JUN 13 2019

STATE OF MAINE
SAGADAHOC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.: BATSC-CV-2018-24

MATTHEW POLLACK
and
JANE QUIRION

Plaintiffs,

v.

JESSICA FOURNIER

Defendant.

ORDER ON SECOND MOTION TO DISMISS

This matter is before the court on the Defendant's Second Motion to Dismiss.

BACKGROUND

Jane Quirion (Quirion) and Matthew Pollack (Pollack) (collectively the Plaintiffs) have brought a third complaint for claims based on the Defendant's, Jessica Fournier (Fournier), alleged retaliation against them. Some procedural history is in order.

On June 2, 2014, the Plaintiffs filed a Second Amended Complaint (Complaint 1) in federal district court. The Plaintiffs filed on behalf of themselves and as next friends of their son, B.P.. The named defendants in Complaint 1 were Regional School Unit No. 75 (the District); Bradley Smith, the Superintendent of the District; and Kelly Allen, an autism consultant employed by the District. Smith and Allen were alleged to have been acting under color of law, within their employment for the District, and were sued in their individual capacities. Complaint 1 referred to Fournier as the "classroom teacher." Complaint 1 included incidences of Quirion being in the same location of Fournier's class field trips that B.P. was not on. It described disputes between the Plaintiffs and the

District, Fournier's alleged defamation claims based on the Plaintiffs' request for a new classroom teacher, and her August 2012 Notice of Claim (Notice) served on the Plaintiffs, among other issues. Amid other claims, the Plaintiffs alleged retaliation in violation of the First Amendment, the Rehabilitation Act, and the Americans with Disabilities Act (ADA) based on the defendants' actions from 2012 through 2013.

A few weeks prior to Complaint 1, on May 23, 2014, the Plaintiffs filed a different Complaint (Complaint 2) in federal district court. The named defendants were the District; Patrick Moore, the Director of Special Services of the District; and Tanji Johnson, a special education administrator employed by the District. Both Moore and Johnson were alleged to have been acting under color of law, within their employment for the district, and were sued in their individual capacities. Fournier is referenced by name in Complaint 2, as is her alleged defamation claim against them and her August 2012 Notice. The claims in Complaint 2 included retaliation in violation of the First Amendment, the Rehabilitation Act, and the ADA, based on the defendants' actions from 2012 through late 2013.

The district court consolidated the cases on October 23, 2014 and they were treated as a single suit (prior suit). Plaintiffs alleged other actions of Fournier's, that were not included in the Complaints, as supporting their retaliation claims during the discovery process. These actions included Fournier allegedly encouraging other parents to initiate harassment actions against the Plaintiffs, and initiating her own harassment action. Ultimately, all of the Plaintiffs' claims were addressed in some fashion from 2015 through 2017 by way of motions to dismiss, motions for summary judgment, stipulations of dismissal, and ultimately a jury verdict and First Circuit affirmance.

Turning to the instant action, on July 27, 2018, the Plaintiffs filed a third complaint (Complaint 3) in Superior Court. Fournier is the sole named defendant. Complaint 3

alleges that Fournier is, and at all relevant times was, an employee of the District, ¶ 4, acting alone and in concert with the District, and acting under color of law, ¶ 138. Many of the prior allegations in Complaint 1 and Complaint 2 are referenced verbatim in Complaint 3,[1] including the incidences of Quirion being in the same places as Fournier's class field trips, B.P.'s upset on a certain date, and their request to have B.P. assigned to a new teacher, among others. Complaint 3 also discusses the Plaintiffs' alleged defamation of Fournier and her August 2012 Notice against them. For the first time in a complaint, Complaint 3 contains allegations of wrongful use of civil proceedings. Plaintiffs allege that Fournier encouraged other parents to initiate harassment notices and proceedings against the Plaintiffs, assisted them in doing so, and herself obtained a temporary protection from harassment order from the District Court. These harassment actions and proceedings were addressed in discovery in the prior suit and used by the Plaintiffs to bolster their retaliation claims. In Complaint 3, the Plaintiffs alleged that

> Fournier's purpose in taking all of the actions against Pollack and Quirion described in this complaint was to prevent [them] from speaking about her performance as an employee for the District, from observing her work as an employee for the District, from filing complaints about her work with the District, from attempting to have her removed as B.P.'s teacher and as a teacher with the District generally, and from otherwise advocating for their son, B.P., to the extent that the advocacy criticized her work with B.P.

¶ 114. The Plaintiffs alleged seven counts in Complaint 3. These included abuse of process, two counts of wrongful use of civil proceedings, unlawful retaliation for exercise of First Amendment rights, retaliation under the Rehabilitation Act, retaliation under the ADA, and violation of the Maine Civil Rights Act. On August 10, 2018, Fournier filed a Notice of Removal to federal court. A month later, on September 10, 2018, she filed her

[1] As Fournier describes in her briefing, many of the same headings and factual allegations under them are literally copied and pasted from one complaint to another.

first Motion to Dismiss. The Plaintiffs then filed a First Amended Complaint (Amended Complaint 3) on September 25, 2018, which discarded their claims arising under federal question jurisdiction, and alleged that Fournier was at all times acting in her individual capacity, not within her scope of employment with the District, or in agency or concert with any of the defendants from the prior suit.

Thereafter, on October 8, 2018, Plaintiffs filed a Motion to Remand. Fournier filed a Second Motion to Dismiss on October 19, 2018, and a Special Motion to Dismiss on the same date. The parties predictably objected to and replied to the opposing parties' motions. On January 15, 2019, the federal court declined Fournier's invitation to exercise supplemental jurisdiction over the remaining claims, and remanded the matter back to this court. On February 11, 2019, this court ordered Fournier to indicate in writing, and pay the filing fees required by court rules, if she wished the court to consider her pending motions to dismiss. On February 19, 2019, Fournier communicated her request for the court to address the pending motions, provided the necessary filing fees, and on March 1, 2019, provided an Appendix of Documents from the prior suit. Four claims need to be addressed on Fournier's Second Motion to Dismiss: abuse of process; two wrongful use of civil proceedings claims; and violation of the Maine Civil Rights Act.

DISCUSSION

To survive a motion to dismiss,[2] the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007). The facts pled must be sufficient to "to raise a right to relief above the speculative level." *Id.* at 555. When the facts in the complaint, accepted as true, permit the "reasonable

[2] The court applies federal law in determining the preclusive effect of a prior federal judgment. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

inference that the defendant is liable for the misconduct alleged[,]" the plaintiff survives a motion to dismiss. *Id.* The court views the facts in the complaint and reasonable inferences to be drawn from them in the light most favorable to the nonmoving party. *Kando v. R.I. State Bd. of Elections*, 880 F.3d 53, 58 (1st Cir. 2018). The plausibility standard is not to be compared to a probability standard, but it requires "more than a sheer possibility" that a defendant acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," do not allow a complaint to survive a motion to dismiss. *Id.*

Fournier argues that the Plaintiffs are attempting a third bite at the apple by bringing this lawsuit against her, as it contains virtually identical allegations as the two prior suits that they brought against the District and other individuals employed by it. Because the Plaintiffs' claims are ultimately based on the same alleged retaliation against them and could have been brought against Fournier in the original suits, she argues that res judicata requires dismissal of the current case. Fournier additionally maintains that the Plaintiffs' claims should all be dismissed on the merits for failure to state a claim upon which relief may be granted, and some are barred by the statute of limitations. The Plaintiffs argue that Fournier is judicially estopped from asserting a res judicata defense, she acquiesced to the splitting of the causes of action and the parties, and that res judicata cannot apply because the claims and the parties are not sufficiently identical. Moreover, they contend they have sufficiently stated claims that survive a Rule 12(b)(6) motion.

At the outset, the parties disagree about what documents this court may consider in deciding Fournier's Second Motion to Dismiss. She argues that because her motion is based on res judicata, it is inevitable that this court will review the record of prior proceedings. Fournier argues that this is possible to do without converting the motion into one for summary judgment, because the court is allowed to take into consideration

documents incorporated by reference into the complaint, matters of public record, and anything else that is susceptible to judicial notice. The Plaintiffs argue that the exception allowing the court to look to documents outside the complaint is narrow. They maintain that extraneous documents cannot be used to challenge the allegations in the complaint, and that when a court takes judicial notice of documents, it does so not for the truth of the matter asserted in them, but to establish the fact of the prior litigation and filings. Additionally, the parties dispute whether the court may consider the directly contradictory allegations contained in Complaint 3 before the Plaintiffs amended it. Each issue is addressed in turn below.

I. What Documents May Be Considered in this Second Motion to Dismiss and What May They Be Considered For?

Generally, a court may not consider documents that are outside the complaint, or not expressly incorporated within it, unless the motion is converted into one for summary judgment. *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). Despite this, a narrow exception exists "for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* (quoting *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). When the complaint relies on such documents, and no party challenges their authenticity, the document "merges into pleadings" and is properly within the court's purview on a motion to dismiss. *Alt. Energy, Inc.*, 267 F.3d at 33. Accordingly, "[u]nder First Circuit precedent, when a complaint's factual allegations are expressly linked to -- and admittedly dependent upon -- a document (the authenticity of which is not challenged), then the court can review it upon a motion to dismiss." *Id.* at 34 (quotation marks omitted).

The First Circuit has explained that lack of notice to the plaintiff is the main concern in looking to documents contained outside the complaint. *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993). That issue is alleviated when the plaintiff has actual notice of the documents and has relied on them in framing the complaint. *Id.* In cases where the court has permissibly looked beyond the complaint to documents, it has interpreted a settlement agreement that was referenced in the complaint, *Alt. Energy, Inc.*, 267 F.3d at 34, and it has drawn facts from child protection proceedings submitted by the plaintiff to determine whether court-appointed psychologists were entitled to qualified immunity from suit, *Watterson*, 987 F.2d at 4-6. In a case with a similar procedural posture as the one at bar, a court looked to the evidence that was presented during trial in the first case via the court's order denying the defendant's motion for judgment as a matter of law. *Havercombe v. Dep't of Educ. of the Commonwealth*, 250 F.3d 1, 9 (1st Cir. 2001). The court explained that when it compared the trial evidence "to the universe of reasonable inferences" that could be drawn from the factual allegations in the later complaint, it could not conclude that any new ground was covered that gave rise to a different "transaction" than was already litigated to a jury verdict in the first case. *Id.*

Here, the Plaintiffs explicitly reference some of the documents in their Amended Complaint 3. This includes Fournier's Notice of Claim, ¶ 32, Quirion's classroom reassignment request, ¶ 45, Fournier's Victim Impact Statement, ¶ 67, and Harassment Notices served on Quirion, ¶ 68. Other documents, such as the prior court orders and judgments, trial testimony, Plaintiffs' answers to interrogatories in the prior case, deposition testimony and the like are not referenced in Plaintiffs' Amended Complaint

3.[3] The Plaintiffs have not disputed the authenticity of any of the exhibits that Fournier attached to her Second Motion to Dismiss. Nor are there any concerns about the Plaintiffs having notice of these documents, as they authored many of them and were present for the depositions and trials. Additionally, any reports to the police are public records, and "matters of public record are fair game in adjudicating Rule 12(b)(6) motions." *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 19 (1st Cir. 2003).

Because the instant Motion requires the court to determine whether the Plaintiffs' claims are barred by res judicata, their Amended Complaint 3 references some of the documents, and the rest are either public records or susceptible to judicial notice, this court will consider them in deciding the Second Motion to Dismiss. When this court takes judicial notice of a document, it does so "not for the truth of the matter asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

II. May the Court Consider the Factual Changes from Complaint 3 to Amended Complaint 3?

Fournier argues that the Plaintiffs' allegations in Complaint 3, that she was acting under color of law and as an employee of the District, constitute admissions that this court may consider despite their subsequent filing of Amended Complaint 3 which states that she acted at all times individually and in no way related to the District or in agency with it or any of the prior defendants. The Plaintiffs conversely contend that Amended Complaint 3 entirely superseded Complaint 3 and therefore they are no longer bound by

[3] However, the Plaintiffs allude to the prior litigation when they assert that Fournier was not acting in the scope of her employment with the District and none of the prior defendants (Allen, Moore, Johnston, or Smith) assisted her or acted as her agent.

the statements in it, and this court may not look to Complaint 3 for any purpose at all in deciding the Second Motion to Dismiss.

The First Circuit has stated that, once filed, and amended complaint normally supersedes the prior complaint. *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 91 (1st Cir. 2008). Because of this, "facts that are neither repeated nor otherwise incorporated into the amended complaint no longer bind the pleader." *InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003). When addressing different facts asserted in an amended complaint for the purposes of judicial estoppel, the First Circuit explained that statements in a superseded complaint are not always "null and void for all purposes[,]" but instead, in certain circumstances, those statements may be party admissions, and used as such despite that complaint's later amendment. *Id.* at 144-45. Again addressing judicial estoppel, the court explained that absent "some sign of unfair advantage," retraction of some statements made in a prior complaint did not justify the invocation of judicial estoppel. *Id.* at 145.

By using "normally" to describe when an amended complaint supersedes the original, the First Circuit has left the door cracked for future courts to look to the prior complaint in certain instances. A magistrate judge addressed this issue in a recent decision, *Krah v. County of Lincoln*, No. 2:16-cv-00415-JDL (D. Me. Apr. 2, 2017). There, the defendants urged the court to take into account allegations in the original complaint that differed from the amended complaint. *Id.* at *7. After addressing the general rule, the court noted the defendants' argument that some federal courts in other circuits recognize an exception, and allow the prior complaint to be considered when a plaintiff blatantly changes facts in response to a motion to dismiss, and the new facts directly contradict the facts in the original complaint.[4] In those instances, some courts have determined that they

[4] *See Colliton v. Cravath*, No. 08-0400-NRB, 2008 U.S. Dist. LEXIS 74388 (S.D.N.Y. Sep. 23, 2008).

are permitted to accept the facts in the first complaint as true. *Id.* at *16. Despite the "normally" language employed by the First Circuit and the caselaw cited by the defendants, the magistrate judge declined to apply the exception in *Krah* because there was no indication that the First Circuit would follow that line of cases.

As the magistrate judge noted, whether a court can consider the facts in a prior complaint as true after it has been amended is unsettled law in the First Circuit. There is caselaw that supports both parties' respective positions. This court is of the opinion that because the First Circuit has stated that a court may not "normally" consider a prior complaint after a subsequent complaint is filed, and because it has allowed consideration of a prior complaint for purposes of deciding whether judicial estoppel applies,[5] that the court may consider the factual allegations in Complaint 3.

III. Federal Claim Preclusion Elements

Fournier argues that the Plaintiffs have litigated against her employer and many of her coworkers for years and that they chose not to name her personally in the prior suit for strategic reasons. Despite not being a named defendant, she maintains that the prior suits actually centered around her, and the current suit should be dismissed on res judicata principles.

For their part, the Plaintiffs contend that Fournier is judicially estopped from asserting res judicata as a defense. They further maintain that Fournier acquiesced to the splitting of the causes of action from the prior suit and that she cannot show the elements of res judicata necessary to use it as an affirmative defense.

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[5] *See InterGen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003).

Res judicata "serves the purpose of relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and encouraging reliance on adjudication." *Gonzalez-Pina v. Guillermo Rodriguez*, 407 F.3d 425, 429-30 (1st Cir. 2005) (quotation marks and ellipses omitted). The affirmative defense of res judicata may be raised and decided on a motion to dismiss if certain conditions are present. *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003). First, "the facts that establish the defense must be definitively ascertainable from the allegations of the complaint, the documents (if any) incorporated therein, matters of public record, and other matters of which the court may take judicial notice." *Id.* Second, those facts must conclusively establish the res judicata defense. *Id.* Federal law decides the preclusive effect of a federal-court judgment that is used to advance a res judicata defense. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). "Federal claim preclusion law bars a plaintiff from litigating claims in a subsequent action that could have been, but were not, litigated in an earlier suit." *Silva v. City of New Bedford*, 660 F.3d 76, 78 (1st Cir. 2011). The three elements of a res judicata defense are "(1) a final judgment on the merits in an earlier proceeding, (2) sufficient identicality between the causes of action asserted in the earlier and later suits, and (3) sufficient identicality between the parties in the two actions." *In re Colonial Mortg. Bankers Corp.*, 324 F.3d at 16.

i. Final Judgment on the Merits

The first element of res judicata that Fournier must prove is that there was a final judgment on the merits. Fournier provides Exhibit 1 which shows the Plaintiffs' claims in the prior suit and their resolutions. All claims have been resolved through the parties' various motions, First Circuit affirmance, jury verdict, and stipulations of dismissal with prejudice. "[A] voluntary dismissal with prejudice is ordinarily deemed a final judgment that satisfies the *res judicata* criterion." *United States v. Cunan*, 156 F.3d 110, 114 (1st Cir.

1998). Plaintiffs do not dispute that Fournier has shown the first element of res judicata. Fournier has met her burden to show that there was a final judgment on the merits in an earlier proceeding.

ii. Sufficient Identicality Between the Causes of Action in the Plaintiffs' Prior Suit and Current Suit

The First Circuit uses a "transactional approach" to determine whether the causes of action in an earlier and later suit are sufficiently related to support claim preclusion. *Silva v. City of New Bedford*, 660 F.3d 76, 79 (1st Cir. 2011). This approach

> does not focus on the labels or sources for the plaintiff's causes of action but instead considers whether the underlying factual bases for the causes are related in time, space, origin or motivation. In other words, we will find the required relationship if both sets of claims—those asserted in the earlier action and those asserted in the subsequent action—derive from a common nucleus of operative facts.

Id. (internal quotation marks, citations, and alterations omitted).

Fournier argues that the Plaintiffs' current claims arise out of the same transaction or series of transactions as the prior complaints because they are all premised on the same litany of facts from 2012 through 2014. Moreover, she maintains that Amended Complaint 3 is based on her alleged retaliation against the Plaintiffs despite their amending the complaint to remove their federal retaliation claims. Fournier points to the Plaintiffs' prior complaints, answers to interrogatories, and statements of material facts where they used her Notice and the various harassment actions procured against them as support for their retaliation claims. She additionally maintains that even though some of the factual bases for the claims in Complaint 3 took place very shortly after the Plaintiffs filed Complaint 2, that because all the events referred to in Amended Complaint 3 occurred before a final judgment on the merits in the prior cases, res judicata is supported here.

Plaintiffs contend that the claims in this suit are not sufficiently identical to those of the first suit because they do not rest on the same "operative facts." They argue that background facts do not amount to operative facts because operative facts must relate to Fournier's actions, not the Plaintiffs' actions. They state that they have alleged new conduct of Fournier's in Amended Complaint 3 and maintain that this court must look beyond the verbiage in common between the complaints and focus on the new facts alleged in the current complaint.

The Plaintiffs mischaracterize Fournier's argument. Fournier points out that the Plaintiffs still base their claims on her alleged retaliation against them, *see* Am. Compl. 3 ¶¶ 92; 95-96, much of which was addressed by the complaints in the prior suit, and could have been asserted against her in the prior suit. This is relevant for the transactional approach that the First Circuit uses in considering "whether the underlying factual bases for the causes are related in time, space, origin or motivation." *Silva*, 660 F.3d at 79. The Plaintiffs still base their claims in retaliation. The alleged retaliation occurred at nearly the same time (2012—2014) as the prior complaints. Fournier's alleged actions that the Plaintiffs reference in prior complaints, answers to interrogatories, and other pleadings are operative facts, not merely background facts.

A. Is There a Common Nucleus of Operative Facts Between the Prior Suit and the Current Suit?

Plaintiffs point to other caselaw for the proposition that an overall relationship between the parties surrounding the events or actions that occurred leading to the lawsuits does not equate to a common nucleus of operative facts. *Cordell v. Howard*, 879 F. Supp. 2d 145 (D. Mass. 2012) is not binding on this court, but can be distinguished. There, the prisoner-plaintiff's first suit was brought against the warden of his current prison and the warden and clinical directors of the prison he was previously incarcerated

at. *Id.* at 150. After his first suit was dismissed, *id.* at 150-51, he brought a subsequent suit against four medical providers at his current prison who he alleged deprived him of his constitutional rights, *id.* at 147. The prisoner-plaintiff's second complaint survived a motion to dismiss based on res judicata grounds. *Id.* at 157.

The case at bar is different than *Cordell.* Here, the Plaintiffs initially filed suit against the District and its superintendent, but also against individuals employed by the District who Plaintiffs alleged retaliated against them. Those individual employees are similarly situated to Fournier as she was also an individual employed by the District, and the Plaintiffs claim that she retaliated against them. Moreover, in *Cordell,* the plaintiff's allegations against "medical staff" in the first suit were generally that they were unable to stabilize his condition, and they gave him too much of his medication which caused him pain. *Id.* at 151. Here, Fournier played a significant role in the prior suit and was referred to, according to her count, more than thirty times in one of the Plaintiffs' prior complaints, which also mentioned her Notice of Claim against them. Unlike *Cordell,* Fournier was particularly referenced at length in the prior Complaint, and some of her specific actions that the Plaintiffs currently complain about were alleged in it.

Plaintiffs cite *Sierra Club v. Secretary of Transportation,* 779 F.2d 776 (1st Cir. 1985) for the proposition that even if claims arise from the same complex of facts, that does not mean that they necessarily arise from the same nucleus of operative facts. There, the plaintiffs argued, and the First Circuit accepted, that two different permits issued by two different agencies, one state and one federal, were separate causes of action when the plaintiffs first sued one agency and later sued the second. *Id.* at 780. In coming to that conclusion, the court reasoned that "[e]ach action was performed independently of the others according to entirely different sets of regulations and by the staffs of different agencies. Each action can be considered a separate and distinct wrong." *Id.* at 780. The

court also explained that entirely different facts were necessary to prove the claim in the second suit. *Id.* The court further distinguished the actions because "[a] challenge to a specific aspect of a complex project such as this cannot as a general rule be permitted to bar an entirely different challenge to a distinctly different part of the project, especially where the challenged actions were taken by different agencies." *Id.* (emphases added).

Here, the Plaintiffs attempt to entirely separate Fournier from the District despite Complaint 3 referencing her being employed by it, that she was acting in the scope of her employment, and under color of law. In Amended Complaint 3, they about-face and now state that she was at all times acting individually, and in no way in concert or agency with the District or former defendants. However, it is impossible to ignore that Fournier is employed by the District, which makes her more closely related to the prior defendants, and less similar to the two entirely different agencies that issued permits in *Sierra Club*.

In the present case, even though different facts may be necessary to prove the wrongful use of civil proceedings, or abuse of process, these claims still arise out of the same common nucleus of operative facts as the prior suit. This common nucleus of operative facts is that the actions of the prior defendants, and now Fournier, which were discussed at length in the prior suit, were in retaliation against the Plaintiffs for their advocacy of B.P.. They are not entirely or distinctly different. Regardless of the "new" claims, it is impossible for the Plaintiffs to get around the fact that the claims are all based on alleged retaliation that a prior court, and jury, rejected. Moreover, in their prior pleadings they alleged that the District assisted Fournier with her harassment claim. This all amounts to the same common nucleus of operative facts being contained within this suit and the prior suit as "the underlying factual bases for that causes are related in time, space, origin, [and] motivation." *Silva v. City of New Bedford*, 660 F.3d 76, 79 (1st Cir. 2011).

B. Could Fournier Have Been Named as a Defendant in the Prior Suit?

The Plaintiffs contend that this case is like *Negron-Fuentes v. UPS Supply Chain Solutions* where dismissal based on res judicata was inappropriate because the plaintiff could not have properly included the defendants named in the later complaint in the first complaint. 532 F.3d 1, 9 (1st Cir. 2008). The First Circuit explained that claim preclusion may be appropriate when parties are in privity or closely related to each other and not named in the prior suit and "where the claims were or could have been brought against the original defendant in the original suit." *Id.* at 10. Because neither condition was satisfied in that case, claim preclusion could not bar the later suit against the new defendant. *Id.* at 10-11.

Plaintiffs attempt to compare their circumstances to those in *Negron-Fuentes*. They allege that Fournier would not have been a proper party to Complaint 1 or 2 because the prior defendants were alleged to have been acting in their employment capacity for the District and therefore would have been immune from some of the claims that Plaintiffs currently assert. This argument appears valid until one looks at procedural posture of this case. In Complaint 3, Plaintiffs asserted that Fournier was an employee of the District, ¶ 4, and acting alone and in concert with the District, and under color of law, ¶ 138. After Fournier filed her first Motion to Dismiss on September 10, 2018, two weeks later the Plaintiffs amended their Complaint to assert that Fournier only ever acted individually, not as an employee of the District, and never as an agent of, or in concert with, the District or defendants in the prior suit, ¶¶ 131-33. This shows that the Plaintiffs originally did pursue their claims against Fournier's employer, and subsequently against her as its employee, and then asserted contradictory factual allegations, which would allow them to survive Fournier's first Motion to Dismiss.

Unlike *Negron-Fuentes*, the Plaintiffs could have brought their claims against Fournier in the prior suits that they filed. This is evidenced by the fact that Complaint 3 brought suit against Fournier in the same capacity that the Plaintiffs brought suit against the prior defendants. The Plaintiffs claim that this court should not look to Complaint 3 before it was amended because, after "no court ever accepted" their allegations in Complaint 1, 2, or 3, they are entitled to change their allegations and allege contrary facts. However, to not consider the change in allegations, or that the Plaintiffs previously alleged that the District assisted Fournier with her harassment claim, would allow the Plaintiffs to maintain a claim that otherwise would have been dismissed under res judicata principles, and undermine the principles supporting res judicata. This is not pleading in the alternative which is commonly accepted, but instead changing factual allegations, after initially asserting them, for the purpose of avoiding certain defenses.

Part of the principle underlying res judicata is avoiding judicial waste. *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 16 (1st Cir. 2003). It is also regarded as "a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts." *Kale v. Combined Ins. Co.*, 924 F.2d 1161, 1168 (1st Cir. 1991) (quoting *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394 (1981). To ignore the Plaintiffs' Complaint 3 before it was amended, when it is unclear whether the First Circuit would adopt an exception to considering a prior complaint in circumstances such as these, would be a disservice to the principle and rule of res judicata. The court determines that Fournier could have been, and should have been, named as a defendant in the prior suit.

C. Are There New Facts or is There a New Series of Events in the Complaint that Destroys the Identicality of the Causes of Action?

Plaintiffs argue that they have alleged "new facts or series of events" that make their current suit different from the prior two that were consolidated. Plaintiffs maintain that subsequent conduct by a defendant, which is the same type of conduct that a prior suit was based on, can create a new and different cause of action. They cite to *Gonzalez-Pina v. Guillermo Rodriguez*, 407 F.3d 425 (1st Cir. 2005) in support of their position. There, a plaintiff employee settled with a municipality in open court regarding his political discrimination claims. *Id.* at 428. After the settlement and his return to work, the plaintiff alleged that the municipality continued to discriminate against him. *Id.* The court found, and the First Circuit affirmed, that the defendant's claims for the new discrimination after his return to work were not barred by res judicata. *Id.* at 430.

Here, both the Plaintiffs' prior Complaints reference Fournier's Notice of Claim. Plaintiffs maintain that they alleged new facts regarding it that would bar res judicata. The court acknowledges that neither Complaint references the harassment actions that are the basis for the wrongful use of civil proceedings claims. However, Fournier points out that the Plaintiffs were aware of the proceedings and used them as a basis for their prior retaliation claim in their Supplemental Answers to Interrogatories.[6] That makes this case different than *Gonzalez-Pina*. Here, the Plaintiffs are not alleging new conduct that occurred after a prior suit was settled or resolved. Instead, they are alleging conduct that occurred during the prior suit in its early stages. Moreover, the conduct that they are now

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[6] When asked to "[i]dentify with particularity the factual basis for your allegations that you have been retaliated against by Defendants" the Plaintiffs answered that they "[r]equest[ed], with an implicit threat that was later followed through with – namely that Jessica Fournier would make a claim of harassment against Jane Quirion – that Jane Quirion . . . ." and that the former defendants "[a]ssist[ed] Caroline Thibeault, NT, Rebecca Brooks, DB, and Jessica Fournier with pursuing claims against Jane Quirion for 'harassment.'" The court treats this as a party admission.

pursuing a new claim for is conduct that they used to support their prior retaliation claim with. This are not new facts or series of events that "rise to an entirely separate cause of action." *Id.* at 430. Next addressed is whether the claims for wrongful use of civil proceedings should have been in the prior suit, even though the events that the claims are based upon arose shortly after the Plaintiffs filed Complaints 1 and 2.[7]

D. Should the Wrongful Use of Civil Proceedings Claims Have Been Brought Previously Although they Allegedly Occurred After the Complaints were Filed?

The Plaintiffs argue that there is no overlap in the Complaints regarding wrongful use of civil proceedings, and therefore they are entirely new claims not barred by res judicata. Fournier maintains that the events giving rise to these claims took place well before judgment was entered in the prior cases and that the Plaintiffs should have amended their Complaints and joined her as a party. She contends that because the harassment proceedings took place in May through June 2014,[8] and the deadline for amending pleadings and joinder of parties was January 2015, that the Plaintiffs had ample time to include their claims against Fournier in the prior suit. Fournier points to *Havercombe* as support for this court to apply res judicata to the current suit, because they used the harassment notices in the prior suit. In *Havercombe*, the court explained that

> [t]he additional incidents during that period could also have been the subject of the testimony and other factual proffers in [the prior suit] as, among other things, proof of the defendant's on-going practice of unlawful discrimination. Such an overlap in evidentiary proffers is, according to the Restatement, another good reason for the second action to be held precluded.

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[7] Complaint 1 was filed June 2, 2014, and Complaint 2 was filed May 23, 2014.

[8] Despite this assertion, it appears to the court that the first harassment action was commenced on May 30, 2014, and some continued into July 2014 when they were resolved. Police reports were still being made in August. Whether the actions wrapped up in June or August is not of consequence in deciding this Motion.

Havercombe v. Dep't of Educ. of the Commonwealth, 250 F.3d 1, 7 (1st Cir. 2001) (internal citations, quotations, and alterations omitted). In this case, the harassment notices and proceedings, victim impact statements, and police reports associated with the Plaintiffs current claim for wrongful use of civil proceedings were filed with the court near the beginning of the prior suit, and some were actually used to support Plaintiffs' claims in that suit. This is a "good reason for the current action to be precluded." *Id.*

The Plaintiffs argue that because the harassment actions occurred after the complaints were filed, they were not required to amend their complaint to include them. They cite to a slip opinion explaining that "[i]n general, claim preclusion does not preclude litigation of events that occur after the date on which the plaintiff filed the prior complaint, assuming the prior claim was not amended to incorporate post-filing events." *Gladu v. Correct Care Sols.*, No. 2:17-cv-00504-JAW, 2018 U.S. Dist. LEXIS 170655, slip op. at *11 (D. Me. Oct. 3, 2018). The following sentence in that opinion, which the Plaintiffs omit, tempers that general statement. The court went on to explain, "[h]owever, claim preclusion prevents litigation in a later action of matters that grew out of the same nucleus of operative facts and should have been brought in the prior action." *Id.* (quotation marks omitted).

In *Gladu*, the first complaint and amended complaint in the first case were filed in September 2015, and December 2016 respectively. *Id.* at 2. The court granted summary judgment in the first case on February 14, 2018, after the plaintiff had already filed another complaint to initiate a second case in December 2017, which alleged events going back to April 2017 that were similar to those in the first complaint. *Id.* at 12-14. In comparing the claims within the two complaints, the court concluded that the plaintiff presented similar evidence on his current claims and sought relief for them in his first case, so "the claims asserted in the current action can fairly be characterized as the same

claims he asserted in the prior action, or claims that should have been asserted in the prior action." *Id.* at 14. (emphasis added).

This court has already determined that Plaintiffs' current claims arise from the same common nucleus of operative facts as their prior suit. Here, Plaintiff filed the first two complaints on May 23 and June 2 of 2014. Exhibits show that Fournier initiated a harassment action with the Topsham Police Department on June 12, 2014. Her Emotional Impact Statement that was provided to the police is dated June 5, 2014. Other individuals filed their own requests for harassment actions with the police and West Bath District Court from May 30 through the middle of June. The harassment actions were concluded by June 27, after another parent voluntarily dismissed her court action, and a district court judge granted Quirion judgment as a matter of law after a hearing on Fournier's protection from harassment request. These events are not only referenced in the Plaintiffs' answers to interrogatories as evidence of retaliation, but they are very near in time to when Complaints 1 and 2 in the prior suit were filed. They were known to the Plaintiffs, who apparently believed them to be relevant to their actions. It would have preserved judicial economy if they had amended their complaint to include Fournier as a defendant, as they could have done, and asserted the current claims. Plaintiffs chose not to do so. These are not the type of "subsequent" claims that escape a motion to dismiss based on res judicata. In sum, these claims should have been brought in the prior action and are sufficiently identical to the cause of action in the prior suit.

iii. Sufficient Identicality Between the Parties in the Two Actions

Privity between the defendants is not necessary for claim preclusion, but res judicata applies "if there is privity or if the new defendant is 'closely related to a defendant from the original action-who was not named in the previous law suit.'" *Silva v. City of New Bedford*, 660 F.3d 76, 80 (1st Cir. 2011) (quoting *Negron-Fuentes v. UPS Supply*

Chain Sols., 532 F.3d 1, 10 (1st Cir. 2008) (alterations omitted). As *Negron-Fuentes* explained,

> claim preclusion can sometimes operate in favor of a party--*e.g.*, one in privity with or closely related to a defendant from the original action--who was not named in the previous law suit. For example: where some alleged conspirators are sued in the first (unsuccessful) action and the remainder in a second suit based on the same allegations, or when a government is sued first (unsuccessfully) and officers in their personal capacities sued afterwards on the same theory. . . . [T]his has usually occurred where the claims were or could have been brought against the original defendant in the original suit.

532 F.3d at 9. The First Circuit has noted, and cited, other courts that found a "sufficiently close relationship existed based on employment and agency to support claim preclusion." *Silva*, 660 F.3d at 80.

Fournier argues that because she was referenced numerous times in the prior complaints and because much of the prior suit was about her, she is closely related to the District and to the individual defendants in the prior cases, who were sued in their individual capacities. She points to the notice of claim that Plaintiffs served on her, the very same one which also was served on Smith, a defendant in the prior suit. She maintains that because the notice alleged the same claims against both of them, it shows how closely related she is to the prior defendants, and intertwined with the Plaintiffs' retaliation claims in the prior suit.

The Plaintiffs point to caselaw outside the First Circuit to show that the identicality prong of res judicata is not met when a plaintiff claims an intentional tort against an employee that was not committed within the scope of her employment. They concede, however, that the third prong is generally met when the claims could have been brought against a defendant in the prior suit, and the second suit attempts to hold related defendants liable on related claims.

Here, like in *Silva*, the question is whether the various judgments, stipulations of dismissal, and verdict in the prior suit bar the Plaintiffs' claims against Fournier because they could have, but did not, bring those claims in their prior case. *Id.* at 79. The claims in the present suit generally arise from the same alleged retaliation that the Plaintiffs claimed in the prior suits. There, they sued both the District in its official capacity, and employees of the District in their personal capacity. Now, after having named Fournier in her capacity as a District employee, they changed their tune and their amended complaint to allege that at no time she was acting in her capacity as an employee, or in agency with the District or any of the prior Defendants. This is clear attempt to separate Fournier from the prior defendants so that claim preclusion may not apply. Despite Plaintiffs' new assertions, Fournier is closely related to the prior defendants and the Plaintiffs could have, but did not, bring their claims against her in the prior case. Plaintiffs "made a number of strategic choices; claim preclusion doctrine requires [them] to live with those choices."[9] *Airframe Sys. v. Raytheon Co.*, 601 F.3d 9, 11 (1st Cir. 2010).

In sum, Fournier has met all the elements of res judicata. There was a final judgment on the merits of all of the Plaintiffs' prior claims. There is sufficient identicality between the causes of actions in the prior and current suit as they share a common nucleus of operative facts. Moreover, Fournier could have been, and should have been, included in the prior suit. Finally, as evidenced by the Plaintiffs amending Complaint 3 to allege that Fournier was at no time acting within the scope of her employment or in

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[9] There, like here, the plaintiffs "made choices to bring piecemeal and sequential litigation, apparently hoping this strategy would maximize its chances of recovery through settlement or trial. This is a case where 'the new party can show good reasons why it should have been joined in the first action and the old party cannot show any good reasons to justify a second chance.'" *Airframe Sys. v. Raytheon Co.*, 601 F.3d 9, 18 (1st Cir. 2010) (quoting 18A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4464.1, at 727 (2d ed. 2002)).

agency with any of the prior defendants, Fournier is closely related to the prior defendants for the sufficient identicality prong of res judicata to apply. Plaintiffs' claims against Fournier are barred by claim preclusion. Below are discussions of judicial estoppel and acquiescence to claim splitting, which the Plaintiffs mount as defenses to res judicata. After an analysis of both, the court finds that neither applies to this case.

IV. Does Judicial Estoppel Prevent Fournier from Asserting Res Judicata?

"[T]he doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant . . . in a prior legal proceeding." *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003). The purposes behind the doctrine are to "ensure that parties proceed in a fair and aboveboard manner, without making improper use of the court system." *Id.* It is most often invoked when the court believes that a party is "playing fast and loose" with it, but not otherwise. *Id.* Judicial estoppel depends on the facts of each case and does not require a mechanical test to determine whether it applies. *Alt. Sys. Concepts, Inc. v. Synopsys, Inc.*, 374 F.3d 23, 33 (1st Cir. 2004).

Two conditions must be satisfied for judicial estoppel to apply, and courts are within their discretion to consider a third factor if they desire. *Id.* These are:

> First, the estopping position and the estopped position must be directly inconsistent, that is, mutually exclusive. Second, the responsible party must have succeeded in persuading a court to accept its prior position. [T]hird . . .: absent an estoppel, would the party asserting the inconsistent position derive an unfair advantage?

Id. Therefore, judicial estoppel applies when "a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage." *InterGen*, 344 F.3d at 144.

Plaintiffs contend that Fournier is judicially estopped from asserting a res judicata defense because in her deposition in the prior suit, her attorney instructed her not to answer questions about the Notice of Claim that she served on the Plaintiffs, and argued

that it was not relevant to the case. She argued that she was only a witness, not a party. The Plaintiffs maintained that the Notice was "very closely related to all of the events surrounding [their] claims." Ultimately, a magistrate judge was called and agreed with Fournier's position that she was not a named party and her motivation in serving the notice was not relevant to the Plaintiffs' claims. The Plaintiffs maintain that this is directly contradictory with Fournier's current claim that the Notice was an operative fact in the first suit, and that she is closely related to the prior defendants so that res judicata applies.

Fournier argues that because she was not a named defendant to the prior action, that alone bars judicial estoppel as it only applies to litigants or parties in prior cases. She maintains that she never alleged exact identicality of the claims and parties in the prior suit and the current case against her, but instead that they are "sufficiently" identical for res judicata to apply.

Plaintiffs state that Fournier objected to questions about the Notice "after she explained why she had served the notice" and argued that questions regarding the Notice were irrelevant because the potential lawsuit in the Notice was not related to why Fournier was being deposed. This could be seen as Fournier previously stating that the Notice was irrelevant to the Plaintiffs' retaliation claims, and therefore asserting an inconsistent position then compared to now. However, because the Plaintiffs concede that she "explained why she served the notice," it is better viewed as Fournier not discussing the Notice as it related to her potential personal tort claims against the Plaintiffs. Therefore, her position then and now are not directly contradictory.

Even if the Plaintiffs could show the elements of judicial estoppel, the doctrine would not apply in the instant case because Fournier was not a defendant in the prior suit. Some federal courts have determined that judicial estoppel cannot apply to a person that was not a party in the prior proceeding where the statement was made. *Encyclopaedia*

Britannica, Inc. v. Dickstein Shapiro, LLP, 905 F. Supp. 2d 150, 155 (D.D.C. 2012). The *Encyclopaedia Britannica* court reasoned that because the Supreme Court, its parent circuit court, and treatises all framed the judicial estoppel test in forms of parties, it is required that a person actually be a litigant for the doctrine to apply to her.[10] *Id.* Therefore, "the logic of judicial estoppel—that a party should not be changing its position between proceedings—does not apply to statements made before one was a party at all." *Id.* Fournier was not a party to the prior suit as the Plaintiffs did not name her although their claims centered around her. Therefore, the doctrine of judicial estoppel does not bar Fournier from asserting a res judicata defense.

V. Did Fournier Acquiesce to the Splitting of the Causes of Action Such that She Cannot Now Assert a Res Judicata Defense?

The general rule against claim splitting is subject to an exception "that if the parties agree, or a defendant implicitly assents, to a plaintiff splitting his claim, then a judgment in an earlier action which normally would bar the subsequent action will not." *Calderon Rosado v. Gen. Elec. Circuit Breakers, Inc.*, 805 F.2d 1085, 1087 (1st Cir. 1986). The rationale behind this exception is that a purpose of res judicata "is to protect a defendant from the harassment of multiple actions." *Id.* Therefore, a "defendant who fails timely to complain waives the benefit" and acquiesces to the claim splitting. *Id.*

The court need not delve into the arguments of the parties. As previously stated, Fournier was not a party to the prior suit. It is illogical that a nonparty could acquiesce to

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[10] A party is "[o]ne by or against whom a lawsuit is brought; anyone who both is directly interests in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment; LITIGANT < a party to the lawsuit>." Party, Black's Law Dictionary, 1297 (10th ed. 2014). Fournier was not a party or a litigant to the prior suit even though the Plaintiffs could have chosen to name her as a defendant.

claim splitting if no claim was brought against her to be split. Therefore, because Fournier was not a party to the prior suit, she could not have acquiesced to claim splitting.

Again, because Fournier has met the elements of res judicata, and the Plaintiffs have not shown that she is judicially estopped from asserting it as a defense, or that she acquiesced to the splitting of the causes of action, the court grants Fournier's Second Motion to Dismiss in its entirety. However, the court will address below the parties' arguments regarding whether the statute of limitations additionally bars the Plaintiffs' claims, and whether some of the claims should be dismissed on the merits.

VI. Fournier's Second Motion to Dismiss Based on the Statute of Limitations

Fournier argues that the Maine Tort Claims Act (MTCA) bars the Plaintiffs' wrongful use of civil proceedings and abuse of process claims against her. The MTCA requires that, within 180 days after a claim or cause of action arises, a claimant shall file a written notice containing specific requirements, including the "name and address of any governmental employee involved." 14 M.R.S. § 8107(1)(C). An action may not be brought if the notice provisions are not substantially complied with. § 8107(4). Section 8110 provides that "[e]very claim against a governmental entity or its employees permitted under this chapter is forever barred from the courts of this State, unless an action therein is begun within 2 years after the cause of action accrues . . . ."

Fournier argues that because the Plaintiffs have not served written notice upon the District that complies with the 180-day timeframe prescribed by § 8107, or the two-year timeframe allowed by § 8110, the abuse of process and wrongful use of proceedings claims must be dismissed. They further argue that the MTCA applies to claims against government employees in their individual capacity.

In response, the Plaintiffs maintain that Fournier's statute of limitations argument fails because they do not allege that she was acting in the course and scope of her

employment, or on behalf of the District when she engaged in the conduct on which their claims are based. They argue that because Fournier's actions against them were not taken in her role as an employee, or a person "acting on behalf of a governmental entity[,]" § 8102(1), that neither the notice requirement nor the two-year limitations period applies to them.

Because Complaint 3 refers to Fournier as acting within the course of employment, the MTCA clearly applies. The Plaintiffs' claims for wrongful use of civil proceedings and abuse of process are dismissed as barred by the MTCA for failing to comply with the notice requirement and as occurring outside the two-year limitations period. The Law Court has not had much occasion to determine when an amended complaint entirely supersedes an initial complaint. Because of that, this court applies the same reasoning as laid out in Section II of this Judgment, and considers the factual allegations of Complaint 3 in deciding the Second Motion to Dismiss based upon the statute of limitations and the merits of the claims. Because Complaint 3 refers to Fournier as acting within the course of employment, the MTCA clearly applies. The Plaintiffs' claims for wrongful use of civil proceedings and abuse of process are dismissed as barred by the MTCA for failing to comply with the notice requirement in the statute.

VII. Fournier's Second Motion to Dismiss as it Addresses the Merits of the Plaintiffs' Claims

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the allegations in the complaint, not the sufficiency of the evidence the plaintiffs are able to present." *Barnes v. McGough*, 623 A.2d 144, 145 (Me. 1993) (internal citations omitted). The court shall "consider the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123, 127. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause

of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 8, 902 A.2d 830, 832). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.* Fournier maintains that the Plaintiffs do not state a claim for which relief can be granted for any of the counts in Amended Complaint 3.

i. Abuse of Process

A plaintiff maintains a claim for abuse of process if he can show "(1) the use of process in a manner improper in the regular conduct of the proceeding, and (2) the existence of an ulterior motive." *Advanced Constr. Corp. v. Pilecki*, 2006 ME 84, ¶ 23, 901 A.2d 189 (quoting *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 1998 ME 70, ¶ 7, 708 A.2d 283) (internal citation marks omitted). Filing a lawsuit is a regular use of process and does not amount to abuse of process, regardless of the plaintiff's motive. *Advanced Constr. Corp.*, 2006 ME 84, ¶ 23, 901 A.2d 189. "[A]buse of process claims arise when litigants misuse individual legal procedures, such as discovery, subpoenas, and attachment, after a lawsuit has been filed." *Id.* However, an abuse of process claim can arise when a plaintiff misuses the procedures for obtaining a lien if material misstatements of facts are contained in the lien statement. *Id.*

Fournier maintains that the Plaintiffs fail to state a claim for abuse of process because a pre-suit notice of claim cannot give rise to an abuse of process claim as no lawsuit had already been filed, or, at best, it was a regular use of proceedings and therefore cannot amount to an abuse of process. The Plaintiffs argue that an abuse of process claim can arise before a lawsuit is filed, and that because they alleged that Fournier never intended to sue them, they have sufficiently stated a claim upon which relief may be granted.

In *Jennings v. Maclean*, a defendant attorney who had obtained a money judgment against a plaintiff sent a letter and copy of the money judgment to an attorney "handling an unrelated real estate closing in a successful attempt to have [the plaintiff's] share of the proceeds withheld." 2015 ME 42, ¶ 1, 114 A.3d 667. The letter explained that the funds payable to the plaintiff needed to be placed in escrow "pending a further turnover by the court" that the defendant attorney would seek. *Id.* ¶ 3. The plaintiff filed suit in Superior Court alleging that the letter amounted to abuse of process. *Id.* ¶ 4. The Superior Court (Knox County, *Horton, J.*) granted the defendant attorney summary judgment. No material facts were in dispute, so the central question for the Law Court on appeal was whether the plaintiff presented a prima facie case of abuse of process.

The Court explained that the defendant attorney "did not employ any process, and did nothing improper, when he sent the letter to [the real estate attorney]. We have cited as examples of the improper use of process for purposes of this tort the 'misuse of individual legal procedures, such as discovery, subpoenas, and attachment, after a lawsuit has been filed, and the misuse of the procedures for obtaining a lien." *Id.* ¶ 7 (internal quotations and alterations omitted). The Court clarified that the letter

> did not involve any "process" because it was not a legal procedure, even though it suggested that a second turnover order—a procedure entirely proper in the regular course of attempting to collect on a judgment—would be sought from the court. Unlike a true instrument of legal process, the letter did not purport to compel [the real estate lawyer] to perform any legal obligation, and he was free to ignore it if he thought that [the defendant attorney] was wrong concerning his professional responsibilities.

Id. ¶ 8.

Here, accepting the facts in the Complaint as true, the plaintiffs have sufficiently alleged Fournier's ulterior motive. Therefore, the crux of the issue is whether Fournier's Notice can amount to abuse of process. Contrary to Fournier's contention, an action that occurs pre-suit, such as obtaining a lien via a lien statement that contains gross

misstatements of material fact, can amount to abuse of process. However, Fournier's Notice is more akin to the letter at issue in *Jennings*. Although a notice of claim is sent pursuant to 14 M.R.S. § 1602-B(5),[11] it is a "regular use of process." It is not a "true instrument of legal process" as it did not purport to compel the Plaintiffs to perform any legal obligation.

Because Fournier's Notice is a regular use of process, it cannot form the basis of an abuse of process claim. Therefore, the Plaintiffs have failed to state a claim upon which relief may be granted, and this court dismisses the abuse of process claim on the merits.

ii. Violation of the Maine Civil Rights Act

The Maine Civil Rights Act (MCRA) prohibits any person from intentionally interfering "by physical force . . . or by the threat of physical force against a person" with that person's exercise of their rights under the Constitution or other laws. 5 M.R.S. § 4682.

The Plaintiffs base their claim on the harassment notices that were served upon Quirion threatening her with arrest if she had contact with anyone listed in the notices. The possibility of arrest is the threat of physical force that the Plaintiffs allege under the MCRA, which they argue is enough to state a claim under the MCRA.

Fournier maintains that the possibility of arrest contained within the harassment notices should not be enough to state a claim upon which relief may granted. She argues that the MCRA is Maine's hate crime statute, is limited in scope, and is intended to apply to "hate groups." She contends that to allow the Plaintiffs' claim to go forward on this alleged threat of force "would mean that any victim who filed a protection from

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[11] "Prejudgment interest accrues from the time of notice of claim setting forth under oath the cause of action, served personally or by registered or certified mail upon the defendant until the date on which an order of judgment is entered."

harassment or abuse notice or claim could be vulnerable to a retribution lawsuit under Maine's hate crime statute" which would chill those in need from seeking them.

To date, the Law Court has not addressed the MCRA and the "threat of force" element it contains in any meaningful way. Often, violations of the MCRA are brought by people who were involuntarily committed to a psychiatric hospitals. *See Doe v. Graham*, 2009 ME 88, 977 A.2d 391; *Saunders v. Tisher*, 2006 ME 94, 902 A.2d 830. In *Graham*, the plaintiff failed to state a claim upon which relief could be granted, even though she alleged that she understood a Spring Harbor doctor telling her that the doctor had no control over the security guards' actions, to be threats of force. 2009 ME 88, ¶ 4, 977 A.2d 391. But, the Law Court did not rest its decision on that aspect of the MHRA, and instead analyzed the case to determine whether the plaintiff was deprived of her liberty under the federal and Maine Constitutions. *Id.* ¶ 22. Ultimately, after her two-hour detention, and given the many procedural safeguards in the involuntary commitment process, it determined that she did not state a claim of "*deprivation*" under the either the State or federal standard and dismissal of her civil rights claims was warranted. *Id.* ¶ 26.

In *Saunders*, a doctor signed an involuntary commitment application and the plaintiff was involuntarily held for twenty-one days after being arrested and forcibly transported to a hospital. 2006 ME 94, ¶¶ 3-4, 902 A.2d 830. There, the majority did not address whether the arrest was sufficient force under the MCRA, as the Court determined that the plaintiff's claims were barred by the three-year statute of limitations in the Maine Health Security Act. *Id.* ¶ 16. In dissent, Justice Alexander quoted the MCRA in relevant part, referred to the plaintiff's arrest and subsequent involuntary commitment, and opined that the record did not preclude his MCRA claim "beyond a doubt." *Id.* ¶¶ 24-26.

Here, the threat of force is the print contained in the harassment notices. It is, as Fournier argues, attenuated from her as she did not make the "threat" directly, because

it was issued through a notice to Quirion after Fournier was granted a temporary protection from harassment order. It is clear to the court that the case at bar, and the "threat of force" it contains, is not the type that the MCRA was intended to address.[12] The threat of arrest contained within the harassment notices served upon Quirion does not amount to a threat of force sufficient to state a claim upon which relief may be granted under the MCRA.

CONCLUSION

The Defendant's Second Motion to Dismiss is granted in its entirety based on res judicata. The Motion is also granted regarding Counts I, II, and III as barred by the statute of limitations. Finally, the Motion is also granted for Counts I and IV as the Plaintiffs fail to state a claim upon which relief may be granted.

The Clerk is directed to incorporate this Order by reference into the docket for this case, pursuant to Rule 79(a), Maine Rules of Civil Procedure.

Dated: June 11, 2019

Daniel I. Billings
Justice, Maine Superior Court

[12] *See Connolly v. Henrietta D. Goodall Hospital* where a nurse who offended hospital officials was placed on a one-day suspension without pay, and the suspension was reported to the Board of Nursing. 2006 Me. Super Lexis 3, at *1 (Jan. 6, 2006). In dismissing her MCRA claims, the Superior Court (York County, *Fritzsche, J.*) wrote that "[n]o hospital official hit her, shot her, lynched her, burnt her house, trespassed upon her property or otherwise violated this law. The [MCRA] was not designed to encompass all potential interferences with civil rights. The precise words chosen by the Legislature cannot be cast aside. The law focuses on force, violence, damage or destruction of property or trespass, none of which exist here." *Id.* at *7.