535 F.Supp.3d 1087
United States District Court, D. Kansas.

Kyle MCLINN; and Outlaw Towing & Recovery Inc., Plaintiffs,
v.
THOMAS COUNTY SHERIFF'S DEPARTMENT; Joel Thomas Nickols, Jr., Individually and in his capacity as Thomas County Sheriff; Jacob Cox, Individually and in his capacity as Deputy Thomas County Sheriff; First State Bank of Healy, also known as First State Bank of Healey; Travis Ryburn; Triple T. Towing; and Thomas County, Kansas, Board of Commissioners, Defendants.

Case No. 20-2385-JWB
04/26/2021

MEMORANDUM AND ORDER

JOHN W. BROOMES, UNITED STATES DISTRICT JUDGE

This matter comes before the court on motions to dismiss by the Thomas County Defendants, Travis Ryburn and ***1096** Triple T Towing, and First State Bank of Healy ("FSB"), as well as on Plaintiffs' motions for a hearing and for leave to file a surreply. The motions are fully briefed and the court is prepared to rule. For the reasons stated herein, Plaintiffs' motions for a hearing and to file a surreply are DENIED; the motion to dismiss of FSB is DENIED without prejudice to refiling; and the motions to dismiss of the Thomas County Defendants, Ryburn and Triple T Towing are GRANTED IN PART and DENIED IN PART.

The claims in this case arise from the allegedly unlawful repossession of Plaintiffs' vehicle on August 10, 2018.

II. Facts

The following allegations are taken from the amended complaint and are assumed to be true for purposes of deciding the motions to dismiss.

Plaintiff McLinn is a resident of Oakley, Kansas. He is the sole shareholder and director of Outlaw Towing & Recovery, Inc. ("Outlaw Towing"). Defendant Cox is a deputy sheriff for Thomas County. Defendant Nickols is the Thomas County Sheriff. Defendant Triple T Towing ("Triple T") is a tow company located in Oakley and is operated by Defendant Ryburn.

In February 2017, Plaintiffs purchased a 2006 Ford F350 ("the F350") with a loan from First State Bank of Healy, Kansas ("FSB"). The F350 was collateral for the loan. Payments on the loan were due the third day of each month, and late charges became due if payments were ten or more days late. Plaintiffs' payment "made in July 2018 was dishonored."

On August 10, 2018, sometime before 9 a.m., Ryburn/Triple T, acting under the direction of FSB, arrived on Plaintiff McLinn's property to repossess the F350. Ryburn/Triple T were Plaintiffs' direct competitors. No notice of any kind was sent by FSB, nor did it obtain any court order to authorize the repossession. The F350 was parked on land rented by McLinn and Outlaw Towing, about a tenth of a mile from the nearest entrance to the property. Deputy Cox arrived at the same time as Ryburn/Triple T. Greg Jirak, a Trooper with the Kansas Highway Patrol, also arrived at that time and remained by the highway near Plaintiffs' property. The officers arrived because Triple T/Ryburn had requested law enforcement presence to facilitate the repossession.

McLinn, who was inside the building on the premises, heard some noise and came outside to investigate. Cox was near the door. McLinn informed Cox that Triple T/Ryburn had been told they were not to come on McLinn's property and that they were not welcome on the property. McLinn demanded that Triple T/Ryburn and Cox leave the F350 alone and leave the property. Cox nonetheless instructed McLinn not to resist and to allow the repossession to happen. McLinn became agitated and yelled to demand that they leave the vehicle alone and leave the property. At more than one point, Cox put his hand on

his gun. When McLinn asked Cox the identity and purpose of the Highway Patrol Trooper, Cox informed him it was Greg Jirak and that he was there as "backup."

McLinn attempted to retrieve his personal items from the F350. Cox imposed himself between McLinn and the F350 and put his hand on his gun. Cox stood close to McLinn throughout the encounter. When it became clear to McLinn that he could not stop the tow, he attempted to go back inside to get dressed. Cox stopped him and demanded that McLinn confirm he was not going back inside to get a weapon.

McLinn was not given any paperwork justifying the repossession. He continued to protest and demand that they leave, but Cox ignored his protests. The tow was completed and the F350 was removed from the property. Cox remained until the repossession was complete.

According to the amended complaint, the towing insurance of Triple T/Ryburn had been canceled as of June 30, 2018, and was not effective again until June 30, 2019, such that Triple T/Ryburn was uninsured on August 10, 2018.

When McLinn first called the Thomas County Sheriff's Office after the incident to complain about the repossession, Sheriff Nickols allegedly laughed and said he saw nothing wrong with what was done.

On the same day the F350 was repossessed, the Thomas County Sheriff's Office represented to the Thomas County Attorney that Cox had been in possession of a court order allowing the repossession. The Thomas County Attorney took the position with McLinn that nothing wrong had been done because Cox was enforcing a valid court order in repossessing the F350.

The amended complaint alleges that over the course of the last two years, McLinn "has repeatedly attempted to make and file a written complaint about the violation of his rights," including "speaking directly with Nickols [and] the County Attorney," but "his requests were denied."

The amended complaint also alleges that McLinn was "threatened with legal action for his repeated and detailed complaints to the Thomas County Attorney, Nickols," and others. In McLinn's calls to the Sheriff's Department, Nickols allegedly told him that if he continued to complain about the violation of his rights, they would charge him with harassment and threatened to arrest him for phone harassment.

The amended complaint contains the following claims, which, except as otherwise noted, are asserted against all Defendants. Count I asserts claims under 42 U.S.C. § 1983 for the deprivation of First, Fourth, and Fourteenth Amendment rights under color of state law. Count II alleges a state law trespass claim. Count III alleges a state law conversion claim. Count IV alleges improper repossession under the Kansas Uniform Commercial Code (UCC). Count V asserts breach of contract against FSB "and to any extent relevant, its agents." Count VI asserts a state law claim for intentional infliction of emotional distress.

The defenses raised by Defendants in their motions to dismiss include failure to state a claim under Rule 12(b)(6), qualified immunity, and failure to satisfy the Kansas "notice of claim" statute, K.S.A. 12-105b(d).

IV. Analysis

A. Thomas County Defendants

1. Count I – Fourth & Fourteenth amendment breach of peace and repossession allegations against Cox. Defendants contend the amended complaint fails to allege facts showing a breach of the peace and, for that reason, fails to state a viable constitutional claim against Cox arising from the repossession.

The Fourth Amendment protects individuals from "unreasonable ... seizures" by the federal government. U.S. CONST. amend. IV. By virtue of its "incorporation" in the Fourteenth Amendment, the right also applies to seizures by state government actors. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). A "seizure" occurs when "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). Additionally, the Fourteenth Amendment protects against deprivations of property by state actors without due process of law. U.S. CONST. amend. XIV, § 1. This right ordinarily requires that an individual be given notice and an opportunity to be heard before a state seizure of property occurs. *See Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The right protects against "unfair or mistaken

deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Id.*

These constitutional restrictions generally apply only to actions taken under color of state or federal law, and for that reason they do not ordinarily apply to the repossession of a vehicle by a private party. *See Elliott v. Chrysler Fin.*, 149 F. App'x 766, 768 (10th Cir. 2005). As explained in *Marcus v. McCollum*, 394 F.3d 813 (10th Cir. 2004), there is "an essential dichotomy" between government and private action under the Fourteenth Amendment. *Id.* Insofar as police officer involvement with a private party's repossession of property is concerned, case law holds that "officers are not state actors during a private repossession if they act only to keep the peace, but they cross the line if they affirmatively intervene to aid the repossessor." *Id.* at 818. *Marcus* said the totality of the circumstances must be examined in making this distinction. It identified a number of actions indicative of state action, such as an officer telling a debtor "don't interfere with this repossession" or "you know you're not the rightful owner," telling the debtor the seizure is legal, telling the debtor to stop interfering or he will go to jail, or the fact that an officer arrived with the repossessor. *Id.* at 819. Additional factors indicative of state action include intervening at more than one step, failing to depart before completion of the repossession, and unreasonably recognizing the documentation of one party over another. *Id.* "[T]he overarching lesson of case law is that officers may act to diffuse a volatile situation, but may not aid the repossessor in such a way that the repossession would not have occurred but for their assistance." *Id.*

Most states (including Kansas) have adopted UCC provisions allowing secured creditors to repossess property from a defaulting debtor without a judicial order if certain conditions are met. One of those conditions allows the creditor to take possession "if it proceeds without a breach of the peace." K.S.A. 84-9-609(a)(1) & (b)(2). What constitutes a breach of the peace depends upon state law. *Cf. Marcus,* 394 F.3d at 820 (examining Oklahoma law). *Marcus* indicated that if there is a breach of the peace, and the repossession is thereby unlawful, an officer who aids the repossession can be liable because "[i]t stands to reason that police should not weigh in on the side of the repossessor and assist an illegal repossession." *Id.* *Marcus* advised that officers "could direct both parties to seek a judicial determination" in order to diffuse a volatile situation, but they should avoid deciding who is entitled to possession in a "curbside courtroom." *Id.*

Taking the allegations in the amended complaint as true, Plaintiffs have stated a plausible claim for relief against Defendant Cox under the foregoing rule. The amended complaint adequately alleges that Cox affirmatively intervened on the side of Triple T/Ryburn and aided them in the repossession of the vehicle in the absence of any judicial order. Cox allegedly arrived with the repossessor; arranged for a backup officer to be present; entered the premises with the repossessor while McLinn was still inside a building on the property; ignored McLinn's demands that he and the repossessor leave his property; told McLinn he had to allow the repossession to proceed; physically imposed himself between McLinn and the F350; and remained on the premises until the repossession was complete. These allegations are sufficient to show state action regardless of whether Cox also repeatedly tapped or touched his gun during the encounter, as Plaintiffs allege. *Cf. Marcus*, 394 F.3d at 820 ("officers ... may not aid the repossessor in such a way that the repossession would not have occurred but for their assistance.")

In view of the fact that due process generally requires notice and a right to be heard before a state can deprive a person of property, Cox's assistance appears sufficient, without more, to state a claim for unlawful deprivation of property without due process. *See Hyman v. Capital One Auto Finance,* 306 F. Supp. 3d 756, 770 (W.D. Pa. 2018) (plaintiff stated due process claim where officer's assistance in repossession caused taking of property without notice or opportunity to be heard). It also might support a Fourth Amendment claim. *Cf. Soldal v. Cook Cty. Ill.,* 506 U.S. 56, 71, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (plaintiff stated claim for unreasonable seizure under the Fourth Amendment where officers assisted repossessor of mobile home who acted without court order). At any rate, as discussed below, Plaintiffs have plausibly alleged that there was a breach of the peace, such that a factfinder could conclude the repossession was unlawful and lacking in due process for that reason.

The leading Kansas case on breach of the peace is *Benschoter v. First Nat'l Bank of Lawrence,* 218 Kan. 144, 542 P.2d 1042 (1975), where a creditor was told by a defaulting debtor that it could "come on out and get" the collateral. When the creditor arrived, the debtor was not at home, and the creditor obtained the collateral by asking the debtor's 17-year old son to open a gate. The Kansas Supreme Court rejected an argument that this was a breach of the peace through "stealth," finding a debtor's lack of knowledge of the repossession does not make a repossession unlawful. *Benschoter*, 542 P.2d at 1050. The court applied a test for breach of the peace that examined "whether there was entry by the creditor upon the debtor's premises" and "whether the debtor or one acting on his behalf consented to the entry and repossession." *Id.* (citing J. White &

R. Summers, *Handbook of the Law Under the Uniform Commercial Code* at 966-75 (West 1972)). A subsequent case, which also cited the White & Summers' consent test, made clear that forced entry of a building is a breach of the peace. *Riley State Bank of Riley v. Spillman,* 242 Kan. 696, 705, 750 P.2d 1024, 1030 (1988).

In another case, the Kansas Court of Appeals found no breach of the peace where a creditor successfully repossessed a car from a debtor's driveway at 2:00 a.m. Although the debtor had previously threatened to use a firearm if the creditor tried to take the car, a month after that threat the creditor was able to take the car before the debtor realized what had happened. *Wade v. Ford Motor Credit Co.*, 8 Kan. App. 2d 737, 739, 668 P.2d 183, 185, *rev. denied*, 234 Kan. 1078 (1983). In finding there was no breach of the peace, the court downplayed the issue of consent – noting a debtor's consent was not required for a lawful repossession – and cited several cases examining whether there was a confrontation between the creditor and debtor at the time of repossession. *See id.*, 668 P.2d at 187-189. The court stated that a breach of the peace "may be caused by an act likely to produce violence," but noted the repossession in that case was accomplished without incident and with the debtor "totally unaware of the repossession until [the creditor] had successfully left the premises with the car." *Id.*, 668 P.2d at 189.

The court concludes the allegations in the amended complaint plausibly allege a breach of the peace under Kansas law. The amended complaint describes a confrontation between McLinn, Cox, and Triple T/Ryburn in which the latter two entered upon Plaintiffs' property without his consent and after Ryburn had been told to stay off the property. McLinn confronted the individuals when he discovered them on the property and demanded they leave; Cox and Ryburn ignored McLinn's demands that they cease the repossession and leave his property; McLinn was "agitated and yelling" these demands; Cox instructed ***1103** McLinn to allow the repossession to proceed; Cox physically interposed himself between McLinn and the truck when McLinn attempted to retrieve personal items; Cox stopped McLinn and demanded that he confirm he was not going to get a weapon; Cox touched or tapped his firearm during the tense exchange; and McLinn "continued to protest" but Cox ignored his protests. In sum, the repossessor and the officer refused to leave private property when instructed to do so by the tenant in possession; there was yelling, continued protests, and physical intimidation between the parties involved, there was a directive by a law enforcement officer to allow the repossession to proceed; and there were concerns about the confrontation leading to the use of firearms. Plaintiffs have plausibly alleged that Cox improperly intervened and assisted an unlawful repossession involving a breach of the peace under Kansas law. *Cf.* K.S.A. 84-9-609, UCC Comment (3) ("This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law enforcement officer."). *See also* L. Anderson U.C.C. § 9-609:13 [Rev] (3d. ed.) ("a repossessing secured party may not use a law enforcement officer in its effort to repossess the collateral without judicial process. The debtor should not be forced to defy a police officer in order to assert its legal right to require a judicial repossession."); 4 White, Summers, & Hillman, Uniform Commercial Code § 34:18 (6th ed.) ("The debtor's opposition, however slight and even if merely oral, normally makes any entry or seizure a breach of the peace. We believe this is sound because the law should not make a debtor physically confront a repossessor in order to sustain a claim of breach of the peace.") (footnote omitted); *Darren Trucking Co. v. Paccar Fin. Corp.*, No. 18-3936-GJH, 2019 WL 3945103, *2 (D. Md. Aug. 20, 2019) ("the weight of state court authority holds that a repossession despite 'unequivocal oral protest of the defaulting debtor' constitutes a breach of the peace.")

2. Count I - Deputy Cox – qualified immunity. Defendants argue "[i]t is not clear at all that Deputy Cox breached the peace, which means that it is also not clearly established that Deputy Cox's conduct was unconstitutional." Although this presents a close question, the court concludes Cox is not entitled to qualified immunity under the allegations in the amended complaint.

The law in the Tenth Circuit was clearly established at the time of the incident that an officer at a private repossession may act to keep the peace, but "they cross the line if they affirmatively intervene to aid the repossessor." *Marcus,* 394 F.3d at 818. *See also Evers v. Bd. of Comm'rs of Torrance Cty.*, 2008 WL 11451364, *14 (D. N.M. Sept. 30, 2008) ("The law was unquestionably clear in March, 2004, that a police officer's assistance in a private party's seizure of property violates the Fourth Amendment.") Applying this rule, *Marcus* denied qualified immunity to officers who "assumed, without good evidence, that [the repossessor] had a repossessory right to the [vehicle] and, through physical action and verbal threats, dissuaded plaintiffs from continuing their resistance to the repossession." *Marcus,* 394 F.3d at 824. In *Price-Cornelison v. Brooks,* 524 F.3d 1103, 1118 (10th Cir. 2008), the Tenth Circuit denied qualified immunity to a sheriff who, confronted with a complainant's allegation that her former domestic partner was improperly removing property from her home, told the complainant the partner could remove whatever property she wanted (because of community property laws) and threatened to arrest the complainant if she returned to her home. The Tenth Circuit concluded, based on *Marcus,* that the sheriff was "on notice ... that he could be liable for assisting a private party's unlawful seizure of property at the time he threatened to arrest [the complainant]." *Id.*

Cox argues that the vague contours of a "breach of the peace" means he is entitled to qualified immunity. It is true that the term lacks a clear or easily applied definition. *See Riley State Bank of Riley v. Spillman,* 242 Kan. 696, 704, 750 P.2d 1024, 1030 (1988) ("The drafters of the UCC did not define the term 'breach of the peace,' purposefully leaving such definition to the courts.... There has been little caselaw in Kansas on what constitutes a breach of the peace; our definition of the term is thus largely incomplete.") But *Marcus* found the law was clearly established and denied qualified immunity under similar circumstances, focusing on the officers' unfounded assumption that the repossessor was entitled to possession of the vehicle and their use of police authority to aid the repossessor. *See Marcus,* 394 F.3d at 824 (citing *Abbott v. Latshaw,* 164 F.3d 141, 149 (3d Cir. 1998) for the proposition that "reasonable police officers should know from established precedent 'that their role is not to be participants in property deprivations without notice and an opportunity to be heard.' ") This case is materially indistinguishable from *Marcus.* Cox argues that differences between the Oklahoma UCC at issue in *Marcus* and the Kansas UCC applicable here means the law governing Cox's conduct was not clearly established. But the Kansas UCC, like the Oklahoma UCC, "does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law enforcement officer." K.S.A. 84-9-609, UCC Comment (3).

Taking Plaintiffs' allegations as true and viewing them in the light most favorable to Plaintiffs, they show that Cox, contrary to clearly established law, affirmatively intervened to aid the repossessor and asserted his authority to overcome McLinn's objections, all in the absence of any court order, and thereby allowed Triple T/Ryburn to accomplish an unlawful repossession. Similar to *Marcus,* Cox assumed without a court order that Ryburn had a right to take the F350. Cox prevented McLinn from halting the repossession and deterred him from continuing to object by ignoring his demands to leave the property, by interposing himself physically near McLinn, and by directing McLinn to allow the repossession to proceed. A reasonable officer in those circumstances would understand that intervening on the side of the repossessor in this manner was contrary to the rule set forth in *Marcus.*

5. Count I - against Nickols in his official capacity. Defendants argue the amended complaint contains only conclusory allegations that official policies or customs of Sheriff Nickols caused a deprivation of Plaintiffs' rights, such that the official capacity claims against Nickols should be dismissed. Plaintiffs respond that this "is a red herring" because Nickols is the final policymaker for the county, such that his actions represent established policies of the sheriff's department.

A local government may be liable under § 1983 only "when execution of a government's policy or custom, whether made by its lawmakers or those whose edicts or act may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs. of City of New York,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Tenth Circuit has recognized that:

> A municipal policy or custom may take the form of (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that ... is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Crittenden v. City of Tahlequah, 786 F. App'x 795, 800 (10th Cir. 2019) (citing *Bryson v. City of Okla. City,* 627 F.3d 784, 788 (10th Cir. 2010)). Kansas law generally vests county sheriffs with authority over law enforcement decisions, making sheriffs the final policymakers for the county on law enforcement matters. *See Dechant v. Grayson,* No. 20-2183-HLT, 2021 WL 62380, *3 (D. Kan. Jan. 7, 2021). It is not enough, however, for a § 1983 plaintiff merely to identify conduct attributable to a local government; a plaintiff must also "show that the municipal action was taken with the requisite degree of culpability and must demonstrate a causal link between the municipal action and the deprivation of federal rights." *Bd. of Cty. Comm'rs of Bryan Cty., Okla. v. Brown,* 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

Plaintiffs' response argues that three actions by Nickols constitute policies that support *Monell* claims. First, Plaintiffs assert that Nickols' actions "permitting deputies to help private actors ensure successful repossession of others' property without a court order" support a claim. But the amended complaint fails to allege facts showing the existence of such a policy. It does not allege that Nickols was involved in the repossession of Plaintiffs' truck, and it only vaguely alludes to "other claims based on similar facts being brought against other members of the Thomas County's Sheriff's Department." Conclusory allegations of unspecified other claims are insufficient to state a plausible claim for relief under *Monell.* Moreover, assuming

this claim relies on a theory that Nickols subsequently ratified Cox's actions during the repossession, that would not aid Plaintiffs because any after-the-fact ratification could not have been the cause of the deprivation claimed by Plaintiffs. *See e.g., Feliciano v. City of Cleveland*, 988 F.2d 649, 656 n.6 (6th Cir. 1993) ("even if it were shown that the municipality subsequently ratified the decision, the plaintiffs would then have to prove that the ratification was a 'moving force' in causing the constitutional violation.") Second, Plaintiffs assert a policy based on Nickols' actions in "retaliating against citizens who complain." Again, no other instances of retaliation are identified in the amended complaint. But insofar as the amended complaint alleges that Nickols himself threatened to arrest or to charge McLinn, such a decision by the county's final policymaker on law enforcement matters could qualify as an official policy of the county for purposes of a *Monell* claim. As to that claim, the court rejects Defendants' argument that Plaintiffs have failed to plausibly allege a policy or facts showing the policy caused a constitutional deprivation. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) ("If the decision to adopt [a] particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood.") Finally, Plaintiffs assert a *Monell* claim based on Nickols' actions in "lying to hide an officer's unconstitutional actions." The court concludes this assertion fails to support any *Monell* claim. Even assuming the truth of the allegation that Nickols lied when he said Cox had a court order authorizing the repossession, Plaintiffs fail to articulate how such an action caused them to be deprived of a constitutional right. Accordingly, Nickols' motion to dismiss the official capacity claims against him is granted in part and denied in part.

B. Defendants Ryburn/Triple T. Towing

1. Count I - Section 1983 claim against Ryburn/Triple T - repossession. Defendants argue the amended complaint fails to state a claim against Ryburn under section 1983 because Ryburn was not a state actor at the time of the repossession. Defendants additionally argue McLinn lacks standing to assert a § 1983 claim because, according to Defendants, Outlaw Towing rather than McLinn owned the F350.

"[T]o hold a private individual liable under § 1983, it must be shown that the private person was jointly engaged with state officials in the challenged action, or has obtained significant aid from state officials, or that the private individual's conduct is in some other way chargeable to the State." *Counce v. Wolting*, 760 F. App'x 575, 580 (10th Cir. 2019) (quoting *Pino v. Higgs*, 75 F.3d 1461, 1465 (10th Cir. 1996) (internal quotation marks omitted)). The individual must be a "willful participant in joint action with the State or its agents." *Beedle v. Wilson*, 422 F.3d 1059, 1071 (10th Cir. 2005).

The court rejects the contention that Ryburn's status as a private individual means he cannot be liable on the § 1983 claim. Plaintiffs allege that Cox came to the scene at the request of Ryburn; that the two coordinated their arrival; that they discussed a plan for the repossession; that Cox aided Ryburn by positioning himself near McLinn, by ignoring McLinn's demands to leave the property, and by instructing McLinn that he had to let the repossession go through; and that Cox remained on the scene near McLinn until the repossession was complete. These allegations are sufficient to plausibly show joint engagement between Ryburn and Cox and/or that Ryburn obtained significant aid from Cox, in what was essentially a joint venture to seize the vehicle without a court order. Plaintiffs have adequately alleged that Ryburn acted under color of state law. *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) ("[T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents.")

With respect to Defendants' argument that McLinn lacks standing to assert a § 1983 claim because he did not own the F350, the court rejects this argument, at least for now, based on the allegations in the amended complaint. According to the amended complaint, "Plaintiffs purchased [the] ... Ford F350 ...." Assuming that allegation is true, McLinn has standing to assert a claim that he had an ownership interest and was unlawfully deprived of the F350.

3. Trespass and conversion. Defendants argue Ryburn did not commit a trespass or conversion because he was authorized to enter the property to repossess the F350 pursuant to K.S.A. 84-9-609. Defendants also contend there was no trespass or conversion because Plaintiffs consented to the repossession through the loan agreement. The court rejects these arguments.

Defendants' contention that K.S.A. 84-9-609 authorized the entry and repossession is premised on the assumption that there was no breach of the peace in connection with the repossession. For reasons previously stated, however, the court finds

Plaintiffs have sufficiently alleged a breach of the peace. Moreover, Kansas law makes clear that K.S.A. 84-9-609 "does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law enforcement officer." *Id.*, UCC Comment (3). That assistance is precisely what Plaintiffs have alleged in this case.

Plaintiffs' purported consent in the security agreement likewise does not preclude a claim for trespass or conversion. As Plaintiffs point out, Kansas law provides that a debtor may not waive the provisions of K.S.A. 84-9-609 "to the extent that it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without a breach of the peace." K.S.A. 84-9-602(6). Moreover, even assuming the loan agreement included some form of consent, any such consent was revoked by McLinn when he demanded that Ryburn leave the F350 and get off the property. *See e.g., James v. Ford Motor Credit Co.*, 842 F. Supp. 1202, 1208 (D. Minn. 1994), aff'd, 47 F.3d 961 (8th Cir. 1995) ("It is reasonably clear that Minnesota follows the majority view of U.C.C. § 9–503: when debtors specifically object to repossession, they revoke any implied right previously granted to the creditors to enter the debtor's property without consent.")

4. Improper repossession under the UCC. Count IV alleges that the repossession was unlawful under the requirements of K.S.A. 84-9-609, and that Triple T/Ryburn "as the agent of FSB, [is] responsible for the unauthorized repossession." Defendants argue the UCC provisions do not place any duty on Triple T/Ryburn because they are not creditors.

Plaintiffs cite no authority showing a right to damages against Triple T/Ryburn for any violation of the UCC. Instead, Plaintiffs simply argue the court "should not give countenance" to Defendants' arguments. But Plaintiffs have identified no provision of the Kansas UCC or Kansas law authorizing a claim for damages against the agent of a secured creditor in these circumstances. The provision allegedly violated, K.S.A. 84-9-609, provides that "*a secured party* ... may proceed without judicial process, if it proceeds without a breach of the peace." (emphasis added.) Similarly, insofar as Article 9 invokes a duty of care with respect to collateral, it states that "*a secured party* shall use reasonable care" for collateral in its possession. K.S.A. 84-9-207(a) (emphasis added). The Article 9 provision authorizing damages states in part that "a person is liable for damages in the amount of any loss caused by a failure to comply with this article." K.S.A. 84-9-625. Taken together, the provisions show there is a duty on the part of "the secured party" to proceed without a breach of the peace and that the secured party is liable in damages in the event it "fail[s] to comply with this article." Because Triple T/Ryburn is not a secured party, the motion to dismiss this claim against them is granted.

V. Conclusion

The Thomas County Defendants' (Cox, Nickols, Thomas County Sheriff's Department, and Thomas County Board of County Commissioners) motion to dismiss is GRANTED IN PART and DENIED IN PART. The motion is GRANTED insofar as Count I alleges a § 1983 claim against Nickols for repossession of the F350, insofar as Count I alleges a claim against Nickols in his official capacity for the repossession, and insofar as Count I asserts a First Amendment retaliation claim against Nickols in his individual capacity; such claims are DISMISSED. The motion is also GRANTED as to the state law claims against these Defendants; Counts II, III, IV, V, and VI against the Thomas County Defendants are DISMISSED WITHOUT PREJUDICE for lack of jurisdiction under K.S.A. 12-105b(d). The Thomas County Sheriff's Department is DISMISSED as a party. The motion is otherwise DENIED.

Defendants' Ryburn and Triple T Towing's motion to dismiss is GRANTED IN PART and DENIED IN PART. The motion is GRANTED as to Count IV (improper repossession under the UCC), Count V (breach of contract), and Count VI (negligent and intentional infliction of emotional distress); the foregoing claims against Rybrun and Triple T Towing are DISMISSED. The motion is DENIED as to Count 1 (§ 1983 claim), Count II (trespass), Count III (conversion) against Ryburn and Triple T Towing, and as to these Defendants' request to dismiss for lack of jurisdiction.

FSB's motion to dismiss is DENIED without prejudice to reassertion based on the parties' notice of settlement.

IT IS SO ORDERED this 26th day of April, 2021.