

appearance was filed by Attorney Feola-Guerrieri on behalf of Defendant Rovella in his official and individual capacities (Doc. No. 12). Attorney Harris filed a notice of appearance on behalf of Defendant Coates, Foley, O'Brien, Spell as well as all John Doe Defendants in their official and individual capacities as appropriate (Doc. No. 14).

On December 18, 2015 Attorney Harris filed a Motion to Dismiss on Behalf of The Defendants Foley, O'Brien, Coates, Spell and John Doe officers 1-6 (Doc. No. 45) as well as a Memorandum of Law in Support (Doc. No. 45-1). This response now follows.

II Standard of Law for Motion to Dismiss

a) F.R.C.P. 12(b)(6)

“For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted...And, the complaint is to be liberally construed in favor of plaintiff. See Fed.Rule Civ.Proc. 8(f); ...The complaint should not be dismissed unless it appears that appellant could ‘prove no set of facts in support of his claim which would entitle him to relief.’ *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 1849, 23 L. Ed. 2d 404 (1969) (Internal citation omitted; internal quotations omitted).

In deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court takes the allegations of the Amended Complaint as true and construes them in a manner favorable to the plaintiff. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 587 (1984); *Fulton v. Goord*, 591 F.3d, 41 (2d Cir.2009); *Phelps v. Kapnolas*, 308 F.3d 180, 184 (2d Cir.2002). The court must draw all reasonable inferences in favor of the plaintiff as the nonmoving party. *See, e.g., Yung v. Lee*, 432 F.3d 142, 146 (2d Cir.2005).

The Court must begins its analysis by “ ‘identifying pleadings that, because they are no more than conclusions, are not entitled to the assumptions of truth.’ “ *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir.2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 1950

(2009)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir.2009). Next, the court must “determine whether the ‘well-pleaded factual allegations,’ assumed to be true, ‘plausibly give rise to an entitlement of relief.’” *Hayden*, 594 F.3d at 161 (quoting *Iqbal*, 556 U.S. at 677–78).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556).

“As granting a motion to dismiss is a harsh remedy, it must be cautiously studied, both to effectuate the spirit of the liberal rules of pleading and to protect the interests of justice.” *Carlson v. U.S. ex rel. U.S. Postal Serv.*, 248 F. Supp. 2d 1040, 1043 (N.D. Okla. 2003)

III Argument

a) Motion to Dismiss against the John Doe Officers

The Plaintiffs do not dispute that the John Doe officers were not named or served within the time required by F.R.C.P. 4(m)¹. The Plaintiffs have been reviewing the voluminous responses to interrogatories provided by Defendant Rovella on February 29, 2015. The interrogatories directed to Sgt. Spell have not been responded to as of yet.

As to the assertions in the Defendants’ memorandum as to the fault of the Plaintiffs for not naming and serving the John Doe Defendants, the video taken by the plaintiff is not of sufficient

¹ Fed. R. Civ. P. 4 (m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court -- on motion or on its own after notice to the plaintiff -- must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A).

quality to identify officers from any name tags on the officer's uniforms. Additionally, the police reports provided do not reflect any officers had contact with the Plaintiffs.

The police reports related to the Park Street Homicide on September 12, 2014 do not state any officer was ordered to expand the crime scene around the area of the intersection of Park & Hungerford so that the Plaintiff would be able to identify these officers from actions described in reports².

Plaintiffs's sent to Defendant Rovella interrogatories on December 29, 2015 requesting:

- 8. Please identify the HPD personnel who participated the incident described in the complaint occurring at:**
 - a. 519 Park Street, Hartford, Connecticut on September 12, 2014, at approximately 9:20 p.m. ("Park Street Incident").**
 - b. 38 Kelsey Street, Hartford, Connecticut on August 7, 2015 at approximately 9:20 p.m. ("Kelsey Street Incident").**

The response provided February 29, 2015 was:

Please refer to all individuals identified in the Defendant's Initial Disclosures and any other individuals who are identified in the police reports associated with these incidents provided hereto. With regard to the Kelsey Street incident, the State Police are currently investigating this matter and therefore only limited information is available to be produced.

These answers do not adequately respond to the interrogatory promulgated in that they do not identify the John Doe HPD officers described in the complaint. Discovery and depositions have not yet been completed; therefore, while the Plaintiffs know the names of all the officers who may have participated, they do not know yet which HPD officers are the tortfeasors.

If the court dismisses the counts against John Doe defendants who have yet to be identified and served, Plaintiffs ask it be without prejudice as the matter is still well within the statute of limitations for a 1983 action³ and permit a summons to issue once the tortfeasors are

² Responses to interrogatories and reports provided in response to interrogatory 8a and 8b are attached as Ex-1.

³ "Accordingly, § 52-577 should have been applied to plaintiffs' claims under § 1983. Since § 52-577 provides a three-year period of limitations, plaintiffs' claims were not barred." *Lounsbury v.*

identified through depositions. "Absent perfected service, a court lacks jurisdiction to dismiss an action with prejudice; therefore dismissal pursuant to Rule 12(b)(5) must be without prejudice." *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 431-32 (S.D.N.Y. 2009);

b) First Amendment

The gravamen of the Defendants claim is that the Plaintiffs were treated in the same manner as the general public; therefore, the Plaintiffs have no first amendment claim. The facts of the incidents before this court give lie to that assertion and the Plaintiffs will address each incident ad seriatim.

i) Park Street

When the Peruta arrived at the Park Street incident and began recording the scene from a vantage point outside the crime scene border in a parking lot across the street from the crime scene. Upon beginning to record⁴ he was immediately observed by Sgt. Spell. The very first words on Clip #1 are, "The camera, move him back."⁵ Although the transcript lists the speaker as an "Unidentified Male"⁶ Peruta's affidavit accompanying this memorandum identifies the voice as that of Sergeant Spell⁷ of the HPD.

It is without question, "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded..." *Branzburg v. Hayes*, 408 U.S. 665, 684-85, 92 S. Ct. 2646, 2658, 33 L. Ed. 2d 626 (1972); however, it is also without question that newsmen have no less access than that of the general public.

Peruta then moved north from the parking lot across the street from the homicide to the

Jeffries, 25 F.3d 131, 134 (2d Cir. 1994)

⁴ Video Clips of the Park Street Homicide #1 through #19 are filed manually on CD as they are unable to be uploaded for filing.

⁵ Transcription of Park Street Homicide, Clips #1, Page 2:1-3 Attached as Ex-2; See also Park Street Video Clip #1 (Filed Manually on CD)

⁶ Id.

⁷ Affidavit of Edward Peruta identifying Sgt. Spell, Attached as Ex-3

corner of Park Street and Hungerford⁸ where he positioned himself outside of the crime scene border and recorded more footage of the scene of the homicide.

Upon observing numerous individuals outside of the crime scene border who were observing the activities of the crime scene⁹ Peruta joined them and remained at the that location recording the activities inside the crime scene border¹⁰. Peruta and at least nine members of the public remained in the vicinity of the north side of Park Street near its intersection with Hungerford Street outside crime scene border. Members of the public walked freely and unimpeded on the street near the corner convenience store at the intersection of Park Street and Hungerford Street that remained open for business without interference from the HPD officers. Members of the public were walking, shopping, observing and observed by the HPD.¹¹

Peruta is then noticed by Sgt. Spell¹² which shows Sgt. Spell wearing a white shirt standing calmly in the cordoned area designated as a crime scene until he became aware that Peruta is videotaping HPD activities of public concern and interest inside the crime scene border. At this point his body language changes significantly. Sgt. Spell points directly at the camera¹³ and instructs HPD Officers to, “Push them out of here.”¹⁴

The Sgt. Spell then begin directing Peruta and the General public towards the area where a homicide suspect was believed to have run – North on Hungerford Street¹⁵ - under threat of arrest¹⁶.

⁸ Park Street Video Clips #3-4 (Filed Manually on CD); See also Complaint (Doc. No. 1) ¶ 51

⁹ Park Street Video Clip #6 - 7 (Filed Manually on CD)

¹⁰ Park Street Video Clips #8 – 11 (Filed Manually on CD)

¹¹ Id.

¹² Park Street Video Clips #11 – 12 (Filed Manually on CD)

¹³ Park Street Video Clip 12 (Filed Manually on CD)

¹⁴ Transcription of Park Street Homicide, Clip #13, Page 4:8-10,; See also Park Street Video Clips 12-13 (Filed Manually on CD) – Affidavit of Peruta identifies this voice as the voice of Sgt. Spell.

¹⁵ Park Street Video Clip 14 (Filed Manually on CD); See also Report No. 14-30263 by Officer L. Bradford, Page 1 of 2 – Attached as EX-4

¹⁶ Transcription of Park Street Homicide, Clip #14, Page 4:15-17

Sgt. Spell states very clearly why he is ordering Peruta and the members of the general public to move from that location and is had nothing to do with public safety or concerns about another shooter. Sgt. Spell stated “You're not going to film a dead body.”¹⁷ then took action to put that into effect. “The First and Fourteenth Amendments bar government from interfering in any way with a free press.” *Pell v. Proconier*, 417 U.S. 817, 834, 94 S. Ct. 2800, 2810, 41 L. Ed. 2d 495 (1974). While the Constitution does not, “...require government to accord the press special access to information not shared by members of the public generally.” *Id.* it does prohibit retaliatory actions based on First Amendment grounds.

To prevail on a free speech claim, a plaintiff must prove, “(1) he has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by his exercise of that right; and (3) defendants' actions effectively chilled the exercise of his First Amendment right.” *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001); See also *Connell v. Signoracci*, 153 F.3d 74, 79 (2d Cir.1998).

No one can make a colorable claim that the Plaintiffs, a journalist and media corporation, do not have an interest protected by the First Amendment. “We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.” *Branzburg*, at 681.

It cannot be seriously argued that stopping the gathering of news under threat of arrest is the chilling free speech. “Speech is chilled when one refrains from speaking rather than risk prosecution.” *Students for Life USA v. Waldrop*, No. CV 14-0157-WS-B, 2016 WL 707028, at *24 (S.D. Ala. Feb. 22, 2016). “[W]here a speaker exists ... the protection afforded [by the First

¹⁷ Transcription of Park Street Homicide, Clip #17, Page 6:9; see also Park Street Video Clip # 17 (Filed Manually on CD))

Amendment] is to the communication, to its source and to its recipients both.” *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756, 96 S.Ct. 1817, 1823, 48 L.Ed.2d 346 (1976).

Sgt. Spell intended to, and did in fact, prevent American New and Peruta from filming a dead body on the streets of Hartford, a clear matter of public interest *because* it was matter of public interest. “The commission of a crime, especially ...violent murder ...is a matter of public interest as a matter of law.” *Lamonaco v. CBS, Inc.*, No. CIV. A. 93-1975(DRD), 1993 WL 556536, at *7 (D.N.J. July 29, 1993) *aff’d*, 27 F.3d 557 (3d Cir. 1994)

Sgt. Spell’s actions were motivated or substantially caused by the Plaintiffs exercising their First Amendment right to gather news. “[N]ews gathering is not without its First Amendment protections...” *Branzburg*, at 707 for “without some protection for seeking out the news, freedom of press could be eviscerated,” *id.*, at 681. “Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.” *Id.*, at 707-08.

The Defendants cannot credibly claim that the Plaintiffs were treated differently than members of the general public when the reason for the HPD expanding the crime scene border to move the Plaintiffs and the general public was the exercise of protected first amendment activity – news gathering.

The reason for expanding the crime scene border and driving the Plaintiffs and the general public in the direction a gunman was thought to have run is clearly states by Sgt. Spell, “You're not going to film a dead body.”¹⁸

ii) Kelsey Street

¹⁸ Transcription of Park Street Homicide, Clip #17, Page 6:9; see also Park Street Video Clip # 17 (Filed Manually on CD)

At approximately 8:30 p.m. on August 7, 2015, Peruta was located in the parking lot of the Dunkin Donuts™ on Washington Street in the vicinity of Hartford Hospital monitoring the public safety scanner for breaking news events. Peruta heard the initial dispatch over the scanner for a mental health disturbance at 38 Kelsey Street. Peruta arrived and parked his car, then exited his vehicle upon arrival on the west, southbound side of Kelsey Street across from 38 Kelsey Street which is a public roadway that runs in the north and south directions. 38 Kelsey Street is a single family residence on the east side of the street.

Upon arriving Peruta immediately noticed a male standing in the yard and a female sitting on a porch step of the private residence on the west side of Kelsey Street just north of 38 Kelsey Street and that members of the public were moving freely on the west side of Kelsey Street in the area across from 38 Kelsey Street where Peruta was located. Peruta was wearing a News Media baseball hat on his head, American News press credentials around his neck, and a handgun openly and lawfully carried pursuant to General Statutes §29-28(b) and secured in his shoulder holster.

From his location Peruta had clear-sight to the rear open doors of the ambulance parked in front of 38 Kelsey Street and the interior entryway and stairs through the open front doors of 38 Kelsey Street. Peruta began to record the crime scene and HPD activities occurring at and near 38 Kelsey Street in north and south directions paralleling the residence and not extending to the west beyond the front porch.

As Peruta began to videotape¹⁹ and otherwise record and gather information about HPD activities of public concern and interest the on-scene supervisor, Sgt. Spell, ordered HPD officers to expand the cordoned area outward from the 38 Kelsey Street residence front porch rail to the sidewalk in front of 38 Kelsey Street in north and south directions, erect a new cordon in an east

¹⁹ Video Clips of the Kelsey Street Incident #6 through #34 are filed manually on CD as they are unable to be uploaded for filing.

to west direction across Kelsey Street to the south of where Peruta was positioned and ordered HPD officers to erect a new cordon in an east to west direction across Kelsey Street to the north of where Peruta was positioned.

In doing so Sgt. Spell cordoned Peruta in a three-sided area with tape to Peruta's east, north, and south and the public able to move freely within the three-sided cordoned area on the open west side of the street where Peruta stood. At this time Officer John Doe #6 threatened to arrest Peruta for trespass if Peruta did not remove himself from the location across from 38 Kelsey Street to the other side of either the cordon extending from east to west across Kelsey Street to the north of Peruta or the cordon extending east to west across Kelsey Street to the south of Peruta; however, individuals whom Peruta had observed upon his arrival in the yard and on the front step of a residence across from and just north of 38 Kelsey Street were not ordered to leave or to go into their home.

At all relevant times Peruta's handgun, carried lawfully and exposed to a permit issued under General Statutes §29-28(b), was visible to HPD officers who did not even remark on same²⁰. The defendant's reference to same in their memorandum of law²¹ is therefore irrelevant.

Peruta was treated differently than members of the general public and was not afforded the same access to information as the general public. "Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded..." *Branzburg*, at 684-85; however, when the general public is not excluded, to exclude the media is a violation of the First Amendment. "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter... would have no justification." *United States v. Cutler*, 6 F.3d 67, 72 (2d Cir. 1993) citing *Branzburg*, at 707-708.

²⁰ See Transcript of the Raw Video Clips 6 through 39 attached as EX-5 as well as the Raw Video Clips submitted manually accompanying this memorandum

²¹ Doc. No. 45-1, Page 9

“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” *Branzburg* at 684, it must logically follow that newsmen have no less access than that of the general public.

Peruta does not have the right to access all sources of information within government control; however, what occurs in public is fair game for reporting. If a police encounter occurs in an, “...open public place ...within the view of persons other than law enforcement officers...” *United States v. Spence*, 397 F.3d 1280, 1283 (10th Cir. 2005) courts are more likely to view an encounter as consensual for Fourth Amendment purposes. This court should do no less for the First Amendment.

We start with the news articles. A trial is a public event. *What transpires in the court room is public property.* If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity.*” *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 1254, 91 L. Ed. 1546 (1947) (Emphasis added).

Plaintiffs were denied access to events occurring in public. These events were of public interest. “The commission of a crime, especially ...violent murder ...is a matter of public interest as a matter of law.” *Lamonaco*, supra.

Plaintiffs were threatened with arrest in the course of same by the HPD when no cause existed to do so²². The expansion of the crime scene border at the command of Stg. Spell was, “Official harassment of the press undertaken not for purposes of law enforcement.” *Branzburg*, at 707.

²² The defendants have not alleged the Plaintiffs violated any statute which would have given arguable probable cause to permit HPD officers to arrest the Plaintiffs. The Plaintiffs assert same did not exist and the threat to arrest the Plaintiffs was made in bad faith for the purpose of harassment.

IV. Conclusion

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, at 678. The Plaintiffs have set forth a claim with facial plausibility.

“The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678. The Plaintiffs have more than met the standard for pleading elucidated in *Iqbal*. The motion to dismiss pursuant to Rule 12(b)(6) should be denied for the reasons stated above.

RESPECTFULLY SUBMITTED
THE PLAINTIFFS

BY: /s/ Mitchell Lake
Mitchell Lake (ct28715)
Rachel M. Baird & Associate
15 Burlington Road
Harwinton, CT 06791
Tel: (860) 605-9340
Fax: (860) 605-9343
Email: Mike@rachelbairdlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the date first above a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's system.

/s/ Mitchell Lake
Mitchell Lake
Commissioner of the Superior Court