IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-B-0023 (CBS)

THOMAS MINK, and
THE HOWLING PIG, an unincorporated association,

Plaintiffs,

vs.

KEN SALAZAR, in his official capacity as Attorney General of the State of Colorado,
A.M. DOMINGUEZ, JR., District Attorney for the 19th Judicial District, in his official capacity, and
SUSAN KNOX, a Deputy District Attorney working for the 19th Judicial District Attorney's Office, in her individual capacity,

Defendants.

RESPONSE IN OPPOSITION TO DEFENDANT KNOX'S MOTION TO DISMISS

Plaintiffs Tom Mink and *The Howling Pig* submit this Response in Opposition to the Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Plaintiffs' Second, Third and Fourth Claims for Relief, filed by Defendant Susan Knox. There is no basis for dismissing any of Plaintiffs' claims against Knox and, therefore, the Court should deny her Motion to Dismiss in its entirety.

I. STANDARDS FOR REVIEW OF KNOX'S MOTION

Knox's motion is essentially one to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("F.R.C.P."). Although she attaches two affidavits to the motion, the affidavits are extraneous to the issues raised by the motion. They do not controvert any of the material allegations of the First Amended and Supplemental

Complaint (the "Complaint"), much less establish the absence of genuine issues as to any material facts. F.R.C.P. 56(c). Therefore, they impose no duty on Plaintiffs to set forth specific facts showing a genuine issue for trial; nor do they preclude Plaintiffs from relying on the allegations of the Complaint. F.R.C.P. 56(e).

The Knox Affidavit essentially confirms Plaintiffs' allegations with respect to Knox's role in the review and approval of the affidavit that led to the warrant for the search and seizure of Mink's home. *Compare* Complaint at ¶¶ 8, 60, 71, *and* Knox Affid. at ¶¶ 2, 4. To the extent that the Knox Affidavit addresses other issues, they are not issues of material fact. Specifically:

- Knox obliquely questions whether the affidavit she approved specifically referenced the criminal libel statute, and notes her prior lack of experience under that statute. *See* Knox Affid. at ¶ 3. However, her subjective understanding of the law is irrelevant under the objective standards for qualified immunity. *See infra* at 16, 17.
- Knox refers to hearsay suggesting that the judges of the Nineteenth Judicial District desire the District Attorney's Office to review affidavits submitted in support of search warrant applications. *See* Knox Affid. at ¶¶ 1, 4. However, the fact that her review might have been deemed desirable is irrelevant to whether she was engaged in an investigative, as opposed to prosecutorial function. *See infra* at 14-15.

The Dominguez Affidavit addresses only two subjects, and raises no issues of material fact:

- Dominguez states that his office engages in prosecutions, not investigations, but he does not state that his office does not assist in police investigations. Instead, he confirms the allegation in the Complaint that the Greeley Police Department undertook an investigation and that Knox reviewed the affidavit prepared by the police as part of that investigation. *Compare* Complaint at ¶ 8, 60, 71, *and* Dominguez Affid. at ¶¶ 5, 6.
- Dominguez suggests that Knox is a county employee, based on the source of her salary and retirement benefits. Dominguez Affid. at ¶ 6. Knox relies on that statement to argue that the Privacy Protection Act of 1980, 42 U.S.C. §§ 2000aa, *et seq.* (the "PPA"), does not apply to her. However, those statements are irrelevant because, as a matter of law, Knox is a state employee to whom the PPA applies. *See infra* at 5-6.

II. SECOND CLAIM FOR RELIEF – PRIVACY PROTECTION ACT OF 1980

Knox makes four arguments in support of dismissal of Plaintiffs' Second Claim for Relief under the PPA. None of her points has merit.

A. The PPA Applies Even Though Knox Did Not Physically Execute the Unlawful Search and Seizure

Knox asserts that, to violate the PPA, a defendant must be physically present and directly participate in the offensive search and seizure. Motion at 2-3. However, she relies on an overly narrow reading of the PPA, and *dicta* from a single case, *Citicasters v. McCaskill*, 89 F.3d 1350, 1356 (8th Cir. 1996). Despite the *dicta*, the Eighth Circuit's remand of this very issue to the district court for factual development –

when the defendant prosecuting attorney "was not present when the warrant was initially served," *id.* at 1356 – demonstrates that a defendant need not physically participate in a search and seizure for the PPA to apply. Indeed, the Eighth Circuit's remand was to give the plaintiff the "the opportunity to establish that [the prosecutor] directed, supervised, or otherwise engaged in the execution of the warrant to such an extent that a finding can be made that she 'searched for or seized' the tape." *Id.* This language makes clear that physical presence during the search is not necessary.

Knox's unduly narrow construction of the PPA is apparent from the statute's genesis. The Act resulted from the Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), which reversed a district court decision that had provided the news media with special protection from search warrants. The Court acknowledged in *Zurcher* that Congress was free to establish by statute the protections the Court had declined to find in the Constitution. *Id.* at 567. Congress quickly accepted that invitation and the result was the PPA. *See* S. Rep. No. 874, 96th Cong. 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3950, 3950-51. In *Zurcher*, a student newspaper had sued the police officers who executed a search warrant, as well as the District Attorney and Deputy District Attorney "who participated in the obtaining of the search warrant." 436 U.S. at 553 n.4. Nothing in *Zurcher* suggests that the District Attorney or his deputy were physically present at the search.

Given this background, it would be nonsensical to construe the PPA as limited to those individuals physically present at a search. Rather, the Act should extend to those individuals whose acts or omissions caused the improper search to occur. Here, in

reviewing and approving the police officer's affidavit in support of the search warrant, Knox obviously participated in obtaining the warrant. Indeed, both the Knox and Dominguez Affidavits state that Knox specifically reviewed the affidavit for "legal sufficiency". Knox Affid. at ¶ 1; Dominguez Affid. at ¶ 2. It is a reasonable inference that Knox also approved the affidavit as "legally sufficient," and that, absent such review and approval, no warrant would have issued. It would be directly contrary to the purpose of the PPA to allow a district attorney who determined that a search warrant was legally sufficient (despite the restrictions set forth in the PPA), to avoid legal responsibility for that decision, while the police officer who relied on the legal acumen of the district attorney would be accountable. The Court should reject Knox's unreasonable construction of the PPA.

B. Knox Is a State Employee to Whom the PPA Applies

Knox argues that she is not a proper party defendant for the PPA claim because she is "employed by a local government entity." Motion at 3-5. This argument borders on frivolous. The Dominguez Affidavit, which Knox cites to support her argument concerning her employment status, does not actually state that she is employed by a local government entity. To the contrary, the affidavit acknowledges that Knox is "employed by my [the district attorney's] office." Dominguez Affid. at ¶ 6. The affidavit goes on to state that Knox's salary and benefits are funded through Weld County and she is a part of the County's retirement program. *Id.* This slippery language cannot avoid Colorado case law that directly contradicts Knox's argument. "The district attorney is a *state* officer and a member of the executive branch of *state* government." *Free Speech Defense Committee v. Thomas*, 80 P.3d 935, 937 (Colo.

App. 2003) (emphasis added). "Furthermore, district attorneys *and their employees* are not county employees [despite receipt of county funds]." *Davidson v. Sandstrom*, 83 P.3d 648, 660 (Colo. 2004) (emphasis added). As a state employee, Knox is a proper individual defendant under the PPA.

C. The PPA's Probable Cause Exception Does Not Shield Knox from Liability

Knox claims that there was no PPA violation under the Act's "probable cause" exception, which permits a search or seizure of otherwise prohibited materials if "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." 42 U.S.C. § 2000aa(a)(1), (b)(1). Motion at 5-6. This argument fails for two reasons. *First*, the warrant was not supported by probable cause. *Second*, even if there was probable cause, the particular materials seized are subject to an exception to the probable cause exception.

1. There Was No Probable Cause

Knox cites no evidence to support her assertion that probable cause existed to believe that Mink had engaged in criminal libel, and, of course, Plaintiffs' allegations are to the contrary. *See* Complaint at ¶¶ 20, 44(B), 62. In fact, the warrant was not supported by probable cause.

In a decision that serves as mandatory authority for a prosecutor in Knox's position, the Colorado Supreme Court limited the situations to which the criminal libel statute could constitutionally apply. In *People v. Ryan*, 806 P.2d 935 (Colo. 1991), the state supreme court held that, under the First Amendment, the criminal libel statute,

C.R.S. § 18-13-105, cannot be constitutionally used to prosecute a private individual for "statements about public officials or public figures on matters of public concern." 806 P.2d at 940. The court relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which held that a defamatory false statement about a public official is not actionable in a civil action for damages unless it was made with "actual malice," and on *Garrison v. Louisiana*, 379 U.S. 64 (1964), which held that the actual malice standard applies to criminal defamation of public officials. 806 P.2d at 938. The court held that the statute was invalid to the extent that it made it a crime to publish "constitutionally protected statements about public officials or public figures on matters of public concern." *Id.* at 940. Thus, there could have been probable cause only if (a) the victim of the claimed libel was a purely "private person," rather than either a public official or public figure, and (b) the allegedly libelous statements addressed "purely private matters," rather than matters of public concern. *Id.* at 939, 941.

The affidavit for the search warrant failed to address or analyze either of these critical issues under Section 18-13-105, as restricted by *Ryan*. Moreover, on its face, it demonstrated that the criminal libel statute could not be constitutionally applied to the statements being investigated. The affidavit stated that the investigation concerned allegations of criminal libel made by Professor Peake, who is the Monfort Distinguished Professor of Finance at the University of Northern Colorado. As such, it was evident that Mr. Peake is not the "purely private person" described in the *Ryan* decision but, instead, is a public employee and a public figure, especially with regard to issues connected to the university community, which was the primary focus of the attached

printouts of *The Howling Pig*. In addition, none of the allegedly libelous statements recounted in the affidavit concerned purely private matters. The stock market bubble of the 1990s and the rise (and fall) of technology stocks, for example, are clearly matters of public concern. Thus, the affidavit failed to provide probable cause to believe that Professor Peake is a "purely private person" complaining about statements that concern purely private matters.

The text of the criminal libel statute also makes clear that another key consideration is the truth or falsity of the purportedly libelous statements. C.R.S. § 18-13-105(2) (truth is an affirmative defense to most types of libel criminalized by statute). Yet the affidavit provided only one sentence that speaks to this issue. It reported that Professor Peake told Detective Warren "that the statements made on the website about him are false." It did not say which particular statements were identified as false, nor did it provide any information, other than the professor's blanket and nonspecific statement, that could have assisted the magistrate in evaluating whether the statements in fact were true or false.

Indeed, there was no information that the affidavit could have provided to assist an inquiry with regard to truth or falsity for most of the purportedly libelous statements, because they were opinions that could not be proven true or false, or satire, parody or hyperbole that could not reasonably be read as factual. Under well-established First Amendment law, the opinion and satirical nature of the statements further established the absence of probable cause to pursue a search and seizure. *See, e.g., Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990); *Hustler Magazine v. Falwell,* 485 U.S. 46

(1988); *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983).

In short, the substantive First Amendment law that governs this case dates back almost forty years and could not have been clearer in December 2003, when Knox reviewed the Warren affidavit, and the search warrant was obtained and executed. There was no basis for prosecuting Mink for criminal libel, as reinforced by the Court's grant of equitable relief and by Defendant Dominguez's ultimate decision not to file charges against Mink. The First Amendment clearly prohibited a prosecution for the statements made in *The Howling Pig* about Professor Peake. The First Amendment, as well as the PPA, protected Plaintiffs' work product and means of production – including the documents, computer, and data that were seized pursuant to the Warren affidavit and the unlawful search warrant. There was no probable cause for that search and seizure and Knox may not avail herself of the "probable cause" exception to the PPA.

2. The Seized Materials Were Subject to an Exception to the PPA's Probable Cause Exception

The PPA permits the search and seizure of materials covered by the Act under the probable cause exception, subject to an important "exception to the exception":

> *Provided, however,* That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein . . .

42 U.S.C. § 2000aa(a)(1), (b)(1). In this case, the purported offense of criminal libel clearly consists of the "communication" of the seized materials or the information they contain. As a result, the probable cause exception does not apply.

D. Plaintiffs' Allegations Satisfy the PPA's Damages Requirement

Finally, Knox asserts that Plaintiffs have failed to allege that they suffered "actual damages", and that the Supreme Court's recent decision in *Doe v. Chao*, __ U.S. __, 124 S. Ct. 1204 (2004), makes such an allegation a necessary element of a PPA claim. Motion at 6-7. This argument is neither legally nor factually accurate.

As a preliminary matter, Knox does not define "actual damages", nor did the Supreme Court need to reach this issue in *Chao*. 124 S. Ct. at 1212 n.12. The Court suggested, however, a broad definition of actual damages. *Id.* at 1211 n.10 (even the minimal "fees associated with running a credit report . . . or the charge for a Valium prescription" can meet the actual damages element); *id.* at 1212 n.12 ("We do not suggest that out-of-pocket expenses are necessary for recovery of the $1,000 minimum; only that they suffice to qualify under any view of actual damages"); *see also*, *e.g.*, *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (actual damages include psychological harm, such as mental distress or embarrassment).

1. The PPA Does Not Require Proof of Actual Damages

Knox's argument is deficient legally because the PPA does not require a plaintiff to prove actual damages in order to establish a *prima facie* right of recovery. The language of the PPA differs substantially from the statute in *Chao*, the Privacy Act of 1974, on which Knox exclusively relies. The relevant section of the Privacy Act of 1974 states as follows:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall *a person entitled to recovery* receive less than the sum of $1,000 . . .

5 U.S.C. § 552(a)(g)(A) (emphasis added). The Supreme Court construed this language as requiring a showing of actual damages by "a person entitled to recovery" as part of the necessary elements of a claim.

In contrast to the language of the Privacy Act of 1974, the PPA provides as follows:

> A person having a cause of action under this section shall be entitled to recover actual damages but not less than *liquidated damages* of $1,000 . . .

42 U.S.C. § 2000aa-6(f) (emphasis added). Thus, the PPA refers to the minimum of $1,000 as "liquidated damages", which differs from the language of the Privacy Act of 1974. Further, the language of the PPA does not make actual damages a part of a plaintiff's "cause of action". The use of "liquidated damages" language demonstrates Congress' awareness that actual damages may be impossible to show in PPA cases. *See Schmitz v. Commissioner*, 34 F.3d 790, 794 (9th Cir. 1994) ("Liquidated damages were traditionally awarded to compensate victims for damages which are too obscure and difficult to prove."), *vacated on other grounds*, 515 U.S. 1139 (1995). Thus, even in the absence of an allegation of actual damages, Plaintiffs' PPA claim is not subject to dismissal under *Chao*.

2. In Any Event, the PPA Violation Caused Actual Damages

Knox's argument presumes that Mink invoked the statutory-minimum-liquidated damages of $1,000, rather than requesting "actual damages", because of an inability to prove the latter. To the contrary, Plaintiffs can show actual damages. For example, it is undisputed that Mink was denied access for a significant period of time to the computer seized pursuant to the search warrant. As a result, he was unable to submit school work or publish *The Howling Pig*. In addition, because Mink needed the use of a computer, he was compelled to drive from his home in Ault to Greeley in order to use computers that were available to him at the University of Northern Colorado; he incurred additional expenses in making that commute that he would not have incurred but for the wrongful seizure. *See* Mink Declaration at ¶¶ 11, 13 (attached as Exh. 1).

Thus, this case does not involve only an abstract privacy violation, as in *Chao*. Rather, loss of use of personal property has definite economic value, and Mink also incurred out-of-pocket expenses due to the unavailability of the computer and the work product stored in it. Plaintiffs have satisfied the PPA's requirement of actual damages.

III. THIRD CLAIM FOR RELIEF – SECTION 1983, FIRST AND FOURTH AMENDMENTS

A. Knox Does Not Have Absolute Immunity

As an official seeking absolute immunity, Knox "bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). In most cases, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87. Here, Knox has not met her burden of proving that she is entitled to absolute immunity.

The Supreme Court has held that a prosecutor is absolutely immune for only those activities "intimately associated with the judicial phase of the criminal process," such as "initiating a prosecution and presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). In *Burns*, the Court squarely held that prosecutors are not entitled to absolute immunity for their role in giving legal advice to the police in the investigative phase of a criminal case. 500 U.S. at 492-96. There the investigating officers had consulted with the prosecutor about whether they had sufficient evidence for the arrest. In rejecting the prosecutor's claim of absolute immunity for the allegedly unlawful arrest, the Court said, "[w]e do not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the judicial process' that it qualifies for absolute immunity." *Id.* at 493 (quoting *Imbler*, 424 U.S. at 430). The Court observed that it would be "incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." *Id.* at 495.

Since *Burns*, the Court has repeatedly reaffirmed that "provision of legal advice to the police during their pretrial investigation of the facts [is] protected only by qualified, rather than absolute, immunity." *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997); *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993) ("prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police"); *accord Moore v. Gunnison Valley Hosp.*, 170 F. Supp. 2d 1080, 1084 (D. Colo. 2001)

("when the prosecutor performs investigative services he or she is like a police officer and entitled only to qualified immunity") (citations omitted).

Burns and its progeny control in this case. Like the police officers in *Burns*, Greeley Police Department Detective Ken Warren consulted a prosecutor, Knox, for advice on whether his affidavit contained sufficient facts to meet the legal standard. Just as the prosecutor in *Burns* advised the police that they had probable cause to make an arrest, Knox advised Warren that his affidavit provided probable cause and sufficient legal grounds to seize the materials from the Minks' home that are at issue here. As in *Burns*, there was no judicial proceeding in which the District Attorney's Office was prosecuting Mink. Like the prosecutor in *Burns*, Knox may claim only qualified immunity, not absolute immunity, for her acts and omissions in advising the police in the course of their investigation.

None of this is changed by the vague hearsay assertions in the Knox and Dominguez Affidavits to the effect that the District Attorney's Office reviews police department affidavits for search and arrest warrants pursuant to the "desire[ ] and request[ ]" of the local state court judges. *See* Dominguez Affid. at ¶ 2; Knox Affid. at ¶ 1. That may or not be true – Knox certainly did not attest that she reviewed the affidavit that led to the unlawful search in *this* case at the request of a judge – but it is irrelevant. The critical question remains whether the prosecutor is "initiating a prosecution and presenting the State's case," *Imbler*, 429 U.S. at 430-31, *i.e.*, engaged in a prosecutorial function, or merely "advising the police in the investigative phase of a criminal case," *Burns*, 500 U.S. at 493, *i.e.*, engaged in an investigative function. The

fact that the prosecutor's role in the investigative phase of the case might have been at the behest of a judge is immaterial.

Nor does it matter that the Colorado General Assembly has attempted to shield prosecutors from the impact of *Burns* through legislation that characterizes their investigative function as "quasi-judicial." *See* Motion at 9-10 (quoting and discussing C.R.S. § 20-1-106.1). The absolute immunity standards set forth in *Imbler* and *Burns* are matters of federal law:

> "Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise . . . .

Martinez v. State of California, 444 U.S. 277, 284 n.8 (1980); *see also Howlett v. Rose*, 496 U.S. 356, 375-78 (1990) (same); Martin A. Schwartz & John E. Kirklin, *Section 1983 Claims and Defenses*, § 9.1, at 201 & nn.14-15 ("[S]tate law immunity defenses and privileges cannot control a § 1983 claim."). Thus, the political whim of the Colorado General Assembly cannot protect Knox from liability under Section 1983.

B. Knox Does Not Have Qualified Immunity

The Court also should reject Knox's cursorily-presented qualified immunity claim. Motion at 12. The Complaint alleges the deprivation of Plaintiffs' First and Fourth Amendment rights by conduct that violates clearly-established law.

Generally, the Court's first task in a qualified immunity analysis is to determine whether the plaintiff's allegations state the deprivation of a constitutional right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). However, Knox's motion does not challenge the

sufficiency of the allegations underlying Plaintiffs' Section 1983 claim, therefore, the Court need not undertake that initial analysis.

The next inquiry – whether the law was clearly established – is governed by the standards reiterated by the Supreme Court in *Wilson*:

> "Clearly established" for purposes of qualified immunity means that "[t]he contours of the right must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right. *This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,* but it is to say that in light of the pre-existing law the unlawfulness must be apparent."

526 U.S. at 614-15 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)) (emphasis added). Knox is entitled to qualified immunity only of she can demonstrate that she "neither knew nor should have known" that she was violating Plaintiffs' constitutional rights. *Harlow v. Fitzgerald,* 457 U.S. 800, 819-20 (1982).

In this case, the law supporting both constitutional claims was clearly established.

1. The First Amendment Claim

For the reasons discussed *supra* at 6-9 (in the context of the absence of probable cause), it was clearly established long before December 2003 that reliance on Section 18-13-105 in the circumstances of this case would violate the First Amendment. The *Ryan* decision had clearly held that, due to the absence of an "actual malice" requirement, the statute could not be constitutionally used to prosecute a private individual for statements about public officials or public figures on matters of public concern. In addition, under the *Hustler* decision and other Supreme Court cases, the

First Amendment forbade prosecution for the publication of statements that undeniably constituted opinion, satire, hyperbole, or parody.

2. The Fourth Amendment Claim

The law underlying Plaintiffs' Fourth Amendment claim also was clearly established by December 2003. Plaintiffs recognize that, ordinarily, an allegedly unconstitutional arrest or search is deemed "objectively reasonable" when it is authorized by a warrant issued by a neutral and detached magistrate. *United States v. Leon*, 468 U.S. 897, 924 (1984). However, reliance on a warrant is not objectively reasonable when it is "based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,'" *id.* at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 610-11 (1975)), *i.e.*, when a "reasonably trained officer would have known that the search was illegal despite the magistrate's authorization." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). Nor is reliance objectively reasonable when the warrant is "so facially deficient – *i.e.*, failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *Id.* (citation omitted). In addition, the protections of the Fourth Amendment must be enforced with "the most scrupulous exactitude" when the government seeks authority to seize materials protected by the First Amendment. *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *see Pleasant v. Lovell*, 876 F.2d 787, 794 (10th Cir. 1989).

In this case, the affidavit set forth *verbatim* the text of the warrant. *Compare* Complaint, Ex. E, *and* Complaint, Ex. F at 1-3. Thus, Knox knew what the warrant would say. No reasonable district attorney could have concluded that the warrant

would be supported by probable cause or would meet the particularity test. Therefore, under clearly-established and controlling law, Knox's role in the unlawful search and seizure was not "objectively reasonable."

Plaintiffs discuss the absence of probable cause *supra* at 6-9. It was objectively unreasonable for Knox to approve the affidavit given its facial failure to establish probable cause for the search.

On its face, the affidavit (and, hence, the warrant) also failed to satisfy the particularity requirement. The Fourth Amendment requires a search warrant to "describe the things to be seized with sufficient particularity to prevent a general, exploratory rummaging in a person's belongings." *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999). "The particularity requirement ensures that a search is confined in scope to particularly described evidence relating to a specific crime for which there is demonstrated probable cause." *Voss v. Bergsgaard*, 774 F.2d 402, 404 (10th Cir. 1985).

In *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), the court held that the search warrant at issue violated the particularity requirement in each of these three distinct ways. *First*, the warrant "contained no limitation on the scope of the search." *Id.* at 606. *Second*, the warrant was "not as particular as the circumstances would allow or require." *Id.* *Third*, the warrant "extends far beyond the scope of the supporting affidavit." *Id.* at 605. The affidavit that Knox approved requested a warrant that suffers from each of the flaws identified in *Leary*. This is especially true because *Leary*

did not involve the First Amendment and, thus, the Tenth Circuit did not apply the heightened standard of "scrupulous exactitude" that is required here.

Facial Overbreadth. In *Stanford*, the Supreme Court invalidated a search of the home of the operator of a small mail-order business. The warrant authorized seizure of "any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments concerning the Communist Party of Texas and the operations of the Communist Party in Texas." 379 U.S. at 486. The Court held that the "indiscriminate sweep" of this description was "constitutionally intolerable," because it was the equivalent of a "general warrant" that left too much discretion to the officers conducting the search.

The warrant in this case, as set forth *verbatim* in the affidavit, is even broader than the invalid warrant in *Stanford*, which at least limited its scope to Communist-related material. In this case, there is *no* stated limitation on what is relevant. In addition to authorizing seizure of all computer-related equipment, computer software, and all hard drives and floppy disks, paragraph 6 of the warrant directs police to seize any papers with names, addresses or telephone numbers, and paragraph 7 directs police to seize "any and all correspondence, diaries, memoirs, journals, personal reminiscences[,] electronic mail . . . letters, notes, memorandum [*sic*], or other communications in written or printed form."

After authorizing this vast seizure of virtually everything in written form and everything computer-related, the final numbered paragraph of the warrant authorizes a search of the written materials found on the computer and storage devices "as those

items may relate to the allegations." But the authorization to search electronically-stored materials only for items that "relate to the allegations" does not adequately limit the scope of the warrant. *First*, even when a warrant authorizes police to search and seize all records relevant to violations of a specified criminal statute, that is not sufficient by itself to limit the warrant's scope. *See Leary*, 846 F.2d at 601-04; *Voss*, 774 F.2d at 402 ("even if the reference to Section 371 is construed as a limitation, it does not constitute a constitutionally adequate particularization of the items to be seized."). *Second*, and more to the point, the warrant provides no information about the nature of these unspecified and unnamed "allegations." Nor does the warrant mention the crime under investigation or refer in any manner to criminal activity. As the Tenth Circuit has explained, "a warrant that simply authorizes the seizure of all files, whether or not relevant to a specified crime, is insufficiently particular." *Id.* at 406.

Governmental Failure to Narrow. This is not a case in which a broad description must be tolerated on the ground that the government has supplied all the detail that a reasonable investigation would allow. *See Leary*, 846 F.2d at 604. The warrant for the Mink residence, recited in the affidavit, refers to "the allegations" but fails to provide any information about them. As a result, this warrant, like the defective warrant in *Leary*, "authorize[s] wholesale seizures of entire categories of items not generally evidence of criminal activity and provide[s] no guidelines to distinguish items used lawfully from those the government had probable cause to seize." *Id.* at 605 (citation omitted).

Scope in Excess of Affidavit. The search warrant also fails to meet the particularity requirement because it authorizes a search and seizure that extends far beyond the scope of whatever arguable probable cause is presented in the supporting affidavit.[1] *See id.* at 605. Specifically:

- Nothing in the affidavit justifies a search of any and all letters, diaries, and "personal reminiscences" found in the Mink residence, yet the warrant authorizes searching these materials without regard to whether they are arguably connected to *The Howling Pig.*
- Nothing in the affidavit justifies seizing passwords for computers other than those found at the Mink residence, yet paragraph 6 of the warrant authorizes seizing passwords for *any* computer, no matter where it is located and without regard to any arguable connection to *The Howling Pig.*
- Even for material that is connected to *The Howling Pig*, the warrant exceeds the arguable scope of the criminal investigation suggested by the affidavit. The gist of the crime of criminal libel is *publication* of statements that fall into a particular category. The statements at issue all appear on *The Howling Pig*'s website or in the first three issues, which are available at the website. Copies of those publicly-available materials were already in Defendants' possession and were attached to the affidavit. The apparent purpose of the search was to uncover evidence linking those already-published statements to a particular computer and to particular persons. Yet the warrant authorizes the search and

[1] In fact, the affidavit provided *no* probable cause for the search. *See supra* at 6-9.

seizure of electronic documents that do not reveal that connection and have nothing to do with the statements at issue.

Thus even assuming that the affidavit provided probable cause to search for at least some evidence, such as a connection between the Mink residence and *The Howling Pig* website, the warrant language was "impermissibly overbroad" because it "extends far beyond the scope of the supporting affidavit." *Id.* at 605-06.

IV. FOURTH CLAIM FOR RELIEF – ELECTRONIC COMMUNICATIONS PRIVACY ACT

Knox makes four arguments in support of dismissal of Plaintiffs' Fourth Claim for Relief under the Electronic Communications Privacy Act, 18 U.S.C. §§ 2701, *et seq.* (the "ECPA"). However, none of these contentions has merit either.

A. The ECPA Applies Even Though Knox Did Not Physically Execute the Warrant for the Yahoo Electronic Records

Arguing that only "those that actually carry out the seizure of the electronic communications" are subject to the ECPA, Knox initially questions whether her role in merely reviewing and approving the affidavit that led to the warrant served on Yahoo (the "Yahoo affidavit") is within the scope of 42 U.S.C. § 2703(a), the ECPA provision on which Plaintiffs rely. Motion at 14. But that section applies broadly to "[a] governmental entity," and Knox's employer, the District Attorney's Office, surely fits within that expansive phrase. Moreover, Knox continues to minimize her role in the unlawful searches and seizures. But for her review and approval of the Yahoo affidavit, there never would have been an ECPA violation.

For the same reasons that the PPA extends to personnel who participated in the "machinery" of the search and seizure without having been physically present during

the execution of the search warrant, *see supra* at 3-5, the ECPA extends to individuals like Knox, without whose active involvement the improper search and compelled disclosure would not have occurred.

B. The ECPA Requires A Lawful Warrant, But the Yahoo Warrant Was Not Supported by Probable Cause

Relying on the literal language of Section 2703(a), Knox argues that there was no violation of that section because the compelled production of Yahoo's records was pursuant to a court-issued "State warrant." Motion at 14-15. She claims that the ECPA precludes a plaintiff from challenging the sufficiency of the warrant, presumably because the statute does not refer to a "lawful State warrant" or a "constitutional State warrant."

Knox's position fails the straight-face test. It cannot be seriously contended that Congress intended to preclude a search of third-party electronic records without a search warrant, but to permit such a search with *any* warrant – whether lawful or not, whether sham or legitimate. Rather, Section 2703(a) requires a "warrant issued using the procedures described in the Federal Rules of Criminal Procedure . . . or equivalent State warrant." Rule 41(d)(1) of the Federal Rules of Criminal Procedure, which governs the issuance of search warrants, requires the warrant to be supported by probable cause. The Supreme Court has held that the rule "reflects '[t]he Fourth Amendment policy against unreasonable searches and seizures.'" *Zurcher*, 436 U.S. at 558 (quoting *United States v. Ventresca*, 380 U.S. 102, 105 n.1 (1965)). In short, "warrants" as used in Section 2703(a) means warrants that comply with the Constitution.

Here, the Yahoo warrant was not supported by probable cause for the same reason that the warrant served on Mink lacked probable cause. *See supra* at 6-9.

C. Knox's Purported Reliance on the District Court's Order Was Impossible and, in Any Event, Does Not Defeat the ECPA Claim

Knox asserts that Section 2707(e) insulates her from liability under the ECPA, because the e-mail records searched and seized from Yahoo "were seized in good faith reliance on a court-approved warrant . . ." Motion at 16. Leaving aside the temporal problem with her position – inasmuch as she reviewed and approved the Yahoo affidavit *before* the issuance of the Yahoo warrant – the argument fails for the same reason her qualified immunity argument fails.

In *Davis v. Gracey*, 111 F.3d 1472 (10th Cir. 1997), the Tenth Circuit held that the standard for the good faith defense under the ECPA is the same as the test for Fourth Amendment qualified immunity. *See supra* at 17. Specifically, the court held that, "[t]o be in good faith [under Section 2707(e)], the officers' reliance must have been objectively reasonable." *Id.* at 1484 (citing *Malley*, 475 U.S. at 344-45). Here, for the reasons discussed *supra* at 6-9, even if Knox somehow relied on the later-issued Yahoo search warrant when she approved the affidavit in support of that warrant, it was not objectively reasonable for her to have done so in light of the affidavit's absence of probable cause.

D. Plaintiffs' Allegations Satisfy the ECPA's Damages Requirement

Knox argues that *Chao* controls application of the ECPA's damages provision, 18 U.S.C. § 2702(c), and requires Plaintiffs to prove actual damages in order to recover the $1,000 statutory minimum damages. Motion at 16. Plaintiffs concede that the

language in Section 2702(c) is very similar to the language in *Chao* that the Supreme Court construed as requiring proof of actual damages, but it is not necessary to determine whether the ECPA requires such proof. Assuming for purposes of this motion only that the ECPA does require actual damages in order to recover the statutory minimum damages, Mink has met that requirement.

As Mink explains in greater length in his attached Declaration, after he learned about the interception of his e-mails, he felt an obligation to inform persons with whom he corresponded electronically. A number of those persons became concerned about communicating by e-mail with him or *The Howling Pig*, out of fear of disclosure of the content of their private communications, and fear that they would be connected with the ongoing criminal investigation. As a result, Plaintiffs were required to communicate with those persons only in person or by telephone. In some cases, this necessitated long-distance telephone calls or travel to Greeley for face-to-face meetings, and Mink incurred the expense of those calls and the expense and extra time for that travel. Mink Declaration at ¶¶ 7, 10, 12. Those out-of-pocket expenses satisfy whatever actual damages requirement might exist under the ECPA. *See supra* at 10 (citing and quoting *Chao* for meaning of "actual damages" under Privacy Act of 1974).

V. CONCLUSION

For all of the reasons set forth above, Tom Mink and *The Howling Pig* respectfully request that the Court deny Defendant Knox's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Plaintiffs' Second, Third and Fourth Claims for Relief.

Dated this __ day of May, 2004.

Respectfully submitted,

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