UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 14-22011-CIV-MARTINEZ

JASON M. WANDNER,

Plaintiff,

v.

AMERICAN AIRLINES,
OFFICER LINDSAY DIAZ,
MIAMI-DADE COUNTY, FLORIDA,
and SWISSPORT, U.S.A.

Defendants.
_____/

DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND FIRST AMENDED COMPLAINT

Defendants, American Airlines ("American"), Officer Lindsay Diaz ("Officer Diaz"), Miami-Dade County (the "County"), and Swissport, U.S.A., improperly sued and served as SWISSPORT, U.S.A., ("Swissport"), (American, Officer Diaz, County, and Swissport referred to collectively as, "Defendants"), by and through their undersigned counsel, hereby file their Joint Memorandum in Opposition to Plaintiff's Motion to Amend First Amended Complaint, **[ECF No. 111]**,[1] and state:

PROCEDURAL BACKGROUND

1. On April 14, 2014, Plaintiff filed a three-count Complaint against American and Officer Diaz. Counts I and II alleged claims against American for malicious prosecution and negligence, respectfully. Count III alleged a claim against Officer Diaz for allegedly violating Plaintiff's constitutional rights.

[1] Defendants jointly respond to Plaintiff's Motion, **[ECF No. 111]**, noting that Plaintiff also filed an identical Motion the same day, **[ECF No. 109]**, which Defendants deem to have been mere error. To the extent the Court deems **[ECF No. 109]** to be the operative filing, Defendants adopt this filing in response to the same.

2. On August 26, 2014, Plaintiff filed an Amended Complaint, adding Swissport as a party and including claims for malicious prosecution and negligence against it, and bringing in the County as a defendant on claims of negligence, spoliation of evidence, and negligent retention **[ECF No. 32]**. Plaintiff filed the Amended Complaint without leave of court, but he later corrected the record by filing a Motion for Leave, **[ECF No. 41]**.

3. On October 31, 2014, the Court granted Plaintiff's Motion for Leave to file Amended Complaint, **[ECF No. 63]**, and deemed as filed the Amended Complaint of record, **[ECF No. 32]**.

4. The County, American, and Swissport all timely moved to dismiss Plaintiff's Amended Complaint **[ECF Nos. 55, 56, and 57, respectively]**. Despite Swissport's and the County's late entry into the case, and the addition of some new legal theories—all of which are the subject of pending dispositive motions—the newly-added parties joined in and diligently participated with the other defendants in discovery.

5. On July 30, 2014, this Court entered an Order Setting Civil Trial Date and Pretrial Schedule, Requiring Mediation, and Referring Certain Motions to Magistrate Judge. **[ECF No. 23]**. As related to the subject filing, according to the Court's Order Setting Pretrial Schedule:

a. Parties must join any additional parties and file motions to amend the complaint, if any, by October 2, 2014;

b. All discovery, including expert discovery, shall be completed by November 26, 2014;[2]

[2] As the Court is aware, the parties attempted to complete the purported expert deposition of Dr. Montano after the discovery cut-off, and by December 12, 2014, as the Court had permitted Plaintiff until December 12, 2014 to complete specific additional depositions in excess of the allotted ten (10) that may be permitted by General Magistrate Goodman by that same date, which as it turns out, General Magistrate Goodman did not allow. **[ECF No.'s 72 and 74]**. Plaintiff's

c. All *Daubert*, summary judgment, and other dispositive motions must be filed by December 1, 2014;[3]

d. All pretrial motions and memoranda of law, such as motions in limine, must be filed by January 12, 2015;

e. Joint pretrial stipulation must be filed by January 20, 2015; and,

f. Trial is scheduled to commence during the two-week period beginning Monday, February 9, 2015, with Calendar Call to be held on Thursday, February 5, 2015.

[ECF No. 23].

6. On December 2, 2014, Plaintiff filed an Unopposed Motion to Dismiss Count IV (negligence against the County under Fla. Stat. 768.28 relating to a parking ticket dispenser) and Count V (spoliation of evidence against the County) of the Amended Complaint with prejudice. **[ECF No. 75]**. On December 5, 2014, the Court granted said Motion. **[ECF No. 83]**.

7. Plaintiff continued to pursue sanctions against the County for spoliation of evidence, and on December 23, 2014, Magistrate J. Goodman held an evidentiary hearing on the matter. **[ECF No. 87]**.

8. On December 19, 2014, the Defendants filed motions for summary judgment on all counts pending against them. **[ECF Nos. 96 and 99]**.

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request for extension of the discovery deadline for additional depositions, and the Court's granting of the same, notably "applied solely to witnesses relating to Miami-Dade County and the issue of the spoliation of evidence." **[ECF No. 72**].

[3] Defendants jointly obtained an extension of time to file a motion to strike/preclude the testimony of Dr. Montano and *Daubert* motion pertaining to Dr. Montano, if any, by January 5, 2014. **[ECF No. 93]**. Defendants sought the extension as a precaution given the closeness in time to the Court's original deadline that Dr. Montano's deposition was scheduled to be completed. Notwithstanding the extension of time though, Defendants filed their Motions related to Dr. Montano on December 19, 2014. See **[ECF Nos. 98 and 101].**

9. On December 29, 2014, just short of three months after the Court's deadline for amendment of the complaint, a month after the expiration of the discovery cutoff, ten days after the Defendants moved for summary judgment, and just a month and some days before trial, Plaintiff filed a second Motion for Leave – now, a Motion to Amend First Amended Complaint, **[ECF No. 111]**. Plaintiff did not as required by Local Rule 7.1(a)(3) "make reasonable effort to confer (orally or in writing), with counsel for the opposing party in a good faith effort to resolve by agreement the issues to be raised in the motion" prior to said filing, as no attempt was made to contact any of the undersigned counsel, orally or in writing, on or before said date. Plaintiff also failed to comply with Local Rule 7.1(a)(1) by neglecting to include a memorandum of law with his Motion.

10. Meanwhile, months earlier, Swissport identified the information that Plaintiff claims in his Motion to Amend that he only now urgently needs to include in the pleadings. Specifically, Swissport served its Unverified Answers and Objections to Plaintiff's First Interrogatories. A copy is attached hereto as **Exhibit A**. Therein, Swissport advised Plaintiff that:

> Plaintiff approached the counter of Swissport agent Derya Uysal, stating that he was unable to print a boarding pass for his scheduled flight from the self-serve kiosk. Ms. Uysal explained to him that he was too late to check-in, and therefore could not obtain a boarding pass. Ms. Uysal offered to place him on stand-by for the next flight. Plaintiff became angry and started yelling and cursing at Ms. Uysal, using rough hand gestures and generally acting in a threatening manner. Plaintiff was warned that the agents were going to contact the authorities if he did not calm down. When he refused to calm down and continued yelling, another agent, Melody Mayorquin, called the authorities.

See **Ex. A**. at p. 9. American had similarly advised Plaintiff on August 14, 2014 that "a [Swissport] employee by the name of Melody was the individual who called the police." A copy

of American's Answers to Plaintiff's First Set of Interrogatories dated August 14, 2014, No. 6(a), is attached hereto as **Exhibit B**.

11. Likewise, the proposed additional claims against the County do not incorporate new facts that Plaintiff only recently discovered. Instead, they reflect new theories of liability that Plaintiff should have included in his very first version of the complaint, as opposed to adding now because they occurred to him after reading the County's Motion to Dismiss filed nearly three months ago.

SUMMARY OF ARGUMENT

1. Plaintiff has sought leave for the second time to amend the operative First Amended Complaint. Plaintiff wishes to amend to allege : (i) that the County violated Florida Statutes Chapter 119, warranting assertion of an additional cause of action against the County; (ii) that the County is negligent based on its vicarious liability for the actions of Officer Diaz; and (iii) facts identified during discovery both clarify and bolster existing counts against Swissport and American, such as identifying the employee who made the purported false allegations and setting forth *new* allegations of failure to provide training and guidelines as to when it is appropriate for an employee to call police on a disgruntled passenger. **[ECF No. 111]**.

2. First and foremost, in filing the Motion to Amend First Amended Complaint, Plaintiff has failed to comply with and acted with complete disregard of the Court's Order Setting Civil Trial Date and Pretrial Schedule, and the Local Rules of Civil Procedure. Plaintiff's Motion was filed roughly three (3) months ***after*** the Court's October 2, 2014 deadline for amendment of the complaint, ten (10) days ***after*** the Defendants filed lengthy motions for summary judgment and supporting statements of material facts, and only forty-three (43) days before the trial period in this case begins. And, Plaintiff has failed to demonstrate good cause as

to non-compliance. Plaintiff also failed to meet and confer as required under Local Rule 7.1(a)(3) prior to filing, and include such a certification in his Motion, and failed to comply with Local Rule 7.1(a)(1) by neglecting to include a memorandum of law with his Motion. On any of these bases alone, Plaintiff's Motion should be denied.

3. Second, Plaintiff's Motion to Amend First Amended Complaint should be denied as it would cause considerable prejudice and undue delay to each of the Defendants given the procedural standpoint of this case. While Plaintiff is preparing amended pleadings and motions seeking leave to file them, Defendants are in the process of complying with the Court's remaining deadlines, including preparing motions in limine, jury instructions, and the pretrial stipulation, and beginning to prepare for trial. Defendants would have to, among other things, divert their efforts away from complying with the Court's current deadlines and prepare new motions to dismiss and motions for summary judgment.

4. On the same basis, Plaintiff's Motion to Amend First Amended Complaint should be denied for bad faith and dilatory motive given the pendency of numerous motions to dismiss, pendency of numerous motions for summary judgment, pendency of numerous motions to preclude/strike expert witness Dr. Maritza Montano, and the upcoming scheduled trial.

5. Lastly, Plaintiff's Motion to Amend First Amended Complaint should be denied for reasons of futility since the proposed second amended complaint is still subject to dismissal.

WHEREFORE, Defendants, American, Officer Diaz, the County and Swissport, respectfully request the Court deny Plaintiff's Motion to Amend First Amended Complaint dated December 29, 2014, and all other relief the Court deems just and proper.

MEMORANDUM OF LAW

Where, as here, a responsive pleading has already been filed, "a party may amend its

pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, because Plaintiff's motion to amend was filed after the Court's Order Setting Civil Trial Date and Pretrial Schedule deadline, Plaintiff must first demonstrate good cause under Fed. R. Civ. P. 16(b) before a court can consider whether amendment is proper under Rule 15(a). See Sosa v. Airport Systems, Inc., 133 F. 3d 1417, 1419 (11th Cir. 1998). Only then, while leave to amend should be given freely, under a Rule 15 analysis "[l]eave may be denied because of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.' " Andrx Pharmaceuticals, Inc. v. Elan Corp., PLC, 421 F. 3d 1227, 1236 (11th Cir. 2005) (*alterations in original*) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). For those reasons set forth below, Plaintiff's Motion should be denied.

I. Plaintiff's Motion should be denied for failure to demonstrate good cause for noncompliance with and complete disregard of the Court's Order and Local Rules.

The Court's Order Setting Civil Trial Date and Pretrial Schedule ("Trial Order") **[ECF No. 23]** provides that any motion to amend the complaint be filed by October 2, 2014. Plaintiff filed the subject Motion on December 29, 2014 (roughly three (3) months later). Plaintiff asserts that leave to file a second amended complaint should be granted "given the fact that the Motions to Dismiss have not yet been ruled upon and the fact that discovery of critical evidence provided subsequent to [the Court's deadline] has given rise to the proposed amendment." **[ECF No. 111 at ¶11]**. The "critical evidence" identified solely being proper identification of the employee of Swissport who purportedly made a false statement to police that is already the subject of the First

Amended Complaint, as Plaintiff is otherwise seeking to merely assert two additional, new causes of action against the County and one additional basis for negligence (*e.g.*, improper training) against Swissport and American. Id.

With regard to employee identification, Defendants state that Plaintiff fails to demonstrate how correct identification of the Swissport employee who purportedly made a false statement warrants good cause to amend. No matter the name of the employee, Plaintiff's claims remain the same. Moreover, Plaintiff alleges in the Amended Complaint that it was Swissport employee, Ms. Uysal, who called the police relative to the subject incident. **[ECF No. 32 at ¶18]**. However, as the record reflects, and as American and Swissport both advised Plaintiff in their initial responses to interrogatories dated August 14, 2014 and October 27, 2014, respectively, it was Swissport employee, Melody Mayorquin, and not Ms. Uysal, who called the police. See **Ex.'s A** at p. 9 and **B** at No. 6(a). Plaintiff completely ignores the fact that he knew of this now purported "critical evidence" as early as on August 14, 2014, well before the Court's October 2, 2014 deadline and the filing of his Amended Complaint, and failed to account for such in the same. Plaintiff's position to the contrary now in the subject Motion that this information was "provided subsequent to [the Court's deadline]", **[ECF No. 111 at ¶11]**, is disingenuous, false and misleading. And, further, when the Court granted Plaintiff leave to file the Amended Complaint on October 31, 2014, **[ECF No. 63]**, Plaintiff with full knowledge of the information he now seeks to include was silent and took no action. It was not until discovery was completed, each of the Defendants filed motions for summary judgment, and the passage of roughly eight (8) weeks that Plaintiff now seeks leave to amend once again, correcting the identification of the Swissport employee, for some immaterial reason.

With regard to one additional basis for negligence (*e.g.*, improper training) against

Swissport and American, Plaintiff also fails to demonstrate good cause to amend. Plaintiff was advised by American on August 14, 2014 that "there is no training on [circumstances in which employees checking in passengers should call law enforcement]." See **Ex. B** at No. 5. Plaintiff knew this information well before the Court's October 2, 2014 deadline and the filing of his Amended Complaint, and failed to account for such in the same. See id. And, further, when the Court granted Plaintiff leave to file the Amended Complaint on October 31, 2014, **[ECF No. 63]**, Plaintiff with full knowledge of the information he now seeks to include was silent and took no action. For Plaintiff to now take the position that "liability for failure to provide training or guidelines whatsoever for its employees as to under what circumstances is it appropriate to call the police on a disgruntled passenger" was learned "subsequent to [the Court's deadline]", **[ECF No. 111 at ¶11]**, is also disingenuous, false and misleading.

As to the new causes of action against the County, Plaintiff does not even attempt to argue that they are based on new "facts" discovered in the case. Instead, he simply admits that they are theories that occurred to him over the last few months. Plaintiff is not evenly remotely timely in bringing the new theories to light. Specifically, the new claim for negligence against the County based on a theory of vicarious liability is something that Plaintiff unapologetically admits was a notion that occurred to him upon his review of the County's Motion to Dismiss the negligent retention claim **[ECF No. 111 at 2]**. The County filed that motion on October 10, 2014 **[ECF No. 55]**. Also, the newly-crafted public records violation claim that Plaintiff now attempts to lodge against the County is a matter that Plaintiff has obviously been aware of for a while, even alluding to it in his Notice of Hearing on discovery issues, filed on December 4, 2014 **[ECF No. 76]**. Plaintiff gives no reason why he could not articulate these matters by the deadlines set forth in the Court's Trial Order.

Since neither correct identification of an employee or new theories of alternative relief based upon information known to Plaintiff prior to the Court's October 2, 2014 deadline demonstrate good cause, Plaintiff fails to satisfy Rule 16(b) and his Motion should be denied. See Diaz v. Burchette, No. 13-13958, 2014WL4667335, *2 (11th Cir. Sept. 22, 2014); Vig v. All Care Dental, P.C., et al., No. 14-10337, 2014WL5072699, *1 (11th Cir. Oct. 10, 2014); See also **[ECF No. 23]** (wherein, the Court states "failure to comply… SHALL result in sanctions or other appropriate actions"). Plaintiff does not even bother to explain why he did not seek leave to file the public records violation claim when it occurred to him at least twenty-five days ago, or the simple negligence claim, which crossed Plaintiff's mind upon reading the County's Motion to Dismiss two and a half months ago. The unexplained delay with which these issues have been thrust to the forefront of this case only underscores that Plaintiff has no good cause to support the requested amendments.

In Diaz, the Eleventh Circuit found that the district court did not abuse its discretion in denying plaintiff's motion for leave to amend her complaint, filed over a year after the district court's deadline to amend pleadings and after defendant had moved for summary judgment. Diaz, 2014WL4667335 at *2. Plaintiff did not provide an explanation as to why she did not seek to amend her complaint earlier, even though the information she sought to include was known to her prior to filing her original complaint. Id. Nor did she make any showing of good cause for her failure to seek to amend her complaint within the time limit set by the district court's scheduling order. Id. (citing Fed.R.Civ.P. 16(b); Sosa, 133 F. 3d at 1419).

In Vig, the Eleventh Circuit found that the district court did not abuse its discretion in denying plaintiff's motion for leave to file second amended complaint in his action, where plaintiff filed motion after deadlines in scheduling order and under local court rules, and plaintiff

did not allege any previously unavailable facts. Vig, 2014WL5072699 at *1.

Like the plaintiffs in Diaz and Vig, Plaintiff here allowed the amendment to pleadings deadline to pass, and has utterly failed to explain why he could not seek amendment earlier. His request to amend the pleadings should likewise be denied.

Further, Local Rule 7.1(a)(3) requires a party to "make reasonable effort to confer (orally or in writing), with counsel for the opposing party in a good faith effort to resolve by agreement the issues to be raised in the motion" prior to filing a motion such as the subject Motion. Plaintiff filed the subject Motion on December 29, 2014 without any prior meet and confer. Plaintiff also failed to comply with Local Rule 7.1(a)(1) by neglecting to include a memorandum of law with his Motion. On these bases as well, Plaintiff's Motion should be denied. See Trial Order (wherein, the Court states "failure to comply… SHALL result in sanctions or other appropriate actions") **[ECF No. 23]**.

II. Plaintiff's Motion to Amend First Amended Complaint should be denied as it would cause considerable prejudice and undue delay, as well as for bad faith and dilatory motive.

The Eleventh Circuit in Diaz also found that granting plaintiff's motion for leave to amend after close of discovery and after defendant filed a motion for summary judgment would have resulted in considerable prejudice to defendant and undue delay in proceedings. Diaz, 2014WL4667335 at *2 (citing Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ., 342 F.3d 1281, 1287 (11th Cir.2003)). This is exactly the case here, despite Plaintiff's self-serving declaration that he does not need to do any additional discovery and, in his opinion, all existing deadlines can remain — all without having even conferred with the parties about the proposed amendments.

As noted in the Procedural Background above, Plaintiff's Motion was filed on December

29, 2014 – ***after*** the close of discovery, ***after*** the Defendants filed motions for summary judgment, and ***after*** the Defendants filed motions to preclude/strike expert witness Dr. Maritza Montano. Furthermore, by the time the Court rules on Plaintiff's Motion, the Defendants will have filed all pretrial motions and memoranda of law, such as motions in limine, which are due to be filed by January 12, 2015. **[ECF No. 23]**. The parties are also required to submit proposed jury instructions, which necessarily require detailed legal standards relating to all the pending claims, by February 2, 2015. Id. And, if the Court were to grant Plaintiff's Motion, the Defendants intend to file motions to dismiss as the proposed second Amended Complaint is still subject to dismissal for those reasons set forth in Section III, below. With trial scheduled to commence during the two-week period beginning Monday, February 9, 2015, with Calendar Call to be held on Thursday, February 5, 2015, there undoubtedly would be undue delay, a need for a continuance, and considerable prejudice to the Defendants in having to expend time, energy, and money in redoing the majority of the foregoing work. Id; see also Watkins v. Farmers & Merchants Bank, 237 F. App'x 591, 593 (11th Cir. 2007) (affirming the district court's denial of leave to amend because the plaintiff sought leave months after the deadline for amendments had passed, the new amendment added new claims causing the existing defendants considerable prejudice, and the plaintiff failed to demonstrate good cause); Creative Compounds, LLC v. Starmark Laboratories, No. 07-22814-CIV, 2009 WL 8741970, at *2 (S.D. Fla. June 23, 2009) (denying the plaintiff's request to amend the pleadings because the plaintiff did not demonstrate diligence in meeting the court's deadlines or explain why it waited so late to seek the relief, as well as because the tardy request would cause undue prejudice to the defendant).[4] Plaintiff's

[4] Any further delay of these proceedings is especially unwarranted from Officer Diaz's perspective given that he has raised a qualified immunity defense in his motion for summary judgment **[ECF No. 96 at 6-16]**, and the Eleventh Circuit has held that such a defense should be

Motion should therefore be denied.

On the same basis, Plaintiff's Motion should be denied for bad faith and dilatory motive. It was not until the Defendants filed motions to dismiss, numerous motions for summary judgment, and numerous motions to preclude/strike expert witness Dr. Maritza Montano, all of which remain pending, that Plaintiff filed the subject Motion. As shown herein, Plaintiff knew of the purported "critical evidence … [giving] rise to the proposed amendment" prior to the Court's October 2, 2014 deadline to amend the complaint. **[ECF No. 111 at ¶11];** see also **Ex.'s A and B**. The new legal claims are also not based upon any new facts, just new ideas that occurred to Plaintiff as the litigation progressed. Plaintiff therefore knew or should have known of the legal alternative means of relief at issue by the amendment to pleadings deadline. Plaintiff's disingenuous efforts to amend the Amended Complaint now constitute nothing but bad faith and dilatory motive, warranting denial of his Motion.

III. Plaintiff's Motion to Amend First Amended Complaint should be denied for reasons of futility since the proposed second amended complaint is still subject to dismissal.

"[The Eleventh Circuit] has found that denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." Burger King Corp. v. Weaver, 169 F. 3d 1310, 1320 (11th Cir.1999) (*citation omitted*). Here, Plaintiff's proposed second Amended Complaint is still subject to dismissal.

In short, as to Swissport and American, Plaintiff claims in Counts I and II in the proposed second Amended Complaint must be dismissed on the same basis argued by Swissport and American in their pending Motions to Dismiss, **[ECF No.'s 56 and 57]**. Plaintiff fails to state a cause of action for malicious prosecution against Swissport and American as the proposed

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adjudicated as early in the litigation as possible. Artiga v. Garcia, 316 F. App'x 847, 848 (11th Cir. 2008).

second Amended Complaint continues to be devoid of any non-conclusory, factual allegations that a Swissport or American employee commenced or caused the criminal proceedings, or that said individual did so with any malice. Plaintiff also fails to state a cause of action for negligence against Swissport and American in the proposed second Amended Complaint as Swissport and American are entitled to a qualified privilege when its alleged agent negligently reported a crime to the police, Florida law does not recognize a negligence claim for reporting a false crime to the police, and there are absolutely no non-conclusory, factual allegations that a Swissport or American employee made any false allegations about Plaintiff to the police that led to his arrest. In addition, Plaintiff improperly asserts a claim for attorney's fees even though he has no statutory or contractual right to recover his attorney's fees; therefore, such claim must be stricken from the proposed second Amended Complaint. The Defendants refer the Court to the pending Motions to Dismiss, **[ECF No.'s 56 and 57]**, for detailed support.

Remarkably, the identity of the employee who made the purported false allegations and *new* allegations of failure to provide training and guidelines as to when it is appropriate for an employee to call police on a disgruntled passenger have no bearing on whether Plaintiff's claims in Counts I and II in the proposed second Amended Complaint are subject to dismissal.

As to the County and Officer Diaz, the claims asserted by Plaintiff are also subject to summary dismissal, and therefore amendment would be futile. To begin, Plaintiff has alleged a claim for negligence against the County based on Officer Diaz's false arrest of him. False arrest is an intentional tort. Gamble v. St. Lucie Cnty. Sheriff's Office, No. 2:12-CV-14167-KMM, 2012 WL 2312047, at *2 (S.D. Fla. June 18, 2012). As such, there is no cognizable claim against the County for negligence based upon Plaintiff's alleged false arrest by Officer Diaz. *Id.*

Finally, Plaintiff frames a claim for violating Chapter 119 of the Florida Statutes against

the County based upon its alleged failure to produce a video of the incident with Officer Diaz and employees of Swissport and American in response to a written request. Florida Statutes Section 119.07 governs the production of public records, and states that:

> Every person who has custody of a public record shall permit the record to be inspected and copied ***by any person desiring to do so***, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records.

(emphasis added).

Plaintiff alleges that he "timely served a written request to Miami-Dade County to preserve and provide a copy of the videos." **[ECF No. 111-1at ¶ 73]**. However, the written request Plaintiff references, attached hereto as **Exhibit C**, clearly asks the County to ***preserve*** such video footage only. The request never expressed a desire for a copy, or an opportunity to inspect, the video footage mentioned. See **Ex. C**. Consequently, there is no viable claim against the County for violating Chapter 119 as framed in the proposed amended pleading. Mintus v. City of West Palm Beach, 711 So. 2d 1359, 1360-61 (Fla. 4th DCA 1998) (holding that the plaintiff's request for documents did not trigger Florida Statutes 119.07 because the request did not comply with the wording of the statute in that it was not served on someone who was a custodian of the record). The Chapter 119 claim against the County is futile as well.

Plaintiff's Motion to Amend First Amended Complaint should therefore be denied for reasons of futility since the proposed second amended complaint is still subject to dismissal. See Burger King Corp., 169 F. 3d at 1320.

WHEREFORE, Defendants, American, Officer Diaz, the County and Swissport, respectfully request the Court deny Plaintiff's Motion to Amend First Amended Complaint dated December 29, 2014, and all other relief the Court deems just and proper.

Dated: January 5, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on January 5, 2015, on all counsel or parties of record in the manner indicated on the Service List below.

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