**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| **MATTHEW AUGUST LeFANDE**<br><br>**Plaintiff**<br><br>**v.**<br><br>**CAROLYN ANNE MISCHE-HOEGES**<br><br>**Defendant** | **Civil Action Number**<br>**1:10-cv-01857(HHK)** |

## OPPOSITION TO MOTION FOR AWARD OF ATTORNEY'S FEES

Plaintiff Matthew LeFande hereby opposes the Defendant Carolyn Mische-Hoeges's Motion for Award of Attorney's Fees (Docket # 19). Mische-Hoeges yet again rehashes her completely unsupported blustery Motion to Dismiss already twice filed before this Court (Docket # 4 and # 5). Mische-Hoeges's 155 page filing, nearly identical to her previous filings of the Motion to Dismiss and Motion for Rule 11 Sanctions (Docket #12) serves no function other than distract away from the plainly evident facts that neither Mische-Hoeges nor the United States Attorney have ever offered substantive argument refuting LeFande's legal contentions and that the issue of probable cause for LeFande's arrest remains without a definitive decision by the District of Columbia courts.

This Court's decision, without explanation, to dismiss LeFande's 42 U.S.C. § 1983 claim is clearly antagonistic with well established Federal notice pleading requirements and such controlling caselaw that states that allegations of abuse of

governmental authority must be examined "in light of the totality of surrounding circumstances", Martinez v. Colon, 54 F.3d 980, 987 (1st Cir. 1995). Absent any definitive decision upon the merits of LeFande's claim of the absence of probable cause for his arrest, or even a compelling argument in opposition thereto by any party, and absent the fact-intensive inquiry required to determine if Mische-Hoeges abused her authority to have LeFande arrested, this Court cannot find that LeFande's prosecution of his claims in the case before this Court was "frivolous, unreasonable, or without foundation". Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

## STATEMENT OF FACTS

On May 31, 2010, Mische-Hoeges made a complaint to the City of Alexandria Police Department, claiming LeFande was stalking her. Docket # 10-3 at 11. In support of this allegation, Mische-Hoeges only claimed that LeFande had called her a "whore" in a single email exchange. Id. Mische-Hoeges admitted to the Alexandria Police that she had no fear of LeFande. Id. at 12. Mische-Hoeges attempted to improperly influence the Alexandria Police investigation by having a Metropolitan Police Department Sergeant call the Alexandria Police supervisor overseeing the investigation. Nevertheless, Mische-Hoeges was denied a warrant and a protection order by the Alexandria magistrate and the Alexandria Police Department reported the case as "unfounded". Id. at 11 (citing Lofgren v. Commonwealth, 684 S.E.2d 223 (Va. Ct. App. 2009)). On June 22, 2010, Mische-Hoeges made the same allegations to the Arlington County Police Department and was again denied a warrant and a protection order.

On that same date, Mische-Hoeges went to the Metropolitan Police Department First District Headquarters, the very location where she is assigned as a police officer, and convinced several of her friends and co-workers to take yet another police report and apply for a warrant on her behalf. Docket # 10-3 at 20-21. Within this police report, Mische-Hoeges used the report numbers from the Alexandria and Arlington County police reports to falsely claim a history of domestic violence between her and LeFande. Id. at 29. She personally signed the bottom of the report containing the false information.

Despite the absence of any allegation constituting an offense under District of Columbia law within the sole affidavit in support, the Superior Court issued a warrant for LeFande's arrest on that date. Id. at 19. LeFande filed a Motion to Dismiss on July 22, 2010, asserting that his alleged text message exchange with Mische-Hoeges, absent any threat, was constitutionally protected speech. Pl.'s Ex. W. The United States Attorney filed an Opposition which focused primarily upon the Government's ability to charge attempt stalking and failed to meaningfully address LeFande's constitutional arguments, simply ignoring that D.C. Code § 22-3133 could not be applied to constitutionally protected conduct by express operation of its subsection (b) and ignoring the legitimate, non-criminal purpose of his speech as explained in Lofgren, *supra*. Pl.'s Ex. X. The sole case cited by the United States Attorney in support of its contention that LeFande's protected speech could be employed to find probable cause for the violation, United States v. Smith, 685 A.2d 380 (D.C. 1996), itself asserted that criminal intent beyond ordinary speech was necessary to find a violation, an element which was not supported whatsoever by the limited allegations on the record.

> We must interpret the statute to support its constitutionality. Therefore, to avoid this potential vagueness problem, we emphasize that the definition of harassing requires that the victim be seriously alarmed, annoyed, frightened, or tormented, and that the conduct would cause a reasonable person to have such a reaction.

Smith 685 A.2d at 387.

> The District of Columbia stalking statute criminalizes certain conduct, such as harassing, that may in certain situations include speech. However, this conduct does not rise to the level of criminality until it is undertaken "willfully, maliciously and repeatedly." Moreover, the conduct must be engaged in with "the intent to cause emotional distress" or to "place another person in reasonable fear of death or bodily injury."

Id. at 387-388.

LeFande's Reply thoroughly refuted each and every point and authority made in the Opposition.

> The Government cites to a D.C. Court of Appeals unpublished Memorandum Opinion and Judgment referred in Rodgers v. Johnson-Norman 2005 WL 24283490 (D.C. Sept. 26, 2005). The actual opinion, reproduced and attached hereto, was issued in 2003. The facts in Rodgers I depart so wildly from the present case that the case stands as little consequence to the present inquiry. According to the underlying Affidavit in Support, also attached, Rodgers violated a standing Maryland peace order on August 7, 2000 by pulling his vehicle in front of Johnson-Norman's, blocking it in and remaining there staring at her for several minutes. Rodgers again violated the Maryland peace order on August 13, 2000 by approaching Johnson-Norman at her place of employment and grabbing her and asking if he could talk to her. Rodgers would go on to violate the Superior Court's own stay away order made as a condition of his release.
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> In Rodgers I, the Court of Appeals found that the trial court had sufficient probable cause to charge Rodgers for the offense of stalking itself. Rodgers, a *pro se* appellant, did not raise the same issues raised by LeFande's Motion to Dismiss. Given the factual findings in Rodgers I, there was little cause to do so.

Pl.'s Ex. Y at 10-11.

> …Mische-Hoeges['s] testimony clearly demonstrates that LeFande's speech served a legitimate and lawful purpose, to convey his disappointment and

> commentary regarding Mische-Hoeges's behavior. Certainly the language is terse and even rude, but this was the end of a profoundly emotional relationship in which LeFande had asked Mische-Hoeges to marry him and they had shared a household together for nearly eight months in what was LeFande's anticipation of a lifelong friendship and bond. LeFande's first text message came within minutes of his discovery that Mische-Hoeges had consummated a surreptitious on-line affair with a foreign national which she initiated while living in LeFande's house. LeFande also discovered that also while living in his house, Mische-Hoeges had been trolling Craigslist for casual sex encounters with other women, preparing bikini photographs of herself with her face obscured and maintaining secret email accounts for this purpose. Needless to say, he was upset and heartbroken.
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> Nevertheless, LeFande's speech never threatened, and Mische-Hoeges had no reasonable cause to be alarmed or frightened by these words alone.

Pl.'s Ex. Y at 4-5 (footnotes omitted).

On September 10, 2010, the United States Attorney's Office formally abandoned prosecution of its criminal charges against LeFande, Pl.'s Ex. I, *before* the Motion to Dismiss was decided by the Superior Court. LeFande filed a Motion to Seal on September 30, 2010. Docket 10-3 at 34.

On February 19, 2011, Mische-Hoeges's attorneys filed a Motion to Intervene in LeFande's Motion to Seal. Id. at 53. Nowhere within the Motion did her attorneys offer any cogent legal argument that demonstrated that Mische-Hoeges had any legal standing to intervene in LeFande's dismissed criminal case. LeFande filed a timely opposition. Id. at 69. On March 22, 2011, the United States Attorney's Office filed an Opposition to LeFande's Motion to Seal. Id. at 14. The Opposition consisted solely of a pat recital of the following factual allegations:

> Indeed, the records in this case demonstrate that on May 26, 2010, the complainant received an e-mail from the defendant that stated "I hope you get reassigned back to prostitution because you really are a [filthy] whore." On May 28, 2010, the complainant received another e-mail from the defendant that stated "Inquiring minds want to know why are you such a whore?" The complainant

> stated she responded to this message by sending the defendant a text message asking him to "... please never contact me again in any way." The complainant further reported that she received another message from the defendant and again she replied "Do not contact me again in any way for any reason." On May 29, 2010, the complainant received another e-mail from the defendant containing obscenities and the claim that he had read the complainants e-mail messages to her new boyfriend. On June 23, 2010, an arrest warrant was obtained, and the defendant was arrested on the arrest warrant on September 10, 2010.

Id. at 15-16.

Nowhere within this Opposition did the United States Attorney offer any argument or cite any authority rebutting LeFande's contention that the alleged statements were non-threatening or were not constitutionally protected speech. The Opposition did not adopt any of the argument employed by the United States Attorney in its previous Opposition to LeFande's Motion to Dismiss, which LeFande had previously refuted. Properly absent from the United States Attorney's factual recitals were any allegation that LeFande had accessed Mische-Hoeges's email accounts[1], or that he had spoken to or emailed any third person, as such allegations were alluded to but not specifically made within either the police report or the affidavit in support of the arrest warrant and solely amounted to abject speculation by Mische-Hoeges without any evidentiary foundation in support.[2] LeFande filed a timely Reply Memorandum on March 31, 2011. Id. at 83.

On July 18, 2011, the Superior Court nominally denied Mische-Hoeges's Motion to Intervene. Id. at 88. On July 19, 2011, the Superior Court denied LeFande's Motion

[1] As previously stated, LeFande does not deny reading Mische-Hoeges's emails, but he did so while Mische-Hoeges lived in his house while he was configuring her new Blackberry with her consent.
[2] Given the District of Columbia Court of Appeals' unambiguous holding in Richardson v. Easterling, 878 A.2d 1212, 1217-1218 (D.C. 2005) that statements to third parties "do not implicate the Intrafamily Offenses Act" and that such a prohibition against "making representations to others" "arguably constitutes constitutionally impermissible prior restraint of speech", the United States Attorney was correct not to include any such allegations in their recitals. The Superior Court failed to address Richardson whatsoever.

to Seal. Id. at 92. The Superior Court's opinion in support of the denial essentially adopted Mische-Hoeges's conclusory arguments within her improper Motion to Intervene, arguments which were never raised by the United States Attorney. The Superior Court's opinion, like the United States Attorney's Opposition, *did not cite a single case* to refute LeFande's contention that his speech was constitutionally protected. LeFande made a timely Notice of Appeal, id. at 101, and immediately moved for summary reversal. Pl.'s Ex. Z.

The United States Attorney's cursory Opposition to LeFande's Motion for Summary Reversal disavowed the only stated basis for the Superior Court's denial of LeFande's Motion to Seal, a spurious claim of threats not upon the record, and in doing so, conceded every issue of law and fact posited by LeFande's Motion for Summary Reversal. Pl.'s Ex. AA. The sole premise offered in opposition to LeFande's assertion that his alleged non-threatening speech was protected speech was that Smith, 685 A.2d 380, withstood a prior constitutional challenge without any further elucidation as to why. The United States Attorney's two sentence rebuttal of LeFande's wealth of controlling First Amendment caselaw was unsupported by any application of Smith to the sole factual allegation upon the record.

Within its Opposition, the United States Attorney misstated the holding of Smith v. United States, 813 A.2d 216 (D.C. 2002). This Smith case actually states, "*when an attempt is proven by evidence that the defendant committed the crime alleged to have been attempted*, the intent required to commit the crime of attempt can be no greater than the intent required to commit the completed crime." Smith at 219 (emphasis added to the

predicate phrase intentionally omitted by the United States Attorney to completely misrepresent the law of this case). The United States Attorney's claim that "Appellant fails to address any of these issues" was remarkable given LeFande's rebuke of the Superior Court for misstating Evans v. United States, 779 A.2d 891 (D.C. 2001) for the very same proposition. Pl.'s Ex. Z at 13. If anything, this Smith case articulated LeFande's proposition even more succinctly for him and in a more recent D.C. Court of Appeals case. The two sole cases cited by the United States Attorney in support of the proposition of Attempted Stalking, People v. Aponte, 944 N.E.2d 204 (N.Y. 2011) and the incorrectly cited State v. Rooks, 468 S.E.2d 354 (Ga. 1996), both contained sufficient factual allegations to support respective charges of actual stalking, consistent with Smith. LeFande's Motion for Summary Reversal has been pending since July 25, 2011 and, as of today's date, has not been decided by the District of Columbia Court of Appeals.

## ARGUMENT

### 1. Standard for an award of attorney's fees for a § 1983 defendant.

"The statute involved here, 42 U.S.C. § 1988, allows the award of 'a reasonable attorney's fee' to 'the prevailing party' in various kinds of civil rights cases, including suits brought under § 1983." Fox v. Vice, 131 S. Ct. 2205, 2213 (2011).

> In Christiansburg [*supra*], we held that § 1988 also authorizes a fee award to a prevailing defendant, but under a different standard reflecting the "quite different equitable considerations" at stake. Id., at 419. In enacting § 1988, we stated, Congress sought "to protect defendants from burdensome litigation having no legal or factual basis." Id., at 420. Accordingly, § 1988 authorizes a district court to award attorney's fees to a defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." Id., at 421; *see also* Kentucky v. Graham, 473 U.S. 159, 165, n. 9 (1985).

Id. (parallel citations omitted). *Accord* Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2496 (2011).

> "[A] loss on the merits does not mean that legal arguments advanced in the context of our adversary system were unreasonable." Taucher v. Brown-Hruska, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (reversing an award of attorney's fees under the Equal Access to Justice Act (EAJA)); *see* [Christiansburg, *supra*] (warning that courts must "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation").

Holland v. Williams Mt. Coal Co., 496 F.3d 670, 674 (D.C. Cir. 2007) (parallel citation omitted).

> It "requires that the district court do more than explain, repeat, characterize, and describe the merits . . . decision." [Halverson v. Slater, 206 F.3d 1205, 1209 (D.C. Cir. 2000)]. Courts evaluating substantial justification must instead analyze why the government's position failed in court: if, for example, the government lost because it vainly pressed a position "flatly at odds with the controlling case law," Am. Wrecking Corp. v. Sec. of Labor, 364 F.3d 321, 326-27 (D.C. Cir. 2004) (internal quotation marks omitted), that is one thing; quite another if the government lost because an unsettled question was resolved unfavorably. *See* United States v. Hallmark Constr. Co., 200 F.3d 1076, 1080 (7th Cir. 2000) ("the district court must reexamine the legal and factual circumstances of the case from a different perspective than that used at any other stage of the proceeding").

Taucher v. Brown-Hruska, 396 F.3d 1168, 1174 (D.C. Cir. 2005) (parallel citation omitted).

> It was not "flatly at odds with the controlling case law," Am. Wrecking Corp. v. Sec'y of Labor [364 F.3d at 326-27] (internal quotation marks omitted), and the Secretary certainly did not press her position in "the face of an unbroken line of authority," Precision Concrete v. NLRB, 362 F.3d 847, 851-52 (D.C. Cir. 2004), or against a "string of losses," Contractor's Sand & Gravel, Inc. v. Fed. Mine Safety & Health Review Comm'n, 199 F.3d 1335, 1341 (D.C. Cir. 2000) (internal quotation marks omitted). We are satisfied that the district court acted within its discretion in concluding that the Secretary's position was, on the whole, "justified to a degree that could satisfy a reasonable person." [Pierce v. Underwood, 487 U.S. 552, 565 (1988)].

Hill v. Gould, 555 F.3d 1003, 1007-1008 (D.C. Cir. 2009) (parallel citations omitted).

The "American Rule" prohibits the shifting of attorney's fees in most civil lawsuits. Fox, 131 S.Ct. at 2213 (citing Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 (1975)); The rationale for the American Rule is that litigants should not be discouraged from seeking redress for perceived wrongs in court or from trying to extend coverage of the law. The rationale continues that society would suffer if a person was unwilling to pursue a meritorious claim merely because that person would have to pay the defendant's expenses if they lost. The Rule provides that each party is responsible for paying its own attorney's fees unless specifically provided by statutory authority, contractual agreement, or certain narrowly defined common law exceptions.

> What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves. Under the antitrust laws, for instance, allowance of attorneys' fees to a plaintiff awarded treble damages is mandatory. In patent litigation, in contrast, "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285 (emphasis added). Under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3 (b), the prevailing party is entitled to attorneys' fees, at the discretion of the court, but we have held that Congress intended that the award should be made to the successful plaintiff absent exceptional circumstances. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). *See also* Northcross v. Board of Education of the Memphis City Schools, 412 U.S. 427 (1973). Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.

Alyeska Pipeline, 421 U.S. at 260-262 (footnotes omitted).[3]

> Nor may a court infer a congressional intent to override the presumption that the American Rule erects against the award of attorney's fees without "clear support" either on the face or in the legislative history of the statute. Rather, as the Supreme Court made clear again in Summit Valley Industries, Inc. v. Carpenters, 456 U.S. 717, 726 (1982), a court may award attorney's fees only when expressly so authorized by the legislature.

Unbelievable, Inc. v. NLRB, 118 F.3d 795, 801 (D.C. Cir. 1997) (parallel citation omitted).

Any statute in derogation of the common law American Rule must be strictly construed. SEACOR Holdings, Inc. v. Commonwealth Ins. Co., 635 F.3d 675, 684-685 (5th Cir. 2011); Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc., 632 F.3d 1195, 1198-1199 (11th Cir. 2011); Norelus v. Denny's, Inc., 628 F.3d 1270, 1280-1281 (11th Cir. 2010) (analyzing the fee shifting provision of 28 U.S.C. § 1927); Western Watersheds Project v. Interior Bd. of Land Appeals, 624 F.3d 983, 989 (9th Cir. 2010) (strict construction of fee shifting in the context of waiver of sovereign immunity); In re Cisneros, 454 F.3d 342, 344 (D.C. Cir. 2006) (same, quoting In re North (Reagan Fee Application), 94 F.3d 685, 690 (D.C. Cir. 1996) (per curiam) ("[t]he petitioner 'bears the burden of establishing all elements of his entitlement.'")).

[3] Mische-Hoeges's repeated reference to the United States Attorney and the Metropolitan Police Department's failure to discipline her for LeFande's well-documented allegations, Docket # 19-2 at 2, 8-9, 15, underscores the very purpose of these "private attorney general" actions. Perdue v. Kenny A., 130 S. Ct. 1662, 1681 (2010) (such a plaintiff is "filling an enforcement void in the State's own legal system") BREYER, J. *concurring in part and dissenting in part*; Doe v. Exxon Mobil Corp., 654 F.3d 11 at 164-165 (D.C. Cir. 2011) (quoting Constructores Civiles de Centroamerica, S. A. (Concica) v. Hannah, 459 F.2d 1183, 1191 (D.C. Cir. 1972)); Turner v. D.C. Bd. of Elections & Ethics, 354 F.3d 890, 894 (D.C. Cir. 2004) (the purpose of 42 U.S.C. §1988 is "to vindicate citizens' rights").

**2. Mische-Hoeges is not a prevailing party for the purposes of 42 U.S.C. § 1988.**

On October 20, 2011, this Court dismissed LeFande's §1983 claims without explanation or opinion. The Court has made no ruling on LeFande's remaining state law claims, which for the most part are alternative or parallel causes of action to the § 1983 claims. As LeFande proceeds on such alternative causes of action without impediment, either in this Court or before the Superior Court as noted by Mische-Hoeges's counsel, Mische-Hoeges fails to demonstrate that she is a prevailing party for the purposes of 42 U.S.C. § 1988.

> We have long held that the term "prevailing party" in fee statutes is a "term of art" that refers to the prevailing litigant. *See, e.g.*, [Buckhannon, 532 U.S. at 603]. This treatment reflects the fact that statutes that award attorney's fees to a prevailing party are exceptions to the "'American Rule'" that each litigant "bear [his] own attorney's fees." Id., at 602 (citing Key Tronic Corp. v. United States, 511 U.S. 809, 819 (1994)).

Astrue v. Ratliff, 130 S. Ct. 2521, 2525 (2010) (parallel citations omitted).

> We began our analysis in [District of Columbia v. Straus, 590 F.3d 898 (D.C. Cir. 2010)] with the Supreme Court's teaching in [Buckhannon, 532 U.S. at 603-605], that to be a prevailing party "requires more than achieving the desired outcome." Straus, 590 F.3d at 901. Following Buckhannon, in Thomas v. National Science Foundation, 330 F.3d 486, 492-93, 356 U.S. App. D.C. 222 (2003), we had identified three requirements for prevailing party status: There must be (1) "a court-ordered change in the legal relationship of the parties"; (2) a "judgment ... in favor of the party seeking the fees"; and (3) "judicial relief" accompanying the "judicial pronouncement." Straus, 590 F.3d at 901 (citing Thomas, 330 F.3d at 492-93) (internal quotation marks omitted). Only the latter two of these requirements apply when the party seeking fees is a defendant. Id. at 901.

District of Columbia v. Ijeabuonwu, 642 F.3d 1191, 1194 (D.C. Cir. 2011) (parallel citations omitted).

First of all, a summary dismissal absent any explanation is not a cognizable judgment of any sort.

> Generally, "district courts should set out the reasons for their decisions with some specificity." United States v. Woods, 885 F.2d 352, 354 (6th Cir. 1989) (noting that "when a motion for summary judgment is granted,[] without any indication as to the specific facts and rules of law supporting the court's decision, it is difficult, except in the simplest of cases, for an appellate court to review such a decision."); *see also* Bybee v. City of Paducah, 22 Fed. Appx. 387 (6th Cir. 2001) (unpublished decision) (concluding that "the district court's order must be vacated. The district court's order is insufficient because it does not provide any indication as to the court's rationale for dismissing [plaintiff's § 1983] complaint …. Thus, a remand is necessary because the district court's order does not provide an adequate basis for appellate review"). Given the district court's lack of analysis, and, mere acknowledgment of Defendants' qualified immunity claim on the record during oral arguments, a remand would be more than appropriate.

Derfiny v. Pontiac Osteopathic Hosp., 106 Fed. Appx. 929, 936 (6th Cir. 2004) (unpublished).[4]

LeFande's § 1983 claims are by no means simple. LeFande alleges that after Mische-Hoeges was unable as an ordinary citizen to obtain an arrest warrant and restraining order in the respective Virginia jurisdictions where Mische-Hoeges and LeFande lived, she traveled to the police district headquarters in the District of Columbia where she is employed to obtain an arrest warrant which no ordinary citizen could have obtained given the facts presented. In each and every facet of the proceedings, Mische-Hoeges could not have accomplished what she did but for her position of authority within the Metropolitan Police Department. LeFande further alleges that Mische-Hoeges

[4] Mische-Hoeges comment about LeFande's "repeated, personal attacks on these Judges and other officers of the Court", Docket # 19-2 at 13 n.5, is simply unwarranted. Certainly, any appeal or other challenge to the propriety of a court's decision is inherently critical of the judge who made the decision (as is any appellate order reversing such decision). If a judge acts contrary to the rules of the court or controlling precedent, or simply acts without any explanation whatsoever in the face of multiple factual and legal controversies before him, a party is correct to challenge that decision and in fact, must challenge that decision, or otherwise waive the ordinary due process to which that party is otherwise entitled.

employed her co-workers as her proxies for the purpose of obtaining LeFande's arrest warrant so as to insulate her from the very allegations she faces now.

Immediately, these allegations appear to pass muster under the applicable caselaw to find a § 1983 violation.

> "[W]hile it is clear that 'personal pursuits' of police officers do not give rise to section 1983 liability, there is no bright line test for distinguishing 'personal pursuits' from activities taken under color of law." Pitchell v. Callan, 13 F.3d 545, 548 (2d Cir. 1994). Rather, "whether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties." Martinez v. Colon, 54 F.3d 980, 986 (1st Cir. 1995). The test is objective. Pitchell, 13 F.3d at 548-49. "The key determinant is whether the actor, at the time in question, purposes to act in an official capacity or to exercise official responsibilities pursuant to state law." Martinez, 54 F.3d at 986. Thus, "[a]cts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way related to the performance of police duties." Gibson v. City of Chicago, 910 F.2d 1510, 1516 (7th Cir. 1990) (internal quotation marks omitted); *see also* Parrilla-Burgos v. Hernandez-Rivera, 108 F.3d 445, 449 (1st Cir. 1997) (an officer does not act under color of law "if the challenged conduct is not related in some meaningful way either to the officer's governmental status or to the performance of his duties"). And "liability may be found where a police officer, albeit off-duty, nonetheless invokes the real or apparent power of the police department." Pitchell, 13 F.3d at 548.

G'Sell v. Carven, 724 F. Supp. 2d 101, 111 (D.D.C. 2010).

This Court fails to identify what "bright line test" LeFande's claims transgress that permits the Court to now dismiss his claims without explanation. This is particularly inappropriate where the caselaw dictates that *there are no such tests* to gauge abuse of governmental authority. Given that the caselaw demands fact-intensive analysis which "turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties", G'Sell, 724 F. Supp. at 111 (quoting Martinez, 54 F.3d at 986), the present absence of any explanation for the Court's

complete disregard for such evidently required analysis renders this summary dismissal particularly infirm for the purposes of considering Mische-Hoeges a "prevailing party".[5]

Second, where LeFande is still free to proceed upon parallel and alternative theories of relief for the same factual contentions, and conceivably obtain the same damages award for his injuries, there has been no substantive judicial relief afforded Mische-Hoeges necessary for her to be a "prevailing party" under 42 U.S.C. § 1988. *See* Hardt v. Reliance Std. Life Ins. Co., 130 S. Ct. 2149, 2159 (2010) (Hardt considered a prevailing party where she "obtained a judicial order instructing Reliance 'to act on Ms. Hardt's application by adequately considering all the evidence' within 30 days", distinguishing this judgment from a "'purely procedural victory'"); Sole v. Wyner, 551 U.S. 74, 86 (2007) (Wyner not a prevailing party where she "had gained no enduring 'chang[e] [in] the legal relationship' between herself and the state officials she sued."); Ijeabuonwu, 642 F.3d at 1196 ("The dismissal therefore 'protected the District from nothing at all.'" quoting Straus, 590 F.3d at 902 and citing Drake v. FAA, 291 F.3d 59, 67 (D.C. Cir. 2002)); Straus, 590 F.3d at 902 ("Res judicata effect would certainly qualify as judicial relief where, for example, it protected the prevailing school district from having to pay damages or alter its conduct.")

> Under Buckhannon it is clear that a plaintiff "prevails" only upon obtaining a judicial remedy that vindicates its claim of right. *See* Select Milk Producers, Inc. v. Johanns, 400 F.3d 939, 948 (D.C. Cir. 2005) (plaintiff whose "claim was fully vindicated by the court-ordered" preliminary injunction, although not a final determination on merits, is "prevailing party" under Buckhannon). On the other hand, a defendant might be as much rewarded by a dispositive order that forever

[5] This of course assumes that the Court's October 20, 2011 Minute Entry even constitutes a "separate document" sufficient to satisfy the requirements of Fed. R. Civ. P. 58(a). *See* Outlaw v. Airtech Air Conditioning & Heating, Inc., 412 F.3d 156, 162-163 (D.C. Cir. 2005).

> forecloses the suit on a procedural or remedial ground as by a favorable judgment on the merits. *See* Dozier v. Ford Motor Co., 702 F.2d 1189, 1191 (D.C. Cir. 1983) (res judicata precludes relitigating issue whether amount in controversy exceeds minimum required for jurisdiction under 28 U.S.C. § 1332). A ruling on a jurisdictional ground, that the action fails either in law or in fact, might give the defendant all it could receive from a judgment on the merits. Be that as it may, this court has not addressed whether, in light of Buckhannon, a defendant "prevails" when the case against it is dismissed for want of jurisdiction.

District of Columbia v. Jeppsen, 514 F.3d 1287, 1290 (D.C. Cir. 2008) (parallel citations omitted).

While the D.C Circuit has contemplated, but apparently not ruled upon, the preclusive effect of a dismissal as prevailing on the merits, certainly none of this analysis supports a "prevailing party" finding for a dismissal which does not preclude the rebringing of essentially the same causes of action in a different venue or the same court later awarding the same kinds of damages under alternative theories of relief.

**3. Mische-Hoeges fails to make a required showing that LeFande's Complaint was frivolous, unreasonable or without foundation.**

Unlike a plaintiff, it is insufficient for Mische-Hoeges as a defendant in a §1983 action to simply be a "prevailing party" to implicate the fee-shifting provision of 42 U.S.C. § 1988. She must demonstrate that LeFande's Complaint was "frivolous, unreasonable or without foundation". Christiansburg, *supra.* Again, as this statute is in derogation of the common law American Rule, it must be strictly construed against its application and Mische-Hoeges has the burden of demonstrating the elements required. She cannot.

> The brevity of [28 U.S.C. § 1915(d)] and the generality of its terms have left the judiciary with the not inconsiderable tasks of fashioning the procedures by which

> the statute operates and of giving content to § 1915(d)'s indefinite adjectives. Articulating the proper contours of the § 1915(d) term "frivolous," which neither the statute nor the accompanying congressional reports defines, presents one such task. The Courts of Appeals have, quite correctly in our view, generally adopted as formulae for evaluating frivolousness under § 1915(d) close variants of the definition of legal frivolousness which we articulated in the Sixth Amendment case of Anders v. California, 386 U.S. 738 (1967). There, we stated that an appeal on a matter of law is frivolous where "[none] of the legal points [are] arguable on their merits." Id., at 744. By logical extension, a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of Appeals have recognized, § 1915(d)'s term "frivolous," when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.

Neitzke v. Williams, 490 U.S. 319, 325 (1989) (footnotes omitted). *See also* Butler v. DOJ, 492 F.3d 440, 443 (D.C. Cir. 2007) (quoting Tafari v. Hues, 473 F.3d 440, 442 (2d Cir. 2007) ("A frivolous action advances 'inarguable legal conclusion[s]' or 'fanciful factual allegation[s].' Thus, the term 'frivolous' refers to the ultimate merits of the case.")).

**a. LeFande's factual allegations.**

LeFande's factual allegations certainly are not fanciful. There seems to be no factual dispute that LeFande was arrested and imprisoned as a result of Mische-Hoeges's efforts. Further, LeFande has presented documentary evidence of her time and attendance fraud upon the Metropolitan Police Department, Docket # 10-3 at 5, 7, and of Mische-Hoeges's expressed intent to wrongfully arrest LeFande prior to the alleged events upon which she later premised her criminal allegations, id at 9. There appears to be no factual dispute that Mische-Hoeges is a District of Columbia police officer and that the report taken and warrant application made were done in her presence by her friends

and co-workers at the station where she is assigned. There appears to be no factual dispute that Mische-Hoeges was twice rebuffed by Virginia authorities and that she employed the police reports from those jurisdictions to falsify an allegation of a "prior history of domestic violence" with LeFande. Id. at 29.[6] Since the time of filing his Complaint, LeFande has also learned that Mische-Hoeges was present at the time the warrant application was presented to the United States Attorney, at a location in government offices where no ordinary civilian complainant would normally ever be permitted, and that Mische-Hoeges used her position with the police department to convince the prosecutor to proceed (against his better judgment). Docket # 16 at 29, n. 13. LeFande further alleges, beyond what is in his Complaint and as required for his notice pleading requirements[7], that Mische-Hoeges employed her officially-issued police identification and government building access keycard to enter the police station and the United States Attorney's offices in a manner in which no ordinary civilian could accomplish. *See* id. at 39 and n.16.

> Federal courts are "without power to entertain claims otherwise within their jurisdiction if [the claims] are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" Hagans v. Lavine, 415 U.S. 528, 536 (1974) (quoting

[6] Mische-Hoeges now offers a roundabout denial of these allegations without any substantive rebuttal of LeFande's documentary evidence already presented to this Court. Docket # 19-2 at 9.

[7] Mische-Hoeges seems to make some umbrage regarding LeFande's personal experience as an attorney engaged in civil rights litigation. Docket # 19-2 at 12. In fact, LeFande's personal experience in prosecuting § 1983 claims dictates the opposite result of this Court's present dismissal of his § 1983 claims. As demonstrated in the attached Memorandum Opinion of the United States District Court for the District of Maryland, LeFande, as plaintiff's attorney prosecuting many of the same causes of action, successfully defended against a Rule 12(b)(6) Motion to Dismiss, largely upon the notice pleading rule. Pl.'s Ex. BB at 6 ("As Defendants seek to dismiss civil rights claims, this Court 'must be especially solicitous of the wrongs alleged' and 'must not dismiss the claim unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory which might plausibly be suggested by the facts alleged*.' Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999) (quoting Harrison v. U.S. Postal Serv., 840 F.2d 1149, 1152 (4th Cir. 1988)) (emphasis in original); *see also* Presley v. City of Charlottesville, 464 F.3d 480, 483 (4th Cir. 2006).")

> Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904)). To warrant dismissal for insubstantiality, "claims [must] be flimsier than 'doubtful or questionable'--they must be 'essentially fictitious.'" Best v. Kelly, 39 F.3d 328, 330 (D.C. Cir. 1994) (quoting Hagans, 415 U.S. at 536-37) (finding claim sufficiently substantial where plaintiffs had not "suggested any bizarre conspiracy theories, any fantastic government manipulations of their will or mind, any sort of supernatural intervention"). Although we have said that "[t]he Rule 12(b)(1) 'substantiality' doctrine is, as a general matter, reserved for complaints resting on truly fanciful factual allegations," id. at 331 n.5, a legal claim may be so insubstantial as to deprive federal courts of jurisdiction if "prior decisions inescapably render the claims frivolous." Hagans, 415 U.S. at 538. That said, "previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial." Id. Thus, to qualify as insubstantial, a claim's "unsoundness [must] so clearly result[] from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Ex parte Poresky, 290 U.S. 30, 32 (1933) (internal quotation marks omitted).

Ord v. District of Columbia, 587 F.3d 1136, 1144 (D.C. Cir. 2009) (case in which LeFande, as appellant's counsel, obtained a reversal of a Fed. R. Civ. P. 12(b)(1) dismissal by this Court).

**b. LeFande's § 1983 claims.**

The application of these factual allegations, which must be accepted as true by the Court at this stage of the litigation, Erickson v. Pardus, 551 U.S. 89, 93 (2007), to the applicable caselaw not only negates any suggestion of frivolity, but dictates that LeFande was improperly deprived of discovery on the fact-driven issue of Mische-Hoeges's abuse of her governmental authority. Given the allegations presented, LeFande relies first and foremost upon United States v. Southerland, 486 F.3d 1355, 1361 (D.C. Cir. 2007) ("an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest", quoting Ariz. v. Evans,

514 U.S. 1, 13 (1995) (quoting Whiteley v. Warden, 401 U.S. 560, 568 (1971))). This appears at first glance to be a simple enough proposition overcoming the sole apparent basis for the Court's dismissal of LeFande's § 1983 claims, but evidently, it now requires further elucidation.

LeFande asserts that after Mische-Hoeges was incapable of obtaining a criminal prosecution against LeFande on two occasions as a private citizen in Virginia, she returned to her police station and employed her friends and co-workers as proxies to initiate an unfounded prosecution against LeFande. It is evident that Mische-Hoeges played a direct role in each part of the process and that certain ordinary elements of the process were eschewed because of her status as a police officer and her influence over the process. There was no independent investigation of any of Mische-Hoeges's claims. The detective prepared and presented the arrest warrant application to the Superior Court immediately after receiving Mische-Hoeges's report. No attempt was made to interview LeFande or to gather evidence independently of Mische-Hoeges's bald claims. Had there been any independent investigation of Mische-Hoeges's claims, as there would have been for any ordinary citizen, such as obtaining the police reports of Mische-Hoeges's claimed history of domestic violence, the detective would have discerned that Mische-Hoeges's claims of such history of domestic violence were false. The detective would have further learned of Mische-Hoeges's prior threats of prosecution to LeFande predating her present allegations. The detective further would have discovered Mische-Hoeges's motivation for falsely prosecuting LeFande, her time and attendance fraud perpetrated against the police department. But for Mische-Hoeges's position within the department and her

inappropriate influence over the process were these ordinary procedural safeguards ignored.

Because Mische-Hoeges was fully cognizant of the entire process, by signing police forms, and apparently meeting with the prosecuting attorney and influencing his approval of the arrest warrant, her position as a law enforcement officer in this jurisdiction implicated a duty to inform the other officials of the falsity of her allegations and the relevant caselaw and judicial determinations which she had been provided demonstrating that LeFande's alleged statements were protected speech.

> A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers. *See* Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986) (excessive force); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir. 1983) (excessive force); Gagnon v. Ball, 696 F.2d 17, 21 (2d Cir. 1982) (false arrest); Bruner v. Dunaway, 684 F.2d 422, 426 (6th Cir. 1982), *cert. denied,* 459 U.S. 1171 (1983) (excessive force); Byrd v. Brishke, 466 F.2d 6, 10-11 (7th Cir. 1972) (excessive force); Skorupski v. County of Suffolk, 652 F. Supp. 690, 694 (E.D.N.Y. 1987) (excessive force).

O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988).

We are certain at this point only that Mische-Hoeges was fully cognizant that her claims of prior history of domestic violence were false and that she had been refused prosecution for the same allegations in two other jurisdictions. There is no information that any of the other participants involved in the District of Columbia prosecution had any of this information. As stated above, it is evident that Mische-Hoeges's position within the police department afforded her the ability to forego any independent inquiry into such facts. "If a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in

his presence, the officer is directly liable under Section 1983." Masel v. Barrett, 707 F. Supp. 4, 9 n.4 (D.D.C. 1989) (quoting Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986) and citing Clark v. Taylor, 710 F.2d 4, 9 (1st Cir. 1983); O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988) ("A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers."); Jackson v. Pantazes, 810 F.2d 426, 430 (4th Cir. 1987); Harris v. Chanclor, 537 F.2d 203, 206 (5th Cir. 1976); Bruner v. Dunaway, 684 F.2d 422, 425-26 (6th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); Putman v. Gerloff, 639 F.2d 415, 423-24 (8th Cir. 1981); Lusby v. T.G. & Y. Stores, Inc., 749 F.2d 1423, 1433 (10th Cir. 1984), *vacated on other grounds*, 474 U.S. 805 (1985).

Further, it is Mische-Hoeges alone that was responsible for forwarding knowingly false information to the prosecutor.

> When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983.

Ricciuti v. New York City Transit Auth., 124 F.3d 123, 130 (2d Cir. N.Y. 1997) (citing United States ex rel Moore v. Koelzer, 457 F.2d 892, 893-94 (3d Cir. 1972); Smith v. Springer, 859 F.2d 31, 34 (7th Cir. 1988); Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988)).

Relevant caselaw also implicates Mische-Hoeges for LeFande's § 1983 claims because of the motivation for Mische-Hoeges's conduct alleged within his Complaint, that Mische-Hoeges sought to retaliate and silence LeFande for his complaints regarding

her time and attendance fraud against the police department. "Where the sole intention of a public official is to suppress speech critical of his conduct of official duties or fitness for public office, his actions are more fairly attributable to the state." Rossignol v. Voorhaar, 316 F.3d 516, 524 (4th Cir. 2003).

> We have no doubt that the seizure in this case was perpetrated under color of state law. The requisite nexus between defendants' public office and their actions during the seizure arose initially out of their censorial motivation. Defendants executed a systematic, carefully-organized plan to suppress the distribution of St. Mary's Today. And they did so to retaliate against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties. The defendants' scheme was thus a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit. The fact that these law enforcement officers acted after hours and after they had taken off their badges cannot immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance. Revene v. Charles Cty. Comm'rs, 882 F.2d 870, 872 (4th Cir. 1989).
>
> To begin with, it is clear that if a defendant's purportedly private actions are linked to events which arose out of his official status, the nexus between the two can play a role in establishing that he acted under color of state law. In Layne v. Sampley, 627 F.2d 12 (6th Cir. 1980), for example, an off-duty police officer was in plain clothes, had been on vacation for several days, and was sitting in his personal car when he shot the plaintiff. The Sixth Circuit nonetheless held that there was sufficient evidence to support a finding that the defendant had acted under color of state law, in large part because "the animosity grew out of [the officer's] performance of his official duties." Id. at 13. And in United States v. Causey, 185 F.3d 407 (5th Cir. 1999), the Fifth Circuit held that a police officer had acted under color of state law when he conspired with two civilians to murder a woman who had filed police brutality charges against him. Important to the decision was the fact that the desire to retaliate against the victim arose out of her criticism of the defendant's actions in his official capacity. Id. at 415-16.

Rossignol, 316 F.3d at 523-524.

> Ultimately, defendants were driven by a desire to retaliate against Rossignol's past criticism of their fitness for office and to censor future criticism along the same lines. This link between the seizure's purpose and defendants' official roles helps demonstrate that defendants' actions bore a "sufficiently close nexus" with the State to be "fairly treated as that of the State itself."

Id. at 525 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

The facts as applied to these cases demonstrates not only that LeFande had an appropriate legal foundation for his claims, this Court acted completely contrary to such caselaw in dismissing LeFande's § 1983 claims without explanation or further factual inquiry.

> In attempting to distinguish private violence from violence attributable to state action for purposes of applying the DeShaney rule [Deshaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 197 (1989)] courts must beware simplistic solutions. To be sure, violence is attributable to state action if the perpetrator is acting under color of state law, but that is a virtual tautology. Furthermore, the construct – "acting under color of state law" -- rarely depends on any single, easily determinable fact, such as a policeman's garb. Nor does "acting under color of state law" depend on whether an officer stays strictly within the line of duty, or oversteps it…
>
> The point is that segregating private action from state action calls for a more sophisticated analysis. In general, section 1983 is not implicated unless a state actor's conduct occurs in the course of performing an actual or apparent duty of his office, or unless the conduct is such that the actor could not have behaved in that way but for the authority of his office. Thus, whether a police officer is acting under color of state law turns on the nature and circumstances of the officer's conduct and the relationship of that conduct to the performance of his official duties.

Martinez, 54 F.3d at 986 (citations omitted).

**c. LeFande probable cause claims.**

While this issue is already fairly well addressed within LeFande's Opposition to Mische-Hoeges Motion for Sanctions, Docket # 16, given Mische-Hoeges's yet again repeated and particularly vexatious reiteration of her previous non-sequitur arguments, it appears appropriate to now re-address certain points. As pointed out above, as of today's date, there has been no definitive adjudication of LeFande's probable cause issue by any

court. Also as pointed out above, the various oppositions made to LeFande's challenge to probable cause by Mische-Hoeges, the United States Attorney and the Superior Court have been particularly lacking in substance and authority, and certainly have given LeFande no pause to reconsider his completely unadjudicated constitutional arguments.[8]

Given that the standard for a § 1983 defendant to be awarded attorney's fees is arguably even a higher threshold than for a Rule 11 sanctions claim, LeFande's prosecution of his claims of no probable cause in the context of a complete absence of standing authority to the contrary are inherently reasonable. Mische-Hoeges continues to demand that this Court defer to the findings of probable cause of her friends and co-workers. This Court owes no deference whatsoever to legal conclusions of police officers, prosecutors or Mische-Hoeges's attorneys.

> A litigant's opposition to a motion to dismiss does not constitute "stubborn refusal to dismiss fatally defective pleadings." The court, not the parties, determines whether a pleading is fatally defective. Until the court rules on a motion to dismiss, therefore, plaintiff's pleadings are not conclusively "fatally defective."

NAACP v. Atkins, 908 F.2d 336, 340 (8th Cir. 1990).

The sole decision on probable cause made *ex post facto* by any court, the Superior Court's July 19, 2011 denial of LeFande's Motion to Seal his criminal record, has been timely appealed and a Motion for Summary Reversal filed. In its brief in opposition to this Motion, the United States Attorney eschewed the sole basis for the Superior Court's denial of LeFande's Motion, a spurious claim by Mische-Hoeges in her improper Motion

[8] Within his Opposition to Motion for Sanctions, LeFande has already sufficiently discussed the complete lack of deference required by this Court to constitutional issues arising within state criminal prosecutions. Docket # 16 at 22-23. None of the cases cited by Mische-Hoeges in her present Motion for Attorney's Fees rebut or distinguish this proposition.

to Intervene that LeFande's speech was threatening. The United States Attorney has now conceded this basis for finding probable cause in LeFande's prosecution and has offered no substantive rebuttal of his constitutional arguments. Certainly this procedural posture gives no cause for LeFande to believe his legal position is "flatly at odds with the controlling case law". Taucher, 396 F.3d at 1174 (quoting Am. Wrecking Corp., 364 F.3d at 326-27 (internal quotation marks omitted)).

Instead, LeFande is now emboldened by what amounts to actual supplemental authority, quite unlike Mische-Hoeges's bizarre September 29, 2011 filing of documents simply claiming that she would not be prosecuted for her demonstrated misconduct. Docket #18. The District of Columbia Court of Appeals' May 5, 2011 decision in Dickens v. United States, 19 A.3d 321 (D.C. 2011), directly supports LeFande's contention that, absent any threat, his speech was constitutionally protected.

> We agree with the Ninth Circuit. Appellant's language in this case was not merely an "obnoxious[]," "offensive[]," or "uncooperative" response to the officers — behavior that would have been constitutionally protected. Rather, appellant used his speech to order his dog to attack a police officer. Although the trial court concluded that it could not find beyond a reasonable doubt that the dog attacked Mendez solely because of appellant's order, a physical attack is not required to convict for intimidation. Intimidation, by definition, generates fear or employs various forms of coercion short of physical force or injury.

Dickens, 19 A.3d at 324 (footnotes omitted).

> The statutory offense of assault on a police officer is framed in terms of "assaulting, resisting, opposing, impeding, intimidating or interfering" with a police officer in the performance of the officer's official duties. D.C. CODE § 22-505(a). We have not described the scope of conduct encompassed by those words, but have stated in construing the statute's prohibition on "opposing" a police officer, that where speech is involved, the statute should be "narrowly construed" to avoid undue infringement of First Amendment rights. *See* [In re E.D.P., 573 A.2d 1307, 1309 (D.C. 1990)] (citing City of Houston v. Hill, 482 U.S. 451, 463 n.11 (1987)). *Cf.* R.A.V. v. St. Paul, 505 U.S. 377, 389-90 (1992)

> (striking down ordinance against "fighting words" that prohibited otherwise permitted speech solely on basis of content).

In re C.L.D., 739 A.2d 353, 356 (D.C. 1999) (footnotes, parallel citations omitted).

> The Supreme Court's First Amendment jurisprudence protects "a significant amount of verbal criticism and challenge directed at police officers." But "a State may punish those words 'which by their very utterance inflict injury.'" In C.L.D., we emphasized that nothing in our opinion should be understood to "imply that a person's speech may not be used to establish the offense," but only that "speech, alone, may not permissibly constitute the offense." As the Ninth Circuit graphically put it, ordering a dog to attack is "more akin to the cocking of a trigger than to privileged speech." Appellant's words — "get them" or "get him" — urging his dog to attack the police officers attempting to handcuff him were, by their very nature, intended to injure one or more officers. Thus, they "failed to meet any conceivable definition of protected speech."

Dickens, 19 A.3d at 327 (footnotes omitted). *See also* Jones v. United States, 16 A.3d 966, 970-971 (D.C. 2011) ("stepping off the sidewalk and yelling, without more, is a legally invalid theory on which to support an [assault on a police officer] conviction"); Bergman v. District of Columbia, 986 A.2d 1208, 1220 (D.C. 2010) ("To be sure, speech may not be denied full First Amendment protection because its 'content communicates any particular idea.'" Quoting R.A.V., 505 U.S. at 383).

**4. Mische-Hoeges fails to distinguish fees incurred for any allegedly frivolous cause of action from those related to any action remaining unadjudicated.**

> In a suit of this kind, involving both frivolous and non-frivolous claims, a defendant may recover the reasonable attorney's fees he expended solely because of the frivolous allegations. And that is all. Consistent with the policy underlying § 1988, the defendant may not receive compensation for any fees that he would have paid in the absence of the frivolous claims.

Fox, 131 S. Ct. at 2218.

In her fee petition, Mische-Hoeges simply lumps the entirety of her fees expended in defense of this litigation and claims the entirety of LeFande's claims are "frivolous, unreasonable, or without foundation". Both LeFande's factual allegations and the controlling caselaw upon which he relies dictate to the contrary. Mische-Hoeges is correct to state that LeFande's claims are interrelated, but this fact in itself is fatal to the entirety of her fee claim, as fees that she has incurred related to LeFande's remaining claims (fees for services which also then benefit her defense of such claims going forward) cannot be received simply because his §1983 claims have been dismissed.

> We note numerous instances of documentation and specification that do not adequately describe the legal work for which the client is being billed. This makes it impossible for the court to verify the reasonableness of the billings, either as to the necessity of the particular service or the amount of time expended on a given legal task.

Role Models Am., Inc. v. Brownlee, 353 F.3d 962, 970 (D.C. Cir. 2004) (quoting In re Sealed Case, 890 F.2d 451, 455 (D.C. Cir. 1989) (per curiam)).

**5. LeFande's prior offer of settlement undermines Mische-Hoeges's present claim for attorney's fees.**

During his telephone conversation with Stephen Neal on or about December 21, 2010, described in Docket # 19-29 at 6, LeFande made a very modest offer of settlement to Mische-Hoeges. This offer consisted of a demand for Mische-Hoeges to consent to the sealing of his criminal record, her consent to the vacation of the September 21, 2010 Consent Order and a one-time payment of ten thousand dollars towards his attorney's fees incurred in the defense of her unfounded civil and criminal actions. Pl.'s Ex. CC.

Mische-Hoeges did not accept this offer and made no counter-offer. Mische-Hoeges now characterizes this offer as "patently absurd". Docket # 19-2 at 16.

Given what has transpired since the offer, it certainly does not seem "patently absurd" in hindsight. Mische-Hoeges's Consent Order has expired without incident and certainly will not be renewed. LeFande's Motion to Seal his criminal record is pending his Motion for Summary Reversal and the United States Attorney has abandoned, and therefore waived, all of Mische-Hoeges's unsubstantiated factual allegations contained in her unjustified Motion to Intervene the Superior Court improperly employed to deny the Motion. The District of Columbia Court of Appeals has denied Mische-Hoeges's Motion to Dismiss LeFande's appeal regarding the constitutionality of the Consent Order and the matter is still pending.[9] And Mische-Hoeges now claims to have incurred $70,639.79 in attorney's fees defending a case she could have settled for only ten thousand dollars last December. This Court certainly should disregard a demand for any attorney's fees incurred by Mische-Hoeges after she recklessly refused LeFande's very modest December settlement offer and made no further attempt to negotiate. *See e.g.* FED. R. CIV. P. 68(d).

[9] It is unclear what part of Mische-Hoeges's attorney fee bill, Docket # 19-29, may be related to the D.C. Court of Appeals litigation or Mische-Hoeges's completely unfounded Motion to Intervene in LeFande's criminal case. Certainly, this Court cannot award Mische-Hoeges attorney's fees for such unrelated litigation, and if fees related to such litigation are present in the bill without further delineation, the bill cannot be used to form the basis for her present claims. *See* Role Models, *supra*. Her Motion appears to demand exactly that and further asks this Court ignore the express holding in Fox, *supra*, because her claim is somehow "distinquished" by the interrelation of LeFande's undismissed state law claims. Docket # 19-2 at 18 n.8. As stated herein, Fox dictates the exact opposite result, that none of her fees can be awarded where the work performed cannot be distinguished from the remaining undismissed claims or other litigation not a part of this case whatsoever. Within that same footnote, Mische-Hoeges misstates LeFande's position regarding this Court exercising jurisdiction over his remaining state law claims. He does not request it, but as twice stated during the recent hearing, he does not object to Mische-Hoeges's request.

> While evidence of settlement negotiations is inadmissible to prove the merit or lack of merit of a claim, the use of such evidence as bearing on the issue of what relief was sought by a plaintiff does not offend the clear terms of Rule 408. Such evidence can be relevant when comparing what a plaintiff "requested" to what the plaintiff was ultimately "awarded." We noted in Washington the "settled principle . . . that counsel fees should only be awarded to the extent that the litigant was successful." [Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1042 (3d Cir. 1996)]. Hensley instructs us that "[t]here is no precise rule or formula" for determining how a fee should be adjusted to reflect limited success. [Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)]. These determinations are appropriately committed to the discretion of the district court "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." Id. at 437. While evidence of settlement negotiations is only one indicator of the measure of success, it is a permissible indicator that is not precluded by Rule 408.

Lohman v. Duryea Borough, 574 F.3d 163, 167-168 (3d Cir. 2009). *See also* Ingram v. Oroudjian, 647 F.3d 925, 927 (9th Cir. 2011) (adopting Lohman).

Instead of accepting LeFande's modest settlement offer, Mische-Hoeges has instead chosen to file hundreds upon hundreds of pages of superfluous documents in three different courts, endlessly repeating factual allegations against LeFande without any evidentiary support and endlessly attacking LeFande's character and reputation without justification. It is particularly evident that Mische-Hoeges has no interest in putting an end to this unfortunate chapter in her life and instead is intent on perpetuating the very injuries that LeFande complains of herein.

**6. The fee demand is not reasonable.**

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonably hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). "The district court . . .

should exclude from this initial fee calculation hours that were not 'reasonably expended'" on the litigation. Id. at 434. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances", id. at 429 (quoting H. R. REP. No. 94-1558, at 1 (1976)), not to unduly punish those persons for filing such grievances.

The record reflects the fee demand is not reasonable. LeFande certainly takes no exception to Mische-Hoeges's employment of the modified or "Kavanaugh" Laffey Matrix to demonstrate a reasonable billing rate. Docket # 19-31. LeFande himself regularly employs these rates and has been personally awarded Laffey Matrix rates in his litigation both by the local and Federal courts. These will be the rates, after appropriate adjustment, that LeFande will demand from Mische-Hoeges upon prevailing in this lawsuit.

What is not reasonable is the amount of time claimed necessarily expended in furtherance of this litigation. The record reflects that the entirety of Mische-Hoeges's defense in this case has consisted of essentially her attorneys filing the same document, her initial Motion to Dismiss, *four separate times* before this Court. Docket # 5, 6, 12, 19. In each instance, Mische-Hoeges's attorneys have employed the identical factual recital wholly unsupported by any evidentiary foundation and which has been repeatedly disavowed by the United States Attorney in LeFande's criminal case. *See e.g.* Pl.'s Ex. AA. This recital has been invariably accompanied by a pat recital of the applicable standard of review of the issue at hand but no substantive analysis of the application thereof.

It is particularly poignant that Mr. Neil's declaration repeatedly describes the extent of LeFande's legal research and authority within his oppositions to Mische-Hoeges's motions, but in the same breath proceeds with the present demand for attorney's fees on a basis that LeFande's claims are "frivolous, unreasonable, or without foundation". Christiansburg, *supra*.

> On December 1, 2010, LeFande filed his Opposition to the Motion to Dismiss. LeFande's Opposition was 30 pages long and cited dozens of cases.
>
> On December 13, 2020 [sic], Mische-Hoeges filed her Reply Memorandum in support of the Motion to Dismiss, which addressed arguments and authority raised in LeFande's Opposition.

Docket # 19-28 at 2 (paragraph enumeration omitted).

> On September 16, 2011, LeFande filed an Opposition to the Motion for Sanctions. This Opposition was 44 pages long and again cited dozens of cases.
>
> On September 26, 2011, Mische-Hoeges filed her Reply Memorandum in support of the Motion for Sanctions, which required additional research to address arguments raised in LeFande's Opposition.

Id. at 3 (paragraph enumeration omitted).

Mr. Neil seems to acknowledge that LeFande's claims had some basis in the law that required his research to respond and his responses demonstrate he failed to refute any of it. He certainly fails to point to a specific instance where his efforts led to a rebuttal rendering LeFande's claims "frivolous, unreasonable, or without foundation".

Mr. Neill further fails to explain what utility spending time he spent speaking to Mische-Hoeges's mother was rendered to the litigation.

> We are also compelled to deduct … charges incurred when attorneys held conferences and teleconferences with persons referenced as "Geiser" and "Wells." The application fails to document who these individuals are or the nature of their relationship to the investigation; consequently, we cannot evaluate whether such

fees were reasonably incurred.

Role Models, 353 F.3d at 972 (quoting In re Donovan, 877 F.2d 982, 995 (D.C. Cir. 1989) (per curiam)).

Mische-Hoeges continues to rely solely upon factual allegations without evidentiary foundation supporting spurious legal conclusions without developed argumentation. This kind of infantile pleading does not warrant even the reduced rates demanded from these purportedly experienced litigators. The seemingly endless repetition of Mische-Hoeges's filings do not reflect the extent of the hours expended now claimed by them. Id., at 972 (quoting Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. United States EPA, 169 F.3d 755, 761 (D.C. Cir. 1999) (per curiam) ("Duplication of effort is another basis on which [the] hours seem excessive.")). The fees demanded are not reasonable for the amount of work actually performed.

## CONCLUSION

For these reasons, and for such other reasons as the Court finds to be good and sufficient cause, the Defendant's Motion for Attorney's Fees should be DENIED.

**Request for Disclosure of Fee Agreement**

In accordance with Fed. R. Civ. P. 54 (d)(2)(B)(iv), the Plaintiff hereby requests the Court order the Defendant's disclosure of the terms of any agreement about fees for the services claimed.

Respectfully submitted, this third day of November, 2011,

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