that Plaintiff's Termination Did Not Contravene a Clear Mandate of Public Policy

Notwithstanding that Plaintiff has an existing statutory remedy under AIR21, the Court correctly dismissed his claim for wrongful termination because he has not pled—and cannot plead—a violation of a clear mandate of public policy in South Carolina. South Carolina has a

strong policy favoring at-will employment. *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 335, 516 S.E.2d 923, 925 (1999). The public policy exception to the at-will employment doctrine is a narrow one, to be narrowly applied, only where “the retaliatory discharge of an at-will employee constitutes violation of a clear mandate of public policy.” *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985); *see also Taghivand*, 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015) (noting the court exercises “restraint when undertaking the amorphous inquiry of what constitutes public policy.”).

In his Motion to Reconsider, Plaintiff reiterates his prior argument that the South Carolina Constitution provides the clear mandate of public policy which Boeing violated by terminating him. [Mot. to Reconsider, p. 6]. The provision upon which he relies is as follows:

SECTION 1. Matters of public concern; General Assembly to provide appropriate agencies.

The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern. The General Assembly shall provide appropriate agencies to function in these areas of public concern and determine the activities, powers, and duties of such agencies.

S.C. Const. Art. XII § 1. Notably, however, Section 1 of Article XII does not set forth a specific and clear public policy mandate. Instead, it simply allows for the creation of various state agencies like the S.C. Department of Labor, Licensing and Regulation; S.C. Department of Health and Environmental Control; and S.C. Department of Natural Resources, who are empowered to enforce and protect endless matters of public concern. And establishing state agencies to oversee an incalculable number of such “matters of public concern” certainly does not equate to a specific, “clear mandate of public policy” itself for purposes of the common law claim for wrongful termination in violation of public policy. To determine otherwise would extend the application of this narrow exception to an infinite number of issues that fall within the ambiguous ambit of public concern, such that this exception would swallow the rule of at-will employment. *See Desmarais*

v. Sci. Research Corp., 145 F. Supp. 3d 595, 598 (D.S.C. 2015) (“[I]f a plaintiff could maintain a cause of action for violation of public policy by simply alleging that a retaliatory termination violated South Carolina's public policy, there would be a substantial risk that the public policy exception would swallow the general rule allowing an employer to terminate an at-will employee at any time and for any reason.”).

Plaintiff has not cited to any South Carolina case or other authority for his assertion that Section 1 of Article XII sets forth a clear mandate of public policy because there is none. *Desmarais v. Sci. Research Corp.*, 145 F. Supp. 3d 595, 600 (D.S.C. 2015) (citing *Batchelor v. Am. Health Ins. Co.*, 107 S.E.2d 36, 38 (S.C. 1959)); see also *Greene v. Quest Diagnostics Clinical Labs, Inc.*, No. 2:05-cv-0811, 2006 WL 2864102, at *8 (D.S.C. June 19, 2006) (“[T]he South Carolina Supreme Court has only been willing to recognize as a public policy ‘mandate’ something tantamount to a judicial or legislative declaration of public policy.”). Indeed, no South Carolina court has ever found that Section 1 of Article XII sets forth a clear mandate of public policy or otherwise provides for a cause of action for wrongful termination.

Having failed to identify any South Carolina public policy that was implicated by his termination, Plaintiff's claim for wrongful termination was properly dismissed.

II. CONCLUSION

The Defendants respectfully request that Plaintiff's Motion to Reconsider be denied. This Court correctly found that Plaintiff cannot state a claim for wrongful termination in violation of public policy because he has an existing statutory remedy under AIR21 and has not plead a violation of a clear mandate of public policy.

Defense counsel certifies that consultation with Plaintiff's counsel would serve no useful purpose.

s/ Cherie W. Blackburn

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May 29, 2020

Charleston, South Carolina

ATTORNEYS FOR DEFENDANTS

LIAM WALLIS V. THE BOEING COMPANY, ET AL.
Case No. 2019-10-1379

EXHIBIT "A"

MARCH 31, 2020 ORDER

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Louis Migliaccio,

Plaintiff,

vs.

The Boeing Company and Kevin Martin,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2019-CP-10-04197

ORDER

THIS MATTER COMES BEFORE THE COURT on the Motion of Defendants The Boeing Company ("Boeing") and Kevin Martin ("Martin") (collectively "Defendants"), pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, to dismiss all causes of action in Plaintiff's Complaint.

A hearing was held January 31, 2020. Present at the hearing were Bonnie Hunt, counsel for Plaintiff, Molly Cherry, counsel for Defendants, C. Edward Rawl, Jr., Senior Counsel for Boeing, and Defendant Kevin Martin. Defendants filed a Memorandum in Support of the Motion to Dismiss. Plaintiff filed a Response in Opposition to Plaintiff's Motion to Dismiss after the hearing concluded. This Order is based upon the Complaint, Defendants' Motion to Dismiss and supporting Memorandum, Plaintiff's Response filed after the hearing, the arguments presented by counsel at the hearing, and the applicable law.

This Court makes the following FINDINGS OF FACTS:

Boeing hired Plaintiff as an aircraft assembler in 2007. (Compl. ¶ 7). Plaintiff's last position at Boeing was Flight Readiness Technician Inspector (FRTI). (Compl. ¶ 9). During the relevant time of Plaintiff's employment, Chris Skidmore was his direct supervisor. (Compl. ¶ 12).

On October 12, 2018, Plaintiff walked across the live flight line taxiway while the blue lights on the taxiway were on and flashing. (Compl. ¶ 21). Plaintiff admits that Boeing's "policy and practice" prohibits employees from entering the taxiway when the blue lights are on. (Compl. ¶¶ 21, 22). Plaintiff was subsequently approached by First Level FRTI Supervisor Kevin Martin and Second Level FRTI Manager Ron Pence and informed that he was suspended pending an investigation of the incident. (Compl. ¶ 24). Following the investigation, Boeing terminated Plaintiff for crossing a closed flight line. (Compl. ¶ 34). Ultimately, Plaintiff alleges that Boeing terminated him "for his safety complaints regarding lighting, failure for more stringent walk throughs, tool accountability, and his involvement in the union." (Compl. ¶ 35).

The Court makes the following FINDINGS OF LAW:

Under Rule 12(b)(6), a claim may be dismissed when the facts alleged in the pleadings fail to establish a cause of action. *Fleteau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003). The question for the Court is whether the pleadings, taken in the light most favorable to the plaintiff, articulate a valid claim for relief. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A Rule 12(b)(6) motion must be granted only if the facts alleged and the inferences reasonably deducible from the pleadings show that the plaintiff could not prevail on any theory of the case. *See Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

Plaintiff alleges three causes of action, all of which are the subject of Defendants' Motion to Dismiss: 1) slander against Mr. Martin; 2) negligent supervision against Boeing and 3) wrongful termination in violation of public policy against Boeing.

I. PLAINTIFF'S CAUSE OF ACTION FOR SLANDER.

Slander is a form of defamation. *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). The elements of a defamation claim require: (1) a false and

defamatory statement; (2) the unprivileged publication of that statement to a third party; (3) the publisher was at fault and (4) either actionability of the statement irrespective or special harm or the existence of special harm caused by the publication. *McBride v. School Dist. of Greenville Cty.*, 389 S.C. 546, 559-560, 698 S.E.2d 845, 852 (Ct. App. 2010). Plaintiff's allegations fail to state a cause of action for slander.

Plaintiff's Complaint does not contain any allegation that Mr. Martin made or published any false or defamatory statement to a third party. Plaintiff alleges only that "Defendants [sic]¹ published false statements regarding the Plaintiff's work performance and issues regarding violations of policy." (Compl. ¶ 52). There is no allegation that Mr. Martin published any false statements to a third party or that any statements were unprivileged. For these reasons, the Court finds that Plaintiff has failed to state a cause of action for slander against Mr. Martin, and he is dismissed from this lawsuit for that reason alone.

Notwithstanding that Plaintiff's claim for slander is only against Defendant Martin, this Court finds that Plaintiff has not sufficiently pled a cause of action for defamation by alleging the statements at issue were published by "Defendant Boeing" through external memoranda. (Compl. ¶ 55). Plaintiff's Complaint does not adequately inform Defendants as to who heard the alleged defamatory statements or provide any particulars about the publication. In *McNeil v. South Carolina Dep't of Corrections*, 404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013), the South Carolina Court of Appeals affirmed the dismissal of the plaintiff's cause of action for defamation, finding that the plaintiff, "did not allege any of SCDC's statements were unprivileged, . . . did not set forth with any specificity what the alleged false statements were . . . [and] she did not assert to whom SCDC made the alleged statements." *McNeil*, 404 S.C. at 195, 743 S.E.2d at 848. Similarly, in

¹ Despite the references to Defendants in the Complaint, this Court finds that Plaintiff's slander claim is only asserted against Defendant Martin.

McBride v. School Dist. of Greenville County, 389 S.C. 546, 559, 698 S.E.2d 845, 851 (Ct. App. 2010), the court found that plaintiff's allegations that her superintendent "made public comments" about the plaintiff were "not specific enough to evaluate." *McBride*, 389 S.C. at 562, 698 S.E.2d at 851.

Plaintiff has failed to assert specific factual allegations identifying what was said, when the statements were made, where the communications occurred, and to whom the alleged defamatory statements were made. *Harris v. Tietex Int'l Ltd.*, 417 S.C. 533, 541, 790 S.E.2d 411, 416 (Ct. App. 2016) (finding the court cannot evaluate a defamation claim where plaintiff fails to identify the statement on which he bases his claim); *see also McBride*, 389 S.C. at 562, 698 S.E.2d at 853; *McNeil*, 404 S.C. at 195, 743 S.E.2d at 848 (affirming dismissal of defamation claim where plaintiff did not specify the alleged false statements or allege to whom they were made). This Court finds that Plaintiff's reference to the "external memorandum" without pleading any particulars is wholly insufficient to set forth a cause of action for defamation.

Next, the Court considers Plaintiff's allegation that "Defendant Boeing" published false statements in "external memorand[a]" regarding the Plaintiff's performance issues." (Compl. ¶ 55). Plaintiff does not identify what was said and to whom the alleged false statements were published. Importantly, Plaintiff does not allege an *unprivileged* communication to a *third* party.

Under South Carolina law, "communications between servants, business associates, officers, or agents of the same corporation enjoy a qualified privilege." *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 560, 459 S.E.2d 315, 317 (Ct. App. 1995); *McBride*, 389 S.C. at 562, 698 S.E.2d at 853; *see also Murray v. Holnam, Inc.*, 334 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001) ("Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business") (citing *Corwell v. Spur Oil*

Co., 240 S.C. 170, 125 S.E.2d 270 (1962). Plaintiff has not pled that the internal memorandum was not privileged, or that it was not published in good faith and in the usual course of business.

Plaintiff must allege malice to overcome a qualified privilege. *See Bell v. Bank of Abbeville*, 208 S.C. 490, 493, 38 S.E.2d 641, 642 (1946) (“When the communication is absolutely privileged, no action will lie for its publication, no matter what the circumstances under which it is published. When qualified, however, the plaintiff may recover if he shows that it was actuated by malice.”). Plaintiff fails to make any factual allegations that would support a finding of actual malice. Plaintiff’s conclusion that he “can clearly establish malice in this case,” does not offset the fact that he has failed to allege that any purported statements were not privileged, and he has not provided any facts showing that Mr. Martin and/or Boeing published a false statement with knowledge of its falsity or reckless disregard for its veracity.²

The Court finds that Plaintiff has failed to state a cause of action for slander against Mr. Martin or Boeing and, as a result, Plaintiff’s slander claim is dismissed from this case.

II. PLAINTIFF’S CAUSE OF ACTION FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

Plaintiff alleges that Boeing wrongfully terminated him “for reporting the safety concerns” and for “his support of the union.” (Compl. ¶¶ 35, 38, 39, 40, 45). Under South Carolina law, a cause of action for wrongful termination in violation of public policy exists as a narrow exception to the doctrine of at will employment when an employee’s discharge violates a clear mandate of public policy. *See Ludwick v This Minute of Carolina, Inc.*, 287 S.C. 219, 223, 337 S.E.2d 213, 215 (1985). The public policy exception to the doctrine of employment at-will does not extend to situations where the employee has an existing statutory remedy for wrongful termination. *Barron*

² Any “showing” of malice would only be relevant to the communications that are subject to a qualified privilege; i.e., the alleged comments made to other unidentified Boeing employees, which Plaintiff fails to plead with the requisite particularity to survive Defendants’ Motion to Dismiss.

v. Labor Finders of South Carolina, 393 S.C. 609, 615, 713 S.E.2d 634, 637 (2011); *See also Dockins v. Ingles Markets, Inc.*, 306 S.C. 496, 413 S.E.2d 18 (1992) (employee allegedly terminated in retaliation for filing complaint under FLSA had existing statutory remedy for wrongful termination); *Epps v. Clarendon County*, 304 S.C. 424, 405 S.E.2d 386 (1991) (per curiam) (employee had an existing remedy for wrongful termination under § 1983); *Addison v. CMH Homes, Inc.*, 47 F. Supp. 3d 404, 428 (D.S.C. 2014), *appeal dismissed*, No. 14-2166 (4th Cir. April 16, 2015), (“Title VII exists for [Plaintiff’s] claims of wrongful termination . . . his public policy claims based on the same allegations are barred as a matter of law.”). As evidenced by the foregoing cases, “the *Ludwick* exception [to at-will employment] is not designed to *overlap* an employee’s *statutory* or *contractual* rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where *no other reasonable means of redress exists*.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999) (emphasis added).

Boeing asserts that Plaintiff cannot state a claim for wrongful termination in violation of public policy because he has an existing statutory remedy available under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), which provides that “[n]o air carrier or contractor . . . may discharge an employee . . . because the employee . . . provided . . . or caused to be provided to the employer . . . information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety” 49 U.S.C. § 42121(a)(1).

In January of this year, the United States District Court for the District of South Carolina, Charleston Division, addressed the issue of whether AIR21 provided a statutory remedy to the plaintiff, an at-will employee of Boeing, warranting dismissal of his wrongful termination cause of action. In *Lugo v. The Boeing Co*, the plaintiff alleged that he was wrongfully terminated for

his “safety complaints regarding lighting, failure for more stringent walk throughs, tool accountability and his involvement in the union.” No. 2:19-CV-2995-RMG, 2020 WL 495336, at *3 (D.S.C. January 30, 2020). The district court dismissed plaintiff’s wrongful termination in violation of public policy claim under Fed. R. Civ. P. 12(b)(6), stating that “AIR21 provides a statutory remedy for individuals who were retaliated against for providing information to their employer *that related to* any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law related to air carrier safety. . . .” *Id.* at *3 (emphasis added). The court held the plaintiff had an existing statutory remedy under AIR21 and, as a result, the public policy exception to at will employment did not apply. *Id.*

Similarly, in *Hobek v. The Boeing Company*, the plaintiff, a quality manager for Boeing, claimed he was concerned about the quality and safety of the aircraft being manufactured and reported his concerns to his supervisors. The plaintiff alleged that his complaints were ignored and that he was later terminated in retaliation for his complaints “regarding quality and safety.” *Hobek v. The Boeing Co.*, No. 2:16-CV-3840-RMG-MGB, 2017 WL 9250342, at *1 (D.S.C. June 8, 2017), *report and recommendation adopted*, No. 2:16-CV-3840-RMG, 2017 WL 3085856 (D.S.C. July 20, 2017). The district court dismissed the claim, similarly holding that the plain language of AIR21 provided the plaintiff a statutory remedy. *Id.*

Plaintiff argues that he did not engage in protected activity under AIR21 because he was merely doing his job.³ (Plaintiff’s Response, p. 13). However, viewing the allegations in a light most favorable to Plaintiff, this Court finds that his allegations clearly fall within the scope of AIR21. AIR21 expressly includes employees lodging internal airplane safety complaints directly

³ In *Lugo*, the plaintiff argued that AIR21 did not apply to him because he must have engaged in protective activity under AIR21, not merely done his job. The court noted that the plaintiff’s argument was “wrong and directly contradicted by the plain language of AIR21.” *Lugo*, 2020 WL 495336, at *3 n. 3.

with their employers, as alleged by Plaintiff in this lawsuit. 49 U.S.C. § 42121(a)(1); *see also Lugo*, 2020 WL 495336, at *3 (*citing Hobek*, 2017 WL 9250342, at *4). Because Plaintiff has a statutory remedy pursuant to AIR21, his claim for wrongful termination fails for that reason alone.

This Court finds that Plaintiff also has an existing statutory remedy under the National Labor Relations Act ("NLRA") for his claim that he was terminated because "he was a supporter of the union." (Compl. ¶ 45).⁴ It is an "unfair labor practice" for an employer "to interfere with, restrain or coerce employees" in the exercise of their rights to "self-organization, to form, join, or assist labor organizations" *See* 29 U.S.C. § 157, 29 USC § 158 (a)(1). According to the NLRA, the National Labor Relations Board ("NLRB") has the exclusive authority to hear all complaints of unfair labor practices filed against employers. *See* 29 U.S.C.A. § 160(b).

Plaintiff's claim that Boeing wrongfully terminated him because he was a supporter of the union fits within the parameters of the NLRA's exclusive jurisdiction. *See Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 263–67 (1940) (the NLRA gives the NLRB "exclusive jurisdiction to prevent and redress unfair labor practices . . . [and] establishes clearly that [the NLRA] is paramount over other laws that might touch upon similar subject matters.") (emphasis added); *Friendly Soc. of Engravers and Sketchmakers v. Calico Engraving Co.*, 238 F.2d 521, 523 (4th Cir. 1956) (internal quotation marks omitted) (stating that "parties complaining of the violation of such rights [under the NLRA] may not go into court for their vindication, but must pursue the remedies that the [NLRA] provide[s]").

Plaintiff has provided no authority to support his argument that he does not have a statutory remedy under the NLRA. He argues that this issue is a "defense" and further discovery is needed in order to determine if the NLRA applies to Plaintiff's claims. (Plaintiff's Response, p. 14). The

⁴ Plaintiff has an unfair labor practice charge pending before the National Labor Relations Board that mirrors his union affiliation claims asserted in this lawsuit. *See Stiles*, 335 S.C. at 228, 516 S.E.2d at 452.

Court disagrees based on well-settled legal authority. The NLRA, 29 U.S.C. § 151, *et seq.*, provides Plaintiff with a statutory remedy and the NLRB has exclusive, original jurisdiction over Plaintiff's claim that he was terminated because of union activities. *Id.*; *Lugo*, 2020 WL 495336, at *2 ("A statutory remedy also exists for individuals who allege 'unfair labor practice charges such as discharge for union activity or anti-union animus.'") (internal citations omitted). Because Plaintiff has a statutory remedy pursuant to the NLRA, his claim for wrongful termination fails for that reason alone.

Boeing further argues that Plaintiff's claim should be dismissed because he has not alleged facts to support a violation of a clear mandate of public policy. The public policy exception to the at-will employment doctrine is a narrow one, to be narrowly applied. *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216; *see also Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 244, 768 S.E.2d 385, 387 (2015). In *Ludwick*, the South Carolina Supreme Court explained, "[w]here the retaliatory discharge of an at-will employee constitutes a violation of *a clear mandate of public policy*, a cause of action in tort for wrongful discharge arises." *Ludwick*, 287 S.C. at 225, 337 S.E.2d at 216 (emphasis added). The South Carolina Supreme Court has recognized only two instances in which the public policy exception has been upheld: "(1) where an employer requires an employee, as a condition of continued employment, to break the law . . . and (2) where an employer's termination is itself illegal." *Taghivand*, 411 S.C. at 243, 768 S.E.2d at 387 (citing *Culler v. Blue Ridge Elec. Coop., Inc.*, 309 S.C. 243, 422 S.E.2d 91 (1992)).

In *Desmarais v. Scientific Research Corp.*, the plaintiff, a former air traffic controller, brought an action for wrongful discharge in violation of public policy, arguing that his discharge was in retaliation for raising internal safety issues. *Desmarais*, 145 F. Supp. 3d 595, 599 (D.S.C. 2015). In its order dismissing the case as a matter of law, the court held that there was no legal

authority establishing that the plaintiff's FAA safety-related discharge claims violated criminal law or that the termination itself violated criminal law. *Id.* The court further stated that there was no "clear mandate of public policy supporting the rights of employees to internally complain about alleged violations of FAA regulations." *Id.*⁵

Consistent with recent rulings in South Carolina District Court, this Court finds that Plaintiff's allegations that he was terminated for raising air safety complaints and sympathizing with the union do not support a clear mandate of public policy in the context of a wrongful termination claim, which provides independent grounds warranting dismissal. No court in South Carolina has recognized these as clear mandates of public policy, and this Court does not expand the definition based on the allegations presented.

III. PLAINTIFF'S CAUSE OF ACTION FOR NEGLIGENT SUPERVISION

To establish a claim for negligence, Plaintiff must allege that: 1) Boeing owed him a duty to do or not to do any of the things alleged; 2) Boeing breached its duty; 3) Plaintiff was injured, and; 4) Boeing's breach of duty proximately caused this injury. *Parsons v. Smith*, No. 2014-UP-403, 2015 WL 4755608, at *2 (S.C. Ct. App. Aug 12, 2015) (citing *Gause v. Doe*, 317 S.C. 39, 42, 451 S.E.2d 408, 409 (Ct. App. 1994)). It is axiomatic that "[f]or negligent conduct to become actionable, it must violate some specific legal duty owed to the plaintiff." *Rice v. School Dist. of Fairfield*, 317 S.C. 87, 93, 452 S.E.2d 352, 355 (Ct. App. 1994). "A negligence claim is insufficient if one of these elements is absent." *Gause*, 317 S.C. at 42, 451 S.E.2d at 409.

It is well settled that employees' claims for negligent supervision against their employers are barred by the exclusivity provision of the South Carolina Workers' Compensation Act, S.C.

⁵ In *Hobek v. Boeing*, the plaintiff alleged he was terminated because he refused "to violate the law by passing a plane that did not meet the safety standards and Quality standards," which the court determined was wholly insufficient to constitute a viable wrongful discharge claim under South Carolina jurisprudence. *Hobek*, 2017 WL 9250342, at *5 (internal quotations omitted).

Code Section 42-1-540. *See, e.g., Sabb v. S.C. State Univ.*, 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002) (holding the Act provides the exclusive remedy for employee's claim for negligent supervision, which arose out of and in the course of her employment with defendant); *Dickert v. Metro. Life Ins. Co.*, 311 S.C. 218, 428 S.E.2d 700 (1993) (holding that the Act provides the exclusive remedy for work-related injuries and that claims for negligence, including hiring, retention, and supervision, are covered by the Act); *Gefre v. Skelton*, No. 2004-UP-347, 2004 WL 6331131, at *1 (S.C. Ct. App. May 25, 2004) (finding plaintiffs' claim for negligent supervision was barred by the exclusive remedy provision of the Act).

It is clear from Plaintiff's Complaint that the allegations of harm purportedly arose out of and in the course of his alleged employment. Specifically, he alleges that "Defendant owed the Plaintiff a duty to protect the Plaintiff from the wrongful act of its employees." (Compl. ¶ 60). The "wrongful act" alleged is that "Plaintiff was the only employee terminated for crossing the flight line." (Compl. ¶ 61). Plaintiff "cannot argue that [his employer] failed to provide protection and yet maintain that [his] injury did not arise out of employment." *Loges v. Mack Trucks, Inc.*, 308 S.C. 134, 139, 417 S.E.2d 538, 541 (1992). The Court finds that Plaintiff's claim for negligent supervision is barred by the exclusivity provision of S.C. Code Section 42-1-540.

In *Gause*, the South Carolina Court of Appeals held that the employee could not meet the first element of a negligence claim, "because his complaint does not allege he was anything other than an at-will employee who could be terminated at any time, for any reason, or for no reason at all, irrespective of any inadequate investigations, false assumptions, or failures to reevaluate on the part of the employee." *Id.* Likewise, in *Parsons v. Smith*, the plaintiff, an at-will employee attempted to bring a claim against her employer for negligent supervision and negligent failure to investigate her allegations of mistreatment by her supervisor. *See Parsons*, 2014 WL 475560, at

*1. The Court of Appeals relied on the *Gause* decision to find that the employer did not owe any duty to the employee to supervise her supervisor or to investigate the manner in which the supervisor scheduled her employees. *See id.* at *2.

Plaintiff argues that employers can be held liable for the actions of its employees, however, the cases cited in support of his argument all involve an employer's duty to a *third party*, not to an employee. (Plaintiff's Response, pp. 17-19). Thus, such cases are inapposite, and do not refute the well-settled law that an employer does not owe a duty to at-will employees or avoid the exclusive remedies mandated by the South Carolina Workers' Compensation Act. Plaintiff also asserts that an injury to an individual's reputation is outside the scope of the workers' compensation exclusivity provision, citing to *Dockins v. Ingles Markets, Inc.*, 306 S.C. 287, 288, 411 S.E.2d 437, 438 (1991), *overruled on other grounds by Sabb v. S.C. State Univ.*, 350 S.C. 416, 567 S.E.2d 231 (2002). (Plaintiff's Response, p. 19). However, *Dockins* is not instructive because it involves a cause of action for slander, not negligent supervision.

The Court finds that Plaintiff fails to allege the elements of a claim for negligent supervision.

For the reasons set forth herein, Defendants' Motion to Dismiss is hereby GRANTED as to all causes of action and Plaintiff's Complaint is DISMISSED.
IT IS SO ORDERED.

The Honorable J. Derham Cole

March ____, 2020
Charleston, South Carolina



Charleston Common Pleas

Case Caption: Louis Migliaccio VS Boeing Company The , defendant, et al
Case Number: 2019CP1004197
Type: Order/Dismissal

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-03-31 10:05:38 page 13 of 13

LIAM WALLIS V. THE BOEING COMPANY, ET AL.
Case No. 2019-10-1379

EXHIBIT "B"

MAY 11, 2020 REPORT
AND RECOMMENDATION

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

Eric A. Dixon,	)	Civil Action No. 2:20-01356-BHH-MGB
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
The Boeing Company,	)	
	)	
Defendant.	)	

Plaintiff filed this action alleging (1) wrongful termination in violation of public policy; (2) slander; (3) race discrimination in violation of 42 U.S.C. § 1981 and Title VII; and (4) retaliation and hostile work environment in violation of 42 U.S.C. § 1981 and Title VII. This matter is before the Court upon Defendant's Motion to Dismiss Causes of Action for Wrongful Termination, Slander, Retaliation, and Hostile Environment (Dkt. No. 5). Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1) and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration. For the reasons set forth below, the undersigned recommends that Defendant's Motion to Dismiss (Dkt. No. 5) be granted in full.

BACKGROUND

Plaintiff filed this action in the South Carolina Court of Common Pleas on January 28, 2020.¹ (Dkt. No. 1-1.) Plaintiff filed an Amended Complaint on February 27, 2020. (Dkt. No. 1-1.) In that Amended Complaint, Plaintiff states that he was an employee of

¹ As Defendant notes (Dkt. No. 5 at 1), Plaintiff filed but never served his initial Complaint. Defendant's Motion to Dismiss is based on the Amended Complaint filed on February 27, 2020.

Defendant at its North Charleston facility, where he began his employment in 2012. (Dkt. No. 1-1 at 5.) Plaintiff states that he was very familiar with Defendant's policies and procedures and that he regularly reported safety issues. (*Id.*; Dkt. No. 1-1 at 7.) He describes a specific incident in which he completed an assignment on an aircraft and walked across the flight line to return to his other duties. (Dkt. No. 1-1 at 6-7.) He states that he was terminated after this incident "for crossing the flight line while the safety beacon lights were on," in violation of Defendant's policies. (Dkt. No. 1-1 at 7.)

Plaintiff alleges that Caucasian employees committed the same act but were not fired. (Dkt. No. 1-1 at 7-8.) He further alleges that he was discriminated against by Defendant, and that his termination was actually a result of his safety complaints and support of the union. (Dkt. No. 1-1 at 8-11.) Plaintiff also asserts that Defendant published false statements regarding his work performance, including failure to report a bird strike. (Dkt. No. 1-1 at 11.) As such, Plaintiff alleges (1) wrongful termination in violation of public policy; (2) slander; (3) race discrimination in violation of 42 U.S.C. § 1981 and Title VII; and (4) retaliation and hostile work environment in violation of 42 U.S.C. § 1981 and Title VII. (Dkt. No. 1-1 at 10-15.)

On April 8, 2020, Defendant removed this action to the United States District Court for the District of South Carolina, pursuant to 28 U.S.C. §§ 1331, 1441 and 1446. (Dkt. No. 1.) Defendant also filed an Answer to Plaintiff's Amended Complaint (Dkt. No. 4) and a Motion to Dismiss Causes of Action for Wrongful Termination, Slander, Retaliation, and Hostile Environment (Dkt. No. 5). On April 22, 2020, Plaintiff filed a Response to Defendant's Motion to Dismiss. (Dkt. No. 8.) On April 28, 2020, Defendant filed a Reply

to Plaintiff's Response. (Dkt. No. 9.) The motion before the Court has been fully briefed and is ripe for disposition.

LEGAL STANDARD

On a motion to dismiss pursuant to Rule 12(b)(6), a "complaint must be dismissed if it does not allege 'enough facts to state a claim to relief that is plausible on its face.'" *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "In reviewing a motion to dismiss an action pursuant to Rule 12(b)(6) . . . [a court] must determine whether it is plausible that the factual allegations in the complaint are 'enough to raise a right to relief above the speculative level.'" *Andrew v. Clark*, 561 F.3d 261, 266 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). "A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

For purposes of a motion to dismiss, the district court must "take all of the factual allegations in the complaint as true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "In considering a motion to dismiss, [the court] accept[s] the complainant's well-pleaded allegations as true and view[s] the complaint in the light most favorable to the non-moving party." *Stansbury v. McDonald's Corp.*, 36 F. App'x 98, 98–99 (4th Cir. 2002) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). However, while the court must draw all reasonable inferences in favor of the plaintiff, it need not accept the "legal conclusions drawn from the facts, . . . unwarranted inferences, unreasonable conclusions or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th

Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Giarratano*, 521 F.3d at 298).

DISCUSSION

I. Wrongful Termination in Violation of Public Policy

Defendant asks the Court to dismiss Plaintiff's claim for wrongful termination in violation of public policy because Plaintiff has existing statutory remedies that preclude his claim.² (Dkt. No. 5 at 3.) As Defendant correctly asserts, South Carolina's public policy exception to at-will employment does not extend to situations where the employee has an existing statutory remedy. *Barron v. Labor Finders of S. Carolina*, 393 S.C. 609, 614, 713 S.E.2d 634, 636–37 (2011). The undersigned finds that Plaintiff has existing statutory remedies for his claim and, therefore, recommends that Plaintiff's claim for wrongful termination in violation of public policy be dismissed.

Absent a specific contract, employment in South Carolina is at-will. *Mathis v. Brown & Brown of S. Carolina, Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 768 S.E.2d 385 (2015). "An at-will employee may be terminated at any time for any reason or for no reason, with or without cause." *Mathis*, 389 S.C. at 310. "Under the 'public policy exception' to the at-will employment doctrine, however, an at-will employee has a cause of action in tort for wrongful termination where there is a retaliatory termination of the at-will employee in violation of a clear mandate of public policy." *Barron*, 393 S.C. at 614. The public policy exception does not apply in cases where there is an existing statutory remedy. *Id.* at 615. The public

² The Court notes Plaintiff's contention that this is a defense and is therefore an improper argument. (Dkt. No. 8 at 14, 16.) However, that contention is incorrect and unfounded. *Lugo v. Boeing*, No. 2:19-cv-2995, 2020 WL 495336, at *3, n. 4 (D.S.C. Jan. 30, 2020).

policy exception “is not designed to overlap an employee’s statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists.” *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 228, 516 S.E.2d 449, 452 (1999).

Here, Plaintiff asserts that “Defendant wrongfully terminated the Plaintiff in violation of public policy when it terminated him because he reported [safety concerns] and [because] he was a supporter of the union.” (Dkt. No. 1-1 at 11.) This Court has previously opined on both of these assertions. *Lugo v. Boeing*, No. 2:19-cv-2995, 2020 WL 495336, at *2–3 (D.S.C. Jan. 30, 2020); *Hobek v. Boeing Co.*, No. 2:16-CV-3840-RMG-MGB, 2017 WL 9250342, at *2 (D.S.C. June 8, 2017), *adopted*, No. 2:16-CV-3840-RMG, 2017 WL 3085856 (D.S.C. July 20, 2017); *Scott v. Wackenhut Services, Inc.*, No. 1:08-3863-MBS-JRM, 2010 WL 1254866, at *3 (D.S.C. Mar. 1, 2010), *adopted*, No. 1:08-3863-MBS, 2010 WL 1254860 (D.S.C. Mar. 23, 2010).

A. AIR21

First, this Court has previously explained that a clear statutory remedy exists for “whistleblowers who inform their employers or the federal government about violations of federal laws relating to air carrier safety.” *Lugo*, 2020 WL 495336, at *2 (quoting *Hobek*, 2017 WL 9250342, at *2). As Defendants correctly note, this statutory remedy is the Wendall H. Ford Air and Investment Reform Act for the 21st Century (“AIR21”). *Id.*

The pertinent portion of AIR21 states:

(a) Discrimination against airline employees. — No air carrier³ or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation,

³ “[A]ir carrier” means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.” 49 U.S.C. § 40102(a)(2).

terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) —

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States

(b) Department of Labor complaint procedure.

(1) Filing and notification. — A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

49 U.S.C. § 42121.

In his Response to Defendant's Motion to Dismiss, Plaintiff asserts that his actions are not covered by AIR21. (Dkt. No. 8 at 14–15.) Regardless, Plaintiff argues that discovery must be completed before the Court can determine whether AIR21 applies. (*Id.*) However, this Court finds that AIR21 clearly provides a statutory remedy for Plaintiff. Plaintiff was an employee of an “air carrier, contractor or subcontractor of an air carrier” who provided “information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety” to his employer. 49 U.S.C. § 42121. He claims to have been discharged and discriminated against for providing this information. (Dkt. No. 1-1 at 9.) This is exactly the situation for which AIR21 provides a remedy. *See* 49 U.S.C.

§ 42121; *see also Hobek*, 2017 WL 9250342, at *4 (stating that the plain language of AIR21 provides a statutory remedy for an employee retaliated against for giving his employer information regarding a violation or alleged violation of a Federal law regarding air carrier safety). Plaintiff contends that he “made no complaints that fall under the parameters of AIR21,” but his primary argument as to why his termination was in violation of public policy is that Defendant fired him for refusing to *violate the law* by ignoring safety and quality standards. (Dkt. No. 8 at 10–14.) Accordingly, Plaintiff’s complaints about safety and quality standards clearly fall into the category of “information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety.” 49 U.S.C. § 42121. In turn, the Court disagrees with Plaintiff that the question of whether AIR21 applies in this case is a factual determination that cannot be determined until discovery has been completed.

Plaintiff also argues that AIR21 is “voluntary and optional” and that he must have gone above and beyond his typical duties as an employee in order for AIR21 to apply. (Dkt. No. 8 at 15.) As previously stated, the South Carolina public policy exception “is not designed to overlap an employee’s statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy **where no other reasonable means of redress exists.**” *Stiles*, 335 S.C. at 228 (emphasis added). AIR21 clearly provides a reasonable means of redress—it does not matter that filing a complaint is voluntary and optional.⁴ Further, nowhere in AIR21 does it say that an employee must

⁴ *See Newman v. S.C. Dep’t of Emp’t & Workforce*, Case No. 3:10-cv-942-CMC-PJG, 2010 WL 4666360 (D.S.C. Nov. 18, 2010) (holding that although the available remedies under the Grievance Act and the Whistleblower Act may be limited and impose procedural hurdles to recovery, the availability of these remedies precludes a Ludwick public policy claim).

do more than his standard duties in order to file a complaint. *See generally* 49 U.S.C. § 42121; *see also* *Lugo*, 2020 WL 495336, at *3, n. 3. An employee simply must meet the criteria set out in the statute.

B. NLRA

Additionally, this Court has held that a statutory remedy exists for persons who allege “unfair labor practice charges such as discharge for union activity or anti-union animus.” *Scott*, 2010 WL 1254866, at *3. The National Labor Relations Act (“NLRA”), 29 U.S.C. § 151 *et seq.*, establishes that the National Labor Relations Board (“NLRB”) has “the exclusive original jurisdiction” over allegations of “wrongful termination based on . . . union activities.” *Id.* (citing *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 242–45 (1959) (exclusive jurisdiction rests with the NLRB for disputes that are arguably subject to § 7 or § 8 of the NLRA)); *Papa v. Truland Sys. Corp.*, 162 F.3d 1155 (4th Cir. 1998) (affirming dismissal of wrongful termination and defamation claims as preempted by NLRA where “the real reason for [Plaintiff’s] termination was” his “engaging in labor activities.”).

Plaintiff argues that the NLRA does not apply here because Plaintiff was a supporter, rather than a member, of the union. (Dkt. No. 8 at 16.) However, Defendant correctly notes that “[t]he NLRA protects an employee’s right to ‘form, join, or assist labor organizations,’ and prohibits an employer from interfering in these rights and from ‘encourag[ing] or discourag[ing] membership in any labor organization.’ *See* 29 U.S.C. § 157; 29 U.S.C. § 158 (a)(1), (a)(3).” (Dkt. No. 9 at 4.) Thus, the NLRA covers Plaintiff’s support of the union and, in turn, provides a statutory remedy for Plaintiff’s claim of wrongful termination. *See Scott*, 2010 WL 1254866, at *3 (stating that the NLRB “has the

exclusive original jurisdiction over allegations of unfair labor practice charges such as . . . anti-union animus.”)

Since Plaintiff has existing statutory remedies, the public policy exception is inapplicable. *See Lugo*, 2020 WL 495336, at *3 (“Because Plaintiff has existing statutory remedies, the South Carolina public policy exception does not apply, and Plaintiff’s wrongful termination claim must be dismissed.”). As such, the undersigned recommends that Defendant’s Motion to Dismiss Plaintiff’s claim for wrongful termination in violation of public policy be granted.⁵

II. Slander

Defendant also asks the Court to dismiss Plaintiff’s slander claim, asserting that the facts pled by Plaintiff are insufficient to state a valid claim. (Dkt. No. 5 at 1, 13–18.) “Under South Carolina law, to [state a claim for] defamation a plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged communication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Campbell v. International Paper Co.*, No. 3:12-cv-3042, 2013 WL 1874850, at *3 (D.S.C. May 3, 2013) (citing *Argoe v. Three Rivers Behavioral Health, LLC*, 392 S.C. 462, 474 (2011)).

Plaintiff alleges that “Defendants published false statements regarding the Plaintiff’s work performance and an alleged failure of the Plaintiff reporting a bird strike.” (Dkt. No. 1-1 at 11.) Plaintiff further alleges that the published false statements “were

⁵ The Court notes Defendant’s argument that Plaintiff has not alleged facts to support a violation of a clear mandate of public policy for his claim for wrongful termination in violation of public policy (Dkt. No. 5 at 11–13) and Plaintiff’s contentions to the contrary (Dkt. No. 8 at 10–14). Because the undersigned recommends that this claim be dismissed for the reasons set forth herein, the Court declines to address that argument.

intentionally made by Defendants, in order to have the Plaintiff terminated . . . and damage his reputation in the Airline Industry” and that “[Defendant] has continued the publication of the false narrative regarding the Plaintiff in order to damage the reputation of the Plaintiff further by publishing internal and external memorandums” (Dkt. No. 1-1 at 12.) .

Plaintiff has not alleged facts to sustain a plausible slander claim. In particular, Plaintiff fails to adequately explain how specific defamatory comments were communicated by Defendant to a third party. *English Boiler & Tube, Inc. v. W.C. Rouse & Son, Inc.*, 1999 WL 89125, at *3 (4th Cir. Feb. 23, 1999) (recognizing in dicta that, in order to plead defamation, a plaintiff “should allege specific defamatory comments [including] ‘the time, place, content, and listener of the alleged defamatory matter,’” (quoting *Caudle v. Thomason*, 942 F. Supp. 635, 638 (D.D.C. 1996)). Rather, Plaintiff conclusively asserts that Defendant made defamatory comments and then argues that Defendant “continued the publication of the false narrative . . . by publishing internal and external memorandums,” without describing where or how these memorandums were distributed. *See Hamada v. The Boeing Company*, 2:19-cv-2777-DCN-BM, Dkt No. 34 (D.S.C. March 30, 2020) (recommending dismissal of slander claim based on internal and external memorandums about plaintiff’s work performance, employment, and union support on basis that allegations were insufficient). Moreover, “[n]owhere in the complaint is it alleged to whom [Defendant] made the statements at issue.” *Campbell*, 2013 WL 1874850, at *3. Plaintiff has instead made only conclusory statements to support the allegation that the communications at issue were made to a third party.⁶ “A pleading that merely offers . . .

⁶ Even considering Plaintiff’s attempt to clarify in his Response to Defendant’s Motion to Dismiss (stating that he was slandered “to employees, outside media sources and the general public”), Plaintiff has not

‘labels and conclusions,’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.* (citing *Twombly*, 550 U.S. at 555). Because this is all Plaintiff has provided, Plaintiff has not adequately pled the second element of slander. As such, the undersigned recommends that Plaintiff’s slander claim be dismissed.

III. Retaliation and Hostile Work Environment

Defendant asks the Court to dismiss Plaintiff’s retaliation claim for failure to administratively exhaust and failure to plead facts giving rise to a plausible claim. (Dkt. No. 5 at 24–29.) Defendant also requests that the Court dismiss Plaintiff’s hostile work environment claim on the ground that Plaintiff has failed to plead facts sufficient to support his claim. (Dkt. No. 5 at 18–24.) Plaintiff’s failure to provide a meaningful response to Defendant’s arguments relating to these claims in his Response to Defendant’s Motion to Dismiss justifies dismissal of these claims. *See Waiters v. Sci. Applications Int’l Corp.*, No. CV 2:17-3227-BHH-BM, 2019 WL 5874132, at *10 (D.S.C. May 10, 2019), *adopted*, No. CV 2:17-3227-BHH, 2019 WL 4462810 (D.S.C. Sept. 18, 2019) (stating that plaintiff abandoned claim by failing to address in his memorandum in opposition to defendant’s motion to dismiss argument raised in defendant’s motion to dismiss); *see also Jones v. Family Health Ctr., Inc.*, 323 F.Supp.2d 681, 690 (D.S.C. 2003) (noting that claim not addressed in opposition memorandum had been abandoned);.

In his Response to Defendant’s Motion to Dismiss, Plaintiff’s most pertinent assertions relating to his retaliation and hostile work environment claims are: “[p]ursuant to the law the Plaintiff has properly presented a claim of unwelcome harassment that was

provided sufficient detail to state a valid claim. *See Campbell*, 2013 WL 1874850, at *3 (dismissing a slander claim where plaintiff alleged only that defendant made the defamatory statement “publicly known” to “countless others”).

based on his race and sufficiently sever[e] to alter the terms and conditions of his employment, and that Boeing was responsible for [this environment] because they failed to alleviate the [h]arassment,” and “Plaintiff complained of discrimination to [Defendant], Boeing terminated the Plaintiff after his complaint of [discrimination].” (*Id.*) In other words, Plaintiff makes threadbare assertions and repeats portions of his Amended Complaint; he does not address the merits of his claims.

As Defendant notes, Plaintiff fails to “address the specific deficiencies of his allegations, as currently pled.” (Dkt. No. 9 at 8.) In particular, Plaintiff does not present any instances of harassment that may have been so severe and pervasive as to have altered the conditions of his employment with Defendant.⁷ Plaintiff also does not attempt to demonstrate a causal connection between his termination and a protected activity in which he engaged,⁸ nor does he acknowledge Defendant’s exhaustion argument. Consequently, Plaintiff has abandoned his retaliation and hostile work environment claims by failing to argue the merits of these claims in his Response.⁹ See *Walters*, 2019 WL 5874132, at *10

⁷ To state a hostile work environment claim under 42 U.S.C. § 1981 and Title VII, Plaintiff’s factual allegations must demonstrate: (1) Plaintiff was subjected to unwelcome conduct in a work related setting; (2) such conduct was based on race or was in retaliation for protected conduct; (3) such conduct was sufficiently severe or pervasive to alter his condition of employment and to create an abusive work environment; and (4) such conduct was imputable on some factual basis to his employer. *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 175 (4th Cir. 2009); *Ocheltree v. Scollon Productions, Inc.*, 308 F.3d 351, 356 (4th Cir. 2002), *rehearing en banc*, 335 F.3d 325 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1406 (2004); *Spicer v. Com. of Va. Dep’t of Corrections*, 66 F.3d 705, 710 (4th Cir. 1995); *Brown v. Perry*, 184 F.3d 388, 393 (4th Cir. 1999); *Scott v. Health Net Federal Services, LLC*, 463 F. App’x 206, 209 (4th Cir. 2012).

⁸ To survive dismissal of the retaliation claim, Plaintiff must demonstrate: (1) he engaged in activity protected under Title VII and/or 42 U.S.C. § 1981; (2) Defendant took an adverse employment action against him; (3) there is a causal connection between the protected activity in which Plaintiff engaged and the adverse action taken by Defendant. *Evans v. Int’l Paper Co.*, 936 F.3d 183, 195 (4th Cir. 2019); *Lettieri v. Equest, Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). Further, because the legal standard is the same for a retaliation claim under Title VII and 42 U.S.C. § 1981, Plaintiff’s offer to file another amended complaint to clarify that his retaliation claim is “specifically pursuant to 42 U.S.C. § 1981 and not pursuant to Title VII” (Dkt. No. 8 at 22) does not address the deficiencies of Plaintiff’s retaliation claim.

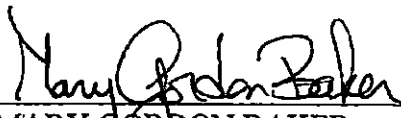
⁹ However, the Court finds that these claims would also fail on the merits because Plaintiff’s Amended Complaint does not allege facts that are “enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555).

(stating that plaintiff abandoned claim by failing to address in his memorandum in opposition to defendant's motion to dismiss argument raised in defendant's motion to dismiss); *see also Jones*, 323 F.Supp.2d at 690 (noting that claim not addressed in opposition memorandum had been abandoned). For these reasons, the undersigned recommends that the Court grant Defendant's Motion to Dismiss (Dkt. No. 5) as to Plaintiff's retaliation and hostile work environment claims.

CONCLUSION

Based on the foregoing, the undersigned recommends that Defendant's Motion to Dismiss Causes of Action for Wrongful Termination, Slander, Retaliation, and Hostile Environment (Dkt. No. 5) be **GRANTED** in its entirety.

IT IS SO RECOMMENDED.



MARY GORDON BAKER
UNITED STATES MAGISTRATE JUDGE

May 11, 2020
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

**Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402**

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

1 STATE OF SOUTH CAROLINA) IN THE COURT
 2) OF COMMON PLEAS
 3 COUNTY OF CHARLESTON) OF THE NINTH
 4) JUDICIAL CIRCUIT
 5)
 6 LIAM WALLIS,)
 7)
 8 Plaintiff,) TRANSCRIPT OF RECORD
 9) 2019-CP-10-01379
 10 vs.)
 11)
 12 THE BOEING COMPANY,)
 13 ANTHONY TIMMS, AND)
 14 MONICA WILLIAMS,)
 15)
 16 Defendants.)
 17)

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 20
 21
 22
 23
 24
 25
 February 27, 2020
 Charleston, South Carolina

B E F O R E:

HONORABLE PERRY M. BUCKNER, III, Judge.

A P P E A R A N C E S

MICHAEL ELLIS, ESQUIRE
 For Plaintiff

CHERIE BLACKBURN, ESQUIRE
 For Defendants

Proceedings recorded by DCRP,
 Digital Courtroom Recorder Project

Transcribed by:
 Julie A. Cendroski,
 Circuit Court Reporter III
 Seventh Judicial Circuit

I N D E X

WITNESSPAGE

ANNOUNCEMENT OF CASE

By The Court

4

MOTION TO DISMISS

By Ms. Blackburn

7

ANSWER TO MOTION TO DISMISS

By Mr. Ellis

18

REPLY TO MOTION TO DISMISS

By Ms. Blackburn

26

ORDER OF THE COURT

27

CERTIFICATE OF COURT REPORTER

29

EXHIBITS

<u>MARKED</u>	<u>ENTERED</u>

NO EXHIBITS PROFFERED;

1 LIAM WALLIS VS. THE BOEING COMPANY, ET AL.

2 THE COURT: All right. Our next motion, which
3 I've got quite a packet on, is 2019-1379, Liam Wallis,
4 Plaintiff, versus Boeing Company, Anthony Timms, and
5 Monica Williams. I'd ask that counsel identify
6 themselves and who they represent, beginning with
7 counsel for the plaintiff.

8 MR. ELLIS: Good morning, Your Honor. Michael
9 Ellis of Query, Sautter & Associates on behalf of the
10 plaintiff, Liam Wallis.

11 THE COURT: All right. Now, hold one second.
12 Let me catch you up. We've updated a lot and every
13 number I've got has changed now, so give me a moment.
14 This is 76 on the updated roster? All right. Mr.
15 Ellis, happy to have you.

16 Counsel for the defendant, Boeing?

17 MS. BLACKBURN: Your Honor, I'm Cherie Blackburn
18 with Nexsen Pruitt and I represent all of the defendants
19 named in the lawsuit.

20 THE COURT: So all the individual defendants and
21 The Boeing Company?

22 MS. BLACKBURN: Yes, Your Honor.

23 THE COURT: All right. For some reason, Ms.
24 Blackburn, I have down Melissa Spence. Is that your
25 firm?

1 MS. BLACKBURN: She is. She is an attorney who
2 works with me.

3 THE COURT: All right. Happy to have you, Ms.
4 Blackburn.

5 MS. BLACKBURN: Thank you.

6 THE COURT: And who's at the table with you?

7 MS. BLACKBURN: Your Honor, the individual
8 defendants, Andy Williams -- Andy Timms, I'm sorry.
9 Andy Timms and Monica ---

10 THE COURT: Anthony Timms.

11 MR. TIMMS: Yes.

12 MS. BLACKBURN: Anthony Timms and Monica
13 Williams, who have been named individually in the
14 lawsuit. And I also have Edward Wall, who is in-house
15 counsel with The Boeing Company.

16 MR. WALL: Good morning, Judge.

17 THE COURT: Happy to have you as well.

18 MR. WALL: Thank you.

19 THE COURT: All right.

20 MR. ELLIS: Your Honor, would you like paper
21 copies? I don't know if you have paper copies of my
22 memos?

23 THE COURT: I already have paper copies --

24 MR. ELLIS: Okay.

25 THE COURT: -- of everything you filed.

1 MR. ELLIS: Thank you.

2 THE COURT: If you don't -- Payton knows this.
3 Because I'm 70 years and I've been on the bench 20
4 years, one of my law clerk's job is to print out every
5 single motion I'm gonna hear in advance. So when I say
6 I've got a packet on you, I've got a packet on you.
7 I've read it, so that means you don't have to trace the
8 history of your motion or your case with me. Hopefully
9 it will save us some time.

10 Let me introduce to you all our court monitor,
11 Mrs. Leanna Teller. She is not a court reporter. This
12 is an electronic courtroom. She's recording the
13 proceedings, so you're gonna need to use my microphone
14 at the rostrum. You can bring your file with you.

15 The young man to my right is my law clerk. Take
16 the blame, take the bullet, keep the notes. His name is
17 Austin McCoy. He does a great job for me. I can't tell
18 you what a hard worker he is, and I -- let's see,
19 Austin, I worked you until, what, 9:45 last night?

20 Most people don't realize what my lawyers, they
21 know, law clerks are invaluable. Austin, because he
22 scored so high on the bar, and you young lawyers
23 understand this, our old ones didn't have this
24 opportunity, he -- we have reciprocity with other
25 states, so he's applied -- he doesn't have to take the

1 bar in Colorado, he's applied to be a member of the
2 Colorado bar because of his score on the South Carolina
3 bar because he thinks living in Colorado would be a
4 dream come true for him.

5 So he's gonna be a member of the Colorado bar.
6 I'm really proud of him because he works extremely hard.
7 He does a great job for me.

8 For those of you that I haven't met, my name is
9 Perry Buckner. I practiced law for 25 years and have
10 been on the bench 20, so I've had 45 years in our
11 profession. And I've read every single thing that
12 Austin has printed out for me, which is, I might add,
13 somewhat verbose, but I think we're ready. And I'm
14 happy now to hear from the moving party.

15 MS. BLACKBURN: Thank you, Judge Buckner.

16 THE COURT: Yes.

17 MS. BLACKBURN: As you know, we're here on our
18 Motion to Dismiss all ---

19 THE COURT: And let's define the parameters. I'm
20 confined to the pleadings.

21 MS. BLACKBURN: Yes, Your Honor, I know. And I
22 understand that you have to ---

23 THE COURT: Then don't go outside of them.

24 MS. BLACKBURN: I'm not.

25 THE COURT: I'm not converting it to a Rule 56

1 strictly based on the pleadings.

2 MS. BLACKBURN: I promise you I will not go
3 outside the pleadings.

4 THE COURT: I promise you I won't allow you to --

5 MS. BLACKBURN: We ---

6 THE COURT: -- because it's my call, not yours.

7 MS. BLACKBURN: I understand that.

8 THE COURT: Proceed.

9 MS. BLACKBURN: We have -- we've moved to dismiss
10 two of the three causes of action, the wrongful
11 termination in violation of public policy, and the civil
12 conspiracy cause of action. And if Your Honor -- I was
13 gonna go over just very briefly the allegations in the
14 complaint, not necessarily the -- just what's alleged.

15 The plaintiff worked as a quality assurance
16 conformity manager for Boeing. Ms. Williams, Monica
17 Williams, who's individually named, was his first line
18 supervisor. Mr. Timms was his senior level manager, two
19 levels above him.

20 He alleges he discovered safety concerns or
21 discrepancies in connection with his inspections of the
22 aircraft. He alleges that he reported those to Ms.
23 Williams. He alleges that he complained to Mr. Timms
24 that Ms. Williams treated him harshly for documenting
25 his findings of discrepancies. And he alleges that

1 after reporting that to Mr. Timms, Mr. Timms told him he
2 could look for another job and he was subsequently
3 terminated in June of 2017.

4 I'd like to start with the civil conspiracy
5 claim. The allegations against Mr. Timms and Ms.
6 Williams are that -- are solely in their capacity as
7 managers of Boeing, yet they have been named
8 individually in this lawsuit. They're not defendants in
9 the lawsuit. It's public record. They have to explain
10 why they've been sued.

11 Ms. Williams actually traveled from San Antonio
12 for this hearing. She works for Boeing, but she's in
13 San Antonio now. And if you look at the pleadings taken
14 in a light most favorable to the plaintiff, there is --
15 they do not state a cause of action for civil
16 conspiracy.

17 The allegations regarding civil conspiracy are
18 that they conspired to have him terminated after he
19 refused to fraudulently document planes as having no
20 discrepancies. They did it to minimize the findings
21 Boeing reported to their boss in an attempt to further
22 their claims or their careers at Boeing. They conspired
23 to deny him access to the internal computer system that
24 allowed plaintiff to verify whether planes were ready
25 for inspection.

1 And, Your Honor, as you know, the elements of a
2 conspiracy require that there is a -- they allege two or
3 more persons combining for the purpose of injuring the
4 plaintiff that cause special damages to the plaintiff.
5 The plaintiff's cause of action is barred by the
6 intra-corporate conspiracy doctrine because he alleges
7 that his termination was in retaliation for Boeing's
8 scheme. And this is alleged in the complaint, Boeing's
9 scheme of fraudulently concealing these non-conformity
10 -- non-conformities in the aircraft. He tries to make
11 Monica Williams and Anthony Timms part of that scheme,
12 but he alleges it's Boeing's scheme.

13 And if you look at the case law, we've cited them
14 in our brief, our courts are clear that a corporation
15 cannot conspire with itself. And the employees of a
16 corporation cannot conspire with the corporation when
17 they are acting in -- within the scope of their
18 employment.

19 There's even a case, Lawson versus South Carolina
20 Department of Corrections, where the Supreme Court has
21 said that two employees, two agents discussing the
22 termination of the plaintiff is not a civil conspiracy,
23 does not allege civil conspiracy. In this case, we
24 actually do not have an allegation of the two
25 individuals, Ms. Williams and Mr. Timms, communicating

1 to each other.

2 Again, it goes back to the scheme that the
3 plaintiff alleges Boeing was engaged in, not the
4 individual. There's no -- there is no allegation to
5 indicate that they were not acting within the scope of
6 their employment. And if you look at what the case law
7 says about acting within the scope of your employment,
8 an act, if it's reasonably necessary to accomplish the
9 purpose of employment and it's in furtherance of the
10 employee's -- of the employer's business, then it is an
11 act within the scope of employment. So two employees,
12 if they were discussing the termination, if they played
13 a role in the termination ---

14 THE COURT: The relief you asked there, would be
15 relief as to the individual defendants, if you were
16 correct. Meaning that, you say that there can't be a
17 conspiracy if it's within the course and scope of their
18 corporate duties for the individual defendants. I
19 understand that. Let's move on.

20 MS. BLACKBURN: Okay. So, Your Honor, with
21 regard to the special damages, because they have to show
22 the special damages.

23 THE COURT: They absolutely do.

24 MS. BLACKBURN: The damages that they've alleged
25 are the same damages that arise out of the wrongful

1 termination claim. They haven't alleged damages that
2 are attributable only to the conspiracy itself. And our
3 appellate courts have made clear that they have to be
4 separate and independent damages that do not overlap.
5 Mr. Wallis alleges -- he's alleged that he's suffered
6 special damages, and he identifies those special damages
7 as being blacklisted.

8 So, I believe, the argument is, well, for the
9 wrongful termination it's wages, lost wages. For the
10 civil conspiracy, it's being blacklisted. The problem
11 is that the allegation as to being blacklisted is that
12 Boeing blacklisted him in the community. So it's not an
13 allegation that Ms. Williams or Mr. Timms blacklisted
14 him. So there's no evidence here, Your Honor, of
15 special damages.

16 If I can move on to the wrongful termination in
17 violation ---

18 THE COURT: You can.

19 MS. BLACKBURN: The primary argument on that is
20 that Mr. Wallis has a statutory remedy. It is well
21 settled in South Carolina that if there is a statutory
22 remedy to the plaintiff, there can be no cause of action
23 for wrongful termination, and we cite those cases in our
24 brief.

25 In this case, the statutory remedy is the Wendell

1 H. Ford Aviation Investment and Reform Act for the 21st
2 Century, commonly referred to as Air 21. And Air 21
3 gives Mr. Wallis a remedy in that if he is -- he
4 believes he is discriminated against or discharged for
5 raising safety concerns related to the aircraft, he can
6 make a claim under Air 21.

7 There are a couple of cases out there where the
8 district court has dismissed the cause of action for
9 wrongful termination because of Air 21. One of them is
10 the Hobek case filed against Boeing. He was a quality
11 manager for Boeing, much like Mr. Wallis. He said he
12 reported safety concerns, he was terminated. He claimed
13 wrongful termination in violation of public policy in
14 the District Court case. District Court found that
15 cause of action could not go forward because he had a
16 statutory remedy.

17 The other case, Your Honor, Lugo versus Boeing,
18 was decided by Judge Gergel in January. And I actually
19 have a copy of his order if you'd like to see it, like
20 to have it.

21 THE COURT: Does counsel have a copy?

22 MS. BLACKBURN: I've got one for him too.

23 THE COURT: Give him one, hand it up.

24 MS. BLACKBURN: May I approach, Your Honor?

25 THE COURT: You may. Let the record reflect I'm

1 being handed an order, an opinion in the United States
2 District Court, Case 219-CV-2995-RMG, and it is the
3 order of Judge Gergel dated January 30th, 2020.
4 Proceed.

5 And, Your Honor, in that case the plaintiff made
6 a very similar allegation that he was terminated because
7 of raising safety concerns and tried to argue that the
8 safety concerns related to his role as an employee and
9 his duties for Boeing, not FAA regulations. And Judge
10 Gergel in a footnote says that argument is incorrect
11 against the statute; that Air 21 does provide him a
12 statutory remedy. And because of the South Carolina law
13 that says you can't have a wrongful termination claim if
14 you have a statutory remedy, Judge Gergel dismissed the
15 wrongful termination in violation of public policy
16 claim.

17 I'll also add that Mr. Wallis also has to show a
18 clear mandate of public policy, and we don't have
19 allegations sufficient to show a clear argument mandate
20 of personal -- of public policy. There is another case,
21 it's a District Court case, that I believe the plaintiff
22 cites in his memorandum. Desmarais versus Scientific
23 Research Authority. And in that case ---

24 THE COURT: That's where the plaintiff argues
25 that termination of plaintiff falls within the public

1 policy exception for at-will employment on the basis
2 that the safety and lives of the people of this State is
3 a mandate of public policy, citing South Carolina
4 Constitution, Article 12, Section 1. What's your
5 response to that? Obviously, that section says the
6 health, welfare, and safety of the lives and property of
7 the people of this state are matters of public concern.
8 Is that not also the public policy of South Carolina, as
9 reflected in the South Carolina constitution?

10 MS. BLACKBURN: Your Honor, no. We do not
11 believe that is the public policy. That statute goes on
12 to state that they are setting up -- the purpose is to
13 set up state agencies to protect the public policy or
14 the concerns. So our position is, no, that statute does
15 not create a public policy sufficient for a wrongful
16 termination in violation of public policy.

17 THE COURT: You think it has to be case law to
18 create public policy?

19 MS. BLACKBURN: No, Your Honor, not necessarily.
20 I think there needs to be guidance. There's guidance in
21 the case law. And, of course, right now we have two,
22 two situations that our appellate courts have said, you
23 know, constitute wrongful termination in violation of
24 public policy, which is basically the employer requires
25 the employee as a condition of employment to break the

1 law or the wrongful termination itself is illegal.

2 And there have been other cases that have come
3 before the court. To date, this is the guidance that
4 we're given. In the Desmarais versus South Carolina
5 Research -- or Scientific Research, the allegations were
6 similar in that they were safety concerns raised
7 regarding the aircraft. And the argument was in the
8 complaint, this affects the safety of the public and,
9 therefore, it's a public policy.

10 And the District Court said that does not create
11 -- I believe that was Judge Norton's opinion. That does
12 not create a clear mandate of public policy. That's the
13 closest case, I guess, that we have addressing these
14 types of allegations, and they found that there was not
15 a cause -- the cause of action could go forward.

16 Despite that, Your Honor, even if there were a
17 question about the public policy, the statutory remedy
18 language is clear in the case law. So for those
19 reasons, Your Honor, we'd move to dismiss the two causes
20 of actions for wrongful termination and civil
21 conspiracy.

22 THE COURT: Thank you very much.

23 MS. BLACKBURN: Thank you.

24 THE COURT: Let me hear from you, Mr. Ellis.

25 MR. ELLIS: Thank you, Your Honor. And just as a

1 matter of housekeeping, this is the first time I've
2 actually had a case come back from across the street
3 over to here.

4 THE COURT: Well, believe me, Judge Norton loves
5 to send me notes when he remands cases to the state
6 court. So it's not a very complicated procedure as far
7 as the federal judges are concerned. They just send it
8 back to the State Court and say let them handle it. But
9 what is it that confuses you or causes you questions?

10 MR. ELLIS: Well, I notice in looking in the
11 on-line file this morning, the amended complaint is not
12 in the State -- we amended our complaint at the federal
13 level.

14 THE COURT: So you've got an amendment while the
15 case was still pending in the federal court?

16 MR. ELLIS: Yes, Your Honor.

17 THE COURT: And you noticed it isn't filed in the
18 clerk's file in state court?

19 MR. ELLIS: Yes, Your Honor.

20 THE COURT: I assume, counsel, you'll have no
21 objection to him handing me his amended complaint
22 because you've been served with it, have you not?

23 MS. BLACKBURN: Absolutely no objection. And,
24 Your Honor, our argument is based on the amended
25 complaint.

1 THE COURT: I thought it was too. That's why I
2 don't understand why -- I started thinking to myself,
3 gosh, I've been sitting here listening 15 minutes of an
4 argument. All right. It's clear I've been handed -- so
5 that the record's clear, since it apparently isn't in
6 the State file. Believe me, there are many things
7 sometimes in the state system that are difficult to
8 locate as to whether or not they've been filed. The
9 amended complaint that I've been handed is dated May 1st
10 -- well, the Certificate of Service is dated May 1st.
11 Hold on.

12 MR. ELLIS: Well, Your Honor, it was filed --

13 THE COURT: What date?

14 MR. ELLIS: -- May 1st, 2019.

15 THE COURT: All right. And it was filed in
16 Federal Court May 1st, 2019. And it is the complaint
17 upon which the 12(b) motion is now being made. I'm
18 confined to the pleadings, as you know. Mr. Ellis,
19 we're talking about civil conspiracy and wrongful
20 termination. Let's begin in the order in which it's
21 alleged with civil conspiracy.

22 MR. ELLIS: Thank you, Your Honor. And, again,
23 thank you, Your Honor, for pointing out that this motion
24 is constrained to our pleadings --

25 THE COURT: Absolutely.

1 MR. ELLIS: -- the amended complaint. We have
2 alleged ---

3 THE COURT: Although, there is -- I'll point this
4 out to you because apparently my lawyers don't realize
5 probably the best case there is in South Carolina from
6 the Supreme Court is a Charleston case. And we're not
7 doing it today, but you need to read it, because it
8 really is a great -- Beard versus Charle -- B-e-a-r-d
9 versus Charleston County. My law clerk will get you the
10 cite. And it deals with the issue of under what
11 circumstances a court may convert a 12(b) motion to a
12 Rule 56 motion for summary judgment. And there are
13 inherent problems, due process problems.

14 For instance, if all of a sudden she files her
15 motion and you came here to argue on the pleadings, then
16 I convert it to a Rule 56, which means we go outside the
17 pleadings and consider depositions and affidavits, how
18 much time do you have to get a reply to do? Boop.

19 And so, notice and opportunity to be heard is
20 always a problem in a conversion. And most lawyers
21 don't even realize that our rules, when you file a
22 motion, we have time deadlines for affidavits. Were you
23 aware of that? Do you know where it is? Can you quote
24 it to me?

25 MS. BLACKBURN: I can't quote it, but I know it

1 has to be filed so many days prior to the hearing.

2 THE COURT: So that he has a chance to get reply
3 affidavits. It's in Rule 5 of the Rules of Civil
4 Procedure. All right. So take a look at *Beard*, it
5 would be good for you.

6 Let's talk about civil conspiracy. She says that
7 I should dismiss this complaint because your complaint
8 fails to allege civil conspiracy. The argument is
9 basically that you've got these individual defendants,
10 who are present, Mr. Timms and Ms. Williams, and the
11 argument is that this is a corporate conspiracy or, as
12 she likes to call it, a Boeing conspiracy, quoting some
13 excerpts from your amended complaint, and that the
14 individuals can't conspire with a corporation. Let me
15 hear from you.

16 MR. ELLIS: Thank you, Your Honor. And it is
17 plaintiff's position that the civil conspiracy
18 allegation was properly pled in our amended complaint.
19 In our amended complaint we do specifically say Anthony
20 Timms and Monica Williams conspired to have plaintiff
21 terminated in paragraph 45.

22 THE COURT: We agree that there has to be a
23 combination of two or more persons for the purpose of
24 injuring the plaintiff and causing the plaintiff special
25 damages. Do you agree those are the elements?

1 MR. ELLIS: Yes, Your Honor, I do.

2 THE COURT: Okay.

3 MR. ELLIS: And there are special damages in this
4 because part of the conspiracy or the result of the
5 conspiracy was that Liam Wallis was fired for
6 fraudulently documenting repairs to the plane, just
7 filing fraudulent documents. So that's what goes into
8 his employment file as a result of their conspiracy.

9 THE COURT: I understand that you allege that,
10 but what I'm asking you now is let's talk about the
11 question that she argues as to whether or not Mr. Timms
12 and Ms. Williams conspired to have the plaintiff
13 terminated or was this a Boeing conspiracy, because
14 that's the basis of her argument.

15 MR. ELLIS: Well, Your Honor, we pled that it is
16 an Anthony Timms, Monica Williams conspiracy, not a
17 Boeing conspiracy.

18 THE COURT: You agree that they were in the line
19 of supervision to your client, one directly over your
20 client and one right above the one that was directly
21 over your client? I've forgotten which was which.

22 MR. ELLIS: And, yes, Your Honor, I do agree. Of
23 course, all inferences to be drawn --

24 THE COURT: Absolutely.

25 MR. ELLIS: -- should be in the light most

1 favorable to the plaintiff and ---

2 THE COURT: Ms. Blackburn understands the light
3 that I have to take it.

4 MR. ELLIS: And any reasonable inference can be
5 drawn that Boeing does not have a policy that encourages
6 their employees to conspire against one another on a
7 regular basis. So any conspiracy by Anthony Timms and
8 Monica Williams, it would be reasonable to infer that
9 that is contrary to Boeing policy, it's not a Boeing --
10 they do not conspire with Boeing to terminate Mr.
11 Wallis.

12 THE COURT: What special damages do you think
13 exist here for purposes of civil conspiracy?

14 MR. ELLIS: That the result of their conspiracy
15 was the documenting that he was fired for filing
16 fraudulent documents concerning his work duties. So
17 going forward whenever he's applying for further
18 aviation industry jobs, when the question comes up, why
19 did you leave Boeing? Well, I was fired because I filed
20 fraudulent documents, is the reason that I was given.
21 Let me explain to you why. I mean, that's gonna be,
22 that's gonna be a hard sale. It' gonna result in
23 him ---

24 THE COURT: You allege that Mr. Timms and Ms.
25 Williams caused him damage from future wages as well in

1 your complaint?

2 MR. ELLIS: It is, it is gaining employment
3 within the aviation industry, Your Honor. It has
4 blacklisted him from the entire aviation industry and
5 he's, since his 2017 firing, has been searching for jobs
6 in the aviation industry and has not been able to find
7 any aviation industry jobs, despite him being one of the
8 more qualified applicants for the jobs he's been
9 applying for.

10 THE COURT: In response to her argument that
11 intra-corporate conspiracy doctrine, which basically
12 says civil conspiracy cannot exist when the acts of
13 those of employees or directors in their official
14 capacity conspiring with a corporation, if you will, and
15 you say that your complaint is sufficient on that
16 ground; is that correct, counsel?

17 MR. ELLIS: Yes, Your Honor. And if you look at
18 paragraph 58 of our amended complaint, we also allege
19 the loss of standing has been tarnished by the
20 individual defendant's civil conspiracy.

21 THE COURT: All right. I've looked at your
22 paragraph 58. Anything else you want to tell me on
23 civil conspiracy?

24 MR. ELLIS: Just to reiterate that the
25 intra-corporate conspiracy doctrine only applies to

1 conspiring with the corporation and our allegations as
2 pled are only ---

3 THE COURT: She argues that your complaint
4 alleges a corporate conspiracy or a Boeing conspiracy.
5 Do you agree?

6 MR. ELLIS: I do not agree, Your Honor. I -- the
7 allegations of civil conspiracy are against the
8 individual defendants alone, not Boeing.

9 THE COURT: All right. Let's turn to wrongful
10 termination.

11 MR. ELLIS: Thank you, Your Honor. And, Your
12 Honor, we would first point out that the safety of the
13 flying public, especially since it considers South
14 Carolinian citizens fly on planes made by Boeing, that
15 this is clearly a public policy issue. Whether the
16 safety of ---

17 THE COURT: You can certainly ask her about South
18 Carolina Constitution Article 12, Section 1, which she
19 denies is a public policy, but I understand that's your
20 argument.

21 MR. ELLIS: Okay.

22 THE COURT: Go ahead.

23 MR. ELLIS: Well, and, Your Honor, as far as the
24 statutory remedy goes, Mr. Wallis is not a member of the
25 protected class under this Air 21 statute that Ms.

1 Blackburn talked about. Air 21 only applies to
2 whistleblowers providing information relating to any
3 violation or alleged violation of any order, regulation,
4 or standard of the Federal Aviation Administration or
5 any other provision of federal law relating to air cargo
6 safety under this subtitle or any other law of the
7 United States.

8 Mr. Wallis was a conformity manager at Boeing.
9 His job was to make sure that Boeings were built in
10 accordance with the Boeing's standards and policies, so
11 -- and that includes the safety of Boeing planes as laid
12 out by Boeing. And ---

13 THE COURT: So your position is that Air 21 is
14 not a statutory remedy?

15 MR. ELLIS: Correct, Your Honor.

16 THE COURT: And wrongful termination, you concede
17 if it were a statutory remedy there can be no wrongful
18 termination?

19 MR. ELLIS: I agree that South Carolina law does
20 not allow for a common law tort of wrongful termination
21 when there is a statutory remedy, but in this case there
22 is no statutory remedy, as Mr. Wallis does not fall
23 within a protected class.

24 THE COURT: I think I understand your public
25 policy argument. Anything else you want to tell me on

1 wrongful termination?

2 MR. ELLIS: Nothing further, Your Honor.

3 THE COURT: Thank you very much.

4 Briefly in reply, Ms. Blackburn. I've got a lot
5 of people waiting. Please be patient today because
6 we're overbooked. Roy, I know you can sit back there in
7 the back row and enjoy the show.

8 MS. BLACKBURN: Your Honor, just with regard to
9 the special damages, Mr. Ellis mentioned more than once
10 termination. That is -- those are the damages that
11 arise out of that termination. That it's out of the
12 wrongful termination is no different from the civil
13 conspiracy.

14 The ability to find future employment, the reason
15 he alleges is because of the termination. The
16 termination was, in his allegations, wrongful, so it's
17 not special damages under civil conspiracy.

18 The only other thing I'll add is with regard to
19 the question of whether Mr. Wallis is covered under Air
20 21, the same argument that he raises is an argument that
21 the plaintiff raised in the Lugo versus Boeing case and
22 that Judge Gergel addressed in his order.

23 THE COURT: That you handed me the order for?

24 MS. BLACKBURN: Yes, Your Honor.

25 THE COURT: Thank you very much.

1 MS. BLACKBURN: Thank you.

2 THE COURT: All right. Take notes. I'm gonna
3 ask you both to submit proposed orders to me. You will
4 submit them to me within seven days of today. You will
5 send my law clerk a working copy, as well as myself.
6 And because we have some crazy rules in South Carolina,
7 do not file any proposed order. You will e-mail your
8 orders to me, so I don't want you being charged or your
9 clients being charged for a proposed order, particularly
10 when it's subject to my editing.

11 Please submit your orders to me at
12 Pbucknerlc@sccourts.org. That's my law clerk's address,
13 Austin McCoy. And to me at Pbucknerj@sccourts.org.
14 Submit them in Word format, not Word Perfect. Please
15 submit them within seven days of today, copying opposing
16 counsel on any transmittal to the court, whether it be
17 by e-mail, United States mail, facsimile, or any type of
18 communication.

19 The record is now closed. I have with me your
20 memorandum. I have with me also your memorandum in
21 opposition, and I have the pleadings. I was given
22 during the hearing the order of Judge Gergel, which I
23 placed on the record. And because Mr. Ellis says he's
24 never been back to State Court on remand, I accepted a
25 copy of his amended complaint, which everybody is using

1 as the complaint for purposes of this 12(b) motion.
2 That's all the documents that I have. I'll look forward
3 to getting your orders within seven days of today.

4 I want to thank you both for being well prepared.
5 I appreciate that very much. I hope you have a nice
6 day.

7 MR. ELLIS: Thank you, Your Honor.

8 MS. BLACKBURN: Thank you, Your Honor.

9 THE COURT: Thank you.

10 (Hearing concluded at 11:04 a.m.)

11

12 --- THIS ENDS REQUESTED TRANSCRIPT ---

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1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Cendroski, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that to the
6 best of my ability from the Digital Court Reporter
7 Program, the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings and evidence
9 introduced in the hearing and/or trial of the captioned
10 case, relative to appeal, in the Court of Common Pleas
11 in Charleston County, South Carolina, on the 20th day of
12 February, 2020.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto. This was
15 transcribed from the Digital Court Reporter Program.
16
17
18
19

20 s/Julie A Cendroski
21 Julie A. Cendroski
22 Circuit Court Reporter III
23 Seventh Judicial Circuit
24
25

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge
Roger M. Young, Sr., Circuit Court Judge

Appellate Case No.: 2021-001439
Case No. 2019-CP-10-01379

LIAM WALLIS.....Appellant,

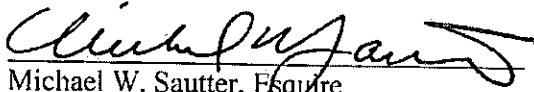
v.

THE BOEING COMPANY, ANTHONY TIMMS, and MONICA WILLIAMS.....Respondents.

CERTIFICATION OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and no other material.

Respectfully Submitted By,



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O. Grady Query, Esquire

McKenna Joyce, Esquire

Alexander W. Tesoriero, Esquire

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Attorneys for Appellant

Dated: 10-05-2022
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge
Roger M. Young, Sr., Circuit Court Judge

Appellate Case No.: 2021-001439
Case No. 2019-CP-10-01379

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SC Court of Appeals

LIAM WALLIS.....Appellant,

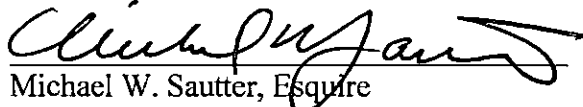
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Dated: 10-05-2022
Charleston, South Carolina