No. _____

In the Supreme Court of the United States

SIGNATURE PHARMACY, INC.,
a Florida corporation, et al.,
Petitioners,

v.

ALEX WRIGHT, an individual,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether search warrants for a business that shares multi-occupancy buildings with others violate the particularity requirement of the Fourth Amendment where the warrants fail to identify the offices, floors or areas to be searched or the specific items to be seized, despite the officer's knowledge of the business' location within the buildings and the limited portion of the business under investigation.

2. Whether the Eleventh Circuit properly ruled that a lead officer with actual knowledge of a business' operations and location within multi-occupancy buildings is entitled to qualified immunity where the officer prepared and obtained search warrants authorizing the unfettered search of the entire buildings and seizure of all business records and items, including those unconnected to the investigation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners, Signature Pharmacy, Inc. ("Signature"), Robert Stan Loomis, Kenneth Michael Loomis, Naomi Loomis (collectively, the "Loomises"), Kirk Calvert ("Mr. Calvert"), and Tony Palladino ("Mr. Palladino"), are the plaintiffs in this case and were the appellees in the court below. The Loomises, Mr. Calvert and Mr. Palladino are individuals. Thus, there are no disclosures to be made by them pursuant to Supreme Court Rule 29.6. Signature is a Florida corporation existing under the laws of the State of Florida and does not have any parent companies, subsidiaries or affiliates pursuant to Supreme Court Rule 29.6.

Respondent, Alex Wright, is a defendant in this case. Respondent was the appellant in the court below.

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The opinion of the Court of Appeals for the Eleventh Circuit is unreported and is reprinted in the Appendix ("App.") to this petition. App. A, 1a-14a. The Eleventh Circuit's opinion reversed an order and opinion of the United States District Court of the Middle District of Florida, which had denied respondent's motion for summary judgment on petitioners' claims of unlawful seizure under the Fourth Amendment and conspiracy to violate § 1983. The District Court's opinion is reported as *Signature Pharm., Inc. v. Soares*, 717 F. Supp. 2d 1276 (M.D. Fla. 2010), and is reprinted at App. B, 15a-57a. The Eleventh Circuit denied a timely petition for rehearing or rehearing *en banc*, reprinted at App. C, 58a-59a.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eleventh Circuit denied both a rehearing and rehearing *en banc* on September 14, 2011. App. C, 58a-59a. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS AT ISSUE

The underlying action was brought by the petitioners in part pursuant to 42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983.

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. The Search Warrants and Their Execution.

This lawsuit stems from an investigation of Signature, the Loomises, and two of Signature's employees, Mr. Calvert and Mr. Palladino, by state law enforcement in New York and state and federal law enforcement agencies in Florida. App. B, 16a-17a.

The investigation specifically related to state and federal laws restricting the sale of anabolic steroids and human growth hormone. App. B, 16a-17a. The investigation included a wiretap of Signature's phone lines authorized by a Florida State Circuit Court, grand jury proceedings before a New York County Court, and the execution of two search warrants for two multi-occupancy buildings Signature did not control, but merely shared with other businesses, in Winter Park and Orlando, Florida. App. B, 16a-17a.

Respondent is a law enforcement officer with the Orlando Police Department who was assigned to the Florida Metropolitan Bureau of Investigation, a local task force serving Orlando and outlying communities. App. A, 2a; App. B, 18a-19a. Respondent was the lead agent for the Florida investigation of petitioners. App. B, 21a-22a. After a lengthy investigation, respondent prepared the two search warrants and supporting applications and affidavits for the buildings that Signature occupied with the other businesses. App. B, 21a-22a, 26a.

At the time the warrants were prepared by respondent, he had personal knowledge from the ongoing investigation that Signature's business was comprised of both traditional pharmacy and compounding operations. App. B, 16a. Respondent also knew that Signature's Orlando and Winter Park pharmacies were located in close proximity to hospitals and enjoyed traditional walk-in business from local customers. He further knew that the traditional pharmacy business was not the subject of any investigation. In addition, respondent knew that Signature had a specialty compounding business that served both local residents and non-local individuals

and clinics who received compounded medications through the mail. Finally, respondent knew from his ongoing investigation that (1) Signature shared space at both buildings with other businesses but did not control the building, that (2) Signature's traditional pharmacy operations and compounding operations were located on separate floors from its corporate offices, and that (3) the investigation focused on the compounding operations at the Orlando location involving steroids and human growth hormones. App. B, 46a.

Despite respondent's knowledge from his lengthy investigation, the two warrants generally identified the entire buildings as the places to be searched by stating their addresses and a description of their entryways. App. B, 46a. Moreover, the warrants failed to identify which floors, offices and areas were occupied by Signature. App. B, 46a. The Winter Park warrant actually noted that Signature shared the building with a company named Ejuven 8, physicians and Allstate Insurance. However, neither warrant contained specific limiting language to indicate which floors, offices or areas could be searched, as compared to those which could not. App. B, 46a-47a.

Moreover, despite respondent's knowledge of Signature's traditional and compounding pharmacy operations that were not being investigated, the non-specific language of the two warrants authorized the seizure of virtually all business records, drugs and prescriptions that would commonly be located in any pharmacy. App. B, 48a. Numerous general criminal laws alleged to be violated were then listed in the warrants, including various Florida and federal laws that apply to all controlled substances. App. B, 48a.

On February 27, 2007, the two warrants were executed by respondent and other law enforcement officers from various state (Florida and New York) and federal agencies. App. A, 4a; App. B, 30a. Respondent was physically present at the Orlando building, while other law enforcement officers searched the Winter Park building. The officers loaded numerous U-Haul trucks and removed from both locations virtually every document and piece of property Signature needed to conduct its business. App. B, 30a-32a. The seizure was not limited to business records and items related to steroids and human growth hormone, which was the focus of the investigation. App. B, 50a.

The Florida state and federal agencies eventually abandoned their investigations of petitioners without bringing charges. App. B, 17a. However, Signature's property was not returned by law enforcement for more than three years following the execution of the two search warrants, and after ignoring for several months the Florida state court's order directing the return of the property to Signature. App. B, 17a, 35a.

Petitioners brought an action against respondent and others under 42 U.S.C. § 1983, in addition to various Florida state law claims. App. A, 2a; App. B, 17a. As relevant to this petition, petitioners allege that respondent violated their Fourth Amendment rights by searching Signature's business locations and indiscriminately seizing petitioners' property pursuant to invalid search warrants prepared and obtained by respondent. App. A, 2a.

B. The District Court Opinion.

In petitioners' civil action, respondent moved for summary judgment, raising the defense of qualified immunity. App. B, 20a-21a. The District Court denied respondent qualified immunity for the petitioners' § 1983 unlawful search and seizure claim and § 1983 conspiracy claim. App. B, 51a, 56a-57a. Specifically, the District Court found that "[t]he search warrants at issue in this case plainly failed to pass muster under the Fourth Amendment's particularity requirements. Neither the place to be searched nor especially the items to be seized were described with reasonable particularity." App. B, 46a.

The District Court noted that the two places to be searched were two-story, multi-occupancy buildings shared by Signature's pharmacy, its corporate offices, and other occupants with no affiliation to Signature. App. B, 46a-47a. The District Court determined:

> Neither warrant describes the particular floor, office, suites or subunits to be searched. In short, nothing in the warrants would preclude an indiscriminate search of the entire buildings. Quite the contrary, the warrants give every suggestion that [respondent] could – and did – do just that. This is clearly improper.

App. B, 46a-47a. As to the items to be seized, the District Court determined that "the warrants authorized the search and seizure of virtually everything on site." App. B, 48a. The District Court found that "[a] lengthy laundry list of specific items unconnected – in any way – to an alleged crime is no better than a warrant for 'all evidence' of an alleged

crime." App. B, 49a. As a result, the District Court held that the two search warrants were invalid on their faces in their descriptions of the places to be searched and the items to be seized. App. B, 51a. The District Court further held that petitioners "carried their burden of showing that the grant of qualified immunity is inappropriate." App. B, 51a.

C. The Court of Appeals Decision.

Respondent appealed the denial of qualified immunity. App. A, 2a-3a. The Eleventh Circuit reversed the District Court and held that respondent was entitled to qualified immunity on petitioners' § 1983 unlawful search and seizure claim. App. A, 3a, 11a-12a. Although recognizing that "the warrants do not indicate that the building is a multiple-occupancy structure with offices unaffiliated with Signature and do not describe the particular floor, office, suites, or subunits to be searched[,]" the Eleventh Circuit did not find that these facts "necessarily render[ed] the warrants facially invalid." App. A, 8a. Instead, the Eleventh Circuit held that "[t]he addresses and descriptions of the buildings, in conjunction with [respondent's] knowledge, were sufficient to enable the officers to locate and identify the premises with reasonable effort." App. A, 8a. The Eleventh Circuit also determined that the two warrants were sufficiently particular as to the items to be seized, despite their broad wording which did not specify what could be seized and what could not. App. A, 10a-11a. The Eleventh Circuit again considered respondent's alleged knowledge as a "seasoned law enforcement officer" in holding that "the items were described with sufficient particularity . . . to identify the things to be seized." App. A, 10a.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because this case presents two compelling and recurring constitutional issues faced by law enforcement officers in investigating white-collar crimes and seeking search warrants directed at businesses with legitimate operations. First, whether search warrants for multi-occupancy buildings violate the particularity requirement of the Fourth Amendment when the warrants do not identify the offices, suites, or floors to be searched, despite the knowledge of the law enforcement officer who prepared the warrants that the buildings were shared by multiple businesses. Second, whether search warrants directed to a business of which only a portion is under investigation violate the particularity clause of the Fourth Amendment when the warrants authorize the seizure of virtually all records and items commonly found at the business as purported evidence of violations of several broad state and federal criminal statutes. As to both of these issues, the Eleventh Circuit's decision substantially erodes the constitutional protections afforded by the particularity clause as articulated in the Court's decisions and conflicts with various Circuits. Given the frequency that law enforcement officers prepare, obtain, and execute warrants directed to businesses that share office buildings or that have operations of which only a portion is being investigated, this case presents constitutional issues of national importance.

This Court should also grant certiorari because the Eleventh Circuit completely ignored the Court's decision in *Groh v. Ramirez*, 540 U.S. 551 (2004), when it considered and relied upon the actual knowledge of

respondent (because it could not consider the applications and affidavits to the warrants that were neither attached nor incorporated therein) in reversing the District Court's decision that respondent was not entitled to qualified immunity. The Eleventh Circuit's decision eviscerates the constitutional requirement that the places to be searched and the items to be seized be particularly described in warrants, and undermines the constitutional prohibition on general warrants. A decision of the Court in this case would provide proper guidance to law enforcement in their frequent use of warrants involving businesses, as the decision below allows law enforcement officers to be unfettered by the particularity requirement of the Fourth Amendment when preparing, obtaining, and executing search warrants for businesses which share office buildings and then to use their prior knowledge to avoid civil liability. Given the well established facts set forth in the record below, this case provides the ideal vehicle for review of these important and significant issues.

I. THIS CASE RAISES A CRITICALLY IMPORTANT CONSTITUTIONAL QUESTION AS TO WHETHER THE PARTICULARITY CLAUSE OF THE FOURTH AMENDMENT INVALIDATES SEARCH WARRANTS THAT INCLUDE OVERBROAD DESCRIPTIONS OF PLACES TO BE SEARCHED AND ITEMS TO BE SEIZED, DESPITE RESPONDENT'S ACTUAL KNOWLEDGE OF FACTS THAT COULD HAVE BEEN UTILIZED TO SIGNIFICANTLY NARROW THE WARRANTS.

A. The Eleventh Circuit's Decision that the Search Warrants did not Violate the Particularity Clause of the Fourth Amendment, Where They Failed to Specify which Offices, Suites, or Floors of Multi-Occupancy Buildings Could be Searched, Despite Respondent's Knowledge of the Areas Occupied by Signature, is in Conflict with Decisions of the Court and Various Circuits.

The Eleventh Circuit's reversal of the District Court's holding that the subject search warrants were facially invalid for lack of particularly in violation of the Fourth Amendment is a radical departure from this Court's jurisprudence. It also squarely conflicts with various other Circuits. Given the national importance of the Fourth Amendment issues raised in this case and ignored by the Eleventh Circuit, certiorari should be granted or the Eleventh Circuit's decision summarily reversed.

In *Steele v. United States No. 1*, 267 U.S. 498 (1925), the Court set forth the standard of

particularity required for a search warrant's premises description. The Court held that "[i]t is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended." *Id*. at 503 (citations omitted).

Over sixty years later, in *Maryland v. Garrison*, 480 U.S. 79 (1987), the Court addressed the particularity required for a search warrant of a multi-occupancy building. Of particular relevance to this case, the Court recognized in *Garrison* that, had the officers known at the time they requested the search warrant that more than one occupant occupied the third floor of the building, more specificity would have been required in the warrant's description of the place to be searched. *Id*. at 85. However, because the officers had no such knowledge, the warrant was valid when it was issued. *Id*. The "factual mistake" of the officers, which was not known at the time the warrant was issued, did not invalidate the warrant. *Id*.

In finding the two search warrants in this case invalid, the District Court relied upon the Court's analysis in *Garrison*. App. B, 46a-47a. However, in reversing the District Court, the Eleventh Circuit ignored *Garrison*. Had the Eleventh Circuit followed this Court's jurisprudence, it would have necessarily determined that respondent's actual knowledge of the locations of Signature's pharmacies, general office operations, and the other businesses within the two buildings required more specificity in the warrants to comply with the particularity clause of the Fourth Amendment. As drafted, the two warrants did not identify the places intended to be searched, be it the pharmacies of Signature, the offices of its executives,

or the unrelated businesses, such that a law enforcement officer with reasonable effort could ascertain where to search and where to avoid. Because respondent had extensive knowledge of Signature's operations and a distinct understanding of the multiple businesses that occupied the premises, the lack of particularity in the warrants is inexcusable.

Like the District Court in this case, the Seventh and Sixth Circuits have found that warrants for multi-occupancy buildings are facially invalid for lack of particularity if the warrants fail to identify the particular floors, subunits, or areas to be searched. In *United States v. Higgins*, 428 F.2d 232 (7th Cir. 1970), the Seventh Circuit held that a warrant for the search of the entire basement level of a multi-occupancy building was facially insufficient under the particularity clause of the Fourth Amendment where the building was three-stories with multiple apartments on each floor and three additional apartments in the basement. *Id*. at 234. The defendant, who occupied one of the three basement apartments, complained that the warrant was facially insufficient in that it described the basement as a single apartment. *Id*. at 233-34. The Seventh Circuit, in holding that the warrant violated the particularity clause of the Fourth Amendment, quoted its prior decision in *United States v. Hinton*, 219 F. 2d 324 (7th Cir. 1955), in which it said:

> Federal courts have consistently held that the Fourth Amendment's requirement that a specific "place" be described when applied to dwelling refers to a single living unit (the residence of one person or family). Thus, a warrant which describes an entire building

> when cause is shown for searching only one apartment is void.

Id. at 235.

In *United States v. Votteller*, 544 F.2d 1355 (6th Cir. 1976), the Sixth Circuit relied upon the Court's guidance in *Steele* and the Seventh Circuit's decisions in *Higgins* and *Hinton* in determining that a warrant for a multi-occupancy building was not sufficiently particular. *Id*. at 1362-63. The warrant at issue in *Votteller* described a building that was shared by residential apartments and a commercial business. *Id*. at 1362. The Sixth Circuit found that "the search warrant was illegal and void for the failure to accurately describe the premises to be searched." *Id*. at 1364. In so holding, the Sixth Circuit observed that "… [t]he *Fourth Amendment* 'safeguard is designed to require a description which particularly points to a definitely ascertainable place so as to exclude all others.'" *Id*. at 1363 (citations omitted).

Moreover, while the Fifth Circuit's decisions were binding on the Eleventh Circuit, the Fifth Circuit decided *United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022 (1982).[1] The Fifth Circuit stated in *Haydel* that "[a] warrant's description of the place to be searched need not meet technical requirements nor have the specificity sought by conveyancers. It need only describe the place to be searched with sufficient particularity to direct the

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[1] Cases decided by the Fifth Circuit before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

searcher, to confine his examination to the place described, and to advise those being searched of his authority." *Id*. at 1157. In determining whether the warrant in *Haydel* was sufficiently particular, the Fifth Circuit implicitly endorsed the Seventh Circuit's decision in *Higgins* by identifying the *Higgins* warrant as one that lacked sufficient particularity. *Id.* at 1158, n.10.

The District Court's finding in this case that the two search warrants did not identify which floors, offices, or areas of the two multi-occupancy buildings could be searched is consistent with numerous other courts that have relied upon *Higgins* in holding that similar warrants violated the particularity clause of the Fourth Amendment. *See e.g., United States v. Maneti*, 781 F. Supp. 169, 179 (W.D. N.Y. 1991); *United States v. Esters*, 336 F. Supp. 214, 218 (E.D. Mich. 1972); *United States v. Parmenter*, 531 F. Supp. 975, 978 (D. Mass. 1982); *United States v. Riveral Rodriquez*, 768 F. Supp. 16, 18 (D. P.R. 1991). The policy behind these holdings is evident: In multi-occupancy buildings, it is imperative that those conducting the search, as well as those who occupy various areas, clearly know which areas can be searched as compared to which areas cannot. Here, that was not the case as the warrants authorized indiscriminate searches of two entire buildings, of which Signature occupied a portion along with businesses that were unrelated to it.

In reversing the District Court's finding that the places to be search were not particularly described, the Eleventh Circuit joined the Second Circuit. App. A, 8a-9a. The Second Circuit's decision in *United States v. Clark*, 638 F.3d 89 (2d Cir. 2011), considered a

warrant for a multi-occupancy building. Although the Second Circuit did ultimately hold that the warrant was invalid for lack of probable cause, the probable cause analysis was used because the Second Circuit found that the warrant was facially valid, although it failed to specify which area of a multi-occupancy building could be searched. *Id*. at 102.

Despite the Court's observation in *Garrison*, related to the lack of knowledge of the officer, the Eleventh Circuit here approved of the general description of the multi-occupancy buildings *even though* respondent had actual knowledge that unrelated businesses, separate and apart from Signature, shared the buildings with Signature. App. B, 46a-47a. The Eleventh Circuit specifically relied upon respondent's knowledge of the buildings (as compared to lack of knowledge) to find *no* facial deficiency in the warrants' descriptions of the places to be searched. App. A, 7a-9a. The Eleventh Circuit relied upon respondent's knowledge to support the warrant for the Winter Park building, despite respondent not being present at that premises while the warrant was executed.

In determining that respondent's actual knowledge could be considered, the Eleventh Circuit relied upon its previous decision in *United States v. Burke*, 784 F.2d 1090 (11th Cir. 1986), *cert. denied*, 476 U.S. 1174 (1986). App. A, 7a-8a. However, *Burke* involved a warrant containing a mistaken street address of an apartment whose apartment number was correctly identified and was not shared with any other apartment in the entire housing development. *Burke,* 784 F.2d at 1092-93. The extension of *Burke* to this case – where respondent made no mistake in identifying both multi-occupancy buildings in their

entirety – seriously erodes the protections afforded by the particularity clause of the Fourth Amendment.

Finally, the Eleventh Circuit's finding that any violations of the Fourth Amendment rights of the other occupants of the buildings have no impact on petitioners' claims (*see* App. A, 8a) is unavailing. There is nothing in the warrants that identifies that the offices, desks or file cabinets of the Loomises, Mr. Calvert or Mr. Palladino could be searched, as compared to the pharmacies themselves or the common areas of the corporate offices. *See Mancusi v. DeForte*, 392 U.S. 364, 369 (1968). Although ignored by the Eleventh Circuit in its analysis, the Loomises, Mr. Calvert and Mr. Palladino, as occupants of the multi-occupancy buildings and petitioners with Signature, had no way of knowing from a review of the warrants whether their offices, desks or file cabinets could be searched.

This Court should grant certiorari to resolve the clear conflict presented here on this critically important Fourth Amendment issue. A decision by the Court can properly guide law enforcement officers in their frequent use of search warrants involving multi-occupancy buildings when they know with specificity which areas are occupied by the target of the investigation.

B. The Eleventh Circuit's Decision that the Search Warrants did not Violate the Particularity Clause of the Fourth Amendment, Where the Warrants Set Forth a Laundry List of all Items Commonly Found in the Business with a Reference to Numerous General Criminal Statutes, is also in Conflict with Decisions of the Court and Various Circuits.

The Eleventh Circuit's reversal of the District Court's holding that the two search warrants were facially invalid for failing to particularly describe the items to be seized in violation of the Fourth Amendment is also a retreat from the prior decisions of the Court. In addition, it is in direct conflict with other Circuits. Given the critical importance to the public of being free from general searches, the Court should grant certiorari or summarily reverse the decision of the Eleventh Circuit.

In *Stanford v. Texas*, 379 U.S. 476 (1965), the Court considered the requisite language for a description of the items to be seized in a warrant. The Court held that "[t]he indiscriminate sweep of [the language in the warrant] is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history." *Id.* at 486.

Citing to the Court's decision in *Stanford*, as well as the Court's subsequent decision in *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993), the District Court held that respondent's laundry list of virtually every document and other business record on the premises followed by a half-page string cite of numerous Florida

and federal statutes "failed to comply with the particularity requirements of the Fourth Amendment." App. B, 49a. The District Court's decision in that regard is consistent with the position taken by the Tenth, First, Ninth, and Sixth Circuits in interpreting *Dickerson* and *Stanford* to prohibit the use of general warrants.

In *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), the Tenth Circuit set forth its unwavering position that the particularity clause required a warrant to "allow the executing officers to distinguish between items that may and may not be seized." *Id*. at 602. In *Leary*, the warrants "encompassed virtually every document that one might expect to find in a modern export company's office." *Id*. The criminal activity cited in the warrants was merely a reference to two federal export statutes. *Id*. at 601. The Tenth Circuit, in a lengthy analysis, found that the Fourth Amendment requires more particularity than a list of virtually every business record and a reference to broad criminal statutes. *Id*. at 602. Indeed, the Tenth Circuit found that such warrants provided no limitation at all that would distinguish them from general warrants. *Id*. at 601.

The Tenth Circuit indicated that it was siding with other Circuits that hold that "reference to a broad federal statute is not a sufficient limitation on a search warrant." *Id*. Specifically, the Tenth Circuit cited to *United States v. Roche*, 614 F.2d 6 (1st Cir. 1980), and *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982), as setting forth the First and Ninth Circuits' analogous positions. *Id*. at 601-02.

In *Roche*, the First Circuit considered the facial validity of thirteen warrants that permitted the search of an insurance company's offices and seizure of:

> books, records, documents, consisting of but not limited to insurance applications, premium notices, claims requests for recovery, correspondence relating to applications and claims, policies, ledger sheets, invoices, account journal, and the office week ending progress reports which are evidence, fruits and instrumentalities of the violation of Title 18, United States Code, Section 1341.

Roche, 614 F.2d at 7. The First Circuit noted that the items that were subject to seizure were not limited to motor vehicle insurance, which was the portion of the company's business being investigated. *Id*. As such, the warrants were facially invalid because they did not distinguish the business records and other items that were authorized to be seized (those related to motor vehicle insurance) from those that could not (those related to all other types of insurance). *Id*. Moreover, the probable cause affidavit, which was more specific, did not save the warrants as it was neither attached nor incorporated to the invalid warrants. *Id*. at 8.

Similarly, in *Cardwell*, the Ninth Circuit concluded that a warrant that authorized the seizure of various business papers that were instrumentalities or evidence of a general tax evasion statute was facially invalid. *Cardwell*, 680 F.2d at 77. In so holding, the Ninth Circuit reasoned that "[l]imiting the search to only records that are evidence of the violation of a certain statute is generally not enough. . . . If items that are illegal, fraudulent, or evidence of illegality are

sought, the warrant must contain some guidelines to aid the determination of what may or may not be seized." *Id*. at 78. The Ninth Circuit similarly found in *United States v. Ozar*, 168 Fed. Appx. 159 (9th Cir. 2006), that a search warrant that authorized the seizure of virtually every business record of a pharmacy was facially invalid. *Id*. at 161.

The Sixth Circuit has also addressed the issue and similarly decided it. In *United States v. Lazar*, 604 F.3d 230 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 973 (2011), the Sixth Circuit considered the particularity of warrants that authorized the seizure of documents and medical records commonly found in medical offices. *Id*. at 232. The items to be seized from the medical offices that were being investigated were summarized as follows:

1. "Any and all documents and records. . . including but not limited to patient charts, files, medical records . . . concerning the treatment of any of the below listed patients, claim forms, billing statements, records of payments received. . . for the following patients:'"
2. "Any and all information and data, pertaining to the billing of services. . . .";
3. "Any and all computer hardware. . . .";
4. "Any and all computer software. . . .";
5. "Any computer related documentation. . . .";
6. "Any computer passwords. . . .";
7. "If a determination is made during the search, by the Special Agent assigned to the computer aspect of this search, . . . that imaging or recreation of the computer hard drives will damage the seized information,

> you are authorized to seize the computers. . . . "; and
> 8. "All other records or property that constitutes evidence of the commission of the offenses outlined in the search warrant. . . ."

Id. at 233. In agreeing with the lower court's reasoning as to the impermissible breadth of the items to be seized, the Sixth Circuit stated: "Rather than specify exactly which documents it was seeking, the government chose to use descriptions of items to be seized that referenced no specific patients, no specific transactions, and most importantly, no time frame." *Id*. at 238.

The District Court's finding in this case that the warrants prepared by respondent violated the particularity clause of the Fourth Amendment with regard to the items to be seized is consistent with the reasoning of the First, Sixth, Ninth, and Tenth Circuits. The District Court correctly found that the subject warrants, like the warrants in the above cases, did not allow the executing officers to distinguish between items that may and may not be seized. App. B, 45a-51a. The warrants included virtually every item that could possibly be located within Signature's pharmacies and its corporate offices, despite respondent investigating Signature for nearly two years related to a limited portion of its pharmacy operations. App. B, 48a. The warrants also included an exhaustive list of several federal and Florida statutes without any connection to the items listed. App. B, 48a.

Noting that the breadth of the warrants left the decision of what could and could not be seized to the

executing officers, the District Court could not ignore the constitutional infirmity. App. B, 47a-51a. In articulating its reasoning, the District Court cited the Court's decision in *United States v. Matlock*, 415 U.S. 164, 185 (1974), and observed that "[o]n the day of the raids, '[n]othing circumscribed [respondent's] activities . . . except [his] own good senses.'" App. B, 49a-50a. There simply was no limitation on what could be seized. Given that fact, the District Court held that "[n]o reasonable officer could possibly have believed that the warrants [respondent] possessed gave him the authority to simply arrive with U-Haul trucks, enter any office or suite in the buildings shared by Signature, and cart away virtually everything found therein." App. B, 49a-50a.

In reversing the District Court, the Eleventh Circuit cited to its previous decisions in *United States v. Santarelli*, 778 F.2d 609 (11th Cir. 1985), and *United States v. Bentancourt*, 734 F.2d 750 (11th Cir. 1984). App. A, 9a-11a. However, in so ruling, the Eleventh Circuit ignored its own reasoning in *Santarelli* that, given the limited information the FBI actually had available to it regarding what would be found at the premises to be searched, the warrant when obtained was crafted as narrowly as possible. *Santarelli*, 778 F.2d at 615. Given the Eleventh Circuit's acknowledgement that respondent "had been investigating Signature for nearly two years" (App. A, 8a), the reasoning of *Santarelli* actually supports a finding that more particularity was required in the subject warrants than authorizing virtually every business record and other item be seized, regardless of what it was or when it was created. In addition to every business record, the warrants in this case allowed for the seizure of every prescription ever filled

by Signature, regardless of the medication, the prescribing physician, the patient, or the date. These prescriptions were seized without regard for the privacy rights of the patients who received heart medications, antibiotics, or any other drugs from Signature which were not part of respondent's ongoing investigation.

Additionally, the Eleventh Circuit cited to the Eighth Circuit as finding warrants facially valid when they include a laundry list of business records and items with a general reference to criminal statutes. App. A, 9a-10a. Indeed, the Eighth Circuit has found such warrants valid in *United States v. Dennis*, 625 F.2d 782, 792 (8th Cir. 1980), and *United States v. Johnson*, 541 F.2d 1311, 1314-15 (8th Cir. 1976). However, even the Eighth Circuit's position has its limits. Specifically, the Eighth Circuit has stated that "[w]here the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice because less particularity can be reasonably expected than for goods (such as those stolen) whose exact identity is already known at the time of issuance." *Johnson*, 541 F.2d at 1314. Thus, while the Eighth Circuit does permit a broader description of items to be seized, it would likely not go as far as the Eleventh Circuit in finding the warrants were facially valid.

Law enforcement officers face this issue with recurring frequency in white-collar investigations where only a portion of a business is under investigation. This Court should grant certiorari and use this case as a vehicle to confirm that law enforcement officers cannot prepare, obtain and execute search warrants which do not particularly

describe the items to be seized such that reasonable officers cannot distinguish between items that may and may not be seized. Alternatively, the Court should summarily reverse the decision of the Eleventh Circuit.

II. THE DECISION BELOW, WHICH REVERSED A DENIAL OF QUALIFIED IMMUNITY TO RESPONDENT WHO, WITH KNOWLEDGE OF THE SPECIFIC PLACES TO BE SEARCHED AND ITEMS TO BE SEIZED, DRAFTED WARRANTS THAT VIOLATE THE PARTICULARITY CLAUSE, DIRECTLY CONFLICTS WITH THE COURT'S DECISION IN *GROH*.

The Eleventh Circuit's reversal of the District Court's denial of qualified immunity to respondent directly conflicts with the Court's jurisprudence from *Groh*. In denying qualified immunity to an officer who drafted a warrant that failed for lack of particularity, the Court in *Groh v. Ramirez*, 540 U.S. 551 (2004), observed that the particularity clause of the Fourth Amendment serves more than the avoidance of general searches. It also "assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Groh*, 540 U.S. at 561 (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)). In so doing, the Court again articulated that "a warrant may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id*. at 565 (quoting *United States v. Leon*, 468 U.S. 897, 923 (1984)).

Here, respondent drafted two warrants for multi-occupancy commercial buildings with which he was keenly familiar, knowing that the warrants did not describe which suites, offices or floors could be searched. The warrants were also drafted for a business (i.e., Signature) that respondent knew had traditional pharmacy operations in both buildings, yet respondent intentionally chose to not specify which prescriptions, drugs, or business records could be seized at those locations. As a result of respondent's intentional conduct in drafting the warrants, there was no assurance to anyone present at either of the buildings of the authority of the searching officers and the limits of their authority. This is especially so in light of the fact that respondent was not even present at the Winter Park location. As noted by the District Court, "[n]o reasonable officer could possibly have believed that the warrants [respondent] possessed gave him the authority to simply arrive with U-Haul trucks, enter any office or suite in the buildings shared by Signature, and cart away virtually everything found therein." App. B, 50a.

In *Groh*, the Court held that a warrant that fails to particularize the places to be searched and the items to be seized may be cured by the supporting affidavit or application if attached to or incorporated in the warrant. *Id*. at 557-58, 560. In such circumstances, a warrant may be saved despite its facial invalidity. Absent such circumstances, the Court has clearly held that the Fourth Amendment requires particularity *in the warrant*. *Id.* at 557.

Here, no affidavits or applications were attached to or incorporated in the subject warrants to narrow the respondent's descriptions of the places to be searched

or the items to be seized. Thus, under *Groh*, the inquiry of whether the warrants could be cured should have ended there. It did not. Instead, the Eleventh Circuit ignored *Groh* and relied upon respondent's personal knowledge and experience (which were not set forth in the warrants themselves) in holding that the warrants were sufficiently particular on their faces. App. A, 8a, 10a-11a. This reliance upon respondent's knowledge and experience applied to both warrants, notwithstanding the fact that respondent was not even present at the execution of the warrant at the Winter Park building.

Importantly, the Eleventh Circuit's decision creates a dangerous precedent that the very knowledge of an officer that should have been used to narrow the descriptions in the warrants (but was not) can be used to save him from being denied qualified immunity. While the Court denied immunity to the officer in *Groh* who made a mistake in describing the items to be seized, the Eleventh Circuit granted immunity to respondent who made no mistake. Rather, respondent received immunity for intentionally drafting, obtaining, and executing facially overbroad warrants.

The Court should grant certiorari or summarily reverse the decision of the Eleventh Circuit to cure the impropriety which creates a perilous precedent that an officer's knowledge or experience can cure a warrant that on its face does not particularly describe the places to be searched and the items to be seized. If the subjective knowledge of a law enforcement officer that is not included in a warrant can later be used to shield that same officer from liability, then the particularity requirement of the Fourth Amendment has little or no meaning. Worse yet, every officer that is sued for

drafting, obtaining and executing a warrant that fails for lack of particularity can avoid liability by simply claiming that he had personal knowledge of where he should search and what he should seize. A grant of certiorari or summary reversal by the Court will reinforce the meaning of the Fourth Amendment's particularity clause in cases involving qualified immunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted or the decision of the Eleventh Circuit should be summarily reversed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-13215
D. C. Docket No. 6:08-cv-01853-GAP-GJK

[Filed July 19, 2011]

SIGNATURE PHARMACY, INC., a Florida corporation, ROBERT STAN LOOMIS, an individual, et al.,	)
Plaintiff-Appellees,	)
versus	)
ALEX WRIGHT, an individual,	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Middle District of Florida

(July 19, 2011)

Before DUBINA, Chief Judge, HILL, Circuit Judge, and GOLDBERG,[*] Judge.

PER CURIAM:

Plaintiff-Appellees Signature Pharmacy, Inc., et al. ("Signature") brought an action against Alex Wright ("Wright"), an officer with the Metropolitan Bureau of Investigation ("MBI"); the City of Orlando; the Albany County District Attorney's Office ("Albany DA"); the Albany County District Attorney, P. David Soares ("Soares"); Assistant Albany County District Attorney, Christopher P. Baynes ("Baynes"); and Mark Haskins ("Haskins"), an officer with the New York Bureau of Narcotics Enforcement ("NYBNE"). This appeal only addresses the claims against Wright.

Plaintiffs sued Wright pursuant to 42 U.S.C. § 1983 (2006) on claims of (1) unlawful seizure of plaintiffs' property without probable cause and outside the scope of any valid search warrant; (2) unlawful arrest; (3) malicious prosecution; (4) defamation; and (5) unlawful conspiracy. The district court granted Wright's motion for summary judgment as to the unlawful arrest, malicious prosecution, and defamation claims.

However, the district court denied summary judgment as to the unlawful seizure claim, finding that the search warrants Wright executed did not comply with the particularity requirement of the *Fourth Amendment*. The district court also denied summary

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[*] Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

judgment as to the unlawful conspiracy claim, finding that Wright's failure to address that claim warranted denial. Wright appeals the district court's denial of summary judgment on those two claims. We conclude that Wright is entitled to qualified immunity for the § 1983 claims and reverse.

I. BACKGROUND

Signature, a pharmacy with business locations in Winter Park and Orlando, Florida, was being investigated for knowingly providing steroids and human growth hormones to individuals without a medical need for those prescriptions and in the absence of a physician-patient relationship.

In November 2005, Wright was assigned to the Signature case. Wright pulled trash from Signature's dumpsters, interviewed Signature's customers, and conducted undercover operations and surveillance of Signature's premises.

On August 4, 2006, Wright applied for a wiretap with Judge Kest of the Ninth Circuit Court, in and for Orange and Osceola Counties in Florida. Judge Kest approved the wiretap, and Wright began monitoring Signature's phone and fax lines for the next 60 days.

In September 2006, Wright met with the other individuals involved in the investigation to create a plan of action. Throughout the fall of 2006, Wright also participated in several meetings with sports teams and the press.

In January 2007, a grand jury in Albany County Court in Albany County, New York returned an

indictment against Signature and its employees. In February 2007, a New York State Court issued arrest warrants for the individuals indicted.

On February 26, 2007, at approximately 8:00 p.m., Wright went to Judge Kest's home with applications for search warrants for the Signature Pharmacy locations. After a thorough, hour-long review of the application and supporting materials, Judge Kest authorized the search warrants.

The next day, the 27th of February, Wright, Baynes, Soares, agents from the DEA, and Orlando police officers executed the search warrants at Signature's Winter Park and Orlando, Florida locations and arrests were made. The search was executed in compliance with the warrants issued by Judge Kest.

II. STANDARD OF REVIEW

The denial of qualified immunity is reviewed *de novo*. *Maggio v. Sipple*, 211 F.3d 1346, 1350 (11th Cir. 2000).

III. DISCUSSION

The district court found that the search warrants Wright procured and executed were facially invalid, general warrants. The district court concluded that Wright was not entitled to qualified immunity and denied summary judgment because he executed warrants that failed to comply with the particularity requirements of the *Fourth Amendment*.

On appeal, Wright challenges the district court's denial of qualified immunity.

A. Qualified Immunity

Qualified immunity protects officials from civil liability in the performance of discretionary functions "so long as their conduct does not violate any 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Rehberg v. Paulk*, 611 F.3d 828, 838 (11th Cir. 2010) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "A government agent is entitled to immunity unless his act is 'so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing.'" *Rehberg*, 611 F.3d at 838 (quoting *Lassiter v. Ala. A&M Univ. Bd. Of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994)).

There is a two-step inquiry to determine whether a defendant is entitled to qualified immunity. *Maggio*, 211 F.3d at 1350. First, the defendant must prove he was acting within the scope of his discretionary authority when the alleged misconduct occurred. *Id.* Once the defendant demonstrates that he was acting within the scope of his discretionary authority, the burden shifts to the plaintiff to show that a grant of qualified immunity is inappropriate. The plaintiff must show (1) there was a constitutional right clearly established at the time of the defendant's alleged misconduct; and (2) the defendant's conduct violated that clearly established constitutional right. *See*

Rehberg, 611 F.3d at 838-39; *see also Saucier v. Katz*, 533 U.S. 194, 202 (2001).[1]

B. Unlawful Seizure

It is undisputed that Wright was acting within the scope of his discretionary authority when he procured and executed the search warrants at issue. Moreover, it is evident that there was a clearly established constitutional right at the time of Wright's conduct because the *Fourth Amendment* clearly provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." *Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

Therefore, we focus our review on the district court's determination that the warrants Wright executed failed to comply with the particularity requirement of the *Fourth Amendment*, violating plaintiffs' *Fourth Amendment* right to be free from unreasonable searches and seizures.

Wright argues that the warrants were not facially invalid because they contained detailed descriptions of

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[1] In *Pearson v. Callahan*, the Supreme Court recognized that courts have discretion to determine which prong of the test to apply first to avoid unnecessary litigation of constitutional issues. *Pearson v. Callahan,* 555 U.S. 223 (2009).

the locations to be searched and the items to be seized. Wright contends that a reasonable officer could rely upon the warrants, and that he was not plainly incompetent or knowingly violating the law in doing so. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). We agree. Because the warrants contained detailed descriptions of the items to be seized and were signed by a state court judge after careful examination, we conclude that Wright's reliance on the warrants in executing his search of the premises was reasonable.

1. Description of premises to be searched

The district court considered the warrants' description of the premises meager, stating that the warrants simply identify a street address and briefly describe the building.

However, as this Court has noted, a search warrant's description is sufficient if it enables an officer to ascertain and identify, with reasonable effort, the place intended to be searched. *United States v. Ellis*, 971 F.2d 701, 703 (11th Cir. 1992) (citation omitted). Specifically, a

> warrant's description of the place to be searched is not required to meet technical requirements or have the specificity sought by conveyancers. The warrant need only describe the place to be searched with sufficient particularity to direct the searcher, to confine his examination to the place described, and to advise those being searched of his authority.

Id. (quoting *United States v. Burke*, 784 F.2d 1090, 1093 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986)). In

addition, "[i]n evaluating the effect [that an error or deficiency in the warrant has] on the sufficiency of [the] warrant, this Court has also taken into account the knowledge of the officer executing the warrant, even where such knowledge was not reflected in the warrant or in the affidavit supporting the warrant." *Burke*, 784 F.2d at 1092-93.

The search warrants at issue contain the addresses of the buildings to be searched and describe the buildings, such as their entryways and doors. For example, the Kuhl Avenue warrant states that the building is two stories, is painted beige with red trim, can be accessed to the East from Columbia street, has two public entrances, has two sets of double glass doors containing the street address ("1200") and the Signature Pharmacy logo, and has a loading dock on the south side. Wright, an executor of the search warrants, had been investigating Signature for nearly two years. The addresses and descriptions of the buildings, in conjunction with Wright's knowledge, were sufficient to enable the officers to locate and identify the premises with reasonable effort. *See Burke,* 784 F.2d at 1092-93.

Moreover, the fact that the warrants do not indicate that the building is a multiple-occupancy structure with offices unaffiliated with Signature and do not describe the particular floor, office, suites, or subunits to be searched does not necessarily render the warrants facially invalid. Even if failure to describe with particularity the floor, office, suites, or subunits to be searched caused law enforcement to conduct a search of other tenants' offices, that would not constitute a violation of these Plaintiffs' *Fourth Amendment* right. *See Katz v. United States*, 389 U.S.

347 (1967) (highlighting that the *Fourth Amendment* protects people, not places); *see also Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (noting that a defendant must demonstrate a personal expectation of privacy in the place searched to claim the protection of the *Fourth Amendment*).

The places to be searched were described with sufficient particularity, and the warrants were not so facially deficient in that regard that Wright could not reasonably presume them to be valid. *See Groh*, 540 U.S. at 565.

2. Description of items to be seized

The district court also considered the warrants' description of the items to be seized too broad, stating that there was merely a laundry list of specific items unconnected to an alleged crime. We disagree.

This Court has held that "a description is sufficiently particular when it enables the searcher reasonably to ascertain and identify the things to be seized." *United States v. Santarelli*, 778 F.2d 609, 614 (11th Cir. 1985). Warrants have been upheld "when the description is as specific as the circumstances and the nature of the activity under investigation permit." *Id.* In *Santarelli*, the final clause of the warrant at issue, authorized seizure of

> **all property constituting evidence of the crimes of** making and conspiring to make extortionate extensions of credit, financing extortionate extensions of credit, and collections of and conspiracy to collect extortionate extensions of credit which are being kept there

> in violation of Title 18, United States Code, §§ 892, 893 and 894.

Id. at 613-14 (emphasis added). This Court upheld that warrant despite its broad wording. *Id.* at 615 (noting that "[s]everal circuits have upheld broadly-worded search warrants authorizing the seizure of . . . evidence" relating to the specific crime(s) charged). Drawing on the language and reasoning of the Eighth Circuit, we upheld the warrant finding that the "general description sufficed because the exact identity of the evidence to be seized could not have been known at the time the warrant issued and because the warrant limited the search to evidence of [the relevant crime(s)]." *Id.* (citing *United States v. Dennis*, 625 F.2d 782, 792 (8th Cir. 1980)).

Similarly, in this case, the warrants authorized seizure of a number of items, such as documents, records, bills, logs, computer equipment, and so forth, **which [are] evidence of a criminal violation of the laws of the State of Florida**. A list of the pertinent crimes and/or statutes followed that language, including, for example, bad faith manufacture, purchase, sale, or delivery of anabolic steroids by prescription, which are controlled substances, and distribution and possession with intent to distribute controlled substances, among others.

Because the descriptions in the warrants refer to items that are evidence of a violation of certain statutes relating to the sale of controlled substances, the items were described with sufficient particularity to allow Wright, a seasoned law enforcement officer, to identify the things to be seized. *See United States v.*

Betancourt, 734 F.2d 750, 754-55 (11th Cir.), *cert. denied*, 469 U.S. 1021 (1984) (stating that a warrant's description need not contain elaborate specificity; it is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized).

In sum, the warrants described with sufficient particularity the place to be searched and the items to be seized. Accordingly, Wright did not violate plaintiffs' *Fourth Amendment* right, and he is entitled to qualified immunity for the unlawful seizure claim.

C. Unlawful Conspiracy

"A plaintiff may state a § 1983 claim for conspiracy to violate constitutional rights by showing a conspiracy existed that resulted in the actual denial of some underlying constitutional right." *Grider v. City of Auburn*, 618 F.3d 1240, 1260 (11th Cir. 2010) (citation omitted). The plaintiff "must show that the parties 'reached an understanding' to deny the plaintiff his or her rights." *Id.* (quoting *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990)). Moreover, "[t]he conspiratorial acts must impinge upon the federal right; the plaintiff must prove an actionable wrong to support the conspiracy." *Bendiburg*, 909 F.2d at 468 (citation omitted).

Because Wright did not deny plaintiffs their *Fourth Amendment* right, there is no actionable wrong to support Signature's conspiracy claim. Thus, Wright is entitled to qualified immunity on the unlawful conspiracy claim as well.

IV. CONCLUSION

We conclude that Wright is entitled to qualified immunity. Accordingly, the order of the district court denying Wright's motion for summary judgment based on his qualified immunity from plaintiffs' § 1983 claims is reversed.

REVERSED.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 10-13215

District Court Docket No.
6:08-cv-01853-GAP-GJK

[Filed July 19, 2011]

SIGNATURE PHARMACY, INC., a Florida corporation, ROBERT STAN LOOMIS, an individual, KENNETH MICHAEL LOOMIS, an individual, NAOMI LOOMIS, an individual, KIRK CALVERT, an individual, et al.,

Plaintiffs - Appellees,

versus

P.DAVID SOARES an individual, et al.,

Defendants,

ALEX WRIGHT, an individual,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of Florida

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JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: July 19, 2011
For the Court: John Ley, Clerk of Court
By: Djuanna Clark

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:08-cv-1853-Orl-31GJK

[Filed June 10, 2010]

SIGNATURE PHARMACY, INC., ROBERT STAN LOOMIS, KENNETH MICHAEL LOOMIS, NAOMI LOOMIS, KIRK CALVERT and TONY PALLADINO,	)
Plaintiffs,	)
-vs-	)
P. DAVID SOARES, CHRISTOPHER B. BAYNES, ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE, MARK HASKINS, CITY OF ORLANDO, FLORIDA and ALEX WRIGHT,	)
Defendants.	)

ORDER

This matter came before the Court upon consideration of Defendant's, Alex Wright ("Wright"),

Motion for Summary Judgment (the "Motion") (Doc. 129), Plaintiffs' response in opposition thereto (Doc. 202), Defendant's reply (Doc. 221), and Plaintiffs' sur-replies (Docs. 230 and 250). The Court heard oral argument and held an evidentiary hearing on May 19 and 21, 2010 (Doc. 257).

I. Overview

In November 2005, authorities began investigating Signature Pharmacy, Inc. ("Signature") and its principals[1] for violations of federal and Florida statutes restricting the sale of anabolic steroids and human growth hormone. The investigation was carried out by multiple federal and state law enforcement agencies[2] in Florida and New York and included, *inter*

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[1] Signature is owned by Robert Stan Loomis ("Stan Loomis"), Naomi Loomis ("Naomi Loomis"), and Kenneth Michael Loomis ("Kenneth Loomis"). Kirk Calvert ("Calvert") and Tony Palladino ("Palladino") were employees of Signature. Collectively, these individuals are referred to herein as the "Plaintiffs."

Signature operated two pharmacies in Central Florida: a traditional pharmacy located on Aloma Avenue in Winter Park and a compounding pharmacy located on Kuhl Avenue near downtown Orlando. A compounding pharmacy creates customized medications for patients whose health care needs may not be met by manufactured medications (including, for example, patients who need specialized dosing or are allergic to inert ingredients such as binders or dyes in commercially available products). International Academy of Compounding Pharmacists, What is Pharmacy Compounding?, http://www.iacprx.org/site/PageServer?pagename=What_is_ Compounding.

[2] The various agencies in the investigation included, among others, the Orlando Metropolitan Bureau of Investigation, U.S. Drug Enforcement Agency, Florida Department of Law

alia: a wiretap of Signature's phones; grand jury proceedings before a New York County Court; and search warrants authorized by a Florida Circuit Court.

The investigation came to a head on February 27, 2007, when agents in Florida executed three search warrants and arrested Signature's principals. During the raids, which were highly publicized and conducted in the presence of the media, agents seized virtually everything on Signature's premises and "perp walked" certain Plaintiffs. A week later, Plaintiffs were transported to Albany, New York for arraignment.

Despite the wiretap and seizure of voluminous amounts of physical and documentary evidence, Plaintiffs were never tried for any criminal wrongdoing. All of the New York indictments were dismissed, the State of Florida formally declared that it would not prosecute, and the property seized during the search warrants was ordered to be returned to Signature.[3]

On September 24, 2008, Plaintiffs brought suit pursuant to 42 U.S.C. § 1983 [hereinafter, "§ 1983"]. (Doc. 3).

Enforcement, U.S. Food and Drug Administration, Orlando Police Department, U.S. Internal Revenue Service, and New York Bureau of Narcotics Enforcement.

[3] Despite a court order, law enforcement has never returned Signature's property.

II. Procedural Posture

Litigation arising out of or related to Signature has proceeded on multiple fronts.[4] In this § 1983 action, Plaintiffs sued the City of Orlando ("City"); Wright, an employee of the Orlando Police Department ("OPD") and an agent with the Metropolitan Bureau of

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[4] Signature is currently litigating in at least three separate actions: (1) a civil State Court matter involving the evidence seized during the raids, which is pending before the Ninth Judicial Circuit Court, in and for Orange and Osceola Counties, Florida, *In re Matter of Search Warrant*, Case No. 2007-CA-1237 (Fla. Cir. Ct. 2007); (2) a miscellaneous federal matter concerning a motion to quash a federal grand jury subpoena and to return Signature's property, which is pending before this Court, *In re: Grand Jury No. 09-1*, Case No. 6:10-mc-38 (M.D. Fla. 2010); and (3) the instant § 1983 action.

In addition to the foregoing, between January 2007 and February 2008, four successive indictments against Signature's principals were returned by two grand juries in Albany County, New York. All four indictments, however, were dismissed and the presentment of the fourth indictment, in particular, was "so improper as to impair the integrity of the grand jury" that the trial court denied the People of New York's motion for leave to re-present their charges to a new grand jury. *People v. Loomis*, 896 N.Y.S.2d 208, 209 (N.Y. App. Div. 2010) (citations and quotations omitted). On February 18, 2010, the New York appellate court affirmed and agreed with the trial court's findings, but as "a matter of discretion [and] in the interest of justice," modified the trial court's order "by reversing. . .[the denial of] the People's motion for leave to re-present the charges. . . ." *Id*. at 211. As of today, however, no charges appear to have been re-presented and it is unclear whether the statute of limitations would preclude a subsequent prosecution.

Investigation ("MBI");[5] the Albany County, New York District Attorney's Office and its district and assistant district attorneys, P. David Soares ("Soares") and Christopher B. Baynes ("Baynes"), respectively; and Mark Haskins ("Haskins"), a peace officer with the New York Bureau of Narcotics Enforcement (collectively, "Defendants"). To effectively manage this case, the Court has focused first on the Florida Defendants (the City and Wright)[6] and will address the claims against the remaining Defendants by separate order. This Order, in particular, concerns Plaintiffs' claims against Wright only.[7]

In their Amended Complaint, Plaintiffs assert five groups of claims against Wright.[8] Specifically, Plaintiffs allege that Wright: (1) illegally seized Plaintiffs' property without probable cause and outside the scope of any valid search warrant, in violation of the Fourth Amendment (the "Unlawful Seizure"

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[5] "MBI is a multi-agency task force that brings together Federal, State and local law enforcement agencies to target . . . criminal enterprises" in Central Florida (Doc. 246 at 2).

[6] The Court disposed of the claims against the City on June 4, 2010. (Doc. 282).

[7] Plaintiffs have sued Wright in his individual capacity only. (Doc. 3, ¶7).

[8] The claims against Wright are not clearly delineated but appear in Count V (labeled simply "42 U.S.C. § 1983") and Count VI (labeled "42 U.S.C. §§ 1983 and 1985"). (Doc. 3, ¶¶ 110-128 and 129-141). Notwithstanding the reference to § 1985, Plaintiffs have represented to the Court that there is a scrivener's error in the Amended Complaint and that they had no intention of asserting a § 1985 claim. (Doc. 202 at 29, n. 22); (Doc. 201 at 15, n. 15).

claims). (Doc. 3, ¶¶ 30 and 119); (2) deprived Plaintiffs of their right not to be arrested or detained without probable cause, in violation of the Fourth Amendment (the "Unlawful Arrest" claim) (Doc. 3, ¶¶ 117-118); (3) caused Plaintiffs to be indicted without probable cause in violation of the Fourth and Fourteenth Amendments (the "Malicious Prosecution" claim) (Doc. 3, ¶ 120);[9] (4) engaged in a negative and false media campaign to destroy Plaintiffs' protected business interests in violation of the Fourteenth Amendment (the "Defamation" claim) (Doc. 3, ¶ 115);[10] and (5) conspired with Soares, Baynes and Haskins to violate their rights under the Fourth and Fourteenth Amendments (the "Unlawful Conspiracy" claim) (Doc. 3, ¶¶ 129-133).

In his Motion, Wright contends that he is entitled to qualified immunity on each of the foregoing claims.[11]

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[9] Plaintiffs' Malicious Prosecution claim is predicated solely on the proceedings in New York.

[10] The contours of Plaintiffs' Defamation Claim against Wright are far from clear. Construing the Amended Complaint in the light most favorable to Plaintiffs, the Court reads Count V as asserting a defamation claim that is separate and distinct from the claims asserted in Counts VIII and IX (which are not asserted against Wright).

[11] Wright also contends that: (1) he has absolute immunity with respect to his testimony before the grand jury; and (2) the claims of Stan Loomis and Tony Palladino must be dismissed for refusal to participate in discovery. (Doc. 129 at 1-2). However, inasmuch as Plaintiffs do not appear to assert (or have otherwise abandoned) any claim related to Wright's grand jury testimony, Wright's entitlement to absolute immunity is of no moment. As to the refusal to participate in discovery, the Court has already ruled

Wright also argues that Plaintiffs had no reasonable expectation of privacy in Signature's stores and therefore lack standing to assert their Unlawful Seizure claims; that Plaintiffs have failed to adduce sufficient evidence in support of their Malicious Prosecution and Defamation claims; and that Plaintiffs have failed to allege their Unlawful Conspiracy claim with particularity. (Doc. 129 at 1-2). In addition, then, to qualified immunity, Wright contends that he is entitled to a judgment as a matter of law on Plaintiffs' Unlawful Seizure, Malicious Prosecution, Defamation and Unlawful Conspiracy claims.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

II. Background[12]

In November 2005, the U.S. Drug Enforcement Agency (the "DEA") and Florida Office of Statewide Prosecutor Anne Wedge-McMillen ("Wedge-McMillen") approached MBI about assisting in their investigation of Signature (Doc. 247 at 1). MBI agreed to join the investigation and Wright was made the lead agent for

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that Defendants waived that defense by failing to timely move to compel Plaintiffs' testimony. (Doc. 140).

[12] Unless otherwise indicated, the material facts are largely not in dispute. Where there are disputes, however, the Court has construed the facts in the light most favorable to Plaintiffs. *See*, *e.g.*, *Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). Citations to the transcript of the hearing are cited to herein as "(Tr. at [page])."

the case.[13] (Doc. 247 at 1). Wright's initial investigation consisted of pulling trash from Signature's dumpsters, interviewing Signature's customers, conducting undercover operations, and surveilling Signature's premises. (Doc. 247 at 3-4). From the outset, however, Wright's primary task was to prepare an affidavit in support of an application for a wiretap of Signature's phone and fax lines. (Doc. 247 at 2).

In May 2006, Wright attended a briefing given by the DEA in Dallas, Texas. (Doc. 247 at 3). At the briefing, Wright met Baynes and Haskins for the first time; they apparently had flown down from New York in connection with an unrelated case that involved the unlawful sale of prescription drugs. (Doc. 247 at 2-3). After learning that the DEA and MBI were attempting to build a case against Signature, Baynes and Haskins agreed to join the investigation. (Doc. 247 at 3). After the meeting, Wright, Baynes and Haskins agreed to share information about Signature on a weekly basis. (Doc. 246 at 3).

On August 4, 2006, Wright and Wedge-McMillen presented Wright's 144-page wiretap application, and

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[13] Officer Wright contends that he was overseen by, and received guidance from, Statewide Prosecutor Anne Wedge-McMillen, Florida's lead prosecutor in the Signature case. (Doc. 129-1). However, Wedge-McMillen testified, in part, that she did not maintain authority over Wright, did not necessarily tell Wright how to proceed, and did not know from whom Wright took his instructions. *See*, *e.g.*, (Doc. 129-13 at 18, Wedge-McMillen Dep. at 67-68).

probable cause affidavit in support thereof,[14] to the Honorable John Marshall Kest, a judge on the Ninth Circuit Court, in and for Orange and Osceola Counties, Florida (the "Florida State Court"). (Doc. 246 at 4 and Doc. 247 at 4). According to Plaintiffs, the wiretap application contained no fewer than 21 false or misleading material statements or omissions and, in the absence/presence of these statements, the application lacked probable cause and otherwise failed to comply with Florida law. (Doc. 247 at 4-8). The Florida State Court entered an order approving the wiretap that same day and Signature's phone and fax lines were monitored for the next 60 days. (Doc. 129-10 at 17).

On September 25 and 26, 2006, Wright, Wedge-McMillen, Soares, Baynes, Haskins and others met at MBI's offices in Orlando to formulate a plan to take down Signature. (Doc. 247 at 8). At the meeting, Soares promised to "shut the operation down" and imprison anyone involved, (Doc. 184-3 at 26), and everyone agreed that:

> [A]lthough there [had] been a significant federal presence in the case . . . the case would be prosecuted and handled primarily by Florida

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[14] Wright was responsible for drafting the affidavit in support of the wiretap. (Doc. 246 at 4). According to Wright, however, the affidavit was "constantly reviewed by . . . Wedge-McMillen" and Wedge-McMillen "was responsible for ensuring that all other investigative means were exhausted before seeking the wiretap." (Doc. 246 at 4). Plaintiffs dispute the extent of Wedge-McMillen's supervision in reviewing the wiretap application and her testimony appears to cast some doubt on the extent of her role. (Doc. 129-13 at 19-20, Wedge-McMillen Dep. at 72-77).

> and New York. The tentative plan would be for NY [to] prepare their Enterprise Corruption case and indict everyone involved. Shortly thereafter[,] when Florida [was] prepared to execute their search and seizure warrants . . . the indictments in the NYS case would be unsealed and everyone arrested and brought to New York. This would divide [Signature's] resources and force them to conduct two difficult cases on different fronts without any possibility of a double jeopardy issue because the case in New York would be based solely on acts committed in New York and not the [S]tate of Florida.

(Doc. 184-3 at 27-28).

In the fall of 2006, Defendants began a public relations campaign by attempting to connect Signature to professional athletes who were allegedly taking steroids and made deals with various media outlets to scoop the story. (Doc. 247 at 8). In December 2006, Wright and Haskins traveled to Pennsylvania and met with the Pittsburgh Steeler's team doctor.[15] (Doc. 247 at 8). That same month, Wright, Haskins and Baynes met with Brendon Lyons, a reporter with the Albany Times Union, and another reporter from Sports Illustrated, at Soares' office in Albany, New York. (Doc. 247 at 8-9). They agreed to give Lyons the scoop on the Signature case and the Albany Times Union

[15] The meeting in Pittsburgh was subsequently reported on by EPSN, (Doc. 247 at 8), but it is unclear who leaked the details of the meeting.

later published its exclusive article minutes before the raids on Signature's premises. (Doc. 247 at 9).

For several weeks in the latter part of December 2006 and January 2007, Baynes appeared before a grand jury at the County Court in and for Albany County, New York (the "New York State Court"). *People v. Calvert*, No. 2-1311, slip op. at 2 (N.Y. Co. Ct. Sept. 11, 2008), *aff'd*, *in significant part*, *sub nom*. *People v. Loomis*, 896 N.Y.S.2d 208 (N.Y. App. Div. 2010); (Doc. 247 at 10). On January 25, 2007, the grand jury returned its first indictment against Stan Loomis, Naomi Loomis, Kenneth Loomis, Calvert and "a.k.a. Signature Pharmacy."[16] (Doc. 180-1). A week later, however, the New York grand jury returned a superseding indictment.[17] (Doc. 168-6); (Doc. 244 at 3).

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[16] The inclusion of "a.k.a. Signature Pharmacy," which the New York State Court considered a formal defendant, was dropped in the fourth indictment. *Calvert*, No. 2-1311. slip op. at 4-5. Notwithstanding the inclusion of "a.k.a. Signature Pharmacy," Signature Pharmacy, Inc. was never indicted. (Doc. 180 at 311).

[17] According to Baynes, the superseding indictment simply corrected a typographical error. (Doc. 180 at 309). Plaintiffs dispute that characterization. The first indictment, *inter alia*, failed to include any of the 19 pattern acts on which the enterprise corruption count was predicated. (Doc. 247 at 10); *compare* (Doc. 180-1) *with* (Doc. 168-6). Although the New York State Court observed that the "second indictment did not differ materially from the first indictment," it also found – as Plaintiffs note – that the second indictment "dropped one count of Criminal Possession of a Controlled Substance in the Fifth Degree, added one count of Criminal Diversion of Prescriptions in the Second Degree and changed the Insurance Fraud count from the second to the third degree." *Calvert*, No. 2-1311, slip op. at 3; (Doc. 247 at 10-11). These changes can hardly be characterized as correcting "essentially a very large typo." (Doc. 180 at 309).

On February 14, 2007, the New York State Court issued arrest warrants for the Loomises and Calvert on the grand jury's first – but not the superseding – indictment. (Doc. 129- 2).[18]

At approximately 8:00 p.m. on February 26, 2007, Wright – acting without the assistance or presence of counsel – appeared alone at the home of Judge Kest and applied for three search warrants.[19] (Doc. 247 at 11-12). The applications were based, in significant part, on Wright's prior wiretap application. Each application was supported by a probable cause affidavit that was more than 200 pages long; all totaled, the documents before Judge Kest consisted of more than 600 pages. (Tr. at 147); (Doc. 221-3).[20]

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[18] It is unclear whether the New York State Court was aware of the superseding indictment at the time it issued the arrest warrants on the superseded indictment and whether the warrants were even valid under New York law. The parties failed to address this issue. For its part, the Court has been unable to find any New York decision addressing the effect (if any) of a superseding indictment on the validity of an arrest warrant issued by a superior court pursuant to N.Y. CPL § 210.10 on a prior, superseded indictment. For purposes of this Order, the Court has simply assumed – without deciding and taking all reasonable inferences in the light most favorable to Plaintiffs – that the New York arrest warrants were invalid as a matter of law.

[19] There is no satisfactory explanation as to why Wright waited until the last minute to apply for these warrants. At this point, the investigation of Signature had been ongoing for several years and there was no exigent reason to act hastily.

[20] All three of the probable cause affidavits were either lost or destroyed – despite an explicit seal order by the Florida State Court – by a court clerk. The only extant "copies" of the affidavits, which were not timely produced to Plaintiffs during discovery,

Approximately one hour later, Wright emerged with signed copies of all three warrants. (Doc. 247 at 12). According to Plaintiffs, Wright's affidavit "carried over many of the falsities, omissions, and misstatements" that were included in the wiretap application, (Doc. 247 at 12), and failed to established probable cause that evidence of a crime would be found at Signature's premises. (Doc. 250). The search warrants authorized the seizure of the following:

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were reconstructed by Wright for the purposes of this litigation. During the evidentiary hearing, Wright testified that he used the same affidavit in support of all three warrants and that he maintained an unaltered Microsoft Word document containing an exact copy of the body of the affidavit in an electronically-stored format. (Tr. 124-129). When the applications were originally signed and approved by Judge Kest, however, Wright made a photocopy of the signature pages (but not the bodies of the affidavits). (Tr. at 130). Accordingly, the document that appears at Doc. 221-3 consists of the body of the affidavit from Wright's Word file with the photocopy of the signed signature pages substituted and attached thereto.

Evidence that is inadmissable at trial cannot be used on summary judgment, *see*, *e.g.*, *Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1249 (11th Cir. 2007), and Wright must "produce evidence sufficient to support a finding" that Doc. 221-3 "is what its proponent claims." FED. R. EVID. 901(a).

Upon careful review, and after a lengthy and detailed evidentiary hearing, the Court finds Wright's testimony to be credible and is satisfied that Doc. 221-3 is admissible as a true and correct copy of the probable cause affidavit that was presented to and signed by Judge Kest on February 26, 2007. *See*, *e.g.*, FED. R. EVID. 1004 (an "original is not required, and other evidence of the contents of a writing . . . is admissible" if the original has been lost or destroyed) and 1005 ("If a copy [of a public record] . . . cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given").

Documents of dominion and control, prescriptions, orders to and from manufacturers, supply lists, theft and loss reports, list and/or inventory of all drugs surrendered to any federal agency, inventory of all drugs on site, Federal Express labels and shipping records, ledgers, packaging, bank statements, documents of vehicle ownership, statements or invoices, address books with contact information, telephone contact lists, cellular telephones and stored information, memory cards, micro chips, data cables and vendor software to facilitate transfer of images, audio equipment, video or surveillance equipment, fax machines, blackberries [sic], telephone numbers, passwords, laptop computers, desk-top [sic] computers.

Checking records, whether original, copied, recorded or electronically stored, documenting the receipt and disbursement of monies paid to or received from customers and/or clients, and records documenting how such monies were disbursed or invested, including, but not limited to, bank records, cancelled checks (front and back), monthly or periodic statements, deposit slips and detail documents for those deposits, memoranda of incoming and outgoing wire transfers, debit and/or credit memoranda, cashier's check records, current transaction reports, and any correspondence involving each account with a bank or financial institution whether original, copied, recorded or electronically stored.

Telephone bills and toll records, appointment journals, Rolodex, desk calendars, phone messages or logs, and telephone answering machine tapes; tax returns, bank records, escrow agreements, escrow agent communications, operating agreements, leases, invoices, copied [sic], recorded or electronically stored.

Computer hardware. . . . [I]nternal and peripheral storage devices such as fixed disks, external hard disks, floppy disk drives and diskettes, tape drives and tapes, optical storage devices, and other electronic media devices; peripheral input/output devices such as keyboards, printers, scanners, plotters, video display monitors, and optical readers; and related communications devices such as modems, network adapters, hubs, routers, switches, cables and connections, and recording equipment, as well as any devices, mechanisms, or parts that can be used to restrict access to computer hardware such as physical keys, locks or dongles, "electronic address books", [sic] portable data assistants, laptop computer systems, desktop computer systems, calculators, or any other storage media where data can be stored. . . . Computer software required to run the above hardware and/or access data from the hardware. . . . Data maintained on the computer, or computer related storage devices. . . . In particular, data in the form of images, word [sic] documents and spread sheets [sic] and supporting documentation of illegal transactions, and/or log files recording the transmission of said documents; Documents,

> notes or equipment relating to passwords, encryption codes and data security devices. . . .

(Doc. 127-5 at 2-3). The Court addresses the validity and scope of the search warrants in detail, *infra*.

On the morning of February 27, 2007, Wright, Baynes, Soares, agents from the DEA, and Orlando police officers executed the search warrants at Signature's Orlando and Winter Park locations.[21] They arrived at the premises with large U-Haul trucks and proceeded to seize virtually everything within Signature's stores, including, *inter alia*:

- Attorney client information/documents
- Computers, hard drives, DVRs and power supplies
- More 200,000 patient prescriptions that Signature had filled since 2002
- General business records, tax returns, corporate notebooks, financial records, ledgers, bank transactions, licenses, permits and expense reports
- Current accounts payable, drug invoices, credit card invoices, check payments, and wire transfer requests

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[21] The third search warrant, which is not material to this Order, was executed at a separate location that housed some of Signature's computer servers.

- Billing statements, rebate forms and shipping invoices/records
- Insurance reimbursement statements, Medicare information and other health insurance information
- Customer phone lists
- Patient compliance information
- Correspondence, planners, Rolodexes
- Blank prescription and bottle labels
- Inventory lists
- Vendor files
- Trade show/press kits
- Investment documents
- Doctor contact, marketing, and conference information
- Compounding formulas
- Shredded documents
- Pharmaceuticals (including Crestor, Stanozol, Nandrolone Decanoate, Testosterone, Testosterone Cypionate, Testosterone Enanthanate, Sustanon Testosterone, Depo-Testosterone, Somatropin, Steno-testosterone, Testosterone Propionate, Human Chorionic

> Gonadotropin, Phentermine hydrochlorine, Oxandrolone, Oxymetholone, Ketamine, Sildenafil, and Androlone).

(Docs. 174-16 and 174-17); (Doc. 247 at 13). The DEA also copied all of Signature's electronically-stored data. According to Naomi Loomis, Signature's President:

> [O]fficers confiscated virtually every document we would need to run our business. They seized thousands of blank prescription labels that were yet to be used to label prescriptions. They seized an actual file cabinet instead of removing the documents inside it. They seized documents containing communications from various law firms that had represented us over the years. They removed the tape from the security camera that would have recorded the events on the day of the raid. They seized business papers which could not have any possible evidentiary value for the investigation, such as receipts for office items that the company purchased that were kept for accounting or tax purposes. . . .
>
> They seized prescription drugs not identified as part of their investigation [such as Crestor – a cholesterol medication], holding them beyond their expiration date and therefore making them useless for resale.

(Doc. 198, ¶¶ 16-17). In short, the "documents, prescriptions drugs, and other tangible items with no possible evidentiary value . . . which were seized by Orlando, through Wright, effectively placed Signature in a position of being unable to operate its business." (Doc. 247 at 13).

On the day of the raids, the Loomises[22] and Calvert were arrested by OPD officers at the direction of Wright.[23] (Doc. 247 at 13-14). The sole basis for the arrests was the New York arrest warrants. (Tr. at 8-9).[24] Despite repeated requests from their counsel, who

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[22] The Loomises were not at the store on the day of the raids and, notwithstanding their offers to voluntarily surrender (which were conveyed by counsel), were directed to come to the store on Kuhl Avenue so that they could be arrested in the presence of the media. (Doc. 198).

[23] There is a dispute as to the extent of Wright's role in the arrests. Although Wright was not formally listed as the arresting officer for the arrests, (Doc. 129-9), he concedes that he "arguably seized two of the Plaintiffs, Kirk Calvert and Stan Loomis," (Doc. 221 at 8), and, more specifically, that he placed handcuffs on Stan Loomis (Doc. 246 at 10). As the lead agent in charge of the investigation and the execution of the search warrants, however, the only reasonable inference that can be drawn from the record at this stage of the proceedings is that Wright directed and orchestrated the arrests.

[24] According to the arrest affidavits prepared by OPD, the Loomises and Calvert were arrested without any Florida warrant pursuant to FLA. STAT. § 941.14, a provision of Florida's Uniform Interstate Extradition statute. (Doc. 129-9 at 1-4), which provides:

> The arrest of a person may be lawfully made also by any peace officer or a private person, without a [Florida] warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding 1 year, but when so arrested the accused must be taken before a judge with all practicable speed and complaint must be made against the accused under oath setting forth the ground for the arrest as in the preceding section; and thereafter his or her answer shall be heard as if the accused had been arrested on a warrant.

were called to the scene during the raids, the Loomises and Calvert were not provided with a copy of the New York warrants. (Doc. 247 at 14); (Doc. 195). Indeed, neither Soares nor Baynes brought copies of the warrants with them to Florida and no one at OPD, MBI or the DEA ever received a copy of the warrants prior to the arrests. Although at least two officers were apparently told that OPD had received a National Crime Information Center ("NCIC") teletype hit on the New York warrants, (Doc. 129-9 at 3-4), there is no record of the New York warrants ever having been entered into NCIC or that a dispatcher at OPD ever requested – much less received – a teletype hit on the New York warrants prior to the arrests. Soares and Baynes simply informed Wright that valid New York warrants existed. (Doc. 127-3 at 55); (Tr. at 11).[25] It was not until at least a day after the Loomises and Calvert were arrested, and after they were processed at the Orange County Jail, that any law enforcement agency in Florida ever received a copy of the New York warrants (and only then, by facsimile). (Tr. at 11-12).

The media presence during the raids and arrests was intense.[26] (Doc. 247 at 14). Before law enforcement

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FLA. STAT. § 941.14. In contravention of the statute, the Loomises and Calvert do not appear to have been "taken before a judge with all practicable speed" and no complaint setting forth the basis for the arrests ever appears to have been made.

[25] Baynes and Soares, however, swear that they did not provide direction or advice to law enforcement as to how agents should engage or proceed with the arrests. (Doc. 244 at 5).

[26] News and footage of the arrests were provided on a national basis. *See*, *e.g.*, Nicholas Confessore et al., *Arrests Reflect a New Focus on Fighting Steroid Sales*, N.Y. TIMES, March 1, 2007,

even arrived at Signature's stores, Lyons – who was soon joined by others from the media – was already at the scene. By the afternoon, there were local and national media outlets present with reporters, cameramen, and satellite trucks. (Doc. 195 at 2, ¶4). The Loomises and Calvert were handcuffed and made to exit the premises amidst a throng of reporters before being escorted to a patrol car. (Doc. 247 at 14).

Since February 27, 2007, Signature has been unable to conduct any business, its reputation having been severely damaged and its inventory, business records and other items essential to its operations never having been returned by law enforcement. (Doc. 247 at 20). Calvert and Mike Loomis have remain unemployed. (Doc. 247 at 20). To this day, however, the Loomises remain licensed pharmacists and not a single administrative action was ever taken against them.

III. Applicable Law

A. Summary Judgment

A party is entitled to summary judgment when it can show that there is no genuine issue as to any material fact. FED. R. CIV. P. 56(c); *Beal v. Paramount*

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available at http://www.nytimes.com/2007/03/01/nyregion/01steroids.html; *NY investigation leads to raid of Orlando pharmacy*, ESPN, March 1, 2007, *available at* http://sports.espn.go.com/espn/news/story?id=2781674; Brendan J. Lyons, *A web of easy steroids*, ALB. TIMES-UNION, Feb. 28, 2007, *available with video footage at* http://www.timesunion.com/AspStories/story.asp?storyID=567310&category=REGIONOTHER&BCCode=HOME&newsdate=2/28/2007.

Pictures Corp., 20 F.3d 454, 458 (11th Cir. 1994). Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Watson v. Adecco Employment Servs., Inc.*, 252 F. Supp. 2d 1347, 1351-52 (M.D. Fla. 2003).

When a party moving for summary judgment points out an absence of evidence on a dispositive issue for which the non-moving party bears the burden of proof at trial, the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp.*, 477 U.S. at 324-25 (internal quotations and citations omitted). Thereafter, summary judgment is mandated against the non-moving party who fails to make a showing sufficient to establish a genuine issue of fact for trial. *Id*. at 322, 324-25; *Watson*, 252 F. Supp. 2d at 1352. The party opposing a motion for summary judgment must rely on more than conclusory statements or allegations unsupported by facts. *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985) ("conclusory allegations without specific supporting facts have no probative value") (citations omitted); *Broadway v. City of Montgomery, Ala.*, 530 F.2d 657, 660 (5th Cir. 1976).

In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in a light most

favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The Court is not, however, required to accept all of the nonmovant's factual characterizations and legal arguments. *Beal*, 20 F.3d at 458-59.

B. 42 U.S.C. § 1983

Actions to remedy a violation of the U.S. Constitution by a state actor are enabled through 42 U.S.C. § 1983. To sustain a § 1983 claim, a plaintiff must establish that: (1) he suffered a deprivation of rights, privileges or immunities secured by the Constitution or laws of the United States; and (2) the act or omission causing the deprivation was committed by a person acting under color of law.[27] *See*, *e.g.*, *Wideman v. Shallowford Community Hosp. Inc.*, 826 F.2d 1030, 1032 (11th Cir. 1987). "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 (1979)). Therefore, the first step in analyzing a § 1983 claim is to identify the specific constitutional right allegedly violated by the defendant. *Id*. Once the constitutional right is identified, the court must then apply the standard applicable to that particular provision to determine whether a constitutional violation actually occurred. *Graham v. Connor*, 490 U.S. 386, 394 (1989).

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[27] It is undisputed that Wright was acting under color of law.

C. Qualified Immunity

Claims Relating to Search Warrants

Qualified immunity protects all but the plainly incompetent officer, or an officer who knowingly violates the law, in obtaining a search or arrest warrant. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (rejecting the application of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) in the warrant context). In *United States v. Leon*, the Supreme Court recognized that "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause. . . ." 468 U.S. 897, 914 (1984). Accordingly, the standard of objective reasonableness applied in the context of a criminal suppression hearing – as discussed in *Leon* – defines the qualified immunity accorded to an officer whose affidavit in support of a warrant leads to an unconstitutional search. *Malley*, 475 U.S. at 344.

Qualified immunity also protects officers in the execution of search warrants. If an officer executes a search warrant that fails to comply with the particularity requirement of the Fourth Amendment, he is entitled to immunity unless the plaintiff can show that "no reasonable officer could believe that [the] warrant plainly did not comply with" the particularity requirement. *Groh v. Ramirez*, 540 U.S. 551, 563 (2004). If the officer prepared the invalid warrant, however, "he may not argue that he reasonably relied on the Magistrate's assurance that the warrant contained an adequate description of the things to be seized and was therefore valid." *Id*. at 564.

All Other § 1983 Claims

The doctrine of qualified immunity protects government and law enforcement officials from civil liability in the performance of "discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Assuming the official can establish that he was acting within the scope of his discretionary authority,[28] the burden then shifts to the plaintiff to show that the grant of qualified immunity is inappropriate. Under *Saucier v. Katz*, 533 U.S. 194 (2001), and *Pearson v. Callahan*, 555 U.S. - - -, 129 S. Ct. 808 (2009), an official is entitled to qualified immunity unless the plaintiff can demonstrate that: (1) the facts viewed in the light most favorable to the plaintiff establish a constitutional violation; and (2) the right at issue was "clearly established" at the time of the official's alleged misconduct.[29] *Pearson*, 129 S. Ct. at 815-16 (citing *Saucier*, 533 U.S. at 201); *see also*, *e.g.*, *Oliver v. Fiorino*, 586 F.3d 898, 905 (11th Cir. 2009). This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002).

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[28] It is undisputed that Wright was acting within the scope of his discretionary authority.

[29] Courts now have discretion to decide which prong of the inquiry to address first. *Pearson*, 129 S. Ct. at 818; *Rehberg v. Paulk*, 598 F.3d 1268, 1277 (11th Cir. 2010).

IV. Discussion

A. Unlawful Seizure Claims

In their Unlawful Seizure claims, Plaintiffs assert that Wright violated their Fourth Amendment rights in two ways: (1) by applying for search warrants that were not issued upon probable cause; and (2) by seizing property that exceeded the scope of any valid warrant. (Doc. 3, ¶ 119). Wright contends that Plaintiffs lack standing and that he is entitled to qualified immunity. (Doc. 129 at 2).

As a threshold matter, Wright's standing argument warrants little discussion. It is beyond peradventure that the Fourth Amendment's protections extend not only to privacy interests, but to interests in property. *See*, *e.g.*, *Horton v. California*, 496 U.S. 128, 133 (1990) ("The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property"); *Katz v. U.S.*, 389 U.S. 347, 350 (1967) (noting that while Fourth Amendment protects individual privacy interests, "its protections go further, and often have nothing to do with privacy at all."). That a pharmacy such as Signature may by subject to routine or even unannounced inspection by various regulatory bodies is of no moment. In the main, Plaintiffs are not complaining of an illegal invasion of their privacy, but the unlawful seizure of their property. It is therefore clear that Plaintiffs have standing to assert their Unlawful Seizure claims.

1. Probable Cause for the Warrants

The Fourth Amendment provides, in pertinent part, that "no Warrants shall issue, but upon probable cause. . . ." U.S. CONST. amend. IV. When a search or seizure is authorized by a warrant, courts must give "great deference" to the issuing magistrate's determination of probable cause. *Leon*, 468 U.S. at 914 (citations and internal quotations omitted). This deference, however, is not boundless and does not preclude inquiry into the affidavit upon which the magistrate's finding of probable cause was based. *Id*. If the affidavit is the only matter presented to the issuing magistrate, the probable cause necessary for the validity of the warrant must stand or fall solely on the contents of the affidavit. *Aguilar v. Texas*, 378 U.S. 108, 109 n.1 (1964); *Giordenello v. U.S.*, 357 U.S. 480, 487 (1958). To establish probable cause, an affidavit must provide the magistrate with a substantial basis for believing that, in the totality of the circumstances, a search will uncover evidence of a crime in the place to be searched. *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996); *Leon*, 468 U.S. at 915 ("reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause") (quotations and citations omitted); *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *see also Franks v. Delaware*, 438 U.S. 154, 164 (1978).

In a § 1983 action, a plaintiff must show that the officer knowingly or recklessly made false statements in his affidavit that were necessary to the finding of probable cause required for the issuance of the warrant. *See*, *e.g.*, *Holmes v. Kucynda*, 321 F.3d 1069, 1083 (11th Cir. 2003); *Dahl v. Holley*, 312 F.3d 1228,

1235 (11th Cir. 2002); *Jones v. Cannon*, 174 F.3d 1271, 1285 n.8 (11th Cir. 1999); *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir. 1994).[30]

In analyzing the issue of probable cause, the first factor to be considered is the crime which the suspects are allegedly committing. Once this is established, the analysis turns to the facts that purport to satisfy the elements of that crime.

Notwithstanding lengthy statutory (and inapposite regulatory) string citations, Wright's affidavit never explicitly identifies the statute(s) (much less the elements of any crime) that Plaintiffs allegedly violated. Distilled to its essence, however, the affidavit charges Plaintiffs with violating FLA. STAT. § 893.13, the Florida statute which makes it unlawful for any person to sell, manufacture or deliver a controlled substance.[31] Of course, these substances may be

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[30] Although *Holmes*, *Jones* and *Curtis* involved arrest warrants, the Supreme Court and the Eleventh Circuit have made clear that the same standard applies to search warrants. *See*, *e.g.*, *Malley*, 475 U.S. at 344 n. 6 ("Although the case before us concerns a damages action for an officer's part in obtaining an allegedly unconstitutional arrest warrant, the distinction between a search warrant and an arrest warrant would not make a difference. . . ."); *Dahl*, 312 F.3d at 1235 (11th Cir. 2002); *Kelly*, 21 F.3d at 1554.

[31] In Florida, anabolic steroids and human growth hormone are, with some exceptions, classified as Schedule III controlled substances. FLA. STAT. § 893.03. "A substance in Schedule III has a potential for abuse less than the substances contained in Schedules I and II and has a currently accepted medical use in treatment in the United States, and abuse of the substance may lead to moderate or low physical dependence or high psychological

legitimately prescribed for medical uses, so the statute creates an express exemption for, *inter alia*, doctors/practitioners and pharmacists. *See* FLA. STAT. § 813.13(9).[32] Moreover, FLA. STAT. § 893.04 specifically authorizes a pharmacist to dispense controlled substances upon the prescription of a practitioner, so long as it is done in good faith and in the course of the pharmacist's professional practice.[33] There is no contention in the affidavit that Signature violated this statute. Instead, Wright's affidavit apparently focuses on FLA. STAT. § 893.13(8)(a), which prohibits a *practitioner* from prescribing a controlled substance under circumstances that amount to fraud or deceit.[34] Presumably, this is the "bad faith" sale that Wright references in his affidavit. He also refers to FLA. STAT. §§ 777.011 and 777.04(3), which generally make it a crime to aid and abet or conspire with another to commit a violation of Florida law. Thus, the

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dependence, or, in the case of anabolic steroids, may lead to physical damage." *Id*.

[32] Wright conveniently omits any reference to this section of the statute.

[33] Wright also omits any reference to this statute.

[34] 4While Wright does at least reference FLA. STAT. § 893.13(8)(a), he omits any reference to an applicable safe harbor in subsection (8)(b), which provides: "If the prescribing practitioner wrote a prescription or multiple prescriptions for a controlled substance for the patient . . . for which there was no medical necessity, or which was in excess of what was medically necessary to treat the patient . . . that fact does *not* give rise to *any* presumption that the prescribing practitioner violated subparagraph (a)1., but may be considered with other competent evidence in determining [whether a violation occurred]." FLA. STAT. § 893.13(8)(b) (emphasis added).

factual underpinning of the affidavit must deal with the manner and means by which Signature's principals *knowingly* assisted practitioners who were writing prescriptions in violation of FLA. STAT. § 893.03(8).[35]

This Court has laboriously examined each and every page of Wright's 212-page affidavit. When the alleged falsities identified by Plaintiffs in their sur-replies (which are, in at least some instances, amply supported by favorable inferences in the record), and the evidence obtained from the wiretap (which the Court has simply assumed was issued without probable cause) are omitted from the affidavit, there is scant basis to conclude that Signature's principals knowingly assisted or otherwise conspired with practitioners to violate FLA. STAT. § 893.13(8)(a).

Even assuming, however, that the search warrant was issued without probable cause, the Court's inquiry does not end there. Under *Malley* and its progeny, the lack of probable cause for an otherwise valid warrant will rarely render an officer's reliance unreasonable. 475 U.S. at 344-45. This is especially true where, as here, there is a significant presumption that attaches to the Florida State Court's determination of probable cause. In short, whatever deficiencies may have

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[35] Wright also lists a provision of Florida's racketeering statute as another source of criminal liability. No incidents of racketeering, however, are explicitly identified in the affidavit. Nor is there any allegation, *inter alia,* that anyone knowingly and willfully became a member of any conspiracy with the specific intent to commit two incidents of racketeering or participate in the affairs of the enterprise with the knowledge and intent that other members of the conspiracy would engage in at least two incidents of racketeering.

existed in the affidavit, this Court simply cannot conclude that the warrant application was "so lacking in indicia of probable cause as to render official belief in its existence unreasonable," *Id*., or that a reasonable officer would have known that Wright's testimony was "not just negligently false, but recklessly so." *Holmes*, 321 F.3d at 1083 (citations and quotations omitted).

Accordingly, Wright's Motion will be granted, on qualified immunity grounds, as to Plaintiffs' claims that he applied for search warrants that were not issued upon probable cause.

2. The Validity of the Warrants and Scope of the Seizure

In addition to the requirement that a warrant be issued upon probable cause, the Fourth Amendment requires that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV; *see also*, *e.g.*, *U.S. v. Khanani*, 502 F.3d 1281, 1289 (11th Cir. 2007) ("The Fourth Amendment . . . mandates that search warrants particularly describe the place to be searched, and the persons or things to be seized"). It is well established that "a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional." *Groh*, 540 U.S. at 564 (quoting *Massachusetts v. Sheppard*, 468 U.S. 981, 988 (1984)). Furthermore, it "is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized and lawfully conducted." *Id*. at 563. This is "not a duty to proofread; it is, rather, a duty to ensure that the warrant conforms to constitutional requirements." *Id*. at 563 n.6.

The search warrants at issue in this case plainly failed to pass muster under the Fourth Amendment's particularity requirements. Neither the place to be searched nor especially the items to be seized were described with reasonable particularity.

With respect to place, the warrant for Kuhl Avenue – the location of Signature's compounding pharmacy and the primary focus of Wright's affidavit – simply identifies a street address, notes that the address "is a two story building," and describes the entryways and doors of the building (Doc. 129-6 at 14). There is no mention of the fact that the address refers to a multiple-occupancy structure or that there were doctors' offices unaffiliated with Signature on the second floor of the building. Nor does the warrant disclose that Signature segregated its pharmacy (which was on the first floor) from its corporate offices (which was the second floor). The warrant for Aloma Avenue,[36] while at least disclosing that there are other occupants in the building, contains the same meager address information and only a brief description of the outside of the building. (Doc. 129-5 at 1). Neither warrant describes the particular floor, office, suites or

[36] There does not appear to be a copy of the warrant for Aloma Avenue in the record – only a copy of the warrant application. (Doc. 129-5). The Court, however, obtained a copy of the warrant from the Osceola County Clerk of the Court and has verified that the warrant application for Aloma Avenue and the warrant contain the same description of the place to be searched and items to be seized. Accordingly, the Court cites to the document at Doc. 129-5.

subunits to be searched.[37] In short, nothing in the warrants would preclude an indiscriminate search of the entire buildings. Quite the contrary, the warrants give every suggestion that Wright could – and did – do just that. This is clearly improper. *See*, *e.g.*, *Maryland v. Garrison*, 480 U.S. 79 (1987); *U.S. v. Higgins*, 428 F.2d 232 (7th Cir. 1970); *see also* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.5(b) (4th ed. current through 2009) ("A search warrant for . . . [a] multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately").

Notwithstanding the failure to reasonably describe the places to be searched, the more troubling defect in the warrants is the failure to describe the items to be seized with particularity. The purpose of a warrant is to uncover evidence of an alleged crime within the premises to be searched. Here, Wright was ostensibly looking for evidence that Signature knowingly facilitated the writing of bad faith prescriptions by doctors in violation of FLA. STAT. § 893.13(8)(a). The warrants and documents putatively incorporated therein make no effort to even suggest that Wright would find evidence of such a crime on Signature's

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[37] The warrant for Aloma Avenue actually mentions the offices of "Dr.[] Glenn Johnston" in bold, suggesting that, along with Signature (also identified in bold), agents were permitted to search Dr. Glenn Johnston's office. Although Dr. Johnston is identified in Wright's affidavit as a possible co-conspirator, there is no request in the warrant application or affidavit to search Dr. Johnston's office and nothing in those documents would have alerted the State Court to such a request.

premises – let alone identify the types of items which would provide evidence of that crime. Yet the warrants authorized the search and seizure of virtually everything on site, including, *inter alia*:

> Documents of dominion and control . . .prescriptions . . . supply lists . . . [inventories] . . . shipping records . . . ledgers . . . bank statements . . . documents of vehicle ownership . . . statements or invoices . . . address books . . . cellular phones . . . data cables . . . audio equipment . . . [video equipment] . . . fax machines . . . [B]lackberries . . . laptop [and desktop computers] . . . [all] banking records . . . [t]elephone bills and tolls records . . . telephone answer machine tapes . . . tax returns . . . operating agreements . . . leases . . . invoices . . . [all] computer hardware . . . peripheral input/output devices such as keyboards, printers, scanners, plotters, video display monitors, and optical readers . . . portable data assistants . . . calculators . . . [c]omputer software . . .[c]omputer-related documentation . . . In particular, data in the form of images, word documents and spread sheets and supporting documentation of illegal transactions . . . All computer files associated with the accounts listed above[38] . . . .
>
> which is evidence of a criminal violation of the laws of the State of Florida, to-wit: [half-page string cite to Florida and federal statutes].

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[38] No "accounts" were "listed above" in the warrants.

(Docs. 129-5 at 1-3 and 129-6 at 15-16). Nothing in the warrants explained that the items sought were those related to a violation of FLA. STAT. § 893.13(8)(a). A lengthy laundry list of specific items unconnected – in any way – to an alleged crime is no better than a warrant for "all evidence" of an alleged crime. Absent at least *some* nexus between the alleged crime and the items to be seized, an officer can simply "rummage and seize at will." *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993) (internal citations and quotations omitted). Exploratory searches such as these have been roundly condemned since well before the founding of our nation.[39]

In sum, the search warrants in this case amount to general warrants that failed to comply with the particularity requirements of the Fourth Amendment. On the day of the raids, "[n]othing circumscribed

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[39] "Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws. They were denounced by James Otis as 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book, because they placed the 'the liberty of every man in the hands of every petty officer.' The historic occasion of that denunciation, in 1761 at Boston, has been characterized as 'perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said [J]ohn Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965) (internal citations and quotations omitted).

[Wright's] activities . . . except [his] own good senses." *U.S. v. Matlock*, 415 U.S. 164, 185 (1974) (internal citations and quotations omitted). No reasonable officer could possibly have believed that the warrants Wright possessed gave him the authority to simply arrive with U-Haul trucks, enter any office or suite in the buildings shared by Signature, and cart away virtually everything found therein. That is precisely, however, what appears to have occurred in this case.

Notwithstanding the foregoing, the sum total of Wright's argument concerning the seizures consists of the following:

> The search conducted in this case was made pursuant to a lawfully issued search warrant supported by probable cause. . . . Furthermore, Agent Wright did not exceed the scope of the search warrant. All items seized were encompassed within the scope of the search warrant, evidence of criminal activity or properly seized pursuant to Florida's Contraband Act.[40] After the seizure of evidence took place, a judicial determination was timely made that probable cause support [sic] seizure of all items.

(Docs. 129 at 21 and 221 at 9). Wright fails to provide a single example of an item of evidence that amounted to evidence of criminal activity. Furthermore, his

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[40] There is no discussion of Florida's Contraband Act (or even an identification of that statute) in Wright's Motion. Furthermore, the warrants themselves were specifically for "evidence" – not contraband. Finally, Wright makes no suggestion that any contraband was seized in plain view.

contention that a "judicial determination" was made regarding the probable cause to support the seizures is completely without support in the record.[41]

Upon review, Wright's Motion will be denied as to Plaintiffs' claims that Wright illegally prepared and executed the search warrants. The warrants were invalid on their face and Plaintiffs have carried their burden of showing that the grant of qualified immunity is inappropriate.

B. Unlawful Arrest Claims

Plaintiffs had a clearly established right not to be arrested without probable cause. *See*, *e.g.*, *Madiwale v. Savaiko*, 117 F.3d 1321, 1324 (11th Cir. 1997). Probable cause exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that a suspect has committed or was committing a crime. *U.S. v. Gonzalez*, 969 F.2d 999, 1002 (11th Cir. 1992) (citations omitted). In determining whether qualified immunity exists on a claim for false arrest, however, the issue is not probable cause in fact, but "arguable"

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[41] Wright's Motion failed to identify a single order or decision (whether written, *ore tenus*, or otherwise) by the Florida State Court that could remotely be characterized as a "judicial determination" regarding the probable cause to support the seizures. Nor has this Court found such a determination and it has been presented with a rather detailed record of the proceedings in the Florida State Court. *See In re: Grand Jury No. 09-1*, Case No. 6:10-mc-38 (M.D. Fla. 2010). Even if Wright had identified such a determination, he provides no analysis whatsoever as to why that determination would save an otherwise invalid warrant or, in any event, be binding on this Court.

probable cause. *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) (citations omitted); *see also Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004). "Arguable probable cause exists where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant could have believed that probable cause existed to arrest." *Case v. Eslinger*, 555 F.3d 1317, 1327 (11th Cir. 2009) (quotations and citations omitted).

Here, Plaintiffs were arrested pursuant to FLA. STAT. § 941.14 on the basis of supposed New York arrest warrants. Although Wright did not have a copy of the New York warrants, Soares and Baynes – the New York prosecutors responsible for securing the arrest warrants – represented to Wright that there were active, valid warrants for Plaintiffs' arrest. (Tr. at 11). As noted, *supra*, FLA. STAT. § 941.14 simply requires that an officer have "reasonable information" that an individual stands charged with a felony in another state before he can make a warrantless arrest. The representations from Soares and Baynes, as inaccurate as they were, constitute reasonable information upon which Wright could have relied in arresting Plaintiffs. *See Whren v. U.S.*, 517 U.S. 806 (1996) (recognizing that the touchstone for Fourth Amendment inquiries is "reasonableness").

Upon review, Wright's Motion will be granted, on qualified immunity grounds, as to Plaintiffs' Unlawful Arrest claim. Although the Loomises' and Calvert's constitutional right not to be arrested without probable appears to have been violated inasmuch as no valid, outstanding New York warrants existed at the time of their arrests, the Court finds that, under the totality of the circumstances, Wright had "arguable

probable cause" to arrest Plaintiffs and is therefore entitled to qualified immunity on Plaintiffs' Unlawful Arrest claim.

C. Malicious Prosecution Claim

To prevail on their malicious prosecution claims under § 1983, Plaintiffs must establish the elements of the common law tort of malicious prosecution under Florida law and a violation of their rights under the U.S. Constitution. *See*, *e.g.*, *Kingsland v. City of Miami*, 382 F.3d 1220, 1234 (11th Cir. 2004). To establish the common law tort of malicious prosecution under Florida law, Plaintiffs must show: (1) an original judicial proceeding was commenced or continued against them; (2) Wright was the legal cause of the proceeding; (3) the termination of the proceeding constituted a bona fide termination of that proceeding in Plaintiffs' favor; (4) there was an absence of probable cause for the proceeding; (5) there was malice on the part of Wright; and (6) damages. *Id*. (citing *Durkin v. Davis*, 814 So. 2d 1246, 1248 (Fla. 2d DCA 2002); *see also Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1355 (Fla. 1994).

Upon review, Wright's Motion will be granted as to Plaintiffs' Malicious Prosecution claim. In short, Plaintiffs have failed to adduce sufficient evidence on the second and fifth elements of their claim.[42] There is simply no evidence that Wright was the legal cause of the proceedings in New York (Soares and Baynes, and

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[42] Furthermore, for the time being, at least, there has not been a termination of the New York proceedings. *Loomis*, 896 N.Y.S.2d at 211.

perhaps Haskins, were the cause of those proceedings). Similarly, notwithstanding his arrest of Plaintiffs and the execution of invalid search warrants, there is nothing in the record evincing malice on Wright's part. Accordingly, Wright is entitled to a judgment as a matter of law on Plaintiffs' Malicious Prosecution claim.

D. Defamation Claim

To prevail on their defamation claim, Plaintiffs must establish the elements of the common law tort of defamation under Florida law, plus an additional constitutional injury flowing from the defamation that is tied to a recognized property or liberty interest. *Rehberg*, 598 F.3d at 1286-87; *Cannon v. City of W. Palm Beach*, 250 F.3d 1299,1302 (11th Cir. 2001); *see also Paul v. Davis*, 424 U.S. 693 (1976). Defamation of a private person has five elements under Florida law: (1) publication to a third party; (2) a false statement; (3) fault, amounting to at least negligence, in the making of the publication; (4) actual damages; and (5) a defamatory statement. *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008); *see also*, *e.g.*, *Thomas v. Jacksonville Television, Inc.*, 699 So. 2d 800, 803 (Fla. 1st DCA 1997) (citations and quotations omitted).

Upon review, Plaintiffs have failed to adduce sufficient evidence on the first element of their Defamation Claim. Although Wright may have conspired with Soares, Baynes and Haskins to defame Plaintiffs, there is simply no record evidence that Wright published any statement to the media or any other third party. Accordingly, to the extent Plaintiffs assert that Wright should be liable for his own

defamatory acts, Wright is entitled to a judgment as a matter of law on Plaintiffs' Defamation claim.

E. Unlawful Conspiracy Claims

In his Motion, Wright contends that Plaintiffs failed to allege sufficient facts in support of an unlawful conspiracy claim under 42 U.S.C. § 1985. (Doc. 129 at 24). However, as Plaintiffs pointed out in their Response, and as the Court noted, *supra*, Plaintiffs have not asserted a conspiracy claim pursuant to § 1985 – their Conspiracy Claim is predicated solely on § 1983. Rather than address that claim, however, Wright stated in his Reply: "Defendants in this case are entitled to fair notice concerning the claims asserted against them. It would be unjust to allow Plaintiffs to seek recovery on a conspiracy claim brought pursuant to § 1983 when the claim as stated in the Amended Complaint *only references* 42 U.S.C. § 1985." (Doc. 221 at 10) (emphasis added). That statement is, at best, disingenuous, and Wright's failure to provide any meaningful analysis of Plaintiffs' Unlawful Conspiracy claim warrants denial of his Motion.

The Amended Complaint clearly asserts:

> **COUNT VI – 42 U.S.C. §§ *1983* AND 1985 (INDIVIDUAL DEFENDANTS)**
>
> 129. This is a cause of action by Plaintiffs against all of the Individual Defendants only for violation of civil rights under *42 U.S.C. § 1983*. . . .

(Doc. 3 at 30) (emphasis added).

Despite the foregoing, Wright's only argument in favor of summary judgment, which is buried in the final paragraph of his Reply, is that: "There exists no set of facts that would support a finding that the Defendants [sic] conspired to violate the Plaintiffs' constitutional rights. None of the facts alleged in support of Plaintiff's [sic] claim constitute a violation of a federally protected right." (Doc. 221 at 10).

Upon review, Wright's Motion will be denied as to Plaintiffs' Unlawful Conspiracy Claim. Notwithstanding this Court's already exhaustive analysis, it is not the responsibility of the courts to sift through the entire record and make the parties' arguments for them. *See*, *e.g.*, *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); *U.S. v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace.") (internal quotation omitted).

V. Conclusion

For the foregoing reasons, it is **ORDERED** and **ADJUDGED** that:

1. Defendant Alex Wright's Motion for Summary Judgment (Doc. 129) is **GRANTED** in part and **DENIED** in part;

2. Defendant Alex Wright is entitled to qualified immunity as to Plaintiffs' claims that he applied for search warrants that were not issued upon probable

cause, and as to Plaintiffs' Unlawful Arrest claims, in Count V of the Amended Complaint;

3. Defendant Alex Wright is entitled to a judgment as a matter of law on Plaintiffs' Malicious Prosecution and Defamation claims in Count V of the Amended Complaint; and

4. In all others respects, Defendant Wright's Motion for Summary Judgment (Doc. 129) is **DENIED**.

DONE and **ORDERED** in Chambers, Orlando, Florida on June 10, 2010.

/s/ Greg Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-13215-GG

[Filed September 14, 2011]

SIGNATURE PHARMACY, INC., a Florida corporation, ROBERT STAN LOOMIS, an individual, et al.,	)
Plaintiffs - Appellees,	)
versus	)
ALEX WRIGHT, an individual,	)
Defendant - Appellant.	)

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: DUBINA, Chief Judge, HULL, Circuit Judge and GOLDBERG,* Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
CHIEF JUDGE

*Honorable Richard W. Goldberg, United States Court of International Trade Judge, sitting by designation.

ORD-42

CERTIFICATE OF COMPLIANCE

No. _____

SIGNATURE PHARMACY, INC., a Florida corporation, et al.,

Petitioners,

v.

ALEX WRIGHT, an individual,

Respondent.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 6,348 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2011.

Sarah R. Miller
Becker Gallagher Legal Publishing, Inc.
8790 Governor's Hill Drive, Suite 102
Cincinnati, OH 45249
(800) 890-5001

Sworn to and subscribed before me by said Affiant on the date designated below.

Date: _____

_____
Notary Public

[seal]

CERTIFICATE OF SERVICE

I, Sarah R. Miller, hereby certify that 40 copies of the foregoing Petition for Writ of Certiorari of *Signature Pharmacy, Inc., et al. v. Alex Wright, an individual*, were sent via 3-Day Service to The U.S. Supreme Court, and 3 copies were sent via 3-Day Service to the following parties listed below, this 13th day of December, 2011:

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All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on December 13, 2011.

_____

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Subscribed and sworn to before me by the said Affiant on the date below designated.

Date: _____

_____
Notary Public

[seal]