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Our File: 9305.189

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PHILIP N. BURGESS, JR.; MICHELLE BURGESS; ALEXANDRIA BURGESS; Minor 1, Minor 2, Minor 3, by their parents Philip and Michelle Burgess and MICROBILT CORPORATION, Plaintiffs, vs. LEONARD A. BENNETT; CONSUMER LITIGATION ASSOCIATES, P.C.; KRISTI CAHOON KELLY; KELLY GUZZO, PLC; JACOB M. POLAKOFF; and BERGER MONTAGUE PC, Defendants.	Civil Action No. 3:20-cv-07103-FLW-DEA **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS WITH PREJUDICE** **ORAL ARGUMENT REQUESTED** **RETURNABLE: SEPTEMBER 21, 2020**

Of Counsel:
Maxwell L. Billek

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PRELIMINARY STATEMENT

This is an action filed by Plaintiffs for malicious abuse of process, invasion of privacy, and intentional infliction of emotional distress ("IIED") against the Defendants arising out of the manner in which Plaintiffs Philip Burgess and his company MicroBilt believe Defendants here have negotiated settlement and conducted discovery in four ongoing matters in the Eastern District of Virginia ("EDVA"). Plaintiffs object to the merits of those actions and the service of process related to same.

The malicious abuse of process and IIED claims are barred by New Jersey's litigation privilege as all allegations arise from Defendants' pursuing their clients' claims against Plaintiffs Burgess and MicroBilt in the EDVA matters.

The invasion of privacy and IIED claims also fail because the conduct alleged here is neither highly offensive nor outrageous. The claims relate to Plaintiffs being served with papers by process servers who purportedly failed to comply with Plaintiffs' preferred social distancing practice. The Complaint, however, contains no allegation that any Plaintiff was exposed to COVID-19, much less that any Plaintiff contracted COVID-19.

Moreover, this Complaint is neither ripe nor appropriately filed as all four prior EDVA matters remain active, no claims have been dismissed against

Plaintiffs, no frivolous litigation findings have been issued, and Plaintiffs remain free to litigate those claims in those still pending actions.[1]

Finally, the hastily drafted Complaint is devoid of any details necessary to connect the actions alleged to have been taken by Defendants with actual harm suffered by Mr. Burgess, his corporation and his wife and children. The Plaintiffs have not alleged any specific basis for damages as to each claimed liability, by each named Defendant, and as to each claimed injured Plaintiff. The result is that this Court lacks jurisdiction because Plaintiffs' have not pled a basis for standing. And the Court lacks subject matter jurisdiction as the Complaint does not establish for each named Plaintiff as to each named Defendant damages of at least $75,000 necessary to meet the amount in controversy threshold for diversity jurisdiction.

[1] The Complaint references that Plaintiff Burgess was dismissed in Virginia for lack of minimum contacts, which then led to the filing of the same allegations in a suit now pending in the District Court of New Jersey. That dismissal has since been reconsidered. Mr. Burgess remains a party in the Virginia action and is permitted to file a new motion after further jurisdictional discovery. Accordingly, Mr. Burgess still remains an active party in Virginia and the New Jersey Williams action is moot.

FACTUAL BACKGROUND

1. On June 11, 2020, Plaintiffs' filed a Complaint in this matter against Defendants, Leonard A. Bennett, Consumer Litigation Associates, P.C., Kristi Cahoon Kelly; Kelly Guzzo, PLC, Jacob M. Polakoff, and Berger Montague, P.C. for allegations involving abuse of process, invasion of privacy and intentional infliction of emotional distress. See Exhibit A.

JURISDICTION AND DIVERSITY

2. Plaintiffs' Complaint relies solely upon claims of diversity jurisdiction and an amount in controversy that allegedly exceeds the sum or value of $75,000, exclusive or interest and costs. Id. at ¶¶14-16.

3. Each of the three counts in the Complaint, state in conclusory fashion that "[a]s a result of Defendants' conduct, Plaintiffs have been damages." Id. at ¶¶50, 55, 61.

4. There are no other allegations as to the nature and detail of the damages that have been plead.

PRIOR AND STILL PENDING LITIGATION

5. It is alleged in the Complaint that there are four inter-related matters pending in Virginia relevant to this action as follows:

(a) Williams v. Big Picture Loans, LLC, Docket No. 3:17-cv-461 ("Big Picture Litigation")
[Per the Pacer Docket:

3:17-cv-00461-REP Williams et al v. Big Picture Loans, LLC et al
Robert E. Payne, presiding
Date filed: 06/22/2017
Date of last filing: 08/20/2020];

(b) Renee Galloway, et als. v. Big Picture Loans, LLC, et als., Docket No. 18-cv-00406-REP ("Galloway Action")
[Per the Pacer Docket:
3:18-cv-00406-REP Galloway et al v. Big Picture Loans, LLC et al
Robert E. Payne, presiding
Date filed: 06/11/2018
Date of last filing: 08/07/2020];

(c) Williams, et als. v. MicroBilt Corporation, et als., Docket No. 3:19-cv-00085-REP ("Virginia Williams Action")
[Per the Pacer Docket:
3:19-cv-00085-REP Williams et al v. Microbilt Corporation et al
Robert E. Payne, presiding
Date filed: 02/11/2019
Date of last filing: 08/21/2020]; and

(d) Lenora Glover, et als. v. MicroBilt Corporation, Docket No. 1:19-cv-01337-RDA-JFA ("Glover Action")
[Per the Pacer Docket:
1:19-cv-01337-RDA-JFA Glover v. Microbilt Corporation
Rossie D. Alston, Jr, presiding
John F. Anderson, referral
Date filed: 10/22/2019
Date of last filing: 08/20/2020].

Id. at ¶17.

6. One or more of the Defendants represent the plaintiffs in all four of the aforementioned actions in the Eastern District of Virginia ("EDVA"). Id. at ¶18.

7. Plaintiff MicroBilt is a named defendant in two of the aforementioned actions. Id. at ¶19.

8. According to the Complaint, the two actions in which MicroBilt is a defendant are "frivolous attempts to compel and coerce MicroBilt and Phillip Burgess into cooperating with the plaintiffs and their counsel (Defendants here) in prosecuting their claims against Matt Martorello, the principal defendant in those cases." Id.

9. Likewise, Plaintiffs plead that "MicroBilt and its employees [are being forced] to spend excessive time, effort and counsel fees in motion practice and in responding to burdensome discovery demands in all four EDVA actions." Id.

10. Both the "Galloway Action" and the "Big Picture Litigation," are putative class actions alleging that the defendant in those actions "violated the federal RICO statute and various State usury laws by operating so-call "rent-a-tribe" payday lending schemes." Id. at ¶20.

11. The "Virginia Williams Action," alleges that Plaintiffs Philip Burger and MicroBilt (defendants in the Virginia Williams Action) violated the Fair Credit Reporting Act "by unlawfully requesting and obtaining [] consumer credit reports and providing them to defense counsel in the Big Picture Litigation in order to gain a litigation advantage in that action." Id. at ¶21.

12. With respect to the "Virginia Williams Action," Plaintiffs Phillip Burgess and MicroBilt each filed motions to dismiss for lack of personal jurisdiction. Id. at ¶¶22-25.

13. Plaintiff Philip Burgess' motion was granted as he was found to have no minimum contacts in Virginia, but MicroBilt's motion was denied. Id.

14. Accordingly, the suit against Mr. Burgess was re-filed in New Jersey under Docket No. 3:20-cv-5781 with the same allegations ("New Jersey Williams Action") and remains pending. Id. at ¶29-30.

15. On August 3, 2020, however, the Hon. Robert E. Payne, U.S.D.J., granted a motion to reconsider the prior finding that the EDVA lacked personal jurisdiction over Mr. Burgess and ordered discovery to proceed on the jurisdictional issue before any renewed motion practice would continue. See Exhibit B.

16. Accordingly, Mr. Burgess remains a party to the "Virginia Williams Action." Id.

17. The Complaint in this matter alleges that as a defense he intends to assert that "there is no legal basis for the 'New Jersey Williams Action' because, among other things, Philip Burgess is not, as alleged, a 'user' of consumer data within meaning of the Fair Credit Reporting Act and because the information that

Philip Burgess allegedly 'procured' was not 'governed data' within the meaning of the Fair Credit Reporting Act." See Exhibit A at ¶31.

18. With respect to the still pending Virginia actions, Plaintiffs here plead that the Defendants in this action engaged in pressure tactics such as: (a) serving a motion to compel in the "Glover Action;" (b) serving numerous deposition notices for employees of MicroBilt in the "Virginia Williams Action" and "Glover Action" who are apparently working from home (there is no mention of whether those depositions are proceeding via Zoom or similar remote proceedings) and (d) allegedly due to statements of Defendant Bennett, MicroBilt was required by Judge Payne to provide a declaration setting forth the ownership history of MicroBilt and the employment relationship with Mr. Burgess for *in camera* review. Id. at ¶27, (a), (b), (c), and (d).

19. Plaintiffs have failed to plead that the depositions at issue were in fact noticed for Zoom and actual service was only attempted after Plaintiffs here would not accept service through counsel. See Exhibit C.

20. In the Glover Action, the Virginia court granted the motions to compel against MicroBilt. See Lenora Glove, et als. V. MicroBilt Corporation, 1:19-cv-1337-RDA-JFA, Dkt. Nos. 39, 64 (E.D.V.A. May 29, 2020; June 26, 2020).

21. According to the Complaint, when these "pressure tactics" failed to force Mr. Burgess and MicroBilt to "settle," the "Defendants resorted to the tortious conduct alleged in this current action." Exhibit A at ¶28.

22. The purported tortious action is the filing of a lawsuit against Mr. Burgess in New Jersey, i.e., the "New Jersey Williams Action," due to his domicile in this state and the prior jurisdictional dismissal that has since been reconsidered, and the process service allegations that follow. Id. at ¶¶28-46.

23. More specifically, on May 15, 2020, a process server attempted to serve Mr. Burgess with suit papers at 7:54 P.M., was advised by Michelle Burgess that he was not home, and the process server left the premises. Id. at ¶32.

24. Plaintiffs Michelle Burgess, Alexandria Burgess, and Minors 1, 2, and 3 were home at this time. Id. at ¶33.

25. A new process server attempted the service the following day at 3:17 P.M. and then "began intentionally banging on the picture windows on the front of the house." Id. at ¶34.

26. The Complaint pleads that these actions "caused, and were intended to cause Plaintiffs Michelle Burgess, Alexandria Burgess, and Minors 1, 2, and 3 to fear possible home invasion, robbery and assault and caused those Plaintiffs to suffer emotional distress." Id. at ¶35.

27. Nevertheless, Michelle Burgess, Alexandria Burgess, and Minor 1 answered the door and the process server asked if Mr. Burgess was home. Id. at ¶36.

28. When he was advised that Mr. Burgess was not home, the server "threw a set of papers at them" and "walked away." Id.

29. Additionally, the process server "was not wearing a mask or gloves, did not maintain a minimum of six feet of social distancing… did not encase the papers he threw at them in plastic… and generally did not practice any recommended practices for… the current COVID-19 pandemic shutdown." Id. at ¶37.

30. According to the Complaint, the papers in questions were the Summons and Complaint in the "New Jersey Williams Action" and a corresponding letter Id. at ¶38.

31. On Monday 18, 2020, Mr. Burgess received a "copy of a Proof of Service purporting to state that the Summons and Complaint in the 'New Jersey Williams Action' was properly served on May 16, 2020.'" Id. at ¶39.

32. The Complaint further alleges that the second process server returned again on May 20, 2020, again banged on the picture windows in front of the house, and his actions "caused, and were intended to cause Plaintiffs Michelle Burgess, Alexandria Burgess, and Minors 1, 2, and 3 to fear possible home invasion,

robbery and assault and caused those Plaintiffs to suffer emotional distress." Id. at ¶40.

33. Notwithstanding that allegation, the Complaint continues to plead that a family housekeeper answered the door and was handed a document and deposition subpoena addressed to Mr. Burgess, captioned in the "Virginia Williams Action." Id. at ¶42.

34. The Complaint repeats the social distancing allegations set forth above at paragraph 22. Id. at ¶43.

35. On May 21, 2020, another process server served a deposition subpoena captioned in the "Galloway Action." Id. at ¶44-45.

36. According to the Complaint, all process servers were "employed by Defendants acting in concert and for their mutual benefit; were acting as the duly authorized agents of the Defendants; and, upon information and belief, were acting on the instruction of one or more of the Defendants." Id. at ¶46.

CAUSES OF ACTION IN THIS COMPLAINT

37. Pursuant to Count One (Malicious Abuse of Process), "Defendants' further acts after issuing legal process against Plaintiffs demonstrates a purpose ulterior to the one for which such process was designed," and "[s]uch purpose was to coerce or oppress either through intentional malicious abuse of process or the issuance of process without reason or probable cause." Id. At ¶¶ 48-49.

38. As such, Plaintiffs alleged without elaboration "damage[s]" pursuant to the aforementioned conduct. Id. at ¶50.

39. Pursuant to Count Two (Harassment – Invasion of Privacy Interests), "Defendants, acting through their duly authorized agents, intentionally intruded upon Plaintiffs' seclusion or private concerns," and this "intentional intrusion by Defendants, through their agents, would be highly offensive to the reasonable person." Id. at ¶¶53-54.

40. As such, "[b]y invading Plaintiffs' privacy," the Complaint alleges damages "for harm caused, including harm to Plaintiffs' interest in privacy, mental anguish, and special damages." Id. at ¶56.

41. Pursuant to Count Three (Intentional Infliction of Emotional Distress), Plaintiffs allege that "Defendants' conduct, through their duly authorized agents, was intentional and intended to produce emotion distress, or reckless in deliberate disregard of the high degree of probability that emotional distress would result." Id. at ¶58.

42. Plaintiffs further plead that "Defendants' conduct, through their agents, directed towards Plaintiffs was extreme and outrageous," and it "proximately caused Plaintiffs' emotional distress so severe that no reasonable person could be expected to endure it." Id. at ¶¶ 59-60.

43. In sum, Plaintiff's Complaint demands judgment for: (a) compensatory, consequential, and punitive damages; (b) a declaration that Defendants have "intentionally harassed, intimidated, and inflicted emotional distress upon Plaintiffs and invaded their privacy; (c) injunctive relief against Defendants; (d) legal fees and costs for this action; and (e) any further relief the Court may deem just.

STANDARD OF REVIEW

In considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true all of the facts in the complaint and draws all reasonable inferences in favor of the plaintiff. Phillips v. Cnty. of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). To survive a motion to dismiss under Rule 12(b)(6), the Complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." Fed.R.Civ.P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic v. Twombly, 550 U.S. 554 (2007). While the Court must accept the allegations of the Complaint as true, "threadbare" recitals of the elements of a cause of action will not suffice. Id. The Court need not accept as true legal conclusions couched as factual allegations. Id. at 678-679. The Court must examine the Complaint to determine whether a claim for relief is plead and that examination is a "context specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679.

Generally, a 12(b)(6) motion to dismiss may not consider matters extraneous to the pleadings. In re Burlington Coat Factory Securities Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). However, exceptions to this rule exist for "documents that are attached to or submitted with the complaint… and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case. Buck v. Hampton

Twp. Sch. Dist., 452 F.3d 256, 260 (3d Cir. 2006). Furthermore, under Fed. R. Evid. 201(b), a court may take judicial notice of a fact that is "not subject to reasonable dispute." Oran v. Stafford, 226 F.3d 275, 289 (3d Cir. 2000).

Finally, a Rule 12(b)(6) dismissal need not be allowed a curative amendment where "such an amendment would be inequitable or futile." Phillips v. Cnty. of Allegheny, 515 F.3d 224, 245 (3d Cir. 2008).

With respect to Rule 12(b)(1), a motion to dismiss "attacks… the right of a plaintiff to be heard in Federal court." Cohen v. Kurtzman, 45 F. Supp. 2d 423, 428 (D.N.J. 1999).

When ruling on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a distinction must be made between a facial and factual attack. Mortenson v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). If the 12(b)(1) motion is a facial attack, "the court looks only at the allegations in the pleadings and does so in the light most favorable to the plaintiff." U.S. ex rel. Atkinson v. Pa. Shipbuilding Co., 473 F.3d 506, 514 (3d Cir. 2007) (citing Mortenson, 549 F.2d at 891). Nevertheless, the party seeking to invoke the Court's jurisdiction bears the burden of proving the existence of subject matter jurisdiction. Kokkonen v. Guardian Life Ins. Cop., 511 U.S. 375, 377 (1994).

LEGAL ARGUMENT

I. PLAINTIFFS' CLAIMS FOR MALICIOUS ABUSE OF PROCESS AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ARE BARRED BY THE LITIGATION PRIVILEGE AND FAIL TO STATE A CLAIM.

In New Jersey, the litigation privilege bars the claims for both the abuse of process and the infliction of emotional distress. See Baglini v. Lauletta, 338 N.J. Super. 282, 297-99 (App. Div.), certif. denied, 169 N.J. 608 (2001) (expressly extending litigation privilege to malicious abuse of process claim); Loigman v. Twp. Comm. of Middletown, 185 N.J. 566, 583 (2006) (noting that the privilege applies to intentional infliction of emotional distress); Peterson v. Ballard, 292 N.J. Super 575, 581 (App. Div. 1996) (the privilege extends to claims for intentional infliction of emotion distress).

As previously recognized by the District Court of New Jersey, the litigation privilege is "well-established," "broadly applicable" and "expansive." Giles v. Phelan, Hallinan 86 Schmieg, L.L.P, 901 F. Supp. 2d 509, 523 (D.N.J. 2012); Grange Consulting Grp. v. Bergstein, 2014 U.S. Dist. LEXIS 147605 at *4 (D.N.J. Oct. 16, 2014). It extends "to any communication (1) made in judicial and quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." Hawkins v. Harris, 141 N.J. 207, 216 (1995) (citations omitted). Further, it ensures that [s]tatements by attorneys, parties, and their

representatives made in the course of judicial or quasi-judicial proceedings are absolutely privileged and immune from liability." Peterson, 292 N.J. Super at 581 (citing Erickson v. Marsh & McLennan Co., Inc., 117 N.J. 539, 563 (1990)). The privilege is not limited to in-court proceedings as that "would inhibit potential witnesses from coming forward, impede the ability of litigants to engage in discovery and investigation, and encumber settlement negotiations." De Vivo v. Ascher, 228 N.J. Super. 453, 458-59 (App. Div. 1988).

Moreover, the question of whether the allegations fall within the privilege shall be given "every presumption and intendment [] indulged in favor of relevancy or pertinency, the burden of proving otherwise being upon the one seeking to show that the allegations were unprivileged." Thourot v. Hartnett, 56 N.J. Super. 306, 309 (App. Div. 1959).

Similarly, the New Jersey Appellate Division has previously cautioned that "courts should not make paper-fine distinctions when analyzing whether a potentially privileged statement relates to a judicial proceeding." Williams v. Kenney, 379 N.J. Super. 118, 138 (App. Div. 2005) (citations omitted).

As litigants get more creative, New Jersey courts have continually extended the litigation privilege to cover unconventional and novel causes of action against attorneys acting within the judicial process. "As one scholar put it, as new tort theories have emerged, courts have not hesitated to expand the privilege to cover

theories, actions, and circumstances never contemplated by those who formulated the rule in medieval England." Loigman v. Twp. Comm. of Middletown, 185 N.J. 566 (citing T. Leigh Anenson, Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers, 31 Pepp. L.Rev. 915, 928 (2004)). During the privilege's progression, "[t]he spectrum of legal theories to which the privilege has been applied includes negligence, breach of confidentiality, *abuse of process*, *intentional infliction of emotional distress*, negligent infliction of emotional distress, *invasion of privacy*, civil conspiracy, interference with contractual or advantageous business relations, [and] fraud." Id. (emphasis added) (citing Anenson, 31 Pepp. L.Rev. at 927-28).

The Supreme Court specifically explained the purposes behind the litigation privilege's broad applicability:

> To ensure that the many honest and competent lawyers can perform their professional duties while furthering the administration of justice, the litigation privilege may protect the few unethical and negligent attorneys from a merited civil judgment and damages award. That trade-off is the necessary price that must be paid for the proper functioning of our judicial system. . . . We remain mindful that the extraordinary scope of the litigation privilege is mitigated to some degree by the comprehensive control that trial judges exercise over judicial proceedings, by the adversarial system, and by the sanctions faced by wayward attorneys through our disciplinary system.

Loigman, 185 N.J. at 587.

Here, Plaintiffs' malicious abuse of process and intentional infliction of emotional distress claims are based entirely upon four pending litigations in Virginia and one ongoing matter in New Jersey, Plaintiffs' objections to their participation in and validity of same, and the service of papers related to those litigations to the Burgess's home during the COVID-19 pandemic. Each and every allegation herein arises from communications (1) made in the Virginia and New Jersey litigations; (2) by the Defendant attorneys and their alleged agents, i.e., process servers; (3) to achieve the objects of the litigation either in the form of the service of papers, production of discovery, or securing testimony; and (4) Plaintiffs plead that the complained of actions are directly related to the pending Virginia and New Jersey litigations. Simply put, Plaintiffs' Complaint seeks to retaliate against these Defendants because they have dared to zealously represent their clients' interests. Accordingly, New Jersey's litigation privilege applies to bar these claims.

Lastly, only two of the Plaintiffs here are parties to any of the litigation that Plaintiffs now allege as a group to have been abusive and malicious. Plaintiffs Michelle Burgess, Alexandria Burgess, Minor 1, Minor 2, and Minor 3 cannot plead these claims as there is no litigation brought against them. And similarly, the Defendants have not alleged facts sufficient as to each separate Defendant – not all

lawyers and law firms are in all cases, for example. And *mens rea* is not implied as to each.

While Rule 8(a) requires only that a pleading seeking relief contain "a short and plan statement of the claim showing that the pleader is entitled to relief," it must nonetheless prove the defendant with a fair idea of the basis of the claim against him. O'Shea v. Littleton, 414 U.S 488, 495-98 (1974); Ryan v. Mary Immaculate Queen Ctr., 188 F.3d 857, 859-60 (7th Cir. 1999) (bare allegation of conspiracy, without information as to when and how it arose, is insufficient pleading under Rule 8); Pietrangelo v. NUI Corp., 2005 U.S. Dist. LEXIS 40832 at *36 (D.N.J. July 18, 2005) (breach of fiduciary duty in an ERISA action failed because employee failed to differentiate among defendants).

For the foregoing reasons, Plaintiffs' First and Third Counts fail to state a claim for relief and should be dismissed with prejudice.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR INVASION OF PRIVACY AS THERE WAS NO INTRUSION OR CONDUCT THAT COULD EVER BE FOUND TO BE HIGHLY OFFENSIVE TO A REASONABLE PERSON.

The tort of invasion of privacy in New Jersey, which deals with the unreasonable intrusion upon the seclusion of another, has been defined as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Bisbee v. John C. Conover Agency, Inc., 186 N.J. Super. 335, 339 (App. Div. 1982) (quoting the Restatement of Torts (Second) § 652B (1977); see also McNemar v. Disney Store, 91. F.3d 610, 622 (3d Cir. 1996). Furthermore, an unreasonable intrusion may be:

> [P]hysical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

Id. (quoting the Restatement of Torts (Second) § 652B (1977). The thrust of this aspect of the invasion of privacy tort is that a person's private, personal affairs should not be pried into. Id. at 340. The converse of this principle is that there is no wrong where defendant did not actually delve into plaintiff's concerns, or whether plaintiff's activities are already public or known. Id.

Additionally, an unreasonable intrusion only exists where reasonable persons would find the intrusion highly offensive. Id. As such, "expectations of

privacy are established by general social norms and must be objectively reasonable — a plaintiff's subjective belief that something is private is irrelevant." Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369, 373 (2012) (quoting White v. White, 344 N.J. Super. 211, 223 (Ch. Div. 2001).

In 2016, the Third Circuit affirmed the Hon. Peter G. Sheridan's dismissal of an invasion of privacy claim, among others, in a matter wherein plaintiff alleged that Bank of America "sent an employee to her home to talk to her without permission, and had engaged in other debt collection or foreclosure activities." Dophin v. Bank of Am. Mortg. Co., 641 Fed. Appx. 131, 13 (2016) (citing Bisbee, 186 NJ Super at 339). The Third Circuit further held that "periodic visits from a [Bank] employee to Dophin's home do not represent a sufficiently substantial intrusion to make out a claim." Id.

Similarly, Plaintiffs' invasion of privacy claim here is premised entirely upon the process servers attempting to, or actually serving, Plaintiffs with papers in the aforementioned Virginia and New Jersey actions during the course of a single week (May 15, 2020 through May 21, 2020). These allegations cannot support a claim for invasion of privacy.

First, the Complaint does not allege that there was an intrusion into Plaintiffs' home as the process servers are not alleged to have entered or attempted

to enter the home. Likewise, the Complaint specifically states that the process servers left the premises when they were advised that Mr. Burgess was not home.

Second, and perhaps most critically, the alleged actions could never amount to highly offensive conduct to a reasonable person. Despite setting forth a legal conclusion that "Plaintiffs Michelle Burgess, Alexandria Burgess, and Minors 1, 2, and 3 [] fear[ed] possible home invasion, robbery and assault and [were] caused [to] to suffer emotional distress," Plaintiff further pleads that on the first occasion, Plaintiffs opened the door to speak to the process server, and on the second, the door was opened by a family housekeeper. Similarly, despite the alleged fear of a lack of face mask or other COVID-19 social distancing, on both occasions the Plaintiffs or their housekeeper nevertheless opened the door to speak to the process server. There is no allegation that anyone was exposed to, or contracted, COVID-19.

Moreover, as with Counts One and Three, and pursuant to Rule 8(a), here Plaintiffs cannot reasonably group all Plaintiffs and all Defendants in a single set of allegations. By Plaintiffs' allegations, Mr. Burgess and MicroBilt were not present at the time of the alleged offensive conduct constituting an invasion of privacy. And certainly MicroBilt cannot be said to have suffered the emotional distress upon which this claim is founded. There is no allegation as to what each specific Defendant did or to whom. Absent some other allegations of intent, or

even involvement, by each named Defendant, the Plaintiffs' generalized claim cannot survive a Federal pleading standard.

Ultimately, the process sever allegations simply cannot be found to be highly offensive to a reasonable person and the Complaint is inadequately pled. As such, Plaintiffs' Second Count should be dismissed with prejudice.

III. PLAINTIFFS FAIL TO STATE A CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BECAUSE THE PLEADING DOES NOT SET FORTH OUTRAGEOUS CONDUCT OR SEVERE DISTRESS.

In order to establish a claim of intentional infliction of emotional distress ("IIED"), the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe. Buckley v. Trenton Saving Fund Soc., 111 N.J. 355, 366-67 (1988). Moreover, the alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. Likewise, plaintiff's distress must be "so severe that no reasonable man could be expected to endure it." Id.

Similar to the invasion of privacy claims, and for the same reasons expressed above, this count must also fail because there could never be a finding that the alleged conduct of the process servers were so outrageous, extreme, or beyond the bounds of decency, that it would be regarded as atrocious and utterly intolerable. Plaintiffs' allegations simply cannot support an IIED claim.

And as above per Rule 8(a), absent specific allegations as to intent and conduct by specific Defendants, the claim cannot fairly lie. Further, as before, Mr. Burgess and MicroBilt cannot in good faith allege such tortious injury as neither was there and the Corporate Plaintiff cannot suffer emotional distress.

IV. PLAINTIFFS' CLAIMS ARE NOT RIPE FOR CONSIDERATION, ARE DUPLICATIVE OF PRIOR ACTIONS, AND SHOULD BE DISMISSED.

The exercise of judicial power under Article III of the Constitution "depends on the existence of a case or controversy." United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993). Federal courts may not issue advisory opinions. Id. Among other things required for a case or controversy, the plaintiff must have suffered an injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

Ripeness is a related justiciability doctrine that "works 'to determine whether a party has brought an action prematurely ... and counsels abstention until such a time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine.'" Plains All Am. Pipeline L.P. v. Cook, 866 F.3d 534, 539 (3d Cir. 2017) (citing Peachlum v. City of York, 333 F.3d 429, 433 (3d Cir. 2003)). The underlying concerns include "whether the parties are in a 'sufficiently adversarial posture,' whether the facts of the case are 'sufficiently developed,' and

whether a party is 'genuinely aggrieved.'" Id. (quoting Peachlum, 333 F.3d at 433-34).

The classic ripeness test considers: (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration." Id. (citing Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967) (abrogated on other grounds).

Here, Plaintiffs seek an end-run around the pending litigations by simply declaring that they have been wronged by these Defendants before the factual record in the prior litigations have been settled or any damages could ever be established. Indeed, there is no allegation that the Plaintiffs have successfully dismissed any of the prior actions. The one jurisdictional dismissal of Mr. Burgess in the EDVA, which led to the filing of the "New Jersey Williams Action," has since been reconsidered and he remains a party to that action. There is also no allegation that any trial judge has determined the Defendants' theories of recovery to be frivolous, or that the Defendants have engaged in any unnecessary or improper discovery.

To the extent any issue raised in the Complaint survives, those issues are more appropriate for the trial court judges already managing those actions and there would be no hardship to any parties by proceeding in that fashion. If the actions against Plaintiffs Burgess and MicroBilt are indeed frivolous, they may

have those actions dismissed and sanctions issued against the Defendants. If the litigation strategies or discovery mechanisms employed in those actions are inappropriate or overly burdensome, Plaintiffs may file appropriate motions for relief. Plaintiffs are also free to waive personal service or set forth an authorized agent to accept any necessary process to avoid direct interactions with third parties if they so choose. All of the allegations set forth in this Complaint can and should be handled by the trial judges in the Virginia proceedings, and not in this separately filed collateral attack against adverse counsel.

There are also of course disciplinary rules and committees which apply to attorneys and are designed to control attorney behavior without also permitting separate causes of action based thereon. See Baxt v. Liloia, 155 N.J. 190, 198-99 (1998); Sommers v. McKinney, 287 N.J. Super. 1, 13 (App. Div. 1996) ("Violation of the rules of professional conduct do[es] not *per se* give rise to a cause of action in tort.") If Defendants' actions are so egregious, Plaintiffs are free to file ethics complaints in Virginia, New Jersey, or both, and may obtain relief in those forums as well.

Finally, and as previously recognized by the Hon. Stanley R. Chesler, U.S.D.J., "federal courts bar attempts to commence 'duplicative litigations' in order to 'foster judicial economy' and 'protect parties from 'the vexation of concurrent litigation over the same subject matter.'" Thomas v. Johnson, 2014 U.S.

Dist. LEXIS 74396, *17 (D.N.J. May 30, 2014) (citations omitted); see also Thomas v. Christie, 2010 U.S. Dist. LEXIS 109983, *35 (D.N.J. October 15, 2010), (quoting Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 183 (1952)) ("[t]he power of a federal court to prevent duplicative litigation is intended "to foster judicial economy and the 'comprehensive disposition of litigation…'") Likewise, "[s]ound discretion dictates that the second court decline its consideration of the action before it until the prior action before the first court is terminated." AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A., 626 F.3d 699, 723 (2d Cir. 2010), (quoting National Equipment Rental, Ltd. v. Fowler, 287 F.2d 43, 45 (2d Cir. 1961)).

Accordingly, should any claim survive in this matter, it should be dismissed or stayed pending resolution of the prior Virginia litigations.

V. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS CASE AS THE COMPLAINT FAILS TO ESTABLISH DIVERSITY JURISDICTION.

Federal Courts have limited jurisdiction and are permitted to adjudicate cases and controversies only as permitted under Article III of the Constitution. See U.S. Const. art. III, §2; Lance v. Coffman, 549 U.S. 437, 439 (2007). Unless affirmatively demonstrated, a federal court is presumed to lack subject matter jurisdiction. Phila. Fed'n of Teachers v. Ridge, 150 F. 3d 319, 323 (3d Cir. 1998) (citing Renne v. Geary, 501 U.S. 312, 316 (1991). The burden of demonstrating the

existence of federal jurisdiction is on the party seeking to invoke it. Common Cause of Pa. v. Pennsylvania, 558 F.3d 249, 257 (3d Cir. 2009) (citing DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006). Pursuant to Rule 12(b)(1), dismissal is appropriate when the court lacks jurisdiction over the subject matter of the action. Fed. R. Civ. P. 12(b)(1).

"In order to establish a basis for subject matter jurisdiction in federal court, a plaintiff's claims must establish either federal question jurisdiction under 28 U.S.C. § 1331 or diversity jurisdiction under 28 U.S.C. § 1332." Gencarelli v. New Jersey Dep't of Labor & Workforce Dev., 2015 WL 5455867, at *1 (D.N.J. Sept. 16, 2015) (citing Hines v. Irvington Counseling Ctr., 933 F. Supp. 283, 387 (D.N.J. 1996)).

Here, there are clearly no federal questions set forth and the Complaint itself relies solely on diversity jurisdiction under 28 U.S.C. § 1332. See Exhibit A, Complaint at ¶¶ 14-16 ("Pursuant to 28 U.S.C. § 1332(a), the amount in controversy exceeds the sum or value of $75,000, exclusive of interest and costs"); see also at ¶¶ 47-61 (wherein Counts One, Two and Three set forth state law claims under theories of malicious abuse of legal process, invasion of privacy interests, and intentional infliction of emotional distress).

Despite relying exclusively on diversity jurisdiction, Plaintiffs have failed to adequately plead same and the Complaint should be dismissed. Bush v. Butler, 521

F. Supp. 2d 63, 71 (D.D.C. 2007); Gilbert v. All-Stor Self Storage, 2006 WL 680986, at * 2 (D.N.J. Mar. 15, 2006) (ruling that, "to the extent that [the plaintiff] is alleging a state law tort claim against the defendant, such claim is subject to dismissal for lack of jurisdiction" if the parties do not establish diversity jurisdiction).

The diversity jurisdiction statute provides that:

> [t]he district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive or interests and costs, and is between… [diverse citizens].

28 U.S.C. § 1332(a). A district court's determination as to the amount in controversy is measured by "a reasonable reading of the value of the rights being litigated." Angus v. Shiley Inc., 989 F.2d 142, 146 (3d Cir. 1993). Likewise, "the amount is judged from the face of the complaint and is generally established by a good faith allegation. Golden v. Golden, 382 F.3d 348, 354 (3d Cir. 2004), (citing Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 353 (1961) ("measuring 'good faith' by whether it appears 'to a legal certainty the claim is really for less than the jurisdictional amount.'")

The claims of several plaintiffs, however, "if they are separate and distinct, cannot be aggregated for purposes of determining the amount in controversy." Meritcare Inc. v. St. Paul Mercury Ins. Cop., 166 F.3d 214, 218 (3d Cir. 1999); Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973). Only claims, whether related or

unrelated, of a single plaintiff against a single defendant may be aggregated. Werwinski v. Ford Motor Co., 286 F.3d 661, 666 (3d Cir. 2002); Synder v. Harris, 393 U.S. 332, 335 (1960); 14B Wright, Miller & Cooper, Federal Practice and Procedure 3d § 3704 at 134 (1994).

Here, the Complaint improperly aggregates the Plaintiffs into one entity and fails to sufficiently plead the alleged damages as to each Plaintiffs with any specificity. Accordingly, the Plaintiffs have failed to meet the amount in controversy requirement in their diversity jurisdiction claims.

With respect to malicious abuse of legal process, it is unclear how Plaintiffs Michelle Burgess, Alexandria Burgess, or Minors 1, 2, and 3, have been harmed at all as there is no allegation that they have been asked to do anything in the other pending litigations. With respect to Plaintiffs Philip Burgess and Microbilt, there is no attempt to plead with any specificity as to how the alleged damages reach the $75,000 threshold.

Similarly, the Complaint fails to plead how a corporation, Microbilt, could have been damaged through any invasion of privacy or intentional infliction of emotional distress through the service of legal papers to the Burgess' home.

In each of the three counts in the Complaint, Plaintiffs merely state in conclusory fashion that "[a]s a result of Defendants' conduct, Plaintiffs have been

damages." Id. at ¶¶50, 55, 61. There is no other attempt to set forth any damage claim with the specificity required.

Simply put, the Complaint makes no effort to plead how the Plaintiffs, individually, were actually damaged in this matter with respect to each claim or how those damages could ever meet the amount in controversy requirement.

CONCLUSION

For the foregoing reasons, this Motion to Dismiss should be granted and the Complaint should be dismissed with prejudice.

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Dated: August 24, 2020