O'Brien v. Flick

United States District Court for the Southern District of Florida

January 10, 2025, Decided; January 10, 2025, Entered on Docket

CASE NO. 24-61529-CIV-DAMIAN

Reporter
2025 U.S. Dist. LEXIS 10625 *

EMMET O'BRIEN, Plaintiff, v. PAUL FLICK and SAMUEL CHAMBERLAIN, Defendants.

Notice: This decision contains references to invalid citations in the original text of the opinion. They are relevant to the decision and therefore have not been editorially corrected. Linking has been removed from those citations.

Subsequent History: Appeal filed, 01/15/2025

Core Terms

lawsuit, counterclaim, sanctions, motion to dismiss, cases, motion to strike, fake, compulsory counterclaim, pro se, non-existent, pro se litigant, allegations, undersigned, Motions, courts, dismissal with prejudice, business relationship, legal authority, misrepresentations, conferral, suits

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Judges: MELISSA DAMIAN, UNITED STATES DISTRICT JUDGE.

Opinion by: MELISSA DAMIAN

Opinion

OMNIBUS ORDER ON PENDING MOTIONS AND DISMISSING CASE

THIS CAUSE is before the Court on Defendant Paul Flick's Motion to Dismiss First Amended Complaint and Motion to Strike, filed September 26, 2024 [ECF No. 9 ("Flick's MTD")]; Defendant Samuel Chamberlain's *Rule 12(b)(6)* Motion to Dismiss, filed November 4, 2024 [ECF Nos. 11 and 12 ("Chamberlain's MTD")]; Plaintiff, Emmet O'Brien's, Motion for Leave to File Sur-Reply to Defendant Paul Flick's Reply in Support of Motion to Dismiss First Amended Complaint, filed October 17, 2024 [ECF No. 16 (the "Motion for Leave")]; and Defendant Paul Flick's Motion to Strike and for Sanctions [ECF No. 18 (the "Motion to Strike")] (collectively, the "Motions").

THE COURT has considered the Motions and the parties' memoranda [ECF Nos. 13, 15, 17, 19, 20, and 21], the applicable **[*2]** law, and the pertinent portions of the record and is otherwise fully advised in the premises.

For the reasons detailed below, this Court concludes the Complaint is due to be dismissed with prejudice.

I. BACKGROUND

A. Relevant Facts

Plaintiff, Emmet O'Brien, was the CEO and majority shareholder of the entity NO-H20 USA, Inc. Defendants, Paul Flick and Samuel Chamberlain, invested in NO-H2O USA, Inc. After their business relationship fell apart, Defendants, in their capacities as managing members of two different limited liability companies ("LLCs"),asserted claims against O'Brien in two separate cases in this District,.

In March 2023, Defendant Flick, as Managing Member of AE Capital Group, LLC brought claims against

O'Brien and NO-H2O USA, Inc. in Case Number 23-cv-60601-RS (the "AE Capital case"). In the AE Capital case, Flick, through AE Capital Group, LLC, asserted claims for (1) Violation of Exchange Act Section 10(b) and *Rule 10b-5* and (2) Violation of *Florida Code § 517.301*, against all Defendants, and (3) Breach of Contract and (4) Fraud in the Inducement against only NO-H2O USA, Inc., alleging "fraudulent representations designed to lure investors into purchasing stock in NO-H2O USA." *Id.*, ¶ 2. According to the Complaint in **[*3]** the AE Capital case, O'Brien and NO-H2O USA "raised almost $2,000,000.00 for the Stock Sale held in July 2021 based on an inflated $13,000,000.00 pre-money valuation of NO-H2O USA. The money raised is now gone—mostly distributed to Emmet O'Brien or the Ireland Companies—and the anchor Stock Sale investors have resigned from the Company's Board." *Id.*

In May 2023, Defendant Chamberlain, as Managing Member of Piccadilly Holdings II, LLC, asserted claims against O'Brien and No-H2O USA, Inc. in Case Number 23-cv-60978-DSL. (the "Piccadilly Holdings case"). In the Piccadilly Holdings case, Chamberlain, through Piccadilly Holdings II, LLC, alleged (1) Violation of Exchange Act Section 10(b) and *Rule 10b-5*, (2) Violation of Exchange Act ¶ 20, (3) Florida Securities and Investor Protection Act claims, and (4) Common Law Fraud for "misrepresentations and omissions in connection with [O'Brien's] activities in improperly inducing Plaintiffs to purchase securities in NO-H2O." *Id.* ¶ 1. The Complaint in the Piccadilly Holdings case alleges that "O'Brien served as the CEO of NO-H2O and by virtue of his high-level and controlling position at NO-H2O, directly participated in the management of the Company and was privy to information regarding **[*4]** the ownership of intellectual property, financial statements, and financial condition . . . [and] is also the majority shareholder of NO-H2O" and that "[i]n O'Brien's overtures to the Plaintiffs, O'Brien made numerous material representations of fact, and/or omitted material facts to prevent material misrepresentations, to induce the Plaintiffs into purchasing the shares of Class A Stock [of NO-H2O]." *Id.* ¶ 6.

B. Procedural History of the Instant Case

O'Brien initiated this lawsuit by filing a Complaint on August 20, 2024, over one year after the above-cited lawsuits were filed against him. [ECF No. 1]. On August 23, 2024 this Court *sua sponte* dismissed the Complaint on the grounds it was a shotgun pleading and insufficiently alleged diversity jurisdiction. [ECF No. 5]. On September 16, 2024, O'Brien filed an Amended Complaint [ECF No. 8], which is now the operative pleading.

In the Amended Complaint, O'Brien asserts seven causes of action: (1) Defamation against Flick (Count I); (2) Defamation against Chamberlain (Count II); (3) Intentional Infliction of Emotional Distress against Flick (Count III); (4) Intentional Infliction of Emotional Distress against Chamberlain (Count IV); (5) **[*5]** Tortious Interference with Business Relationships against Flick (Count V); (6) Tortious Interference with Business Relationships against Chamberlain (Count VI); and (7) Fraudulent Misrepresentation against Flick (Count VII).

O'Brien's claims in the Amended Complaint center, generally, on O'Brien's allegations that the Defendants, as a board member and investor, respectively, in No-H2O Holdings Limited and No-H2O USA, Inc.,[1] presented themselves as supporters of O'Brien's vision for No-H2O but then, through a series of actions, caused him "lost income, loss of business value, reputational harm, emotional distress, legal fees, and other damages[.]" Am. Compl. at 1-2.

On September 26, 2024, Flick filed a Motion to Dismiss [ECF No. 9], and on October 4, 2024, Chamberlain filed a Motion to Dismiss [ECF Nos. 11 and 12] (together, the "Motions to Dismiss"). In the Motions to Dismiss, Defendants argue that the Amended Complaint is a shotgun pleading, that the business-judgment rule applies to bar most (if not all) of O'Brien's claims, and that O'Brien has otherwise failed to state a claim in his various causes of action against them. *See generally* ECF Nos. 9, 11, and 12.

II. LEGAL STANDARD

*A. Motion [*6] to Dismiss*

Rule 12(b)(6) provides that a defendant may move to dismiss a complaint that does not satisfy the applicable pleading requirements for "failure to state a claim upon which relief can be granted." *Fed. R. Civ. P. 12(b)(6)*. In considering a *Rule 12(b)(6)* motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc., 555 F.3d 949, 959 (11th Cir. 2009)* (quoting *St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir. 2002)*).

[1] Collectively, "No-H2O."

The Court must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *Hishon v. King and Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. However, pleadings that "are no more than conclusions[] are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft*, 556 U.S. at 679. Dismissal pursuant to a *Rule 12(b)(6)* motion is warranted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint." *Shands Teaching Hosp. and Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1310 (11th Cir. 2000)* (internal quotation marks omitted) (quoting *Hishon, 467 U.S. at 73*).

Federal Rule of Civil Procedure 8(a)(2) also requires that a pleading contain a "short and plain statement of the claim" showing the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. The complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (cleaned up).

B. Motion [*7] to Strike

Federal Rule of Civil Procedure 12(f) provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. Although a court has broad discretion when reviewing a motion to strike, such motions are considered "a drastic remedy" and are often "disfavored by the courts." *Simmons v. Royal Caribbean Cruises, Ltd., 423 F. Supp. 3d 1350, 1352 (S.D. Fla. 2019)* (Ungaro, J.). Motions to strike are generally denied "unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." *Id.* (quoting *Bank of Am., N.A. v. GREC Homes IX, LLC, No. 13-21718, 2014 U.S. Dist. LEXIS 8316, 2014 WL 351962, at *4 (S.D. Fla. Jan. 23, 2014)* (Altonaga, J.)).

C*. Pro Se *Litigants

Courts generally construe filings by *pro se* litigants liberally, but *pro se* litigants must comply with the Federal Rules of Civil Procedure and the Local Rules. *See Moton v. Cowart, 631 F.3d 1337, 1340 n.2 (11th Cir. 2011)* (stating *pro se* litigants must comply with procedural rules); *see also S.D. Fla. L.R. 1.1* ("When used in these Local Rules, the word 'counsel' shall be construed to apply to a party if that party is proceeding pro se.").

III. DISCUSSION

As noted above, Defendants raise several challenges regarding the sufficiency of O'Brien's claims. The undersigned has conducted a careful review of the 59-page Amended Complaint, as well as the parties' briefs in connection with the pending Motions. Based **[*8]** on this review, it is the finding of this Court that this case is due to be dismissed because O'Brien was required to assert the claims now asserted in this lawsuit as compulsory counterclaims in the previous lawsuits asserted against him in this District. As explained below, this case is also due to be dismissed as a sanction for O'Brien's troubling use of citations to non-existent legal authority and his repeated failure to follow the Local Rules of this Court.

A. O'Brien's Claims Should Have Been Asserted As Compulsory Counterclaims In Other Lawsuits.

Pursuant to *Federal Rule of Civil Procedure 13(a)*, if a defending party's counterclaim arises from the same transaction or occurrence that is the subject matter of the plaintiff's claim, then the counterclaim is compulsory and must be asserted as a counterclaim to the original suit. *See Fed. R. Civ. P. 13(a)*. Under *Rule 13(a)*, a party "must state" any compulsory counterclaim it has "at the time" it serves its answer, if it knew the grounds for the counterclaim at that time. *Id.* "To effect the purpose of *Rule 13*, the consequence for failing to assert a compulsory counterclaim is a bar against the assertion of that claim in any other action." *Univalor Tr., SA v. Columbia Petroleum, LLC, 315 F.R.D. 374, 380 (S.D. Ala. 2016)*. In other words, "[c]ompulsory counterclaims which are not brought **[*9]** are 'thereafter barred.'" *Nippon Credit Bank, Ltd. v. Matthews, 291 F.3d 738, 755 (11th Cir. 2002)*, *abrogated on other grounds by Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc., 593 F.3d 1249 (11th Cir. 2010)*.

To determine whether a counterclaim is compulsory, the Eleventh Circuit applies the "logical relationship" test. *Republic Health Corp. v. Lifemark Hosps. of Fla., Inc., 755 F.2d 1453, 1455 (11th Cir. 1985)*. This inquiry involves considering whether "the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activate additional

legal rights, otherwise dormant, in the defendant." *Id.* "The purpose of the compulsory counterclaim rule is to eliminate multiplicity of litigation." *Montgomery Ward Dev. Corp. v. Juster, 932 F.2d 1378, 1381 (11th Cir. 1991)* (discussing state court equivalent). This is a loose standard, which permits a "broad realistic interpretation in the interest of avoiding a multiplicity of suits." *See U.S. v. Amtreco, Inc., 790 F.Supp. 1576, 1580 (M.D. Ga. 1992)* (quoting *Plant v. Blazer Fin. Serv., 598 F.2d 1357, 1361 (5th Cir. 1979)*). The objectives of *Rule 13(a)* are to provide complete relief to the parties in a single suit, to promote judicial economy, and to avoid the inefficiencies of piecemeal litigation. *John Alden Life Ins. Co. v. Cavendes, 591 F.Supp. 362, 366 (S.D. Fla. 1984)* (Aronovitz, J.).

Both Defendants here aver that O'Brien asserted the claims in the instant action as retaliation for their prior lawsuits against O'Brien. *See* Flick's MTD at 2 ("In retaliation [to the filing of other lawsuits filed against O'Brien], Mr. O'Brien filed this lawsuit."); Chamberlain's MTD at 1-2 (describing the instant suit as a **[*10]** "retaliation for the actions previously filed against O'Brien and No-H2O USA, Inc. . . . seek[ing] to blame [Defendants] for the failings of No-H2O . . . [and] airing of grievances . . . attempt[ing] to point the blame for the failure of No-H2O away from O'Brien.").

The undersigned has reviewed the claims in the two previous lawsuits filed by the Defendants against O'Brien and compared them with the claims O'Brien asserts in this lawsuit.[2] Based upon this review, this Court concludes that O'Brien's claims in this case fall within the scope of *Rule 13(a)* as compulsory counterclaims that he was required to assert in the two previous suits filed against him. O'Brien's claims in this case share a logical relationship with each of the prior suits: they arise out of the same transaction or occurrence, namely the unraveling of the business relationships surrounding No-H2O since the involvement of Flick and Chamberlain in that business began in 2020. Stated simply, "separate trials . . . would involve a substantial duplication of effort and time . . . ." *Goings v. Advanced Sys. Inc. of Suncoast, 2008 U.S. Dist. LEXIS 74331, 2008 WL 4195889, *2 (M.D. Fla. Sept. 12, 2008)*. O'Brien asserted his Answer to Flick's suit on July 10, 2023 (*see* Case No. 23-cv-60601-RS at ECF No. 15), and his Answer to Chamberlain's suit on August **[*11]** 29, 2023 (*see* 23-cv-60978-DSL at ECF No. 25). O'Brien did not timely assert any counterclaims against either Flick or Chamberlain in either suit, despite each lawsuit being about the business relationship between each Defendant and O'Brien *vis-à-vis* No-H2O—the subject matter of the instant lawsuit.[3]

Rule 13(a) applies to counterclaims that have "matured at the time" the defendant serves his pleadings. 6 Wright and Miller, Federal Practice and Procedure § 1411, at 55. This Court has examined the Amended Complaint with this requirement in mind. While O'Brien includes factual allegations in the Amended Complaint involving events that occurred after July and August 2023, (*e.g.* Am. Compl. ¶ 59 (alleging a September 15, 2023 email)), each Count involves a series of allegations detailing behavior alleged to have commenced well before summer 2023—and, more importantly—known to O'Brien well before that time. Thus, even if the Amended Complaint contains additional allegations from after summer 2023, the basis for each of O'Brien's counterclaims was known to him at the time he asserted the Answers in the earlier suits filed against him. Put differently, O'Brien's allegations do not involve counterclaims **[*12]** which were merely "likely to arise" or were "contingent" at the time O'Brien served each Answer in the previous lawsuits. *See Slavics v. Wood, 36 F.R.D. 47 (E.D. Pa. 1964)*. Therefore, these counterclaims were "matured" for the purposes of *Rule 13(a)* at the time O'Brien filed each Answer. *See id.*

Because O'Brien's claims now asserted in the Amended Complaint constitute compulsory counterclaims that were required to be asserted in the previous lawsuits filed against him, and he failed to assert them at the time of filing his Answers in those original suits, O'Brien

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[2] The Court may consider these dockets—and the filings contained therein—because courts may take judicial notice of public records, such as a pleading filed in another court, since such documents are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1278 (11th Cir. 1999)* (quoting *Fed. R. Evid. 201(b)(2)*).

[3] This Court is aware that O'Brien belatedly moved for leave to amend his Answers to assert counterclaims in both cases, and that each attempt was denied by the district court for multiple, redundant reasons. *See* Case No. 23-cv-60601-RS at ECF No. 77, and Case No. 23-cv-60978-DSL at ECF No. 83. Nevertheless, under *Rule 13(a)*, a party "must state" any compulsory counterclaim it has "at the time" it serves its answer, if it knew the grounds for the counterclaim at that time. *See Fed. R. Civ. P. 13(a)* (emphasis added). Asserting these claims anew in a separate lawsuit is not an end-run around the compulsory nature of *Rule 13(a)*.

is barred from asserting the claims in this new action. The Amended Complaint is therefore due to be dismissed with prejudice, as no amendment can resolve this procedural bar.

While the Amended Complaint is subject to dismissal for the above-explained reasons, the undersigned also addresses a separate basis for dismissal due to O'Brien's troubling conduct in this litigation.

B. O'Brien's Use Of Fake, Non-Existent Case Citations.

In the Reply in Support of Motion to Dismiss First Amended Complaint and Motion to Strike [ECF No. 15], Defendant Flick points out that Plaintiff cites two cases in Plaintiff's Response in Opposition [ECF No. 13] that do not exist. *See* Reply at 2 n.1 ("Undersigned **[*13]** was unable to identify any cases by the name or citation of *Snyder v. City of Sanford*, 645 So. 2d 1126 (Fla. 5th DCA 1994) or *Valley Nat'l Bank of Arizona v. A.E. Moses*, 617 So. 2d 455 (Fla. 4th DCA 1993[])] and does not believe any such cases exist."). The undersigned has conducted a thorough search for these two cases, and, based on the search, agrees that neither case exists.

In response, O'Brien filed a proposed Sur-Reply, in which he claims that "some case law references" "may have been cited in error," but that this was an "honest mistake" and part of mere "minor clerical errors[,]" comparable to his having exceeded the applicable page limits in his briefs without first seeking leave of court.[4] O'Brien claims that these errors were "the result of an inadvertent mix-up while handling multiple case references." ECF No. 16 at 5-6. This Court is not persuaded by O'Brien's attempt to explain away fabricated legal authority.

There are simply no cases which exist at the citations O'Brien provided, and review of O'Brien's briefs reflects that he cites no other case from Florida's Fifth District Court of Appeal in 1994, nor from Florida's Fourth District Court of Appeal in 1993. Thus, his claim of a "mix-up" with other citations lacks credibility. Nor does any other legitimate case he cites resemble the fake cases **[*14]** in any way that might conceivably have made such a mix-up possible. This Court is left with the firm conviction that O'Brien generated his Reply with the assistance of a generative artificial intelligence program.[5] While there is no prohibition against the use of technology to aid in the preparation of court filings, there is a duty of candor to the Court, and that duty applies to *pro se* plaintiffs. *See* *Burns v. Windsor Insurance, Co., 31 F.3d 1092, 1095 (11th Cir. 1994)*.

Here, O'Brien has filed a memorandum that is based in part on non-existent case law—certainly an improper purpose. It is also troubling that O'Brien declines to admit that he used non-existent case citations, whether they were generated through his use of generative AI or otherwise, and instead offers what appears to be another misrepresentation to the Court—that the fake citations were "the result of an inadvertent mix-up while handling multiple case references."

The use of non-existent case citations and fake legal authority generated by artificial intelligence programs has been the topic of many published legal opinions and scholarly articles as of late. Courts that have addressed the practice consistently agree that the use of fake legal authority is problematic and warrants sanctions. **[*15]** "Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors . . . . There is potential harm to the reputation of judges and courts whose names are falsely invoked . . . ." *Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 448-49 (S.D.N.Y. 2023)* (also explaining that fictious citations promote "cynicism about the legal profession and the American judicial system [because] . . . a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity."). O'Brien's *pro se* status does not absolve him of the responsibility to abide by a duty of candor to the Court. *See* *Kendrick v. Sec'y, Fla. Dep't of Corr., 21-12686, 2022 U.S. App. LEXIS 18235, 2022 WL*

[4] This Court notes that O'Brien indeed exceeded the applicable page limits. While this is a clear violation of the Local Rules, in light of the liberal pleading standards afforded to *pro se* litigants, the Court is willing to tolerate that violation. This Court notes, however, its disagreement with O'Brien that violation of the page limits rule constitutes only a "minor clerical error." *See, e.g., Clifford Paper Inc. v. Colonial Press Int'l, Inc.*, No. 17-22396-CIV, 2017 WL 7311852, at *1 (S.D. Fla. July 19, 2017) (Altonaga, J.) (explaining, while considering a question of whether litigant exceeded briefing page limits, that "[t]he Court will not permit an end-run around the Local Rules . . .").

[5] This Court also notes that the Reply is written in a formulaic, sing-song manner—seemingly lifelike on the surface, yet devoid of much substantive legal argument on the merits—the tell-tale hallmarks of generative AI work product.

2388425, at *3 (11th Cir. July 1, 2022)" ("[w]hile it is true *pro se* pleadings are held to a less strict standard than counseled pleadings and are liberally construed . . . [*pro se* litigants] also owe the same duty of candor to the court as imposed on any other litigant.").

The imposition of sanctions against parties who submit fake citations is also not uncommon. *See, e.g., Thomas v. Pangburn*, CV423-046, 2023 WL 9425765, at *4-5 (S.D. Ga. Oct. 6, 2023) ("Plaintiff did not explain what sources he relied on during his research or where he found the sham cases."), *report and recommendation adopted*, 4:23-CV-46, 2024 U.S. Dist. LEXIS 15387, 2024 WL 329947 (S.D. Ga. Jan. 29, 2024). And *pro se* litigants are not immune from such sanctions. **[*16]** *See Kruse v. Karlen, 692 S.W.3d 43, 48 (Mo. Ct. App. 2024)*, *reh'g and/or transfer denied* (Apr. 9, 2024) (sanctioning *pro se* litigant who submitted false citations by imposing a $10,000 fine); *see also* Morgan v. Cmty. Against Violence, No. 23 Civ. 353-WPJ/JMR, 2023 U.S. Dist. LEXIS 190181, 2023 WL 6976510, at *7 (D.N.M. Oct. 23, 2023) (explaining that although courts make "some allowances for [a] *pro se* Plaintiff's failure to cite to proper legal authority, courts do not make allowances for a Plaintiff who cites to fake, nonexistent, misleading authorities." (cleaned up)).

"The Supreme Court has held that sanctions such as dismissal . . . are within a court's inherent power when a party's conduct evidences bad faith and an attempt to perpetrate a fraud on the court." Qantum Communications Corp. v. Star Broad., Inc., 473 F. Supp. 2d 1249, 1268 (S.D. Fla. 2007) (Martinez, J.) (citing Chambers v. NASCO, Inc., 501 U.S. 32, 40-46, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)). In other words, "[i]t is well settled that federal courts have the inherent power to sanction parties, but the court must make a finding of bad faith on the part of the litigant before imposing such sanctions." *Harris v. Warden, 498 Fed. Appx. 962, 964, 965 (11th Cir. 2012)* (finding "no abuse of discretion in the district court's dismissal" of a *pro se* plaintiff's lawsuit "as a sanction for [that plaintiff's] abuse of the judicial process."). Here, the undersigned has read and considered O'Brien's proposed Sur-Reply [ECF No. 15], in which he directly addresses the allegation that he cited non-existent authority. This Court is ultimately left **[*17]** with the conviction that allowing O'Brien's bad faith citation of non-existent authorities would "serve only to foster extensive and needless satellite litigation," Chambers v. NASCO, Inc., 501 U.S. 32, 51, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991), and that O'Brien provides no reason to conclude his filing was made except in bad faith.[6]

Based on the above-discussed authorities, considering O'Brien's history in this District and the fact that O'Brien *continues* to neglect his duty of candor to this Court, this Court finds that the imposition of sanctions against O'Brien is appropriate and warranted. While there is certainly authority for the imposition of a civil fine against O'Brien, the undersigned concludes that, in this case, a more appropriate sanction under the circumstances is the dismissal of this action. *See* Hood v. Tompkins, 197 Fed. Appx. 818, 819 (11th Cir. 2006) ("A district court may impose sanctions if a party knowingly files a pleading [that] contained false contentions.") (finding that district court did not abuse its discretion in dismissing case).

Thus, while dismissal is appropriate based upon O'Brien's failure to assert his compulsory counterclaims in the lawsuits filed against him, dismissal without prejudice is also warranted here based on O'Brien's misrepresentations to the Court.

C. O'Brien's [*18] Failure To Comply With This Court's Conferral Requirements.

Defendant Flick also avers that O'Brien's "filings have demonstrated a pattern wherein Plaintiff has used his *pro se* status as both a sword and a shield." ECF No. 18 at 3. This Court agrees.

Specifically, O'Brien filed the Motion for Leave without engaging in the conferral process required by Local Rule 7.1. *Compare* ECF No. 16, *with* S.D. Fla. L.R. 7.1(a)(3). Flick contends that this is "the latest in a string of motions filed by O'Brien without the required pre-filing conferral." ECF No. 18 at 2 (citing the two other cases in this district in which O'Brien is a litigant). Flick attaches an order in which Judge Smith denied O'Brien's Motion for Leave to Amend due in part to O'Brien's failure to confer. *Id.* at Ex. A. In response, O'Brien "acknowledges the importance of adhering to the Local Rules" but argues he has "faced significant challenges in complying with these procedural requirements due to the aggressive and unprofessional behavior of opposing counsel." ECF No 20 at 4. To this end, he attaches several emails exchanged with Flick's counsel. *See id.*

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[6] This is not the first time O'Brien has been admonished for making representations to the Court that lack a good faith basis. *See, e.g.*, Case No. 23-cv-60978, ECF No. 83 at 3-4 (Leibowitz, J.).

at Ex. A.

Again, although he acknowledges the importance of adhering to the Local Rules, O'Brien fails to acknowledge **[*19]** that he has not complied with them, and he does not suggest that he will make any effort to comply going forward. To the contrary, O'Brien repeats the same pattern of disregard for the Local Rules that he has shown in the other cases against him in this District.[7] At the end of the day, O'Brien demonstrates no remorse for having failed to abide by the Local Rules' conferral requirement, and no indication that he plans to abide by it going forward.

Accordingly, although much of the relief sought in the Motion to Strike is rendered moot upon the dismissal of the case, this Court finds Defendant Flick has demonstrated that the Motion to Strike should be granted in part and O'Brien's Proposed Sur-Reply [ECF No. 16] should be stricken. O'Brien is admonished that any further failures to comply with this Court's orders, or the rules of this Court, will result in the imposition of additional sanctions, including monetary sanctions. Moreover, the Court notes that O'Brien's repeated refusal to engage in conferral as required by the Local Rules further supports its finding that this lawsuit should be dismissed. *See* *Baltimore v. Jim Burke Motors, Auto., 300 Fed. Appx. 703, 707 (11th Cir. 2008)* (finding that, because *pro se* plaintiff "had engaged in previous litigation and **[*20]** had been reminded in that case as well as the instant case that she was obligated to comply" with court orders and general rules, that this plaintiff's "non-compliance was not the result of mistake or negligence, but was willful misconduct" and thus that dismissal as a sanction was warranted).

D. Defendants' Other Arguments.

Because this Court concludes O'Brien's claims are due to be dismissed for the aforementioned reasons, this Court need not consider Defendants' other arguments in support of dismissal of the Amended Complaint.

IV. CONCLUSION

For the reasons set forth above, this Court finds that the Amended Complaint is due to be dismissed with prejudice because O'Brien's claims constitute compulsory counterclaims he failed but was required to timely assert as a defendant in two other cases. This Court also finds that O'Brien's submission of fake authorities, combined with his failure to candidly acknowledge that mistake along with his pattern of disregarding court orders and the Local Rules, warrants the imposition of the sanction of dismissal. Whereas dismissal as a sanction is generally without prejudice, nevertheless, because there is a basis to dismiss the Amended Complaint with **[*21]** prejudice, this Court finds that dismissal with prejudice is warranted and appropriate. Accordingly, it is hereby

ORDERED AND ADJUDGED that this case is **DISMISSED WITH PREJUDICE**. The Clerk of Court shall **CLOSE** this case, and any pending motions are **DENIED AS MOOT**. It is further

ORDERED AND ADJUDGED that the Motion to Strike and for Sanctions [ECF No. 18] is **GRANTED IN PART**, and ECF No. 16 is **STRICKEN**.

DONE AND ORDERED in Chambers in the Southern District of Florida this 10th day of January, 2025.

/s/ Melissa Damian

MELISSA DAMIAN

UNITED STATES DISTRICT JUDGE

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[7] The emails O'Brien attaches to his response do not help him here and do not justify O'Brien's repeated failure to comply with the Local Rules.