CASREF,PAW

U.S. District Court
Southern District of Florida (Ft. Lauderdale)
CIVIL DOCKET FOR CASE #: 0:11-cv-61846-DMM

Sweeney v. Almanzar et al
Assigned to: Judge Donald M. Middlebrooks
Referred to: Magistrate Judge Patrick A. White
Cause: 42:1983 State Prisoner Civil Rights

Date Filed: 08/17/2011
Jury Demand: None
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Russell Sweeney
Prisoner ID: DC #096670

represented by **Russell Sweeney**
DC #096670
Jackson Work Camp
5607 Highway 71 North
Malone, FL 32445
PRO SE

V.

Defendant

Orlando Almanzar
of the Ft. Lauderdale Police Department

represented by **Robert Hunt Schwartz**
McIntosh Schwartz, P.L.
888 SE 3rd Avenue
Suite 500
Fort Lauderdale, FL 33316
954-556-1483
Fax: 954-760-9531
Email: rhs@mcintoshschwartz.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Michael Holdorff
of the Ft. Lauderdale Police Department

represented by **Robert Hunt Schwartz**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Paul Rogers
of the Ft. Lauderdale Police Department

represented by **Robert Hunt Schwartz**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text

08/17/2011	1	COMPLAINT against Orlando Almanzar, Michael Holdorff, Paul Rogers. Filing fee $ 350.00. IFP Filed, filed by Russell Sweeney.(jua) (Entered: 08/18/2011)
08/17/2011	2	Judge Assignment to Judge Donald M. Middlebrooks (jua) (Entered: 08/18/2011)
08/17/2011	3	Clerks Notice of Magistrate Judge Assignment to Magistrate Judge Patrick A. White. Pursuant to Administrative Order 2003-19 for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. (jua) (Entered: 08/18/2011)
08/17/2011	4	MOTION for Leave to Proceed in forma pauperis by Russell Sweeney. (jua) (Entered: 08/18/2011)
08/25/2011	5	ORDER PERMITTING PLAINTIFF TO PROCEED WITHOUT PREPAYMENT OF FILING FEE BUT ESTABLISHING DEBT TO CLERK OF $350.00 and Granting 4 Motion for Leave to Proceed in forma pauperis. Signed by Magistrate Judge Patrick A. White on 8/25/2011. (tw) (Entered: 08/25/2011)
08/25/2011	6	ORDER OF INSTRUCTIONS TO PRO SE CIVIL RIGHTS LITIGANTS. Signed by Magistrate Judge Patrick A. White on 8/25/2011. (tw) (Entered: 08/25/2011)
09/26/2011	7	ORDER RE SERVICE OF PROCESS REQUIRING PERSONAL SERVICE UPON AND INDIVIDUAL. The United States Marshal shall serve a copy of the complaint and appropriate summons upon:Officer Orlando Almanzar, Fort Lauderdale Police Dept., 1300 West Broward Boulevard, Fort Lauderdale, FL 33312; Officer Michael Holdorff, Fort Lauderdale Police Dept., 1300 West Broward Boulevard, Fort Lauderdale, FL 33312 and Officer Paul Rogers, Fort Lauderdale Police Dept., 1300 West Broward Boulevard, Fort Lauderdale, FL 33312. Signed by Magistrate Judge Patrick A. White on 9/23/2011. (tw) (Entered: 09/26/2011)
09/26/2011	8	REPORT AND RECOMMENDATIONS on 42 USC 1983 case re 1 Complaint filed by Russell Sweeney. Recommending. The excessive use of force claim should proceed against all three officers. 2. The unlawful search and seizure claims proceed against the defendant officers. 3. The unlawful arrest claims proceed against the three officers. Objections to R&R due by 10/14/2011. Signed by Magistrate Judge Patrick A. White on 9/26/2011. (tw) (Entered: 09/26/2011)
09/28/2011	9	Summons Issued as to Orlando Almanzar. (br) (Entered: 09/28/2011)
09/28/2011	10	Summons Issued as to Michael Holdorff. (br) (Entered: 09/28/2011)
09/28/2011	11	Summons Issued as to Paul Rogers. (br) (Entered: 09/28/2011)
10/03/2011	12	SUMMONS (Affidavit) Returned Executed on 1 Complaint Orlando Almanzar served on 10/3/2011, answer due 10/24/2011. (yha) (Entered: 10/03/2011)
10/03/2011	13	SUMMONS (Affidavit) Returned Executed on 1 Complaint Michael Holdorff served on 10/3/2011, answer due 10/24/2011. (yha) (Entered: 10/03/2011)

10/03/2011	14	SUMMONS (Affidavit) Returned Executed on 1 Complaint Paul Rogers served on 10/3/2011, answer due 10/24/2011. (yha) (Entered: 10/03/2011)
10/24/2011	15	*Defendants'* ANSWER and Affirmative Defenses to Complaint *[DE 1]* by Orlando Almanzar, Michael Holdorff, Paul Rogers.(Schwartz, Robert) (Entered: 10/24/2011)
10/26/2011	16	SCHEDULING ORDER: Amended Pleadings due by 3/6/2012. Discovery due by 2/21/2012. Joinder of Parties due by 3/6/2012. Motions due by 3/27/2012.. Signed by Magistrate Judge Patrick A. White on 10/25/2011. (tw) (Entered: 10/26/2011)
11/17/2011	17	RESPONSE to Defendant's First Request for Production by Russell Sweeney. (jua) (Entered: 11/17/2011)
01/10/2012	18	NOTICE of Attorney Appearance by Robert Hunt Schwartz on behalf of Orlando Almanzar, Michael Holdorff, Paul Rogers (Schwartz, Robert) (Entered: 01/10/2012)
01/17/2012	19	ORDER ADOPTING REPORT AND RECOMMENDATIONS ; adopting Report and Recommendations re 8 Report and Recommendations. Certificate of Appealability: No Ruling. Signed by Judge Donald M. Middlebrooks on 1/17/2012. (mg) (Entered: 01/17/2012)
02/06/2012	20	MOTION for Pretrial Conference or Telephonic Conference by Russell Sweeney. (jua) (Entered: 02/06/2012)
02/06/2012	21	MOTION for Discovery by Russell Sweeney. Responses due by 2/24/2012 (jua) (Entered: 02/06/2012)
02/06/2012	22	Pretrial Statement by Russell Sweeney (jua) (Entered: 02/06/2012)
02/14/2012	23	ORDER denying 20 Motion motion for status conference and discovery; denying 21 Motion for Discovery, all discovery requests should be directed to the defendants.. Signed by Magistrate Judge Patrick A. White on 2/14/2012. (cz) (Entered: 02/14/2012)
04/26/2012	24	TRIAL BRIEF *Defendants' Pretrial Statement* by Orlando Almanzar, Michael Holdorff, Paul Rogers. (Schwartz, Robert) (Entered: 04/26/2012)
04/26/2012	25	PRETRIAL STIPULATION by Orlando Almanzar, Michael Holdorff, Paul Rogers (ls)(See Image at DE # 24) (Entered: 04/30/2012)
04/30/2012	26	Clerks Notice to Filer re 24 Trial Brief. **Wrong Event Selected**; ERROR - The Filer selected the wrong event. The document was re-docketed by the Clerk, see [de#25]. It is not necessary to refile this document. (ls) (Entered: 04/30/2012)
05/01/2012	27	*Endorsed Order Upon a sua sponte review of the file it is Ordered and Adjudged that the date for discovery shall be extended to on or before 5/30/12, and any dispositive motions shall be filed by 6/28/12.. Signed by Magistrate Judge Patrick A. White on 5/1/2012. (cz) (Entered: 05/01/2012)

PACER Service Center			
Transaction Receipt			
05/15/2012 14:28:42			
PACER Login:	vl0006	**Client Code:**	
Description:	Docket Report	**Search Criteria:**	0:11-cv-61846-DMM
Billable Pages:	3	**Cost:**	0.30

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11-CV-61846-MIDDLEBROOKS/WHITE

The attached hand-written document has been scanned and is also available in the SUPPLEMENTAL PAPER FILE

cat/div 1983/1550/FIL
Case #
Judge Mag PAW
Motn lfp Yes Fee pd $ No
Receipt #

PROVIDED TO JACKSON W.C. ON
AUG 12 2011
FOR MAILING

A COMPLAINT UNDER THE CIVIL RIGHTS ACT,
42 U.S.C. §1983

FILED by D.C.
AUG 17 2011
STEVEN M. LARIMORE
CLERK U. S. DIST CT
S. D. of FLA. – MIAMI

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Russell Sweeney)
)
)
)
(Enter above the full name of the plaintiff or plaintiffs in this action.))
)
v.)
Orlando Almanzar)
Michael Holdorff)
Paul Rogers)
Of the Ft. Lauderdale Police Dept.
(Enter above the full name of the defendant or defendants in this action.)

Instructions for Filing Complaint by Prisoners
Under the Civil Rights Act, 42 U.S.C. §1983

This packet includes four copies of a complaint form and two copies of a forma pauperis petition. To start an action you must file an original and one copy of your complaint for each defendant you name and one copy for the court. For example, if you name two defendants, you must file the original and three copies of the complaint. You should also keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original.

The clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. The plaintiff or plaintiffs must sign and swear to the complaint. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, it is necessary for you to file a separate complaint for each claim that you have unless they are all related to the same incident or issue.

In order for this complaint to be filed, it must be accompanied by the filing fee of $ 120.00. In addition, the United States Marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauparis. Two blank petitions for this purpose are included in this packet. One copy should be filed with your complaint; the other copy is for your records. After filling in the petition, you must have it notarized by a notary public or other officer authorized to administer an oath.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

When these forms are completed, mail the original and the copies to the Clerk of the United States District Court for the Southern District of Florida, 301 North Miami Avenue, Miami, Florida 33128-7788.

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?
Yes ( ) No (✓)

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs: _____

_____

Defendants: _____

_____

2. Court (if federal court, name the district; if state court, name the county): _____

_____

3. Docket number: _____

4. Name of judge to whom case was assigned: _____

_____

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?):

_____

_____

6. Approximate date of filing lawsuit: _____

7. Approximate date of disposition: _____

II. Place of present confinement: Jackson Work Camp, 5607 Hwy. 71 North, Malone, Fla. 32445

A. Is there a prisoner grievance procedure in this institution? Yes (✓) No ( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes ( ) No (✓)

C. If your answer is YES:

1. What steps did you take? _____

_____

_____

2. What was the result? _____

_____

D. If your answer is NO, explain why not: This action is against The Broward County Police Department, Ft. Lauderdale Police Department

III. Parties

(In Item A below, place your name in the first blank and place your present address in the second blank. Do the same additional plaintiffs, if any.)

A. Name of plaintiff Russell Sweeney

Address Jackson W.C., 5607 Hwy. A. Malone, Fla. 32445

In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants.

B. Defendant Orlando Almanzar

is employed as Police Officer

at Ft. Lauderdale Police Dept. 1300 W. Broward Blvd. Ft. Lauderdale, Fla. 33312

C. Additional Defendants: Michael Feldgoff, and Paul Rodgers, Police Officers for Ft. Lauderdale Police Dept., 1300 West Broward Blvd. Ft. Lauderdale, Fla. 33312

IV. Statement of Claim

State here as briefly as possible the facts of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not

give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary.)

On 1-17-2009, approx. 0445 hours, Plaintiff and his friend Debra Ettenberg pulled into the Race Track Gas Station at 2300 W. Broward Blvd. for Gas and drinks. Ms. Ettenberg went inside the Station to pay for the purchases and use the restroom. During this time Defendants Almanzar, Holdorff and Rodes were in the parking lot station conversating. When Ms. Ettenberg exited the Station Defendants stoped her and began questioning her. Plaintiff observing this confrontation completed pumping his gas and then parked his vehicle to wait on Ettenberg. After approx. 5 minutes, plaintiff yelled out his window to Ettenberg "Stating let's go." Defendant Holdorff then approached Plaintiff's vehicle and requested to see his license and Registration. While Plaintiff was retrieving the documents Defendant Holdorff opened his car door and ordered Plaintiff to get out of the car with his hands on his head. Defendant Holdorff then handcuffed Plaintiff and ordered him to sit on the ground. Defendants then began searching Plaintiff's vehicle without permission or consent. After searching the vehicle, Defendant Holdorff began questioning Plaintiff as to what he was doing in the area. During the conversation Defendant Holdorff asked Plaintiff what did he have in his mouth. Before Plaintiff could respond Defendant Holdorff grabed him by the neck and began choking Plaintiff. Both Defendants Almanzar and Rodes became involved, who started punching and kicking Plaintiff. Defendant Holdorff then used his taser gun shooting Plaintiff in his left

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

Plaintiff sues Defendants for False Arrest, Unnecessary use of Force, Battery and Violation of his Civil Rights.

Extra Sheet

side. After the beating and tazering of Plaintiff, Defendant Almanzar picked up off the ground a plastic baggie saying it appeared to be Cocaine or had Cocaine in it. Plaintiff was arrested, charged with Possession of Cocaine and denied Medicial treatment. Ms. Eronberg was released and caught a cab home.

On 6-25-09 charge were droped against Plaintiff.

Plaintiff Sues each Defendants for Compensation in The Amount of One Hundred dollars $100.00

Signed this 12th day of August, 2011

(Signature of plaintiff or plaintiffs)

VERIFICATION

State of Florida)

County of Jackson)

Russell Sweeney, being first duly sworn, under oath, says: that he is the plaintiff in this action and knows the content of the above complaint; that it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes to be true.

(Signature of affiant-plaintiff)

Subscribed and sworn to before me this 12th day of August, 2011.

Deborah R Lockett

NOTARY PUBLIC STATE OF FLORIDA

DEBORAH R. LOCKETT
MY COMMISSION # EE 010492
EXPIRES: July 20, 2014
Bonded Thru Budget Notary Services

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.11-61846-CIV-MIDDLEBROOKS
MAGISTRATE JUDGE P.A. WHITE

RUSSELL SWEENEY, :

Plaintiff, :

v. :

ORLANDO ALMANZAR, ET AL., :

Defendants. :

REPORT OF
MAGISTRATE JUDGE

I. Introduction

The plaintiff, Russell Sweeney, currently incarcerated at the Jackson Work Camp, filed a pro se civil rights complaint pursuant to 42 U.S.C. §1983 for damages. (DE# 1). The plaintiff has been granted leave to proceed in forma pauperis.

This civil action is before the Court for an initial screening pursuant to 28 U.S.C. §1915.

II. Analysis

A. Applicable Law for Screening

As amended, 28 U.S.C. §1915 reads in pertinent part as follows:

> Sec. 1915 Proceedings in Forma Pauperis
>
> * * *
>
> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -
>
> * * *
>
> (B) the action or appeal -

* * *

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief from a defendant who is immune from such relief.

This is a civil rights action Pursuant to 42 U.S.C. §1983. Such actions require the deprivation of a federally protected right by a person acting under color of state law. See 42 U.S.C. 1983; Polk County v Dodson, 454 U.S.312 (1981); Whitehorn v Harrelson, 758 F. 2d 1416, 1419 (11 Cir. 1985. The standard for determining whether a complaint states a claim upon which relief may be granted is the same whether under 28 U.S.C. §1915(e)(2)(B) or Fed.R.Civ.P. 12(b)(6) or (c). See Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). A complaint is "frivolous under section 1915(e) "where it lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Bilal v. Driver, 251 F.3d 1346, 1349 (11 Cir.), cert. denied, 534 U.S. 1044 (2001). Dismissals on this ground should only be ordered when the legal theories are "indisputably meritless," id., 490 U.S. at 327, or when the claims rely on factual allegations that are "clearly baseless." Denton v. Hernandez, 504 U.S. 25, 31 (1992). Dismissals for failure to state a claim are governed by the same standard as Federal Rule of Civil Procedure 12(b)(6). Mitchell v. Farcass, 112 F.3d 1483, 1490 (11 Cir. 1997)("The language of section 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6)"). In order to state a claim, a plaintiff must show that conduct under color of state law, complained of in the civil rights suit, violated the plaintiff's rights, privileges, or immunities under the

Constitution or laws of the United States. Arrington v. Cobb County, 139 F.3d 865, 872 (11 Cir. 1998).

To determine whether a complaint fails to state a claim upon which relief can be granted, the Court must engage in a two-step inquiry. First, the Court must identify the allegations in the complaint that are not entitled to the assumption of truth. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Twombly applies to §1983 prisoner actions. See Douglas v. Yates, 535 F.3d 1316, 1321 (11 Cir. 2008). These include "legal conclusions" and "[t]hreadbare recitals of the elements of a cause of action [that are] supported by mere conclusory statements." Second, the Court must determine whether the complaint states a plausible claim for relief. Id. This is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." The plaintiff is required to plead facts that show more than the "mere possibility of misconduct." The Court must review the factual allegations in the complaint "to determine if they plausibly suggest an entitlement to relief." When faced with alternative explanations for the alleged misconduct, the Court may exercise its judgment in determining whether plaintiff's proffered conclusion is the most plausible or whether it is more likely that no misconduct occurred.[1]

B. Statement of the Claims

The plaintiff names as defendants Ft. Lauderdale Police Officers Orlando Almanzar, Michael Holdorff, and Paul Rogers. He alleges that on January 17, 2009, he was approached while sitting in his parked vehicle by Holdorff, who requested to see his licence and

[1] The application of the Twombly standard was clarified in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009).

registration. He claims that Haldorff asked him to get out of the car, handcuffed him and told him to sit on the ground. He then allegedly searched his car without consent or probable cause. He asked plaintiff what he was doing in the area and then asked what was in his mouth. Before plaintiff could respond he grabbed him by the neck and began choking him. Almanzar and Rodgers started punching and kicking him and Haldorff tazered him on his left side. Plaintiff states that Almanzar then picked a plastic baggie off the ground which appeared to be cocaine. He was then arrested and charged with possession of cocaine. He claims that on June 25, 2009, the charges were dropped. He seeks monetary damages.

C. Sufficiency of the complaint
Excessive Force

Liberally construing the complaint, Sweeney alleges that the three officers used excessive force during a seizure in violation of his Fourth Amendment rights.

Claims of excessive force by police officers are cognizable under 42 U.S.C. §1983, as are claims that officers who were present failed to intervene. Fundiller v. City of Cooper City, 777 F.2d 1436 (11 Cir. 1985). A claim that a law enforcement officer used excessive force in the course of an arrest, an investigatory stop, or any other seizure of a free citizen is to be analyzed under the Fourth Amendment and its "reasonableness" standard. Graham v. Connor, 490 U.S. 386 (1989)("all claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard"); Ortega v. Schram, 922 F.2d 684, 694 (11 Cir. 1991).

Sweeney states he was choked, kicked and tazered. He has stated minimally sufficient facts under the Twombly or any "heightened pleading" standard so that the excessive use of force claim should proceed against the three officers. A determination of whether the officers might be entitled to qualified immunity cannot be determined at this juncture or upon consideration of a motion to dismiss. Sweeney has not stated the officers be sued in their official capacities, and the complaint is construed as a suit against the defendants in their individual capacities.

Unlawful Search and Seizure

Sweeney also argues that the three officers violated his Fourth Amendment rights by conducting an unlawful search and seizure. As stated by the Eleventh Circuit in U.S. v. Alexander, 835 F.2d 1406, 1408 (11 Cir. 1988), the basic premise of the **search** doctrine is that "searches undertaken without a warrant issued upon probable cause are 'per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions.'" (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). Whether the encounter constitutes a **seizure**, thereby triggering the citizen's constitutional rights, turns on whether a reasonable person would feel free to disregard the police and go about his business. Florida v. Bostick, 501 U.S. 429, 434 (1991). A seizure occurs when a person submits to an officer's show of authority. California v. Hodari D., 499 U.S. 621, 628 (1991).

In this case, Sweeney alleges that the officers handcuffed him while he was attempting to produce his licence and registration. He further alleges that they searched the car without permission. Further, they apparently attempted to forcefully search his person for drugs. Nothing in the complaint suggests that the officers

possessed probable cause or reasonable suspicion. In light of the foregoing, Sweeney alleges sufficient facts under the Twombly standard to permit the unlawful search and seizure claims to proceed against the three officers.

False Arrest

Sweeney asserts that the officers violated his constitutional rights by falsely arresting him. Although a warrantless arrest without probable cause violates a person's constitutionally protected liberty interest, and forms the basis for a section 1983 claim, Marx v. Gumbinner, 950 F.2d 1503, 1505-06 (11 Cir. 1990); Motes v. Meyers, 810 F.2d 1055 (11 Cir. 1987), the Constitution does not guarantee that only the guilty will be arrested, Baker v. McCollan, 443 U.S. 137 (1979), and the existence of probable cause is an absolute bar to a section 1983 action for false arrest. Marx, 950 F.2d at 1506. Moreover, the fact that an arrested individual is ultimately acquitted, or charges against him are dropped, is of no consequence in determining the validity of the arrest. Id. at 1507; Mills v. Town of Davie, 48 F. Supp. 2d 1378, 1380 (S.D. Fla. 1999). Probable cause "requires more than mere suspicion, but does not require convincing proof." Bailey v. Board of County Commiss'rs of Alachua County, 956 F.2d 1112, 1120 (11 Cir. 1992). The definition of probable cause is well established, see, e.g., United States v. Elsoffer, 671 F.2d 775 (11 Cir. 1982), and it has been long recognized that probable cause to arrest exists where the facts and circumstances within an arresting officer's knowledge, and of which he had reasonably trustworthy information, are sufficient for a man of reasonable caution to believe that an offense has been or is being committed. Hunter v. Bryant, 502 U.S. 224, 229 (1991). Moreover, the existence of circumstances in which an arresting officer has only *arguable*

probable cause, if not actual probable cause, is sufficient for a defendant officer to be entitled to qualified immunity. See Lee v. Ferraro, 284 F.3d 1188, 1195 (11 Cir. 2002); Scarborough v. Myles, 245 F.3d 1299, 1302 (11 Cir. 2001). Arguable probable cause exists where reasonable officers in the same circumstances, and possessing the same knowledge as the defendant officer(s) could have believed that probable cause existed to arrest. Scarborough, 245 F.3d at 1302.

Following his arrest, the plaintiff states that the charges were dropped. Although the plaintiff states that a plastic baggie was found on the floor after the assault, the facts contained in the complaint do are not sufficient to establish probable cause to arrest Sweeney at this very early stage. Thus, Sweeney has raised sufficient factual allegations such that his false arrest claim should proceed against the officers beyond this initial screening, as his allegations meet the Twombly standard.

III. Recommendation

1. The excessive use of force claim should proceed against all three officers.

2. The unlawful search and seizure claims proceed against the defendant officers.

3. The unlawful arrest claims proceed against the three officers.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

It is so recommended at Miami, Florida, this 26th day of September, 2011.

UNITED STATES MAGISTRATE JUDGE

cc: Russell Sweeney, Pro Se
Jackson Work Camp
Malone, FL
Address of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61846-CIV-MIDDLEBROOKS

RUSSELL SWEENEY,

Plaintiff,

vs.

ORLANDO ALMANZAR, MICHAEL HOLDORFF,
PAUL ROGERS, of the Fort Lauderdale Police
Department,

Defendants.
_____/

DEFENDANTS ORLANDO ALMANZAR, MICHAEL HOLDORFF AND PAUL ROGERS' ANSWER & AFFIRMATIVE DEFENSES TO PLAINTIFF'S COMPLAINT [DE 1]

Defendants, ORLANDO ALMANZAR ("ALMANZAR"), MICHAEL HOLDORFF ("HOLDORFF") and PAUL ROGERS ("ROGERS") by and through their undersigned counsel, hereby file their Answer and Affirmative Defenses to Plaintiff's RUSSELL SWEENEY'S ("SWEENEY") Complaint [DE 1], and state as follows:

1. ALMANZAR, HOLDORFF and ROGERS deny each and every allegation contained within SWEENEY'S Complaint [DE 1] and demand strict proof thereof.

AFFIRMATIVE DEFENSES

2. ALMANZAR, HOLDORFF and ROGERS allege and assert that they are entitled to qualified immunity because they did not act in any way that would violate any clearly established rights guaranteed to SWEENEY under the Constitution of the United States and/or under any statutory law, of which a reasonable person and/or reasonable police officer would have known.

2. ALMANZAR, HOLDORFF and ROGERS allege and assert that, at all times material, they had probable cause and/or arguable probable cause, and/or reasonable suspicion, and a duty, as well as lawful authority, to stop, detain, search, and/or arrest SWEENEY.

3. ALMANZAR, HOLDORFF and ROGERS allege and assert that the actions taken by them, including any alleged use of force, with regard to the apprehension and arrest of SWEENEY, were reasonable upon objective evaluation and not so grossly disproportionate to the need to take those actions so as to warrant recovery pursuant to 42 U.S.C. § 1983.

4. ALMANZAR, HOLDORFF and ROGERS allege and assert that, at all times material, they used only such force as was reasonable or necessary under the circumstances.

5. ALMANZAR, HOLDORFF and ROGERS allege and assert that SWEENEY unjustifiably resisted lawful arrest with and/or without violence as prohibited by § 776.051, § 843.01, and/or § 843.02, Fla.Stat.

6. ALMANZAR, HOLDORFF and ROGERS allege and assert that, at all times material, they used only such alleged force as was justifiable as enumerated in § 776.05, § 776.051, and § 776.07, Fla.Stat., i.e., pursuant to arrest, in self defense, in the protection of others, and/or in attempts to prevent an escape.

7. ALMANZAR, HOLDORFF and ROGERS allege and assert that SWEENEY's conduct is the sole cause of his alleged injuries and damages, if any.

8. ALMANZAR, HOLDORFF and ROGERS allege and assert that SWEENEY has failed to mitigate his alleged damages.

DEMAND FOR ATTORNEY'S FEES

9. ALMANZAR, HOLDORFF and ROGERS further demand reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988, should they prevail in this action.

RESERVATION OF RIGHTS

10. ALMANZAR, HOLDORFF and ROGERS reserve the right to amend and supplement these affirmative defenses adding such affirmative defenses as may appear to be appropriate upon further discovery being conducted in this case.

WHEREFORE, having fully answered SWEENEY's Complaint [DE 1], ALMANZAR, HOLDORFF and ROGERS pray they be dismissed with prejudice and costs and fees awarded to ALMANZAR, HOLDORFF and ROGERS.

Dated: October 24, 2011
Fort Lauderdale, Florida

Respectfully submitted,

s/Robert H. Schwartz

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Robert H. Schwartz
ROBERT H. SCHWARTZ

SWEENEY V. ALMANZAR, HOLDORFF and ROGERS
Case No. 11-61846-CIV-MIDDLEBROOKS

SERVICE LIST

Russell Sweeney, *Pro Se*
DC#096670
Jackson Work Camp
5607 Highway 71 North
Malone, Florida 32445
Pro Se Plaintiff
[via Regular U.S. Mail]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61846-CIV-MIDDLEBROOKS
MAGISTRATE JUDGE P. A. WHITE

RUSSELL SWEENEY, :

Plaintiff, :

v. :

ORLANDO ALMANZAR, et al., :

Defendants. :

ORDER SCHEDULING PRETRIAL PROCEEDINGS WHEN PLAINTIFF IS PROCEEDING PRO SE

The plaintiff in this case is incarcerated, without counsel, so that it would be difficult for either the plaintiff or the defendants to comply fully with the pretrial procedures required by Local Rule 16.1 of this Court. It is thereupon

ORDERED AND ADJUDGED as follows:

1. All discovery methods listed in Rule 26(a), Federal Rules of Civil Procedure, shall be completed by **February 21, 2012.** This shall include all motions relating to discovery.

2. All motions to join additional parties or amend the pleadings shall be filed by **March 6, 2012.**

3. All motions to dismiss and/or for summary judgment shall be filed by **March 27, 2012.**

4. On or before **April 10, 2012,** the plaintiff shall file with the Court and serve upon counsel for the defendants a document called "Pretrial Statement." The Pretrial Statement shall contain the following things:

(a) A brief general statement of what the case is about;

(b) A written statement of the facts that will be offered by oral or documentary evidence at trial; this means that the plaintiff must explain what he intends to prove at trial and how he intends to prove it;

(c) A list of all exhibits to be offered into evidence at the trial of the case;

(d) A list of the full names and addresses of places of employment for all the non-inmate witnesses that the plaintiff intends to call (the plaintiff must notify the Court of any changes in their addresses);

(e) A list of the full names, inmate numbers, and places of incarceration of all the inmate witness that plaintiff intends to call (the plaintiff must notify the Court of any changes in their places of incarceration); and

(f) A summary of the testimony that the plaintiff expects <u>each</u> of his witnesses to give.

5. On or before **April 24, 2012,** defendants shall file and serve upon plaintiff a "Pretrial Statement," which shall comply with paragraph 4(a)-(f).

6. Failure of the parties to disclose fully in the Pretrial Statement the substance of the evidence to be offered at trial may result in the exclusion of that evidence at the trial. Exceptions will be (1) matters which the Court determines were not discover-

able at the time of the pretrial conference, (2) privileged matters, and (3) matters to be used solely for impeachment purposes.

7. If the plaintiff fails to file a Pretrial Statement, as required by paragraph 4 of this order, paragraph 5 of this order shall be suspended and the defendants shall notify the Court of plaintiff's failure to comply. The plaintiff is cautioned that failure to file the Pretrial Statement may result in dismissal of this case for lack of prosecution.

8. The plaintiff shall serve upon defense counsel, at the address given for him/her in this order, a copy of every pleading, motion, memorandum, or other paper submitted for consideration by the Court and shall include on the original document filed with the Clerk of the Court a certificate stating the date that a true and correct copy of the pleading, motion, memorandum, or other paper was mailed to counsel. All pleadings, motions, memoranda, or other papers shall be filed with the Clerk and must include a certificate of service or they will be disregarded by the Court.

9. A pretrial conference may be set pursuant to Local Rule 16.1 of the United States District Court for the Southern District of Florida, after the pretrial statements have been filed. Prior to such a conference, the parties or their counsel shall meet in a good faith effort to:

(a) discuss the possibility of settlement;

(b) stipulate (agree) in writing to as many facts and issues as possible to avoid unnecessary evidence;

(c) examine all exhibits and documents proposed to be used at the trial, except

that impeachment documents need not be revealed;

(d) mark all exhibits and prepare an exhibit list;

(e) initial and date opposing party's exhibits;

(f) prepare a list of motions or other matters which require Court attention; and

(g) discuss any other matters that may help in concluding this case.

10. All motions filed by defense counsel must include a proposed order for the undersigned Magistrate Judge's signature.

DONE AND ORDERED at Miami, Florida, this 25th day of October, 2011.

s/Patrick A. White
UNITED STATES MAGISTRATE JUDGE

cc: Russell Sweeney, Pro Se
DC #096670
Jackson Work Camp
5607 Highway 71 North
Malone, FL 32445

Robert H. Schwartz, Esquire
McIntosh Schwartz P.L.
888 S.E. Third Avenue
Suite 500
Fort Lauderdale, FL 33335-9002

Hon. Donald M. Middlebrooks, United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11 CV 61846 DMM

The attached hand-written document has been scanned and is also available in the SUPPLEMENTAL PAPER FILE

FILED by ___ D.C.
NOV 17 2011
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA - MIAMI

United States District Court
Southern District of Florida

Case No. 11-61846-Civ-MiddleBrooks

Russell Sweeney,
Plaintiff,

vs.

Orlando Almanzar, et al.,
Defendants.

NOV 14 2011

Response to Defendants' first Request for Production

Plaintiff, Russell Sweeney, Pro Se, pursuant to Fed. R. Civ. P. 34 and local rule 26.1, responds to Defendants' first request for Production

(1) Plaintiff is incarcerated within the Florida Department of Corrections and not allowed to have in his Possession or custody any of the documents or records requested in regards to Paragraph 1.

(2) None.

(3) None.

(4) Unable to Provide said documents due to his incarceration.

(5) Incarcerated.

(6) See January 17, 2009, Complaint affidavit, Probable Cause affidavit, Offense incident report,

Supplement Report and discovery in case Number: 09000986CF10A, Judge R. Powell, 17th Judicial Circuit, Broward County, Fla.

(7) Same response as Paragraph - 6.

(8) Same response as Paragraph - 6.

(9) Same response as Paragraph - 6.

(10) Same response as Paragraph - 6.

(11) Same response as Paragraph - 6.

(12) Same response as Paragraph - 6.

(13) Same response as Paragraph - 6.

(14) Same response as Paragraph - 6.

(15) Same response as Paragraph - 6.

(16) Same response as Paragraph - 6.

(17) Same response as Paragraph - 6.

(18) Same response as Paragraph - 6.

(19) Same response as Paragraph - 6.

(20) Same response as Paragraph - 6.

(21) Same response as Paragraph - 6.

(22) See Doc Web Cite: www.de.state.fl.us.

(23) Same response as Paragraph - 6.

(24) Same response as Paragraph - 6.

(25) Same response as Paragraph - 6.

Respectfully Submitted,

/S/ Russell Sweeney

Russell Sweeney 096670

Certificate of Service

I hereby Certify that a true and correct copy of the foregoing has been furnished by U.S. mail to: Robert A. Schwartz and McIntosh, Schwartz, P.L., 888 S.E. 3rd Ave. Suite 500, Ft. Lauderdale, Fl. 33316 this day of Nov 14, 2011

/S/ Russell Sweeney

Russell Sweeney 096670
Jackson Work Camp
5607 Hwy. 71 North
Malone, Fla. 32445

NOV 14 2011

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61846-CIV-MIDDLEBROOKS/WHITE

FILED by ____ D.C.
JAN 17 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. – W.P.B.

RUSSELL SWEENEY

Plaintiff,

v.

ORLANDO ALMANZAR, *et al.*,

Defendants.

_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE is before the Court upon the Report and Recommendation (DE 8) of Magistrate Judge Patrick A. White, filed September 26, 2011. The Court notes that no objections to the Report have been filed, and the time for filing such objections has passed. The Court notes that even though Defendants were not served until October 3, 2011; as of today, none of the Defendants have filed an objection. As no timely objections were filed, the Magistrate Judge's factual findings in the Report are hereby adopted and deemed incorporated into this opinion. *LoConte v. Dugger*, 847 F.2d 745, 749-50 (11th Cir. 1988), *cert. denied*, 488 U.S. 958 (1988); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

Although no timely objections were filed, the Court has conducted an independent *de novo* review of the Report and record and is otherwise fully advised in the premises. The Court agrees with the Magistrate's conclusion that for the limited purpose of an initial screening of Plaintiff's Complaint pursuant to 28 U.S.C. § 1915, Plaintiff has alleged a claim of due process violation

pursuant to 42 U.S.C. § 1983.

For the reasons stated in the Report of the Magistrate Judge and upon an independent review of the file, it is hereby

ORDERED AND ADJUDGED that United States Magistrate Judge White's Report (DE 8) is **RATIFIED, ADOPTED, AND APPROVED** in its entirety.

It is further

ORDERED AND ADJUDGED that Plaintiff's claims against Defendants may proceed.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 17 day of January, 2012.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Magistrate Judge White;
All Counsel of Record;
Russell Sweeney, *pro se*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 11cv 61846 DMM

The attached hand-written document has been scanned and is also available in the SUPPLEMENTAL PAPER FILE

FILED by AO D.C.
FEB 06 2012
STEVEN M. LARIMORE
CLERK U. S. DIST. CT.
S. D. of FLA. – MIAMI

United States District Court
Southern District of Florida

Russell Sweeney,
Plaintiff,

vs.

Case No.# 11-61846-Civ-Middlebrooks
Magistrate Judge P.A. White

Orlando Almanzar, et al.,
Defendant

Pretrial Statement

Russell Sweeney, Defendant, Pro Se, Pursuant to Rule 26(a) Federal Rules of Civil Procedure, files his Pretrial Statement as followed:

(A) This Case is about the Violation of Plaintiff's Civil and Constitutional Rights where Defendants falsely Arrested and Imprisoned Plaintiff, Used Unnessary Force and Committed battery upon the

(B) The facts are that on 1-17-2009, defendants falsly Arrested Plaintiff and while he was handcuffed and apprehended. Defendant searched his Vehicle without Permission or consent and during the course of the Plaintiff's Arrest, he was choked, Punched, Kicked and tampered without cause and Defendants planted evidence on Plaintiff to wit: Cocaine. Plaintiff Intends to Prove These Facts by all record evidence on file and Relevant to his Criminal case. # 09000996CF10 A

(C) List of Exhibits:

(1.) 1-17-2009 Arrest Affidavit Report and Summary

(2.) Information (Charged Offense)

(3.) All filed discovery in the Plaintiff Criminal Proceedings in case No. #09000496 CF10A

(4.) All Photographs, Tapes and Evidence in Case No. #09000996CF10A

(D.) Witnesses To Be Called:

(1.) Ettonberg, Debra
address To Be Provided

(2.) Gattorno, Janet
204 S.E. 6th St.
Crime Lab
Ft. Lauderdale, Fl. 33301

(E) N/A

(F) All Aforementioned Witnesses Will Testify To Plaintiff's 1-17-2009 Arrest and Evidence Seized and Prints Taken.

Certificate of Service

I Hereby Certify That a True and Correct Copy of the Foregoing has Been Furnished by U.S. Mail To: Robert H. Schwartz, Attorney for Defendants, 888 S.E. 3rd Ave. Suite 500, Ft. Lauderdale Fl. 33316 This 30 day of January, 2012.

/S/ Russell Sweeney #096670
Jackson Work Camp.
5697 Hwy 71 North
Malone, Fl. 32445

PROVIDED TO
JACKSON W.C. ON
JAN 30 2012
FOR MAILING

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 11-61846-CIV-MIDDLEBROOKS

RUSSELL SWEENEY,

Plaintiff,

vs.

ORLANDO ALMANZAR, MICHAEL HOLDORFF,
PAUL ROGERS, of the Fort Lauderdale Police
Department,

Defendants.
_____/

DEFENDANTS' PRETRIAL STATEMENT

Defendants, ORLANDO ALMANZAR ("ALMANZAR"), MICHAEL HOLDORFF ("HOLDORFF"), and PAUL ROGERS ("ROGERS"), by and through their undersigned counsel, and pursuant to the Court's Order Scheduling Pretrial Proceedings When Plaintiff is Proceeding Pro Se, dated October 25, 2011 [DE 16], hereby file their Pretrial Statement:

A. Brief General Statement of the Case

This is a claim against Fort Lauderdale Police Officers ALMANZAR, HOLDORFF and ROGERS alleging unlawful arrest, unlawful search and seizure and excessive use of force.

B. Written Statement of the Facts to be Offered at Trial

The Plaintiff, RUSSELL SWEENEY ("SWEENEY") alleges that on January 17, 2009, he was approached while sitting in his vehicle by Officer HOLDORFF. HOLDORFF requested to see his license and registration and he alleges that HOLDORFF requested that he get out of his vehicle. Subsequently he alleges that he was handcuffed and told to sit on the ground. SWEENEY then

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alleges that his car was searched without his consent or without probable cause and that he was asked what he was doing in the area and what he had in his mouth. He further alleges that ALMANZAR and ROGERS battered him and that he was tasered by HOLDORFF. He then alleges that ALMANZAR found a plastic baggie of cocaine near his person on the ground and that he was arrested and charged with possession of cocaine. He alleges that on June 25, 2009 the charges were dropped and that he seeks monetary damages.

Officer HOLDORFF alleges that on January 17, 2009 at 4:45 a.m. he responded to 2300 West Broward Boulevard in response to a call for service. The call indicated that Debra Erronberg was being held against her will by a black male in a Chevrolet Pick-Up Truck. Contact with made with Erronberg who was incoherent and appeared to be intoxicated. While talking with Erronberg HOLDORFF noticed a black Chevrolet Pick-Up Truck pulled into the parking lot. The truck and its driver were identified by Erronberg. Contact was made with SWEENEY and HOLDORFF asked SWEENEY for identification, registration and insurance. RUSSELL produced a Florida driver's license and registration indicating that the vehicle belonged to him. HOLDORFF noticed a small plastic baggie with white powder residue on the driver's side floor and, at that point, directed SWEENEY to exit the vehicle and sit on the ground near the left rear wheel of the vehicle. HOLDORFF recovered the baggie which tested positive for cocaine.

During further questioning HOLDORFF observed a small baggie inside SWEENEY's mouth and HOLDORFF attempted to force SWEENEY to spit the drugs out. SWEENEY attempted to get up from his seated position and Officer ALMANZAR and HOLDORFF rolled him on his stomach but he refused to place his hands behind his back. He was commanded to place his hands behind his back and stated that he was under arrest. SWEENEY resisted and HOLDORFF attempted to tase him. After a brief struggle SWEENEY was placed into custody and the cocaine was taken into

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evidence.

A Probable Cause Affidavit was prepared charging SWEENEY with possession of cocaine.

C. Exhibit List

1. 1-17-2009 Arrest Affidavit Complaint and Summary of Plaintiff's Arrest in Case No. 09000996CF10A.

2. Any and all discovery submitted in Case No. 09000996CF10A regarding all criminal proceedings in the aforementioned case.

3. All sworn statements or admissions given by ALMANZAR, HOLDORFF, ROGERS, Debra Erronberg and Janet Gattorno to Defendant's arrest on 1/17/2009 and Case No. 11-61846-CIV and Criminal Case No. 09000996CF10A.

4. Any and all photographs, tapes and all evidence in regards to the Criminal discovery pursuant to Fla.R.Crim.P 3.220 and in regard to Case No. 09000996CF10A.

5. All evidence taken from SWEENEY will be offered at trial.

6. Any and all exhibits listed by SWEENEY.

7. Rebuttal exhibits;

8. Impeachment exhibits;

9. Defendants reserve the right to amend their list of exhibits upon proper notice to SWEENEY.

D. Witness List

1. Officer Orlando Almanzar
   Can and should be contacted through:
   c/o McIntosh Schwartz, P.L.
   888 SE 3rd Avenue, Suite 500
   Fort Lauderdale, FL 33316

2. Officer Michael Holdorff
   Can and should be contacted through:
   c/o McIntosh Schwartz, P.L.
   888 SE 3rd Avenue, Suite 500
   Fort Lauderdale, FL 33316

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3. Officer Paul Rogers
   Can and should be contacted through:
   c/o McIntosh Schwartz, P.L.
   888 SE 3rd Avenue, Suite 500
   Fort Lauderdale, FL 33316

4. Any and all listed by SWEENEY.

5. Impeachment Witnesses

6. Rebuttal Witnesses

7. ALMANZAR, HOLDORFF and ROGERS reserve the right to amend their list of witnesses upon proper notice to SWEENEY.

E. Inmate Witness List

None

F. Summary of Testimony of Witnesses

The testimony of ALMANZAR, HOLDORFF and ROGERS would be consistent with the Statement of Facts contained in sub-paragraph B.

Dated: April 26, 2012
Fort Lauderdale, Florida

Respectfully submitted,

s/Robert H. Schwartz

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/Robert H. Schwartz
ROBERT H. SCHWARTZ

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SWEENEY V. ALMANZAR, HOLDORFF and ROGERS
Case No. 11-61846-CIV-MIDDLEBROOKS

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