

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 23-13045

Non-Argument Calendar

MARC M. DULCIO,

Plaintiff-Appellant,

versus

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants,

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
ARCADIS U.S. INC,
GPI PROPERTIES INC,
d.b.a. Groundwater Protection,
EARTH TECH DRILLING INC,

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STACI KICHLER,
individual capacity, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:22-cv-81908-RLR

No. 23-13474

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MARC M. DULCIO,

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ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants,

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ARCADIS U.S. INC,
GPI PROPERTIES INC,
d.b.a. Groundwater Protection,
EARTH TECH DRILLING, INC,
STACI KICHLER,
individual capacity,
JASON ANDROETTA,
individual capacity, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:22-cv-81908-RLR

Before LAGOA, ABUDU, and KIDD, Circuit Judges.

PER CURIAM:

Plaintiff Marc M. Dulcio, proceeding *pro se*, appeals the district court's dismissal of both his first and second amended complaints and his motion for reconsideration of those dismissals. After careful review, we affirm in part and vacate and remand in part.¹

¹ Because we conclude that the district court erred in dismissing with prejudice certain claims in the First Amended Complaint, this opinion does not address

I. FACTUAL² AND PROCEDURAL BACKGROUND

In June 2019, Marc Dulcio bought a dry-cleaning business, New LifeStyle Cleaners (LSC), and entered into a 5-year lease for the site on which LSC operated. About two years before Dulcio's purchase of LSC, Arcadis US, Inc. had performed several assessments and surveys of the site for the Florida Department of Environmental Protection (FDEP). Arcadis installed certain air and gas wells around that time as well.

In July 2019, shortly after Dulcio's purchase of the business, FDEP personnel performed a Compliance Evaluation Inspection which required Dulcio to make several repairs to the site. About a year later, in September 2020, Arcadis returned to the site, this time to drill three additional wells and collect groundwater samples for the FDEP. After reviewing the collected samples, FDEP employee Breck Dalton submitted a March 2021 internal memorandum noting "significant contamination" at the site that required remediation were LSC to continue to operate its business onsite.

the appellate issues arising from the Second Amended Complaint or the motion for reconsideration.

² Because the procedural posture of this case involves a Rule 12(b)(6) motion, we must accept the allegations of plaintiff's first amended complaint as true. See *Marsh v. Butler County*, 268 F.3d 1014, 1023 (11th Cir. 2001) (en banc), *abrogated in part by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007). The facts set forth in this section of the opinion therefore are taken from the First Amended Complaint, which at this procedural stage we must accept as true and construe in the light most favorable to the plaintiff.

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Apprised of the memorandum, the FDEP then sent an employee, Romina Lancellotti, to inspect the site. But the FDEP did not notify Dulcio of the inspection visit and Dulcio, suspecting that Lancellotti was an unwanted intruder, sought to prevent her from conducting the inspection. The two had a harsh exchange of words in which Lancellotti insulted Dulcio and threatened him with fines and criminal charges. Dulcio later confirmed that Lancellotti was in fact an FDEP employee and apologized to the FDEP for the misunderstanding. FDEP employee Alannah Irwin responded to Dulcio's apology by threatening him with violations, fines, fees, and civil liabilities.

Lancellotti eventually returned to inspect the site in April 2021. As a result of this inspection, Lancellotti placed the LSC site in "non-compliance status." This led the site's owner to threaten Dulcio with eviction should he not come into compliance with the FDEP. By July 2021, Dulcio completed all the requisite corrections and submitted documentation to the FDEP to confirm the site's compliance with their instructions. But Irwin informed Dulcio that the FDEP review of his submission could take up to 300 days. Displeased that LSC might have to wait 300 days to come into compliance with the FDEP, the site's owner notified Dulcio that he planned to evict him. Dulcio then tried to sell LSC, but could not find a willing buyer for his FDEP-non-compliant business.

In September 2021, Dulcio, the FDEP, and the site's property owner held a call to discuss LSC's non-compliance status. FDEP informed Dulcio and the property owner that it concluded

that LSC discharged perchloroethylene, a toxic chemical, at the site. This was the final straw for the property owner, and he evicted Dulcio shortly after.

His eviction notwithstanding, Dulcio sought to determine the root cause of the perchloroethylene discharge in an attempt to exonerate himself. As part of his investigation, Dulcio reviewed the reports Arcadis had submitted to the FDEP and noticed some discrepancies in the reporting. Dulcio contacted Arcadis to clarify these discrepancies, but was told “[t]hose things don’t matter, the real problem is they have a black business owner that didn’t give them access. He’s basically digging his own grave.”

In December 2021, the FDEP issued Dulcio an Official Notice of Potential New Discharge, and in February 2022, it issued him an Official Notice of Violation. Dulcio also became aware that the FDEP opened both civil and criminal investigations against him and had acquired a search warrant with his name on it to search the LSC site.

Dulcio alleges that it was not possible that he caused the new perchloroethylene discharge, that the site had been misdiagnosed and mishandled by Arcadis and two other companies, Earth Tech Drilling, Inc. and GPI Properties, Inc., and that that mismanagement caused the chemical discharge. He contends that an independent firm conducted its own analysis of the site and determined that it was “not possible given the evidence” that Dulcio caused the new discharge.

Dulcio ultimately filed suit against several FDEP entities³ and employees, Arcadis, GPI, Earth Tech, and the Environmental Protection Agency (EPA) alleging thirteen counts under both federal and state law for, among other things, declaratory judgment, fraud, defamation, conspiracy, state and federal RICO, and negligence. The district court dismissed Dulcio’s complaint as a shotgun pleading, and specifically dismissed Counts I, II, III, V, VI, XI, XII, and XIII with prejudice and Counts IV, VII, VIII, and IX without prejudice. Count X was dismissed with prejudice in part. The district court also dismissed Dulcio’s motion to amend—which attached a proposed second amended complaint— instead directing Dulcio to amend his complaint in line with her order. Dulcio then filed a second amended complaint, which the district court dismissed in full as to all federal claims. It then declined to exercise jurisdiction over Dulcio’s state claims and directed him to bring those claims in state court. Dulcio timely appealed the district court’s dismissal of both his first and second amended complaints.

II. STANDARDS OF REVIEW

We “review a dismissal on Rule 8 shotgun pleading grounds for an abuse of discretion.” *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1294 (11th Cir. 2018). We also review a district court’s decision to dismiss a complaint with prejudice for abuse of discretion. *See Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

³ FDEP Waste Site Cleanup Section, FDEP Office of General Counsel, and FDEP of the Southeast District.

III. ANALYSIS

On appeal, Dulcio argues that the district court erred by (1) dismissing the First Amended Complaint as a shotgun pleading, (2) dismissing the individual counts for failure to state a claim, and (3) only granting limited leave to amend by dismissing certain counts with prejudice. We affirm the district court’s dismissal of the complaint as a shotgun pleading, but we hold that the district court abused its discretion by dismissing with prejudice Counts I and II of the First Amended Complaint because repleading those counts was not necessarily futile.

A. The District Court properly dismissed the First Amended Complaint as a shotgun pleading.

A complaint must contain a short and plain statement of the claim showing that the plaintiff is entitled to relief. Fed. R. Civ. P. 8(a)(2). This short and plain statement must “give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quotation marks omitted and alterations adopted).

Unlike what is required under *Twombly*, a shotgun pleading fails “to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests.” *Weiland v. Palm Beach Cnty. Sheriff’s Off.*, 792 F.3d 1313, 1323 (11th Cir. 2015). This Court disfavors shotgun pleadings because they “waste scarce judicial resources, inexorably broaden the scope of discovery, wreak havoc on appellate court dockets, and undermine the

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public’s respect for the courts.” *Vibe Micro, Inc.*, 878 F.3d at 1295 (quotation marks and brackets omitted).

We agree with the district court that Dulcio’s First Amended Complaint was a shotgun pleading. As we explained in *Weiland*, a complaint is properly classified as a shotgun pleading if it, among other things, is “replete with conclusory, vague, and immaterial facts,” or alleges “multiple claims against multiple defendants in each count, without identifying which defendants are responsible for which claims.” 792 F.3d at 1321–23. Dulcio’s First Amended Complaint is guilty on both counts.

The 229-paragraph complaint—replete with numerous subparagraphs—contains a host of allegations, many vague and conclusory, that do not straightforwardly connect to any individual count,⁴ and, what’s more, each count incorporates the first 50 paragraphs of factual allegations. In addition, all but one count is alleged against multiple defendants, but there is little effort to clarify each defendant’s respective implicated actions. So, for example, Count XI alleges a Florida RICO claim against eight defendants, but

⁴ For example, in Count X, Dulcio asserts a § 1983 claim alleging deprivation of his rights under the Eighth and Fourteenth Amendments, but Dulcio simply recounts that the FDEP assessed a fine against him and classified LSP as non-compliant and then conclusory alleges that this “violated his [eighth] amendment rights by subjecting him to ‘cruel and unusual punishment.’” Dulcio makes no attempt to connect the specific actions undertaken by the FDEP to a deprivation of his constitutional rights. *Barmapov v. Amuial*, 986 F.3d 1321, 1326 (11th Cir. 2021) (finding a shotgun pleading where a “defendant who reads the complaint would be hard-pressed to understand the grounds upon which each claim [against him] rests.”) (citation and quotations omitted).

does not outline the relevant actions undertaken by each defendant or how they amount to violations of the state RICO act. Likewise, in Count XII, Dulcio asserts a federal RICO claim against three defendants, but he offers no discrete factual allegations as to each defendant's actions giving rise to this claim.

The end-result of the First Amended Complaint's construction is that it is nigh-impossible to adequately identify which specific allegations support which claims against which defendants. *See Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996) ("perfect example of a 'shotgun' pleading" is where "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief."). We therefore affirm the district court's dismissal of this complaint as a shotgun pleading.

B. The District Court abused its discretion in dismissing Counts I and II of the First Amended Complaint with prejudice.

Dulcio appeals only the district court's dismissal on the merits of Counts I–III, V, VIII–IX, and XI–XIII. Of those, Counts VIII and IX were dismissed without prejudice. Because we affirm the district court's dismissal of the First Amended Complaint on shotgun-pleading grounds, we need not independently evaluate its merits dismissal of each of these counts. *See Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1356 (11th Cir. 2018) (affirming the district court's dismissal of complaint on shotgun pleading grounds "[r]ather than reviewing [it's] comprehensive analysis of

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each...cause[] of action”). Instead, we only assess whether the district court abused its discretion by dismissing the remainder counts *with prejudice*.⁵ We conclude that the district court abused its discretion by dismissing Counts I and II with prejudice.

A *pro se* plaintiff “must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice” unless amendment would be futile or the district court has clear indication that the plaintiff does not want to amend his complaint. *Woldeab v. Dekalb Cty. Bd. of Educ.*, 885 F.3d 1289, 1291 (11th Cir. 2018). Amendment is futile where even a “more carefully drafted complaint could not state a claim.” *Id.* Notably, where the issue of futility is “close” we “err on the side of generosity” to the plaintiff. *O’Halloran v. First Union Nat. Bank of Fla.*, 350 F.3d 1197, 1206 (11th Cir. 2003). Indeed, where a more carefully drafted complaint “could conceivably state a valid claim” we will vacate and remand to the district court to allow for amendment. *Id.* (emphasis added); see *Silva v. Bieluch*, 351 F.3d 1045, 1049 (11th Cir. 2003) (“We cannot say it is *scarcely possible* that a more carefully drafted complaint might state a free speech claim.” (emphasis added)).

⁵ Because Counts VIII and IX were dismissed without prejudice and can be repleaded anyway, we do not address the district court’s merits analysis of those counts.

We agree with the district court that any amendment to Counts III, V, and XIII would be futile.⁶ As to Counts I and II, however, we conclude that the district court incorrectly determined that Dulcio could not “conceivably” replead those counts successfully. *O’Halloran*, 350 F.3d at 1206.

In Count III, Dulcio asserted a negligence claim under Florida Statute § 556.106(2)(a), which provides a cause of action for “member operator[s]” when an individual performs “an excavation or demolition that damages the [member operator’s] underground facility.” We agree with the district court that this statute has no bearing on Dulcio’s factual allegations and that no amendment could salvage this count. This statute concerns the prevention of damage to municipal utility systems; it does not apply to the damaged septic tank of a dry-cleaner business. *See* Fla. Stat. Ann. § 556.101 (“purpose” of statute is to “prevent[]...the interruption of services resulting from damage to an underground facility caused by excavation or demolition operations.”); *Peoples Gas Sys. v. Posen Constr., Inc.*, 931 F.3d 1337, 1338 (11th Cir. 2019) (Fla. Stat. Ann. §556.106 “permits utilities to recover damages when construction

⁶ We also affirm the district court’s dismissal with prejudice of Counts XI and XII because, as the district court noted, Dulcio’s proposed Second Amended Complaint did not even include those counts. *See Woldeab*, 885 F.3d at 1291 (district court need not grant leave to amend where it “has a clear indication that the plaintiff does not want to amend his complaint[.]”).

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workers negligently damage utility lines.”). Nor does Dulcio meet the statute’s definition of a “member operator.”⁷

In Count V, Dulcio asserted a §1983 claim against two FDEP employees for prohibiting him from recording their inspection of the LSC site. The district court correctly dismissed this claim with prejudice because Dulcio has no constitutional right to record a state official’s site inspection of his private property. *Smith v. City of Cumming*, the case Dulcio relies on, is inapposite, as it recognized a right “to gather information about what public officials do on *public* property, and specifically a right to record matters of *public interest*.” 212 F.3d 1332, 1333 (11th Cir. 2000) (emphasis added).

In Count XIII, Dulcio sought injunctive relief from the FDEP and the EPA, including for immediate remediation of the LSC site and for an assessment of \$96 million in penalties. Again, the district court correctly dismissed this claim with prejudice, because both the FDEP and EPA are immune from Dulcio’s suit. And, in fact, Dulcio does not even contest their immunity on appeal.

Counts I and II are a different story, however. In those counts, Dulcio sought declaratory relief that FDEP and/or Arcadis were responsible for the toxic discharge, not him, and a declaration vesting him with “the benefits of limitation of liability of future

⁷ A “member operator” is “any person who furnishes or transports materials or services by means of an underground facility.” Fla. Stat. Ann. § 556.102(10).

action brought against the LSC-Plant site as a result of the new discharge or other condition[s] of pollution.” The district court dismissed these claims with prejudice on standing grounds, finding that Dulcio failed to allege facts showing an “immediate or definite threat of future injury” to warrant declaratory relief. The district court explained that “[w]hile [Dulcio] alleges he received violations in the past, there are no allegations that FDEP intends to issue additional violations or otherwise cause harm to Plaintiff in the future.”

We agree with the district court that, as it stands, Dulcio’s First Amended Complaint does not articulate a sufficiently concrete threat of injury to create standing for his declaratory relief counts. See *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347 (11th Cir. 1999) (to have standing for declaratory relief, “the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury.” (quoting *Emory v. Peeler*, 756 F.2d 1547, 1552 (11th Cir.1985))). But we do not find it inconceivable that Dulcio, if granted leave to amend, could make the adequate showing. Dulcio alleged that, at the time of his First Amended Complaint, the FDEP had active civil and criminal investigations against him and had acquired a search warrant for the LSC site. In light of our caselaw’s *pro se*-friendly approach to futility determinations, we cannot say that “it is scarcely possible,” *Silva*, 351 F.3d at 1049, that a better drafted complaint could—perhaps by providing more detail on the FDEP’s ongoing investigations—establish a more definite threat of future injury to Dulcio and

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establish standing for these counts. We therefore hold that the district court erred in dismissing Counts I and II with prejudice.

Although Dulcio also appeals the dismissal of the Second Amended Complaint and denial of his motion for reconsideration, his leave to amend should have been broader than as determined by the district court, so his Second Amended Complaint and motion for reconsideration need not be considered at this time.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.